Jurisdiction, rule of law, and unity of EU law in *Rosneft*

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ABSTRACT: This article engages in a critical reading of the treatment of issues concerning the jurisdiction of the European Court of Justice (the Court), the rule of law, and the principle of unity of Union law in the *Rosneft* ruling of March 2017, and offers a contemplation of the nature of the Court's jurisdiction and of its role in the Union legal order. In *Rosneft*, the Court engaged in a judicial correction of the scheme of CFSP remedies in the Treaties. In light of previous developments in case-law, the finding of jurisdiction to hear preliminary rulings on the validity of CFSP acts in *Rosneft* was doctrinally unsurprising. That being said, the justifications offered for that finding in the ruling slightly mistreat both the Treaty text and the case-law upon which they build. The reading given to *Rosneft* in this article suggests that the outcome of the jurisdictional question in the case is centrally based on considerations flowing from the principle of unity of Union law and the *Foto-Frost* maxim. This notwithstanding, the Court's reasoning rested centrally on argumentation on the basis of the principle of rule of law, thus making the justifications seem like a veneer rather than a transparent representation of the logic underlying the ruling. It is suggested that in light of the interests at play, a more open emphasis of all relevant considerations in the ruling would have been both possible and preferable. After sketching an alternative reasoning for the rationale of *Rosneft* and discussing the risk of future expansion of Article 267 TFEU jurisdiction within the field of CFSP, the article concludes by drawing conclusions on the implications of the chosen manner of justification for the Court itself, and on the importance of the Court's self-depiction in *Rosneft* for the broader scheme of the Treaties.

I. Introduction

When describing its own role in the Union legal order, the European Court of Justice (the Court) has developed a steady tradition of referring to its status as a guardian of legality under Article 19(1) of the Treaty on European Union (TEU). The Article famously assigns to the Court the *raison d'être* of ensuring that in the interpretation and application of the Treaties the law is observed. The consequences of the vagueness of this formulation are equally famous: it is widely recognised that 'the law' is not exhausted by a reference to the Treaties alone. Instead, the Court has successfully claimed a prerogative in determining what 'the law' in Treaty interpretation entails. In consequence, the limits of the Court's interpretative leeway are largely self-perceived.[1] Being in charge of 'the law' in all questions that may arise in the EU legal order, the Court even, at times, pronounces on the correct interpretation to be given to the Treaty provisions regulating its own jurisdiction.

This article discusses one such occasion: the *Rosneft* ruling of March 2017 in which the Court was asked to interpret the Treaty Articles laying down its jurisdiction to give preliminary rulings on the

[1] K Lenaerts and J Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20 *Colum. J. Eur. L.* 3, 6.

validity of EU acts adopted under the Common Foreign and Security Policy (CFSP).[2] The aim of the article is to offer a critical reading of the ruling in light of issues concerning the jurisdiction of the Court, the rule of law, and the principle of unity of Union law. It is centrally claimed that in *Rosneft*, the Court engaged in a judicial correction of the scheme of CFSP remedies in the Treaties in order for it to correspond to what the Court perceives 'the law' to require. In light of previous developments in CFSP jurisdiction cases, the outcome of the *Rosneft* case was doctrinally unsurprising – indeed, the Court indeed found itself competent to hear references for preliminary rulings on the validity of CFSP acts. That being said, the justifications offered for that finding in the ruling slightly mistreat both the Treaty text and the case-law upon which they build. The reading given to *Rosneft* in this article suggests that the outcome of the jurisdictional question in the case is centrally based on considerations flowing from the principle of unity of Union law and the *Foto-Frost* maxim. This notwithstanding, the Court's reasoning rested primarily on argumentation relying on the principle of rule of law, thus making the justifications seem like a veneer rather than a transparent representation of the logic underlying the ruling. It is suggested that in light of the interests at play, a more open emphasis of all relevant considerations in the ruling would have been both possible and preferable.

The article will unfold as follows: Section II introduces the context of the *Rosneft* ruling by explaining the CFSP jurisdictional framework and briefly recounting the central case law on the Court's jurisdiction in light of the limiting Treaty provisions and in the context of the CFSP. Section III zooms in on the Court's reading of the Treaties and use of past case law in *Rosneft*. The analysis shows how the Court, adamant about basing its interpretation on the Treaty text, is prepared to go at great lengths in order to accommodate its stance within the bounds of Treaty language. But more importantly, the analysis suggests that the Court's argumentation in *Rosneft* building on the principle of rule of law is somewhat ill-fitting; furthermore, it is based on a slightly mutating representation of the Court's previous rule of law case law. Section IV discusses the possibility of an alternative reasoning and issues left open in *Rosneft*. Section V concludes with some brief remarks on the import of all this for the Court and for the regulation of jurisdiction in the Treaties.

[2] Judgment of 28 March 2017, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (C-72/15), ECLI:EU:C:2017:236.

II. The context of *Rosneft*: (CFSP) jurisdiction in the Treaty framework and in case-law

A. CFSP jurisdiction in the Treaties

The Court's jurisdiction in the field of CFSP is laid down in Articles 24(1) TEU and 275 of the Treaty on the Functioning of the EU (TFEU). According to the last sentence of the second subparagraph of Article 24(1) TEU,

> [t]he Court of Justice of the European Union shall not have jurisdiction with respect to [the CFSP provisions contained in Chapter 2 of Title V of the TEU], with the exception of its jurisdiction 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;

whereas according to Article 275 TFEU,

> [t]he Court of Justice of the European Union 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.
>
> However, 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.

The purpose of Article 275 TFEU is to alleviate the problems relating to the legality review of restrictive measures that existed prior to the Lisbon Treaty. Previously, due to the Court's lack jurisdiction to review CFSP acts, individuals were steered towards indirectly challenging restrictive measure acts by bringing annulment actions against EU implementing measures that were adopted under a non-CFSP legal basis.[3] The aim has thus been to provide a mechanism for individuals to assert their rights directly against restrictive measures that are in breach of the law. However, at the same time, an interest has been acknowledged in safeguarding the restrictive measures regime, which is very political in nature, from unwarranted modification through adjudication. In this way, the Court has not been granted jurisdiction to conduct a validity review *simpliciter* but some caveats have been inserted: express reference is only made to the direct action procedure, leaving it open to interpretation whether preliminary rulings remain barred within the CFSP sphere. It is argued here

[3] See eg Intervention by Koen Lenaerts, Assises de la Justice, 21–22 November 2013, Effective judicial protection in the EU, 8.

that the purpose of the Article indeed seems to have been to rule out the use of the preliminary ruling mechanism in the validity review of restrictive measures.

The choice to disallow preliminary rulings but to nevertheless grant the Court jurisdiction under the direct action procedure may seem confused, as the mere ruling on the validity of an act necessarily entails interpretation. Yet, it can be argued that the perceived nature of the preliminary ruling mechanism[4] entails that the element of interpretation is deemed to be emphasized to a much greater extent in the preliminary ruling context. Another plausible explanation for the Treaty Drafters' preference for limiting the Court's involvement lies in the temporal limitation inherent in the direct action procedure. Applicants under Article 263(4) TFEU are subject to a two months' prescription period, whereas the preliminary ruling scheme does not entail any time bars on Treaty level. Therefore, the availability of the preliminary ruling mechanism could theoretically lead to unpleasant surprises for the CFSP legislator long after the window for direct action has closed. The exclusion of preliminary rulings thus translates into an ability to limit the period of uncertainty over the tenability of a restrictive measures scheme. As noted elsewhere, the merits of the solution of maintaining the patchy nature of the CFSP jurisdictional scheme are dubious when compared to the nature of the EU legal order as sketched by the Court.[5] Nevertheless, the will to limit the Court's involvement becomes apparent upon consideration of the Treaty text.

