The Maastricht Treaty and the ECJ in the light of its recent case law

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Abstract

The Maastricht Treaty introduced the Court of First Instance into primary law of the Union as a first instance court in certain matters. This paper discusses the evolution of the system of appeals against the decisions of that court before the ECJ. The development of the case law of the ECJ concerning the sanctioning of Member States for non-compliance with the judgments of the ECJ, which was introduced by the Maastricht Treaty, shows some particularity, as addressed in the second chapter of the paper. EU citizenship is the third topic elaborated on in the paper in connection with the loss of the nationality of a Member State and Brexit. The CFSP, which is also a novelty of the Maastricht Treaty, proves to be a field of ongoing ECJ competence issues, as attested by the recent case law of that court.

Keywords: Maastricht, Court of Justice of the European Union, General Court, sanction mechanism, lump sum or penalty payment, EU citizenship, CFSP

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1. Introduction

With the adoption of the Maastricht Treaty[1], the then twelve Member States established new legal bases for cooperation within the European Community, introduced the principle of subsidiarity[2] and, along with that, modified and extended the jurisdiction of the European Court of Justice (ECJ). The Maastricht Treaty opened the way for cases with new themes and topics and established new rules for the organisation and the powers of the ECJ. As to the former, some of the new fields of primary law included trans-European transport, telecommunications, energy networks, environment, consumer protection, promotion of European culture, and preparation of the European Monetary Union[3], all of which over the last thirty years have evolved into separate chapters of EU law. Of these, I would like to highlight particularly EU citizenship. Another significant change has been the introduction and regulation of the Common Foreign and Security Policy in primary law. I will present a few reflections on this topic based on the recent case law of the ECJ. As regards the rules directly affecting the ECJ, this is where I shall start my presentation.

2. Court of First Instance – the General Court

The Maastricht Treaty introduced two important changes regarding the judicial architecture. The first is the introduction of the Court of First Instance into primary law, the second is the creation of a new procedure for fining (sanctioning) Member States for non-compliance with judgments of the ECJ requiring fulfilment of an EC Treaty obligation. I will first touch briefly on the significance of the new Court of First Instance and then on the new areas of jurisdiction of the ECJ.

The Single European Act, which was signed in 1986 and entered into force on 1 July 1987, allowed for the establishment of a Court of First Instance of the European Communities. To this end, the Council was authorised to set up such a court by unanimous decision, after consulting the Commission and the European Parliament. The Council took this decision in 1988, and the Court of First Instance became operational in September 1989, entrusted with jurisdiction to hear and determine certain cases at

1 Anderheiden, 2018.

2 Article G (5) of the Treaty of Maastricht introduced Article 3b in the Treaty establishing the European Community.

3 Additional topics: Agreement on Social Policy, European Union Citizenship, Economic and Monetary Policy, European Monetary Union.

first instance, notably competition cases and staff cases. This provided for a two-tier court system.[4]

Following this significant change, judgments and orders adopted at first instance can be appealed to the ECJ by requesting a review – limited to points of law – of the decisions adopted by the Court of First Instance.[5] Over the years, the division of the workload between the two courts has changed significantly. In 2009, the Court of First Instance became the General Court. After the reform of the General Court in 2015,[6] the latest reform was formally launched about six months ago by the ECJ itself.[7] Extending the 2019 reform, the recent proposal of the ECJ provides for the extension of the mechanism for determining whether an appeal is allowed to proceed against judgments or orders of the General Court to other matters.

In addition to the current matters[8], it would be extended to decisions of independent boards of appeal of the following authorities: (1) the European Union Agency for the Cooperation of Energy Regulators; (2) the Single Resolution Board; (3) the European Banking Authority; (4) the European Securities and Markets Authority; (5) the European Insurance and Occupational Pensions Authority; (6) the European Union Agency for Railways.[9] As a consequence, the General Court would become the forum that ultimately decides on certain EU law issues, an EU administrative court with one instance, as is already the case, for example, in intellectual property law disputes as a result of the 2019 reform. This is a fundamental and significant change in the judicial architecture of the European Union which renders the General Court even more significant, although statistics show that on average, 20% of the approximately 800–900 decisions taken by the General Court each year are appealed by

4 Article G (50) of the Treaty of Maastricht introduced the new Article 168a. After the fundamental reform of the Court of First Instance / General Court in 2015, a new reform is ongoing (see Note 7 above).

