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JURISDICTION OF THE EUROPEAN COURT OF JUSTICE OVER ISSUES RELATING TO THE COMMON FOREIGN AND SECURITY POLICY UNDER THE LISBON TREATY

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Abstract. *Although the Lisbon Treaty maintained the general exclusion of Common Foreign and Security Policy (CFSP) matters from ECJ jurisdiction, it introduced a number of changes into this area, including an explicit statement that the Court is competent to review the legality of the Council decisions imposing restraining measures on persons. The article analyzes the nature and origin of those changes and considers the legal implications for the level of the protection of fundamental rights in the European Union. For this purpose the author firstly considers the context of the exclusion of CFSP matters from the ECJ jurisdiction, including discussions on the issue at the European Convention, and, secondly, takes a closer look at the separate heads of jurisdiction over which the Court is competent to act after the entry into force of the Lisbon Treaty. A conclusion is made that the Lisbon Treaty did not introduce significant changes to ECJ jurisdiction. Similarly to the pattern of previous amendment treaties, the Lisbon Treaty again gave recognition to the practice of the ECJ on relevant questions. Nonetheless, the amendments made by the Lisbon Treaty should be welcome for introducing more clarity into the legal regulation of the matter, thus boosting the legal certainty and protection of fundamental rights in the European Union.*

Keywords: *common foreign and security policy (CFSP), Court of Justice jurisdiction, Lisbon treaty, right to judicial review, effective judicial protection.*

Introduction

The jurisdiction of the European Court of Justice (hereinafter referred to as the ECJ) over issues related to common foreign and security policy (hereinafter referred to as CFSP) has been restricted ever since its introduction into EC primary law by the Single European Act. After the Maastricht Treaty the matter was governed by Article L (after the Amsterdam Treaty—Article 46) of the Treaty on the European Union (hereinafter referred to as the TEU). Since the Court did not have the jurisdiction over claims against CFSP acts, including those on the conclusion of international agreements in the CFSP field, such acts could not, therefore, be annulled by the Court pursuant to Article 230 of the EC Treaty. However, Article 46 was subjected to Article 47, providing that no provision of the TEU shall affect the provisions of the EC Treaty. Even before the entry into force of the Lisbon Treaty, this legal basis entitled the ECJ to find that despite the exclusion of the CFSP area from its jurisdiction, it maintained significant powers to review instruments adopted under Title V of the TEU.¹

The Lisbon Treaty has made certain alterations to the content and manner of the regulation of the jurisdiction of the ECJ over CFSP. It is currently governed by Article 24 of the TEU, specifying that the ECJ shall not have jurisdiction with respect to CFSP, with the exception of its jurisdiction to monitor the compliance with Article 40 of the TEU and to review the legality of certain decisions as provided for by Article 275 (2) of the Treaty on the Functioning of the European Union (hereinafter referred to as the TFEU). It includes at least three explicit statements that the ECJ shall not have jurisdiction over CFSP, yet at the same time it explicitly provides that the ECJ shall indeed have jurisdiction to review a) that the extent of the powers of European institutions and the procedures under Article 40 of the TEU are not affected by the exercise of CFSP, as well as b) the legality of CFSP decisions providing for restrictive measures against natural or legal persons adopted within the scope of CFSP.

This article seeks to identify the legal significance of this alteration, in particular, on the level of the protection of fundamental rights of individuals as far as the CFSP matters are concerned. A number of scholars have written on ECJ jurisdiction before, including Takis Tridimas,² Maria Gisella Garbagnati Ketvel,³ Geert de Baere,⁴ Ronald van Ooik⁵ and Piet Eeckhout⁶. Their contributions were made before the Lisbon Treaty

1 Case T-14/98, *Heidi Hautala v. Council* [1999] ECR II-2489.

2 Tridimas, T. *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union? In European Union Law for the Twenty-First Century: Rethinking the New Legal Order*. Vol. 1: *Constitutional and Public Law. External Relations*. Tridimas, T.; Nebbia, P. (eds.). Hart Publishing, 2004.

3 Garbagnati Ketvel, M. *The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy*. *International & Comparative Law Quarterly*. 2006, 55: 77–120.

4 De Baere, G. *Constitutional Principles of EU External Relations*. Oxford University Press, 2008.

5 van Ooik, R. *Cross-Pillar Litigation before the ECJ: Demarcation of Community and Union Competencies*. *European Constitutional Law Review*. 2008, 4: 399–420.

6 Eeckhout, P. *Does Europe's Constitution Stop at the Water's Edge?: Law and Policy in the EU's External Relations*. Europa Law Publishing, 2005; Eeckhout, P. *External Relations of the European Union - Legal and Constitutional Foundations and of the European Internal Market and International Trade - A Legal Analysis*. Oxford University Press, 2004.

was drafted and before it entered into force, and hence are not entirely focused on the ECJ jurisdiction under the Lisbon Treaty, which is the object of the present study. Thus, the first part of the article addresses the context of the exclusion of CFSP matters from the jurisdiction of the ECJ, the second part analyzes the right of the ECJ to monitor compliance with the Article 40 of the TEU. The third part deals with a discussion whether the level of protection of fundamental rights of private persons has improved as a result of the Lisbon changes. The fourth part briefly assesses whether the TFEU regulation after the Lisbon Treaty has entitled the ECJ to give prior opinions over international agreements in the CFSP area.

