Goce Delcev University - Shtip, Faculty of Law

BALKAN

SOCIAL SCIENCE REVIEW

Vol.11

2018

 Address of the Editorial office: Goce Delcev University - Shtip, Faculty of Law, ul. Krste Misirkov bb, PO box 201, 2000, Shtip, Republic of Macedonia www.ugd.edu.mk

URL: http://js.ugd.edu.mk/index.php/BSSR

ISSN 1857- 8799

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341.645.2:355.02(4)

THE PRELIMINARY RULLING PROCEDURE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE COMMON FOREIGN AND SECURITY POLICY

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Abstract

The paper aims to analyze the preliminary ruling procedure before the Court of Justice of the European Union (CJEU) in the area of the Common Foreign and Security Policy (CFSP) through its case-law, in particular through recent court decisions, such as the Rosneft judgment from 28th of March 2017.

The case relates to imposing restrictive measures or sanctions on individuals and legal entities in the field of the CFSP, hence the question of whether the CJEU can have jurisdiction and provide the national courts with an interpretation of EU law in cases which are referred to it by national courts under Article 267 of the Treaty on the Functioning of the European Union (TFEU) for preliminary references, when the subject matter in question is addressed to the CFSP?

In March 2017, the CJEU deciding in the Grand Chamber, affirmatively responded to this issue of jurisdiction. The paper does not go into the analysis of the case itself and the facts, but in the analysis of the judgment, the answer to the question of establishing the jurisdiction, the opinion of the General Advocate, as well as the significance of the judgment in CFSP and the implications arising from "specific rules and procedures" which apply to the law in CFSP.

In the conclusion, the paper refers to some considerations regarding future autonomous choices when individuals and entities are subject of EU's general regime on restrictive measures under CFSP auspices.

Keywords: *Court of Justice, Foreign and Security Policy, preliminary references, sanctions*

Introduction

According the Lisbon Treaty (Treaty on European Union and Treaty on the Functioning of the European Union), the CJEU shall have jurisdiction to review the legality of acts ensuring restrictive measures imposed on individuals and legal entities adopted by the Council in CFSP area, if the individuals or entities prove their individual or direct concern to from those acts. Also, actions could be made against a regulatory act which is of direct concern to them and does not entail implementing measures.[1] Article 263 of the Treaty on the Functioning of the European Union (TFEU) clearly stipulates that individuals may challenge a legislative act, although it is unclear the formulation of the right to access to CJEU, since the concept of regulatory act is not defined, but the term "regulatory act" is more preferred than "act of general application" (Treaty on the Functioning of the European Union, 2012). So far, individuals were faced with certain difficulties in this matter, especially in cases of *Gestoras and Segi* (Court of Justice judgment, 2007) where applicants were not able to refer the case even in front of their national courts since there were no implementing measures.

Also, the Lisbon Treaty put significant attention on Article 24, paragraph 1 of Treaty on European Union (TEU) and Article 215 of TFEU on procedural legal protection. The respect of fundamental rights and freedoms means the protection and respect of appropriate procedural rights of individuals or subjects concerned. In order to guarantee a thorough legal review of decisions that obligate the individuals or subjects to restrictive measures, such decisions must be based on clear and delineated criteria. These criteria should be defined on the basis of the specifics of each restrictive measure.

Even though the Lisbon Treaty allows for the EU to access to the ECHR, it is somewhat inconsistent in that the idea of extending the CJEU's jurisdiction with the right to accept preliminary references from the national courts has not found its place in the amendment to the Treaty. It should be borne in mind that the most significant changes related to the protection of fundamental rights in the EU have emerged as a result of referrals by the national courts for preliminary rulings.

