



## UvA-DARE (Digital Academic Repository)

### Common Foreign and Security Policy

*The Consequences of the Court's Extended Jurisdiction*

Eckes, C.

#### DOI

[10.1111/eulj.12183](https://doi.org/10.1111/eulj.12183)

#### Publication date

2016

#### Document Version

Final published version

#### Published in

European Law Journal

[Link to publication](#)

#### Citation for published version (APA):

Eckes, C. (2016). Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction. *European Law Journal*, 22(4), 492-518.  
<https://doi.org/10.1111/eulj.12183>

#### General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

#### Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.



*European Law Journal*, Vol. 22, No. 4, July 2016, pp. 492–518.

© 2016 John Wiley & Sons Ltd. 9600 Garsington Road, Oxford, OX4 2DQ, UK  
and 350 Main Street, Malden, MA 02148, USA

# Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction

*Christina Eckes\**

**Abstract:** *Despite the explicit exclusion of its jurisdiction, the Court of Justice of the European Union exercises judicial control over Common Foreign and Security Policy (CFSP). This article examines and explains how the Court's extended jurisdiction contributes to the juridification, judicialisation and constitutionalisation of the EU's compound CFSP structures. It first lays the groundwork by explaining the link between constitutionalisation and democratic legitimation and setting out the Court's formal jurisdiction over CFSP under Article 40 Treaty on European Union and Articles 218(11) and 275(2) Treaty on the Functioning of the European Union. The centre piece of the article then identifies how the Court's jurisdiction has expanded since the entry into force of the Lisbon Treaty, points at additional 'substantive' avenues of judicial review on the basis of access to information and access to justice, and analyses the effects of the Court of Justice of the European Union's extended jurisdiction for CFSP.*

## I Introduction

As is well-known, the Court's jurisdiction over the Common Foreign and Security Policy (CFSP) is excluded by Article 24(1)2 Treaty on EU (TEU) and Article 275(1) Treaty on the Functioning of the EU (TFEU). These provisions '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'.<sup>1</sup> This paper examines the exceptions to the exception, i.e. where the EU Courts nonetheless exercise jurisdiction, and the consequences of the Court's jurisdiction over CFSP.

In Opinion 2/13 on the EU's accession to the European Convention on Human Rights (ECHR), delivered on 18 December 2014, the Court confined itself to stating that firstly, 'the Court has not yet had the opportunity to *define the extent to which its jurisdiction is limited* in CFSP matters [...]',<sup>2</sup> and that secondly, 'it is sufficient to declare that, as EU law now stands, *certain acts* adopted in the context of the CFSP fall outside the ambit

---

\* Professor of European Law, Amsterdam Centre for European Law and Governance, University of Amsterdam. I would like to thank Nik de Boer, Marija Bartl, the participants of the ARENA seminar in Oslo on 3 February 2015, the members of the project The Architecture of Postnational Rulemaking at the University of Amsterdam, as well as the anonymous reviewers and the editor of the *European Law Journal* for their helpful comments on earlier drafts. I am further grateful for the generous funding of the Dutch Science Foundation (NWO). All remaining errors are of course my own.

<sup>1</sup> Case C-658/11, *Parliament v. Council (Piracy Agreement)*, ECLI:EU:C:2014:2025, para. 70.

<sup>2</sup> Opinion 2/13 EU Accession to the ECHR, ECLI:EU:C:2014:2454, para. 251 [emphasis added].

of judicial review by the Court of Justice'.<sup>3</sup> In particular, the Court's interpretation, that (only) 'certain acts adopted in the context of CFSP' are excluded, is an invitation to speculate under which circumstances the Court would exercise jurisdiction over CFSP. In Opinion 2/13 itself, the Court exercised jurisdiction over the draft accession agreement, which also covers matters of CFSP, without expressing any hesitation. However, it then interpreted its own jurisdiction in the context of CFSP more narrowly than the Commission. Indeed, the Court's limited jurisdiction over CFSP was one of the reasons why the Court found the draft agreement contrary to EU law.

This paper addresses two interrelated questions. Firstly, it examines whether and how the jurisdiction of the CJEU has expanded beyond its *prima facie* limits in the Treaties. Secondly, after identifying such expansions, the paper addresses the consequences of the Court's jurisdiction for CFSP. It argues that the CJEU has exercised a form of constitutional review over CFSP that has strengthened the framework conditions for democratic deliberation. The Court's extended review has not depoliticised CFSP but rather contributed to its democratic legitimacy.

Section II briefly conceptualises constitutionalisation and links it to democratic legitimacy. The section further highlights the relevant particularities of CFSP and the relevance of the CJEU's jurisdiction over CFSP. Section III introduces the Court's formal jurisdiction over CFSP as it is set out in the European Treaties. Section IV then turns to the practice. It contextually examines the Court's jurisdiction in the post-Lisbon setting, considering how recent case-law and Treaty changes have led to an expansion of the Court's jurisdiction. Section V identifies two additional rights-based entry points for judicial review: the right of access to information and access to justice. Both existed pre-Lisbon, but both have recently grown in importance. They may allow for direct actions, preliminary rulings and action for damages (Articles 263, 267 and 340 TFEU). Section VI reflects on the consequences of the extended judicial review of the CJEU for the constitutionalisation and democratic legitimacy of CFSP.

## II Terminological Clarification and Relevance

### A Constitutionalisation and Democratic Legitimacy

Extended judicial review by the CJEU over CFSP may have different consequences. *Prima facie*, it seems to increase the relevance of law in the field of CFSP, strengthen the Court's ability to influence and potentially annul decisions of the national executives and allow individuals to challenge the EU's foreign policy. To disentangle the potential consequences of the CJEU's jurisdiction over CFSP, including for its democratic legitimacy, a distinction should be made between juridification (proliferation of law), judicialisation (expansion of judicial power) and constitutionalisation.

'Constitutionalising' in the EU context regularly refers to developing and applying common EU norms and principles. It essentially equates constitutionalisation with EU legal integration<sup>4</sup> and makes no distinction between the proliferation of EU law and constitutionalisation of the European legal sphere. This perspective remains

<sup>3</sup> *Ibid.*, para. 252 [emphasis added].

<sup>4</sup> B. Rittberger and F. Schimmelfennig speak of a, 'Deepening of European Legal Integration', 'Explaining the Constitutionalization of the European Union', (2006) 13 *Journal of European Public Policy*, 1148–1167. For a critical analysis of different understandings of constitutionalisation: C. Möllers, 'Pouvoir Constituant-Constitution-Constitutionalisation', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart Publishing, 2010), 169–204.

unsatisfactory. To distinguish the extended relevance of the law and constitutionalisation, it is helpful, first of all, to recall Blichner and Molander's five dimensions of juridification.<sup>5</sup> First, 'a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system'; second, 'a process by which an activity becomes subject to legal regulation or more detailed legal regulation'; third, 'conflicts in society increasingly are solved by reference to law'; fourth, 'increased judicial power' (judicialisation); and fifth, 'an increased tendency to understand self and others, and the relationship between self and others, in light of a common legal order'. None of these dimensions necessarily results in constitutionalisation; yet, they may contribute to constitutionalisation.

Constitutionalisation should be understood and analysed with reference to the functions and purposes of modern constitutions. Modern constitutions have a mixed procedural-substantive character, setting out substantive components, such as fundamental rights and state purposive provisions, as well as procedural components regulating the legislative process. Both components essentially aim to enable and limit politics by protecting three different achievements of the enlightenment: democratic legitimation, fundamental rights and separation of powers.<sup>6</sup> Procedural and substantive components of a constitution can hence be distinguished, but the relevance of this distinction should not be overstated. Constitutional procedures are not pointless, arbitrary or unjustifiable; they serve a substantive purpose, such as democratic legitimation and the protection of fundamental rights. Moreover, any judicial ruling on procedural issues has an influence on who is in charge of determining substantive policies, who may give input and who is excluded. This ultimately also impacts on the actual substantive policy that is adopted. Furthermore, one consequence of constitutionalisation is entrenchment. In order to change constitutional law, a higher threshold needs to be reached. This entrenchment also necessarily results in a shift of power.

Since the 1990s, mainstream theory has moved towards a deliberative understanding of democracy.<sup>7</sup> 'Deliberative democracy' is the banner used for a number of democracy theories. Their core-distinguishing feature is that they do not focus on aggregation of individual pre-political preferences but on a process of open debate leading to an agreed policy (the collective will). Hence, deliberative democracy should not be understood as divorced from politics, but as the best self-understanding of politics as a process of open discussion, in which actors are amenable to changing their position.

In particular, constitutional review by unelected judges stands in essential tension with and may even pose a threat to democratic legitimacy. Constitutional and judicial review should be distinguished in this regard. Constitutional review, while not necessarily conducted by the judiciary, is, when the judiciary conducts it, a particular form of judicial review. It is characterised by the interpretation of indeterminate norms of constitutional status, such as human rights. It may further require the court to annul legal instruments adopted pursuant to legislative procedures and to act as a referee between actors, who derive their mandate from constitutional law. The fourth category of Blichner and Molander's model earlier covers both judicial and constitutional review.

<sup>5</sup> L. Blichner and A. Molander, 'Mapping Juridification', (2008) *European Law Journal*, 36–54.

<sup>6</sup> See e.g. A. Wiener, *The Invisible Constitution of Politics—Contested Norms and International Encounters* (Cambridge University Press, 2012).

<sup>7</sup> J. Elster (ed.), *Deliberative Democracy* (Cambridge University Press, 1998); J.S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2002); J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Massachusetts Institute of Technology Press, 1996).

Courts are counter-majoritarian but may also engender or preserve deliberation, for example, by reducing coercion (e.g. by protecting rights) and protecting a deliberative space (e.g. through media laws). Indeed, in the words of Jürgen Habermas, one of the most sophisticated supporters of a procedural model of deliberative democracy:

[C]lassical liberties are co-original with political rights.<sup>8</sup>

If one understands the constitution as an interpretation and elaboration of a system of rights in which private and public autonomy are internally related and must be simultaneously enhanced, then *a rather bold constitutional adjudication is even required* in cases that concern the implementation of democratic procedure and the deliberative form of political opinion- and will-formation.<sup>9</sup>

Habermas' procedural account of democratic legitimacy presumes that a collective will can only be formed in a legally structured political community,<sup>10</sup> based on constitutionalism and the rule of law. Constitutional review is required to ensure that the collective will is formed pursuant to pre-established (constitutional) rules, including both procedural and substantive rules that allow the equal and free participation of all in the collective will-forming.<sup>11</sup> In this reading, constitutional and judicial reviews are a functional and fundamental requirement of democracy. On the one hand, constitutional review (and judicial review more broadly) protects the framework conditions for collective will-forming and, on the other hand, they ensure that all participants are treated as individually autonomous. This should not be read too narrowly. It allows arguing that constitutional review by courts is not only legitimate but ultimately even necessary. Pursuant to Habermas' co-originality thesis, the protection of fundamental rights is a necessary condition for democratic legitimacy. The content and implications of fundamental rights are specified in the democratic process. Ultimately, this leaves us with a tension between an independent (judicial) review protecting fundamental rights and the political space necessary to fill these rights with democratically determined content. When the judiciary strikes down democratically adopted legal acts because they violate fundamental rights, it remains open whether this enhances or unduly interferes with the democratic process. Co-originality precisely does not answer the question of whether fundamental rights protection by the judiciary or the democratic process of determining these rights should prevail. Yet, it provides us with a tool to reflect about the consequences of judicial review for democratic legitimacy.

