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Understanding the EU Constitutional Core through the Case Law on the Common Foreign and Security Policy

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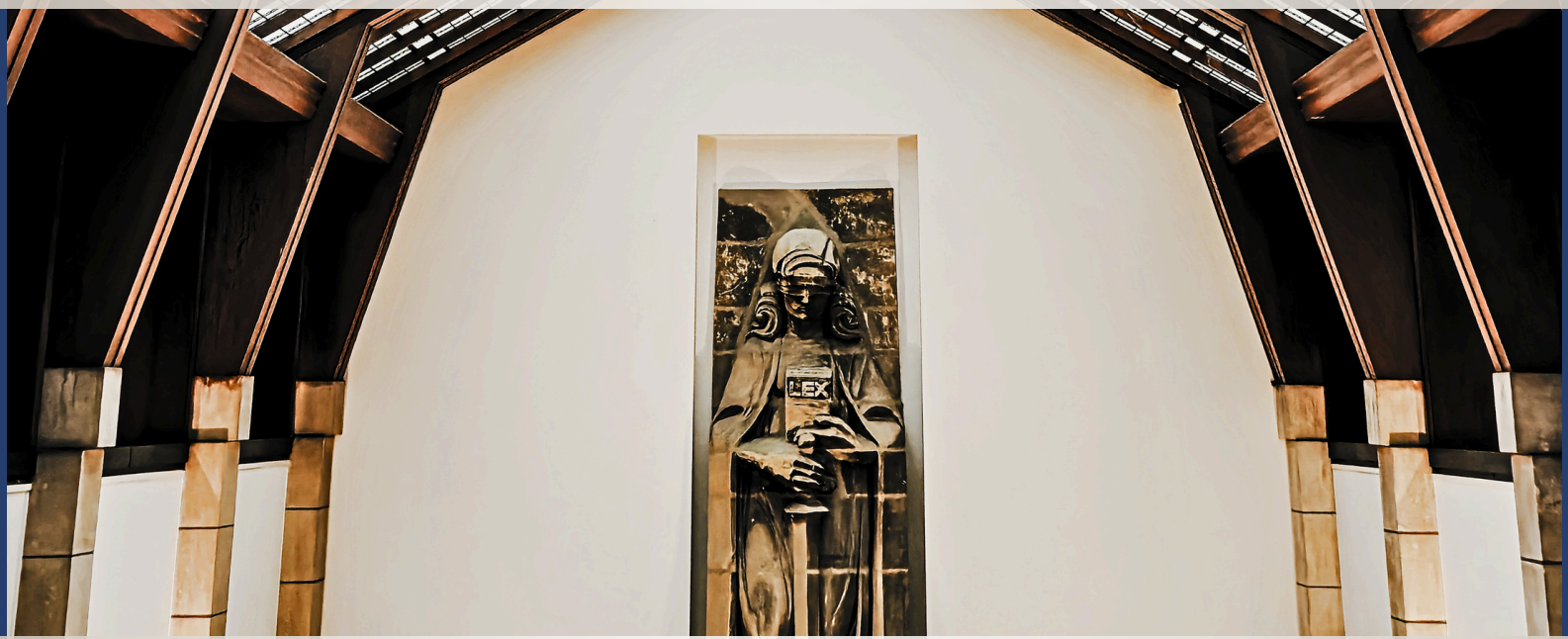

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Abstract

In light of certain judgments of the Court of Justice of the European Union, academic scholarship has coined the term 'EU constitutional core' to refer to the basic tenets of EU law which are hierarchically superior to other provisions of the Treaties and cannot be derogated from. Commentators suggest that the EU constitutional core encompasses the founding values of Article 2 TEU: democracy, rule of law, protection of fundamental rights. On a parallel line, in the caselaw on the Common Foreign and Security Policy, the Court has resorted to Article 2 TEU to extend its jurisdiction and to deliver effective judicial protection, regardless of the jurisdictional limitations imposed by the Treaties. This thesis connects these different strands of caselaw and investigates how the caselaw on the Common Foreign and Security Policy contributes to the development of the EU constitutional core. Employing the latter concept as explanatory framework for the analysed jurisprudence, this thesis argues that the Court has identified in Article 2 TEU part of the EU constitutional core while simultaneously operationalizing it. Furthermore, it illustrates how the special features of the EU constitutional core affect its relationship with other EU primary law provisions.

Acknowledgments

In August 2021, I arrived in Maastricht with a luggage full of inappropriate clothes to face the upcoming Dutch fall as I had to start my Erasmus at Maastricht University. Those four months in the vibrant, stimulating and international environment that characterizes this little city in Limburg, Netherlands, allowed me to encounter outstanding individuals and learn important life lessons. When my stay came to an end, I made the promise to myself to conclude my Law studies in Italy in the fastest way I could and come back to pursue an LL.M. in EU law (yes, I already knew I was not destined for *carriera forense*).