5 The procedural changes were introduced in certain type of actions in 2019, see [Online]. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/cp190053en.pdf. (Accessed: 9 December 2023).

6 Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

7 Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union [Online]. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf. (Accessed: 9 December 2023).

8 The European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency and the European Union Aviation Safety Agency, respectively.

9 In addition to the decisions of the General Court relating to the performance of a contract containing an arbitration clause, within the meaning of Article 272 of the Treaty on the Functioning of the European Union, proposed to include the "filtering" system of preliminary authorisation of an appeal.

the parties.[10] These procedural changes will further increase the importance of the General Court which decides at the final level in several matters of European law.[11]

The second main element of the currently pending reform proposal is to have the General Court deal with references for preliminary ruling in certain areas, such as VAT or excise duty.[12]

3. Sanctioning Member States for non-compliance with the judgments of the ECJ

The new powers introduced in the Maastricht Treaty allow the ECJ to impose a fine on a Member State that does not comply with an ECJ ruling.[13] Under the current rules, the applicant in an infringement action is the Commission under Article 260 (1) of the TFEU, which brings the action before the ECJ following a preliminary procedure. Several judgments can be mentioned, for example, as Italy failed to enforce the 2012 State aid judgment[14], the ECJ in 2020 imposed a fine of EUR 7.5 million – known as a lump sum payment – and a daily penalty payment of EUR 80,000 for the period until the enforcement of the judgment (C-576/18). In another 2018 judgement, Slovakia was ordered to pay a lump sum payment of EUR 1 million and a daily penalty of EUR 5,000 for non-enforcement of a 2013 ECJ judgment for breaching EU environmental rules. The amount of the fine is proposed by the Commission, which issued a communication on its calculation.[15] The ECJ emphasised that it was not bound by the proposal of the Commission concerning the calculation and amount of the fine. The communication of the Commission should serve transparency, foreseeability and legal certainty in the application of the relevant rules rather than imposing constraints on the ECJ.

Case C-204/21 concerned the infringement of EU law by a reform of the Polish judiciary, including the creation of a disciplinary chamber within the Supreme Court. In parallel with the case, the Commission requested an interim measure, in respect of which the Vice-President of the ECJ, acting as a single judge, by order of

10 The status and history of the Civil Service Tribunal, which ceased its activity on 1 September 2016 and the competence of which was transferred to the General Court, is not discussed here.

11 The possibility of revision before the ECJ is very restricted with respect to the final judgments of the General Court.

12 When the Court of First Instance began its work, the necessity of an Advocate General was considered, but there were only four cases with an Advocate General involved.

13 Article G (51) of the Treaty of Maastricht reformulated Article 171.

14 C-243/10, EU:C:2012:182 of 29 March 2012, relating to the decision of the Commission of 2 July 2008.

15 Recently, Communication from the Commission – Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union infringement proceedings (2022/C 74/02).

14 July 2021, suspended the application of certain Polish legislative measures until the delivery of the judgment in the main case. The Commission then argued that Poland had failed to comply with the Vice-President's order and therefore initiated a separate infringement procedure. Poland took the view that the Vice-President of the ECJ, acting as a single judge, is not entitled to render a new interim order because of failure to enforce a previous one, that there was essentially no legal basis for such a decision, and that in any event it should be issued by the Grand Chamber of the ECJ (a panel of 15 judges).[16] Poland also referred to a previous case, Case C-121/21 R Czech Republic v Poland (Turów lignite mine), where in the first order of 21 May 2021, the Vice-President required the immediate discontinuation of mining activity at the Turów mine, and following the order of 20 September 2021, the Vice-President ordered Poland to pay a daily penalty of EUR 500,000. In Case C-204/21, Poland argued that the determination of the amount of the periodic penalty payment – its basis and its calculation – was not reasoned in any way in the Turów mine interim order of the Vice-President.[17] The Vice-President of the ECJ, acting as a single judge in the Polish disciplinary chamber case, granted the Commission's request and, by order of 27 October 2021, ordered Poland to pay a periodic penalty payment of EUR 1 million per day for failure to comply with the previous interim order until Poland complies with the previous orders or until judgment in the main proceedings is delivered. After this decision, Poland requested the revocation of that order and a reduction in the penalty imposed, which the Vice-President granted by order of 21 April 2023 by reducing the amount to half million euros per day.[18] The judgment in the main case was delivered on 8 June 2023, declaring the condemnation of Poland.