Articles 24(1) TEU and 275 TFEU are essentially manifestations of the same rule, repeated in the contexts of the general depiction of the CFSP in the TEU, and of the conferral of competences to the Court in the TFEU, respectively. The difference of context is important, for it accounts for the difference in the focus and the level of detail in the wordings of Articles 24(1) TEU and 275 TFEU. Article 24(1) TEU contains a material description of the Court's task in the field of the CFSP and summarily refers to the review of certain decisions as provided for by Article 275 TFEU, whereas Article 275 TFEU approaches the matter from a procedural viewpoint and confers to the Court a jurisdiction to 'rule on proceedings, brought in accordance with the conditions laid down in [Article 263(4) TFEU]'.[6] The discrepant approaches of the two Articles are bound to create confusion.

[4] See e.g. *Opinion 2/13* of 18 December 2014 (*Adhésion de l'Union à la CEDH*), ECLI:EU:C:2014:2454*3*, para. 176, wherein the Court described the preliminary ruling mechanism as "the keystone of the Union judicial system".
[5] P Van Elsuwege, 'Upholding the rule of law in the Common Foreign and Security Policy: H v. Council' (2017) 54 *CMLRev*, 841, 851.
[6] There is disparity between language versions: e.g. the German, Swedish and Finnish version of Article 275 TFEU refer to a jurisdiction to hear "actions" ('*Klagen*', '*talan*' or '*kanteet*', respectively, corresponding to the expression used in Article 263 TFEU) rather than to rule on "*proceedings*" as in the English version. In comparison, the term used by the Swedish and Finnish versions elsewhere where the English version uses the term '*proceedings*' in a similar general sense, is '*tvist*' or '*riita*', respectively, which translate as a dispute; see e.g. Article 277 TFEU. The French version in turn uses

However, the wording of Article 275 TFEU, which is the proper source of the Court's jurisdiction, implies a limiting purpose in expressly referring only to the direct action procedure.[7] Its language seems to suggest a deliberate choice to leave out one tenet of validity review, the preliminary ruling mechanism, and thus to create an exception to the general scheme of judicial protection in the Treaties in the area of CFSP.[8] This reading should not be affected by the fact that Article 275 TFEU refers to 'proceedings, brought *in accordance with conditions*' laid down in Article 263(4). It is not likely that this formulation was to be understood, eg, as purposively allowing for whatever form of procedure would be used as long as the conditions prescribed in the Treaties for direct actions are complied with; for, this would result in an uncharacteristic muddying of the waters between the established forms of procedure in the Treaties.

The limiting purpose of Article 275 TFEU is further supported by the drafting history of the Articles. In the preparation of the CFSP provisions of the draft Treaty establishing a Constitution for Europe, upon which the present Article 275 TFEU is based, the question of granting the Court jurisdiction in the CFSP realm divided opinion. While certain discussants have supported the view that the Court should be granted 'general jurisdiction with powers to control the legality of acts adopted by the Council in the CFSP field', others have opposed *any* grant of powers of legality review out of worries over the efficiency of the CFSP.[9] Notably, the desirability of expanding the scopes of application within the CFSP of the preliminary ruling scheme and direct action rights, respectively, have been treated as separate questions.[10] This background supports a reading which assigns importance to the fact that only the Article 263(4) TFEU procedure is expressly referred to in Article 275 TFEU.

The will of the Treaty Drafters is of course not expressed by the IGC preparing the draft instruments. However, it can be maintained that the *travaux préparatoires* contain valid information of the purpose

'*recours*', a term used elsewhere in the French text of the TFEU on its own where the English version refers to 'actions or proceedings' (see e.g. Article 256(2) TFEU).

[7] Cf. S Poli, 'The Common Foreign Security Policy after *Rosneft*: Still imperfect but gradually subject to the rule of law' (2017) 54 *CMLRev*, 1799, 1810 and 1821–1822. This account does not, however, consider the perks that were potentially strived after with the formulation making explicit reference to only direct actions as a form of validity review, discussed above.

[8] In their observations in the case, all intervening Member States and the Council considered the Court to lack jurisdiction to give a preliminary ruling on the validity of the CFSP act concerned pursuant to Articles 24(1) TEU and 275 TFEU; see para 58 of the judgment as well as para. 66 of AG Wathelet's Opinion in *Rosneft*, ECLI:EU:C:2016:381. This stance has been stated also in the context of *Opinion 2/13*; see para. 131, where the UK, Spanish, Finnish, French and Polish Governments as well as the Council are recorded to hold that the Article "specifically limited reviews of the validity of acts covered by the CFSP to actions for annulment only".

[9] Secretariat of the European Convention, Supplementary report on the question of judicial control relating to the common foreign and security policy, Document CONV 689/1/03 of 16 April 2003, para 2, 4, 5 and 7(c).

[10] Secretariat document (WD 10) of 12 March 2003, annexed to the Supplementary report on the question of judicial control relating to the common foreign and security policy, Part II, para 2 and 3.

of the legislator: insofar as it is conventionally accepted that the explanatory materials accompanying a legislative act may in the future inform the adjudicator, the national legislators' vote to accept the Treaty text can be taken as a simultaneous acceptance of the explanatory drafting materials unless an express dissociation therefrom takes place.[11] Especially in its post-Lisbon case-law, the Court has made a habit of referring to the *travaux* in Treaty interpretations where they support its stance.[12] It is indeed of some interest for the present purposes that the drafting history of Article 275 TFEU has been recalled by two Advocates General who have found that the purpose of the Article is to limit the Court's jurisdiction with respect to preliminary references.[13]

On these grounds, it shall be argued throughout that in Article 275 TFEU, the Treaty Drafters deliberately sought to create an exception to the general scheme of legal remedies and procedures of the Treaties. Next, we shall provide a brief account of the Court's previous case law concerning similar Treaty-based limitations to its own jurisdiction. It shall be seen that there exists a strong tradition of interpreting such limitations narrowly.

B. The case law as it existed prior to *Rosneft*

Rosneft can be placed on two jurisprudential continuums. It can be perceived as another chapter in the development of the Court's doctrine of narrow interpretation of Treaty-prescribed restrictions of the availability of judicial review, and thus placed in the wider constitutional canon. Secondly, from a narrower perspective, it can be viewed as a continuation of the Court's work of defining its jurisdiction within the field of CFSP. These two strands of case law shall be briefly recalled in the following.

The Court has traditionally adopted a permissive stance towards challenges of Treaty-based restrictions of judicial review. The touchstone of this jurisprudence is the *ERTA* ruling whereby it was first confirmed that the potential of EU acts to be subjected to judicial review hinged not on the formal characteristics of the act but on its purpose of producing legal effects.[14] This rationale, centrally resting on a systemic reading of the Treaties in light of the purpose that judicial review

[11] A Ross, *On Law and Justice* (Berkeley: University of California Press, 1959), 143.
[12] See eg *Opinion 2/15* of 16 May 2017 (*Accord de libre-échange avec Singapour*), EU:C:2017:376, paras 59 and 83. See also Lenaerts and Gutiérrez-Fons (n 1), 24.
[13] View of AG Kokott in *Opinion 2/13*, ECLI:EU:C:2014:2475, paras 88–95 and 100–101. Reference is made to AG Kokott's finding also by AG Wahl his Opinion in *H v Council and Commission* (C-455/14 P), ECLI:EU:C:2016:212, para. 63. AG Wathelet in his Opinion in *Rosneft* briefly states his disagreement with AG Kokott's view, stating the rule of law as an overriding concern, see para. 66.
[14] Judgment of 31 March 1971, *Commission v Council* (22/70, *ERTA*), ECLI:EU:C:1971:32, para. 39.

served vis-à-vis the Court's task under Article 19(1) TEU,[15] allowed for the Court to circumvent the limitative Treaty formulations referring to either certain types of acts, or later in *Les Verts* to certain types of institutions as originating legislators,[16] in determining which acts were subjectable to judicial review. In *Les Verts*, the wide reach of judicial review was famously attached to the nature of the then European Community as a Community based on the rule of law.[17]