1. The Context of the Exclusion of CFSP Matters from the Jurisdiction of the ECJ

The very first document which excluded the possibility of ECJ jurisdiction over the matters of CFSP was the Single European Act (Article 31).⁷ This did not change significantly in the TEU, since, as one scholar has put it, ‘at the Maastricht IGC the Member States were wary of any integrative actions by the Court in this sensitive area’⁸. However, the Maastricht Treaty introduced the positive list of areas in which the ECJ was to have jurisdiction, and CFSP was not included. The Commission explained this issue as follows:

Article Y10 places the field covered by this chapter outside the jurisdiction of the Court of Justice under Article 164 to 188 of the Treaty, since action taken in pursuance of foreign or security policy is preeminently a matter of political decisions and not, generally, speaking, a matter for the judiciary.⁹

Notably, the Dutch Draft Treaty had envisaged the possibility for the Court to ‘review... the legality of the application of the procedures for deciding upon the joint action referred to in this Title of the Treaty’. Yet, the provision did not make it to the final Draft for the lack of necessary consensus.¹⁰

The matter was raised again for discussion at the European Convention, which was called on to draft the text of the Constitution for Europe.¹¹ Although the Constitution never entered into force, a significant number of its provisions found their way into the

7 Case C-253/94 P, *Olivier Roujanski* [1995] ECR I-0007, para 4.

8 Wessel, R. Good Governance in EU Foreign, Security and Defence Policy. In *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*. Curtin, D.; Wessel, R. (eds.). Intersentia, 2005, p. 234.

9 Initial Contribution by the Commission to the Intergovernmental Conference on Political Union. Composite Working Paper. SEC (91) 500 final, available at University of Pittsburgh Archive of European Integration [interactive]. [accessed 27-01-2010]. <<http://aei.pitt.edu/4679/>>.

10 See Laursen, F.; Vanhoonaeker, S. *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community*. Maastricht, EIPA, 1992, p. 215–228.

11 More on the Convention of Europe see Church, C. *Understanding the European Constitution: an Introduction to the EU Constitutional Treaty*. Routledge: Taylor & Francis Group, 2006; Piris, J. C. *The Constitution for Europe: a Legal Analysis*. Cambridge: Cambridge University Press, 2006.

Lisbon Treaty. Those included the provisions concerning the jurisdiction of the ECJ over CFSP.

The discussions over the changes in the role, structure and functioning of the ECJ, including its role regarding CFSP, at the Convention took within a separate Discussion Circle.¹² The issue of ECJ jurisdiction was discussed at a separate meeting on the basis of a Working document No. 10.¹³ The document suggested the following possible options for change:

1. to maintain the status quo, but consider changing the wording of Articles 60 and 301 of the TEC, so as to make an explicit provision for the possibility of adopting economic sanctions against individuals;
2. to give the national court the possibility of using the preliminary ruling procedure on interpretation before the Court of Justice when they have to decide on questions relating to the implementation by the Member States of CFSP decisions to which they are required to give effect;
3. expand the possibility of recourse to CFSP decisions which could affect persons other than from an economic point of view, considering the possibility of giving individuals the right to institute actions before the Court of Justice a) either for the annulment of CFSP decisions which are of direct and individual concern to them or b) solely for the claims for damages based on the illegality of the act, but without the Court having the power to annul the act or declare it void.

Several further more innovative options were suggested, including the right of the institutions to ask the Court to annul CFSP decisions, and extending the Court's jurisdiction over CFSP matters on the same conditions as they used to apply for the first pillar areas, and, finally, introducing the possibility for an institution or a Member State to request for a prior opinion from the Court to examine whether a planned international CFSP agreement would be compatible with the provisions of the Constitution.

Although the Discussion Group reached consensus on the option relating to the possibility to impose sanctions on individuals, and their right to refer such cases to the ECJ, other options caused disagreements. Those who believed that the ECJ should have general jurisdiction with the power to control the legality of the acts adopted by the Council in the CFSP field argued that this was a consequence of the EU being a community based on the rule of law and having a Charter of Fundamental Rights.¹⁴ They further argued that, in any event, the European Court of Human Rights could be asked to consider actions arising from the implementation of such acts.¹⁵ In this context the possibility of entitling the Member States to bring actions (as under Article 227 of

12 European Convention, Summary report on the Plenary Session of 13 February 2003, CONV 543/03; European Convention, Final Report of the Discussion Circle on the Court of Justice of 25 Mar 2003, CONV 636/03. At the Convention, there were three Discussion Circles: on the Court of Justice, on the budgetary procedure, and on own resources. For the working documents and final reports see <http://european-convention.eu.int/doc_CIRCLE.asp?lang=ENSee> [accessed 31-01-2010].

13 European Convention, Note from Secretariat of 17 March 2003. *Judicial control relating to the common foreign and security policy*. CONV 689/1/03 REV 1.

14 *Ibid.*

15 *Ibid.*

the TEC) was mentioned. Other members argued that if the Court of Justice were given powers to review the legality of the acts adopted in the CFSP field, this would not only threaten the policy's effectiveness and development but also entail a significant shift in the existing institutional balance.¹⁶

In the end, the key proposal to provide the ECJ with the jurisdiction over CFSP matters, including the extension of the preliminary reference procedure to this area, was found to be politically unacceptable: similarly to the Single European Act, the final text of Article III-376(1) of the Treaty on the Constitution of the European Union explicitly stated that the ECJ shall not have jurisdiction with respect to CFSP matters.¹⁷ The issue was not reopened for discussion during the negotiations which led to the Lisbon Treaty, thus, the formulation remained as suggested by the European Convention. The absence of a comprehensive commentary of the issue calls for a more detailed consideration.

2. The Right of the ECJ to Monitor the Compliance with Article 40 of the TFEU

After Lisbon, Article 40 of the TEU provides:

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 of the Treaty on the Functioning of the European Union. 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.