The above shows that this addition to the jurisdiction of the ECJ that the Maastricht Treaty introduced into EU law evolved in a relatively short period of time and under rather peculiar circumstances, leading (amongst other things) to an increase in the significance of interim orders. How this situation will develop in the future and which Member States will be affected by these new competences depend essentially on the Commission[19]. On the one hand, the infringement procedures initiated by the Commission against a Member State follow a consolidated case law regarding the amount of the penalty, on the other hand, the interim orders of the Vice-Presidents of the ECJ show a new trend, highlighting the discretionary power they have

16 In case C-441/17 R, EU:C:2017:877 of 20 November 2017, Commission v Republic of Poland, the interim order was rendered by the Grand Chamber; however, the previous order, C-441/17 R, EU:C:2017:622 of 27 July 2017, Commission v Republic of Poland, in the same case, was rendered by the Vice-President.

17 See points 50–51 of the order.

18 C-204/21 R-RAP, EU:C:2023:334 of 1 April 2023, Commission v Republic of Poland (Indépendance et vie privée des juges).

19 Or, as the Turów mine case shows, another possible plaintiff, Member State.

in that context.[20] Some authors have assessed the effectiveness of the infringement procedure in connection with the new legal instrument of EU law – the withholding of EU funds to enforce rule of law principles.[21] Without examining the factual and legal basis of this new instrument and its recent practice, the question is rather to what extent the imposition of such a fine is effective and, when it is not complied with, what impact it has on the credibility of EU law and its enforcement, and on the ECJ's perception in general.[22]

4. EU citizenship

EU citizenship was established by the Maastricht Treaty[23] thirty years ago, its basic rules in their current formulation are laid down in the Treaty on European Union in Article 9, and in the Treaty on the Functioning of the European Union in Article 20.[24] The wording of the provision is clear: 'Every person holding a nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be complementary to national citizenship and not a substitute for it.' Article 20 (2) TFEU lists various elements of this right: the right to move and reside freely, the right to vote and stand as a candidate in elections to the European Parliament, diplomatic and consular protection, the right of petition, the right of access to the European Ombudsman and the right of appeal to EU bodies. Each right is further detailed in Articles 21–24 TFEU, which relate to Articles 39–46 of the Charter of Fundamental Rights. Over the last thirty years, these rules and the secondary legislation based on them have enabled the concept of EU citizenship to make a significant contribution to judicial practice and become one of the strongest catalysts for the development of EU law (together with the requirement of equal treatment and the rights enshrined in the Charter of Fundamental Rights). In particular, freedom of movement and residence has generated new momentum in areas, such as social entitlements, taxation, the right to university education, educational benefits, language use in criminal proceedings, family name choice and data protection, to name a few examples of the ever-widening scope of the application of EU law.[25]

20 In case C-441/17R, EU:C:2017:877 of 20 November 2017, Commission v Republic of Poland, the interim order of 20 November 2017 of the Grand Chamber required a daily penalty of EUR 100,000 (see point 118 of the interim order, under certain conditions).

21 Nguyen, 2021.

22 Gibson and Gregory, 1998, pp. 63–91.

23 Point C of Article G of the Maastricht Treaty on European Union inserted Articles 8–8e (five articles). Point 1 of Article 8 declares that Citizenship of the Union is hereby established.