The practice of the Court of relying on a 'general jurisdiction'[18] conferred by Article 19 TEU is quite unique. To begin with, it can be questioned whether it is not slightly misguided to view the Article as a veritable basis for jurisdiction. For, in the system of the Treaties the purpose of the Article is to lay down the programmatic general task of the Court, which only takes its more concrete form through the provisions of the TFEU containing actual competence bases.[19] The most plausible way, however, of looking at the Court's treatment of Article 19(1) TEU is to assume that it uses the Article as a shorthand – when reference is made to Article 19(1) TEU as a basis for jurisdiction, what is actually meant is the cluster of constitutional principles upon which the Court bases its broad reading of its own powers. It appears that the Court includes among these principles the premise that the Court should be included as often as possible in the forms of judicial protection provided under the Treaties. The potency of the Court's claim for a wide construction of its own powers is great, as illustrated eg by *Chernobyl Regulation*. In that case, the Court found an action for annulment brought by the European Parliament admissible despite the fact that the Treaties did not contain a basis for such a right of action. The constitutional ground for thus creating a right of action for the Parliament was not found in the principle of institutional balance nor in the status of the Parliament under the Treaties, but in *the Court's* role under Article 19(1) TEU.[20] As a result, the Court's reading of its own importance had the practical effect of adding to the prerogatives of yet another Union institution.

The Court has consistently extended the interpretative rationale to the sphere of the CFSP in spite of the special nature of the field.[21] In principle, before and after the entry into force of the Lisbon Treaty,

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[15] At the time, Article 164 of the EEC Treaty; *ERTA*, paras 40–42.
[16] Judgment of 23 April 1986, *Les Verts v European Parliament* (294/83), ECLI:EU:C:1986:166.
[17] *Les Verts*, para. 23.
[18] Judgment of 19 July 2016, *H v Council and Commission* (C-455/14 P), ECLI:EU:C:2016:569, para. 40, refers to the "*general jurisdiction which Article 19 TEU confers on the Court* to ensure that in the interpretation and application of the Treaties the law is observed" (emphasis added here).
[19] Similarly A Arnull, 'Does the Court of Justice Have Inherent Jurisdiction?' (1990) 27 *CMLRev* 683, 683 and 685, characterising the content of Article 19(1) TEU as the Court's "special responsibility" and noting a lack of "jurisdictional significance" with respect thereto, as well as finding the "specific heads of jurisdiction" in the more concrete jurisdictional provisions that followed Article 164 in the EEC Treaty.
[20] Judgment of 22 May 1990, *Parliament v Council* (C-70/88), ECLI:EU:C:1990:217, paras 22–27.
[21] For a fuller account, see e.g. G Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 *EuConst* 673.

the Court has conceded that as a matter 'inherent to the way in which the Court's powers are structured by the Treaties', the Court's jurisdiction to conduct judicial review remained incomplete in the CFSP.[22] However, an *ERTA* style argument relying on the purpose of acts of producing legal effects was already introduced in the field in *Segi* and *Gestoras Pro Amnistia* prior to the entry into force of the Lisbon Treaty.[23] The post-Lisbon case law has affirmed step by step the limited force of the jurisdictional caveats imposed in the CFSP Treaty Articles.[24] On one hand, in the *Pirate Transfer Agreement* cases the Court has established its jurisdiction to review the validity of CFSP acts with a view to their compatibility with Article 218 TFEU when that Article is cited as the procedural legal basis for CFSP decisions pertaining to the conclusion of international agreements between the Union and third parties.[25] In *Elitaliana* and *H v Council and Commission*, the Court has further clarified its reading of its jurisdiction to review the validity of CFSP acts which entail elements from other substantive areas of Union law,[26] finding jurisdiction with respect to these other material considerations on each occasion.[27] Pursuant to the trend detected in this jurisprudence, it has been held in the literature that the CFSP should not be treated as a separate domain but as a part of the EU constitutional order in which certain exceptions to the otherwise applicable constitutional principles have been put in place.[28]

The above presentation has laid out the legislative and jurisprudential context of the *Rosneft* ruling for our present purposes. It has been seen that, on one hand, the Treaties curb the Court's general jurisdiction in the field of the CFSP and, on the other hand, the Court has tended to interpret such exceptions narrowly. Next, we shall discuss the argumentation of the Court in *Rosneft* against the background outlined, and identify issues in the treatment of the question of jurisdiction that encumber the ruling.

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[22] Judgments of 27 February 2007, *Segi and Others v Council* (C-355/04 P), ECLI:EU:C:2007:116, and *Gestoras Pro Amnistía and Others v Council* (C-345/04 P), ECLI:EU:C:2007:115, para. 50 of both judgments; *Opinion 2/13*, para 252–253.
[23] *Segi* and *Gestoras Pro Amnistía*, para. 53 of both judgments.
[24] See e.g. Van Elsuwege (n 5), 841.
[25] Judgment of 24 June 2014, *Parliament v Council* (C-658/11, *Pirate Transfer Agreement with Mauritius*), ECLI:EU:C:2014:2025, paras 69–74, implicitly confirmed in judgment of 14 June 2016, *Parliament v Council* (C-263/14, *Pirate Transfer Agreement with Tanzania*), ECLI:EU:C:2016:435, paras 68–85.
[26] Budgetary provisions of Union law with regard to public procurement contracts charged from the Union budget, and provisions concerning the employment relations of seconded staff members of CFSP missions, respectively.
[27] Judgments of 12 November 2015, *Elitaliana SpA v Eulex Kosovo* (C-439/13 P), ECLI:EU:C:2015:753, paras 41–50, and *H v Council and Commission*, paras 39–59.
[28] E.g. P Van Elsuwege (n 5), 850 and 857; R Wessel, '*Lex Imperfecta*: Law and Integration in European Foreign and Security Policy' (2016) 1 *European Papers* 439; D Halberstam, ''It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *GLJ* 105, 137–139.

III. The treatment of CFSP jurisdiction Articles and rule of law case-law in *Rosneft*

A. The Court's argumentation

The *Rosneft* reference originates in the challenge before the High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court) by PJSC Rosneft Oil Company (Rosneft), the partially state-owned Russian oil company, of national measures implementing EU sanctions imposed on Rosneft under the CFSP. As the national court found that the challenge also indirectly concerned the EU acts at issue, it turned to the Court with a view to determine the validity of the EU acts in question. The national court, however, recognized that the wording of Articles 24(1) TEU and 275 TFEU seemed to propose that the Court did not have jurisdiction to issue preliminary rulings with respect to the CFSP nor the acts adopted on the basis of CFSP provisions, and also posed a question concerning the Court's jurisdiction to provide guidance on the matter.

The apparent purpose of Article 275 TFEU notwithstanding, the Court found jurisdiction to issue preliminary rulings on the validity of CFSP restrictive measures. Against the background of previous case law exhibiting a tendency to circumscribe the effect of Treaty-based limitations of the Court's jurisdiction, such a reading is not entirely surprising. In an illustration of the intensity of the Court's scrutiny of the Treaty provisions limiting its CFSP jurisdiction, Butler has even asked whether the jurisdiction of the Court has been lifted in the post-Lisbon case-law to 'a general principle of Union law'.[29] In this sense, the outcome of *Rosneft* fits the jurisprudential continuum. However, the reasoning provided by the Court for the outcome raises some questions.

