



H v. COUNCIL: STRENGTHENING THE RULE OF LAW IN THE SPHERE OF THE CFSP, ONE STEP AT A TIME

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ABSTRACT: In its judgment in the case of *H v. Council et al.*, the Grand Chamber recognised the jurisdiction of the Court of Justice of the European Union to assess the validity under EU law of a decision by the Chief of Personnel of the European Union Police Mission in Bosnia-Herzegovina (EUPM) to redeploy an Italian magistrate, seconded to the EUPM in Sarajevo, to the post of Criminal Justice Adviser in another location in that country. The question was salient in light of the jurisdictional *carve-out* in the sphere of the Common Foreign and Security Policy (CFSP) provided for in Art. 24, para. 1, TEU and Art. 275 TFEU. Before the Court, the parties had advanced diverging interpretations of these provisions aimed at recognising or ruling out the Court's jurisdiction. The Court took an alternative path, relying on Art. 270 TFEU on jurisdiction over staff management disputes to confirm its jurisdiction in the case at bar. This *Insight* contextualises the Court's ruling by pointing to the deficiencies in the system of judicial protection in the sphere of the CFSP. In addition, it argues in favour of a broad reading of the exceptions to the exclusion of the Court's jurisdiction in the sphere of the CFSP. In support of this argument, the *Insight* assesses the arguments in this direction advanced by the appellant and the European Commission.

KEYWORDS: EU external relations – Common Foreign and Security Policy (CFSP) – rule of law – complete system of judicial protection – Art. 275 TFEU and Art. 24, para. 1, TEU – autonomy of EU law.

I. INTRODUCTION

On 19 July 2016, the Grand Chamber of the European Court of Justice (ECJ)¹ rendered judgment in the case of *H v. Council et al.*² In his *Highlight*, published on the *European Forum of European Papers*, Stian Øby Johansen sketches out the factual and procedural

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¹ The term ECJ will be used to refer to the upper-level court within the CJEU, whereas the term CJEU will be used to refer to the court as a whole, encompassing both the ECJ and the General Court.

² Court of Justice, judgment of 19 July 2016, case C-455/14 P, *H v. Council et al.* [GC].

background of the case.³ Building on that contribution, this *Insight* immediately proceeds to an analysis of the Advocate's General opinion and the Court's ruling. The question before the Court was the following: does the Court of Justice of the European Union (CJEU) have jurisdiction to assess the validity under EU law of a decision by the Chief of Personnel of the European Union Police Mission in Bosnia-Herzegovina (EUPM) to redeploy an Italian magistrate, seconded to the EUPM in Sarajevo, to the post of Criminal Justice Adviser in another location in that country?⁴

The question would have been a simple one, were it not that the EU Treaty, in its Art. 24, para. 1, second subparagraph in fine provides that "[t]he [CJEU] shall not have jurisdiction with respect to [the provisions with regard to the common foreign and security policy], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union".⁵ Art. 275 TFEU holds:

"The [CJEU] 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, the Court shall have jurisdiction to monitor compliance with Article 40 [TEU] and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V [TEU]".

The text of these provisions stands in tension with one of the objectives of the Treaties, namely the construction of a Union founded on the principle of the rule of law.⁶ As

³ For an overview of the facts and the procedure, see S. ØBY JOHANSEN, *H v. Council et al. – A Minor Expansion of the CJEU's Jurisdiction over the CFSP*, in *European Papers – European Forum*, Highlight of 7 October 2016, www.europeanpapers.eu, p. 1 *et seq.*

⁴ Decision of 7 April 2010, signed by the Chief of Personnel of the European Union Police Mission (EUPM), by which the appellant was redeployed to the post of 'Criminal Justice Adviser — Prosecutor' in the regional office of Banja Luka (Bosnia and Herzegovina), not published.

⁵ This provision puts further flesh on the bones of the principle that "[t]he common foreign and security policy is subject to specific rules and procedures" envisaged in Art. 24, para. 1, TEU. On the gradual constitutionalisation of the CFSP, see e.g. R.A. WESSEL, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*, in *European Papers*, 2016, www.europeanpapers.eu, pp. 439-468; as well as T. VERELLEN, *Pirates of the Gulf of Aden: the Sequel, or how the CJEU further embeds the CFSP into the EU legal order*, in *European Law Blog*, 2016, europeanlawblog.eu.