24 Ehlermann, 2013, pp. 481–490.

25 Gyeney and Szabó, 2023.

In the context of the jurisprudence relating to certain social rights of EU citizens, we see that, since 2004, access to social benefits for economically inactive EU citizens in a Member State other than that of their nationality or of their original residence has been significantly affected by the economic interest of that other Member State.[26] The case law indicates an extensive consideration of Member States' interests in the field of the rights that arise from EU citizenship and can be claimed under EU law.

Family members of EU citizens from third (non-EU) countries enjoy derived EU rights stemming from the family-law relationship with the EU citizen. Thus, the right of residence of a person with such a status is essentially linked to that of his/her EU relative. The benefits under EU law to which the child is entitled directly affect the legal situation of the third-country parents. This also shows the spill-over effect of EU citizenship. One of the strong points of EU asylum and immigration law is that it allows family relationships to break through even strict legal walls: family relationship, child-parent or spousal relationship has been the basis of numerous exceptions in this field of EU law, demonstrating the European Union's appreciation of the importance of family-related values.[27]

EU citizenship establishes a direct legal link between the citizens of the Member States and the European Union, while it remains attached to national citizenship, nationality. The link between EU citizenship and Member State nationality has raised a number of questions, some of which are currently pending before the ECJ. The baseline of the problem is that while legislation on nationality is an exclusive competence of the Member States, loss of nationality entails the loss of EU citizenship together with the broad range of rights arising from it. Bearing this in mind, the ECJ has ruled that the acquisition and deprivation of nationality of a Member State may be subject to certain limitations stemming from EU law. According to the case law, in exceptional cases, EU citizenship can provide protection against the loss of nationality. The rules on the loss of nationality must not disregard the principle of proportionality. Proportionality first and foremost requires an individual assessment of the consequences of the loss of nationality for the persons concerned, with special attention to the loss of rights attached to EU citizenship. While each Member State is free to determine the substantive legal elements of its nationality policy, deprivation of nationality cannot take place automatically without such an examination.

In Case C-689/21, the question was whether the requirements of EU law can put limitations on the application of certain rules on the statutory loss of nationality that is based on lack of attachment between the citizen and the Member State of nationality. The applicant in that case lost his Danish nationality by the force of law at the age of 22 based on the fact that he spent no more than 44 weeks in the country altogether until that age. When turning 22 years old, the applicant no longer had

26 Gyeney and Szabó, 2023, Chapter 3.

27 Recently, C-273/20 and C-355/20 joint cases, C-279/20, EU:C:2022:617 of 1 August 2022, Bundesrepublik Deutschland (family unification); and C-279/20, EU:C:2022:618 of 1 August 2022, Bundesrepublik Deutschland.

the option of an individual assessment of his case by the national authorities. In his opinion published on 26 January 2023, Advocate General Szpunar advised the ECJ that the statutory loss of nationality which results in the loss of EU citizenship must *in all cases* be subject to an individual assessment, including, where appropriate, the possibility of restoring the person's nationality with *ex tunc* effect. This case provided the ECJ with the opportunity to further clarify what requirements can be derived from EU law with regard to the protection of EU citizenship. The ECJ followed the opinion of the Advocate General in so far as it accepted that on the basis of the principle of effectiveness and proportionality, the Member States shall provide the opportunity, for the person concerned, to lodge, within a reasonable period of time, an application for the retention and recovery of their nationality. In the context of that procedure, the competent national authority shall examine the proportionality of the loss of the nationality from an EU point of view and, where appropriate, allow the retention and recovery *ex tunc* of that nationality. In the view of the ECJ, the Danish model of loss of nationality based on the pure lapse of time, after attaining the age of 22, in the absence of a genuine link between that person and the Member State concerned, and without prior notice to the person by the Member State about the potential loss of nationality and its consequences, does not comply with the principle of effectiveness and proportionality. However, with all those principally procedural guarantees ensured – such as proper prior notice to the person concerned, the possibility to lodge an application at a certain age, an individual assessment by the authorities – as set forth by the ECJ in its judgment, the Member State shall remain competent to lay down the conditions for the acquisition and the loss of nationality, in connection with a genuine link between the state concerned and its citizens.