The Court's justifications rested on an analysis of the Treaty language and on developments from previous case law. The justifications based on Treaty text can be summarized as follows: According to the Court, the CFSP jurisdictional framework in the Treaties confers upon the Court the jurisdiction to review the legality of restrictive measures. Article 24(1) TEU only refers to Article 275 TFEU with regard to the types of acts subject to this review. As has been established in the Court's case law, the review of legality relies on two complimentary procedures, ie direct actions and preliminary rulings. Preliminary rulings are thus encompassed by the concept of legality review. This general framework of judicial protection extends to the sphere of the CFSP.[30]

Having offered its take on the proper reading of the Treaty text, the Court turned to its own case law for substantiating its argument. According to the justifications of the Court, the availability of the

[29] Butler (n 21), 684.
[30] *Rosneft*, paraa 65–70.

preliminary ruling mechanism is essential for the purposes of securing access to judicial review in situations where, in the context of national proceedings, the validity of both a national implementing measure and the underlying Union restrictive measure act is challenged. This finds support in the rule of law, characterised as one of the EU's founding values; it also stems from the conclusion that, in light of the principle of effective judicial protection enshrined in Article 47 of the Charter of fundamental rights as well as of the Court's task under Article 19(1) TEU, the CFSP exception to the Court's jurisdiction should be strictly interpreted. Lastly, as if for completeness, it is held that, in line with the Court's case law, the power to declare Union acts invalid should be reserved to the Court at the expense of national courts.[31]

The argumentation presents two issues. First, whilst the finding of jurisdiction centrally draws on the principle of the rule of law, it appears as if the rationale guiding the outcome has not been that of securing the rule of law, but of protecting the unity of EU law. This impression becomes apparent when one considers the interpretation given to the CFSP jurisdiction Articles (Section III.B) and is further strengthened when one considers the factual premises of the Court's reference to the rule of law in the case (Section III.C). Secondly, perhaps because of the discord between the rationale and the justification, the Court has been brought to rely on its previous rule of law case law in a manner which mutates the original logic of that case law (Section III.D). These issues shall be discussed next.

B. Treaty interpretation in *Rosneft*: reading *Foto-Frost* into Article 275 TFEU

It is noteworthy that the Court's argument deliberately takes the Treaty language as its first premise and that the Court was keen to find support for its stance in the Treaties. However, the Court's treatment of the Treaty text has an air of a forced prelude preceding the actual argument, and it resorts to an interpretation which rewrites the apparent intended effect of the Treaty text.

The key means of interpretation employed by the Court is a markedly systemic and selective reading[32] emphasizing the Treaty provisions that suit its construction, and downplaying the limiting factors inserted by the Treaty Drafters in Article 275 TFEU. The purpose of the interpretative endeavour seems to be to show that the Treaty text does not *absolutely* outlaw the interpretation that the Court is about to suggest.[33] The Court anchors its interpretation to the more benign language of the TEU:

[31] *Rosneft*, paraa 71–81.
[32] For similar analysis, see P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 *ICLQ* 1, 24. For an account supporting the Court's reading, cf. Poli (n 7), 1821–1823.
[33] See *Rosneft*, para. 70, where the Court contends that '[n]either the EU Treaty nor the FEU Treaty indicates that an action for annulment […] constitutes the sole means for reviewing the legality […]' and the opening of para 71, where the "however" marking the passage to the teleological argumentation could as well be read as a be that as it may'.

giving Articles 24(1) TEU and 275 TFEU a spin, it characterises *both* of them as conferring the Court the jurisdiction to *review the legality of acts* of the EU and ignores the express reference in Article 275 TFEU to a jurisdiction to rule on Article 263(4) TFEU proceedings.[34] This concentration on Article 24(1) TEU can be faulted because for Article 24(1) TEU, as a CFSP Treaty provision, is beyond the Court's jurisdiction according to the very same Article. The Court's contention[35] that the reference in Article 24(1) TEU to Article 275 TFEU should only be read to cover the types of decisions subject to legal review is an interpretation that technically stays within the imaginable ambit of the language of the Articles but results in the somewhat unsatisfactory outcome of stripping the language of Article 275 TFEU its apparent purpose. All in all, the Court is able to construe an argument which does not quite depart from Treaty language, but does so somewhat strenuously; against both the textual and historical information available, this construction is not obvious.[36]

The disregard of the textual and historical evidence of an intended jurisdictional restriction in Article 275 TFEU implies that the Court takes issue with the Treaty Drafters' solution. It identifies one concrete problem which is likely to stem from it: when individuals want to challenge the validity of national measures implementing restrictive measures adopted under the CFSP, the validity of the underlying EU measures comes indirectly to question as well.[37] This is why the Court considers the national courts' ability to refer questions regarding validity to the Court essential: in light of its established *Foto-Frost* principle[38] national courts have no business unilaterally declaring on the validity of EU acts but are required to refer the question for the Court's preliminary ruling. This is a consideration that seems to not have weighed greatly in the formulation of Article 275 TFEU; and in consequence, the Court is required to read it into the *ratio* of the Article on its own initiative. This is the understated key rationale of the *Rosneft* ruling, and it can be understood against the interpretation that the Court has given its own role under the Treaties.

Article 19(1) TEU entails not only an interpretative entitlement but also a substantive need and an interpretative requirement that shape the Court's position. First, the Court's role entails a pressing need for access to doctrinal discussion. This translates into a question of jurisdiction. It explains the tendency of the case law to expand the Court's review powers by reference to Article 19(1) TEU.

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[34] *Rosneft*, paras 65–66.
[35] *Rosneft*, para. 70.
[36] For perspective, at the Assises de la Justice, a discussion forum on EU justice policies hosted by the Commission in 2013, the new Article 275 TFEU was characterised by Koen Lenaerts, then Vice-Precident of the Court but writing in personal capacity, as *entitling private applicants to bring annulment actions against CFSP measures.* See Intervention by Koen Lenaerts, Assises de la Justice, 21–22 November 2013, Effective judicial protection in the EU, 8.
[37] *Rosneft*, para. 71.
[38] Judgment of 22 October 1987, *Foto-Frost* (314/85), ECLI:EU:C:1987:452.

The preliminary ruling mechanism in particular has been of paramount importance in the Court's work in developing the EU law. Accordingly, a jealous guardianship of its Article 267 TFEU prerogative seems to be in-built in the Court's self-image.

Secondly, besides assessing the breadth of its own jurisdiction *required* in light of its role under Article 19(1) TEU, cases such as *Rosneft* call on the Court to rule on how it perceives the limits of its own interpretative leeway *granted* in light of the same Article. While the Court exercises considerable influence on the direction in which the EU constitution develops, Article 19(1) TEU imposes a formal qualification of the Court's room for manoeuvre: the Court is also bound to act in observance of 'the law' and to fit its construction within what is considered reasonable in light of the Treaty text and telos. The constitutional environment in which the Court operates is, however, a riptide of conflicting orders. Where the Member States as the Treaty Drafters attempt to depart from the Court's constitutional ideas, there are competing claims as to the content of 'the law'. The communication and justification of the Court's authoritative interpretation in such situations is a delicate balancing act seeking to maintain the Court's legitimacy. This may lay behind the choice in *Rosneft* to try and force the interpretation within the Treaties' language.

The Court's position is not certainly not enviable. Its construction of the CFSP jurisdictional regime is guided by its conviction of the paramount value of the *Foto-Frost* principle to which Article 275 TFEU makes a glaring exception. But in proposing an interpretation that would alleviate this fault in the Treaty text it ends up raising more questions than it answers. It can be asked whether the Court's reasoning would be more convincing and legitimate if it openly stated its disagreement with the Treaty Drafters' view and addressed head-on the discrepancy that it sees between 'the law' and the Treaty text – for it is inevitably bound to disrespect that text as a result its chosen interpretation.

C. Is the issue in *Rosneft* essentially a rule of law problem?

As has been argued above, *Rosneft* is to be read as proof of the crucial importance attached by the Court to the constitutional maxim relating to the unity of EU law, and to its own position as the sole performer of validity review; for the Court, *Rosneft* ultimately seems to be a question concerning the scope of application of the *Foto-Frost* doctrine rather than an exercise of interpreting Article 275 TFEU. These concerns are not, however, brought forward as the primary tenet of the Court's

justifications; instead, the Court refers to the maintenance of the rule of law.[39] This solution raises the question whether the argument from the rule of law is indeed necessary in the case.