The contribution of courts and the law to deliberative democratic legitimacy is hence ambiguous. They are not necessarily seen as limiting but may also be reinforcing democracy. Much depends on the institutional design, the specific issue at stake and the yardstick that the court both formally and actually uses. In the ideal democratic setting, the exercise of public power is grounded in the will of autonomous rights holders, whose rights are protected by independent review. Furthermore, besides (at least potentially) engendering an environment contributive to deliberation, certain institutions, such as domestic courts, are constructed in a way that allows them to deliberate about certain choices in a different way. Courts need to take adequate account of detailed and specialised information in order to decide the case at hand. They are obliged to offer a justification for their choices that fits within the existing legal and constitutional framework and builds in this way on

<sup>8</sup> J. Habermas, 'On the Internal Relation between Law and Democracy', in J. Habermas, *The Inclusion of the Other* (Massachusetts Institute of Technology Press, 2000), at 260.

<sup>9</sup> Habermas, above, n. 7, at 279–280.

<sup>10</sup> *Ibid.*, at 448.

<sup>11</sup> See for a detailed analysis of Habermas' stand on democracy and judicial review: C. Zürn, 'Deliberative Democracy and Constitutional Review', (2002) 21 *Law and Philosophy*, 467–542.

existing choices supported by the democratic process of the past. Even if judicial justification may not necessarily be more comprehensive or better-argued, by placing the current decision in the light of the law, consisting largely of past democratic choices, it offers a particular form of coherence and continuity.

Modern views of a ‘power-limiting constitution’ increasingly understand law and judicial review to shape rather than weaken political power<sup>12</sup> and to be necessary to protect a space for free deliberation in society. Constitutions are understood to establish rules for an institutional setting that simultaneously guarantees the legitimacy and the organisation of democratic will-formation through formal legal procedures.<sup>13</sup> In this ideal typesetting, judicial and constitutional reviews protect and enforce these rules, as well as the general egalitarian concern on which democracy is based.<sup>14</sup>

### *B Particularities of the EU and Common Foreign and Security Policy*

European Union law in general and CFSP with its state-centred decision-making rules in particular hardly meet an ideal standard of egalitarian democratic participation. In the transnational context, the externalisation (transfer) of national executive powers, without a similar transfer of parliamentary control, creates a particular threat to democratic legitimacy. This also lies at the core of the ‘democratic deficit’ of the EU.<sup>15</sup> It is even more pronounced in the compound ‘intergovernmental’ legal system of CFSP, which is dominated by national executive decisions and in which the attempts to introduce (additional) democratic legitimacy within the European legal sphere are very limited.

In this CFSP setting, judicial control by the CJEU ensures autonomy from intergovernmental control and adherence to constitutional principles, including fundamental rights. This further disjoins (national) democratic legitimacy from decision in the EU context but enhances adherence to principles. It leads to juridification of a realm that aims otherwise to protect political discretion. This plays into the concern of the counter-majoritarian criticism that judicial review pre-empts politics, as well as of the literature that more specifically criticises the political power of the CJEU and the judicialisation of the EU.<sup>16</sup> Power shifts towards the EU judiciary under CFSP could hence be seen as further weakening democratic control of national parliaments over national executive decisions in the realm of CFSP. It is here crucial to distinguish the two legal spheres of the compound constitutional structure of the EU: the national and the European.<sup>17</sup> While an increase of the powers of the European Parliament *prima facie* increases the democratic legitimisation of a measure within the European legal sphere, this does not necessarily increase democratic legitimisation over all if national parliaments lose grip over the same measure.

The internal political and legislative process within the EU offers (limited and often criticised<sup>18</sup>) democratic and procedural legitimacy through the participation of the

<sup>12</sup> See Möllers, above, n. 4, at 174.

<sup>13</sup> *Ibid.*, 177.

<sup>14</sup> R. Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), chapter 18.

<sup>15</sup> See e.g. A. Føllesdal and S. Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, (2006) 44 *Journal of Common Market Studies*, 533–562.

<sup>16</sup> See e.g. F. Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot be a “Social Market Economy”’, (2010) 8 *Socio-Economic Review*, 211–250.

<sup>17</sup> Section VI (B) specifically connects to this point.

<sup>18</sup> See literature on the democratic deficit of the EU, e.g. A. Føllesdal and S. Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, (2006) 44 *Journal of Common Market Studies*, 533–562. Føllesdal and Hix, above, n. 15.

European Parliament, citizens' consultations and indirect democratic control of national representatives through national structures. In this regard, review by the CJEU may be seen as particularly problematic because it has a stronger entrenching force than ordinary judicial review usually has. The other EU institutions are bound by the decisions of the Court. The Member States need to amend the Treaties in a long and complex procedure requiring ratification in all 28 Member States in order to rein in a decision of the CJEU. This makes political correction of judicial decisions particularly difficult and triggers entrenchment of EU law, including decisions of the CJEU. Furthermore, the Lisbon Treaty recently introduced a new appointment procedure for judges to the CJEU,<sup>19</sup> which aims to ensure their judicial qualification and ultimately their ability to offer autonomous reason-based legitimacy, but makes the appointments also less political.

Moreover, the question arises whether national courts may be (better) placed to offer judicial review under CFSP than the CJEU. The CJEU seems to consider national review to be *excluded*<sup>20</sup> pursuant to the *Foto-Frost* logic that national courts cannot review the validity of EU acts.<sup>21</sup> Yet, this may not rule out that national courts might exercise jurisdiction over CFSP, pursuant to an adapted *Solange* logic,<sup>22</sup> where the CJEU fails to do so.

An extension of the jurisdiction of the CJEU over CFSP may potentially lead to all five dimensions of juridification. CFSP is characterised by 'intergovernmental' decision-making both of the Member States and predominantly the Council. The more supranational EU institutions, such as the European Parliament, the Commission and the Court, only have a limited role. CFSP hence lacks both the EU channels and structures of democratic legitimation of other areas of EU law, but largely relies on democratic legitimation through national channels, e.g. through national parliamentary oversight. Moreover, while individuals may be directly affected by CFSP measures and the Court's case-law, CFSP usually does not directly regulate activities of individuals. The particular characteristics of CFSP are relevant for the interpretation and application of the five different dimensions of juridification, including constitutionalisation, as well as the consequences of the CJEU's jurisdiction for the democratic legitimacy of CFSP.

### *C Relevance of the Court of Justice of the EU's Jurisdiction over Common Foreign and Security Policy*

At present, there are three cases pending before the CJEU that would allow the Court to define its scope of jurisdiction over CFSP. They demonstrate the relevance of judicial review of CFSP and the variety of issues that may come up. Furthermore, they indirectly confirm—together with the other post-Lisbon cases discussed in the succeeding paragraphs—that after Lisbon, the number and hence also the likelihood of such cases has increased. They are, first of all, evidence of judicialisation, but may also trigger other dimensions of juridification. The CJEU may, for example, specify existing norms, which results in more detailed regulation. Whether they lead to constitutionalisation by (re-) enforcing the constitutional function of EU law to protect and enhance democratic

<sup>19</sup> Art 253–255 TFEU.

<sup>20</sup> Case C-355/04 P, *Segi*, ECLI:EU:C:2007:116, and AG Mengozzi in this case, paras. 104–106; Opinion 2/13 EU Accession to the ECHR, ECLI:EU:C:2014:2454, paras. 255–256.

<sup>21</sup> Case 314/85, *Foto-Frost* [1987] ECR 4199, ECLI:EU:C:1987:452.

<sup>22</sup> BverfGE, 73, 339, see also *Fragd*, judgment of the Italian Constitutional Court of 21 April 1989, IT: COST:1989:232.

legitimacy, fundamental rights and separation of powers, as discussed earlier, cannot be decided in general terms; it depends on the issues at stake and the CJEU's approach.

The first case is an appeal against an order of the General Court (GC), in which it rejected an action for annulment against the award of a public tender by Eulex Kosovo to a third party.<sup>23</sup> The GC's rejection was motivated by the fact that Eulex Kosovo did not have legal capacity to be a defendant. The Court did not engage with the defendant's argument that it lacked jurisdiction to rule on the case because the tender was based on provisions of CFSP. The appeal, by contrast, centrally focuses on the jurisdiction of the Court over the contested measures because Eulex Kosovo was created by a CFSP decision. The Commission argued that the rules on public procurement were a normative parameter extrinsic to the CFSP and that this would allow the Court to find the exclusion of its jurisdiction in Articles 24(1) TEU and 275(1) TFEU not applicable, without needing to examine whether the contested act is itself an act adopted on the basis of a provision of the CFSP. The Advocate General disagreed.<sup>24</sup>

The second case is also an appeal.<sup>25</sup> It challenges an order of the GC rejecting the applicant's action for annulment against a decision to redeploy the plaintiff to a position as prosecutor, which resulted in her no longer being the chief of personnel and of the head of mission of the European Union Police Mission (EUPM) in Bosnia-Herzegovina and requests damages for harm suffered. In this order, the jurisdiction of the Court was the specific point of contestation. Both Council and Commission submitted that the contested decisions were measures that pertain to an operational action decided upon and carried out under CFSP and that, as a consequence, the Court has no jurisdiction to hear the action.<sup>26</sup> The applicant, by contrast, relied on *Sogelma v. EAR*<sup>27</sup> to argue that the contested decisions were not political or strategic CFSP decisions. She added that, if the GC were to consider that it lacked jurisdiction, she would be denied the right to an effective remedy, as laid down in Article 47 Charter of Fundamental Rights of the European Union (CFREU) and Article 6 ECHR, because the national courts could neither annul those decisions nor order the EU institutions to compensate her for the harm that they have caused.<sup>28</sup> The GC held that the situation of the applicant was not covered by the exceptional jurisdiction of the EU Courts under Article 275(2) TFEU, but that the CFSP decision on EUPM in Bosnia Herzegovina regulated that acts of staff seconded from Member States should be challenged before national courts.<sup>29</sup> The applicant appealed.

The third case is a preliminary reference from the High Court of Justice (England and Wales) asking the CJEU to pronounce on the validity and interpretation of a number of provisions of a CFSP decision on sanctions against Russia.<sup>30</sup> The High Court's first question concerns the extent of the Court's jurisdiction to reply to a preliminary request on CFSP measures. Indeed, the wording of Article 275(2) TFEU refers to direct actions against restrictive measures against persons without mentioning preliminary rulings. Moreover, the extent to which the Court has jurisdiction over sanctions measures that

<sup>23</sup> C-439/13 P, *Elitaliana v. Eulex Kosovo*, ECLI:EU:C:2015:753.