A version of this provision was present already in the TEU in its original formulation in Article M (Article 47 after the Amsterdam Treaty). It specified that 'nothing in [the EU] Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them'. This provision has been interpreted as serving two purposes: a) as a provision specifying which (EU or EC) Treaty should apply in case of their conflict, and b) as reflecting the objective of the EU to preserve the integrity of its *acquis communautaire*.¹⁸

However, in the light of the positive formulation of Article 46 of the TEU regarding the competencies of the Court, a number of the Member States were of the opinion that the TEU in its original formulation excluded the competence of the Court to review

16 *Ibid.* It is conventionally considered that the CFSP is excluded from the ECJ jurisdiction as a result of the fear of the Member States that the possibility of judicial review might constrain their sovereignty in the field of international politics. See Garbagnati Ketvel, M., *supra* note 3, p. 79.

17 Article III-376(1) of the Constitution: 'the Court of Justice shall not have jurisdiction with respect to the general provisions in Part I concerning the Common Foreign and Security Policy (Article I-40) and the Common Security and Defence Policy (Article I-41), nor with respect to the provisions in Part III concerning such policies (Chapter II of Title V, Articles III-294 to III-313). It shall also lack jurisdiction with respect to Article III-293, insofar as it concerns the CFSP'.

18 Garbagnati Ketvel, M., *supra* note 3, p. 86.

whether an act adopted under CFSP did not encroach on the Community competence.¹⁹ This argument was first tried in cases concerning the third pillar area,²⁰ and immediately rejected by the Court: it found that it was its responsibility to ensure that the acts allegedly falling under the scope of the third pillar would not encroach on the competencies attributed to the Community by the EC Treaty.²¹

It did not take long for the Court to confirm its right to exercise this function also with respect to CFSP.²² The first attempt to raise this question appeared in *Miskovic and Karic*²³ where the applicants sought annulment of the Council Decision, which implemented the Common Position on restrictive measures against the Federal Republic of Yugoslavia and included a list of persons who were subjected to an obligation of non-admission in the Member States. The applicants claimed that the measures concerned the exclusive EC competence, and thus that the contested decision was wrongly based on Title V of the TEU.²⁴ However, this case was removed from the docket before the Court could consider the issue.

The opportunity to finally confirm that Article 47 serves as a basis of ECJ jurisdiction came with the *Small Arms and Light Weapons* (or *ECOWAS*) case.²⁵ In it the Commission sought the annulment, for the lack of competence of the Council Decision implementing a joint action, on the basis that the act adopted by the Council in the framework of CFSP encroached on the Community development cooperation competences. The Commission was seeking a declaration of illegality of the joint action itself, an act of a general legislative nature on which the challenged CFSP decision was based. It argued that the contested measures affected Community powers in the field of development aid, and, therefore, breached Article 47 of the TEU. The Community Cotonou Agreement already covered actions taken against the spread of small arms and light weapons. Pursuant to this agreement, the Commission had concluded a Regional Indicative Programme for West Africa, giving support to a regional policy of conflict prevention and good governance, and providing for a moratorium on the import, export and production of light weapons in West Africa.²⁶ Consequently, in the opinion of the Commission, the conclusion of the joint action encroached on the Community competencies. The Council, the UK and Spain again argued that the Court had no jurisdiction to rule on the

19 See, e. g. UK submissions in Case C-170/96, *Commission v. Council [Airport Transit Visas]* [1998] ECR I-2763; also see Case C-440/05 *Commission v. Council (Ship Source Pollution case)* [2006] ECR I-9097, where over twenty Member States intervened supporting the position of the Council in a case brought by the Commission against the legality of a third pillar measure imposing criminal sanctions for environmental violations.

20 Case C-170/96, *Commission v. Council (Airport Transit Visas)* [1998] ECR I-2763.

21 This was subsequently confirmed in Case C-176/03, *Commission v. Council (Environmental penalties)* [2005] ECR I-7879, paras 51–55; Case C-440/05, *Commission v. Council (Ship Source Pollution)* [2006] ECR I-9097.

22 Case C-91/05, *Commission v. Council (Small Arms and Light Weapons)* [2008] ECR I-3651.

23 Case T-349/99, *Miroslav Miskovic v. Council of the European Union*; Case T-350/99, *Bogoljub Karic and four others v. Council of the European Union*, OJ 2000, C 79/35-36.

24 *Ibid.*

25 Case 91/05, *Commission v. Council (Small Arms and Light Weapons case)* [2008] ECR I-3651.

26 *Small Arms and Light Weapons case*, paras 5, 6, 7.

legality of a measure falling within the CFSP, in particular, with regard to the plea based on the illegality of the contested joint action.²⁷ The Court disagreed, confirming that it was its task to ensure that the acts which fell within the scope of Title V of the TEU did not encroach on the powers conferred by the EC Treaty on the Community.²⁸

Furthermore, Article 40 includes another novelty which was not included in the former Article 47 of the TEU—the implementation of the CFSP *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 EU competences under this Chapter. Though new, this provision also codifies the findings of the Court, in its line of case law where it reiterated that its lack of jurisdiction to review the legality of certain EU documents did not curtail its powers of judicial review over matters concerning public access to those documents.²⁹ The Court based its jurisdiction on Article 230 of the EC Treaty. These findings were confirmed with respect to CFSP documents in the *Hautala* case.³⁰

In sum, Article 40 of the TEU includes a clearer wording making it explicit that CFSP competencies should not encroach on other EU competencies and that it is within the Court's jurisdiction. Nonetheless, this is only a clearer restatement of the law as it stood already before the Lisbon Treaty. The same comment applies regarding the explicit inclusion of procedural matters into the text of Article 40 of the TEU.

3. Enhanced Protection of the Rights of Private Persons under the Lisbon Treaty

The Lisbon Treaty introduced several modifications to the provisions regarding the jurisdiction of the ECJ which are likely to have an impact on the protection of the rights of persons. Those include an explicit grant of right to the Council to adopt restrictive measures aimed not only against third states but also private persons and an extended right of direct access to the ECJ. Although the Lisbon Treaty did not include any specific provision concerning the availability of the preliminary reference procedure over questions relating to the validity or interpretation of CFSP measures, it equally did not provide that such references were not allowed. These innovations need to be addressed in turn.