The central premise that the Court adopts in its argumentation is that *judicial relief were absent* unless validity review through the preliminary ruling mechanism is accepted in the sphere of the CFSP. This premise is flawed.

In *Rosneft*, despite the potential inapplicability of the preliminary ruling mechanism, recourse to the Court existed and, indeed, was relied upon by the applicant: Rosneft had already previously brought an action under Article 263(4) TFEU that was still pending before the General Court when the reference for the preliminary ruling was issued.[40] Against this background, instead of opening the preliminary reference route, it would have been conceivable for the Court to require the national court hearing the indirect challenge of the EU's restrictive measure to stay proceedings whilst a direct action is pending before the EU courts. Butler has rightly pointed out that even where the General Court found that an applicant such as Rosneft lacked standing under Article 263(4) TFEU, the right of appeal to the Court would provide an added level of protection.[41]

On the other hand, even where a private litigant lacked standing or had foregone their right of action under the prescription rule of Article 263(6) TFEU, the closing of the direct action route would not necessarily require the Court to open a preliminary reference route in order to secure the availability of judicial review. Suggestions have been made, eg by AG Wahl in *H v Council and Commission*, concerning arranging legal protection for individuals in the CFSP context in a manner that respects *Foto-Frost* exclusivity but still abides by the letter of the Treaties. In AG Wahl's model,[42] where recourse to the Court was missing due to the CFSP jurisdiction carve-outs, the Court would neither surrender validity review to national courts nor gain novel powers unsupported by Treaty text. Instead, the national courts would provide relief in the form of case-by-case suspension of the applicability of CFSP acts whose validity was in doubt, and it would then be for the Union legislator to revise the acts to dispel any doubts of illegality.[43]

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[39] *Rosneft,* para. 72.
[40] *Rosneft*, para. 37.
[41] Butler (n 21), 685.
[42] Opinion of AG Wahl in *H v Council and Commission*, paras 101–103.
[43] Cf. Van Elsuwege (n 5), 856–857, rejecting both the approach of AG Kokott in *Opinion 2/13* and AG Wahl in *H v Council and Commission* and finding that 'the *Foto-Frost* logic can only be applied to the extent that the ECJ is competent to address preliminary questions from national courts and tribunals'. Van Elsuwege finds support to his view in Article 23 TEU, extending the founding values of the Union, such as the rule of law, within the realm of the CFSP; but, as

Finally, in light of the two-level judicial protection scheme of Article 19(1) TEU, maintenance of the rule of law would not necessarily require the involvement of the Court at all. In the field of CFSP, the need for the inclusion of national courts in the system of remedies is pronounced as the Court's jurisdiction in the Treaties is not comprehensive. As proposed by AG Kokott in *Opinion 2/13*, access to a court still exists as, where the Court lacks jurisdiction, issues of EU law are to be decided by national courts.[44] The Court, however, has thus far appeared averse to including national courts in the CFSP remedies scheme, for which it has rightfully been criticised by Koutrakos.[45] The role of national courts is indeed key from the vantage point of the rule of law, understood here in accordance with the Court's own formulation as entailing 'effective judicial review designed to ensure compliance with provisions of EU law'[46]. Ultimately because of national courts, in the circumstances of *Rosneft*, access to *a court* remained open at all times.

Alternatively, paragraphs 65–75 of the *Rosneft* ruling may be read as a qualification of the concept of the rule of law in the EU context: it is possible to interpret the Court as saying that the rule of law requires the existence of judicial supervision not by *a court*, but by *the Court* itself. This reading would not just tie the concept of a 'complete system of legal remedies and procedures'[47] established under the Treaties to the notion of the rule of law in the traditional instrumental sense of ensuring that there exists *some form* of recourse to judicial review.[48] Instead, it would virtually equate the rule of law with a reading of the Treaty system of remedies that relies solely on the Court's involvement, and compromises the two-tier structure of Article 19(1) TEU. This seems to be what AG Wathelet has leaned towards in his Opinion in *Rosneft.*[49]

In theory, the past rule of law case law can be interpreted in support of such a Court-centric concept of the rule of law. For example, in *H v Council and Commission* the Court has visibly sought to avoid the creation of a situation where EU acts cannot be reviewed by the Court and national courts have to be resorted to for judicial protection. Yet, if the conclusion were accepted, the question would arise how such conceptualization of the rule of law could be consolidated with the fact that the Court

maintained here, it can be questioned whether the principle of rule of law is at all jeopardised in the case that preliminary rulings are excluded in the validity review of CFSP acts.

[44] View of AG Kokott delivered in connection to *Opinion 2/13*, paras 95 and 102.

[45] Koutrakos (n 32), 29 *ff.*

[46] *H v Council and Commission*, para. 41.

[47] *Rosneft*, para. 66.

[48] *Les Verts*, para. 23.

[49] AG Wathelet's Opinion in *Rosneft*, para. 66.

nevertheless has previously accepted that exceptions could be made in the Treaties to its jurisdiction in the field of the CFSP.

As will be recalled, in *Opinion 2/13*, the Court did not flag any rule of law issues with respect to the CFSP but seemed to accept a complete lack of judicial review absent its own power.[50] The Court confirmed that 'as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice',[51] and hence accepted a lacuna in its jurisdiction. Because of this lacuna, the Court maintained, judicial review of those CFSP acts would be left 'exclusively to a non-EU body', ie the ECtHR in the context of *Opinion 2/13*.[52] The Court thus created a complete vacuum of judicial review of CFSP acts by tacitly denying the jurisdiction of *national courts* where it itself lacks jurisdiction, even if this possibility could have been derived from Article 19(1) TEU. If the Court applied a Court-centric concept of rule of law, both the lacuna and the vacuum of judicial review would render the Treaty text, and indeed the Court's own perception of 'the law', contradictory to the values enshrined in Article 2 TEU.

Against these viewpoints, it seems implausible that the Court would purport to establish a generally applicable Court-centric concept of the rule of law.[53] The Court's argumentation in the previous rule of law cases is rather to be construed as a combination of the principles of rule of law and unity of EU law: the Court has resolved the issue of the rule of law (ie the need of access to *a court*) in a manner that best serves the interest of uniform application of EU law (ie by creating access to *the Court*). The Court does not seem to expressly consider its own involvement as an indispensable part of the rule of law, for this would render the system of legal remedies under the Treaties untenable; instead, it adamantly requires it from the point of view of the unity of EU law. The lack of express differentiation in the case law between these two aspects may be due to the circumstance that the issues are likely to appear in tandem in the evaluation of questions of jurisdiction under the Treaties.

[50] The fact that in *Opinion 2/13*, the Court's review focuses on an evaluation of its own powers vis-à-vis a third institution, rather than as a question of internal coherence and legality of the Treaties, naturally restricts the breadth of the discussion of this question. However, if the lack of jurisdiction within the CFSP were considered unlawful within the Union legal order, it could not pose a problem of inconsistency as regards the draft accession agreement either.
[51] *Opinion 2/13*, para. 252.
[52] *Opinion 2/13*, para. 255.
[53] Closely related is Poli's suggestion that the ruling in Rosneft reflects an understand of the rule of law as requiring *effective* judicial review; Poli (n 7), 1822. Arguably, the inapplicability of preliminary references touches upon the expediency of the access to the Court for validity review. However, the Court's acceptance of a total lack of jurisdiction in certain situations within the CFSP also affects the tenability of the introduction of a preliminary ruling jurisdiction on the grounds of the requirement of effective judicial review. For, to accept that Treaty-level caveats may create a total lack of jurisdiction should mean *a fortiori* that the lessened expediency of judicial protection due to the Treaty Drafters' choice neither raises any problems.