⁶ Art. 2 TEU. Note that the rule of law principle applies also to the CFSP, which has become an integral part of EU law in the post-Lisbon era. In this sense, see C. HILLION, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, in M. CREMONA and A. THIES (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges*, London: Hart, 2014, p. 51 and the references to the literature there.

Sir Francis Jacobs has argued, the key to the notion of the rule of law is the reviewability of decisions of public authorities by independent courts.⁷ This formal understanding of the rule of law has been given textual expression in Art. 47 of the Charter of Fundamental Rights and Freedoms of the EU (Charter), where it 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”.⁸

In its *Parti écologiste “Les Verts” v. European Parliament* judgment, the ECJ articulated an institutional theory of judicial review under which the responsibility for upholding the rule of law in the EU is divided between the CJEU and the Member State courts as “ordinary EU courts”. The Court held, in particular, that

“[w]here the [EU] institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling”.⁹

Key to this theory of judicial review is the availability of recourse to the CJEU, be it directly or indirectly, allowing the CJEU to determine the meaning or the validity of the EU measure on the basis of which a litigant seeks relief. In this sense, the ECJ considers the system of judicial protection to be “complete”, a characterisation an ECJ judge explained as meaning that “sufficient legal remedies and procedures exist before the [EU] courts and the national courts so as to ensure judicial review of the legality of the acts of the [EU] institutions, with the result that when the review of the legality of [an EU] act

⁷ F. JACOBS, *The Sovereignty of Law: the European Way*, Cambridge: Cambridge University Press, 2007, p. 35. In the same sense, see the references to literature mentioned in G. DE BAERE, *Constitutional Principles of EU External Relations*, Oxford: Oxford University Press, 2008, p. 176.

⁸ In addition, the ECJ has articulated a substantive understanding of the rule of law through the development of an elaborate fundamental rights case law, dating back to the *Internationale Handelsgesellschaft* case, in which the ECJ declared that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice” (see Court of Justice, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, para. 4). On the distinction between formal and substantive conceptions of the rule of law, see P. CRAIG, *Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework*, in *Public Law*, 1997, pp. 467-487. On the conception of the rule of law in EU law, see generally L. PECH, ‘A Union Founded on the Rule of Law’: *Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, in *European Constitutional Law Review*, 2010, pp. 359-396.

⁹ Court of Justice, judgment of 23 April 1986, case 294/83, *Parti écologiste “Les Verts” v. European Parliament*, para. 23. For a recent confirmation, see Court of Justice, judgment of 5 October 2015, case C-362/14, *Maximilian Schrems v. Data Protection Commissioner*, para. 60.

cannot be carried out directly by the [EU] courts for reasons of inadmissibility, it must somehow be brought before the national courts which will refer for a preliminary ruling on validity control of such act".¹⁰

II. A COMPLETE SYSTEM OF JUDICIAL PROTECTION, ALSO IN THE SPHERE OF THE CFSP?

Precisely how an exclusion of direct CJEU jurisdiction in the sphere of the CFSP conflicts with the understanding of a complete system of judicial protection on which the Treaties are premised, became visible in Advocate General Wahl's Opinion in the case reviewed in this *Insight*.¹¹ AG Wahl advised the ECJ to answer the abovementioned question in the negative. The absence of CJEU jurisdiction implies, the AG argued, that the Member State courts – charged with the responsibility of providing remedies sufficient to ensure effective legal protection in the fields covered by Union law¹² – have the necessary jurisdiction to assess the compatibility with the Treaties of a CFSP decision as the one at issue in *H v. Council et al.*, subject to the requirements of effectiveness and equivalence.¹³

However, as established in the *Foto-Frost v. Hauptzollamt Lübeck-Ost* case, only the CJEU has the constitutional authority to invalidate norms of EU law. "Divergences between courts in the Member States as to the validity of Community acts" – the Court held in that case – "would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty".¹⁴ As AG Wahl acknowledged, it follows from *Foto-Frost* read together with the contention that the CJEU lacks jurisdiction, that no EU court – neither the CJEU nor a Member State court – has jurisdiction to invalidate the contested decision.¹⁵ At most, the Member State court could suspend the decision and award damages, the AG suggested, in accordance with the *Zuckerfabrik* case law.¹⁶

¹⁰ K. LENAERTS, *The Basic Constitutional Charter of a Community Based on the Rule of Law*, in M. POIARES MADURO and L. AZOULAI (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, London: Hart, 2010, p. 304.