<sup>24</sup> C-439/13 P, *Elitaliana v. Eulex Kosovo*, Opinion of AG Jääskinen, ECLI:EU:C:2015:341.

<sup>25</sup> C-455/14 P, *H v. Council and Commission*.

<sup>26</sup> GC, Case T-271/10, *H v. Council*, Order of 10 July 2014, ECLI:EU:T:2014:702, para. 29.

<sup>27</sup> T-411/06, *Sogelma v. EAR*, ECLI:EU:T:2008:419.

<sup>28</sup> GC, Case T-271/10, *H v. Council*, Order of 10 July 2014, ECLI:EU:T:2014:702, appeal pending: C-455/14 P, *H v. Council and Commission*.

<sup>29</sup> Case T-271/10, *H v. Council*, ECLI:EU:T:2014:702, paras 40–52. In the case at hand, this would be the Italian courts because the head of mission was Italian.

<sup>30</sup> C-72/15, *Rosneft*, case in progress.

do not directly target persons, such provisions that relate to oil and arms, may also be questionable under the wording of Article 275(2) TFEU.<sup>31</sup> The Commission suggested interpreting the wording of this provision broadly to cover the other CFSP measures affecting individuals in a direct manner. This corresponds to its position in Opinion 2/13 that ‘restrictive measures’ within the meaning of Article 275(2) TFEU should cover all acts that have binding legal effects and that are capable of resulting in a breach of fundamental rights.<sup>32</sup>

Common Foreign and Security Policy measures of direct impact may still be few, but they are increasing. Examples are the measures at stake in operation ATALANTA, in which the EU deters, prevents and represses acts of piracy and armed robbery at sea, including by apprehending suspects and transferring them to some African states for prosecution and punishment,<sup>33</sup> or the more recent EU military operation of fighting traffickers in the Southern Central Mediterranean (EUNAVFOR MED), in the context of which the EU disposes of ‘vessels and related assets’ and ‘apprehend[s] traffickers and smugglers’; searches and, if necessary, diverts ‘suspicious vessels’.<sup>34</sup> ATALANTA and EUNAVFOR MED are the clearest examples of the human rights relevant of the EU’s operations. They demonstrate that CFSP interference with the rights of individuals has become a real possibility.<sup>35</sup> These cases raise, above all, questions about the scope of political discretion. To what extent should political discretion be shielded from judicial interference? How should courts hold political actors accountable for their actions, including in the field of foreign policy? Ultimately, this translates into the question of how narrow should courts construe the constitutional framework based on a judicial standard for politics to remain able to weigh autonomous political considerations.

### III Formal Jurisdiction of the Court over Common Foreign and Security Policy

In order to examine whether the Court has expanded its jurisdiction beyond its *prima facie* limits in the Treaties, these limits must first be established. This section, hence, sets out the formal jurisdiction of the Court. The Lisbon Treaty extended the Court’s formal jurisdiction over CFSP. Article 275 TFEU in combination with Article 40 TEU, Article 275(2) TFEU in combination with Article 263 TFEU and Article 218(11) TFEU are the codified entry points for the Court into CFSP territory.

<sup>31</sup> C. Eckes, ‘EU Restrictive Measures Against Natural and Legal Persons: From Counter-Terrorist to Third Country Sanctions’, (2014) 51 *Common Market Law Review*, 869–906.

<sup>32</sup> Opinion 2/13 EU Accession to the ECHR, ECLI:EU:C:2014:2454, para. 98 and 99. This is the Commission’s reading of *Segi*, discussed in the succeeding sections.

<sup>33</sup> <http://eunavfor.eu/>. See the increasing number of challenges of counter-piracy actions before national courts, e.g. the ruling of the Cologne administrative court, available at: [http://www.justiz.nrw.de/nrwe/ovgs/vg\\_koeln/j2011/25\\_K\\_4280\\_09urteil20111111.html](http://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html). This case also concerned attributability of the acts to Germany (instead of the EU).

<sup>34</sup> Council Decision 2015/778/CFSP of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED). EUNAVFOR MED has entered into the active second stage on 7 October 2015.

<sup>35</sup> See also European Union Force Althea (EUFOR ALTHEA), where the EU ‘contribute[s] to a safe and secure environment’, which are tasks usually assigned to national law enforcement and security forces; and The European Union Rule of Law Mission in Kosovo (EULEX Kosovo), where the EU exercise[s] executive responsibilities in specific areas of competence, such as war crimes, organised crime and high-level corruption, as well as property and privatisation cases.

### A *The Mutual Non-Affection Clause of Article 40 Treaty on EU*

Article 275(2) TFEU explicitly establishes the Court's jurisdiction over the 'mutual non-affectation clause' in Article 40 TEU. This provision excludes any substitution or replacement between CFSP and TFEU policies and any legal hierarchy between the two.<sup>36</sup> Article 40, section 1 TEU is identical to the pre-Lisbon non-affectation clause of ex-Article 47 TEU. It protects TFEU policies from CFSP invasion. In the old setting, this has led to an assumption of the primacy of Community law (now TFEU policies) over Union law (now only CFSP). Indeed, pre-Lisbon, the CJEU's rulings in *Airport Transit Visa* (1998)<sup>37</sup> and *Environmental Crime* (2005)<sup>38</sup> had emphasised the role of ex-Article 47 TEU as a preserver of the powers of the Communities and had held that if a subject matter can be governed by Community measures, it must be dealt with under Community law.<sup>39</sup> Post-Lisbon Article 40, section 2 TEU was added. It mirrors the first and protects the intergovernmental nature of CFSP by excluding that TFEU powers may affect CFSP. This logically ends the primacy of TFEU policies and explicitly requires the Court to protect political discretion in the realm of CFSP from the more legalised and constitutionalised TFEU methods. Asking the question whether a measure 'can be' adopted as a TFEU measure and then asking whether it 'can be' adopted as a CFSP measure may likely lead to two affirmative answers. This would not be helpful to determine a dividing line.

The end of the hierarchal relationship between the TEU and the TFEU has increased the likelihood of disagreement on whether a policy falls within either Treaty and hence the likelihood of judicialisation. Indeed, since the entry into force of the Lisbon Treaty, the Court has already ruled three times on the matter.<sup>40</sup> As we will see in the succeeding sections, the Court created in both cases new potential for further litigation. It has also increased the likelihood that the CJEU exercises constitutional review over CFSP by acting as a referee between the EU political institutions and deciding on the scope and interpretation of their competences under the EU Treaties.

### B *Review of Restrictive Measures under Article 275(2) Treaty on the Functioning of the EU*

Article 275(2) TFEU further extended the Court's jurisdiction in direct but limited way. It establishes jurisdiction of the EU Courts over actions for annulment (Article 263 TFEU) of restrictive measures against individuals (sanctions). Arguably, it extends to actions for damages.<sup>41</sup> What might seem at a first reading like a fairly narrow entry point for judicial review has resulted in an exceptionally high number of cases.<sup>42</sup> Indeed, restrictive

<sup>36</sup> Similarly, already with regard to ex-Article 47 TEU, R.G. Bono, 'Some Reflections on the CFSP Legal Order', (2006) 43 *Common Market Law Review*, 337–394, at 351.

<sup>37</sup> Case C-170/96, *Commission v. Council (Airport Transit Visa)*, ECLI:EU:C:1998:219.

<sup>38</sup> Case C-176/03, *Commission v. Council (Environmental Crime)*, ECLI:EU:C:2005:542.

<sup>39</sup> For *Airport Transit Visa*, G. Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy', (2006) 55 *International and Comparative Law Quarterly*, 77–120, at 91; P. Eeckhout, *External Relations of the European Union* (Oxford University Press, 2011).

<sup>40</sup> Case C-130/10, *Parliament v. Council (UN Sanctions)*, ECLI:EU:C:2012:472; Case C-658/11, *Piracy Agreement*, ECLI:EU:C:2014:2025. Case C-263/14, *Parliament v. Council (Piracy Agreement II/Tanzania)*, ECLI:EU:C:2016:435. See below.

<sup>41</sup> C. Eckes, 'EU Counter-Terrorist Sanctions against Individuals: Problems and Perils', (2012) *European Foreign Affairs Review*, 113–132. See below.

<sup>42</sup> Eckes, above, n.31.

measures are by far the most judicially contested type of CFSP measure. At the time of writing, about 100 cases have been decided, most of which have led to annulments.<sup>43</sup> About 100 additional cases are pending before the GC. Ten appeals were brought to the CJEU in 2013 and 2014 only. This does not count cases that only relate or refer to restrictive measures. Sanctions directly interfere with the rights of individuals and have led to an exceptionally high amount of litigation. A combination of these two related points gives the Court ample opportunity to rule on constitutional issues, such as the protection of fundamental rights in the area of CFSP.

### *C The Review of Envisaged International Agreements under Article 218(11) TFEU*

Article 218 TFEU sets out the general procedure for the adoption of international agreements, including for CFSP agreements. Article 218(11) TFEU empowers the Court to give an opinion on the compatibility of an envisaged international agreement with the EU Treaties. While several paragraphs of Article 218 TFEU distinguish CFSP agreements from TFEU agreements, Article 218(11) TFEU does not make such a distinction. The Court may hence give an opinion on the compatibility of CFSP or joint CFSP/TFEU agreements under Article 218(11) TFEU. Opinion 2/13 confirmed this.<sup>44</sup> The Court specifically considered the potential difficulties resulting from its limited jurisdiction in the area of CFSP,<sup>45</sup> but the fact that the draft agreement also concerned CFSP matters was not raised as a reason for inadmissibility.<sup>46</sup> The Court's jurisdiction over envisaged CFSP or joint CFSP/TFEU agreements is also necessary for the Court to fulfil its mandate of patrolling the dividing line between the Treaties pursuant to Article 40 TEU.

Pursuant to Article 218(11) TFEU, the Court may exercise a powerful *ex ante* review, allowing the Court to impose constraints on the executive before it commits the EU to a set of international obligations. In the area of CFSP where the Union cannot adopt legislative acts, international agreements are a significant instrument of governance. With the increased external powers of the Union, this has become even more important.<sup>47</sup> Indeed, international agreements adopted on the basis of Article 218 TFEU benefit from limited democratic legitimisation through the involvement of the European Parliament and are used to adopt quasi-legislative measures. For this reason, the Court's jurisdiction under Article 218(11) TFEU is also the most likely to directly interfere with policy choices of the EU political institutions. Striking down the EU's commitment to international agreements is similar to annulling legislative instruments. It is a form of constitutional review that may be particularly invasive. Moreover, the Court's opinions on envisaged agreements have regularly addressed issues of constitutional relevance, such as the autonomy of the EU legal order.<sup>48</sup> Opinion 2/13 should be seen as an example of this.

<sup>43</sup> Until November 2014, 35 sanctions decisions were upheld, 65 were annulled, and in 86 cases, applications have been withdrawn or removed from the Courts' register, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-008614&language=EN>.

<sup>44</sup> See also already, 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—Constitutional Challenges* (Hart Publishing, 2014), 183–209.

<sup>45</sup> Opinion 2/13 EU Accession to the ECHR, ECLI:EU:C:2014:2454, para. 249–257.

