ARTICOLI

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ONE STEP TOO FAR, ONE STEP TOO CLOSE. THE ROCKY ROAD TOWARDS DEFINING THE SCOPE OF JUDICIAL REVIEW IN CFSP MATTERS IN LIGHT OF *KS AND KD v COUNCIL AND OTHERS* AND *NEVES77 SOLUTIONS*

Un passo troppo lungo, un passo troppo corto. Il percorso accidentato verso la definizione dell'ampiezza della sfera di tutela giurisdizionale in materia PESC alla luce delle sentenze KS e KD v Consiglio e.a. *e* Neves77 Solutions

Un pas trop loin, un pas trop court. Le chemin bosselé pour affiner le champ d'application du contrôle juridictionnel en matière PESC à la lumière des arrêts KS et KD c. Conseil et a. *et* Neves77 Solutions

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1. Introduction

Since the establishment of the EU Second Pillar by the Treaty of Maastricht[1], European integration in the foreign and security policy has been pursued in an inherently intergovernmental framework. The

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[1] Treaty on the European Union, in OJ C 191, 29.7.1992, p. 1 ss.

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abolition of the pillar structure by the Treaty of Lisbon[2] did not obliterate the different nature of the Common Foreign and Security Policy (CFSP) unlike in other fields of EU law. Indeed, the CFSP is subject to «specific rules and procedures»[3] characterising both decision-making powers and judicial review[4]. On one hand, the definition and implementation of the CFSP are mostly reserved for the European Council and the Council acting on the initiative of the single Member States or the High Representative. Conversely, the EU supranational political institutions – the Commission and the European Parliament – have limited powers[5]. On the other hand, the Court of Justice (CJEU) enjoys narrow jurisdiction in CFSP matters. Articles 24 TEU and 275(1) TFEU exclude the Court's competence in that domain, save for two circumstances defined by Article 275(2) TFEU. Firstly, the Court can review the legality of Union acts breaching the dividing line between CFSP and other Union competencies established by Article 40 TEU[6]. Secondly, the CJEU jurisdiction extends

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[2] For an analysis of the broader implications of the abolition of the pillar structure and the progressive 'constitutionalisation' of CFSP, see P. EECKHOUT, *The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism* in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds), *EU Law after Lisbon*, Oxford, 2012, p. 265 ss.; R. A. WESSEL, *Integration and Constitutionalisation in EU Foreign and Security Policy*, in R. SCHÜTZE (ed), *Globalisation and Governance: International Problems, European Solutions*, Cambridge, 2018, p. 339 ss.; P. VAN ELSUWEGE, *EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency*, in *Common Market Law Review*, 2010, p. 987 ss.

[3] Article 24(1) TEU.

[4] M. CREMONA, *The Position of CFSP/CSDP in the EU's Constitutional Architecture*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, Cheltenham-Northampton, 2018, p. 5 ss., in particular p. 10. On the implications of abolition of the pillar structure for judicial review in CFSP matters, among many, see C. HILLION, *A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy*, in M. CREMONA A. THIES (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Oxford, 2014, p. 47 ss.

[5] Among extensive literature on the CFSP institutional structure, see S. MARQUARDT, *The Institutional Framework, Legal Instruments and Decision-making Procedures*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *op. cit.*, p. 22 ss.

[6] According to Article 40 TEU, «The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 [TFEU]. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter». As argued in the literature, the Court's competence to review the respect of that provision ultimately strengthens the separation between the CFSP and other Union competencies (v. M. E. BARTOLONI, *La politica estera e di sicurezza comune (PESC)*, in M. E. BARTOLONI, S. POLI (a cura di), *L'azione esterna dell'Unione europea*, Napoli, 2021, p. 256).

to «decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union»[7].

Despite the elements of persisting intergovernmentalism, the abolition of the pillar structure led to profound consequences for the scope of judicial review in CFSP matters. Following the Treaty of Lisbon, that policy became subject to the Union's constitutional framework of principles and values. The latter includes the principle of effective judicial protection provided by Article 19 TEU, which «gives concrete expression to the value of the rule of law stated in Article 2 TEU»[8]. This stance implies that the general exclusion of jurisdiction in CFSP matters will be seen as an exception to the rule established by Article 19 TEU[9]. As a consequence, any limitation to the Court's competence in CFSP matters should be narrowly interpreted[10].

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[7] Article 275(2) TFEU. On the relationship between CFSP decisions and regulations based on Article 215 TFEU, among many, see S. POLI, *Le misure restrittive e la tutela dei diritti dei singoli*, in in M. E. BARTOLONI, S. POLI (a cura di) *op. cit.*, p. 263 ss., in particular pp. 281-283. For a broader analysis of the pecular nature of CFSP acts imposing restrictive measures, among many, see S. POLI, *Le misure restrittive autonome dell'Unione europea*, Napoli, 2019.

[8] Court of Justice, 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 32. On the implications of the rule of law value in CFSP matters, among many, see M. CREMONA, *"Effective Judicial Review is of the Essence of the Rule of Law": Challenging Common Foreign and Security Policy Measures Before the Court of Justice*, in *European Papers*, 2017, p. 671 ss.; L. SUTTO, *État de droit et contrôle juridictionnel dans l'Union européenne*, in C AMALFITANO, I. ANRÒ, L. RASS-MASSON, J. THÉRON (dir.), *L'état de droit – lo Stato di diritto – The Rule of Law*, Toulouse, 2020, p. 163 ss, in particular pp. 168-169.

[9] Among many, see C. CELLERINO, *EU External Action and the Rule of Law: Ensuring the Judicial Protection of Human Rights beyond the Right of Access to Judicial Protection*, in *Il Diritto dell'Unione europea*, 2017, p. 669 ss., in particular p. 679.

[10] Court of Justice. 24 June 2014, case C-658/11, *Parliament v Council* ECLI:EU:C:2014:2025, para 70; 6 October 2020, case C-134/19 P, *Bank Refah Kargaran v Council*, ECLI:EU:C:2020:793, para 32; 28 March 2017, case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para 74. For an analysis of the *Bank Refah Kargaran v Council* ruling, see: F. BESTAGNO, *Danni derivanti da misure restrittive in ambito PESC e azioni di responsabilità contro l'UE*, in *Eurojus*, 2020, p. 280 ss.; N. BERGAMASCHI, *La sentenza Bank Refah Kargaran: l'evoluzione del controllo giurisdizionale sulla PESC*, in *European Papers*, 2020, p. 1371 ss. For an analysis of the *Rosneft* ruling, see: S. POLI, *The Common Foreign Security Policy after Rosneft: Still Imperfect but Gradually Subject to the Rule of Law*, in *Common Market Law Review*, 2017, p. 1799 ss. At the same time, some scholarly analysis contests the Court stance by affirming that in CFSP matters Art. 24 TEU replaces Art. 19 TEU as the key provision on judicial review. Consequently, the former is not an exception to the latter. Rather, only Art. 24 TEU would apply in the CFSP (R. BARATTA, *La* iurisdictio *in ambito PESC: la dubbia* ratio decidendi *della Corte di giustizia*, in *Eurojus*, 2024, p. 308).

This finding represented a paradigm shift, as it shed light on the implications for judicial review of the 'constitutionalisation' of CFSP inaugurated by the Treaty of Lisbon. However, this development gave rise to a wide array of complex interrogatives concerning the extent of the Court's jurisdiction in that domain. If limitations defined by Articles 24 TEU and 275(1) TFEU were narrowly interpreted, would it be possible to broaden the scope of the Court's competence to situations not covered by Article 275(2) TFEU? If so, which actions or omissions in CFSP matters would be excluded from the Court's review? Where the CJEU is competent concerning a given action or omission, can remedies other than the review of legality expressly mentioned in Article 275(2) TFEU be exercised? Should the Court be incompetent to review a given CFSP action or omission, could national courts exercise jurisdiction in those circumstances?

These profound questions led the Court down a rocky road in its quest towards defining the boundaries of its competence in CFSP matters. Each interrogative that then emerged has manifested a crossroads for the CJEU, confronted with the uneasy task of shaping a coherent reconstruction of the system of judicial protection in the CFSP domain against the elusive formulation of the relevant Treaty provisions and pretended completeness of remedies affirmed in *Les Verts*[11]. In all the crossroads encountered so far, the Court has followed a coherent direction: limitations to its jurisdiction shall be exceptional and narrowly construed[12]. On that basis, the Court had to cope with several issues emerging from the interrogatives – or crossroads – previously mentioned.

In one strand of case-law, the CJEU recognises that the material scope of judicial review is not limited to circumstances covered by Article 275(2) TFEU. Indeed, the limitations enshrined in Articles 24 TEU and 275 TFEU cannot prevent the Court from exercising jurisdiction in that policy where non-CFSP provisions trigger its competence. That is the

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[11] Court of Justice, 23 April 1986, case 294/83, *Les Verts v Parliament*, ECLI:EU:C:1986:166, para. 23. This affirmation has been consistently recalled in the CJEU case-law, thus becoming one of the defining paradigms of the Union system of remedies. Among extensive case-law, see Court of Justice, 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, paras 38 and 40; 3 September 2008, case C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, para. 281; 3 October 2013, case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 92.