¹¹ Opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council et al.*

¹² Art. 19, para. 1, TEU.

¹³ For a recent example, see Court of Justice, judgment of 6 October 2015, case C-61/14, *Orizzonte Salute - Studio Infermieristico Associato v. Azienda Pubblica di Servizi alla Persona San Valentino - Città di Levico Terme et al.*, para. 46.

¹⁴ Court of Justice, judgment of 22 October 1987, case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, para. 15. Confirmed recently in *Maximillian Schrems v. Data Protection Commissioner*, cit., para. 61.

¹⁵ Opinion of AG Wahl, *H v. Council et al.*, cit., paras 102-103.

¹⁶ The AG summarised the *Zuckerfabrik* requirements for suspension as follows: "(i) the national court must entertain serious doubts as to the validity of the EU measure and, if the validity of the contested measure is not already in issue before the Court, that court must itself refer the question to the Court; (ii) there must be urgency, in that the interim relief must be necessary to avoid serious and irreparable damage being caused to the party seeking the relief; (iii) the national court must take due account

The Court in *Zuckerfabrik* conceived of the possibility of suspending the application of a national measure based on a EU act as a form of interim relief, to be granted to a party at risk of suffering “serious and irreparable damage”.¹⁷ Substantive relief remained available, as the Member State court could make a request for a preliminary ruling to the ECJ on the validity of the contested EU measure.

When the Court ruled in *H v. Council et al.*, by contrast, it was not yet clear whether Member State courts have the same possibility with regard to CFSP decisions. In the case of *Rosneft*, pending at the moment of writing, the Court is required to address the question of whether it has jurisdiction to issue preliminary rulings on the interpretation and validity of a CFSP decision on restrictive measures. While significant, as Art. 275 TFEU only *expressis verbis* provides for jurisdiction via the medium of the annulment action, judicial restraint makes it unlikely that the ECJ will take a position on the broader question of whether preliminary ruling procedures are authorised also with regard to other types of CFSP decisions.¹⁸

Even if the Court recognises its jurisdiction to issue preliminary rulings on the interpretation and validity of CFSP decisions on restrictive measures, it nonetheless remains the case, as the Court emphasised in its opinion on the accession of the EU to the European Convention on Human Rights, that there are necessarily certain acts adopted in the context of the CFSP that fall outside the ambit of judicial review by the Court of Justice.¹⁹ To the extent that a lack of CJEU jurisdiction over these acts implies that their validity cannot be put into question, as a Member State court might not be in a position to issue a request for a preliminary ruling on the validity of the EU acts at issue, the EU system of judicial protection contains a gap. Such a gap undermines the claim to completeness, which, as explained in the above, represents a core component of the conception of the rule of law, which the ECJ has defended in a line of case law dating back to *Les Verts*.

Note, moreover, that this gap can be filled neither by Member State courts on the basis of their domestic fundamental rights law, nor by the European Court of Human Rights (European Court). Both Member State courts and the European Court are at risk

of the interests of the European Union; and (iv) in its assessment of all those conditions, the national court must comply with any decisions of the EU Courts on the lawfulness of the EU measure or on an application for provisional measures seeking similar interim relief at EU level”. See Opinion of AG Wahl, *H v. Council et al.*, cit., footnote 74, and Court of Justice, judgment of 21 February 1991, joined cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*.

¹⁷ *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, cit., para. 28.

¹⁸ Advocate General Wathelet advised the Court to recognise its jurisdiction in the *Rosneft* case. See Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*.