However, although the Treaty does not explicitly provide for the possibility of preliminary references, this does not mean that these are excluded. Since it has been accepted that the CJEU has jurisdiction to consider restrictive measures against individuals and legal entities through direct action, there is no reason why challenging restrictive measures should be limited. Such an argument is drawn from

[1] Article 24, paragraph 1 and Article 275, paragraph 2 of TFEU, according which "the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and 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."

the *Foto-Frost* case (Court of Justice judgment, 1987), according to which the national court must submit a request for preliminary ruling to the CJEU if the issue raised is due to the undertaken CFSP measure (or measure of the then third pillar – Justice and Home Affairs, today Area of Freedom, Security and Justice) that is implemented in the national law and such a measure should have been taken according the TEC.

Although the Lisbon Treaty did not make significant changes to the CJEU's jurisdiction over the CFSP measures, the amendments should be welcomed as they confirm the remedies available to individuals and authorize the CJEU to take into account a greater range of claims than before.

CJEU Jurisdiction on CFSP Matters: the Rosneft Case

The *Rosneft* case refers to EU's restrictive measures regime, also known as sanctions.[2] Individuals subject to sanctions have the possibility to directly challenge them in front of the General Court. Given that *locus standi* of undertaking actions in front of the CJEU as a narrow right, the use of preliminary references, also known as referring from national courts, also functions as an indirect means for individuals and legal entities to access the CJEU for judicial settlement on matters of EU law. What is different in the *Rosneft* case, comparable to other aspects of the CFSP case law and restrictive measures, is that it is the first case where the CJEU's jurisprudence to rule on sanctions was not directly taken in front of the General Court. Instead, the *Rosneft* case arrived in front of the CJEU through the preliminary ruling procedure, as a reference from national court, in this case the High Court of Justice of England and Wales, based on Article 267 of the TFEU.

Restrictive measures are particular in their procedural meaning. First, a CFSP decision is needed, according Article 29 of the Treaty of European Union (Treaty on European Union, 2012). Second, regulation needs to be adopted according Article 215 of TFEU, allowing implementation of sanctions throughout the entire EU. Thus, in the *Rosneft* case, we have CFSP Council Decision 2014/512 (Council Decision, July 2014), CFSP Council Decision 2014/659 (Council Decision, September 2015) and CFSP Council Decision 2014/872 (Council Decision, December 2014), hereinafter referred to as "the Decision". Further, we have Regulation 833/2014 (Regulation, July 2014), Regulation 960/2014 (Regulation, September 2014) and Regulation 129/2014 (Regulation, December 2014) hereinafter referred to as "the Regulation". The Council Decision, where EU member-states act unilaterally as a general rule, came into being as direct result of the alleged actions of Russia in Ukraine. Further, the applicant contested the implementation measures by way of the Regulation adopted by the Government of

[2] Court of Justice, judgment of 28 March 2017, case C-72/15, Rosneft [General Court].

Great Britain as a result of the Decision, of which it was a part. Therefore, the crucial reference is whether the Decision is sufficient or imprecise?

In the *Rosneft* case, the Decision and the Regulation were contested. Still, it is not quite clear whether the CJEU has the jurisdiction to answer the question, having in mind that the first legal act was adopted according CFSP's legal basis, and the second legal act without CFSP's legal basis. Court's jurisdiction regarding the Regulation is unquestionable since it was adopted according to Article 215 of TFEU; however, more considerations and questions arise regarding Court's jurisdiction on the Decision, given its adoption on CFSP legal basis. As a result of previous Treaties revisions, questions on Court's jurisdiction have significantly grown in the past decades. However, the Lisbon Treaty perceived a bold effect that the Court's jurisdiction should be presumed, unless specifically derogated by the Treaties. One of these limitations is acts adopted under CFSP according Article 24, paragraph 1 of TEU and Article 275 of TFEU.

First, Article 24, paragraph 1 of TEU, inter alia, stipulates that "The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union."

Second, Article 275 of TFEU stipulates that the Court have the 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 individuals or legal entities adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union."