3.1. Restrictive Measures against Private Persons

Although the European Convention remained quite conservative with regard to ECJ jurisdiction in CFSP matters, the suggestions to reformulate the text of the Treaty making it explicit that economic sanctions may be adopted also against individuals was accepted

27 *Small Arms and Light Weapons case*, paras 5, 6, 7. para. 30.

28 *Ibid.*, para. 33.

29 Case T-174/95, *Svenska Journalistförbundet* [1998] ECR II-2289.

30 Case T-14/98, *Hautala v. Council* [1999] ECR II-2489, paras 41-42; also see Case T-47/03, *Jose Maria Sison v. Council* [2007] ECR II-0073.

by consensus.³¹ Thus, Article 215(2) of the TFEU currently provides that ‘where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities’.

The result is not surprising: although previous editions of Articles 60, 301 and 308 of the EC Treaty referred only to the measures taken against third states, and thus did not explicitly allow for the possibility of adopting economic and financial sanctions against individuals, in practice the provision was interpreted by the Council widely, as allowing for such a possibility. This was confirmed, though quite reluctantly, in the decision of the CFI in *Kadi*³², and the landmark judgment of the ECJ in this case on appeal.³³ As already the CFI judgment, which found such interpretation ‘justified both by considerations of effectiveness and by humanitarian concerns’,³⁴ prompted intense discussions on whether the decision was persuasive,³⁵ the change in the text of the provision governing this issue was more than necessary and welcome.

In *Kadi*, drawing on Article 60 of the EC Treaty (which authorized the Council to take the necessary urgent measures on the movement of capital and on payments ‘as regards the third countries concerned’) and on Article 301 (which authorized the implementation of the CFSP call for measures ‘to interrupt or reduce... economic relations with one or more third countries’), the CFI agreed that the intended target for sanctions must be one or more third countries.³⁶ However, the CFI would allow sanctions directed

31 European Convention, Note from the Secretariat of 17 March 2003, *Judicial control relating to the common foreign and security policy*. CONV 689/1/03 REV 1.

32 Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-3649 (hereinafter: *Kadi* (CFI)).

33 Joined cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 (hereinafter: *Kadi* (ECJ)), para. 236.

34 *Kadi* (CFI), para. 91.

35 See Halberstam, D.; Stein, E. The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order. *Jean Monnet Working Paper*. 02/09, p. 29; De Baere, G., *supra* note 4, p. 282: ‘The Court’s argument with regard to States no longer being the sole sources of threat is compelling from a political perspective, and is a strong argument in favour of Treaty-amendment allowing the Community to take the necessary measures, or of action under the CFSP under the current constitutional structure. It is, however, not a legal argument for allowing the Community to take those measures *de lege lata*’. Also see Eckes, C. Judicial Review of European Anti-Terrorism Measures—The Yusuf and Kadi Judgments of the Court of First Instance. *European Law Journal*. 2008, 14: 74–92, p. 78, ‘[t]his is the most obvious and convincing textual reason why Articles 301 and 60 EC cannot serve as a basis for individual sanctions’.

36 *Kadi* (CFI), at para. 95. Article 60 EC reads as follows: ‘[i]f, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned. Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest’. Article 301 EC reads as follows: ‘[w]here it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely,

against individuals under Articles 301 and 60 of the EC Treaty insofar as these individual sanctions ,actually seek ‘to limit economic relations with one or more third countries’.³⁷ Further, sanctions against such individuals may be viewed as equivalent to sanctions aimed at the third country only insofar as the targeted individuals are connected with the government and territory of a third country (even if only by providing the governing regime with monetary support). In the CFI’s view, the lack of such a link between Mr. Kadi and any governing regime, however, meant that these particular sanctions fell beyond the scope of Articles 60 and 301 of the EC Treaty.³⁸ In the CFI’s view, Article 308 of the EC Treaty—the residual enabling clause allowing for all ‘necessary [measures] to attain, in the course of the operation of the common market, one of the objectives of the Community’—could not provide the Community with the necessary autonomous power because the contested regulation served none of the purposes spelled out in Articles 2 and 3 of the EC Treaty: the measure was not aimed at establishing a common commercial policy, as it did not concern relations with a third country, and could not be said to be aimed at preventing the distortion of competition. A mere ‘theoretical’ risk of distortion would not suffice for Article 308 to apply.³⁹ However, although the Court rejected both Articles 60 and 301 and Article 308 of the EC Treaty as a proper legal basis for the imposition of smart sanctions against individuals, it accepted the argument that a combination of all three could serve as a legal basis for the contested regulation. The Court viewed Articles 60 and 301 of the EC Treaty as providing a general ‘bridge’ between the EU objectives and the EC Treaty, allowing the Community to act to advance the CFSP objectives of the EU.⁴⁰ Therefore, if the specific Community powers were insufficient to serve these particular purposes, the Community could resort to Article 308 of the EC Treaty as an ‘additional’ legal basis to serve the CFSP objectives, which were imported via Article 301 of the EC Treaty into the Community pillar. Hence, in the Court’s view, the Council was competent to adopt the contested regulation.⁴¹

A different approach towards the interpretation of the same matter was expressed by the Advocate General Maduro: he supported the views of the Commission that the Articles at issue on their own offered sufficient legal basis to adopt the contested regu-

economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission’.

37 *Kadi* (CFI), para. 89.

38 Given that the Taliban regime lost control over the government of Afghanistan, the necessary link vanished between the supporters (and associates) of that former regime and the ‘third country’ at which the contested regulation would have to be directed for the purposes of Articles 60 EC and 301 EC, according to the CFI. See *Kadi* (CFI), at para. 93–94.