¹⁹ Court of Justice, Opinion 2/13 of 18 December 2014, para. 252.

of undermining the autonomy of EU law if they would declare a CFSP measure illegal as a matter of domestic or European Court of Human Rights law.

With regard to the former, the ECJ confirmed this point in the case of *Melloni*, where it rejected the argument that the Spanish understanding of the right to a fair trial should prevent the Spanish authorities from extraditing Mr Melloni to Italy. Doing so would undermine the primacy of the European Arrest Warrant Framework Decision, the Court considered.²⁰ The holding in *Melloni* arguably applies to CFSP measures as well, as the CFSP is an integral part of EU law.²¹ This implies that Member State courts are prohibited under EU law from disappling, let alone invalidating, a CFSP measure on the basis of the argument that their domestic legal system provides for a higher standard of fundamental rights protection than the protection provided for by EU law.

With regard to the latter, the ECJ in Opinion 2/13 rejected the compatibility with EU law of the draft Accession Agreement of the EU to the European Convention on Human Rights in part because the agreement would empower the European Court to exercise judicial review over EU measures outside of the jurisdiction of the CJEU.²² If, in the absence of an EU accession to the ECHR, the European Court chooses to maintain the so-called *Bosphorus* presumption²³ also in cases involving the conventionality of an EU Member State measure taken in the context of the CFSP, the European Court would not step in to fill the legal accountability gap and review EU Member State measures taken

²⁰ Court of Justice, judgment of 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, in particular paras 55-64.

²¹ In support of the application of the primacy principle to the CFSP, see already R. GOSALBO BONO, *Some Reflections on the CFSP Legal Order*, in *Common Market Law Review*, 2006, p. 378 (arguing in the pre-Lisbon context that “even the sacrosanct Community principles of direct effect and primacy over the law of the Member States cannot be said to be completely alien to the CFSP legal order”) and more recently R.A. WESSEL, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*, cit., p. 463 *et seq.*

²² Opinion 2/13, cit., para. 258. As argued by Jed Odermatt, this leaves the EU and ECHR Member States with two avenues to fill the gap: either exclude CFSP measures from the scope of the judicial review by the European Court or extend the CJEU’s jurisdiction to the entirety of the CFSP. See J. ODERMATT, *A Giant Step Backwards? Opinion 2/13 on the EU’s Access to the European Convention on Human Rights*, in *Leuven Centre for Global Governance Studies Working Papers*, 2015, pp. 10-11.

²³ The *Bosphorus* presumption stands for the proposition that the European Court does not review measures taken by EU Member States in the implementation of EU law, as long as EU law provides for an equivalent system of fundamental rights protection. See European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC]. As pointed out by Stian Øby Johansen, the so-called *Bosphorus* presumption was recently reconfirmed in the European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia* [GC], a case involving the recognition of judgments on the basis of the Brussels I regulation. See S. ØBY JOHANSEN, *EU Law and the ECHR: the Bosphorus Presumption is Still Alive and Kicking - the Case of Avotiņš v. Latvia*, in *EU Law Analysis*, 24 May 2016, www.eulawanalysis.blogspot.com. See also G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in *European Papers*, 2016, www.europeanpapers.eu, pp. 579-596.

in implementation of their CFSP obligations in light of the ECHR. However, even if the European Court exercised jurisdiction, it would only exercise a conventionality check; it cannot apply the EU Charter, nor should it be expected to do so. In such an arrangement, no guarantee exists that the EU Charter and the rights contained in the Charter will be applied uniformly to all EU citizens in all Member States. The autonomy of EU law remains at risk.

III. IN SEARCH OF THE LIMITS OF THE JURISDICTIONAL *CARVE-OUT*: IN DEFENCE OF THE ECJ'S INCREMENTAL APPROACH

The abovementioned observations point to the need to close the jurisdictional gap. Absent a Treaty amendment, efforts at protecting the complete system of judicial protection necessarily remain interpretative in nature. The challenge is a complex one, as the language of abovementioned Arts 24 TEU and 275 TFEU can reasonably be understood as expressing an intent of the Treaty framers to exclude all CFSP measures from the CJEU's jurisdiction.²⁴ AG Wahl's argument rested precisely on these originalist grounds, where he argued that "[t]he system is ... the result of a conscious choice made by the drafters of the Treaties, which decided not to grant the CJEU general and absolute jurisdiction over the whole of the EU Treaties. The Court may not, accordingly, interpret the rules set out in the Treaties to widen its jurisdiction beyond the letter of those rules or to create new remedies not provided therein".²⁵