This additionally refers to Article 263, paragraph 4 of the TFEU which indicates that "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

The first and second paragraph of Article 263 obviously does not anticipate the possibility for the CJEU being able to answer on questions by national courts according the preliminary ruling procedure. But, as it could be argued by the *Rosneft* case, the Court may afford some possibilities in this area (Lenaerts, Maselis and Gutman, 2014, p. 458), at the same time, confirming that it is by no means a resolved question.

General Advocate Wathelet said that the CJEU has jurisdiction to answer essential questions brought by national courts. Still, how the General Advocate came to this conclusion regarding the treaties and their apparent formulation to exclude Court's jurisdiction on such issues was not totally explained. While the recognition of Court's jurisdiction on CFSP matters, at first sight, is limited by

Article 24, paragraph 1 of TEU and Article 275, General Advocate Wathelet explained a narrow interpretation of Article 263 of TFEU and its lack of foresight to perceive preliminary reference in this area. For the abovementioned Article 24, paragraph 1 of TEU and Article 275 of TFEU, we may assume that there was a need to have the same effect. However, they are differently formulated and therefore, the General Advocate Wathelet held that they might put out the wrong impression that the Court had no jurisdiction. Consequently, Article 24, paragraph 1 of TEU and Article 275 of TFEU enables the Court to "to review the compliance with Article 40 TEU of all CFSP acts" (General Advocate Wathelet Opinion, 2016), regardless of the application in front of the CJEU, whether by direct actions or by preliminary ruling. The General Advocate's Opinion demonstrates how the repetition of primary law provisions might be wrong, when assuming the intention of the Treaty-drafters to have equal or similar meaning. Taking into consideration this part of the General Advocate's Opinion, which is, of course, by its nature, non-binding, what did the CJEU say in its judgment and did it come to the same conclusion?

The Rosneft Case Judgment

In its judgment from 28th of March 2017, the Grand Chamber, before ruling on the merits, had to face the importance of jurisdictional question and struggle more with the admissibility of the jurisdictional question. The EU Council queried whether the referred question by the national court could be answered with regards to the non-CFSP Regulation alone, instead of contesting the validity of the CFSP Decision. So, the Court then would not have to determine any jurisdiction over CFSP, for which the Council always defended from any judicial interruption by the Court.[3] The Court refused this Council's standpoint, recognizing that the national court was the one to put questions to the Court for EU law interpretation. Therefore, the Court had to answer on a question referred by a national court unless there was no legal question or where the problem is hypothetical. Further, the Court indicated that only focusing on consideration of non-CFSP Regulation, and not for the other question, may be inadequate for answering national courts questions. Moreover, despite the clear distinction between CFSP acts and non-CFSP acts, in order to impose a restrictive measure within the EU legal order, the Court underlined that they are inseparably connected. Given how sanctions are imposed within the EU legal frame, it is a perfect demonstration for the possibility of closely connected

[3] For example, see, Court of Justice: judgment of 19 July 2016, case C-455/14 P, H v. Council and Commission [General Court]; judgment of 12 November 2015, case C-439/13 P, Elitaliana v. Eulex Kosovo; judgment of 14 June 2016, case C-263/14, European Parliament v. Council of the European Union [General Court]; judgment of 24 June 2016,case C-658/11, European Parliament v. Council of the European Union [General Court].

relations between CFSP and non-CFSP acts, since the Court in *Kadi* case said that the link occurs when it is made explicitly (Court of Justice judgment, 2008).

However, the Court in the *Rosneft* case assumed that if the later Regulation which implements that CFSP Decision would be declared as invalid that would still mean that a member-state should adjust to a CFSP Decision. Accordingly, in order to annul the Regulation following the CFSP Decision, the Court should have jurisdiction to examine the CFSP Decision.

Since it is decided upon the admissibility of the question of jurisdiction, the Court proceeded to answer the jurisdictional question, where it concluded that "Article 19, 24, and 40 of TEU and Article 275 of TFEU and Article 47 of the Charter of Fundamental Rights must be interpreted as meaning that the Court has jurisdiction to give a preliminary ruling, under Article 267 of TFEU, on the validity of an act adopted on the basis of provisions relating to the CFSP" (Rosneft judgment, 2017, ruling 1-3).

