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Review Paper

CONSTITUTIONAL BREAKTHROUGH OF THE COMMON FOREIGN AND SECURITY POLICY IN THE CONTEXT OF BANK REFAH KARGARAN CASE

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Abstract. *In the appeal case of Bank Refah Kargaran v Council, the EU Court of Justice established its jurisdiction over claims for damages in the field of Common Foreign and Security Policy (CFSP) pertaining to restrictive measures against individuals. The case at hand indicates a broader tendency of the Court to expand the contours of its review despite limitation clauses set out in the Lisbon Treaty. Driven by the present case and former case law, the Court emphasized the importance of effective judicial protection in preserving the unity of the EU legal order. Thus, the Court reaffirmed its ambitions in terms of further constitutionalization of CFSP matters in the name of the rule of law and human rights protection. The paper aims to shed some light on the process of constitutionalization of the CFSP which has been underway for some time, but also to investigate potential impacts of the judgment at hand considering political sensitivity of foreign affairs and shared power of national courts in exercising judicial review of the CFSP acts.*

Key words: *Court of Justice of the European Union, Common Foreign and Security Policy, restrictive measures, rule of law, actions for damages, effective judicial protection*

1. INTRODUCTION

Between 2010 and 2013, various regulations and decisions pertaining to the Common Foreign and Security Policy (hereinafter: CFSP) had directly targeted the Bank Refah Kargaran for involvement in Iran's nuclear proliferation.[1] As a result, the appellant's funds

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[1] For further reference, *see:* Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP; Council Regulation (EU) No 961/2010 of 25 October 2010 concerning restrictive measures against Iran; Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413; Council Regulation (EU) No 267/2012 of 23 March 2012 on restrictive measures against Iran; Council Decision 2013/661/CFSP of 15 November 2013 amending Decision 2010/413.

were frozen on the basis of Article 29 of the Treaty on the European Union (hereinafter: TEU) and Article 215 of the Treaty on Functioning of the European Union (hereinafter: TFEU) providing for restrictive measures or sanctions against individuals, states and non-state entities. After successfully challenging the targeted CFSP regulations and decisions before the General Court, the Iranian bank went on to claim damages in reparation for the injury caused by respective CFSP acts. The General Court was therefore faced with jurisdictional question as to whether the Court of Justice of the European Union (hereinafter: the Court, CJEU) has a competence to award damages for non-contractual liability incurred by the EU in the context of restrictive measures brought under Article 29 TEU. Following the logic of strict textual interpretation of the Treaties' provisions, the General Court concluded that it did not have jurisdiction to rule on damages allegedly suffered by the appellant as a result of adopted CFSP acts.[2] In the appeal procedure before the Grand Chamber in late 2020, the Court took the opposite view in quite a surprising manner. Even though the action was dismissed due to insufficient legal ground for non-contractual liability on the part of the Union[3], the Court decided that it did have jurisdiction to hear an action for damages based on Article 263 TFEU.[4] Therefore, the Court provided highly important clarification on the type of judicial remedies available within the sphere of CFSP. In other words, the Court further strengthened its constitutional and oversight role in the CFSP as to include not only the legality of CFSP decisions imposing restrictive measures against natural or legal persons, states and non-state entities but also relevant actions for damages incurred by the EU.

As observed by Bartoloni, the Court's decision was built upon four main arguments (Bartoloni, 2020: 1364). Firstly, the Court reiterated that its limited capacities in the area of CFSP should be interpreted narrowly as an exception to the general jurisdiction rule under Article 19 TEU.[5]Secondly, the Court stipulated that action for damages constitutes an integral part of the EU's system of legal remedies pursuant to the right to an effective legal remedy.[6] Finally, the Court recalled the rule of law as "one of the EU's founding values" and stressed the need for coherent system of judicial protection provided for by the EU law.[7] By this judgment, inherently limited jurisdiction of the Court was further extended as to cover not only the review of legality of decisions providing for restrictive measures (as prescribed by the Treaty text) but also relevant actions for damages, which in fact has sparked much debate in academic circles.

2. THE LEGAL BASIS OF THE CJEU'S COMPETENCE IN CFSP

The Treaty of Lisbon has introduced some significant changes to the EU legal order by, *inter alia*, dissolving the Maastricht's pillar structure and conferring a single legal personality on the Union. Consequently, the CJEU's oversight role in the EU legal order was expanded, which was reflected onto the CFSP to some extent. As some authors

[2] CJEU, case T-552/15, *Bank Refah Kargaran v Council*, Judgment of the General Court (Second Chamber) of 10 December 2018, ECLI:EU:T:2018:897.

[3]As correctly emphasized by the General Court, the inadequacy of statement of reasons for annulled legal acts pertaining to restrictive measures does not itself provide an adequate legal ground for triggering the non-contractual liability of the Union. CJEU, case T-552/15, para. 68.