Given the rather firm textual grounds against understanding the scope of the Court's jurisdiction in too expansive a fashion, an argument in favour of CJEU jurisdiction must rest on other grounds, such as the context of the concerned provisions and the objectives of the Treaties.²⁶ The following question arises at this juncture: how far should one go in bending the Treaty text in an effort to do justice to a transversal constitutional principle such as the rule of law?

In its ruling of 19 July 2016, the ECJ avoided tackling this constitutional issue head on. It did so by introducing into the equation Art. 270 TFEU, according to which "[t]he Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the

²⁴ Art. 275, para. 1, TFEU excludes "acts adopted on the basis of [the CFSP] provisions". The notion of "acts" is not qualified in any way, which can be reasonably be understood as meaning *all* acts.

²⁵ Opinion of AG Wahl, *H v. Council et al.*, cit., para. 49. Note that the Court itself acknowledges the intent of the framers to exclude certain acts from the purview of the CJEU, where it held in Opinion 2/13 that "that situation is inherent to the way in which the Court's powers are structured by the Treaties [...]" (Opinion 2/13, cit., para. 253).

²⁶ Note that the interpretation of EU law is a balancing exercise between different methods of interpretation. In this sense, see K. LENAERTS and J. GUTIERREZ-FONZ, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, in *Columbia Journal of European Law*, 2013, p. 3 *et seq.*

Union". By categorising the decision to redeploy Mr or Ms H as a staff decision, which, even if it had an *operational* or *theatre* dimension, could not easily be disentangled from its administrative dimension, the ECJ concluded that

"the scope of the limitation, by way of derogation, on the Court's jurisdiction, which is laid down in the final sentence of the second subparagraph of Article 24(1) TEU and in the first paragraph of Article 275 TFEU, cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions".²⁷

Apart from the fact that the staff management decision had a certain operational dimension, the ECJ justified this view also on the basis of institutional practice and on considerations of structure. With regard to the former, the ECJ referred to Council and High Representative of the Union for Foreign Affairs and Security Policy decisions on the secondment of national experts to, respectively, the Council and the European External Action Service. In both of these contexts, the decisions recognised the jurisdiction of the ECJ over staff management disputes.²⁸ With regard to the latter, the ECJ submitted that to recognise CJEU jurisdiction in the present case avoids the undesirable possibility of a diverging case law between Member State courts and the CJEU, which each would hold jurisdiction over disputes involving staff seconded by, respectively, the Member States and the EU institutions.²⁹

It is a well-established principle in constitutional adjudication – in particular in common law jurisdictions, it must be added³⁰ – that courts should decide a case on the narrowest grounds available.³¹ Doing so prevents judicial activism and preserves a scope of manoeuvre for the Court that might prove welcome in the future. By characterising the issue in *H v. Council et al.* as one of staff management with certain operational aspects from which the staff management dimension could not be disentangled, the ECJ was able to avoid, in an entirely legitimate manner, articulating a more compre-

²⁷ *H v. Council et al.* [GC], cit., para. 55.

²⁸ *Ivi*, para. 56.

²⁹ *Ivi*, para. 57.

³⁰ Note that the ECJ has been referred to as a common law court. See e.g. E. YOUNG, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, in *New York University Law Review*, 2002, p. 1631 ("notwithstanding the civil-law traditions of most of the Member States and the ECJ's adoption of particular structures from national courts, the ECJ seems to function primarily as a common-law court").

³¹ US Supreme Court Justice Brandeis expressed this point e.g. in US Supreme Court, decided on 17 February 1936, *Ashwander v. Tennessee Valley Authority*, 297 US 288, p. 347, where he held that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of".

hensive understanding of the limits of the Court's jurisdiction in CFSP matters. As Stian Øby Johansen points out in his *Highlight*,³² the reliance on Art. 270 TFEU allows the ECJ to expand its jurisdiction over CFSP matters in an incremental fashion. Unfortunately, this approach does leave the more principled question of the scope of the jurisdictional *carve-out* unanswered.