[12] Among many, see P. VAN ELSUWEGE, *Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice*, in *Common Market Law Review*, 2021, p. 1731 ss., in particular p. 1739; P. KOUTRAKOS, *Judicial Review in the EU's Common Foreign and Security Policy*, in *International & Comparative Law Quarterly*, 2018, p. 1 ss, in particular p. 10.

case, for instance, of CFSP acts concluding international agreements. The procedure is based on Article 218 TFEU, which applies to the conclusion of both CFSP and non-CFSP agreements and falls short of the exclusion of jurisdiction provided for by Articles 24 TEU and 275 TFEU[13]. Therefore, the Court is entitled to review those acts[14]. The same rationale applies to CFSP acts grounded on the rules on EU budget administration – such as the award of a public contract scrutinised in *Elitaliana*[15] – and staff management measures on which the Court has general competence under Article 270 TFEU, as the *H v Council*[16] and *SatCen*[17] cases show.

In a second strand of case-law, the Court clarifies that its competence in CFSP matters is not limited to the review of legality under Article 263 TFEU. Since the Treaties have established a «complete system of judicial remedies and procedures»[18], the Court's jurisdiction also extends to preliminary references on the validity of CFSP provisions[19] and actions for damages stemming from the Union's conduct[20]. The Court has not yet had the opportunity to assess whether actions for failure to act may be admissible in the CFSP. Still, a positive answer appears appropriate. As clarified by the CJEU itself, Articles 263 and 265 TFEU «merely prescribe

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[13] Court of Justice, 24 June 2014, case C-658/11, *Parliament v Council (EU-Mauritius Agreement)*, ECLI:EU:C:2014:2025, para. 73.

[14] *Ibid*, para. 72; 14 June 2016, case C-263/14, *Parliament v Council (EU-Tanzania Agreement)*, ECLI:EU:C:2016:435, para. 68. On this point, in literature, see R. A. WESSEL, Lex Imperfecta*: Law and Integration in European Foreign and Security Policy*, in *European Papers*, 2016, p. 439 ss, in particular p. 459. At the same time, the CJEU is also competent to review CFSP acts concluding international agreements whenever their legal basis is contested under Article 40 TEU. For an example in judicial practice, see Court of Justice, 14 June 2016, case C-263/14, *Parliament v Council (EU-Tanzania Agreement)*, ECLI:EU:C:2016:435, paras 42-56.

[15] Court of Justice, 12 November 2015, case C-439/13 P, *Elitaliana v Eulex Kosovo*, ECLI:EU:C:2015:753, para. 49.

[16] Court of Justice, 19 July 2016, case C-455/14 P, *H v Council and Commission*, ECLI:EU:C:2016:569, para. 44. On this point, in literature, see P. VAN ELSUWEGE, *Upholding the Rule of Law in the Common Foreign and Security Policy: H v. Council*, in *Common Market Law Review*, 2017, p. 841 ss., in particular p. 855.

[17] Court of Justice, 25 June 2020, case C-14/19 P, *CSUE v KF*, ECLI:EU:C:2020:492. While the Union Staff Regulations did not apply to SatCen's agents, the Court concluded that the principles of effective judicial protection and equality preclude the exclusion of staff management acts from the Court's review (paras 62 and 66).

[18] Court of Justice, 23 April 1986, case 294/83, *Les Verts v Parliament*, cit., para. 23.

[19] Court of Justice, 28 March 2017, case C-72/15, *Rosneft*, cit.

[20] Court of Justice, 6 October 2020, case C-134/19 P, *Bank Refah Kargaran v Council*, cit.

one and the same method of recourse»[21], whereby equally contributing to effective judicial protection within the EU legal order.

These streams of case-law represented fundamental steps in clarifying the scope of judicial review in CFSP matters. However, the path in this direction is far from clear. Several issues remain to be addressed, and the steps taken by the Court in this respect sometimes elicit further reflections and interrogatives. That is the case with the two last steps the Court took, namely, the recent rulings in *KS and KD v Council and Others* and *Neves77 Solutions*. On those occasions, the CJEU was confronted with two different yet complementary issues: respectively, the material scope of judicial review in actions for damages involving fundamental rights violations and the Court's competence on preliminary references on the interpretation of CFSP provisions. Building upon a combined analysis of the two judgments, this paper aims to assess their implications for the scope of judicial review in CFSP matters. After framing the key question addressed in both cases (2), this article argues that the conclusion reached by the ECJ in *KS and KD v Council and Others* is a step too far ahead. By redesigning the criterion for assessing whether a given CFSP action or omission is subject to the Court's review, that ruling ultimately blurs the dividing line stemming from Articles 24 TEU and 275 TFEU (3). On the other hand, *Neves77 Solutions* features a step too close, as it falls short, in general terms, of clarifying the scope of the CJEU's jurisdiction on interpreting CFSP acts in the context of preliminary reference procedures (4).

2. Two Major Crossroads: The Key Issues Raised by the *KS and KD v Council and Others* and *Neves77 Solutions* Cases

In *KS and KD v Council and Others*, the appellants claimed damages resulting from omissions by an EU civilian mission, Eulex Kosovo, in situations not covered by Article 275(2) TFEU, thereby questioning the Luxembourg Court's material scope of jurisdiction in CFSP matters (2.1). Conversely, *Neves77 Solutions* concerned the scope of judicial review from a procedural viewpoint, as it dealt with the Court's competence to hear preliminary references on the interpretation of CFSP provisions (2.2).

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[21] Court of Justice, 18 November 1970, case 15/70, *Chevalley v Commission*, ECLI:EU:C:1970:95, para. 6; 26 November 1996, case C-68/95, *T. Port v Bundesanstalt für Landwirtschaft und Ernährung*, ECLI:EU:C:1996:452, para. 59. On this point, in literature, see R. ADAM, A. TIZZANO, *Manuale di Diritto dell'Unione europea*, Torino, III ed., 2020, p. 325; K. LENAERTS, K. GUTMAN, J. T. NOWAK, *EU Procedural Law*, Oxford, II ed., 2023, p. 416.

2.1. *KS and KD v Council and Others*: Does a Potential Violation of Fundamental Rights Suffice to Establish the CJEU Jurisdiction Over Any CFSP Act?

The applicants are relatives of two victims of violent crime in Kosovo, where an EU civilian mission (EULEX Kosovo) is currently deployed[22]. The mission aims at supporting Kosovar institutions by, *inter alia*, taking action to «ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law»[23]. The mission's activities are subject to review by the Human Rights Panel, an independent body entrusted to receive complaints. Should a breach of fundamental rights be established, the Panel issues non-binding recommendations to the Head of Mission[24]. The two applicants filed distinct complaints before the Panel, claiming that the Mission failed to take appropriate action following crimes of which their relatives had been victims. The Panel established that the Mission did not take appropriate steps under its mandate and those failures amounted to a violation of several fundamental rights secured by the European Convention on Human Rights (ECHR), including the right to life[25], the prohibition of torture and inhuman or degrading treatments[26], the right to respect private and family life[27] and the right to an effective remedy[28]. After issuing recommendations, the Panel subsequently held that the Mission had only partially implemented them and closed the case.

Following the proceedings before the Panel, the applicants brought two actions for damages before the General Court – then merged into a single case – against the Council, the Commission and the European External Action Service. By their action, KS and KD sought compensation for the Mission's omissive conduct allegedly in breach of

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[22] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others,* ECLI:EU:C:2024:725, paras 14-15.

[23] Art. 3 of Council Joint Action 2008/124/CFSP, of 4 February 2008, on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, in OJ L 42, 16.2.2008, p. 92 ss.

[24] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others,* cit., para. 6.

[25] Art. 2 ECHR.

[26] Art. 3 ECHR.

[27] Art. 8 ECHR.

[28] Arts 6 (right to a fair trial) and 13 (right to an effective judicial remedy) ECHR.

Articles 2, 4 and 47 of the Charter, read in the light of the corresponding ECHR provisions. The defendants, on their part, raised a plea of lack of jurisdiction based on Article 130(1) of the Rules of Procedure[29]. By deciding on the objection without going into the substance of the case, the General Court dismissed the action for manifest lack of jurisdiction resulting from Articles 24 TEU and 275 TFEU. In particular, the General Court found that «the circumstances of the present case are not comparable to those prevailing in cases within the CFSP context, but which concern provisions whose application is subject to review by the Courts of the European Union»[30]. The applicants challenged the Order before the Court of Justice, giving rise to the case analysed here. The appeal was based on a single ground composed of four parts, pleading in essence that the General Court erred in law in holding that it manifestly lacked jurisdiction to hear the action for damages at issue[31]. The Commission appealed as well, arguing essentially that the General Court failed to interpret Articles 24 TEU and 275 TFEU narrowly when declining jurisdiction in the case at issue[32].

The Joined Cases *KS and KD v Council and Others* unveil a critical crossroads for the Court in its path towards defining the limits of its jurisdiction in CFSP matters. Differently from previous cases such as *Elitaliana*[33], *H v Council*[34], and *SatCen*[35], the contested conducts did not entail any link with non-CFSP provisions triggering the Court's competence. However, it allegedly amounted to a violation of fundamental rights secured by the Charter. Does this circumstance suffice to trigger the Court's jurisdiction? A positive answer would have represented a paradigm shift, potentially widening the CJEU's competence to cover any CFSP action or omission insofar as it is contested on fundamental rights grounds. At the same time, a negative answer would have also entailed crucial consequences for the Union's constitutional architecture. The lack of jurisdiction in cases involving fundamental rights would arguably be at odds with the principle of effective judicial protection required by the rule of law, a fundamental value on which the

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[29] General Court, 10 November 2021, case T-771/20, *KS and KD v Council and Others*, ECLI:EU:T:2021:798, para. 25.

