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Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?

By Christian Breitler

The year is 2022. In a Union based on the rule of law, the entire body of EU legal acts is subject to the review of their conformity with the Treaties as the Union's basic constitutional charter. Well, not entirely! One small Gallic village called the Common Foreign and Security Policy (CFSP) still holds out against the promise of a complete system of legal remedies and procedures – even after the collapse of the pillar structure more than 12 years ago. And life is not easy for claimants, national courts and EU scholars alike who garrison the Court's fortified barriers of jurisdiction in search for clarity, coherence and justice. However, two cases currently pending before the ECJ might eventually mark the end of the seemingly indomitable village.

The Carve-Out under Siege

After the entry into force of the Treaty of Lisbon, the previously existing pillar structure was – at least formally – dismantled. The former second pillar (CFSP) and third pillar (Police and Judicial Co-operation in Criminal Matters – PJCC) were integrated into the body of Union law, from then on being on an equal footing with the rest of the *acquis*. There is, however, no denying that both the Area of Freedom, Security and Justice (AFSJ) as well as the CFSP still exhibit certain peculiarities when compared to the rest of EU law. While these peculiarities are rather insignificant with regard to the AFSJ, the 'intergovernmental echo' of the CFSP is still strong. This echo manifests itself, *inter alia*, in the fact that CFSP measures are generally excluded from the Court's jurisdiction pursuant to Article 24(1) TEU

and Article 275(1) TFEU (the carve-out). The only two exceptions are the monitoring of the non-affection clause of Article 40 TEU, and the legality review of CFSP decisions concerning restrictive measures 'as provided for by the second paragraph of Article 275 TFEU', the latter constituting a codification of the Court's *Kadi* jurisprudence (the claw-back).

After the entry into force of the Lisbon Treaty, the scope of the Court's jurisdiction over CFSP has quite frequently been subject to litigation. Broadly speaking, these cases fall into two categories. On the one hand, there are cases that deal with the question whether a measure actually qualifies as a CFSP measure to fall under the carve-out. As laid down by AG Bobek in *CSUE v KF*, in order to be considered a provision of the CFSP, a measure must both formally and substantively relate to the CFSP (para. 61). In that sense, the Court has ruled that the carve-out does not negatively affect its jurisdiction if the contested measure was adopted under a non-CFSP provision, even if it substantively covers aspects falling under CFSP (*Mauritius* and *Tanzania*). The Court has also decided that it is not sufficient that a measure was adopted procedurally under CFSP to be excluded from its jurisdiction if the act in question is in substance a non-CFSP act. That is the case for public procurement (*Elitaliana v Eulex Kosovo*) or staff management (*H v Council and Commission*, *CSUE v KF*, *EULEX-KOSOVO*). On the other hand, there are cases that did not concern the question whether a measure would in principle fall under the carve-out as the CFSP nature was clear, but rather whether as an 'exception to the exception', a measure would be brought back into the Court's jurisdiction by virtue of the claw-back. Accordingly, the Court has decided that, even though Article 275(2) TFEU provides that CFSP decisions on restrictive measures can be reviewed in proceedings 'brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty' (i.e. an action for annulment), its jurisdiction would also extend to preliminary rulings on validity (*Rosneft*) and actions for damages (*Bank Refah Kargaran v Council*) concerning such decisions.

In brief, it is readily apparent that the question of jurisdiction in the area of the CFSP is far from being settled. The general tendency of the Court, however, is to interpret the carve-out – as an exception to the general rule of full jurisdiction in all other areas – narrowly and to give effect to the principle of effective judicial protection.

Restrictive Measures and Preliminary References on Interpretation: *Neves 77 Solutions SRL*

By reference of 31 May 2022, the Regional Court of Bucharest lodged a request for a preliminary ruling (C-351/22) on the interpretation of Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, which had been adopted after the Russian attack on Crimea. The issue in the main proceedings is a dispute between the Romanian company Neves 77 Solutions SRL and the tax fraud department of the Romanian national tax administration agency. Neves 77 Solutions SRL

had acted as a broker for a transaction between a Ukrainian and an Indian company for the delivery of a certain type of radio sets that were manufactured in Russia. The Romanian Department for Export Control held the view that the transaction came within the scope of Decision 2014/512/CFSP and imposed a fine on the company and ordered the confiscation of the entire proceeds of the transaction. The Regional Court of Bucharest, on appeal, decided to refer the matter to the CJEU, posing three questions on the interpretation of Decision 2014/512/CFSP.