[4] CJEU, case C-134/19, *Bank Refah Kargaran v Council*, Judgment of the Court (Grand Chamber) of 6 October 2020, ECLI:EU:C:2020:793.

[5] CJEU, case C-134/19, para. 32.

[6] CJEU, case C-134/19, para. 33 and 36.

[7] CJEU, case C-134/19, para. 35 and 39.

suggest, the Court's principal task of ensuring the respect for the rule of law has remained fundamentally unchanged despite the significant increase in the number of activities relating to foreign relations (Kuijper, 2018: 212). The Court's invocation of rule of law and human rights values dates back to early 1970s when the Court ruled that human rights form an integral part of the general principles of Community law which are protected by the Court of Justice.[8] The Lisbon Treaty has significantly departed from intergovernmental approach to Union's external relations and the concept of European Political Cooperation[9] which was superseded by the CFSP. Consequently, the Court is now able to exercise judicial control, albeit limited, over CFSP matters that used to be delicate in their nature and devoid of judicial supervision.

Furthermore, it is important to stress the ambivalent position of the CFSP in the EU's constitutional architecture which is characterized by threads of both distinctiveness and integration (Koutrakos, 2018: 3). First of all, the rules governing CFSP are not set out in TFEU as one might expect due to their substantive nature but rather laid down in the TEU, which discerns between the CFSP and the rest of the EU's constitutional framework. The uniqueness of the CFSP is also reflected in Article 24(1) TFEU stating that this area is "subject to specific rules and procedures"[10], thus pointing out to its procedural and structural *sui generis* nature (e.g. no legislative acts can be adopted, the Council acts unanimously, the European Parliament does not participate in decision making, etc.). The CFSP competence is also distinguished from other EU's competences (*e.g.* shared, exclusive, coordinating, supporting and supplementing) and therefore listed separately in Article 2(4) TEU. On the other hand, the area of CFSP is characterized by some integrationist elements which have been clearly articulated in the Treaty's provisions and frequently used by the CJEU as the main argument for teleological approach to the limits of its judicial activism. This can be seen in intentional dissolution of the tripartite pillar structure as well as in subsequent integration of the Union's principles and objectives governing external policies into single legal framework.[11]

As for the CJEU's competence in the CFSP, the latter is explicitly exempted from judicial scrutiny based on Article 24(1) TEU and Article 275(2) TFEU. Nevertheless, the Treaty provisions envisage "an exception to the exception", meaning that the Court is competent to monitor compliance with Article 40 TEU and to rule on the legality of decisions pertaining to restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU, as Article 275(2) TFEU stipulates.[12] The following chapters will illustrate the Court's broader tendency to interpret the aforementioned "carve-outs"[13] in a narrow sense as an exception to the rule on general jurisdiction provided for in Article 19 TEU.[14] Building upon the logic of integrationist approach to judicial activism, the Court has opened the door to a greater scope of its jurisdiction in the realm of CFSP.

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[8] CJEU, case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of the Court of 17 December 1970, ECLI:EU:C:1970:114.

[9] The European Political Cooperation was a synonym for the EU's external relation policy up until the Maastricht Treaty in 1993 and establishment of a Common Foreign and Security Policy under the second Maastricht's pillar.

[10] Consolidated version of the Treaty on European Union (TEU), Official Journal, C 326/2012,Article 24(1).

[11] Article 21 TEU.

[12] Article 40 TEU. Also *see:* Consolidated version of the Treaty on the Functioning of the European Union, Official Journal, C 326/2012, Article 275.

[13] In the *Rosneft* case, the Advocate General Wathelet referred to the limits on the CJEU's jurisdiction as "carve-outs" from the general jurisdiction of the CJEU, as opposed to "claw backs", enshrined in Article 275 TFEU, which simply take back the Court's judicial power in the field.

[14] Article 19(1) TEU:"…It shall ensure that in the interpretation and application of the Treaties the law is observed."