[30] *Ibid*, para. 34.

[31] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others,* cit., para. 42.

[32] *Ibid*, para. 43.

[33] Court of Justice, 12 November 2015, case C-439/13 P, *Elitaliana v Eulex Kosovo*, cit.

[34] Court of Justice, 19 July 2016, case C-455/14 P, *H v Council and Commission*, cit.

[35] Court of Justice, 25 June 2020, case C-14/19 P, *CSUE v KF*, cit.

entire Union's architecture is grounded. Indeed, the rule of law presupposes judicial review over public authorities' acts[36], and this obligation also applies to Union institutions[37]. Moreover, a persistent lack of judicial review in CFSP matters would represent a noteworthy obstacle to the Union's accession to the ECHR. As the CJEU underlined in Opinion 2/13, the Court's limited jurisdiction would entail that pleas such as the one at issue in *KS and KD v Council and Others* would be reviewed by the Strasbourg Court exclusively, thus endangering the autonomy of the EU legal order[38].

2.2. *Neves77 Solutions*: Is the ECJ Competent to Interpret CFSP Decisions in the Context of Preliminary Rulings?

The second case under analysis, *Neves77 Solutions*, dealt with the Court of Justice's jurisdiction on the interpretation of CFSP provisions on restrictive measures. This issue is closely intertwined with the nature of the acts in question. Indeed, the process of imposing restrictive measures is intricate, requiring both CFSP and non-CFSP actions. Initially, the Council must unanimously adopt a CFSP decision to fully or partially halt economic relations with a third country. That decision may provide for detailed restrictive measures against natural and legal persons, thus touching upon the position of individuals listed therein[39]. Second, the CFSP decision is implemented by a Council regulation based on Article 215 TFEU. As the CJEU recalled, «such regulations constitute EU acts adopted on the basis of the FEU Treaty and in respect of which the Courts of the European Union have full jurisdiction conferred on them by primary EU legislation»[40]. Therefore, preliminary references on

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[36] Court of Justice, 23 April 1986, case 294/83, *Les Verts v Parliament*, cit., para. 23.

[37] Among many, see: A. CIRCOLO, *Il valore dello Stato di diritto nell'Unione europea: violazioni sistemiche e soluzioni di tutela*, Napoli, 2023, p. 88.

[38] Court of Justice, 18 December 2014, Opinion 2/13, *Adhésion de l'Union à la CEDH*, ECLI:EU:C:2014:2454, paras 252-257. On the significance of the *KS and KD v Council and Others* case for the Union's accession to the ECHR, see: D. SARMIENTO, S. IGLESIAS SANCHEZ, *KS and Neves 77: Paving the Way to the EU's Accession to the ECHR*, in *EU Law Live*, 12 September 2024, https://eulawlive-com/insight-ks-and-neves-77-paving-the-way-to-the-eus-accession-to-the-echr/; C. CONTARTESE, *Conclusioni dell'AG Ćapeta nelle cause KS/KD (C-29/22 P e C-44/22 P) e Neves (C-351/22) del 23 novembre 2023, ovvero come la CGUE dovrebbe assicurarsi che "qualsiasi treno che possa arrivare a Strasburgo deve prima fermarsi a Lussemburgo"?*, in *Rivista Quaderni AISDUE*, 2024, p. 321 ss.

[39] Among many, see M. E. BARTOLONI, *La politica estera e di sicurezza comune (PESC)*, cit., p. 257.

[40] Court of Justice, 10 September 2024, case C-351/22, *Neves77 Solutions*, ECLI:EU:C:2024:723, para. 39. On this point, see also Court of Justice, 28 March 2017,

interpreting provisions enshrined in Article 215 TFEU regulations are admissible[41]. However, pursuant to Article 275(2) TFEU, individuals are entitled to challenge the legality of not only Article 215 TFEU regulations but also CFSP decisions laying down the sanctions addressed to them and representing the legal precondition for those regulations[42]. As previously outlined, the Court's competence in this respect also extends to preliminary rulings on the validity of restrictive measures, objections of illegality and actions for damages stemming from these provisions[43]. Still, *Neves77 Solutions* represented the first occasion for the Court to clarify whether judicial review of restrictive measures also covers preliminary references on their interpretation.

Against this background, the legal and factual background of *Neves77 Solutions* featured an uneasy interaction between the CFSP decision and the regulation based on Article 215 TFEU. In fact, the preliminary question involved a restrictive measure drafted in general terms in Council Decision 2014/512/CFSP[44] concerning restrictive measures following Russia's actions destabilising the situation in Ukraine, but was not reproduced in Council Regulation (EU) 833/2014[45], adopted on the basis of Article 215 TFEU to implement the said decision.

The case originated from a dispute between *Neves77 Solutions*, an intermediary company in the field of aviation, and the Romanian Department of Export Control. The latter imposed on *Neves77 Solutions* a fine and confiscation measures for brokering radio sets originating from the Russian Federation in violation of Article 2(2)(a) of Council Decision 2014/512/CFSP. That provision prohibits, *inter alia*, «brokering services and other services related to military activities […] directly or indirectly to any natural or legal person, entity or body in, or for use in Russia».

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case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para. 106; 3 September 2008, joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission*, cit., para. 326. In literature, see S. POLI, *The Common Foreign Security Policy after Rosneft*, cit., p. 1799 ss., in particular p. 1814.

[41] The CJEU has been recently seized with the interpretation of provisions on restrictive measures enshrined in an Article 215 TFEU regulation in case C-313/24, *Opera Laboratori Fiorentini*, currently pending.

[42] Among many, see S. POLI, *Le misure restrittive e la tutela dei diritti dei singoli*, cit., p. 284.

[43] See *supra*, para. 1.

[44] Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, in OJ L 229, 31.7.2014, p. 1 ss.

[45] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, in OJ L 229, 31.7.2014, p. 1 ss.

According to Romanian authorities, that provision applies even where the object of the brokering services has not been sold in Russia and has been delivered to a third state – in that case, India – without being imported into a Member State. *Neves77 Solutions* contested this point and instituted proceedings before the Court of First Instance of Bucharest to seek the annulment of the domestic decision, which has since been dismissed. Seized on appeal, the Regional Court of Bucharest decided to stay the proceedings and question the interpretation of the geographical scope of application of the prohibition enshrined in Article 2(2)(a) of Council Decision 2014/512/CFSP, as well as of the legality and proportionality of the confiscation measures imposed[46].

Despite the intriguing questions raised by the referring Court on the merits, the vital issue emerging from that case is of a procedural nature and concerns the scope of the CJEU's jurisdiction. Is the Court competent to interpret CFSP provisions of general scope insofar as the relevant restrictive measures have not been reproduced in the implementing regulation? That is the interrogative raised by the Regional Court of Bucharest. At a closer look, the case materialises into an even broader crossroads for the Court. Indeed, the preliminary reference in *Neves77 Solutions* provides the CJEU with the occasion to clarify whether it is, in general terms, competent to interpret CFSP provisions where the Treaties provide for their judicial review. As the following analysis will show, the Court did not seize that opportunity and decided to take a step closer instead.

3. One Step Too Far: Redesigning the Limits to the ECJ Jurisdiction Over CFSP Actions or Omissions

3.1. The Exclusion of a 'Fundamental Rights' Sphere of Jurisdiction in CFSP Matters

Against the legal issue posed by the appellants in *KS and KD v Council and Others*, Advocate General Ćapeta put forward a bold reading of the scope of the Court's jurisdiction in CFSP matters. The action or omission at issue fell outside the scope of Article 275(2) TFEU and did not entail any connection with non-CFSP provisions. However, the Advocate General argued that the pleas raised by the appellants should fall within the scope of the Court's competence since they entail a violation of fundamental rights attributable to the Union's institutions. To reach such

[46] Court of Justice, 10 September 2024, case C-351/22, *Neves77 Solutions*, cit., para. 33.

a conclusion, Advocate General Ćapeta recalled previous case-law affirming that Articles 24 TEU and 275 TFEU pose exceptions to the Court's general competence recognised by Article 19 TEU[47]. Consequently, such limitations shall be narrowly interpreted[48]. According to the Advocate General, this finding «has its basis in EU constitutional principles»[49], as it follows from «the basic values of the EU legal order, essentially the rule of law, the principle of effective judicial protection and the protection of human rights»[50]. Following the Treaty of Lisbon's abolition of the pillar structure, the CFSP became an integral part of that constitutional framework of values and principles. In this context, the rule of law «requires that both EU and Member State authorities be subject to judicial review»[51], and that finding also applies in principle to the definition and implementation of the CFSP[52].

How do the principle of effective judicial protection and the rule of law value impact the interpretation of Articles 24 TEU and 275 TFEU? The Advocate General referred to *Kadi*[53], affirming that «respect for human rights is a condition of the lawfulness of EU acts, and acts incompatible with human rights are not acceptable within the European Union»[54]. On that basis, a narrow interpretation of the limits to the Court's jurisdiction would imply that the Court is always competent to review the Union's actions or omissions where individuals claim a violation of fundamental rights secured by the Charter[55]. According to the Advocate General, this conclusion does not contradict the Court's ruling in *Carvalho*, which clarified that the right to an effective remedy and the principle of effective judicial protection could not overcome the conditions for

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[47] Opinion of Advocate General Ćapeta, 23 November 2023, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, ECLI:EU:C:2023:901, para. 54. To develop its argument, the Advocate General underlined that the narrow interpretation of Articles 24 TEU and 275 TFEU has been refined by the Court's case-law in three groups of cases so far, respectively involving the review of restrictive measures (paras 56-62), acts adopted by EU missions (paras 63-66) and the conclusion of international agreements under the CFSP (paras 67-69).