The referral is remarkable, as the question whether a preliminary ruling on the interpretation of a CFSP decision concerning restrictive measures also falls under the claw-back rule has not yet been decided by the Court. As is apparent from the request for a preliminary ruling, the referring court is familiar with the CJEU's case-law, as it makes an explicit reference to the *Rosneft* case. However, in *Rosneft*, the Court only ruled on the question of validity, not on the interpretation of Decision 2014/512/CFSP.

Therefore, the ruling in *Neves 77 Solutions SRL* will break new ground. On the one hand, it could be argued that just like preliminary references on validity, questions of interpretation also fall within the claw-back exception and consequently come within the jurisdiction of the Court. This solution was suggested by AG Wathelet in his Opinion in *Rosneft* (paras. 73-76). AG Wathelet argued based on an *a fortiori* argument that if the Court was competent to rule on the (wider) question of validity of a CFSP decision on restrictive measures, it would all the more be competent to rule on the (narrower) question of interpretation. By giving an interpretation of a CFSP decision which conforms with primary law, a declaration of invalidity of a measure could be avoided. On the other hand, the reasoning of the Court in *Rosneft* and *Bank Refah Kargaran v Council* was largely based on the argument of coherence of judicial protection. In the Court's view, the coherence of judicial protection would be undermined if the Court did not have the power to give a preliminary ruling on validity or rule on an action for damages.

The coherence argument (which undoubtedly was already weaker with regard to actions for damages than preliminary rulings on validity) might not suffice, however, to establish the Court's jurisdiction for questions of interpretation, since actions for annulment, preliminary rulings on validity and actions for damages are all directed against the Union (the so-called 'shield function' of the EU's system of judicial protection). By contrast, preliminary rulings on interpretation are directed 'against' the Member States, basically serving as a means for indirect enforcement of EU law (the so-called 'sword function' of the EU's system of judicial protection). In other words, preliminary rulings on interpretation serve a very different purpose than preliminary rulings on validity. Nonetheless, the view held by AG Wathelet is ultimately more convincing. Given that every question on validity is at the same time a question on interpretation, it does not seem to be useful to strictly differentiate between the two procedures for the purpose of jurisdiction. Excluding

questions of interpretation of CFSP decisions concerning restrictive measures would most likely compel national courts that have doubts over the interpretation of such a decision to engage in some sort of 'linguistic acrobatics', phrasing questions of interpretation as questions on validity to circumvent all too strict jurisdictional requirements.

Accountability for CFSP Missions: *KS and KD v Council and Others*

While the question whether preliminary rulings on interpretation only concern the margins of the carve-out and claw-back debate, the case of *KS and KD v Council and Others* goes straight to the heart of the CFSP. The case concerns an action for damages against the Council, the Commission and the EEAS brought by family members of individuals who were tortured and killed or who disappeared in 1999 in Kosovo. In 2008, the EU Rule of Law Mission was established, entrusted within its mandate to investigate and prosecute, *inter alia*, war crimes and inter-ethnic crimes. The applicants brought their case before the EU Human Rights Review Panel, which subsequently found the respective investigations of the applicants' family members' death or disappearance to have violated a number of rights under the ECHR, most notably Article 2 (right to life), Article 3 (prohibition of torture), and Article 13 (right to an effective remedy) and issued (non-binding) recommendations for remedial actions to the Head of Mission.

KS and KD consider that these recommendations were poorly handled and they therefore brought an action for damages before the General Court in 2020. Prior to that, however, they also brought an action for annulment before the General Court in 2017, and an action for damages before the High Court of Justice (England & Wales) Queen's Bench Division in 2018. Both actions were dismissed for lack of jurisdiction. The General Court also dismissed the 2020 action for damages for lack of jurisdiction. In the relevant paragraphs of the judgment (paras. 29-41), the General Court held that – after a respective plea of lack of jurisdiction raised by the Council and the EEAS – in accordance with Art 24(1) TEU and Art 275(1) TFEU, it did not have jurisdiction 'to review the legality of such acts or omissions, which relate to strategic choices and decisions concerning the mandate of a crisis management mission set up under the CSDP, which is an integral part of the CFSP, nor can it award damages to applicants who claim to have suffered harm as a result of those acts or omissions.' (para. 27) The General Court held that the implementation of Council Joint Action 2008/124/CFSP neither constituted a restrictive measure, nor was the compliance with Article 40 TEU at stake. Likewise, the action was not comparable to the cases concerning staff management or public procurement and also different from the facts that gave rise to the judgment in *Bank Refah Kargaran v Council*, which concerned individual restrictive measures.