In addition, Court's argument regarding its jurisdiction was not entirely unqualified. The Court imposed two conditions. The first one is that it must refer to Article 40 of TEU for the Court to have jurisdiction to determine the border between CFSP and non-CFSP in its border policy role. The second one allows the court to prove its jurisdiction when the legality of restrictive measures among individuals and legal entities is included.

The notification of Article 40 is significant for the Court. In the past, the CJEU was accused for incorrect use of this Article on clarity regarding the correct boundaries between CFSP and non-CFSP. So far, it has avoided such possibilities which are provided in order to determine the lines for such providing, underlining the fact that CFSP, legally speaking, is the unclear area of the Treaties. The *Rosneft* case likely explains some reasons why Article 40 of TEU was not used by the Court up to now, since "the Treaties do not make provision for any particular means by which such judicial monitoring is to be carried out" (Rosneft judgment, paragraph 62). By that, giving this lack of direction, the Court found itself under the restrictions Article 19 of TEU, which requires the Court "to ensure that in the interpretation and application of the Treaties the law is observed" (Rosneft judgment, paragraph 75).

A decade ago it was maintained that concerns for the rule of law may be used for ensuring the justification of the Court's jurisdiction in CFSP cases on preliminary ruling (De Baere, 2008, p. 183). While this might be a common phrase in number of situations to justify the Court's actions, the CJEU instead of using this argument right here, it went step further and called on the Charter for Fundamental Rights, especially on Article 47 and effective judicial protection and fair trial, ensuring those who possess "rights and freedoms guaranteed by EU law ... should have the right to an effective remedy" (Rosneft judgment, paragraph 73), as a ground for confirmation of this position on its jurisdiction.

From the Court's perspective, it may not want the national courts to challenge EU's legal acts in CFSP. It is a long-standing jurisprudence judgment in place since the *Foto-Frost* case (Court of Justice judgment, 1987), that the possibility to challenge the EU law cannot be made by national courts. By that, the national courts have the possibility only to challenge implementing national measures which are subject of their own domestic legal system, and not the EU legal acts. The freshest example of the Court confirming its jurisdiction in CFSP was the case of *H v. Council*. Contrary to the *H v. Council* case, in which the CJEU confirmed its jurisdiction, it continued to transfer the substantive question back to the General Court for judicial settlement (Butler, 2016, p. 671). The Court in the *Rosneft* case, itself had to continue to answer on substantive questions, which finally, upheld the restrictive measures in question.

Analysis of the Judgment and General Advocate's Opinion

The CJEU and General Advocate's Wathelet Opinion on jurisdictional points can be commented on as disapproval of creating a legal gap from further deprivation of CFSP as a separate part of EU law and ensuring that it is held close to the formal rules of Article 267 of TFEU. If the jurisdiction is confirmed, it may lead the national courts not to send preliminary references in which they seek an interpretation of the EU law. This potential encouraging effect is likely to hamper not only the nature of restrictive measures, but also the coherent interpretation of EU law, for which the CJEU is the main arbiter. In coming to the conclusion that the CJEU has jurisdiction, empowering itself with the ability to respond to substantive matters, General Advocate acknowledged he was in collision with General Advocate's Kokott position stated in Opinion 2/13 for EU's accession to the ECHR (General Advocate Kokott Opinion, 2014). General Advocate Wathelet said that without the CJEU having jurisdiction, it would undermine the Treaties, especially Article 23 of TEU, which guarantees access to a Court and effective judicial protection, although following another alternative method, the Court reached the same conclusion.