[48] Opinion of Advocate General Ćapeta, 23 November 2023, joined cases C-29/22 P and C-44/22 P, KS and KD v Council and Others, cit., para. 54.

[49] *Ibid*, para. 70

[50] *Ibid*, para. 71

[51] *Ibid*, para. 80.

[52] *Ibid*, para. 83.

[53] Court of Justice, 3 September 2008, case C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, cit., paras 281-284.

[54] *Ibid*, para. 85

[55] *Ibid*, para. 93.

triggering the Court's jurisdiction as laid down in the Treaties[56]. Indeed, that point of law would not prevent the Court from interpreting the provisions laid down in Articles 24 TEU and 275 TFEU, as the Advocate General purportedly proposed in her Conclusions.

The solution just outlined aimed at recognising a 'fundamental rights' sphere of jurisdiction in CFSP matters, thus ensuring that each plea concerning their protection would fall under the scope of the CJEU review[57]. However, the legal reasoning proposed by the Advocate General was particularly problematic since it would have led to overreaching the limits of the CJEU jurisdiction as designed by the Treaties. A detail enshrined in the wording of Article 24 TEU may demonstrate this point. This provision states that the Court's jurisdiction in CFSP matters is limited to «[monitoring] compliance with Article 40 [TEU] and to [reviewing] the legality of *certain* decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union (emphasis added)»[58]. By using the adjective «certain», the authors of the Treaties appeared to affirm that the Court's jurisdiction cannot extend to *every* CFSP action or omission. That provision should indeed be interpreted narrowly: as a result, the competence of the Court also extends to certain acts, actions or omissions not expressly recalled in Article 275(2) TFEU. As previously mentioned, that is the case of decisions concluding international agreements[59] and those adopted by CFSP bodies or missions for staff management purposes[60]. Still, the Court's jurisdiction in these cases was triggered by reasons of the inherent characteristics of the categories of actions or omissions, as they entailed a legal connection with non-CFSP provisions[61]. Therefore, previous case-law led to the

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[56] Court of Justice, 25 March 2021, case C-565/19 P, *Carvalho and Others v Parliament and Council*, ECLI:EU:C:2021:252, para. 78.

[57] On this point, see: C. CONTARTESE, *Conclusioni dell'AG Ćapeta nelle cause KS/KD (C-29/22 P e C-44/22 P) e Neves (C-351/22) del 23 novembre 2023*, cit., p. 328; S. NOTARIO, *AG Ćapeta Opinion on the admissibility of a human rights action for damages in CSDP: filling the gaps in the EU system of legal remedies?*, in *European Law Blog*, 5 December 2023, https://www.europeanlawblog.eu/pub/ag-capeta-opinion-on-the-admissibility-of-a-human-rights-action-for-damages-in-csdp-filling-the-gaps-in-the-eu-system-of-legal-remedies/release/1?readingCollection=b12188ee.

[58] Article 24(1) TEU.

[59] See *supra*, fn. 14.

[60] See *supra*, fn. 16-17.

[61] See *supra,* para. 1. Article 218 TFEU materialises that normative link with non-CFSP provisions in case of CFSP acts concluding international agreements, Article 270 TFEU in those cases involving CFSP staff management acts, as well as EU budget administration rules in cases concerning public procurements acts by CFSP civilian missions. For further analysis on this point, a reference may be allowed to L. GROSSIO,

broadening of the Court's jurisdiction only to «certain acts» in compliance with Article 24 TEU. Conversely, by admitting that any CFSP act can be challenged on the grounds of potential fundamental rights violations, the solution proposed by Advocate General Ćapeta would have run counter to the ultimate limit to the Court's jurisdiction posed by Article 24 TEU.

3.2. Turning the Rationale Into the Rule: The Rise of the Political Question Doctrine as the Boundary to the CJEU Jurisdiction in CFSP Matters

The Court's ruling did not follow that solution, thus reaffirming that its jurisdiction could not extend to any CFSP actions or omissions on the sole grounds that they violate fundamental rights[62]. Still, the *KS and KD v Council and Others* ruling materialises into a decisive step towards broadening the scope of judicial review in that domain. Indeed, the CJEU held that previous judgments in *Elitaliana*, *H v Council* and *SatCen* entail «in essence [… that] the jurisdiction of the Court of Justice of the European Union may be based on the fact that the acts and omissions at issue are not directly related to the political or strategic choices made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP»[63]. In those circumstances, the Court shall be regarded as having jurisdiction «to assess the legality of those acts or omissions or to interpret them»[64].

At first sight, that contention appears grounded on previous case-law. Still, at a closer look, its link with precedents is weaker than it may appear. What the Court proposes in *KS and KD v Council and Others* is a revised reading of that stream of case-law. In fact, the *Elitaliana* case dealt with Eulex Kosovo's awarding it a public contract. On that occasion, the Court recognised a formal link between the contested act and its jurisdiction, as the former was governed by the rules on the EU budget[65]. An analogous link emerged in *H v Council and Commission*, an action for damages arising from a disciplinary measure adopted by the Head of the EU Police Mission in Bosnia-Herzegovina. Also of a CFSP nature, that measure was

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Ai confini del sistema completo di rimedi: le attuali vie di tutela giurisdizionale nell'ambito della PESC e l'opportunità di una loro revisione, in *Rivista Quaderni AISDUE*, 2024, p. 1 ss, in particular pp. 9-11.

[62] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, cit., para, 73.

[63] *Ibid*, para. 116.

[64] *Ibid*, para. 117.

[65] Court of Justice, 12 November 2015, case C-439/13 P, *Elitaliana v Eulex Kosovo*, cit., para. 49.

governed by the Union Staff Regulations, falling under the scope of the Court's competence established by Article 270 TFEU[66]. That link also applies to acts of staff management of CFSP bodies whose officials fall outside the scope of application of the Staff Regulations. Building on the principle of equal treatment, the Court held in *SatCen* that such a circumstance «is comparable to disputes between an institution, body, office or agency of the European Union not covered by the CFSP and one of their officials or staff members»[67]. In all these cases, the CJEU grounded its competence on a normative link between the object of the action or omission at issue and the Court's jurisdiction in non-CFSP matters[68]. That connection differs profoundly from the dividing line between political or strategic choices and CFSP acts which are amenable to judicial review that the Court proposes in *KS and KD v Council and Others*.

Building on such a renewed reading, the Court advanced a two-step test to assess whether it was competent to review a given CFSP action or omission. Firstly, it shall assess whether the CFSP action or omission at issue falls under the scope of circumstances provided by Articles 24 TEU and 275 TFEU, «in which that jurisdiction is expressly allowed»[69]. Secondly, if this is not the case, the Court shall ascertain whether the contested actions or omissions «are not directly related to the political or strategic choices made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP»[70]. This assessment is inherently casuistic, as the Court shall ground its evaluation on the specific profiles addressed by the Union's institutions in the context of their decision or failure to act[71]. That circumstance leaves much discretion in the Court's hands, as the ruling in *KS and KD v Council and Others* discloses[72]. By

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[66] Court of Justice, 19 July 2016, case C-455/14 P, *H v Council and Commission*, cit., para. 44.

[67] Court of Justice, 25 June 2020, case C-14/19 P, *CSUE v KF*, para. 92.

[68] On the same point, see A. NAVASARTIAN HAVANI, *An EU External Relations Political Question Doctrine that Suffers No Human Rights Exception: Joined Cases C-29/22 P and C-44/22 P* KS and KD *on the Court's Jurisdiction in CFSP Matters*, in *European Law Blog*, 25 September 2024, https://www.europeanlawblog.eu/pub/kwd8041a/release/1.

[69] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, cit., para. 115.

[70] *Ibid*, para. 116.

[71] *Ibid*, para. 121. In literature, see L. Schubert, *Doing Too Much and Too Little: The CJEU's Approach to Judicial Review of Fundamental Rights Breaches in the CFSP After KD and KS*, in *EJIL Talk!*, 30 October 2024, https://www.ejiltalk.org/doing-too-much-and-too-little-the-cjeus-approach-to-judicial-review-of-fundamental-rights-breaches-in-the-cfsp-after-kd-and-ks/.

[72] On this point, see S. NOTARIO, *Judicial Review in Damages Actions in the Common Security and Defence Policy*, in *Centre d'Etudes Juridiques Européennes*, 10 October 2024,

applying the second step of the test, the CJEU concluded that the pleas for damages concerning the lack of adequate personnel[73], legal aid in proceedings before the Human Rights Panel[74], the extent of the latter's competencies[75] and the alleged failure to remedy fundamental rights violations[76] fall under the scope of its jurisdiction. Conversely, the pleas attacking the alleged lack of sufficient resources at the disposal of Eulex Kosovo «on the basis of the first subparagraph of Article 28(1) TEU, are directly related to the political or strategic choices made within the framework of the CFSP»[77] and are therefore excluded from the Court's jurisdiction.