39 *Kadi* (CFI), at para. 111. In particular, the Court noted that the specificity of the Security Council resolutions, coupled with the urgency of their implementation, did not raise the spectre of distortions due to the discrepancies in the implementation across Member States. *Id.* at para. 115. Nor could the references to ‘solidarity’, the ‘United Nations’, and ‘peace and liberty’ in the preamble to the EC Treaty be combined with the EU Treaty objectives to create a general Community objective to ensure peace and security that would sustain legislation based on Article 308 alone. *Id.* at paras 76, 117–19.

40 *Kadi* (CFI), para. 123–125.

41 *Kadi* (CFI), para. 135.

lation.⁴² The Advocate General emphasised that it was impossible to exclude economic relations with individuals or groups from the ambit of ‘economic relations with third countries’, as it would ignore a ‘basic reality of international economic life: that the governments of most countries do not function as gatekeepers for the economic relations and activities of each specific entity within their borders’.⁴³

Yet another way to interpret the same problem was suggested by the ECJ, sitting as a Grand Chamber. The Court disagreed with the Advocate General concerning the reading of Articles 60 and 301. It also disagreed that Article 308 *per se* could serve as a legal basis to implement the smart sanctions regime as such an interpretation would contradict its very wording.⁴⁴ The Court further disagreed with the CFI that Article 301 could be considered as a ‘general bridge’ for importing CFSP objectives into the Community pillar,⁴⁵ but found that the right to impose restrictive measures of an economic nature in order to implement actions decided under the CFSP, Articles 60 and 301 of the EC Treaty were ‘the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument. That objective could be regarded as constituting an objective of the Community for the purpose of Article 308 EC.’⁴⁶

In sum, the ECJ Grand Chamber found that the Articles under discussion could serve as a combined legal basis for the sanctions against Mr. Kadi in particular and private persons in general. Therefore, literally taken the amendments of the Lisbon Treaty would not involve any expansion of the EU competence over issues involving the imposition of smart sanctions.

3.2. Extended Right of Direct Access to the ECJ

A relating amendment was an introduction of an explicit statement that the ECJ would have the jurisdiction to review the legality of the decisions providing for restrictive measures against natural or legal persons adopted by the Council in the CFSP area.⁴⁷

Although important, this inclusion is not a fundamental novelty, since, as demonstrated by the previous CFI and ECJ case law, individuals already had the ability to address the ECJ, if they managed to demonstrate their direct and individual concern in the measure.⁴⁸ Establishing direct and individual concern would not generally be a problem

42 Advocate General opinion in *Kadi* (ECJ), para. 13.

43 *Ibid.*

44 *Kadi* (ECJ), paras 198–199.

45 *Kadi* (ECJ), para. 197.

46 *Kadi* (ECJ), paras 226–227.

47 Art. 24(1) EU and Art. 275 TFEU, which reads: ‘the Court shall have jurisdiction...to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union’.

48 But see De Baere, G., *supra* note 4, p. 189 who considers that this amendment constitutes an ‘extension’ of the ECJ jurisdiction. The cases which were found admissible under similar circumstances include Case T-362/04, *Minin*; T-299/04, *Selmani*; T-253/04, *Kongra-Gel*; T-49/04, *Hassan*; T-327/03, *Al Aqsa*; T-253/02,

in similar cases, since the individuals would usually be included into a list by their name. Such an inclusion would generally be considered as a measure which, in substance, constitutes a decision; as a result, the applicants have not been likely to face problems with admissibility of their claims.⁴⁹

After the Lisbon Treaty direct challenges can be made also against Community measures which do not require implementation. Article 263 of the TFEU makes it clear that an individual may challenge a truly legislative act; however, it leaves intact the current position on *locus standi* in relation to legislative acts and liberalizes, to a limited extent, the *locus standi* in relation to regulatory acts.⁵⁰ However, the new formulation of the right to access the ECJ remains unclear, since the concept of a ‘regulatory act’ is not defined in the Treaty. The Presidium commentary explains that the terms ‘regulatory act’ was preferred over a term of ‘an act of general application’:

[S]ince it would enable a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts, for which the ‘of direct and individual concern’ condition remains applicable while providing for a more open approach to actions against regulatory acts.⁵¹

As in the area of CFSP the adoption of legislative acts is excluded,⁵² arguably, this amendment is unlikely to impact the current right of persons to bring actions before the ECJ.

So far private persons have faced certain difficulties in this respect. The classical cases include *Segi*⁵³ and *Gestoras pro Amnistia*.⁵⁴ The names of the applicants had been included in a list of terrorist persons, groups and bodies under a Council Common Position, which was a third pillar measure the legality of which could not be challenged before the ECJ. Similarly, the applicants could not refer the case to national courts, since there were no implementing measures. The claim was brought before the CFI as a claim for damages allegedly suffered as a result of the absence of legal remedies, which was caused by the insertion of the list in an instrument adopted in the framework of intergovernmental cooperation.

The CFI dismissed the action as manifestly inadmissible, holding, firstly, that it clearly lacked jurisdiction to hear and determine the applicant’s claim for damages, secondly, that it did, however, have the jurisdiction to determine whether the action was

Ayadi; T-228/02, *Organization des Modjahedines du Peuple d.Iran* and T-318/01, *Othman*, Cases C- 354/04, *Gestoras pro Amnistia* and C-355/04, *Segi* and Case C-229/05, *PKK* and *KNK*. All cases are available from <<http://curia.europa.eu>>.