<sup>46</sup> *Ibid.*, para. 144–152.

<sup>47</sup> Several interest organisations already now lobby the European Parliament to bring a request to the Court for an opinion under Article 218(11) TFEU if the Trans-Atlantic Trade and Investment Partnership is concluded.

<sup>48</sup> See R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence* (Asser Press, 2013).

#### IV Structural Organisational Principles Post-Lisbon: Need for Judicial Clarification

Formal jurisdiction under the Treaties is not the whole story. The present section demonstrates how the post-Lisbon characteristics of the CFSP, the changed relationship between the Treaties and the Court's post-Lisbon case-law concerning CFSP have increased the likelihood of judicial challenges under the CFSP.<sup>49</sup> This fits into Blichner and Molander's second, third and fourth dimension of juridification, in that activities, here the exercise of public power, become subject to more detailed legal regulation; that conflicts between constitutional actors are more often resolved by reference to law; and that the powers of the CJEU increase. In the light of the fact that CFSP may in many ways still be considered a legal order in the making, it may also lead to the first dimension of juridification in that it may add to the explicated competencies of the EU under CFSP. The objectives of this section are to demonstrate how the CJEU has expanded its jurisdiction by ruling on structural organisational principles in the area of CFSP. The core argument is that the Court exercises the right type of review by strengthening both the constitutional functions of EU law and national and EU channels of democratic legitimation, as well as by refraining from interfering with the policy choices of the political actors.

##### *A Inter-Treaty Relations: Consistency, Horizontal Objectives and Cross-Treaty Legal Bases*

One of the central aims of approximating CFSP and policies under the TFEU under Lisbon Treaty was to render EU external actions more consistent. Indeed, post-Lisbon, the Treaties highlight the importance of consistency in numerous ways: within specific policy areas;<sup>50</sup> between different policy areas;<sup>51</sup> of external actions;<sup>52</sup> of external actions with others policies;<sup>53</sup> between the actions and statements of the different EU actors;<sup>54</sup> and of enhanced cooperation with Union law.<sup>55</sup> The Lisbon Treaty notably pursued consistency by refraining from clear-cut delimitations, creating space for convergence and synergies between different policies and powers of different actors<sup>56</sup> and by leaving many details to be determined through interpretation and application by the Council, but also increasingly the Court.<sup>57</sup> The two major structural changes introduced by the Treaty of Lisbon to achieve greater substantive consistency are witness to this way of ensuring coherence through ambiguity: firstly, the introduction of common horizontal objectives, and secondly, the abolishment of any hierarchy between the two Treaties.<sup>58</sup> In combination, they have significantly increased the space for the CJEU to act as a constitutional court.

<sup>49</sup> Eckes, above, n. 41.

<sup>50</sup> Art. 42(7) TEU; Art. 196(1) TFEU; Art. 212 TFEU; Art. 214 TFEU.

<sup>51</sup> Art. 13 TEU; Art. 7 TFEU.

<sup>52</sup> Art. 16(6) TEU; Art. 18(4) TEU; Art. 26(2) TEU.

<sup>53</sup> Art. 21(3) TEU.

<sup>54</sup> Art. 13 TEU; Art. 16(6) TEU; Art. 18(4) TEU; Art. 26(2) TEU.

<sup>55</sup> Art. 329(2) TFEU.

<sup>56</sup> On different ways of how to pursue consistency, M. Cremona, 'Coherence through Law: What difference will the Treaty of Lisbon make?', (2008) 3 *Hamburg Review of Social Sciences*, 11–36.

<sup>57</sup> The most striking institutional example in this regard is the European External Action Service, which is only mentioned once in Article 27(3) TEU and whose composition, powers and relations with the EU institutions had to be worked out following the entry into force of the Lisbon Treaty.

<sup>58</sup> Art. 1(1) and 40 TEU.

The case of *UN Sanctions* (2012) is highly illustrative of how the choice to pursue consistency through ambiguity has increased the CJEU's role as a constitutional court in the field of CFSP. *UN Sanctions* concerned the legal basis chosen by the Council to give effect to UN Security Council resolutions imposing sanctions against terrorist suspects.<sup>59</sup> The Council had based the sanctions on Article 215 TFEU, which is an exceptional 'hybrid CFSP/TFEU provision' that requires a prior CFSP decision under the TEU for the Union to take action under the TFEU and so aims to protect political discretion of the Member States. Parliament challenged this choice and argued that the correct legal basis would have been Article 75 TFEU.<sup>60</sup> The main procedural difference directly relates to democratic legitimisation through the EU institutions. Article 75 TFEU requires the ordinary legislative procedure, while Article 215 TFEU only requires that Parliament be informed. The Court found Article 215 TFEU to be the correct choice. The Court further explained that, in principle, a single legal basis must be chosen and that the correct legal basis be determined pursuant to the main aim or component of the measure (centre of gravity test<sup>61</sup>). Only if a measure 'simultaneously pursues a number of objectives, or [...] has several components which are inseparably linked without one being incidental to the other, [...] [it] will have to be founded, exceptionally, on the various corresponding legal bases'.<sup>62</sup>

The list of common objectives for the Union's external policies in Article 21 TEU makes the determination of whether a measure serves a CFSP or a TFEU objective much more difficult post-Lisbon. Ironically, this makes the Court's additional mandate under Article 40 TEU, to also defend political discretion under CFSP from TFEU encroachment, more difficult now than it would have been before the entry into force of the Lisbon Treaty, when the different external policies had their own objectives and the Court did not yet have this task.<sup>63</sup> It makes the objectives-based analysis that the Court mentioned in *UN Sanctions* difficult, if not impossible. Ultimately, the Treaties do not provide the Court with much of a constitutional yardstick to determine the relationship between CFSP and TFEU policies. It is left up to the Court to draw the line between the TFEU, which constitutes a more constitutionalised EU sphere, and the realm of CFSP, which is characterised by greater discretion of the national executives.

Furthermore, while ex-Article 47 TEU in the reading of *ECOWAS* excluded a cross-Treaty combined CFSP/TFEU legal basis, Article 40 TEU in the reading of *UN Sanctions* establishes as a matter of principle the possibility to adopt acts on a cross-treaty legal basis if the procedures are compatible.<sup>64</sup> Yet, according to the Court's own standards, compatibility is difficult to argue for CFSP and TFEU procedures. In *UN Sanctions*, the Court specifically held that the ordinary legislative procedure cannot be combined with a provision where Parliament is only informed.<sup>65</sup> The underlying reason is that a combination of legal bases may not encroach upon the prerogatives of any of the institutions. Article 31 TEU stipulates that '[CFSP d]ecisions [...] shall be taken by

<sup>59</sup> Case C-130/10, *UN Sanctions*, ECLI:EU:C:2012:472.

<sup>60</sup> See for the choice of the legal basis, C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009), chapter 2.

<sup>61</sup> This was already established in Case C-91/05, *Commission v Council* (ECOWAS), ECLI:EU:C:2008:288, para. 60, 73 and 75.

<sup>62</sup> Case C-155/07, *Parliament v Council* (European Investment Bank Guarantees) [2008] ECR I-8103, para. 35–37; see also: Case C-130/10, *UN Sanctions*, ECLI:EU:C:2012:472, para. 42–44.

<sup>63</sup> Already before Lisbon, the objectives were so broadly phrased that any delimitation would have been difficult. Yet, for example, they did not include trade, specific economic objectives or the environment.

<sup>64</sup> Eckes, above, n. 41.

<sup>65</sup> Case C-130/10, *UN Sanctions*, ECLI:EU:C:2012:472, para. 47.

the European Council and the Council acting unanimously, except where this Chapter provides otherwise'.<sup>66</sup> Parliament is not mentioned at all.<sup>67</sup> The provision further specifies how a Member State can abstain and sets out the exceptions to the general decision-making rule in which 'the Council shall act by qualified majority'.<sup>68</sup> The exceptional qualified majority vote is further subject to an 'emergency break', where a Member State sets out 'vital and stated reasons of national policy', 'the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity'.<sup>69</sup> This differs considerably from the ordinary legislative procedure under the TFEU not only as regards the involvement of Parliament but also in the described procedural particularities that protect decisions that are democratically legitimised through national channels and hence ultimately national political discretion. These differences are greater than the differences in the combination that the Court explicitly excluded.

The Lisbon Treaty has made CFSP part of the Union's *one* legal order but preserved the particular protection of national political discretion and the looser control of EU constitutional mechanisms and actors. In *UN Sanctions*, the Court has adopted a similarly mixed approach. On the one hand, it approximated CFSP to other policies by opening the door for speculations that a cross-Treaty legal basis is possible and framing the choice of the legal basis under CFSP in the same constitutional terms as other policies. On the other hand, it protected national political discretion by accepting the choice for a CFSP legal basis and making a cross-Treaty legal basis procedurally impossible. The former reveals the Court's view of CFSP as part of the Union's legal order, which is subject to the same basic EU constitutional rules and principles. Whether the extended jurisdiction of the Court will, in practice, lead to the Court applying and enforcing constitutional principles more intensively under CFSP remains to be seen. In *UN Sanctions*, the Court only hinted at its willingness to protect the privileged role of the European Parliament. However, its acceptance of a joint legal basis as a matter of principle could, at least potentially, open the door to applying procedural requirements of TFEU legislative procedures to CFSP decision-making, e.g. transparency requirements.

In conclusion, in *UN Sanctions*, the Court demonstrated its willingness to exercise constitutional review under CFSP; its concern with national political discretion and hence democratic legitimisation of CFSP through national channels; and its regard for the EU channels of democratic legitimisation through involvement of the European Parliament. It was concerned with institutional and participatory questions of who is in charge and who should be involved. By addressing these questions, the Court's ruling has an indirect impact on the content of any measure; yet the Court itself did not directly consider the legality or content of the controversial sanctions policy as such.

## *B Inter-Institutional Relations: Prerogatives and Procedural Requirements*

Asserting institutional prerogatives is the main objective of inter-institutional challenges before the CJEU. CFSP is governed by a distinct set of rules, both concerning the roles

<sup>66</sup> See also Article 24(1) TEU sets out that the adoption of a CFSP measure 'is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise'.

<sup>67</sup> Formally, Parliament has a limited role under CFSP; see, in particular, Art. 36 and 41(3) TEU, which require Parliament to be consulted.

<sup>68</sup> Art. 31(2) TEU.

<sup>69</sup> *Ibid.*

of the EU institutions and the reserved competences of the Member States. Hence, the delimitation between CFSP and TFEU is directly relevant to institutional prerogatives in the decision-making process and the political discretion of the Member States.

Generally speaking, changes in institutional prerogatives are prone to trigger inter-institutional litigation. Two changes have given and will continue to give the Court the occasion to rule on CFSP matters: Firstly, the extended powers of the European Parliament over the negotiation and conclusion of international agreements (Article 218 (10)&(6) TFEU, respectively),<sup>70</sup> and secondly, the introduction of one general procedure for the adoption of international agreements, which falls under the jurisdiction of the Court, including where a CFSP agreement is concerned (Article 218 TFEU).<sup>71</sup> The latter is an expression of the broader approximation of the two Treaties, which increases the likelihood that actors attempt to extend the prerogatives that they have under one Treaty to the other.