In August 2025, four years and a Law degree later, I find myself writing the final words of my Master thesis in EU Law at Maastricht University under the supervision of Professor Matteo Bonelli, whose work I have admired since I first read Judicial Serendipity. Matteo, thank you for your kind support, especially during my (recurring) moments of doubt on the quality of this work, for your constant positive energy and for reminding me that this was *not* an Italian thesis. Having as supervisor someone with whom you can discuss both EU law and – most importantly – Italian scudetto has been a true privilege. To Daniel, thank you for always being available to discuss my project and for constantly providing new (and challenging!) perspectives to reflect upon – I will continue to consider them in the upcoming four years.

Concluding this journey would not have been possible without the friends I met in Maastricht, whose support was indispensable to face MECC exams, Dutch weather and cuisine: Maria Vittoria, Ivor and Lejla. A special acknowledgement also to my MHRT colleagues (and friends): Aljoša; Chloé, Rosa. Thanks to my friends from all over Europe: Camilla, Benedetta, Beatrice, Amalia.

Last but not least, my family. Mamma e Papà, thank you for giving me the freedom to choose the path I thought was best for me and believing I could achieve anything I wanted (with the big exception of anything related to science and numbers). To my sister and my cousin, for always being there. Thanks to i miei nonni, whose warm support defied the long distance between Napoli and Maastricht. Thanks to my other Neapolitan family that I was lucky enough to find away from home. Words cannot describe how grateful I am to you all.

My time in Maastricht is over for now, but as they say, non c'è due senza tre – plus, I still have to finish my other thesis titled 'Il Sale Che Non Sala: A Comparative Study on Salt in Italy and the Netherlands'. Stay tuned!

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1 Introduction

1.1 An inherent tension to begin with: Article 2 TEU and judicial review in CFSP

'The obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission.'[1]

The words of Advocate General ('AG') Mancini in his Opinion to the landmark case *Les Verts*[2] seem to have been a mantra for the Court of Justice of the European Union ('CJEU') when faced with the delicate task of reviewing acts adopted in the context of the Common Foreign and Security Policy ('CFSP'). The mission pursued by the CJEU appears to be guaranteeing a 'complete system of legal remedies',[3] notwithstanding the Treaties limitations on the powers of the judiciary in the area of 'national interests and sovereign wills *par excellence*'.[4]

At the time of its adoption, the Treaty of Lisbon was characterized by an inherent tension. On the one hand, Article 2 of the Treaty on the European Union ('TEU')[5] identifies the rule of law as a founding value of the European Union ('EU'). Furthermore, Article 19 TEU establishes the general jurisdiction for the CJEU in order to ensure that 'in the interpretation and application of the Treaties, the *law* is observed'.[6] At the same time, Article 24 TEU and Article 275 Treaty on the Functioning of the European Union ('TFEU')[7] place CFSP beyond jurisdictional reach. The difficulty in reconciling these primary law provisions became even more evident with the delivery of *Opinion 2/13* on the EU accession to the European Convention of Human Rights ('ECHR'). As is well known, the Court of Justice's ('ECJ' or 'the Court') conclusion that the Draft Accession Agreement ('DAA') did not acknowledge 'the specific characteristics and autonomy of EU law'[8] precluded the long-awaited union between the Strasbourg and Luxembourg courts.[9]

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[1] Case C-294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] EU:C1985:483 Opinion of Advocate General Mancini, p. 1350.
[2] Case C-294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] EU:C:1986:166.
[3] ibid para 23.
[4] Marti Koskenniemi, 'International Law Aspects of the Common Foreign and Security Policy' in Marti Koskenniemi (ed) International Law Aspects of the European Union (Kluwer Law International 1998) 27.
[5] Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C 326/13.
[6] ibid Article 19(1).
[7] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/79.
[8] Case C-2/13 Opinion pursuant to article 218(11) TFEU on the EU accession to the ECHR [2014] EU:C:2014:2454, para 257.
[9] Nicole Lazzerini, 'Questo matrimonio (così?) non s'ha da fare: il Parere 2/13 della Corte di Giustizia sull'adesione dell'Unione Europea alla Convenzione Europea sui diritti dell'uomo' (2015)

One particular aspect that constituted a major obstacle was the limited scope of judicial review for the CJEU over CFSP acts: it represented simultaneously a special characteristic of the EU legal order[10] and an insurmountable hurdle to finalize accession.[11]