3. STRIVING FOR CONSTITUTIONALIZATION OF CFSP: NO LONGER THE "ODD ONE OUT"?

Notwithstanding the fact that the Court's jurisdiction remains largely outside the scope of CFSP, recent case law leading up to *Bank Refah Kargaran* judgment seems to indicate a progressive constitutionalization dynamics occurring within the field, with the CJEU in the driver's seat. In recent academic discussions, the process of constitutionalization has been referred to as "normalization", "mainstreaming" or "assimilation" of the CFSP into the EU legal order which was recognized in the Court's practice as well (Elsuwege, Van Der Loo, 2019:1352; Lonardo, 2021:297; Hillion, 2018:1675).[15] Despite the fact that the term "constitutionalization" has been frequently used in different legal and political discourses, especially when it comes to development of CFSP within the EU's constitutional context, no explicit theory of constitutionalization has been developed to date (Karolewski, 2005: 1650). Very little academic attention has been drawn to the process of constitutionalization, which is, however, not the case with the theory of constitutionalism which has formed part of a much clearer picture. The latter has been revolving around the role of law in democracy and has been frequently challenged against the theory of traditional legal constitutionalism (Bellamy, 2007:2). If constitutionalization is simply perceived as a part of a process or transition leading up to formation of a constitution, the term itself makes little sense in view of the EU's legal nature which still lacks a crucial constitutional feature – the constitution in a strict formal sense, despite some notable efforts that took place back in 2005.[16] However, if we broadly understand the collection of all EU and EC treaties as having established the constitutional framework of the EU as De Búrca points out, the term "constitutionalization of CFSP" in fact stands a chance (De Búrca, 2008: 11). As for the latter, this means that the aforesaid policy of the EU is slowly becoming integrated into the EU's constitutional architecture. However, this process seems to be done not by means of codification or formal regulation of CFSP processes but rather by the Court's loose interpretation of the applicable legal provisions.

The constitutionalization of the respective field has been taking place by virtue of horizontal application of the general constitutional principles and mechanisms with the aim of preserving the unified nature of the EU legal order. It might be even argued that the CFSP norms are no longer as soft as they may seem despite their intergovernmental nature (Wessel, 2015:126). Even though the CFSP norms comprise soft-law elements such as the absence of legal enforcement mechanisms as well as exclusion of the notions of supremacy and direct effect, the latter is considered to have some legally binding effect aimed at shaping the Member States' behavior in a certain way. Yet, even before the Lisbon Treaty, the Court underlined the binding nature of common positions under the CFSP, thus explicitly obliging the Member States to comply with their obligations under the EU law by virtue of duty to cooperate in good faith.[17] Accordingly, the CFSP norms could be described as *lex imperfecta* due to the presence of dichotomy between their legally binding nature and the lack of full judicial review over their enforcement.

While the Lisbon Treaty reconciled certain differences between the CFSP and other EU's policies, the subsequent case law, which will be discussed further in more depth, has

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[15]For further reference, *see:* CJEU, case C-244/17, *European Commission v Council of the European Union,* Judgment of the Court (Grand Chamber) of 4 September 2018, ECLI:EU:C:2018:662.

[16] Back in 2005, the Draft Treaty establishing a Constitution for Europe failed in the absence of necessary unanimity of all 27 Member States. On that occasion, France and Netherlands voted against the EU Constitution.

[17]CJEU, case C-355/04 P, *Segi, Araitz ZubimendiIzaga and Aritza Galarraga v Council of the European Union*, Judgment of the Court (Grand Chamber) of 27 February 2007, ECLI:EU:C:2007:116.

created almost a blurred line between the two, especially considering the *Bank Refah Kargaran* case and recognition of the Court's jurisdiction over claims for damages under the CFSP for the very first time. Although innovative and progressive, the Court's holistic reasoning in the judgment at hand can be understood as a relic of the past at the same time. A similar perspective surrounds the landmark judgment *Les Verts* (1986) where the Court broadly interpreted the scope of its jurisdiction in the name of rule of law and uniform interpretation of the Community's law.[18] Although there were times when the Court tied up the scope of its jurisdiction to the exact wording of the Treaties while addressing the principle of effective judicial protection[19], it mostly continued in the same vein as in the aforesaid *Les Verts*, thus moving towards integrationist approach rather than the intergovernmental one which was reaffirmed by the case at hand.

In a string of cases leading up to *Bank Refah Kargaran*, the Court managed to avoid certain legal gaps associated with the EU's system of judicial protection in practically the same manner, *i.e.* by invoking the rule of law values. In cases such as *European Parliament v Council* (Mauritius case)[20], *Elitaliana v Eulex Kosovo*[21], *H. v Council*[22], the Court considered Article 40 TEU and Article 275 TFEU as derogations from the general jurisdiction rule established in Article 19 TEU. In other words, the CJEU used the expansionist approach in interpretation of its jurisdiction over the CFSP acts that are rooted in other areas of the EU's law, either in terms of procedural rules or legal basis.

The *Mauritius* case, primarily dealing with Article 218 TFEU and procedural rules on international agreements in the context of CFSP, perfectly illustrates the ambitious appropriation of the CJEU's jurisdiction even in those areas that are not exclusively related to the CFSP and are subject to more intergovernmental decision-making model, as it was the case with the *Bank Refah Kargaran* judgment (*e.g.* judicial cooperation in criminal matters)[23]. Besides, the former case illustrates the Court's tendency to use a "center of gravity test" as a way to avoid incompatibilities related to the legal basis of CFSP decisions, meaning that both the aim and content of disputed CFSP measures are examined at the same time as to elevate the power of the EU judiciary (Elsuwege, *et. al.*, 2019: 1352).[24]

By analogy, the same reasoning was applied to the *Kazahstan* case, where the Court dealt with a legal question covering both the CFSP and other policy areas.[25] Instead of approaching the CFSP separately from other fields of the EU's activity pursuant to Article 24(1) TFEU, the Court horizontally applied general constitutional principles in order to stress the importance of the EU's institutional balance and reach out for greater judicial powers (Lonardo, 2021: 297).