The *Piracy Agreement* case (2014) concerned Parliament's new powers. Parliament challenged the Council's CFSP decision to conclude an agreement with Mauritius on the treatment of suspected pirates and associated seized property.<sup>72</sup> Article 218(6) TFEU requires either consent or consultation of Parliament for the conclusion of broad categories of international agreements, with the exception of agreements that relate exclusively to CFSP. The central point of contention in *Piracy Agreement* was whether the agreement related *exclusively* to CFSP and fell under this exception. The Court agreed with the Council's choice of a CFSP decision and Parliament lost this point; yet it won a more fundamental procedural battle concerning its information rights under Article 218(10) TFEU.

The CJEU confirmed that Parliament's right to be informed is an essential requirement and cuts across all different negotiation procedures.<sup>73</sup> In the words of the Court, it 'is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly'.<sup>74</sup> The Court's ruling is relevant in several ways. First of all, the Court confirmed its jurisdiction to control compliance with the European Parliament's right to information, including where CFSP matters are concerned. Secondly, the ruling is a reasonable but generous reading of Parliament's rights under Article 218(10) TFEU. The first point is an extension of the Court's powers (fourth dimension of juridification; judicialisation). The second sets out an understanding that CFSP also has to meet standards of democratic legitimacy in the European legal sphere, irrespective of the presence of legitimation through national channels. It further contributes to the ability of the European Parliament to ensure that these standards are met. Furthermore, the Court's specific way of formulating Parliament's rights in terms of a 'fundamental democratic principle' and the fact that it directly linked the required standard of democratic legitimacy to the intensity of power exercised reveals the Court's constitutional mindset when ruling on CFSP matters. In the mind of the Court, more invasive CFSP

<sup>70</sup> C. Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures', (2014) 12 *International Journal of Constitutional Law*, 904-929.

<sup>71</sup> Confirmed by, Case C-658/11, *Piracy Agreement*, ECLI:EU:C:2014:2025, para. 73.

<sup>72</sup> Case C-658/11, *Piracy Agreement*, ECLI:EU:C:2014:2025.

<sup>73</sup> *Ibid*, para. 54 and in particular paras. 80-86.

<sup>74</sup> *Ibid*, para. 81, referring also to: Case 138/79, *Roquette Frères v. Council*, ECLI:EU:C:1980:249, para. 33; and C 130/10, *UN Sanctions*, ECLI:EU:C:2012:472, para. 81.

powers also require a higher level of democratic legitimation in the EU sphere, ie a greater role for the European Parliament. The Court further sees itself as the guarantor of these European channels of democratic legitimation.

## V Additional Rights-Based Entry Points for the Court

Besides interpreting and enforcing procedural rules that determine the powers and involvement of the different constitutional actors, the CJEU has also signalled its willingness to review compliance of fundamental rights under CFSP. As we have seen earlier, fundamental rights are a condition for democratically legitimate government. The rights-based review of the CJEU is hence, at least in potential, reinforcing the democratic legitimacy of CFSP. At the same time, Habermas' co-originality theory also means that fundamental rights require a democratic process in which these rights are specified in an ongoing manner. A too intrusive review would encroach upon this process. It would hence be incorrect to conclude that more intrusive fundamental rights review necessarily is necessarily enhancing the framework conditions for a functioning deliberative democracy. Two rights have, in particular, become entry points of judicial review under CFSP: the right of access to information and the right of access to justice. The right of access to information directly improves the framework conditions for deliberation. For the right of access to justice, the picture is more nuanced.

### A Access to Information

Article 1 TEU stipulates that EU decisions 'are taken as openly as possible and as closely as possible to the citizen'. Both the TEU and the Charter of Fundamental Rights contain specific provisions on the right of access to documents.<sup>75</sup> CFSP is—as a matter of principle—subject to the same transparency rules as the TFEU. Furthermore, even before the entry into force of the Lisbon Treaty, the Court of First Instance<sup>76</sup> reviewed the legality of decisions denying access to documents under the Union pillars.<sup>77</sup> The pre-Lisbon case-law remains, in its essence, still relevant.

On the one hand, attempts are made to ensure transparency of EU decision-making; on the other, the system of classified information protecting secrecy within the EU legal order has formalised.<sup>78</sup> The absolute largest share of classified information relates to CFSP.<sup>79</sup> As a result, access to information has become more relevant and more controversial particularly under CFSP. Examples for CFSP classified information are the EU positions

<sup>75</sup> Art. 15(3) TEU and Art. 42 CFREU.

<sup>76</sup> Now GC.

<sup>77</sup> Case T-14/98, *Heidi Hautala*, ECLI:EU:T:1999:157; Case T-174/95, *Svenska Journalistförbundet*, ECLI:EU:T:1998:127.

<sup>78</sup> See Council Decision of 23 September 2013 on the Rules for protection of EU classified information (EUCl) (2013/488/EU), OJ L 274, of 15.10.2013, pp. 1–50.

<sup>79</sup> EEAS commentary, Article 10, S. Blockmans and C. Hillion (eds.), 'EEAS 2.0: A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service', (2013), available at <http://www.ceps.eu/book/eeas-20-legal-commentary-council-decision-2010427eu-establishing-organisation-and-functioning-e>.

on and approaches to the political situation in third countries<sup>80</sup> or specific aspects of the EU's counter-terrorist strategies, such as necessary changes to the listing procedure.<sup>81</sup>

The European External Action Service (EEAS), as an institutional cross-treaty hybrid, dealing both with CFSP and other policies,<sup>82</sup> is an interesting case study for access to information under CFSP. Even if its acts largely do not have external legal effects and the EEAS may not appear as a defendant before the EU courts,<sup>83</sup> access to information is an issue that has ended and will continue to end up before the EU Courts. The Transparency Regulation does not contain any specific limitations applicable to the public access to CFSP documents.<sup>84</sup> Since April 2014, the EEAS has its own security rules, which do not distinguish between information pertaining to CFSP and other Union policies either.<sup>85</sup> Challenges of decisions to deny access to information held by the EEAS have come up not only in the context of sanctions<sup>86</sup> but also in other contexts.<sup>87</sup>

The CJEU's current rules of procedure do not set out general rules for dealing with confidential information, only exceptionally with regard to interveners to the proceedings they foresee that information may be kept under certain circumstances secret.<sup>88</sup> As a matter of principle, relevant information must be disclosed to the other party, and the Court will only consider information available to both sides.<sup>89</sup> The GC has recently revised its rules of procedure,<sup>90</sup> aiming to improve 'the procedural treatment of confidential information or material pertaining to the security of the Union or of its Member States or to the conduct of their international relations'.<sup>91</sup> This revision demonstrates the increased relevance of dealing with confidential information. It was triggered, in particular, by the procedural difficulties of dealing with information in sanctions cases;<sup>92</sup> yet, the GC's new rules of procedure do not specifically refer to CFSP. Hence, information related to the CFSP is treated

<sup>80</sup> E.g. concerning Russo-Georgian war in 2008, a joint EU Special Representative/Secretariat/Commission non-paper containing concrete proposals for an enhanced EU role in the conflict resolution efforts (coreu message CFSP/SEC/1433/08—EU RESTRICTED); Georgia Monthly Bulletin of 7 July 2008 (EU CONFIDENTIAL), issued by the Situation Centre (SitCen); EU Watchlist of 16 July 2008 (EU CONFIDENTIAL), issued by the Intelligence Directorate (IntDir); Georgia Monthly Bulletin of 4 August 2008 (EU CONFIDENTIAL), issued by SitCen; demarche by the local Presidency in Moscow on 15 July 2008 at the Russian Ministry of Foreign Affairs (coreu message CFSP/PRES/PAR/0325/08 of 17 July 2008—EU RESTRICTED); demarche by the local Presidency in Tbilisi on 17 July 2008 at the Georgian Ministry of Foreign Affairs (coreu message CFSP/PRES/PAR/0329/08 of 17 July 2008—EU RESTRICTED).

<sup>81</sup> Available at <https://www.consilium.europa.eu/uedocs/cmsUpload/st10826-re01en07.pdf>.

<sup>82</sup> See Article 11(1) of the EEAS Decision. See for more detail, *EEAS commentary*, above, n. 79.

<sup>83</sup> Case T-395/11, *Elti v Délégation de l'Union au Monténégro*, ECLI:EU:T:2012:274, paras. 31–32, 35, 37–38, at 43, 46, 51, 65; see also, Case T-369/11, *Diadikasia Symvouloi Epicheiriseon v. Commission and Others*, ECLI:EU:T:2012:425 and Case T-410/13, *Bitiqi and Others v. Commission and Others*, ECLI:EU:T:2014:871.

<sup>84</sup> Recital 7 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, of 31.5.2001, pp. 43–48.

<sup>85</sup> Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 19 April 2013 on the security rules for the European External Action Service (2013/C 190/01), OJ C 190, of 29.6.2013, pp. 1–46.

<sup>86</sup> Eckes, above, n. 31; see e.g. C-280/12 P, *Council v. Fulmen and Mahmoudian*, ECLI:EU:C:2013:775, para. 55, referring to information that may have been shared by the EEAS.

<sup>87</sup> Case C-656/11, *UK v. Council*, ECLI:EU:C:2014:97, para. 15, information on the EEAS involvement in international negotiations.

<sup>88</sup> Article 131 of the Rules of Procedure of the Court of Justice, OJ L 265, of 29.9.2012, pp. 1–44.

<sup>89</sup> See also Article 67, para. 3 of the Consolidated version of the Rules of Procedure of the GC of 2 May 1991, OJ C 177, of 2.7.2010, 37–70.

<sup>90</sup> The New Rules of procedure entered into force on 1 July 2015. See OJ L 105, of 23.4.2015, pp. 1–66.

<sup>91</sup> *Ibid.*, see in particular, the fourth and ninth objective, chapter 6, section 3 and chapter 7.

<sup>92</sup> The introduction to chapter 7 specifically refers to restrictive measures, even if article 105 is phrased in general terms and could be applied to other security matters.

as any other confidential information. Access to information both as an individual right but also as the collective good of public access to information under the Transparency Regulation jointly ensure the equal participation of autonomous individuals in the deliberative democratic process in the Habermasian sense. Despite certain shortcomings with regard to the adoption of the GC's new rules of procedure, which were themselves negotiated in secret, the CJEU directly contributes to greater transparency and political accountability by guaranteeing access to information in the field of CFSP. Access to information ensures the public knowledge necessary for political deliberation.