49 See Craig, P.; de Burca, G. *EU Law: Text, Cases, Materials*. Oxford University Press, 2008, p. 502–575.

50 For detailed discussion see Ward, A. Draft EU Constitution and Private Party Access to Judicial Review of Member States. In *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*. Vol.1: *Constitutional and Public Law. External Relations*. Tridimas, T.; Nebbia, P. (eds.). Hart Publishing, 2004.

51 European Convention, Presidium Cover Note on the Articles on the Court of Justice and the High Court of 12 May 2003. CONV 734/03, p. 20; see also Tridimas, T., *supra* note 2, p. 121.

52 Art. 24 TEU.

53 Case C-355/04, *Segi* [2007] ECR I-01657.

54 Case C-354/04, *Gestoras pro Amnistia* [2007] ECR I-01579; Case T-333/02, *Gestoras pro Amnistia* (unpublished).

based on the infringement of the powers of the EU. The Court finally dismissed the action because the appellants failed to cite any legal basis in the EC Treaty that had been disregarded.⁵⁵

On appeal, the ECJ confirmed the interpretation of the CFI of the Treaty concerning the right to hear and determine claims for damages regarding measures adopted under Title VI of the TEU.⁵⁶ The Court read the Treaty provisions on its jurisdiction restrictively. Although, when the Council adopted the Common Position 2001/931, it made a declaration stating that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress,⁵⁷ the ECJ did not find this sufficient to confer on it the jurisdiction in this respect.⁵⁸ In the view of the Court, the treaties have established a system of legal remedies in which the jurisdiction of the Court is less extensive under Title VI of the TEU than it is under the EC Treaty, and it was only for the Member States to reform this system, possibly also including the body of rules governing non-contractual liability.⁵⁹ Nevertheless, the Court conceded that the lawfulness of common positions adopted on the basis of Article 34 of the TEU could be considered through indirect challenges to national courts. Although Article 35(1) of the TEU enables national courts to refer questions to the Court for a preliminary ruling only on acts which do not include common positions, if the act at issue raises a serious doubt about being really intended to produce legal effects in relation to third parties, national courts are entitled to make such a reference.⁶⁰

Although this argument was never tested with respect to CFSP measures, the explicit restatement by the Lisbon Treaty that the Court has the jurisdiction to review the legality of Council decisions imposing restrictive measures against persons should serve as a clear legal basis to argue that ECJ would also have the jurisdiction to hear claims for damages in similar cases. If this interpretation is correct, this already constitutes a meaningful expansion of ECJ jurisdiction concerning substantive protection of fundamental rights of private entities.

Finally, the Lisbon Treaty has also paid a lot of attention to the significance of procedural legal safeguards. The Lisbon declaration on Article 24(1) of the TEU and Article 275 of the TFEU reads as follows:

The Conference recalls that the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to

55 Case C-354/04, *Gestoras pro Amnistia* [2007] ECR I-01579, paras 10-14 (summarizing the CFI judgment in case T-333/02).

56 *Ibid.*, paras 44, 46-48.

57 See AG Mengozzi opinion in *Gestoras pro Amnistia* of 26 October 2006.

58 *Ibid.*, paras 60-61.

59 *Ibid.*, para. 50.

60 *Ibid.*, para. 54.

restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure.⁶¹

In the light of this declaration, it is no less significant that in the *Kadi* case the Court also held that Community Courts must ensure the review of the lawfulness of all Community acts in the light of fundamental rights protected by the EU legal order as general principles of Community law, including the review of the Community measures designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.⁶² This finding can be interpreted as a further affirmation from the ECJ to the resolution of the Member States to observe due process rights and to exercise a substantive fundamental rights review.

Nevertheless, in view of these affirmations and of the fact that the Lisbon Treaty entitles the EU to accede to the European Convention on Human Rights, it is somewhat inconsistent that the idea to expand the jurisdiction of the ECJ with the right to accept preliminary references from national courts did not find its way into the amended Treaty. It should be recalled that the most important developments relating to the protection of fundamental rights in the EU occurred as a result of references from national courts for preliminary references. A number of authors have expressed their strong opinion that the very exclusion of the issue of legality of CFSP measures from the jurisdiction of the ECJ is ‘not persuasive’.⁶³

But, even though the Treaty as amended still does not explicitly provide for the possibility of preliminary references, as pointed out by professor Tridimas, that does not necessarily mean that it is excluded:⁶⁴ once it is accepted that the Court has the jurisdiction to review restrictive measures against natural or legal persons by way of a direct action, there is no reason why challenge should be restricted to it.⁶⁵ This argument has been developed by Curtin and Dekker, who, drawing on the line of reasoning from *Foto-Frost*⁶⁶ have argued that a national court must refer a request for a preliminary ruling to the Court of Justice, should a question arise whether a CFSP (or a third pillar) measure implemented in national law should not have been taken under the EC Treaty instead.⁶⁷ *Gestoras pro Amnistia* again could partly be used as providing support to this argument. There the Court made a sweeping reference to the rule of law argument and the existence of the right of national courts to make a reference with respect to ‘all measures adopted by the Council, whatever their nature or form, which are intended to have legal

61 See Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union OJ C115, Declaration 25 on Articles 75 and 215 of the Treaty on the Functioning of the European Union, p. 439.

62 *Kadi* (ECJ), paras 283–285, 299, 303–304, 306–308, 326.

63 De Baere, G., *supra* note 4, p. 183.

64 Tridimas, T., *supra* note 2, p. 128.

65 *Ibid.*

66 Case 314/85, *Foto Frost v. Hayptzollamt Lubeck-Ost* [1987] ECR 4199.

67 Curtin, D.; Dekker, I. The EU as a “Layered” International Organization: Institutional Unity in Disguise. In *The Evolution of EU Law*. Craig, P.; de Burca, G. (eds.). Oxford: 1999, p. 123; Garbagnati Ketvel, M., *supra* note 3, p. 91.

effects in relation to third parties'.⁶⁸ Nevertheless, the argument was made with respect to the third pillar, and Article 35 of the TEU had provided for a special procedure of reference in these matters. It could be argued that in the view of the abolition of the pillar system this legal circumstance should no longer be important and both the TEU and the TFEU should be read as consistent documents: in the absence of explicit exceptions, the preliminary references procedure should not be interpreted as restraining the rights of national courts to refer questions concerning interpretation of CFSP measures. The Lisbon treaty leaves this issue open for interpretation. Thus, it remains to be seen whether this argument will be favoured by the ECJ in its after-Lisbon case law.