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[18] CJEU, case 294/83, *Partiécologiste "Les Verts" v European Parliament*, Judgment of the Court of 23 April 1986, ECLI:EU:C:1986:166, para. 23.
[19] CJEU, case T-173/98, *Unión de Pequeños Agricultores v Council*, Order of the Court of First Instance (Third Chamber) of 23 November 1999, ECLI:EU:T:1999:296.
[20] CJEU, case C-658/11, *European Parliament v Council*, Judgment of the Court (Grand Chamber), 24 June 2014, ECLI:EU:C:2014:2025.
[21] CJEU, case C-439/13, *Eulex Kosovo v Elitaliana*, Order of the Court (Tenth Chamber) of 16 January 2020, ECLI:EU:C:2020:14.
[22] CJEU, case C-455/14, *H v Council et. al.*, Judgment of the Court (Grand Chamber) of 19 July 2016, ECLI:EU:C:2016:569.
[23] Article 3(2) TEU.
[24] Also *see* CJEU,case C-300/89, *Commission v. Council (Titinium Dioxide)*,Judgment of the Court of 11 June 1991., EU:C:1991:244.
[25] CJEU, case C-244/17, *European Commission v Council of the European Union*, Judgment of the Court (Grand Chamber) of 4 September 2018, ECLI:EU:C:2018:662.

In *Elitaliana v Eulex Kosovo* the Court emphasized that a CFSP mission and its rules on public procurement are not shielded from the CJEU's jurisdiction despite limitations in place.[26] Such a controversial line of reasoning was backed up by the judgment in *H. v. Council* case[27], where the boundaries of the EU law were pushed way beyond the wording of the Treaties. In particular, the Court decided that it has jurisdiction over EU military and civilian staff members deployed in a CFSP mission, including those seconded from Member States. Since the case concerned a staff member seconded from the Member State and not the EU, the Court's reference to Article 270 TFEU appears legally groundless, as the latter grants the CJEU's jurisdiction solely over the EU personnel.[28]

Even though the Court's invocation of the Union's founding values, such as the rule of law and the values of equality, seems legit from the perspective of coherent interpretation of CFSP rules and decisions, it is important to highlight the fact that formal constraints of Article 40 TEU, Article 275(2) TFEU and Article 218 TFEU do not allow any extension of the CJEU's jurisdiction in CFSP outside the scope of the established legal framework.[29] For these reasons, turning a blind eye to the relevant Treaties' provisions was rightfully assessed as "highly artificial and acrobatic", which could be applied to the case at hand as well (Elsuwege, 2021: 1748; Heliskoski, 2018: 10). In light of the foregoing, it is obvious that the CJEU's teleological approach to the limits of its jurisdiction moves beyond the literal interpretation or mere wording of the Treaties. Thus, it seems reasonable to bring into question a wide margin of the Court's maneuver from the perspective and the intention of the Treaties' drafters.

4. Analyzing the Intention of the Treaties' Drafters: a Matter of Perspective?

Before continuing with examination of the limits to the CJEU's review in the CFSP, it is necessary to get to grips with intention of the Treaties' drafters. In other words, did they intend to preserve the intergovernmental nature of the CFSP and exclude the CJEU's jurisdiction thereof, or did they aim to create a separate legal order for the CFSP where the CJEU would enjoy the wider scope of review? Having in mind the ambiguous position of the CFSP in the current state of affairs, it seems that both opinions could have sound grounds at the same time. Wessel argued that the CFSP isolation was not only not tolerated but also not intended (Wessel, 2015: 143). He further suggested that Member States did not want to attribute legally binding nature to the CFSP norms but that the latter had evolved over the years due to its close connections with other areas of EU law. Yet, the real question is to what extent divergent views on the Treaties' provisions can be tolerated from a pure legal perspective?