However, that margin of discretion is physiological, as it results from the combination of two interrelated factors: the generality of the criterion advanced by the Court to assess its jurisdiction and the broad object of CFSP actions and omissions. After all, any CFSP act is ultimately aimed at contributing to the attainment of foreign and security goals framed by the Council. What is more, the complexity of this assessment is further exacerbated by the need to also consider the intensity of the nexus of the given action or omission with political or strategic choices, which shall be of a «direct» nature[78]. By way of approximation, that parameter may suggest that actions or omissions following immediately from political or strategic choices as their implementing measures are excluded from the Court's jurisdiction. For example, that would be the case of a decision to establish a CSDP mission: it identifies the appropriate tool to respond to a given strategic objective tackled by the Council. Conversely, actions or omissions which are ancillary to or provide for the implementation of those acts are not directly related to political or strategic choices, as their object is dependent upon the CFSP acts previously considered. However, such a preliminary theorisation does not allow coping with that assessment's inherent elusiveness. Indeed, the complexity of the practice of EU institutions in the CFSP domain makes any rigid distinction between the two categories of actions or omissions almost impossible from a purely theoretical viewpoint. Therefore, there is arguably no alternative to a case-by-case examination of the object of each CFSP

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https://ceje.ch/fr/actualites/action-exterieure/2024/10/judicial-review-damages-actions-common-defence-and-security-policy/.

[73] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, cit., para. 127.

[74] *Ibid*, para. 130.

[75] *Ibid*, para. 131.

[76] *Ibid*, para. 133.

[77] *Ibid*, para. 126.

[78] *Ibid*, para. 117.

action or omission in order to assess whether they fall under the scope of the Court's jurisdiction.

According to the Court, the two-step test advanced in *KS and KD v Council and Others* is in line with both the principle of effective judicial protection and the wording of Articles 24 TEU and 275 TFEU[79]. On one hand, the CJEU clarified that the principle of effective judicial protection does not require *every* action or omission to be amenable to judicial review. In fact, the right to an effective judicial remedy is not absolute. This finding stems from interpreting Article 47 of the Charter based on the corresponding rights enshrined in Articles 6 and 13 of the ECHR, as required by Article 52(3) of the Charter[80]. Indeed, the Strasbourg Court acknowledged that the judiciary is constitutionally prevented from questioning political choices in international relations[81]. That limitation – which is inherent in the principle of separation of powers[82] – also applies to the review exercised by the Strasbourg Court. Therefore, the Court contended that excluding only actions or omissions manifesting political or strategic choices from judicial review represents a viable solution for reconciling Articles 24 TEU and 275 TFEU with the principle of effective judicial protection and, ultimately, the rule of law value[83]. This reasoning is insightful, as it discloses the Court's willingness to align the scope of judicial review of CFSP actions or omissions to the standards stemming from the ECHR[84]. The concluding remarks in this paper will return to this profile and reflect on the implications of this approach for the Union's accession to the ECHR.

On the other hand, the Court contended that upholding jurisdiction on any CFSP action or omission which are not directly related to political or strategic choices «enables the effectiveness of [Articles 24 TEU and 275 TFEU] to be preserved, without, however, unduly prejudicing the right to an effective remedy, and […] corresponds to the aim pursued by those

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[79] *Ibid*, para. 118.

[80] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, cit., para. 77.

[81] *Ibid*, para. 78. In this respect, the CJEU referred to the Strasbourg Court's findings in ECtHR, 14 September 2022, *H.F. and Others v. France*, with particular emphasis on para. 281 therein.

[82] On the principle of separation of powers in the EU legal order, among many, see K. LENAERTS, *Some Reflections on the Separation of Powers in the European Communities*, in *Common Market Law Review*, 1991, p. 11 ss.

[83] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, cit., para. 119.

[84] D. SARMIENTO, S. IGLESIAS SÁNCHEZ, *KS and Neves 77: Paving the Way to the EU's Accession to the ECHR*, cit.

same provisions»[85]. Against this finding, a further critical remark shall be advanced. It shall be underlined that the CJEU's stance turns the underlying rationale of Articles 24 TEU and 275 TFEU into a legal rule. In fact, limitations to judicial review enshrined therein are grounded on the so-called «Political Question Doctrine»: they aim at shielding the majority of CFSP acts from judicial review because of their political significance[86]. Following the *KS and KD v Council and Others* ruling, the Political Question Doctrine mutated its nature and acquired binding legal significance in CFSP matters. Indeed, it became the criterion to assess whether the Court is competent to review actions or omissions exceeding the scope of Article 275(2) TFEU.

But does that interpretation really preserve the *effet utile* of Articles 24 TEU and 275 TFEU? A negative answer appears appropriate, as the two-step test envisaged in *KS and KD v Council and Others* deprives those limitations of relevance for defining the CJEU jurisdiction in CFSP matters. In fact, the intensity and scope of the Court's power of review in situations covered by Articles 275(2) TFEU and those stemming from the second step of the *KS and KD* test are arguably the same. The Court shall avoid reviewing political and strategic choices even when adjudicating over restrictive measures or CFSP acts violating Article 40 TEU, since that limitation is inherent in the principle of separation of powers. This finding is apparent, in particular, from the case-law on restrictive measures. On multiple occasions, the Court recalled that «the Council has a broad discretion in areas which involve the making by that institution of political, economic and social choices, and in which it is called upon to undertake complex assessments»[87]. Consequently, the judiciary cannot scrutinise the political or strategic considerations guiding the Council to adopt restrictive measures. The Court may only review the implementing provisions where they appear «manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue»[88]. Like the Political

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[85] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, cit., para. 119.

[86] Among many, see L. LONARDO, *The Political Question Doctrine as Applied to Common Foreign and Security Policy*, in *European Foreign Affairs Review*, 2017, p. 571 ss.; G. BUTLER, *Constitutional Law of the EU's Common Foreign and Security Policy*, Oxford, 2019, pp. 151, 206-208; C. CELLERINO, *EU External Action and the Rule of Law*, cit., p. 678.

[87] Among extensive case-law, see Court of Justice, 28 March 2017, case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para. 113; 1 March 2016, case C-440/14 P *National Iranian Oil Company* v *Council*, ECLI:EU:C:2016:128, para. 77; 28 November 2013, case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft*, ECLI:EU:C:2013:776, para. 120; 1 February 2007, case C-266/05 P, *Sison* v *Council*, ECLI:EU:C:2007:75, para. 33.

[88] Among many, see Court of Justice, 1 March 2016, case C-440/14 P, *National*

Question Doctrine, that moderation in the Court's review stems from the principle of separation of powers and applies horizontally to CFSP and non-CFSP actions or omissions[89]. It follows that Union Courts are prevented from scrutinising political or strategic choices in situations falling under the scope of both Article 275(2) TFEU and the *KS and KD* test.

Therefore, the dividing line between actions or omissions covered by Article 275(2) TFEU and the *KS and KD* test appears to be merely virtual. The Political Question Doctrine has now become the actual boundary of the Court's jurisdiction, not differently from the scope of judicial review in any other non-CFSP domain. While the boundaries of the Court's jurisdiction in CFSP matters are defined by Articles 24 TEU and 275 TFEU, the ruling substantially deprives those provisions of their effectiveness, as the two-tier test overcomes the limits enshrined therein. By ultimately nullifying the specific limitations to judicial review characterising the CFSP, the *KS and KD v Council and Others* ruling is questionable as a step too far along the Court's jurisprudential path. The conclusion reached by the Court indeed provides a way out from the incoherent intersection between the principle of effective judicial protection and the limited scope for judicial review established by Articles 24 TEU and 275 TFEU. However, since the *KS and KD* test ultimately overcomes those limits, it remains doubtful whether such a result could be reached by interpreting the Treaties or, conversely, their reform would be desirable.

Iranian Oil Company v *Council*, cit., para. 77.

[89] As Advocate General Capeta herself underlined, the need to separate the realm of political choices from that of jurisdiction does not only characterise the CFSP, but the entire Union order (Opinion of Advocate General Ćapeta, 23 November 2023, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, cit., para. 115). To provide just a single emblematic example, the same need emerged in the clash between the Court of Justice and *Bundesverfassungsgericht* concerning the legitimacy of the ECB quantitative easing programme. In the *Gauweiler* and *Weiss* rulings, the Court of Justice reaffirmed that the ECB enjoys a broad discretionary power that implies a limitation of the scrutiny conducted by Union Courts (Court of Justice, 16 June 2015, case C-62/14, *Gauweiler and Others*, paras 68-69; 11 December 2018, case C-493/17, *Weiss and Others*, paras 73, 91-92). On this profile, among many, see A. BOBIC, M. DAWSON, *Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the Euro: Weiss and Others*, in *Common Market Law Review*, 2019, p. 1024. The same jurisprudential approach emerges with respect to the scrutiny of EU acts involving technical or scientific assessments. In literature, among many, see E. VOS, *The European Court of Justice in the Face of Scientific Uncertainty and Complexity*, in M. DAWSON, B. DE WITTE, E. MUIR (eds), *Judicial Activism at the European Court of Justice*, Cheltenham, 2013, p. 142 ss.

3.3. The Exclusion of National Courts' Jurisdiction Over CFSP Actions or Omissions: The End of the Debate

Despite the critical remarks previously outlined, the *KS and KD v Council and Others* ruling advances a further point that should not be underestimated. This ruling expressly clarifies that the exclusive nature of the CJEU jurisdiction on claims for damages stemming from Union actions or omissions also extends to the CFSP domain[90]. This finding aligns with the Opinion of Advocate General Ćapeta in the very same case, who argued that «[n]ational courts cannot decide about non-contractual liability for damages allegedly caused by EU institutions and bodies in any area which is within the scope of EU law»[91].