### *B Access to Justice and the Principle of 'Wider Jurisdiction'*

The principle of effective judicial protection plays an important role, not only from the perspective of the individual but also from a systemic perspective (i.e. on what regards the EU legal order at large). It is a fundamental right protected by the CFREU, as well as the ECHR and the constitutional traditions common to the Member States. Judicial protection is an indispensable requirement for the acceptance of supremacy and direct enforceability, as well as the principle of consistent interpretation,<sup>93</sup> made explicit by the constitutional courts of several Member States. It aims to exclude that individuals are subject to arbitrary measures that would not stand the test of constitutionality. Indeed, judicial review of legally relevant acts is so central to the EU legal order that the CJEU has introduced the principle of wider jurisdiction by virtue of which it has accepted cases outside the express limits of its jurisdiction.<sup>94</sup> This principle is based on the assumption that under the rule of law, the exercise of certain powers, in particular those directly affecting the rights of individuals, *requires* judicial review.

In the words of AG Mancini in the landmark case *Les Verts* (1986):

[...] [T]he obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interest of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission.<sup>95</sup>

As is well-known, the CJEU followed this interpretation and declared acts of the European Parliament subject to actions for annulment under what is now Article 263 TFEU, despite the fact that the letter of the Treaties did not cover such review at the time. The question here is to what extent is the Court's reasoning may be transferrable to CFSP. The *rationale* in *Les Verts* was that if the Treaties allowed the European Parliament to adopt acts affecting the legal rights of third parties, they must also allow for judicial review of these acts. Historically, it should also be taken into account that the Court gave its ruling in *Les Verts* on 23 April 1986. This was roughly two months after the signing of the Single European Act, which maintained the existing situation and did not extend ex-Article 173 EEC (now-Article 263 TFEU) to allow for actions against acts of the European Parliament. The Court considered that this contradicted the fundamental value choices of the EU legal order in the light of the extended powers and prerogatives of the European Parliament.

<sup>93</sup> Which was extended to the Union pillars in Case C-105/03, *Pupino*, ECLI:EU:C:2005:386, para. 43.

<sup>94</sup> Case 294/83, *Parti Ecologiste Les Verts v EP*, ECLI:EU:C:1986:166. See also an extensive interpretation of *Les Verts* by the Court of First Instance, allowing for judicial review of agencies with legal personality: Case T-411/06, *Sogelma v EAR*, ECLI:EU:T:2008:419, and the arguments of the parties at: Case C-355/04 P, *Segi*, ECLI:EU:C:2007:116, para. 28.

<sup>95</sup> Case 294/83, *Les Verts*, Opinion of AG Mancini, ECLI:EU:C:1985:483, paraphrasing Case C-44/81, *Germany v. Commission*, ECLI:EU:C:1982:197.

There are two central elements in the reasoning of the Court in *Les Verts*: first, the increase in the European Parliament's powers, and secondly, the new legal effects of its acts on individuals. As to the first point, in principle, the sky is the limit for the Union's actions under CFSP. Article 24(1) TEU stipulates 'The Union's competence in matters of [CFSP] shall cover *all areas* of foreign policy and *all questions* relating to the Union's security'.<sup>96</sup> The Union's activities under CFSP have tremendously broadened over time and may further be extended to other acts that differ from traditional foreign policy. They range from civilian missions and military operations, including the aforementioned counter-piracy and counter-traffickers operations with its high potential to interfere with fundamental rights,<sup>97</sup> as well as sanctions. As to the second point, when the Treaty of Maastricht introduced the Union pillars, it was assumed that CFSP did not directly affect individuals. The exclusion of jurisdiction under the second pillar was motivated by the sensitive nature of CFSP measures and by the fear of the Member States that the CJEU might extend its integrationist doctrines to the CFSP.<sup>98</sup> It was far from obvious at the time that CFSP would directly impinge on the rights of individuals. In the EU's compound structure, CFSP was thought to be limited to cooperation measures, which required further national implementation measures, which would be subject to review by national courts. Yet, as discussed earlier, some of the current CFSP measures directly interfere with individuals' rights.

Treaty amendments since Maastricht have introduced the possibility of exceptional review of CFSP measures under Article 275(2) TFEU, but have not established more broadly jurisdiction of the Court for acts that interfere with fundamental rights. As mentioned earlier, the Commission seems to advocate a generous reading of Article 275(2) TFEU that would indeed allow the Court to review all CFSP measures affecting fundamental rights.<sup>99</sup> The principle of wider jurisdiction rooted in the rule and law takes a different approach. It avoids a narrow debate about the extension of the term 'restrictive measures'. It also avoids interpreting 'restrictive measures' differently in Article 275(2) TFEU than in Article 215 TFEU, which is undesirable from a perspective of coherence and certainty. It further allows for the possibility of asking a preliminary question or bringing an action for damages.<sup>100</sup>

The preliminary ruling mechanism under Article 267 TFEU has proven an exceptionally strong tool to establish core organisational principles of EU law, such as primacy and direct effect. An adapted principle of wider jurisdiction has already led the Court to extend ex-Article 35(1) TEU (against its wording) to allow for preliminary rulings on the validity of common positions. In the words of the Court:

a preliminary ruling must [...] exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties (...).<sup>101</sup>

<sup>96</sup> Emphasis added.

<sup>97</sup> At present, five military operations and 11 civilian missions, concrete data available at <http://www.eeas.europa.eu/csdp/missions-and-operations/>.

<sup>98</sup> E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, 2002), at 312.

<sup>99</sup> Opinion 2/13 EU Accession to the ECHR, ECLI:EU:C:2014:2454, paras. 98–99.

<sup>100</sup> 'Complete' system of remedies, see Case 294/83, *Parti Ecologiste Les Verts v. EP*, ECLI:EU:C:1986:166, para 23; Case C-50/00 P, *Union de Pequenos Agricultores*, ECLI:EU:C:2002:462, para. 40.

<sup>101</sup> Case C-355/04 P, *Segi*, ECLI:EU:C:2007:116, paras. 51–54. See Eckes, above, n. 60, chapter 6.

This confirms the possibility of making a preliminary reference for hybrid ex-third pillar/CFSP measures that impinge on rights of individuals. This case law is applicable to CFSP and remains valid post-Lisbon.<sup>102</sup>

Finally, the principle of wider jurisdiction also supports an argument in favour of damages under Article 340 TFEU for conduct related to CFSP. Restitution of damages is a constitutional principle within the EU legal order.<sup>103</sup> This closely connects to the Court's position that the Union offers a 'complete system of remedies' in which relief cannot only be sought in actions for annulment but also through other procedural means, such as Articles 340 and 267 TFEU.<sup>104</sup> However, while non-contractual liability in Article 340 TFEU is applicable under Union law, in its entirety, this does not address the issue of jurisdiction. Article 275 TFEU excludes the CJEU's jurisdiction 'with respect to the provisions relating to the [CFSP]' and 'with respect to acts adopted on the basis of those provisions'. Implementing measures under national law or under the TFEU remain subject to judicial review. With regard to the TFEU implementing measures, the dividing line between the two Treaties, as we have seen earlier, is not always easy to draw. In a recent sanctions case for example, the GC awarded compensation for non-material damage for an unlawful listing of an entity as supporting nuclear proliferation in Iran.<sup>105</sup> The Court did so specifically for the reputational damage resulting from the public sanctions measures. However, while the Court stated at the outset that the Council regulation adopted under the TFEU is a direct consequence of the adoption of a CFSP decision under the TEU, it did not consider this fact in the context of non-material damages. While this case confirms that an unlawful listing in a TFEU regulation may lead to compensation, it does not immediately allow the conclusion that the Court would accept jurisdiction for a CFSP listing only. Logically, however, the CFSP listing lies at the origin of the reputational damage of the applicant. Furthermore, some unlawful conduct in the context of CFSP may be attributable to the EU and cause individuals to suffer damages; yet it may not in all cases be an act adopted on the basis of CFSP provisions. Examples are unlawful actions of EEAS staff on the ground, military actions, counter-piracy and counter-traffickers operations or security detentions.<sup>106</sup> Actions for damages should then be possible under CFSP in accordance with the conditions developed by the CJEU.<sup>107</sup>

Subjecting measures that immediately interfere with fundamental rights to the rule of law is, in principle, a precondition of modern constitutions, including in all the Member States. A general *carte blanche* for the executive in the field of foreign policy no longer exists in any of the Member States. If CFSP measures that affect individuals are not subject to the jurisdiction of the Court, this undermines the Union's claim to be a

<sup>102</sup> In Opinion 2/13 EU Accession to the ECHR, ECLI:EU:C:2014:2454, the Commission agreed with this interpretation of *Segi*; see para. 98.

<sup>103</sup> Case C-48/93, *Brasserie du Pecheur*, ECLI:EU:C:1996:79, para. 29.

<sup>104</sup> Case 294/83, *Parti Ecologiste Les Verts v. EP*, ECLI:EU:C:1986:166, confirmed by Case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, ECLI:EU:C:2002:462.

<sup>105</sup> T-384/11, *SafaNicuSepahan Co. v. Council*, ECLI:EU:T:2014:986, paras. 78–92. See also T-293/12, *Syria International Islamic Bank PJSC v. Conseil*, ECLI:EU:T:2014:439, para 70, where the Council accepted that the Court is competent to establish whether it has jurisdiction to award damages for CFSP measures.

<sup>106</sup> E.g. Case T-138/14, *Chart v. EEAS*, ECLI:EU:T:2015:981: Randa Chart seeks a declaration that EEAS is liable for the harm suffered by the applicant between October 2001 by reason of the unlawful conduct of the European Union Delegation in Cairo and the EEAS. See also *Behrami v. France and Saramati v. France, Germany and Norway*, Judgement of 2 May 2007, App. No. 71412/01 and 78166/01.

<sup>107</sup> Notably, a sufficiently serious breach of a rule of law that is intended to confer rights on individuals and a direct causal link between the infringement of the rule and the damage suffered.

constitutional order. The enforceability of fundamental rights and the protection from arbitrary and unaccountable exercise of public power is also a precondition for well-functioning of the deliberative democracy model as defended by Habermas. It requires that citizens are in the position to contest the rights-relevant consequences of democratic procedures and have them reviewed by an independent body, because the risk persists that their rights were not taken into account and that deliberation failed for this reason.

## VI Consequences of Judicial Review of Common Foreign and Security Policy

Since the entry into force of the Lisbon Treaty, the CJEU's jurisdiction over CFSP has increased. New provisions, recent case-law, the EU's increased CFSP activities, as well as contextual developments, such as the approximation of the two Treaties and the emphasis on transparency in combination with the increased relevance of confidential information, have opened up new avenues of judicial review. This has provided and will continue to provide the Court with the opportunity to exercise constitutional review over CFSP-related issues. At the same time, the formal legal framework of Article 40 TEU, Article 275(2) TFEU and Article 218 TFEU restrains judicial review of CFSP and keeps it focused on the margins of foreign policy.

Articles 40 TEU and 218 TFEU build a framework of judicial review, in which the Court acts predominantly as referee in horizontal and vertical power struggles within the Union legal order. The delimitation of CFSP and TFEU policies in legal basis disputes under Article 40 TEU usually serve the purpose to protect institutional prerogatives or, less often, the (reserved) powers of the Member States. Procedural disputes under Article 218 TFEU equally aim to assert institutional prerogatives, such as the extended powers of the European Parliament. The Court defended the position that more intensive powers require better democratic legitimation in the European sphere. At the same time, this position pushes towards a stronger role of the supranational actors, such as the European Parliament and the Court. This results in closer integration of CFSP in parallel with the increased use of CFSP. Articles 218(11) and 275(2) TFEU are different in this regard. The former exceptionally allows the Court to engage with policy choices in international agreements, including those in the area of CFSP. The latter predominantly aims to protect the right of access to justice for a specific and particularly intrusive policy: individual sanctions.