That being said, the latest rulings of the ECJ establish that once a Member State has left the European Union, the national of that (former) Member State can no longer rely on any of the rights attached to EU citizenship. The case law that has developed in the context of Brexit clearly and very firmly state the well-known dictum: 'Brexit means Brexit'. The withdrawal of the United Kingdom leads to the automatic loss of EU citizenship and surrender of the rights deriving from that status.

In the case of Préfet du Gers (C-673/20), decided in 2022, the referring court questioned the validity of the Withdrawal Agreement based on which British nationals who had transferred their residence to a Member State would be deprived of their right to vote and to stand as a candidate in municipal elections in their Member State of residence. The ECJ made it clear that British nationals no longer enjoyed the status of citizen of the European Union and pointed out that EU citizenship required possession of the nationality of a Member State. Since United Kingdom nationals have been, from 1 February 2020, nationals of a third country, they lost the status of citizen of the Union as from that date. This is an automatic consequence of the sovereign decision taken by the United Kingdom to withdraw from the European Union. Therefore, neither the principle of proportionality nor any other general principle of EU law may be called upon to challenge the validity of that decision or deny its legal effects.

Although EU citizenship is indeed destined to be a fundamental status, it remains rooted in Member State nationality. The argument, therefore, that once EU citizenship has been acquired, it can no longer be withdrawn, cannot hold true. Even though the ECJ has established important safeguards around EU citizenship, the consequences of losing EU citizenship cannot be circumvented.[28] The line remains clear between the rights of EU citizens and non-EU citizens, there is no third way.

5. CFSP

Moving on to another important achievement of the Maastricht Treaty, cooperation between the Member States in the field of common foreign and security policy (CFSP) was provided with a legal basis in 1992, established as the second pillar of the European Union.[29] Although in 2007 the Treaty of Lisbon abolished the pillar structure, the CFSP retained its intergovernmental nature and its separation from other EU policies. In matters falling within this field of law, the Union Courts have only exceptional and limited jurisdiction (Article 24(1) TEU and Article 275(1) TFEU). More precisely, they have jurisdiction to review CFSP decisions on restrictive measures against natural and legal persons (Article 275(2) TFEU). Furthermore, they may monitor compliance with the principle that the implementation of the CFSP cannot affect the European Union's non-CFSP external action and *vice versa*.

The text of the Treaties seems to be clear in that regard. However, the determination of the details of these powers in CFSP-related matters is far from being evident and, moreover, their scope is less constrained than it might appear at first sight. The question of which issues fall within the jurisdiction of the ECJ, and which fall within the jurisdiction of national courts is often highly debated. Indeed, the ECJ has a major role in developing and defining the precise scope of its jurisdiction in CFSP-related matters. It follows from the case law that the limitations on its jurisdiction in CFSP-related matters must be understood as an exception to the general rule that the Union Courts shall provide for effective judicial review in all matters of EU law (under Article 19 TFEU). Any deviation from this requirement is an exception and, as such, has to be construed narrowly.

This narrow interpretation means, among others, that the mere fact that a decision is adopted in a CFSP context does not in itself mean that it is excluded from the jurisdiction of the Union Courts. This was the view taken by the ECJ in the case

28 In the "Pancharevo" case – C-490/20, EU:C:2021:1008 of 14 December 2021 – the ECJ considered that it was irrelevant in the case that one of the parents of the child concerned was a national of the United Kingdom, which is no longer a Member State (p. 66).