By this affirmation, the Court appears to mark the end of the longstanding scholarly and jurisprudential debate on the potential involvement of domestic courts in reviewing CFSP actions or omissions. That discussion has been ignited by the view of Advocate General Kokott preceding Opinion 2/13, according to which «even where the CFSP is implemented by the EU's own institutions, bodies, offices or agencies in such a way as to be of direct and individual concern to the individual, [individuals'] access to national courts and tribunals is not barred unless, exceptionally, [they] can find legal protection in the Courts of the EU directly, pursuant to the second alternative in the second paragraph of Article 275 TFEU»[92]. That finding stimulated scholarly debate, as it appears to suggest a potential way out of the gaps in judicial protection in CFSP matters stemming from the Court's limited jurisdiction according to Articles 24 TEU and 275 TFEU. In particular, some authors in the literature[93] suggested that the domestic court's competence could even extend to the review of the legality of CFSP acts, thus derogating from the

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[90] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, cit., para. 90.

[91] *Ibid*, para. 143.

[92] View of Advocate General Kokott, 13 June 2014, Opinion 2/13, *Adhésion de l'Union à la CEDH*, ECLI:EU:C:2014:2475, para. 99. Before the adoption of the Treaty of Lisbon, Advocate General Mengozzi advanced a similar solution for scrutinising Union acts falling under the scope of the former Third Pillar which were excluded from the CJEU jurisdiction on the basis of Article 35 TEU (Opinion of Advocate General Mengozzi, 26 October 2006, cases C-354/04 P and C-355/04 P, *Gestoras Pro Amnistía and Others v. Council* and *Segi and Others v Council*, ECLI:EU:C:2006:667, para. 99).

[93] In this respect, see: C. HILLION, R. A. WESSEL, *'The Good, the Bad and the Ugly': three levels of judicial control over the CFSP*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *op. cit.*, p. 65 ss., in particular pp. 82-83; O. POLLICINO, G. MUTO, *Corte di giustizia dell'Unione europea e sindacato giurisdizionale: cosa rimane fuori e perché. Il caso degli atti PESC*, in *Eurojus*, 2023, p. 89 ss., in particular p. 99.

Foto-Frost case-law[94]. To support such a conclusion, it has been argued that the Court's findings in that case presuppose that the Union Courts are competent on the matter, thus being in the best position compared to domestic courts to assess the legality of the acts at issue. Conversely, the CJEU's lack of jurisdiction on specific CFSP acts would entail the inapplicability of the finding established by *Foto-Frost*[95]. On those grounds, domestic courts could appear as the only judicial avenue to fill the jurisdictional gaps and ensure effective judicial protection.

The argument was problematic, since judicial redress before domestic courts in CFSP matters would undermine the autonomy of the EU law from domestic legal orders[96]. That was the underlying rationale of *Foto-Frost*[97], but the very same risk would emerge even in the context of actions for damages or failure to act. Should CFSP actions or omissions be reviewed by domestic courts, the preliminary reference procedure would constitute the essential tool for securing the unity and autonomy of EU law. Indeed, Article 267 TFEU is the «keystone» of the Union's judicial

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[94] Court of Justice, 22 October 1987, case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, para. 15.

[95] C. HILLION, R. A. WESSEL, *op. cit.*, pp. 84-85; A. HINAREJOS, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars*, Oxford, 2009, pp. 127-128.

[96] On the principle of autonomy of EU law, among extensive literature, see L. LIONELLO, *L'autonomia dell'ordinamento giuridico dell'Unione europea. Significato, portata e resistenze alla sua applicazione*, Torino, 2024; C. CONTARTESE, *The Autonomy of the EU Legal Order in the CJEU's External Relations Case-law: From the 'Essential' to the 'Specific Characteristics' of the Union and Back Again*, in *Common Market Law Review*, 2017, p. 1627 ss.; R. BARENTS, *The Autonomy of Community Law*, The Hague, 2004; S. VEZZANI, *L'autonomia dell'ordinamento giuridico dell'Unione Europea. Riflessioni all'indomani del parere 2/13 della Corte di giustizia*, in *Rivista di diritto internazionale*¸ 2016, p. 68 ss.; C. ECKES, *The Autonomy of the EU Legal Order*, in *Europe and the World*, 2020, p. 1 ss.; P. IANNUCCELLI, *La Corte di giustizia e l'autonomia del sistema giurisdizionale dell'Unione europea:* quousque tandem*?*, in *Il diritto dell'Unione europea*, 2018, p. 281 ss.; V. MORENO-LAX, K. S. ZIEGLER, *Autonomy of the EU Legal Order a General Principle? On the Risks of Normative Functionalism and Selective Constitutionalisation*, in K. S. ZIEGLER, P. J. NEUVONEN, V. MORENO-LAX (eds), *Research Handbook on General Principles in EU Law*, Cheltenham, 2022, p. 227 ss., in particular pp. 230-231; A. MIGLIO, *Autonomia dell'ordinamento dell'Unione europea e risoluzione delle controversie in materia di investimenti*, in A. SPAGNOLO, S. SALUZZO (a cura di), *La responsabilità degli Stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento*, Milano, 2017, p. 301 ss., in particular pp. 304-305.

[97] In this line of reasoning, Advocate General Wahl argued that the *Foto-Frost* case-law would be «applicable also with regard to the field of CFSP, in spite of the fact that there is no EU Court that can exercise that power» (Opinion of Advocate General Wahl, 7 April 2016, case C-455/14 P, *H v Council and Commission*, ECLI:EU:C:2016:212, para. 102).

system[98]. More specifically, that procedure sets up a dialogue between domestic and Union Courts to ensure that EU law is uniformly interpreted and applied, «thereby serving to ensure its consistency, its full effect and its autonomy»[99]. Should domestic courts exercise jurisdiction in CFSP matters, they would be prevented from raising preliminary references concerning actions or omissions to which the CJEU is not competent according to the Treaties. Therefore, the impossibility of resorting to Article 267 TFEU would profoundly prejudice the autonomy of EU law. Indeed, domestic courts could not seek the CJEU's guidance on correctly interpreting and applying relevant EU provisions, thus subjecting CFSP actions and omissions to purely domestic judicial review.

For two reasons, the *KS and KD v Council and Others* ruling marks the end of this debate. On one hand, the exclusion of domestic jurisdiction on actions for damages affirmed by *KS and KD v Council and Others* should also extend to other remedies to which the Court is exclusively competent, such as action for annulment or failure to act. In fact, the potential competence of domestic courts on both procedures would give rise to comparable – if not more significant – prejudice for the autonomy of the EU legal order compared to action for damages. On the other hand, and most notably, the *KS and KD* test has the potential to fill the jurisdictional gaps in CFSP matters generated by Articles 24 TEU and 275 TFEU. Consequently, only actions or omissions directly related to political and strategic choices remain excluded from judicial review. As previously mentioned, that exception is compatible with the principle of effective judicial protection, since the Political Question Doctrine follows the separation of powers[100]. Therefore, the *KS and KD* test nullifies the need to identify avenues for judicial protection alternative to the CJEU, as its sphere of competence in CFSP matters is now in line with Article 19 TEU, Article 47 of the Charter and, ultimately, the rule of law value as enshrined in Article 2 TEU.

4. One Step Too Close: Framing the Relationship Between the Court's Jurisdiction on the Interpretation and Validity of CFSP Acts

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[98] Court of Justice, 14 December 2024, Opinion 2/13, *Adhésion de l'Union à la CEDH*, cit., para. 176. Among extensive literature, see S. BARBIERI, *Il rinvio pregiudiziale tra giudici ordinari e Corte costituzionale*, Napoli, 2023, p. 46 ss.

[99] Among extensive case-law, see Court of Justice, 21 December 2023, case C-718/21*, Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge)*, ECLI:EU:C:2023:1015, para. 43.

[100] See *supra*, para. 3.2.

While focusing on the material scope of the Court's jurisdiction in CFSP matters, the *KS and KD v Council and Others* ruling provides an interesting insight concerning the procedures available to the Union Courts to review CFSP actions or omissions. Should the latter fall under its competence, the CJEU should be entitled «to assess the legality of those acts or omissions *or to interpret them* (emphasis added)»[101]. This affirmation suggests that the Court's spheres of competence on the interpretation and validity of CFSP provisions coincide. On that basis, it would be reasonable to expect the Court to reaffirm the same finding in the *Neves77 Solutions* ruling, delivered on the same day as *KS and KD v Council and Others*. Quite surprisingly, the CJEU in *Neves77 Solutions* took a shyer approach. In fact, its reasoning is indissolubly linked to that case's peculiar factual and legal background, where a restrictive measure of general application designed by the Council in a CFSP decision had not been implemented through the regulation based on Article 215 TFEU.