For the purposes of our reading of *Rosneft*, this highlights all the more the suggestion that considerations of the unity of Union law have played a decisive role in the case. All in all, with the fulfilment of the rule of law factually secured even without the Court's expansive interpretation of its jurisdiction in the CFSP area, it rather appears that the Court's evaluation of the case has been affected by a wish to keep the Court in the loop. This issue surfaces in *Rosneft* only towards the end of the Court's analysis,[54] where the Court devotes considerable space to reprising the rationalizations of *Foto-Frost* for why the exclusive power of ruling on validity of Union acts should rest with the Court. This afterthought constitutes the true crux of the Court's justification, the repetition of which could nonetheless be dispensed with if we follow the Court's argument: if the Court already found jurisdiction on the grounds of the rule of law, the question of national courts' responsibilities where the Court lacks jurisdiction should be rendered immaterial.

D. Does the rule of law case law fit?

Notwithstanding the above, the justifications of the Court in *Rosneft* largely build upon a language of the rule of law. The rule of law argument put forward in *Rosneft* is in dialogue with both the general legality review case law and the CFSP jurisdictional case law recalled above. It builds upon the interpretative methods and doctrines developed therein – but in some respects, it goes further in stretching the past case law than would be at first sight expected.

When deciding cases of constitutional import, instead of viewing itself simply as a provider of legal redress in individual cases, the Court seems to characterize its own action equally as an exercise aiming at building a coherent system of EU law.[55] Against this background it would be expected that the Court should treat its own case law with some fidelity to its original import; the general interest in legal certainty should support the same. However, *Rosneft* provides evidence to the contrary: there is some amount of fuzziness in the way the Court uses its past rule of law case law in justifying its findings. It is claimed here that past doctrine relating to the rule of law is relied upon in *Rosneft* in a manner which mutates the original logic of the case law, in order for it to better fit its purpose of justifying why the jurisdictional limitation laid down in Treaty text should be ignored.

[54] *Rosneft*, paras 77–80.

[55] E.g. Jacob's study of the use of precedent by the Court suggests attention to systemic coherence; see M Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge: Cambridge University Press, 2014), 120. Jacob similarly asserts that the Court's preference to fit suggested interpretations into the grander scheme of past doctrine straddles the Court: 'the need to appear coherent alone has an impact on room for manoeuvre'.

The aim of the justifications in *Rosneft* is to explain a departure from the language of Article 275 TFEU that bars the availability of *a certain form of procedure*.[56] To do so, the Court makes reference to a collection of past rule of law cases from the field of CFSP where it has judicially amended the list of *reviewable acts* contained in the jurisdictional Treaty Articles in the spirit of *ERTA* and *Les Verts*, in order to allow for a review of acts that should *ratione materiae* be susceptible to review.[57] Here, an equivalence is being drawn that is not entirely correct.

In the previous rule of law case law, the Court can be seen to rely on an understanding of the Treaties as *traités cadre* that do not so much lay down exhaustive rules but rather contain a set of goals and principles in light of which the Treaties should be construed. Thus, the Court has identified the purpose in the Treaties of providing comprehensive legal protection and therewith justified a reading of the Treaty Articles that enables judicial review of all kinds of Union acts besides those expressly named in the Treaties. The past rule of law case law is to be seen first and foremost as a material expansion of the group of EU acts amenable to judicial review in light of the agenda set by the Treaties, and not as a procedural expansion of the Court's jurisdiction – although this naturally comes about as a side-effect.

Supported by this past rule of law case law, the Court found in *Rosneft* that an act that is *ratione materiae* reviewable could be assessed under a form of procedure other than that intended in the Treaties – through a preliminary ruling procedure rather than though direct action before the General Court.[58] This sort of reliance in *Rosneft* on the rule of law case law cannot have the *traités cadre* rationale behind it. This is because even when the Treaties are viewed as *traités cadre*, they contain certain fixed and binding rules that maintain the very framework of the Treaty. The institutional provisions laying down the competences and procedures by means of which the Treaty agenda shall be fulfilled without doubt fall within the latter category.[59] The idea is neatly echoed in the finding of AG Ruiz-Jarabo Colomer, according to whom '[t]he Court of Justice cannot have control of its own jurisdiction. The ground rules must be clearly defined in a Community governed by the rule of law'.[60] *Rosneft* crucially differs from the past rule of law case law in that, in engaging bluntly in jurisdictional expansion, it does not conform to an agenda but goes expressly against an institutional competence

[56] *Rosneft*, para. 76.
[57] *Rosneft*, para. 75; reference is made by the Court to *Segi* and *Gestoras Pro Amnistía*; *Pirate Transfer Agreement with Mauritius*; *Elitaliana;* and *H v Council and Commission*.
[58] *Rosneft*, para. 76.
[59] See J Bengoetxea, *The legal reasoning of the European Court of Justice: towards a European jurisprudence* (Oxford: Clarendon Press, 1993), 70.
[60] Opinion of AG Ruiz-Jarabo Colomer in *De Coster* (C-17/00), ECLI:EU:C:2001:366, para. 61.

clause, ie a non-programmatic binding Treaty provision. Because of this difference, the recourse to rule of law case law does not seem to fit: the Court makes reference to a group of cases sharing a logic that does not correspond to that employed in *Rosneft*.

In fact, the Court has itself rejected the *Rosneft* logic in its previous CFSP case law. Namely, in *Segi* and *Gestoras Pro Amnistia*, the Court found that a certain type of EU CFSP act had to be included in the scope of legality review despite its absence from the list of reviewable acts in the Treaties. However, it expressly refused to adopt a suggested expansive interpretation of the Treaty provision concerning its jurisdiction to hear actions for damages, on the grounds that the Treaties conferred 'no jurisdiction on the Court of Justice to entertain any action for damages whatsoever' in the field at stake. Indeed, the Court held that 'it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 [T]EU'.[61] A similar analysis was given more recently in the CFSP context by AG Wahl in *H v Council and Commission.*[62] In these cases, the Court has rejected the thought of judicial transgression of procedural competence articles – albeit only after finding another way of securing judicial review of CFSP acts. In comparison, *Rosneft* brings the Court one step closer to the suggestion[63] that the Court would have assumed inherent jurisdiction and rejected the premise that it was illegitimate for it to create new heads of jurisdiction in the absence of textual basis thereto in the Treaties.

The problems of fit pointed out above make one wonder why the Court has nevertheless chosen to rely on the past rule of law case law in its argumentation. One possible conclusion is that the Court has not dared to object the Treaty Drafters' solution to limit the Court's involvement on the basis of arguments stemming from the need to safeguard the uniform application of Union law alone. Instead, it has had recourse to its past case-law in order to '[shrink] the distance between ("permissible since real") *lex lata* and ("impermissible since wishful") *lex ferenda*'[64]. Indeed, one is brought to ask whether the rule of law case law has been relied upon, at least in part, because of its instrumental value. First, reliance on past case law in itself is an effective tool utilized by the Court in imposing its constitutional worldview on its interlocutors: for, reference to established case law emphasizes the Court's authority and mirrors interlocutors' past acceptance of the Court's findings, buttressing their continued acceptance of the Court's construction. Second, certain power lies in the principle of the rule of law. The principle, championed as one of the fundamental values of the European Union, is a

[61] *Segi* and *Gestoras Pro Amnistia*, paras 52–54, 46 and 50.
[62] Opinion of AG Wahl in *H v Council and Commission*, paras 49–50.
[63] Arnull (n 19), 701; and recently in the context of CFSP, see Butler (n 21), 684.
[64] Jacob (n 55), 15.

guideline that national courts or the Member States as Treaty Drafters are unlikely to refuse. It is, in Alf Ross' language, a concept that 'glitters like jewels'[65]: it is pregnant with not only descriptive meaning but also positive connotation and emotional appeal which is likely to speak to national courts. The effect of the introduction of such value-laden vocabulary in the justification is beyond argumentative: it is also persuasive.