Consequently, even though the Lisbon Treaty did not significantly alter the ECJ jurisdiction over CFSP measures, the changes made are to be welcomed because they clearly reaffirm the legal remedies available to private persons and entitle the ECJ to consider a wider scope of possible claims than before. The identification of a legal remedy available to persons targeted by 'the smart sanctions'⁶⁹ as such already constitutes a legal safeguard and serves as a measure enhancing legal certainty. Similarly, an explicit restatement that the institutions are entitled to define a framework for administrative measures with regard to capital movements and payments of natural or legal persons, groups or non-state entities is clearly welcome for introducing more clarity into the regulation of this area and thus enhancing fundamental rights protection in the EU.⁷⁰

4. Jurisdiction of the ECJ with Regard to CFSP International Agreements

Last but not least, the Lisbon Treaty has introduced certain changes with regard to the conclusion of international agreements. A need for such changes arose when the Lisbon Treaty abolished the three pillar system. The European Convention was puzzled over the issue whether the Court should be given the jurisdiction to give prior rulings over the compatibility of the CFSP agreements with third countries or international organizations with the Treaties. This is now governed by Article 218 of the TFEU. The relevant provision, Article 218(11), is formulated in a generally applicable manner and does not provide for exceptions.⁷¹ A number of commentators, therefore, opine that Arti-

68 Case C- 354/04, *Gestoras pro Amnistia* [2007] ECR I-01579, para. 53.

69 More on smart sanctions see Nettesheim, M. UN Sanctions against Individuals – a Challenge to the Architecture of European Union Governance. WHI Paper 1/07; van den Herik, L. The Security Council's Targeted Sanctions Regimes: in Need of Better Protection of the Individual. *Leiden Journal of International Law*. 2007, 20: 797–807.

70 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ C115. The matter is currently governed by Article 75 (1) TFEU, which states: '[w]here necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities'.

71 The text of Article 218(11) reads as follows: '[a] Member State, the European Parliament, the Council or the

cle 218 should be interpreted as conferring jurisdiction to the ECJ to give prior advisory opinions in the CFSP area as well.⁷² However, some leading scholars, like Lenaerts, are of another opinion pointing out that international agreements concluded in the field of CFSP would not be subject to the jurisdiction of the Court, since, in principle, the Court does not have jurisdiction with respect to action taken by the EU within the framework of the CFSP.⁷³ This argument is based on Article 275 of the TFEU: ‘the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy *nor with respect to acts adopted on the basis of those provisions*’ (emphasis added).

Nevertheless, in the view of the reasoning of the ECJ in *Gestoras pro Amnistia*, it would seem that the Court should not read the Treaties as amended restrictively. Arguably, the change of the manner of the formulation of the ECJ jurisdiction moving from a positive list of areas in which the Court has jurisdiction to the identification of exceptions where it does not, should be sufficient to find that the Court would be competent to issue prior opinions regarding CFSP international agreements as well.

Conclusions

The present research affirmed that the changes in the regulation of the ECJ jurisdiction in the Lisbon Treaty were rather modest and sought to affirm the established practice of the ECJ on relevant issues. The key change is in the formulation of Article 40 of the TEU, which is similar to former Article 46 of the TEU. This similarity is deceiving. Garbagnati Ketvel is perhaps correct stating that it cannot be regarded as its ‘equivalent’ or ‘successor’ to the former Article 46. The jurisdiction of the ECJ after the Lisbon Treaty extends as a general rule over the entire text of the Treaty, except for those instances where it is expressly excluded by Article 275 of the TFEU, which provides that the Court shall not have jurisdiction with respect to the provisions relating to the CFSP nor with respect to acts adopted on the basis of those provisions. Before, the jurisdiction of the ECJ over the EU Treaty was generally excluded, except in those areas where it was expressly conferred to it exhaustively listed in Article 46. Although both provisions excluded the matters concerning CFSP from judicial supervision, the change opens the possibility for a wider approach to the ECJ jurisdiction.

The Lisbon Treaty left a couple of areas which are open for interpretation with regard to whether the Court would gain jurisdiction: firstly, the right to hear preliminary references over CFSP measures, and, secondly, the right to issue prior opinions regarding international agreements concluded in the area of CFSP. Arguably, the change in

Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised’.

72 Tridimas, T., *supra* note 2, p. 129; Garbagnati Ketvel, M., *supra* note 3, p. 119.

73 But see Lenaerts, K.; van Nuffel, P. *Constitutional Law of the European Union*. 2nd ed. Thomson Sweet & Maxwell, 2005, p. 811.

perspective of the manner of regulating the ECJ jurisdiction could be sufficient for the Court to interpret the ambiguities in favour of establishing jurisdiction in these areas.

Finally, a number of changes introduced by the Lisbon Treaty appear to strengthen the due process rights of private persons. First, it is an explicit entitlement of the Council to adopt restrictive measures also against private entities, bodies, organizations and a related amendment entitling the Court to hear claims concerning the legality of the restrictive measures adopted in the area of CFSP. Arguably, this amendment also entitles the ECJ to hear and decide claims for damages, which would constitute an expansion of the ECJ jurisdiction in this area. Otherwise, the explicit Lisbon Treaty amendments have solely sought to reflect the findings of the ECJ and present that regulation with more clarity. Such enhanced clarity is to be welcomed as a contribution to legal certainty, and thus an improvement of the EU system of fundamental rights protection.