### A Strengthening the Framework Conditions for Deliberation

While judicial review should not be seen as an automatically constitutionalising force, the analysed case-law demonstrates that it *can have* this effect, in particular where the CJEU acts as a constitutional court. Dieter Grimm explained how review by the CJEU above all because of the supremacy of EU law has a constitutionalising effect that may lead to 'overconstitutionalisation', at the expense of democratic will-formation.<sup>108</sup> The core problem, as Grimm describes it, lies in the fact that matters decided at the constitutional level are no longer open to political decision. Hence, if the CJEU determines matters of EU constitutional law, these matters are withdrawn from the national or European political arena. This is not the functional definition of constitutionalisation that was developed in Section II earlier. In light of that definition, the question is whether the extended review

<sup>108</sup> D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', (2015) *European Law Journal*, 460–473.

of the CJEU strengthens the constitutional function of EU law to enable and limit politics by ensuring democratic legitimation, fundamental rights protection and the separation of powers.<sup>109</sup>

In the case-law examined earlier, the CJEU has been rather protective of the political sphere. CFSP will not reach the same levels of juridification, judicialisation or constitutionalisation as the TFEU any time soon. The constitutional framework of the Treaties excludes legislative decisions. Instead, Council decisions are taken by unanimity and hence enjoy a greater indirect democratic legitimation through national channels. In *UN Sanctions*, the Court seems to respect this by opting for the legal basis that requires a unanimous Council decision, although without involvement of the European Parliament. In the controversial context of counter-terrorist sanctions, the Court may have considered it particularly wise to rely on national legitimation channels.

Nonetheless, the CJEU has made CFSP subject to the same basic underlying logic as other EU policies: from a rule of law perspective, more intrusive powers require stronger democratic legitimation, which in turn requires ensuring the protection of fundamental rights as a condition for deliberative democracy. In the *Piracy Agreement* case, the Court's extensive interpretation of its own jurisdiction seems motivated by an understanding that an appropriate remedy must protect fundamental rights and the prerogatives of the European Parliament. This should be seen as strengthening the rule of law and protecting EU channels of democratic legitimation.

By allowing claims of individuals enforcing access to information and access to justice under CFSP, including where this is *prima facie* contrary to the Court's limited formal jurisdiction, the CJEU attached not only great weight to fundamental rights, but it also prioritised rights that make a direct contribution to democracy and the rule of law. Indeed, the Court has explicitly emphasised the links between the right of access to information and democracy<sup>110</sup> and the right of access to justice and the rule of law,<sup>111</sup> acknowledging that these individual rights serve an intangible purpose in a legal order that goes beyond individual justice. In conclusion, the CJEU has shown its willingness to read into the existing Treaties the safeguards necessary to match the exercise of increasingly intrusive powers. In the examined post-Lisbon CFSP case-law, the CJEU cannot be accused of narrowing the scope for political decisions or entrenching substantive policy considerations at constitutional level. It rather aimed to strengthen the framework conditions for legitimation and deliberation in the EU context. Strengthening these framework conditions may in turn justify a more far-reaching exercise of powers. This would trigger dialectic dynamics of constitutionalisation that may change over time the nature of CFSP, as well as its relationship with other Union policies. However, these potential long-term and indirect effects of the CJEU's case-law remain to be seen.

## B The EU's Compound Constitutional Structure

This article focuses on the consequences of judicial review by the CJEU for the democratic legitimation of CFSP. Such legitimation is possible both through EU and national channels and spaces for democratic legitimation and deliberation. Hence, any discussion of the

<sup>109</sup> See previous text accompanying note 6.

<sup>110</sup> See e.g. Case C-280/11 P, *Council v. Access Info Europe*, ECLI:EU:C:2013:671, para. 32 and the case-law cited.

<sup>111</sup> Case 294/83, *Parti Ecologiste Les Verts v. EP*, ECLI:EU:C:1986:166; Case C-355/04 P, *Segi*, ECLI:EU:C:2007:116.

consequences of expanded jurisdiction within the EU also needs to consider who is better placed to provide democratic legitimacy and judicial control, the EU or Member States, and even more importantly whether exercise of judicial control by the CJEU interferes either with judicial control or with political decision-making in the national sphere. This raises a number of sub-questions: firstly, does an expansion of the powers of the CJEU or the European Parliament in the area of CFSP weaken national constitutional control, eg judicial review of national courts or political control of national parliaments; and secondly, are the constitutional framework conditions ensured by the EU institutions structurally weaker than in the national context?

As to the first, Section VI gave a glimpse of the important role played by fundamental rights play in the relationship between the CJEU and other EU institutions. Yet, fundamental rights also play an important role in the power relationship between the EU and its Member States. On the one hand, national constitutional courts have pressured the EU to protect fundamental rights as a condition for them to accept the primacy of EU law; on the other, when the CJEU interprets and enforces fundamental rights, this is largely perceived as happening at the expense of decisions that are democratically legitimised within a national context.<sup>112</sup> Some powerful national constitutional courts within the EU have explicated doctrines of ‘counter-checks’.<sup>113</sup> This doctrine, as originally developed in the German Federal Constitutional Court (GFCC)’s *Solange* doctrine,<sup>114</sup> could be crudely summarised as follows: ‘so long as the CJEU sufficiently protects fundamental rights we will not step in’. Hence, if the CJEU failed to protect fundamental rights, the GFCC would likely step in. This has also been confirmed by a recent case, in which the GFCC explicitly agreed to exercise jurisdiction in response to an alleged individual infringement, rather than only a structural lowering of the fundamental rights protection offered by the CJEU.<sup>115</sup>

AG Mengozzi picked up this logic from the perspective of the EU. With regard to judicial review of hybrid CFSP/ex-third pillar measures, he essentially argued: ‘if we don’t do it national courts will’. In his words:

were the Court to endorse the recognition of such a gap in the protection of fundamental rights [...], the national courts of various Member States would feel entitled [...] to verify whether the acts [...] were compatible with the fundamental rights *guaranteed by their respective national legal systems* [...] The theory of so-called counter-checks under domestic law, which have become established in the constitutional case-law of several Member States as a barrier to the institutions’ exercise of the parts of sovereignty transferred to the Community, would find scope for much more concrete application [...].<sup>116</sup>

Hence, if the CJEU does not review CFSP measures that interfere with fundamental rights or demonstrates too much deference towards the EU institutions, this may trigger (additional) national review, even if some of the arguments that the GFCC developed with regard to EU law in general cannot be transferred one-to-one to CFSP. The *ultra vires*

<sup>112</sup> See e.g. Protocol (No 30) on the Application of the Charter to Poland and to the UK and Declaration No 1 concerning the Charter.

<sup>113</sup> This is confirmed by the European Arrest Warrant cases: Polish Constitutional Tribunal, 27 April 2005, P 1/05; German Federal Constitutional Court, 18 July 2005, 2 BvR 2236/04; Supreme Court of Cyprus, 7 November 2005, Ar. No. 294/2005; Belgian Cour d’Arbitrage, 13 July 2005, No 124/2005.

<sup>114</sup> See references for the *Solange* logic, above, n. 22.

<sup>115</sup> *Beschluss vom*, 15 Dezember 2015, 2 BvR 2735/14, available at: [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/12/rs20151215\\_2bvr273514.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/12/rs20151215_2bvr273514.html). The facts were similar to the *Melloni* case decided by the CJEU in 2013.

<sup>116</sup> C-354/04 P and C-355/04 P, *Segi*, ECLI:EU:C:2007:116, para. 90.

argument of the GFCC, for example, pursuant to which it is ready to check whether the EU and, in particular, the CJEU acts outside of its conferred competences, does not hold in the area of CFSP. CFSP competences are not only intergovernmental and nearly unlimited but also *parallel* competences in that, subject to the duty of sincere cooperation, Member States remain always able to take national measures, irrespective of whether the EU has exercised its competences.

It can be concluded that national (constitutional) courts are less likely to exercise jurisdiction if the CJEU provides ‘an equivalent level’ of judicial review. However, that should not lead us to conclude that review by the CJEU overall does not improve the framework conditions for democratic legitimation. Particularly within CFSP, where national executives dominate the EU decision-making process and the European Parliament is largely excluded, judicial review by the CJEU focused on the margins of structural organisational principles, and (certain) fundamental rights may have an added value that none of the national courts can provide in the same way.<sup>117</sup> Furthermore, judicial review by EU and national courts does not work as a zero-sum game. National review remains in the background, for implementation measures, for acts of national civil servants and where EU institutions, including the Court itself, are deemed to go beyond the competences transferred to them. In order to effectively complement national review, the CJEU should exercise a form of review over EU decision-making that ensures a level of fundamental rights protection that is perceived as equivalent to the national level, but that does not unduly limit or displace national democratic decision-making.

If the CJEU regularly struck down national democratic choices, its review would displace political control by national parliaments. Judicial review can only contribute to democratic legitimation if it does not replace and hence undermine the choice of the democratically elected bodies, national or European. Instead, it needs to control and improve the procedure by explicating what are the conditions that lead to a more democratically legitimate decision-making. In the EU’s compound constitutional structure, the supremacy of EU places decisions of the CJEU outside the reach of the democratically elected legislator of individual Member States. This may result in an ‘overconstitutionalisation’ as described by Grimm,<sup>118</sup> which pre-empts political choice. This is, in particular, the case if the CJEU takes substantive policy decisions, which are not usually taken at the constitutional level, and hereby elevates them to a constitutional status, outside of the reach of the ordinary legislator, be it the national or the European. Yet, while this may be a general point of concern, the examined case-law in the area of CFSP does not give specific reasons for concern in this regard. In the *UN Sanctions* case, for example, the CJEU displayed a considerable amount of deference towards the indirect legitimation of the Council.

With regard to the involvement of the European Parliament, the situation is equally nuanced. Increasing the powers and information rights of the European Parliament must be read to strengthen the democratic legitimacy of CFSP, without necessarily interfering with control by national parliaments of CFSP matters, which is structurally weak.<sup>119</sup>

<sup>117</sup> See also the succeeding paragraphs on the remarks on the European perspective offered by the CJEU.

<sup>118</sup> Grimm, above, n. 108.

<sup>119</sup> F. Zanon, ‘EU Foreign Policy Cooperation: A Challenge for National Parliaments?’, (2010) 15 *European Foreign Affairs Review*, 19–38; G. Bono, ‘National Parliaments and EU External Military Operations: Is there any Parliamentary Control?’, (2005) 14 *European Security*, 203–229; H. Krunke, ‘Developments in National Parliaments’ Involvement in Ordinary Foreign Policy and European Policy—Denmark’, (2007) 13 *European Public Law*, 335–348.