As previously noted, the Court tends to horizontally apply the EU's constitutional principles when dealing with the CFSP matters; however, the vertical dimension and the limits of the CFSP remain quite unclear. Within the meaning of the judgment at hand, a closer look at Article 275 TFEU and Article 24 TEU reveals no interpretative ambiguities

[26] Case C-439/13, para. 49.
[27] CJEU, C-455/14 P, H. v. Council of the European Union and Others, Judgment of the Court (Grand Chamber) of 19 July 2016, ECLI:EU:C:2016:569.
[28] TFEU, Article 270.
[29] Article 40(1) TEU: "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". Also *see* Article 275(2) and 218(11) TFEU.

as both clearly imply limited judicial capacities in the CFSP matters with no interference in the action for damages. However, the Court had a wind at its back, based on loose wording of Article 19 TEU which states that "in the interpretation and application of the Treaties the law is observed".[30] The latter has been used as the main argument for exercising the general scope jurisdiction, along with Articles 268 and 340 TFEU suggesting that the Union should compensate for any damage caused by its institutions or servants.[31]

When discussing conflicting Treaties' provisions on the CFSP, it is important to bear in mind the fundamental principle of conferral laid down in Article 5 TEU, which stipulates that the EU acts only within the limits of the competences that Member States have conferred upon it in the Treaties.[32] Therefore, limited judicial review provided for by Article 275(2) TFEU is rather a result of "conscious choice made by the drafters of the Treaties", as argued by the Advocate General Wahl in *H. v. Council*[33]. This means that the Court should not exercise its powers beyond the limits laid down in the Treaties in spite of ambiguous and conflicting wording of certain provisions. The Advocate General Kokkot took the same view in Opinion 2/13 on the accession of the EU to the European Convention on Human Rights by saying that the Court is granted only restricted judicial review pursuant to Articles 24 TEU and 275(1) TFEU. She emphasized that wide interpretation of the Court's jurisdiction is "not necessary for the purpose of ensuring effective legal protection for individuals" and that "Member States are expressly obliged to provide remedies sufficient to ensure effective legal protection in the CFSP".[34]

It is worth remembering here that, based on Article 19(1) TEU, both the CJEU and national courts are charged with the responsibility of ensuring effective judicial protection for individuals. Whenever the CJEU lacks jurisdiction in the CFSP field, Member States should be able to step in and compensate for the existing legal gaps. The bottom line is that domestic courts are unable to come up with an independent position or to rule on the legality of decisions with respect to the CFSP. Therefore, propositions put forward by the Advocate General Hogan in *Bank Refah Kargaran* case, according to which the Treaties' drafters wanted to exempt only the decisions of a purely political nature because they are "inapt for judicial resolution"[35], seem rather weak in light of the legislative text at hand which explicitly prescribes only limited judicial review.

However, not every expansionist step that the Court has taken so far should be unwelcomed, despite implied limitations set out in the Treaties. For instance, in the *Rosneft* case, the Court stretched the notion of jurisdiction over the preliminary ruling procedure in matters dealing with the review of legality of CFSP decisions.[36] This ruling is significant for strengthening the relationship between the Court and Member States and ensuring uniform interpretation of the EU law by virtue of preliminary ruling procedure. The importance of such inter-institutional cooperation cannot be overstated, especially in

[30] Article 19 TEU.
[31] Article 340(2) TFEU.
[32] Article 5 TEU
[33] Opinion of AG Wahl to CJEU, case C-455/14 P, *H. v. Council and Commission*,7 April 2016, ECLI:EU:C:2016:212, para. 49.
[34] View of AG Kokott to CJEU, *Opinion pursuant to Article 218(11) TFEU*, 13 June 2014, ECLI:EU:C:2014:2475, para. 95 and 97.
[35] Opinion of AG Hogan to CJEU, case T-552/15,*Bank Refah Kargaran v Council of the European Union*,28 May 2020, ECLI:EU:C:2020:396, para. 47.
[36] Opinion of AG Wathelet to CJEU, case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*,31 May 2016, ECLI:EU:C:2016:381.

challenging times when the rule of law and democracy are most seriously at stake in backsliding Member States (Bard, 2021: 371-395; Tošić, 2021: 73-90).

Nevertheless, the continuous preference for a holistic approach can be criticized for disregarding the original intention of the Treaties' drafters. The question is how far the Court will go against the Union's general principle of legal certainty in setting out its own jurisdiction in CFSP matters. Some rightfully argue that the Court will never fully define the extent of limitations posed on it as it will be "pigeonholing itself for the future cases" (Butler, 2019:167).

5. CJEU'S APPROACH TO CFSP: ULTRA VIRES OR NOT?

Alongside the foregoing lines, it is important to investigate whether the CJEU's scrutiny in the field can be qualified as *ultra vires*, having in mind its frequent departure from the respective legal provisions. The integrationist approach to *Bank Refah Kargaran* case was heavily built upon the aforementioned *Rosneft* logic, as one of the CJEU's landmark judgments in the respective field.[37] The Court's argument in *Rosneft* was based on Articles 263 and 267 TFEU and the premise of general jurisdiction, which extends all the way to preliminary rulings as well as to review of the legality of the EU acts which are "intended to produce legal effect vis-a-vis third parties".[38] This particular predecessor of the *Bank Refah Kargaran* case revolved around the same legal concepts and arguments: the principles of rule of law and effective judicial protection pursuant to Articles 2 and 21 TEU as well as Article 47 of the EU Charter of Fundamental Rights.[39] Along with the case at hand, the *Rosneft* case was significant for providing further legal clarification on validity and context of restrictive measures under the CFSP. Thus, the Court has strengthened its problematic position that the jurisdiction is presumed even in the absence of textual basis thereto in the Treaties (Kuisma, 2018: 20).