Still, the preliminary question posed in that case raises a general issue beyond the case's specific features. Does the Court's jurisdiction over CFSP provisions cover their validity and interpretation as well? In her conclusions, Advocate General Ćapeta advanced a negative answer: the CJEU's jurisdiction under Articles 24 TEU and 275 TFEU would only concern the validity of certain CFSP measures. Conversely, Union Courts would be prevented from interpreting them in the context of preliminary references. To reach such a conclusion, the Advocate General established a dividing line between the purposes and implications of the Court's jurisdiction over, on one hand, the interpretation and the validity of CFSP acts, on the other. The first sphere of judicial competence would entail that «the Court can choose between several possible meanings of a legal rule»[102], thereby decisively influencing the Union's foreign policy choices underlying the provision at stake. According to the Advocate General, Articles 24 TEU and 275 TFEU aim to avoid such a consequence since «the authors of the Treaties essentially sought to exclude the Court from policy-making in the CFSP»[103].

Conversely, reviewing the validity of CFSP provisions would entail a shallower impact on the Union's policy choices. In the Advocate General's view, that form of judicial review aims at establishing that a rule *having the meaning intended by the Council* cannot be accepted in the EU legal order

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[101] Court of Justice, 10 September 2024, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, cit., para. 117.

[102] Opinion of Advocate General Ćapeta, 23 November 2023, case C-351/22, *Neves77 Solutions*, ECLI:EU:C:2023:907, para. 71.

[103] *Ibid*, para. 72.

(emphasis added)»[104]. Therefore, the Court should be prevented from interpreting the meaning of provisions subject to review even in the context of actions for their annulment or preliminary references on their validity. To assess their legitimacy, EU Courts should be bound «by the meaning attributed to the reviewed measure by its author, which submits it either as a party in a direct action before the Court or as a participant in the preliminary ruling procedure»[105]. However, this conclusion does not prevent the CJEU from assessing the compatibility of domestic measures implementing EU sanctions with the relevant CFSP provisions. In fact, while the latter cannot be subject to interpretation, the Court may still interpret the general principles of the EU legal order governing the implementation of the relevant restrictive measures at domestic level[106].

Differently from the Advocate General's contentions, the reasoning of the CJEU reaches the opposite conclusion on the grounds of the specific features of the case. Rather than providing general insights into the relationship between its jurisdiction over the validity and interpretation of CFSP provisions, the Court grounded its reasoning on the case's specific factual and legal background. As previously stressed, the general prohibition of providing brokering services had not been reproduced in a regulation based on Article 215 TFEU. According to the CJEU ruling, that choice of the Council is at odds with the specific features of the competence conferred by that provision. Since Article 215 TFEU provides that the Council «*shall adopt* the necessary measures», which is «distinct from the terms 'may adopt' used in paragraph 2 of that article»[107], the powers of that institution are circumscribed. More specifically, Article 215 TFEU prevents the Council from selectively excluding single restrictive measures designed by CFSP decisions from the implementing regulation based on that provision[108]. This finding also applies to a general measure such as the one at issue in the *Neves77 Solutions* case. The prohibition of providing brokering services produces binding legal effects

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[104] *Ibid*, para. 75.

[105] *Ibid*, para. 72.

[106] *Ibid*, para. 43. In that case, the Advocate General proposed to ground the interpretation sought by the referring court on the principles of legal certainty, *nulla poena sine lege* and the fundamental right to property. However, as noted in the literature, such an approach would ultimately open the way to circumventing the limits to the Court's jurisdiction defined by Articles 24 TEU and 275 TFEU (S. POLI, F. FINELLI, *Le misure restrittive russe davanti alla Corte di Giustizia dell'Unione europea: le tendenze giurisprudenziali emergenti*, in *DUE*, 2023, p. 523 ss., in particular, pp. 531-532).

[107] Court of Justice, 10 September 2024, case C-351/22, *Neves77 Solutions*, cit., para. 46.

[108] *Ibid.*

against individuals, as it «is intended to restrict the ability of economic operators to carry out transactions that come within the scope of the FEU Treaty»[109].

Should the Council omit to transpose a similar measure in the regulation based on Article 215 TFEU, this circumstance could not result in a limitation on the Court's competence to interpret that provision in the context of preliminary references[110]. According to well-established case-law, the formal qualification – a CFSP decision or a non-CFSP implementing regulation – of EU acts producing legal effects on third parties does not restrict the Court's power to review them as conferred by the Treaties[111]. On those grounds, «the possibility provided for by the Treaties of making a reference to the Court for a preliminary ruling regarding a regulation adopted on the basis of Article 215(1) TFEU must be available regarding *all the provisions that the Council should have included in such a regulation* and which form the basis for a national sanction adopted against third parties (emphasis added)»[112]. Indeed, preliminary references are vital tools for ensuring the consistency and uniformity of EU law, so that a different answer to the issue posed by the *Neves77 Solutions* case «would be liable to jeopardise the very unity of the EU legal order and to undermine the fundamental requirement of legal certainty»[113].

The Court's ruling and the Advocate General's conclusions radically manifest different approaches, giving rise to some issues. Firstly, the exclusion of the Court's competence in interpreting the CFSP provision proposed by Advocate General Ćapeta appears to overlook that a clear dividing line between the jurisdiction over the interpretation and validity of EU law can hardly be established. Except in cases where EU law provisions are challenged solely on procedural grounds, assessing their legitimacy requires the EU Courts first to interpret them to establish their meaning. It follows that, in principle, the sphere of jurisdiction on the validity of EU law matches the one on its interpretation[114].

According to the Advocate General, the need to avoid judicial interferences in CFSP policy choices would derogate from the two spheres of jurisdiction's coincidence. In fact, the two Treaty provisions reduce the scope of judicial interpretation in CFSP matters because – differently from the review of legality – that form of jurisdiction gives rise to interferences

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[109] *Ibid*, para. 56.

[110] *Ibid*, para. 48.

[111] *Ibid*, para. 47.

[112] *Ibid*, para. 49.

[113] *Ibid*, para. 50.

[114] On this point, see S. POLI, *Le misure restrittive e la tutela dei diritti dei singoli*, cit., p. 285.

with the Council's policy choices. However, this rationale is questionable. Notably, Articles 24 TEU and 275 TFEU limit the Court's jurisdiction on the validity of CFSP provisions for the very reason of shielding foreign and security policy choices from judicial interventions[115]. Therefore, even that form of review impacts the definition and implementation of CFSP.

Arguably, that impact is equally or even more in-depth than that resulting from interpreting the relevant provisions. Let us assume that the Court declares a given CFSP provision invalid by following the reasoning suggested by Advocate General Ćapeta, namely, by taking for granted its meaning as attributed by the Council. That decision would strike down a provision which is the material result of a specific policy choice. Therefore, it appears logical to affirm that such a review entails at least the same (if not a greater) impact on the definition and implementation of CFSP compared to merely interpreting the relevant provision[116].

Given these considerations, the step proposed by Advocate General Ćapeta would have led the Court down an uncertain path marked by significant theoretical challenges. Nevertheless, her conclusions had the merit of offering a comprehensive answer regarding the Court's jurisdiction in interpreting CFSP provisions. The Court's ruling lacks such a general understanding of the issue raised by the case. By relying on the «circumscribed» nature of the Council's powers under Article 215 TFEU, the judgment in *Neves77 Solutions* clarifies that the Court is competent to interpret general provisions on restrictive measures which have not been implemented in regulations. Still, this is not the only category of CFSP acts for which the same issue may emerge. Indeed, the review of the legality of CFSP actions or omissions also extends to acts not expressly envisaged by Article 275(2) TFEU. Could the Court also interpret those acts in the context of preliminary references? Against the positive answer incidentally advanced in *KS and KD v Council and Others*, the ruling in *Neves77 Solutions* remains silent on that interrogative.

However, the judgment enshrines an ancillary consideration that, if further enhanced in the legal reasoning, could have led the Court to provide a general solution to the issue at stake. In fact, the Court in *Neves77 Solutions* underlined that preliminary references on the interpretation of EU law are essential to ensure not only the consistency and unity of the

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115 Among extensive scholarly analysis on this point, see G. BUTLER, *op. cit.*, pp. 151, 206-208.

116 This point is shared by Advocate General Whatelet's conclusions in *Rosneft*, arguing that the review of legality of Union acts is a broader task compared to their interpretation; therefore, if the Treaties allow the Court to perform the former in CFSP matters, also the latter shall be admitted in the same domain (Opinion of Advocate General Whatelet, 31 May 2016, case C-72/15, *Rosneft*, ECLI:EU:C:2016:381, para. 75).

EU legal order, but also effective judicial protection as required by the rule of law[117]. As previously recalled, the Court consistently relied on the same reference to the rule of law and the effectiveness of judicial remedies to clarify that its jurisdiction in CFSP matters is not limited to actions on the annulment. Indeed, the CJEU sphere of competence extends to preliminary rulings on the validity of EU provisions, objections of illegality and actions for damages[118]. But if preliminary references on the interpretation of EU law are also essential for ensuring effective judicial remedies, as affirmed by the CJEU in *Neves77 Solutions*, then they ought to be admitted regarding any CFSP provision falling under the scope of the Court's jurisdiction.

Following these considerations, the *Neves77 Solutions* constitute a small step in the right direction. In fact, the reasoning followed by the Court is highly dependent upon that case's specific factual and legal circumstances. Against this approach is a different line of reasoning which could have clarified the admissibility in general terms of preliminary references on the interpretation of CFSP provisions falling under the scope of its jurisdiction, in line with the incidental affirmation in *KS and KD v Council and Others*[119].