29 Title V Provisions on a Common Foreign and Security Policy of the Treaty on European Union, Article J – Article J.11, and the competence was established by new Article 228a, inserted by Art G (81) of the Treaty of Maastricht.

of *H v. Council.*[30] The case was brought by a staff member of the EU Police Mission in Bosnia and Herzegovina established under the CFSP[31], who was then redeployed to another location in the country. The applicant turned to the General Court, seeking the annulment of the decision taken and also the award of damages. The General Court initially found the case inadmissible on the grounds that the question was related to the CFSP where the Union Courts cannot exercise jurisdiction.[32] On appeal, the ECJ took a different approach and held that the General Court indeed had jurisdiction to hear and determine the case. The ECJ did not deny that the contested decision was related to the CFSP but argued that this alone could not be a reason for establishing lack of jurisdiction. The ECJ found that the decision was also an act of staff management, and thus the General Court had jurisdiction to deal with it as a dispute between the European Union and its civil servants. Consequently, the General Court, and the ECJ in the event of an appeal, have jurisdiction to review such acts. The case was eventually judged on the merits by the General Court and the applicant received compensation.[33]

This case is also an example of the ECJ relying on general constitutional principles of the EU in determining the scope of judicial review in CFSP matters, such as the requirement for complete judicial review to ensure compliance with EU law.

Perhaps the most prominent and interesting ECJ judgement concerning external relations was delivered in 2008 in the case of a Saudi national, Y.A. Kadi (C-402/05 P, 415/05 P).[34] In this case the ECJ established its jurisdiction by relying on another general constitutional principle of the EU, the protection of human rights. The ECJ had to decide whether a Community measure implementing a UN Security Council resolution could be subject to judicial review. The answer was affirmative and the ECJ reviewed the validity of the restrictive measures in the light of the fundamental right to property. The ECJ established that the Community judicature had to ensure complete judicial review of the compliance of Community acts with fundamental rights. Obligations arising from an international agreement cannot prejudice the Community's principle that all Community acts must respect fundamental rights, such respect being a condition of their legality. The ECJ underlined that the European Community did not authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms.

30 C-455/14 P, EU:C:2016:569 of 19 July 2016, H v Council.

31 Council Joint Action 2002/210/CFSP of March 2002 on the European Union Police Mission (EUPM). The EUPM was established to follow on from the United Nations International Police Task Force in Bosnia and Herzegovina.

32 T-271/10, not published, EU:T:2014:702 of 10 July 2014, H v Council.

33 T-271/10 RENV, EU:T:2018:180 of 11 April 2018, H v Council, after an appeal against this judgement, the Court in its judgement C-413/18 P, not published, EU:C:2019:1044 of 9 December 2019, H v Council, partially annulled and resent the case to the General Court. Final judgment: T-271/10 RENV II, EU:T:2020:548 of 18 November 2020.

34 The Kadi judgments were analysed by several authors, see list; Art. 215 TFEU Osteneck, in: Schwarze, 2012, p. 1982.

The Kadi case is also the one where the ECJ first established its jurisdiction to review the lawfulness of so-called "smart sanctions", individual restrictive measures in the area of CFSP. This jurisdiction was then incorporated into EU primary law, providing a legal basis for the review of CFSP sanctions. A literal interpretation of this legal basis in Article 275 (2) TFEU could lead to a conclusion that a direct action for annulment is the only option for reviewing the legality of targeted sanctions. However, in the Rosneft Case (C-72/15), the ECJ in 2017 adopted an interpretation that the legal base provides for review of the validity of decisions on CFSP sanctions, regardless of the type of procedure. Therefore, the Court established its jurisdiction in cases where the validity of the decision is raised as a preliminary question by a national court. In addition, in the case of Bank Refah Kargaran v Council (C-134/19), the ECJ established its jurisdiction to hear an action for damages for the harm caused by a CFSP decision imposing individual sanctions.[35] The Court referred to the requirement of a complete system of legal remedies, and underlined that such review was necessary in order avoid a lacuna in the judicial protection of the persons concerned.[36]

To summarise, both branches of the Union judicature, namely, the General Court and the ECJ, have jurisdiction to review restrictive measures in the area of CFSP. On the one hand, the specific decisions of the Council can be challenged before the General Court and annulled to the extent necessary. In addition, applicants can also bring an action for damages in connection with the unlawfully imposed EU sanctions. As far as the jurisdiction of the ECJ is concerned, it can furthermore rule on the validity of CFSP decisions (restrictive measures) if such a question arises in a preliminary ruling procedure.