In addition to a heightened level of care when faced directly with the Treaty Drafters' demands, the reliance on the rule of law also points to an indiscriminate attitude when it comes to developing justifications: legal principles characterized elsewhere as fundamental may be turned into instruments in the Court's hands. It has been noted by Bengoetxea that hard cases commonly call for systemic interpretation whereby 'the legal order as a fuzzy set is resorted to'.[66] The sort of transformative use of past doctrine visible in *Rosneft*, however, transcends the systematic and more accurately resembles a holistic[67] view on Union law. Striving at maintaining a coherent system, the Court ends up conflating and picking and choosing among ingredients within the EU legal order. It has previously been observed by Beck that in the Court's argumentation 'building blocks from previous judgments including familiar statements and principles are used to emphasise and suggest continuity but are in fact applied to different factual scenarios and thus in effect extend, limit or even modify the rule they contain.'[68] It is easy to point to a cause for criticism in this instrumental, pragmatist use of case law: besides risking causing inconsistency in the case law,[69] it is deleterious to securing legal certainty in a legal order that builds, to a large degree, on legal constructs originating from adjudication.

It has been suggested above that the *Rosneft* justifications slightly mistreat both the Treaty text and the case law upon which they build, all in the cause of correcting the scheme of CFSP remedies in the Treaties. The question was also posed whether the factors underlying the interpretative solution could have been more comprehensively reflected in the *Rosneft* judgment. Next, we shall discuss an alternative logic of reasoning and contemplate issues left open by *Rosneft*.

IV. A sketch of an alternative reasoning and future issues

A. Could the Court have acted otherwise?

[65] Ross (n 11), 314.
[66] Bengoetxea (n 59), 188.
[67] For a similar characterisation of the case-law of the Court relating to the principle of effective judicial protection, see A Rosas, 'The National Judge as EU Judge: Opinion 1/09' In P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System* (Oxford: Hart Publishing, 2012), 108.
[68] Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing, 2012), 175.
[69] Jacob (n 55), 45.

The discussion above has pointed at some alternative ways of organizing the validity review of CFSP acts that would have relied more centrally on national courts and that would not have required the opening of the preliminary ruling route in conflict with the language of Article 275 TFEU. Koutrakos has taken this argument as far as suggesting that the application of *Foto-Frost* within the CFSP should be 'adjusted […] in order to reflect the reduced jurisdiction of the Court'.[70] *Rosneft* shows that the Court is opposed to such development: the Court has rejected the suggested the alternative ways of organizing CFSP judicial review because they clash with the Court's interest in being included in all forms of judicial protection provided under the Treaties. It is admittedly logical that *Foto-Frost* exclusivity should apply even in the CFSP sphere where the Court *does* have jurisdiction; this is consistent with the premise that the general constitutional principles of EU law extend to the CFSP. Moreover, as the Treaties do confer the Court review powers in the context of restrictive measures, *Foto-Frost* exclusivity does not create a vacuum of judicial review. That being said, it can be contested whether the creation of jurisdiction to hear preliminary rulings was truly necessary to protect the Court's exclusive review power.

Turning from substance to justification, an alternative line of reasoning reflecting the centrality of the unity of EU law could have been drawn in *Rosneft* from the Court's construction of 'the law'.

It is known to the Court's observers that in its constitutional thinking, the Court characterizes its own jurisdiction as a 'fundamental feature of the EU system'[71]. It is equally known that the Court has not seen it as illegitimate to depart from Treaty language in order to bring about a state of affairs that it considers necessary in light of 'the law'; the establishment of the very *Foto-Frost* doctrine is a classic example.[72] Therefore, the difficulties which the Court encountered when discussing the textual limitations of Article 275 TFEU could have been avoided by an open reflection of the Court's interpretation of the jurisdictional requirements posed by 'the law'. Although understandably rarely used, such argumentation has been deemed legitimate by the Court and was previously relied upon in order to alleviate gaps left in the Treaty text.

In *Chernobyl Regulation*, the Court openly admitted that in absence of the EU Parliament's right of action in the Treaty text, it was not possible for the Court to include the Parliament among the institutions enjoying privileged standing under Article 263 TFEU; instead, the Court found that the need to maintain and safeguard institutional balance and Parliamentary prerogatives, combined with

[70] Koutrakos (n 32), 32.
[71] *Opinion 2/13*, para. 202.
[72] Arnull (n 19), 687–689.

the Court's role in ensuring the full application of the Treaties, mandated the Court to provide judicial review.[73] The outcome necessary in light of 'the law' was thus achieved without forcing the language of the Treaties.

Besides the difficulties posed by the Treaty text, *Chernobyl Regulation* and *Rosneft* even share a theoretical problem: how to justify the inference of competences from a perception of 'the law' in a legal order wherein the principle of conferred powers occupies a central role as a constitutional principle? The explanation lies in a balancing of constitutional values. In *Chernobyl Regulation*, the Court was able to build upon *ERTA* and *Les Verts* in emphasizing the constitutional importance of the rule of law as a principle whose fulfilment outweighs a strict adherence to the principle of conferred powers.[74] In *Rosneft*, the Court is following the same logic whilst breaking new ground. For, *Rosneft* seems to suggest that even the principle of unity of EU law should be assigned similar importance. Therewith, *Rosneft* confirms what Judge Tizzano has posited extra-judicially: the Court's involvement as a constitutional adjudicator cannot be legitimately curbed.[75]

It is argued that in *Rosneft*, a *Chernobyl Regulation* line of argumentation would have allowed the Court to avoid the strenuous stretching of the language of Article 275 TFEU. Whilst it is impossible to say whether a similar approach in *Rosneft* would have aroused criticism,[76] it can be cautiously suggested that some support existed: in its order for reference, the national court in fact seemed to encourage the Court to side-line the Treaty text by having direct recourse to constitutional principles.[77] Furthermore, instead of operating behind a justification relying on the rule of law, it would have been preferable that the Court had built its justifications in *Rosneft* more openly on the unity of EU law as a guiding legal principle. By bringing the principle of unity of EU law to centre stage from the margins of the ruling, the Court could have communicated its message more clearly.

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[73] *Chernobyl Regulation*, paras 24–26.

[74] See, in the same vein, Lenaerts and Gutiérrez-Fons (n 1), 5, suggesting that 'the ECJ must strike the right balance between, on the one hand, the principle of effective judicial protection, and, on the other, the principles of inter-institutional balance and mutual sincere cooperation.'

[75] A Tizzano, 'Le rôle de la cour de justice et les développements du système communautaire' in N Fenger, K Hagel-Sørensen and B Vesterdorf, B. (eds), *Festskrift til Claus Gulmann: Liber Amicorum* (Copenhagen: Forlaget Thomson, 2006), 471: '*Nous prenons plutôt non comme conclusion mais comme point de départ que le rôle de la Cour de justice est absolument incontournable dans le système communautaire et que son altération substantielle serait totalement inconcevable, même s'il est malgré tout étroitement lié et conditionné par les caractéristiques que revêt ce système.*'

[76] In *Chernobyl Regulation*, the issue of the Parliament's right of action apparently did not evoke strong emotions: the plea of inadmissibility raised by the Council on the grounds that the Parliament lacked a right of action was not repeated by the parties intervening in support of the Council – on the contrary, the Commission otherwise in support of the Council's contentions asked for the plea of inadmissibility to be dismissed. See *Chernobyl Regulation*, para. 9.

[77] *Rosneft*, para. 38.

B. Future issues: *TWD Deggendorf*

There may be occasion to consider the benefits of a more open approach to justification when the questions left open by *Rosneft* eventually reach the Court. One such question concerns the future of the *TWD Deggendorf* rule in the CFSP.