It is worth recalling the times when the integrationist logic put forward by the *Bank Refah Kargaran* case was dismissed, which perfectly illustrates the progressive expansion of the Court's jurisdiction within the field. For instance, in *Segi*[40] and *Gestoras Pro Amnistia*[41], the Court explicitly ruled out the possibility of reviewing actions for damages on the ground that Treaties do not provide for such an expansive and loose interpretation. Likewise, the rulings in *Unión de Pequeños Agricultores* and *Jégo Quéré*[42] recalled the limits to the Court's power by stating that the judicial protection cannot go beyond the jurisdiction provided for in the Treaties and that Member States are the ones to make amendments to the scope of judicial review.

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[37] CJEU, case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, Judgment of the Court (Grand Chamber) of 28 March 2017, ECLI:EU:C:2017:236.
[38] TFEU, Articles 263 and 267.
[39] Articles 2 and 21 TEU; Charter of Fundamental Rights of the European Union, OJ, C 326/2012, Article 47.
[40] Case C-355/04 P, *Segi, Araitz ZubimendiIzaga and Aritza Galarraga v Council of the European Union*.
[41] CJEU, case C-354/04 P, *Gestoras Pro Amnistía, Juan Mari Olano and Julen Zelarain Errasti v Council of the European Union*, Judgment of the Court (Grand Chamber) of 27 February 2007, ECLI:EU:C:2007:115.
[42] CJEU, case T-177/01, *Jégo-Quéré & Cie SA v Commission of the European Communities*, Judgment of the Court of First Instance (First Chamber, extended composition) of 3 May 2002, ECLI:EU:T:2002:112.

A new light was shed on the CFSP by the (in)famous *Kadi* case[43], where the Court reflected on the nature of the EU's constitutional architecture and vertical hierarchy between the EU, the UN and national legal orders. By precluding primacy of the UN Security Council's resolution over the EU law, the CJEU turned its back on traditional fidelity to the public international law. The *Kadi* case, together with *Mox Plant,*[44] marked the beginning of a new phase of the Court's jurisdiction which has been heavily inspired by integrationist ideas ever since. Thus, the autonomy and unity of the EU legal order have been strongly tied up to the Court's (exclusive) jurisdiction which has been largely used to leverage the Member States' obligations and duties under the international law. However, there is a lack of clarity on the cause-effect relationship between the EU's autonomous nature and the Court's exclusive jurisdiction thereof, as some authors suggest (Lukić, 2013:198).

Slipping into a repetitive pattern of reasoning indicates that the Court is devoted to the protection of the Union's fundamental values more than ever before, but also interested in pursuing certain political objectives as a "driving force of the European integration process" (European Parliament, 2021). Legally speaking, such a flexible approach to judicial discretion has an *ultra vires* dimension and potentially threatens the principle of legal certainty at the same time. The Court's subtle political ambitions are reflected in an overly expanded jurisdiction which is ill-defined in the legislative text. The political question doctrine[45], albeit not officially recognized in the Court's practice, would help delimitate and clarify the uncertain scope of the Court's jurisdiction which is becoming slightly intrusive in the field of EU foreign policy (Lonardo, 2017: 587).

It follows that the Court's post-Lisbon *modus operandi* in the CFSP has shifted from abstentionism to expansionism. Although it might be criticized for being too artificial and unfaithful to the text of the Treaties in a formal sense, the Court's switch to unrestrained approach reflects the Union's changing political landscape that has been taking place for years. The rule of law and right to an effective judicial protection no longer have the same meaning within the CFSP context due to the progressive development of the notion of human rights but also (de)evolving geopolitical environment which surely requires a greater degree of coherence. In spite of the existence of legitimate (political) reasons for the Court's ever-expanding jurisdiction, infidelity to the scope and nature of the Treaties' provisions on the CFSP should not be welcomed with arms wide open in spite of an unorthodox understanding of tripartite separation of powers (Beširević, 2011: 77).

6. The Role of National Courts

As for the role of domestic courts in creating the CFSP, wishing to protect the uniform nature of the EU legal order, the CJEU recalled on several occasions that Member States are not entitled to rule on the validity of the CFSP acts. This is part of the so-called *Foto-*

[43] CJEU, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 3 September 2008, ECLI:EU:C:2008:461.