Jurisdictional matters are not only meaningless issues in execution of EU's foreign policy, but also contribute to the over reach of EU's procedural law and the constitutional frame in which EU functions. The Court's judgment, confirming its own jurisdiction, when it was questioned, additionally extends the potential for its scope in EU's foreign policy. This brings us to the question of the difference between the Court and the matters that ultimately are based on "sensitive policy areas?" Do the member-states want the Court to have jurisdiction in CFSP? The Treaties are in the best position to prevent this and five out of six member-states which intervened as well as the Council in *Rosneft* case objected that the Court has no jurisdiction to decide on CFSP acts. However, such issues are not unknown to

the Court, as it previously faced with jurisdictional issues in sensitive areas, although in different context in the Area of Freedom, Security and Justice, in *Gestoras and Segi* cases (Court of Justice judgment, 2007). In context before the Lisbon Treaty, the Court stated that in order to reduce its jurisdiction on cases falling outside the Article 35, paragraph 1 of TEU since they are preliminary references, would not be in observance of the law. Therefore, the Court ruled in *Gestoras and Segi* cases that the Court's jurisdiction in that area was permissible.

Taking into account the *Rosneft* case judgment, the CJEU needs to be inventive in the future, knowing what the difficulties were when the Treaties were drafted. For to Court not to confirm its jurisdiction in *Rosneft* case would be contrary to the assumption according which the EU is a "complete system of legal remedies and procedures" as cited in the *Rosneft* case (Rosneft judgment, paragraph 66) and following from the *Les Vert* case (Court of Justice judgment, 1986). Do the Treaties permit the creation of a vacuum where judicial review is excluded or does it provide a judicial review through an acceptable manner? Secondly, Article 19, paragraph 1 of TEU stipulates that the Court "shall ensure that in the interpretation and application of the Treaties the law is observed" and that "member-states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". This, along with the Court's Declaration on the occasion of the 60th Anniversary of the Rome Treaties, one day before the *Rosneft* case judgment, began with the assumption that the EU is a "Union governed by the rule of law" (Court of Justice of the European Union Press Release, 2017). However, such decisive measures are always suppressed by other events and are difficult to fit into recent developments of the General Court, as case of *NF and Others v. European Council* and General Court's Orders of 28th of February 2017 clearly have shown (Orders of the General Court, 2017). It is likely that such issues on the extent of CJEU's jurisdiction in non-CFSP will continue.

Conclusion

The Lisbon Treaty has left several areas open to interpretation as to whether the CJEU will acquire greater jurisdiction, including the right to act upon preliminary references to the CFSP measures. The modification in the manner of the regulation may be sufficient for the CJEU to interpret the ambiguities in favor of establishing jurisdiction in the CFSP areas.

While the *Rosneft* case judgment clarified the scope of the Court's jurisdiction in preliminary ruling cases on CFSP matters, it is questionable why the litigant did not go directly to the General Court with an annulment claim, seeking annulment of the applied restrictive measures. The CJEU hold that the grounds for actions for annulment through direct actions are not the only means for which restrictive measures could be challenged. Therefore, from this standpoint, it may be concluded that the *Rosneft* case opens the ground for future autonomous choice

when legal entities are subject of EU's general regime on restrictive measures under CFSP auspices.

Remaining questions on CFSP legal limitations as a separate area have yet to be answered in a categorical manner. One example is the doctrine of primacy, with complex questions about its applicability in CFSP. Even with this, the jurisdictional issues on CFSP remain. In the recent Order by General Court in *Jenkinson v. Council* case (Orders of the General Court, 2016), it was found that there was no jurisdiction to deal with in a case of employees arising from the Common Security and Defence Policy as an operational part of CFSP.

However, the *Rosneft* case confirms that CFSP is one (small) step towards wider integration with the rest of the EU's legal order. The former judge of the CJEU, Federico Mancini, in a speech in front of the Denmark's Supreme Court said that without the preliminary references system, the "roof would collapse" (Mancini and Keeling, 1991, pp. 2-3). The *Rosneft* case judgment, ensuring that Article 267 of TFEU can be used in preliminary reference on CFSP matters supports such opinion quite firmly.

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