IV. LOOKING FORWARD: TOWARDS A COMPREHENSIVE APPROACH

On this issue, essentially three arguments have been advanced in *H v. Council et al.* First, the appellant and the Commission had argued in favour of an interpretation of Art. 275 TFEU that focusses on the nature of the plea rather than the nature of the contested act. Second, they had argued in favour of a narrow interpretation of the phrase "certain decisions as provided for by the second paragraph of Article 275 [TFEU]" in Art. 24, para. 1, TEU. Third, the appellant had argued for a broad interpretation of the terms "restrictive measures" in Art. 275 TFEU as encompassing not only traditional sanctions, but also other types of CFSP acts that affect the legal status of individuals. While the first argument fails to convince, the second and third arguments do have a certain merit and deserve further elaboration in the event the issue of the scope of the CJEU's jurisdiction in CFSP matters again is brought before the Court.

IV.1. A READING OF ART. 275 TFEU FOCUSED ON THE NATURE OF THE PLEA RATHER THAN THE NATURE OF THE CONTESTED ACT

The appellant and Commission had argued that Art. 275 TFEU should be read as authorising the CJEU to review CFSP measures, but only in light of non-CFSP Treaty provisions. This argument runs into unsurmountable textual and contextual difficulties. As the AG mentioned, the provision excludes "acts adopted on the basis of [the CFSP Treaty provisions] from CJEU jurisdiction".³³ Had the framers wished to exclude from judicial review certain pleas, rather than certain acts, they would have introduced different language. The context of the first paragraph of Art. 275 TFEU proves this point, as the second paragraph of the same provision does adopt a plea-focussed approach, and to do so speaks of "monitoring compliance with" – an expression not used in the first paragraph.

One could imagine a variant of the plea-focussed approach by reading broadly Art. 40 TEU (the *non-affectation clause*). In this view, not defended by the parties in *H v. Council et al.*, Art. 40 TEU could be relied upon not only to protect the powers of the EU on the basis of the non-CFSP Chapters of the Treaties, but also to protect other norms of EU law, in particular those protecting fundamental rights.³⁴ An argument of this type

³² S. ØBY JOHANSEN, *H v. Council et al. – A Minor Expansion of the CJEU's jurisdiction over the CFSP*, cit.

³³ Opinion of AG Wahl, *H v. Council et al.*, cit., para. 66.

³⁴ See e.g. G. DE BAERE, *Constitutional Principles of EU External Relations*, cit., p. 183.

had been advanced in the pre-Lisbon context, in which the ECJ had expressly understood the then Art. 47 TEU as a mechanism to protect the *acquis communautaire* generally understood.³⁵

In the post-Lisbon context, however, this argument is more difficult to maintain, if only because the language of present Art. 40 TEU is more restrictive than that of its predecessor, Art. 47 TEU (Nice). While the latter provided that “nothing in [the EU] Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them”, present Art. 40 TEU limits the non-affectation requirement to “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”. Arguably, this change should be understood precisely as a means to prevent the CJEU from understanding Art. 40 TEU as a catch-all provision, allowing the Court to by-pass Art. 275 TFEU.

IV.2. A NARROW INTERPRETATION OF THE PHRASE “CERTAIN DECISIONS AS PROVIDED FOR BY THE SECOND PARAGRAPH OF ARTICLE 275 [TFEU]” IN ART. 24, PARA. 1, TEU

The second argument is significantly more attractive than the first, although it, too, is not without its flaws. On the one hand, to endorse the narrow reading of the “certain decision” phrase according to which the jurisdictional *carve-out* would be limited to *high politics* decisions (decisions of “sovereign policy”, in the Commission’s terms),³⁶ would introduce into EU law similar discussions to those held in France on the topic of the scope of the *actes du gouvernement* doctrine,³⁷ or in the United States on the scope of the political question doctrine.³⁸ In both of these jurisdictions, it remains unclear pre-

³⁵ Court of Justice, judgment of 20 May 2008, case C-91/05, *Commission of the European Communities v. Council of the European Union* [GC], para. 59: “in providing that nothing in the EU Treaty is to affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them, Article 47 EU aims, in accordance with the fifth indent of Article 2 EU and the first paragraph of Article 3 EU, to maintain and build on the *acquis communautaire*”.