5. Looking Ahead: Next Stop Strasbourg?

The two judgments in *KS and KD v Council and Others* and *Neves77 Solutions* constitute the Court's most recent steps along the rocky road towards progressively refining the scope of judicial review in CFSP matters. The elusive formulation of Articles 24 TEU and 275 TFEU, as well as the need to accommodate these limitations to judicial review with the principle of effective judicial protection stemming from the rule of law value, have posed noteworthy hermeneutic obstacles. Each major case contributed to this rocky road which then materialised into a complex crossroads, requiring the Court to assess whether its competence extends to specific CFSP action or omission at issue in the context of a given remedy.

Against this case-by-case approach, the *KS and KD v Council and Others* ruling marks a turning point. By reworking its previous case-law, the Court advances a general criterion to assess whether CFSP actions or omissions other than those enshrined in Article 275(2) can be subject to judicial review. More specifically, the CJEU turns the rationale behind those

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[117] Court of Justice, 10 September 2024, case C-351/22, *Neves77 Solutions*, cit., paras 50-52.

[118] See *supra*, fn. 19-20.

[119] See *supra*, fn. 101.

provisions – the Political Question Doctrine – into the general rule: any CFSP action or omission which is not directly related to political or strategic choices is subject to the Court's scrutiny. As argued in this paper, that stance appears too far-reaching. Indeed, employing the Political Question Doctrine as a legal rule to assess jurisdiction for the CFSP architecture as defined by the Treaties ultimately circumvents the limits enshrined in Articles 24 TEU and 275 TFEU, thus depriving the latter of their effectiveness.

Despite that critical remark, the judgment in *KS and KD v Council and Others* entails two further features which cannot be underestimated. Firstly, it reaffirms that even in CFSP matters national courts are not endowed with jurisdiction for reviewing Union actions or omissions. As argued in this paper, that finding might end the debate on national courts' involvement in CFSP matters. This development should be welcomed, as an opposite solution would have seriously undermined the autonomy of the EU legal order. In a similar scenario, Articles 24 TEU and 275 TFEU would have prevented the CJEU from providing domestic judicial authorities with guidance on reviewing CFSP actions or omissions through preliminary references, which are vital tools for preserving the unity and coherence of the EU legal order.

Secondly, the *KS and KD v Council and Others* ruling incidentally affirmed that the sphere of jurisdiction on reviewing the legality of CFSP actions or omissions also entails interpreting the relevant CFSP provisions. However, that general finding is at odds with the casuistic approach that the CJEU followed in *Neves77 Solutions*. As argued in this paper, that ruling does not go far enough. In fact, it fails to clarify whether preliminary references on the interpretation of EU law shall always be admitted when the Court of Justice is competent to rule on the validity of the same provisions.

In light of these considerations, it appears that the CJEU's mission towards defining the boundaries of its competence in CFSP matters is far from over. Looking ahead to the following steps, two main directions can be envisaged. On one hand, it can be expected that the Court will be further confronted with the uneasy task of assessing whether a given CFSP action or omission is directly linked to strategic or political choices. As previously argued, this evaluation is casuistic by its very nature, and the very broad formulation of the *KS and KD* test leaves very little room for conceptualisation. While there is arguably no alternative to a case-by-case assessment in that respect, further case-law may provide insights into how the test should be applied in the light of the circumstances of each case.

On the other hand, the steps taken by the Court may have finally paved the way for the Union's accession to the ECHR. As pointed out in

Opinion 2/13, the reduced scope of the Court of Justice's jurisdiction over CFSP actions or omissions would, in the event of accession to the ECHR, entail the attribution of such scrutiny to the Strasbourg Court alone, in violation of the principle of autonomy of the EU legal order[120]. The new draft accession agreement, finalised in March 2023[121], does not include any provision to cope with that issue[122]. Thus, without an alignment of the Court's jurisdiction in CFSP matters to the standards deriving from Articles 6 and 13 of the ECHR, the path towards the Union's accession to the Convention would have remained substantially precluded. The *KS and KD v Council and Others* ruling shall be seen in that framework: by providing a hermeneutic way out of the limits established by Articles 24 TEU and 275 TFEU, it aligns the scope of judicial review in CFSP matters to the standards derived from the ECHR[123]. That development represents the much-awaited green light for the conclusion of the new accession agreement, which we might expect to happen soon.

However, a final interrogative remains. Given the weakness of the *KS and KD* test against the current wording of the Treaties, would a different conclusion by the Court have been an obstacle to the prospect of accession to the ECHR? In that case, the Member States would have probably been forced to consider a Treaty revision to amend Articles 24 TEU and 275 TFEU to align the scope of jurisdiction in CFSP matters to the ECHR standards. Given the profound difficulties in reaching a unanimous consensus on treaty amendments, that circumstance would have indeed unveiled a rockier road to the EU accession to the ECHR. Still, such an alternative scenario would have avoided putting the Court in the uncomfortable position of hermeneutically reaching the same alignment of standards while depriving Articles 24 TEU and 275 TFEU of their effectiveness.

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[120] See *supra*, fn. 96.

[121] Final Consolidated Version of the Draft Accession Instruments, 17 March 2023, https://rm.coe.int/final-consolidated-version-of-the-draft-accession-instruments/1680aaaecd

[122] An earlier version of the draft agreement enshrined a mechanism for holding individual Member States liable for CFSP acts and conduct in cases where they are forming the object of an action before the Strasbourg Court and the Court of Justice lacks jurisdiction over them. However, this mechanism was finally set aside as difficult to apply in practice (N. BERGAMASCHI, *Prime considerazioni sul nuovo tentativo di adesione dell'Unione alla CEDU e sui suoi principali ostacoli*, in *Rivista Quaderni AISDUE*, 2024, p. 13 ss., in particular p. 29; S. ØBY JOHANSEN, *The (Im)possibility of a CFSP "Internal Solution"*, in *European Papers*, 2024, p. 783 ss., in particular p. 788).

[123] For a different reading, see L. GOBIET, *The Final Episode of a (Never-Ending) Series? CFSP Damages Claims and the ECHR Accession*, in *European Law Blog*, 8 November 2024, https://www.europeanlawblog.eu/pub/edrqzitg/release/2.

ABSTRACT

Under Articles 24 TEU and 275 TFEU, the Court of Justice's jurisdiction in Common Foreign and Security Policy (CFSP) is, in principle, limited to reviewing acts breaching Article 40 TEU and those imposing restrictive measures. However, those limitations to judicial review must be interpreted narrowly, as they are exceptions to Article 19 TEU. That finding inaugurated a rocky road for the Court. Crossroad by crossroad, the CJEU has been called upon to progressively define the boundaries of its competence in CFSP matters. The article reflects on the implications of the last two steps the CJEU took in this regard. On one hand, it argues that the *KS and KD v Council and Others* ruling is a step too far on the Court's jurisprudential road, as it ultimately deprives the limits to judicial review enshrined in Articles 24 TEU and 275 of their *effet utile*. On the other hand, the article contends that the *Neves77 Solutions* judgment is a step too close, since it fails to clarify in general terms the admissibility of preliminary references on the interpretation of CFSP provisions falling under the scope of the CJEU jurisdiction.

Ai sensi degli artt. 24 TUE e 275 TFUE, la giurisdizione della Corte di Giustizia in materia di Politica estera e di sicurezza comune (PESC) è, in linea di principio, limitata al controllo degli atti che violano l'art. 40 TUE e di quelli che impongono misure restrittive. Tuttavia, tali limitazioni alla cognizione della Corte devono essere interpretate in modo restrittivo, in quanto eccezioni rispetto all'Articolo 19 TUE. Questa considerazione ha delineato un percorso accidentato per la Corte, chiamata a definire progressivamente i confini della sua competenza in materia di PESC. L'articolo riflette sulle implicazioni degli ultimi due passi compiuti dalla CGUE lungo tale percorso. Da un lato, il contributo argomenta che il principio di diritto espresso nella sentenza *KS e KD/Consiglio e.a.* rappresenta un "passo troppo lungo", in quanto finisce per privare le limitazioni al controllo giurisdizionale sancite dagli artt. 24 TUE e 275 del proprio effetto utile. D'altro canto, l'articolo sostiene che la sentenza *Neves77 Solutions* costituisce un "passo troppo corto", in quanto non chiarisce in termini generali l'ammissibilità dei rinvii pregiudiziali sull'interpretazione di disposizioni della PESC che ricadono nella giurisdizione della Corte.

En vertu des articles 24 TUE et 275 TFUE, la compétence de la Cour de justice en matière de Politique étrangère et de sécurité commune (PESC) est, en principe, limitée au contrôle des actes qui violent l'article 40 TUE et de ceux qui imposent des mesures restrictives. Toutefois, ces

limitations de la compétence de la Cour doivent être interprétées de manière restrictive, en tant qu'exceptions à l'article 19 du TUE. Cette considération a tracé un chemin bosselé pour la Cour, qui a été appelée à définir progressivement les limites de sa compétence en matière de PESC. L'article réfléchit aux implications des deux dernières étapes franchies par la CJUE sur cette voie. D'une part, il affirme que le principe de droit exprimé dans l'affaire *KS et KD c. Conseil e.a.* est un « pas trop loin », car il finit par priver de leur effet utile les limitations du contrôle juridictionnel consacrées par les articles 24 TUE et 275 TFUE. D'autre part, l'article soutient que l'arrêt *Neves77 Solutions* constitue un « pas trop court », car il ne clarifie pas en termes généraux la recevabilité des demandes de décision préjudicielle sur l'interprétation des dispositions de la PESC qui relèvent de la compétence de la Cour au sens des deux dispositions mentionnées.