[44] CJEU, case C-459/03, *Commission of the European Communities v Ireland*, Judgment of the Court (Grand Chamber) of 30 May 2006, ECLI:EU:C:2006:345.

[45] Traditional expression of the doctrine refers to the idea that politically sensitive issue should not be heard by the Court. *See* U.S. Reports, *Marbury et. al. v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Frost rule[46], which was explicitly invoked by the Court in the *Rosneft* case, unlike in the *Bank Refah Kargaran* case, where the Court relied solely upon the rule of law protection as well as rights to an effective remedy and judicial review. Nevertheless, it would be incorrect to say that the *Bank Refah Kargaran* judgment was not inspired by the *Foto-Frost* logic at all (Verellen, 2021: 23). Both cases demonstrate the Court's ever-growing powers but also its commitment to protect both individual rights and the unity of the EU legal order.

Within the meaning of the *Bank Refah Kargaran* case, the Court wanted to avoid a "lacuna in the judicial protection of the natural or legal persons"[47] and to ensure that compensation for damages would have the exact same meaning in all Member States. The question arises as to whether such an expansionist approach would threaten the position of domestic courts in this field. On the one hand, the role of national courts in the EU's system of judicial protection was strengthened via the *Rosneft* judgment and subsequent introduction of a preliminary ruling as a new procedural tool which enabled the Member States to take a greater part in implementation of the CFSP acts. As recalled by Elsuwege and Lonardo, the CFSP is conceived and implemented by both Member States and the EU, which means that domestic courts form a part of the EU's legal system of judicial protection and play a crucial role in upholding the rule of law (Elsuwege, 2021: 1758; Lonardo, 2021: 297).[48]

Even though national courts are guided by the principle of primacy and direct effect of the EU law as established by landmark judgments of *Costa v. E.N.E.L.*[49] and *Van Gend and Loos*,[50] the question of primacy in this regard remains rather unclear considering the lack of clarification on the type of competence that the CFSP falls into. The relevant case law of the CJEU suggests that the *sui generis* nature of the CFSP is characterized by some degree of primacy; however, it does not imply that the role of national courts should be undermined or set aside. After all, the CFSP is subject to "mixed judicial control in a multilevel judicial field" and Member States are supposed to assist each other in carrying out tasks stemming from the Treaties, pursuant to the principle of sincere cooperation (Butler, 2019: 157).[51] The systematic reading of Article 4 TEU as well as Article 24 TEU suggests that competences not conferred upon the EU will remain with the Member States themselves, and *vice-versa*. Therefore, neither the CJEU nor national courts are entitled to exclusively rule on the CFSP matters; instead, they should be co-responsible for the field at stake.

The presented case law of the CJEU suggests that the Court is striving for "exclusivity on the judicial scene", which can also be identified in the Court's Opinion 2/13 on the EU's accession to the European Convention on Human Rights[52] where indirect limitations were placed upon, *inter alia*, the national courts (Butler, 2019: 168). Even though complementary jurisdiction of the CJEU and national courts is inherently built in the complete system of judicial remedies within the EU, one cannot deny that such system suffers from practical deficiencies given that all Member States do not equally comply with their obligations under the EU law.

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[46] CJEU, case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*., Judgment of the Court of 22 October 1987, ECLI:EU:C:1987:452.
[47] CJEU, case C-134/19, para. 39.
[48] Also *see* Article 19(1) of the TEU.
[49] CJEU,case 6-64, *Flaminio Costa v E.N.E.L.*, Judgment of the Court of 15 July 1964, ECLI:EU:C:1964:66.
[50] CJEU, case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Judgment of the Court of 5 February 1963, ECLI:EU:C:1963:1.
[51] Also *see* Article 4(2) TEU.
[52] Case Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU*, Opinion of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454.

When it comes to actions for damages in particular, nothing in the relevant provisions, primarily in Article 24(1) TEU and Article 275(1) TFEU, seems to indicate that the Court's interpretative acrobatics might be able to stretch so far as to cover compensation for the harm incurred by the EU, which means that the latter competences rest upon the national courts in the first place. Having in mind some straightforward aspects of both pre-Lisbon and post-Lisbon case law, which heavily praised the competences of national courts in the field of compensatory justice[53], the *Bank Refah Kargaran* judgment came as a surprise due to significant departure from the well-established judicial practice, but also from relevant Treaties' provisions and the fundamental requirement of legal certainty.

7. Concluding Remarks

In light of the aforementioned, it could be said that the CJEU is committed to protection of the Union's overarching foundational values within the ambit of foreign policy, but also highly interested in performing certain political functions even at the expense of the Member States' traditional area of competence. The case of *Bank Refah Kargaran* is yet another example of this growing adjudicative trend in the EU.