³⁶ *H v. Council et al.* [GC], cit., para. 32.

³⁷ E. CARPENTIER, *Permanence et unité de la notion d'acte de gouvernement*, in *L'actualité juridique, droit administratif*, 2015, p. 799 *et seq.*, holding that the notion of the “*acte du gouvernement*” is difficult to capture in a single definition, which, in turn, has led commentators to define the notion by means of an enumeration of examples.

³⁸ For a critique of the abdicationist tendencies of US courts in the sphere of foreign affairs, see T. FRANCK, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, Princeton: Princeton University Press, 1992. For a recent discussion of the doctrine, see US Supreme Court, decided on 26 March 2012, *Zivotofsky v. Clinton*, 132 S.Ct. 1421, on the issue of whether the question of the compatibility of an executive policy of only mentioning the city or town of birth of naturalised US citizens if this town or city is located in a disputed territory, with a Congressional statute providing that Americans

cisely to what extent these doctrines require courts to deny jurisdiction. It is fair to say that to introduce a distinction of this type between *high politics-actes du gouvernement*-type of CFSP decisions and decisions of a more administrative nature would, at least in the short term, increase rather than reduce legal uncertainty.

On the other hand, however, introducing such a distinction, the contours of which would be patrolled by the ECJ, would allow the ECJ to bring EU law more in line with developments in the abovementioned jurisdictions, where courts more and more often rely on the rule of law principle – in France the imperative to avoid a *déni de justice* – to read narrowly the scope of the executive’s authority to adopt decisions that escape judicial review. In the United States, for example, in the case of *Zivotofsky v. Clinton*, Chief Justice Roberts argued for the majority that courts cannot be prevented from fulfilling their duty to “say what the law is” merely “because the issues have political implications”.³⁹ Similarly, in France, the Council of State already in 1924 has relied on the doctrine of the *acte détachable* to allow administrative courts to accept jurisdiction to rule on the legality of parts of decisions that, considered as a whole, should be considered *actes du gouvernement*.⁴⁰ These developments are illustrative of a broader tendency amongst courts in liberal democracies to reject arguments – typically mounted by the executive – that aim to isolate certain spheres of decision-making from the scope of judicial review.

It is fair to say that the CFSP jurisdictional *carve-out* considered as a whole is yet another manifestation of this executive tendency – one that is not idiosyncratic to the EU, it must be emphasised.⁴¹ When approached from this perspective, to “read down” the jurisdictional *carve-out* by identifying a category of decisions of a mere administrative, as opposed to a “high politics” nature, would not be a manifestation of judicial ac-

born in Jerusalem may elect to have “Israel” listed as the place of birth on their passports, constitutes a political question, requiring federal courts to decline jurisdiction.

³⁹ US Supreme Court, *Zivotofsky v. Clinton*, cit., per Chief Justice Roberts, pp. 1427-1428. The *Zivotofsky* decision has been understood as a manifestation of a broader tendency of the Roberts Supreme Court to “normalize” US foreign relations law, i.e. to apply ordinary canons of constitutional interpretation to issues pertaining to foreign relations. See G. SITAMARAN, I. WUERTH, *The Normalization of Foreign Relations Law*, in *Harvard Law Review*, 2015, pp. 1925-1926.

⁴⁰ See in particular French Council of State, judgment of 29 June 1924, *Goldschmidt*.