The case of *KS and KD v Council and Others* has the potential to become a landmark case. It strikes at the very core of the CFSP and the question of effective judicial protection in a

Union based on the rule of law. What is particularly notable is that the case was also – as briefly mentioned above – the subject matter of a judgment by the English High Court (for a summary and most insightful analysis of the case, see Johansen). Although the *ratio decidendi* for dismissing the case was a technicality relating to the (non-)implementation of CFSP into English law by the European Communities Act, the High Court's judgment contains an interesting *obiter dictum* regarding the CJEU's jurisdiction (paras. 79-87). The High Court considered that it would most likely not be competent to decide on the merits of the case as the dispute fell into the exclusive jurisdiction of the CJEU. The High Court arrived at this conclusion in particularly by considering that the action brought before it was not aimed at seeking the annulment of the Council Joint Action, but only at seeking damages. Thus, the High Court agreed with the submission of the representatives of the European Commission, which participated in the proceedings in accordance with Article 335 TFEU, that the carve-out was to be construed narrowly and only applies to sovereign policy choices within the CFSP framework, whereas the nature of a claim for damages is not concerned with a sovereign policy choice, thus being closer to cases concerning staff management. On that note, it is also worth highlighting that the Commission only raised a plea of inadmissibility in the procedure before the General Court. Unlike the Council and the EEAS, it did not raise a plea for lack of jurisdiction.

Taking into consideration that both a domestic court and the General Court dismissed the case for lack of jurisdiction, the applicants seem to be in a precarious situation – a legal limbo in which apparently no court feels competent to hear the case. Needless to say, this situation can hardly be reconciled with the promise of a Union based on the rule of law building on a complete system of legal remedies and procedures. While the CJEU has repeatedly stressed that the principle of effective judicial protection 'cannot have the effect of setting aside the conditions expressly laid down in that Treaty', the consequence in the present case would be a complete denial of justice – the parallels with the premises that gave rise to the pivotal *Kadi* judgment are all too evident. As the applicants have decided to appeal against the judgment of the General Court, the Court will be provided with the opportunity to clarify the matter. And chances are that the Court's judgment will prove that, contrary to common perceptions, the Gallic village called CFSP is not a stronghold.

The Way to Strasbourg Leads across Gaul: Implications for the EU's Accession to the ECHR

The timing of the two pending cases could not be more significant. In 2020, more than five years after the CJEU delivered its bombshell *Opinion 2/13*, the negotiations for the EU's accession to the ECHR have resumed. And as of today, the CFSP is one of the last remaining stumbling blocks for the completion of the negotiations. To recall, in *Opinion 2/13*, the CJEU opined that 'the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result [Article 24(1) TEU and Article 275(1) TFEU].' (para. 251). Since, however, 'certain acts adopted in the context of the CFSP'

are outside the CJEU's jurisdiction, the ECtHR could not be entrusted with the review of compliance with fundamental rights of those acts (paras. 252-256).

The CJEU's statements concerning the CFSP were rather cryptic and left many questions open. First, the Court did not bother to elaborate which acts were those 'certain acts adopted in the context of the CFSP' which were excluded from its jurisdiction, thus rendering it unnecessarily difficult to re-negotiate and re-draft the accession agreement. Second, the Court also was not entirely clear on the issue whether the CJEU itself must have jurisdiction to review CFSP measures in light of fundamental rights, or whether Member States' courts could be given a role here. On the one hand, the CJEU opined that 'judicial review […] cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU' (para. 256), which arguably could be read as meaning that national courts, which pursuant to Article 19(1) TEU are likewise Union courts, could provide for sufficient judicial protection in areas for which the CJEU lacks jurisdiction. On the other hand, the Court strongly emphasised in *Opinion 2/13* that the failure to 'have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters' (para. 257) was linked to the CJEU's lack of jurisdiction, thus making it seem questionable whether national courts could fill the jurisdictional void and review (certain) CFSP acts. These doubts are also supported by the way the Court handled cases like *Rosneft* and *H v Council and Commission*, in which it demonstrated a strong reluctance to entrust the national courts as functional Union courts with reviewing CFSP acts.

The cases of *Neves Solutions 77 SRL* and *KS and KD v Council and Others* will shed light on these issues and eventually might provide answers which help pave the way for an EU accession to the ECHR – after all, the way to Strasbourg leads straight across Gaul.