It is important to note that the case at hand could have far-reaching implications stretching outside the scope of the EU's restrictive measures. The impact of the ruling is anything but limited at this point, despite the fact that restrictive measures were already subject to the Court's legality review. The broader perspective suggests that the Court's continued reliance on the integrationist approach could spread out to other non-political questions, such as the ones brought under the Common Security and Defense Policy (hereinafter: CSDP), *i.e.* EU's military and civilian missions and operations aimed at preventing human rights violations. After all, the Court's increased reference to the rule of law would make it difficult to uphold the view that the CSDP missions should be devoid of judicial review (Elsuwege, De Coninck, 2020). The judgment at hand, along with its predecessors, could also pave the way for subsequent action for damages brought by non-Member States before the CJEU.

The extensive and dualist jurisprudence indicates the Court's willingness to present itself as a powerful actor at both international and national levels. The main concern is, however, whether the Court is allowed to juggle between the law and politics insofar as the relevant legal constraints are considered. Notwithstanding the fact that the exact contours of the jurisdiction remain quite unclear to date, it is evident that the Court has taken some decisive steps in this regard. If it continues in the same vein, one of the greatest obstacles in the recommenced negotiations on the EU's accession to the ECHR, which refers to the lack of CJEU's jurisdiction in CFSP, might be dismantled at least (Council of Europe, 2019).

Based on the aforementioned, it could be said that the Court's role in CFSP is less limited in practice than it might be presumed from the narrow reading of the relevant provisions. The progressive constitutionalization of the CFSP has created a distorted reality where principles of primacy and direct effect can no longer be ruled out from the field at stake. This means that traditional understanding of the Union's foreign affairs has been abandoned, which has considerably undermined the role of the Member States as well as the fundamental principle of legal certainty. By acquiring the right to rule on action for

[53] CJEU, case T-328/14, *Mahmoud Jannatian v Council of the European Union*, Judgment of the General Court (Seventh Chamber) of 18 February 2016, ECLI:EU:T:2016:86.

damages, the CJEU is leading the CFSP's constitutional dynamics towards a higher degree of coherence and integration despite its debatable gap-filling role. It seems that the latter perfectly displays the Court's continuous attempts to "kill two birds with one stone", meaning that there is a strong need to protect the Union's fundamental values, on the one hand, but also to expand the scope of judicial powers for non-legal reasons, on the other hand.

Finally, a full-fledged system of judicial review and enforcement in the CFSP is unlikely to happen, at least as long as traditionally unadaptable political matters are concerned. However, given the current atmosphere in the EU, prevalence of unity over fragmentation is quite expectable in the future. In case these predictions come true, we might be witnessing something that Beširević referred to as judicial tyranny (instead of judicial activism), especially in the absence of much needed political question doctrine that would allow for a clearer delimitation of the Court's competences in the CFSP (Beširević, 2011: 78).

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KONSTITUCIONALIZACIJA ZAJEDNIČKE SPOLJNE I BEZBEDNOSNE POLITIKE U KONTEKSTU SLUČAJA *BANK REFAH KARGARAN* PRED EVROPSKIM SUDOM PRAVDE

U presudi od 6. oktobra 2020. godine u predmetu Bank Refah Kargaran, veliko veće Suda pravde odbacilo je presudu Opšteg suda, utvrdivši po prvi put sopstvenu nadležnost and zahtevima za naknadu štete u oblasti Zajedničke spoljne i bezbednosne politike u delu koji se odnosi na restriktivne mere protiv fizičkih i pravnih lica. Pomenuti slučaj predstavlja značajan iskorak u pravcu dalje konstitucionalizacije oveoblasti, iako je reč o ustavnosudskom aktivizmu koji u velikoj meri odstupa od slova Lisabonskog ugovora. Takođe, Sud je naglasio postojanje uzročno-posledične veze između prava na efikasnu sudsku zaštitu, s jedne strane, te jedinstva pravnog poretka Evropske unije, s druge strane. Predmetna presuda ukazuje na rastuće političke ambicije Suda povodom sopstvenih nadležnosti na polju ZSBP koje prevazilaze okvire lisabonskih ograničenja, a sve u svrhe očuvanja autonomnog pravnog Sistema koji se temelji na zaštiti vladavine prava i ljudskih prava. Rad je usmeren ka pojašnjenju konstitucionalnih procesa u okviru ZSBP, kao i ispitivanju praktičnih implikacija konkretne presude iz osetljivog spoljnopolitičkog ugla kojeg karakteriše podeljena nadležnost između Evropske unije i država članica.

Ključne reči: *Sud pravde Evropske unije, Zajednička spoljna i bezbednosna politika, restriktivne mere protiv fizičkih i pravnih lica, vladavina prava, pravo na naknadu štete, pravo na efikasnu sudsku zaštitu.*