⁴¹ In this sense, with regard to the pre-Lisbon CFSP, see R. GOSALBO BONO, *Some Reflections on the CFSP Legal Order*, cit., pp. 378-379: “[t]he CFSP legal order is certainly not unique in this sense: in the same way as the national law of foreign relations, the CFSP legal order is not in principle enforced by the courts”. Similarly, in more general terms, see M. KOSKENNIEMI, *International Law Aspects of the Common Foreign and Security Policy*, in M. KOSKENNIEMI (ed.), *International Law Aspects of the European Union*, The Hague: Nijhoff, 1998, pp. 27-28: “[i]t is conventional to think of foreign and security policy as a realm of sovereign wills and national interests *par excellence*. If law should play a role in it, it is only as an instrument for the expression and realization of those wills and interests [...] providing a language and institutional arrangements that sometimes facilitate the attainment of consensus [...] But in the realm of vital interests, national security, peace and war, rules cannot constrain”.

tivism, considering that even in jurisdictions with strong traditions of deference towards the executive in the sphere of foreign relations courts have been adamant to protect their jurisdiction against arguments aimed at isolating areas of “high politics” from the scope of judicial review.

IV.3. A BROAD INTERPRETATION OF “RESTRICTIVE MEASURES” IN ART. 275 TFEU⁴²

A similar argument can be mounted in support of the appellant’s proposal to read broadly the notion of “restrictive measures” referred to in Art. 275 TFEU, albeit that the originalist argument against interpreting the notion in such a broad fashion carries with it more persuasive force. To read “restrictive measures” broadly as to include all CFSP decisions that affect the legal status of individuals would, as the AG suggested, stand in tension with the original intent of the framers, who, it is safe to assume, introduced Art. 275 TFEU in response to the *Kadi*-type of case law, which revealed the shortcomings of the then even broader jurisdictional *carve-out* in the sphere of the CFSP.⁴³

However, this originalist objection can be overcome by interpreting the provision in light of its purpose. Surely, in political terms, Art. 275 TFEU was a response to the issue of the judicial protection of individuals subject to EU sanctions. However, in legal terms, the introduction of Art. 275 TFEU can be understood as a means to further the objective of protecting the rule of law. Under this view, closing the gap in the system of judicial protection was a mere means to attain the objective of ensuring that EU law provides a complete system of judicial protection. From this perspective, to stretch the text of Art. 275 TFEU in order to close similar gaps as the one brought to light in cases such as *Kadi* is a legitimate exercise, entirely in line with the spirit of Art. 275 TFEU.

Interpretative interventions as those discussed here only go that far, however. In the final analysis, *H v. Council et al.* again makes visible the structural deficiencies of the CFSP as designed by the Lisbon treaty framers. Ideally, the framers should extend the scope of the CJEU’s jurisdiction by means of a Treaty amendment.⁴⁴ In the absence of

⁴² The Commission had articulated a similar argument in the proceedings leading up to Opinion 2/13. See Opinion 2/13, cit., paras 98-100.

⁴³ Court of Justice, judgment of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission v. Yassin Abdullah Kadi*. Note that *Kadi* was only the latest in a series of cases of this type. In the early 2000s, the European Convention already discussed the need to extend the CJEU’s jurisdiction to restrictive measures. See The European Convention, Supplementary Report on the Question of Judicial Control Relating to the Common Foreign and Security Policy of 26 March 2003, CONV 689/1/03 REV 1.

⁴⁴ Academic commentators have criticised the gap in the EU system of legal protection caused by the CFSP. See e.g. P. EECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 499 (“[t]he case for limited Court jurisdiction in CFSP matters is not persuasive. In a Union governed by the rule of law there ought to be no acts of the institutions which are outside the Court’s jurisdiction”) or G. DE BAERE, *Constitutional Principles of EU External Relations*, cit., p. 200, concluding that the absence of Court jurisdiction in the sphere of the CFSP not only runs counter to the rule of law, but is liable also to damage seriously the abilities of the Union as an international actor.

such an amendment, however, it is incumbent on the Court of Justice to interpret the scope of its jurisdiction over CFSP-related disputes broadly, if only because exceptions are to be interpreted narrowly,⁴⁵ and should not prevent the Court of Justice from providing relief where Member State courts are not in a position to do so effectively.

⁴⁵ The restrictions on the Court's jurisdiction in the sphere of the CFSP are exceptions to the general rule that the Court does possess jurisdiction. In this sense, see e.g. Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council*, para. 70: "[t]he final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be interpreted narrowly".