The ECJ plays a decisive role in clarifying the scope of review in CFSP matters. I briefly refer here to two pending cases. In the Neves 77 Solutions SRL case (C-351/22), the ECJ has to decide whether it has jurisdiction to *interpret* certain restrictive measures taken in view of Russia's actions. Here, it is not the validity of the CFSP decision that is at stake but the interpretation of its content.[37] Another case, that started before the General Court, is KS and KD v Council and Others (T-771/20, on appeal C-29/22 P). This case concerns a matter which the national court previously refused to hear on the basis, inter alia, that the matter should be decided by the Union Courts. The question is, on the background of the established case law and

35 Former cases before the Court of First Instance: T-184/95, EU:T:1998:74 of 28 April 1998, Dorsch Consult v Council and Commission; T-341/07, EU:T:2011:687 of 23 November 2011, Sison v Council, in which the Court said that the violation of the fundamental rights was not "sufficiently serious" for establishing the non-contractual liability of the Community, para 80.

36 See also the Opinion of AG Capeta in joined cases C-29/22 P and C-44/22 P, EU:C:2023:901, KS and KD v Council and Commission v KS and KD, point 84, that the effective judicial protection shall make possible a claim based on the infringement of the fundamental rights by EU institutions and bodies in the exercise of the CFSP.

37 The validity of the national measure for confiscation of the proceeds of the transaction violated Decision 2014/512/CFSP.

in view of the principle of a complete system of legal remedies, whether the jurisdiction of the Union Courts should be extended to actions for damages outside the scope of individual restrictive measures. The damage claim at stake, based on the infringement of fundamental rights, is an action for damages against the Council, the Commission and the EEAS brought by family members of individuals who were tortured and killed or who disappeared in 1999 in Kosovo. In 2009, the European Union established a Human Rights Review Panel with a mandate to examine complaints of human rights violations by Eulex Kosovo in the implementation of its executive mandate. The review panel is an independent, external accountable body which, after reviewing those complaints, found violation of certain rights of the concerned family members, notably violation of Article 2 (right to life), Article 3 (prohibition of torture) and Article 13 (right to an effective remedy) ECHR,[38] but no proper remedy was given. An action before the High Court of Justice (England & Wales), Queen's Bench Division (United Kingdom) against the European Union on the ground of failure to investigate the war crimes at issue was refused based on lack of jurisdiction. The action for damages was filed with the General Court on account of breach of fundamental human rights, and concerns policy or strategic matters connected with defining Eulex Kosovo's activities, priorities and resources and with the decision to establish a review panel without giving it the power to provide legal aid to qualifying applicants or the power to enforce its decisions or provide a remedy for the breaches found. On 10 November 2021, the General Court dismissed the action for damages based on the lack of jurisdiction.

The judicial review in CFSP-related matters raises a number of complicated and complex questions, some of which are currently pending before the ECJ. Whatever the outcome of these cases may be, it is clear from the existing case law that there are no easy, obvious answers. The general principles of EU law have an important role to play in guiding the interpretation of the legal bases in the Treaties. However, reliance on these principles may at a certain point reach its limits in the sense that the ECJ cannot step beyond the boundaries of its jurisdiction as defined in the Treaties. Although the jurisdiction of the ECJ in CFSP-related matters has seen an important development since its introduction in the Maastricht Treaty, the limits of the scope of judicial review in CFSP-related matters is a legacy of the former pillar structure that has not yet vanished. The extent to which this pillar residue is compatible with some of the foundations of the EU legal system, which is based on the rule of law and a complete system of legal remedies and procedures[39], remains to be decided by the ECJ.

The briefly presented cases show how the novelties of the Maastricht Treaty became the object of the case law of the ECJ and how the abstract rules of that Treaty were transformed into concrete rules of the Union European, and how this case law in interaction with other rules of the Union built new chapters of that legal system.

38 Breitler, 2022.

39 Breitler's analysis goes further in connection with Opinion 2/13 of the Court.

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