The Court has traditionally held that while the preliminary ruling mechanism may be used to complement direct actions as another means of bringing EU acts before the Court for validity review, it should not enable applicants to forego the time bar laid down in Article 263(6) TFEU for bringing an action.[78] The *TWD Deggendorf* rule has been applied in situations where the applicant's standing has been *unquestionable*;[79] arguably, this would be the case in the situations falling within the scope of Article 275 TFEU jurisdiction concerning individuals expressly named as targets of restrictive measures. Does, then, *TWD Deggendorf* stand in the field of CFSP?

In *Rosneft*, the question did not arise as Rosneft had already brought action under Article 263(4) TFEU. But when a future litigant emerges who has *not* brought an action within the prescribed time and pursues the invalidation of a restrictive measure through the now open preliminary reference route, it would only be in line with the logic of extending the general principles under the Treaties to the CFSP to find that the *TWD Deggendorf* rule prevents the admission of such a reference for preliminary ruling.[80] In such a case, the Court would not have any possibility of assessing the validity of the restrictive measure, except with regards to its compatibility with Article 40 TEU. In light of *Rosneft*, the *Foto-Frost* rule might also prevent national courts from providing judicial protection. On the other hand, it is not unimaginable in the CFSP context that individuals may forego the two month time limit for bringing an action against a restrictive measure as they only feel the force of EU sanctions once the national implementation measure gains effect. Would it be, in such a case, compatible with the aims of Article 275 TFEU for the Court to concede and admit a lack of jurisdiction?

Of interest in this context is the Court's earlier ruling in *E & F*. This case concerned a claim of invalidity raised against a CFSP restrictive measure by private litigants who were not themselves included in the sanctions list but who were nevertheless affected by the measure as members of an organization that was targeted by it. The Court found that the *TWD Deggendorf* rule did not prevent it from hearing the case, as it was not beyond doubt that the litigants would have had individual

[78] Judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92), ECLI:EU:C:1994:90.
[79] *Rosneft*, para. 67.
[80] See Poli (n 7), 1823–1824.

standing under Article 263(4) TFEU.[81] It is noteworthy that AG Mengozzi noted in his reasoning in the case that 'legal certainty is not an absolute requirement' and that the time-bar effect could be weighed against competing interests.[82] This points to a risk that in a further wave of jurisdictional expansion, *TWD Deggendorf* could be shoved aside.

Furthermore, the strictness of the time bar of annulment actions is normally tempered by the ability of the Court to assert its influence through *interpretation* of any acts through the preliminary ruling procedure. Within the CFSP, *Rosneft* has only established the jurisdiction in which references for preliminary ruling concerning the validity of acts can be heard. AG Wathelet, on the contrary, has already expressed a preference for the construction that the preliminary ruling jurisdiction within the CFSP should also encompass the interpretation of restrictive measures.[83] If the Court were to adopt AG Wathelet's suggestion, it could alleviate the lack of validity review due to the time bar.

If the Court were to follow the suggestions of AG Mengozzi or AG Wathelet, the applicability of the preliminary ruling mechanism within the CFSP would indeed have the effect of prolonging the period of uncertainty in the enforcement of restrictive measures which the negotiators of the Treaties sought to prevent. Such an interpretation would mark an even deeper disagreement with the Treaty Drafters' *ratio* in drafting Article 275 TFEU than *Rosneft* already entailed. But with the support of *Rosneft*, the leap may not be that far.

V. Conclusions

This article has discussed the treatment of issues of jurisdiction, the rule of law, and the unity of EU law in the *Rosneft* ruling. It began noting that the Treaty Drafters appear to have intended to limit the types of judicial review available under the CFSP regime, and that the Court has generally tended to interpret similar limitations narrowly. The discussion then moved on to the Court's findings in *Rosneft*, suggesting that whilst the outcome of the case is understandable in light of the Court's traditional perception of its own role, the means of arriving at this outcome in *Rosneft* can be contested. First, the Court's handling of the Treaty text seemed forced; second, it appeared that the principle of unity of EU law and the *Foto-Frost* maxim were not awarded the space in the justification befitting their importance for the outcome of the case; and third, the choice to justify the finding of jurisdiction by grounds relating to the rule of law proved somewhat ill-fitting and doctrinally

[81] *E & F* (C-550/09), ECLI:EU:C:2010:382, para. 46 *ff.*
[82] View of AG Mengozzi in *E & F* (C-550/09), ECLI:EU:C:2010:272, para. 86.
[83] AG Wathelet's Opinion in *Rosneft*, paras 73–76.

confused. Finally, an alternative reasoning for the rationale of *Rosneft* was sketched, and a risk of future expansion of Article 267 TFEU jurisdiction within the field of CFSP was identified. We shall conclude by short remarks on the importance of this all for the Court, and the interests it seeks to protect.

Some strands of legal theory accept that the justification of judicial decisions may resemble more ex post rationalisation than deductive reasoning.[84] Legal justifications are held to be simulacra of legal interpretative methods[85] or a façade[86], an interface separating between the musings of the individuals engaged in finding the best possible solutions to legal problems and the official law-creating formulation rendered by the adjudicatory organ. It has even been questioned whether sincerity as such is a value in legal justification.[87] Issues of credibility ensue only if the justification shows cracks and reveals that a decision may not have been due to the reasons offered in the justifications. This is the risk in *Rosneft*. As the outcome of the case fits in continuum of the Court's CFSP case law, the ruling is unlikely to cause an uproar. But it offers an occasion to ponder on whether the Court, seemingly interested in safeguarding the legitimacy and development of the EU legal order, could in fact be more successful in this aim if it operated more openly. After all, the Court's rulings have little worth as an authoritative source of interpretative guidance if they fail to reveal the entire picture.

The acceptance of previous case law on jurisdictional limitations shows that the Court's interlocutors have tacitly accepted the difficulty in bringing about a re-thinking of the Court's role through Treaty amendment. *Rosneft* re-confirms that a compromise suggested by the Treaty Drafters will not necessarily succeed if it encroaches upon the image that the Court holds of itself or of the nature of Union law. This is because the Court's practice of relying on deductive reasoning from the general to the particular has a tendency to undermine any attempted revision of the nuances of Treaty provisions while leaving the grand lines intact.

This also serves as a cue to note that *Rosneft* should not be treated as a 'mere' CFSP judgment the main rationale of which is the promotion of integration within this policy sector. The Court that we see in action in *Rosneft* is the EU constitutional court maintaining the entire system of EU law. *Rosneft* is a reminder of the importance that the Court attaches to its own role under the Treaties. Although the Court does not seem to go as far as to expressly assimilate its own involvement in adjudication

[84] See eg A Ross (n 11), 43–44; Bengoetxea (n 59), 114 *ff.*
[85] A Somek, 'The Emancipation of Legal Dissonance' In H Koch, K Hagel-Sørensen, U Haltern and J Weiler (eds), *Europe – The New Legal Realism. Essays in Honour of Hjalte Rasmussen* (Copenhagen: DJØF Publishing, 2010), 686.
[86] Ross (n 11), 44.
[87] Bengoetxea (n 59), 161; compare, however, 105.

with the existence of legal remedies that satisfy the test of the rule of law, it enforces the maxim of safeguarding the unity of EU law so vigorously that the effect is virtually the same. Ultimately, *Rosneft* shows that the day is yet to come when AG Ruiz-Jarabo Colomer's prophesy in *Gaston Schul*[88] is fulfilled and the national courts will reclaim their status 'robbed' by *Foto-Frost*.

[88] Opinion of AG Ruiz-Jarabo Colomer in *Gaston Schul Douane-Expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* (C-461/03), ECLI:EU:C:2005:415, para. 81: 'One day things will return to normal and the national courts will reclaim the leading role which it is intended that they share with the Court of Justice in the performance of judicial cooperation through preliminary rulings, thereby relinquishing the role of supporting actors to which they have been relegated as a result of the protective zeal of the Court of Justice.'