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EUROPOS SAJUNGOS TEISINGUMO TEISMO JURISDIKCIJA BENDROS UŽSIENIO IR SAUGUMO POLITIKOS SRITYJE: LISABONOS SUTARTIES PAKEITIMAI

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Santrauka. *Tai, kad Europos Teisingumo Teismas neturi jurisdikcijos BUSP srityje, EB steigimo sutartyje buvo įtvirtinta jau Vieningu Europos Aktu 1986 m. ETT jurisdikcija šiuo klausimu išliko apribota ir Maastrichto sutartimi. Požiūri mėginta keisti Lisabonos sutartimi, siekiant praplėsti Teismo kompetenciją kai kuriais su BUSP susijusiais klausimais, įskaitant teisę priimti prejudicinius sprendimus dėl BUSP teisės aktų aiškinimo ir galiojimo, institucijų ir valstybių narių teisę kreiptis į ETT dėl BUSP teisės aktų anuliavimo. Sutarties dėl ES veikimo tekste šie pokyčiai nebuvo įtvirtinti. Tačiau nors ETT neturėjo jurisdikcijos BUSP srityje, ES sutarties 47 str. įgalino Teismą tikrinti, ar realizuojant kompetenciją BUSP klausimais nėra pažeidžiamos Bendrijų kompetencijos ribos. Lisabonos sutartis pakeitė Teismo jurisdikcijos reglamentavimo būdą: ankstesnis 46 str. numatė baigtinį sąrašą sričių, kuriose ETT turi jurisdikciją. Naujas požiūris – laikoma, kad Teismas turi jurisdikciją tose srityse, dėl kurių nėra taikomos išimtys. Tokia išimtis yra numatyta BUSP klausimu bent keletą kartų (pvz., Sutarties dėl ES veikimo 270 str.).*

Šiame straipsnyje analizuojamas Lisabonos pakeitimų pobūdis, prielaidos ir galimos teisinės pasekmės, ypač asmenų teisių apsaugai ES. Nors šia tema yra rašę nemažai gerai žinomų teisininkų, pvz., prof. Tridimas, dr. Garbagnati Ketvel, prof. Eeckhout, dr. de Baere, jų darbai buvo parašyti dar iki Lisabonos sutarties teksto paskelbimo ir dėl to nebuvo orientuoti į Lisabonos sutartį. Tikslams pasiekti pirmiausia analizuojamos ETT jurisdikcijos apribojimo BUSP klausimams aplinkybės, kontekstas ir diskusijos Europos konvente, kurios ir nulėmė Sutarties dėl Europos Konstitucijos tekstą bei Teismo jurisdikcijos klausimais buvo perkeltos ir į Lisabonos sutartį. Antroje dalyje analizuojama Sutarties dėl ES veikimo 40 str. įtvirtinta ETT teisė kontroliuoti, kad realizuojant BUSP kompetenciją nebūtų pažeistos kitos ES kompetencijos. Trečioje dalyje analizuojami Lisabonos sutarties pakeitimai dėl ETT jurisdikcijos, kuriais sustiprinamos privačių asmenų teisės į teisminę gynybą BUSP srityje: aptariamas Sutarties dėl ES veikimo 215 (2) str. dėl Tarybos teisės taikyti sankcijas privatiems asmenims bei susijusi Sutarties dėl ES veikimo 275 str. 2 d., kuria ETT suteikiama kompetencija prižiūrėti, kaip laikomasi ES sutarties 40 str., priimti privačių asmenų ieškinius dėl BUSP teisės aktų anuliavimo, prižiūrint teisėtumą Tarybos sprendimų, patvirtinančių ribojančias priemones fiziniams ir juridiniams asmenims. Straipsnyje taip pat polemizuojama, ar dabartinis reglamentavimas nepalieka erdvės ginčyti, kad Europos Teisingumo Teismas galėtų priimti nacionalinių teismų prašymus dėl prejudicinių sprendimų BUSP klausimais, nors Sutarties tekstas aiškiai to nenumato. Galiausiai, trumpai aptariama problema dėl ETT teisės priimti išankstines nuomones dėl BUSP srityje sudaromų tarptautinių sutarčių suderinamumo su ES sutartimis.

Pagrindinė straipsnio išvada – didžioji dalis aiškiai matomų Lisabonos sutartimi pa-

darytų pakeitimų dėl ETT jurisdikcijos BUSP klausimais yra orientuoti į ankstesnę ETT praktiką, siekiant aiškiai išreikšti tai, kas ankstesnėje sutartyje nebuvo taip aišku, ir tapo ETT tyrimo objektu. Tai ir klausimas, ar ETT gali tikrinti, ar priimant BUSP teisės aktus nebuvo pažeista EB kompetencija, ir galimybė taikyti sankcijas prieš asmenis. Tačiau Teismo jurisdikcijos reglamentavimo pobūdžio pakeitimas bei trijų ramsčių sistemos panaikinimas leidžia spėti, kad taip buvo atvertos galimybės aiškinti ETT jurisdikciją plačiau, kaip suteikiančią jam ir galimybę priiminti prejudicinius sprendimus BUSP klausimais, ir teikti išankstines nuomones dėl BUSP tarptautinių sutarčių suderinamumo su ES sutartimi ir Sutartimi dėl ES veikimo.

Reikšminiai žodžiai: bendra užsienio ir saugumo politika (BUSP), Europos Sąjungos Teisingumo Teismo (ETT) jurisdikcija, Lisabonos sutartis, teisė kreiptis į Europos Teisingumo teismą, efektyvi teisinė apsauga.

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