The increased cooperation of the European Parliament and national parliaments<sup>120</sup> may even justify assuming that involvement and information of one of the parliaments may improve the attention of the others paid to the same issue.

As to the second point on the standard of the safeguards that are offered, both national and European judicial reviews are subject to different constraints. Judicial review is context-bound. It depends on the perspective taken, the legal framework applied and legal frameworks disallow or allow, or even prioritise certain interests. Interpretation usually serves a host of objectives, which differ depending on whether they are interpreted and applied by a national court or by the CJEU. National judicial review is always framed by the national legal system. It is the constitutional mandate of national courts to administer national law. This would result in significant differences between national jurisdictions and hence create from an EU a patchwork of human rights protection. National review can further only limit the application of CFSP, because national courts cannot declare CFSP measures invalid.

The CJEU, by contrast, offers a European perspective, which is subject to other limitations. EU integration and the autonomy of the EU legal order are at the highest level of generality a prevailing concern of the CJEU.<sup>121</sup> However, again, the case of CFSP requires a nuanced analysis. The particular concern with the autonomy of the EU legal order has also played a role in the field of CFSP; yet, different from the autonomy concern in the context of the TFEU policies. It is less directed towards the law of the Member States, as in the constitutionalising case-law of *van Gend* and *Costa/ENEL*, but more towards international law, as in *Kadi*.<sup>122</sup> This creates a different dynamic that does not have the same depoliticising effect. At the same time, the CJEU is able to offer not only a uniform interpretation but also a European perspective, in the sense that its frame of reference is EU law and the European Treaties, rather than taking a necessarily partial, national perspective. This includes an interpretation of the principle of sincere cooperation, which is post-Lisbon fully applicable to CFSP.<sup>123</sup> The question of whether the GC and the CJEU or national courts are better placed to exercise review that strengthens a constitutional legal environment that enables politics and protects fundamental rights depends on the specific circumstances of the case. Relevant questions here are as follows: Does the case concern a CFSP policy that directly interferes with fundamental rights? Does the policy still require national implementation measures? Does the case concern powers or prerogatives of the EU institutions? Does it concern matters of national constitutional identity? In the examined case-law, the CJEU dealt with matters that—at least in first instance—seem to be better reviewed from a common EU perspective, such as the role and involvement of Parliament, the legal basis, access to information held by the EU institutions and judicial protection from acts of the EU institutions. Moreover, where CFSP measures

<sup>120</sup> Conference of Parliamentary Committees for Union Affairs of the Parliaments of the European Union—COSAC; Joint Parliamentary Meetings of MEPs and national MPs; see also K. Raube, ‘Parliamentarisation approaches—Parliamentary Control in EU Foreign Policy’, in M. Wilga and I.P. Karolewski (eds.), *New Approaches to EU Foreign Policy* (Routledge, 2014), 125–141.

<sup>121</sup> See for integration, G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012).

<sup>122</sup> Case 26/62, *van Gend*, [1963] ECR 1; Case 6/64, *Costa v. ENEL*, [1964] ECR 585; Cases C-402/05 P and C-415/05 P, *Kadi and al Barakaat*.

<sup>123</sup> Article 4(3) TEU applies to all EU policies. Article 24(3) TEU specifically sharpens the principle of sincere cooperation under CFSP: ‘The Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. [...] The Council and the High Representative shall ensure compliance with these principles’.

directly affect individuals, and this is increasingly the case, only review by the EU courts can ensure EU-wide protection because only they can annul EU legal acts. By contrast, where national implementing measures are violating fundamental rights, national courts may be better placed to offer effective protection and potentially refer a preliminary question to the CJEU. By introducing jurisdiction for restrictive measures, the Treaties aimed to ensure review by the CJEU of CFSP measures that directly affect the rights of individuals. It would serve the rule of law and the constitutionalisation of CFSP if the Court elevates this to a general rule.

Finally, it should be added that overall the CJEU has a track record of protecting fundamental rights at a level 'equivalent' to the highest national courts or the European Court of Human Rights (ECtHR). This is not only visible in its case-law but explicitly confirmed by the ECtHR in *Bosphorus* and by the GFCC in its *Solange* decisions.<sup>124</sup> This general conclusion does not speak to the fundamental rights protection that the CJEU offers in the individual case; nor does it address the criticism that the CJEU vests economic freedoms with the constitutional status of fundamental rights.<sup>125</sup> Yet, again, the latter point, as pertinent as it may be for the EU at large, is less relevant in the CFSP context. Particularly relevant for CFSP is the standard of review that CJEU exercises over foreign policy matters, and that is at least equivalent to the review offered by national courts.<sup>126</sup> This was confirmed by the examined case-law, in which the Court in any event did not accept a general foreign policy exception but held the EU institutions in principle to the usual standards of EU law.

### C Law and Politics under Common Foreign and Security Policy

Review by courts of foreign policy matters has long triggered a debate on the (blurry) relationship between the judicial branch and the political branches. Scholars have drawn our attention to different aspects of how power shifts from the political branches to the judiciary. Martin Shapiro, one of the influential US scholars in this debate, portrays the legal system as an extension of the political system and emphasises the political character of judicial action.<sup>127</sup> Others have even argued that judicial methodology does not have a justifying force but is 'a cloak to conceal the real basis for justices' decisions'.<sup>128</sup> In line with most European scholars,<sup>129</sup> this article takes a 'juridification' perspective, which sees judicial review as happening, at least potentially, at the expense of political action and accepts that courts rather than being invaded by politics follow their own logic. If judges adjudicate on political issues, the judicial discourse is not only politicised but the judicial discourse enters and arguably interferes with the political realm.

<sup>124</sup> ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, application no 45036/98, (2006) 42 EHRR 1; BVerfGE 73, 339, of Decision of 22 Oct 1986, 2 BvR 197/83 (*Solange II*).

<sup>125</sup> See recently, Grimm, above, n. 108, at 467 ff.

<sup>126</sup> See for an overview of judicial review of external actions in France, Germany and the US: Matthias Kottmann, *Introvertierte Rechtsgemeinschaft* (Springer, 2014), chapter 2. For the CJEU, see D. Thym, 'Foreign Affairs', in A. Von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart Publishing, 2nd edn, 2010), 328–329. See also Case C-241/87, *Watson*, Opinion of AG Darmon, ECLI:EU:C:1989:229 and Case C-120/94, *Commission v. Greece*, Opinion of AG Jacobs, ECLI:EU:C:1995:109 (Greece's embargo on FYROM). The *Kadi* saga is a forceful assertion of judicial control over foreign policy; see Eckes, *EU Counter-Terrorist Sanctions*, above, n. 60.

<sup>127</sup> M. Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (London Free Press, 1964); see also, M. Shapiro, 'Political Jurisprudence', (1964) 52 *Kentucky Law Journal*, 294–345.

<sup>128</sup> H. Spaeth, 'The Attitudinal Model', in L. Epstein (ed.), *Contemplating Courts* (Washington, DC, 1995), at 305.

<sup>129</sup> See e.g. C. Landfried, 'The Judicialization of Politics in Germany', (1994) 15 *International Political Science Review*, 113–124 and R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), chapter 10.

Scholars that have examined the pre-emption of political decision-making by judicial review, including in the EU external relations more generally, have concluded that it seems to be the exception.<sup>130</sup> On the basis of the case law that has been reviewed here, this may also be concluded for CFSP more specifically. Firstly, it is a general phenomenon, in the area of CFSP as in all other areas, that judicial review of all courts is subject to the restraint that courts are ‘passive’ actors. Just as national courts, the CJEU is only able to exercise jurisdiction when a case is brought before it and can, hence, only address issues that are raised by cases before it. Secondly, more specifically in the area of CFSP, the aforementioned discussed decisions of the Court reveal that the Court has limited its ruling to subtle, often procedural, issues, such as legal basis, transparency, consistency and access to justice. It has not so far declared a specific policy unlawful, including in the case of counter-terrorist sanctions (see, e.g. the *UN Sanctions* case earlier), where the legality of the whole policy of identifying terrorist suspects and freezing their assets was highly controversial. The Court’s decisions on procedural matters, while indirectly influencing the content of policy,<sup>131</sup> often trigger further explanation or improvement of the decision-making procedure, rather than direct substantive changes or even abolishment of a specific policy. Review of international agreements under Article 218(11) TFEU and in particular Opinion 2/13 may be an exception in this regard. The latter depends on whether and how the EU institutions and the Member States will continue the path of EU accession to the ECHR after the Court’s negative opinion. So far, the CJEU has so far acted as a ‘reticent [constitutional] court’ in the area of CFSP.<sup>132</sup> In none of the discussed cases has the CJEU directly ruled on ordinary policy issues. It has not annulled political decisions or vested policy decisions through its rulings with constitutional status.

Moreover, CFSP decision-making is subject to special procedures that privilege the EU institutions in which national executives are represented (Council and European Council). While this allows a certain degree of control via national democratic channels, executives generally enjoy a more limited democratic legitimacy than legislators. The European Parliament is weak under CFSP. Its involvement is limited to information or consultation rights; yet its powers have been formally extended and it has taken action to assert them, including through the budget.<sup>133</sup> At present, it works on establishing an information-sharing framework with the Council and the High Representative (HR) concerning its access to classified information held by the Council and the EEAS in the area of the CFSP.<sup>134</sup> The European Parliament intends to ensure that selected Members of Parliament have unconditional access to such documents as is the case in areas other than CFSP under inter-institutional agreements with the Council.<sup>135</sup> The Court’s decision in the *Piracy Agreement* case to apply Article 218(10) TFEU across the board bolsters the Parliament’s

<sup>130</sup> Specifically analysing the CJEU’s case-law on external relations, M. Cremona, ‘A Reticent Court? Policy Objectives and the Court of Justice’, in M. Cremona and A. Thies (eds.), *The European Court of Justice and External Relations Law* (Hart Publishing, 2013), 15–32; see also E. Benvenisti and G. Downs, ‘The Democratizing Effects of Transjudicial Coordination’, (2012) 8 *Utrecht Law Review*, at 158 *et seq.*

<sup>131</sup> See Section II.

<sup>132</sup> Expression borrowed from Cremona, above, n. 130.

<sup>133</sup> G. Rosén, ‘A Budgetary Advance The European Parliament’s Growing Role in EU Foreign Policy’, (2014) 9 *ARENA Working Paper*, at 9.

<sup>134</sup> European Parliament resolution of 13 March 2014 on the implementation of the Treaty of Lisbon with respect to the European Parliament (2013/2130(INI)); P7\_TA-PROV(2014)0249.

<sup>135</sup> See e.g. the Inter-institutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy.

position. The CJEU has, hence, not only extended the judicial discourse into the realm of foreign policy but also strengthened parliamentary influence.

In conclusion, judicial review by the CJEU in the area of CFSP, in particular where it strengthens the rights of access to information and the powers and rights of the European Parliament, did not only contribute to juridifying and judicialising CFSP but created better framework conditions for deliberation. This advancement of the constitutional setting of CFSP is further particularly relevant because the constitutional framework conditions under CFSP continue to be weak.

*First submission: October 2015*

*Final draft accepted: June 2016*