On December 2014, the ECJ concluded that 'certain acts adopted in the context of the CFSP fall outside the ambit of judicial review'[12] and that 'it has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters'.[13] With this statement, the ECJ set the foundational stone to the stream of caselaw that pursues the mission of shedding light on the blurry boundaries of judiciary powers in foreign policy. This clarifying activity resulted into a departure from the text of the Treaty. As a matter of fact, the second subparagraph of Article 24(1) TEU foresees jurisdiction for the CJEU over CFSP acts only to, first, review the compliance with Article 40 TEU, and second, to review the legality of restrictive measures through an action for annulment. Conversely, by relying on the values of Article 2 TEU – in particular, the rule of law - the Court expanded its jurisdiction in CFSP and made available the complete toolbox of legal remedies granted by primary law.

In other fields of EU law, the Court identified Article 2 TEU as being a set of rules from which no derogation was possible when it came to apply international law;[14] as constituting 'an integral part of the very identity of the European Union' to which the national identities' claims of the Member States need to comply.[15] In light of these jurisprudential developments, scholars designated EU values as the 'EU constitutional core', understood as the basic tenets of EU law that enjoy superiority over other Treaty provisions[16] and that the Member States,[17] but also EU institutions, cannot escape. However, the (very) limited role envisaged for the CJEU in CFSP provides

1 Osservatorio sulle Fonti 2.

[10] Luigi Lonardo, 'How the Court tries to deliver justice in the Common Foreign and Security Policy, where the need for judicial protection clashes with the principles of conferral and institutional balance' (2024) 9(2) European Papers, 837.

[11] As of today, no agreement has been reached on the matter. See Council of Europe, '18th Meeting of the CDDH ad hoc negotiation group ("46+1") on the accession of the European Union to the European Convention on Human Rights' (Meeting Report 14-17 March 2023), para 7.

[12] *Opinion pursuant to article 218(11) TFEU on the EU accession to the ECHR C-2/13* [2014] EU:C:2014:2454, para 252.

[13] ibid para 251.

[14] Case C-402/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] EU:C:2008:461; *Opinion pursuant to article 218(11) TFEU on the EU accession to the ECHR C-2/13* [2014] EU:C:2014:2454.

[15] Case C-157/21 *Poland v Parliament and Council* [2022] EU:C:2022:98, para 264.

[16] Armin Von Bodgandy, The Emergence of European Society through Public Law (Oxford University Press 2024) 90- 93.

[17] Luke Dimitrios Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts' (2020) 57 Common Market Law Review 361, 387.

fertile ground for broader reflections on this concept, as the CJEU's task to preserve the EU constitutional core is put on test.

Much ink has been spilled on the Court's approach to the jurisdictional limitations in CFSP, either with praise[18] or criticism.[19] However, the connection between Article 2 TEU being the EU constitutional core and the role this provision continues to play in CFSP caselaw has been somewhat overlooked. For this reason, this thesis aims at answering the following research question: How does the caselaw on the Common Foreign and Security Policy contribute to the development of the EU Constitutional Core?

As this thesis looks at CFSP caselaw as a study case to investigate on the broader concept of 'EU constitutional core', it is necessary to provide sufficient background to understand what led scholars to coin this term. Therefore, before diving into the analysis of a selected set of cases on CFSP, the thesis provides a brief account of a few landmark judgments whereby Article 2 TEU was understood as the fundamental basis of the EU legal order. In particular, the focus is on two broader phenomena: (i) the link between Article 2 TEU and the autonomous nature of the EU, which acts as a shield to external interventions; (ii) Article 2 TEU as a limit to national constitutional identity claims by illiberal Member States.

1.2 Relevance and Aims

February 16th, 2022, marks a memorable day for EU constitutional scholars as the ECJ, for the first time, referred to the concept of 'European identity' and linked it to the values of Article 2 TEU.[20] Following the judgment, commentators have dedicated their attention to the relationship between the newly found EU constitutional core and the national identity of the Member States, as protected under Article 4(2) TEU;[21] on Article 2 TEU constituting a limit to future amendments of the Treaties,[22] as well as the basic tenets of EU constitutional law.[23] On a parallel line, academic discussions on the

[18] Among many, see Sara Poli, 'The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law' (2017) 54 Common Market Law Review, 1799; Christina Eckes, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22(4) European Law Journal 492.

[19] Panos Koutrakos, 'Judicial Review in the Common Foreign and Security Policy' (2018) 68 International and Comparative Law Quarterly 3; Lea Schubert, 'Doing Too Much and Too Little: The CJEU's Approach to Judicial Review of Fundamental Rights Breaches in the CFSP after KD and KS' (2024) EJIL: Talk! www.ejiltalk.org; Thomas Verellen, KS and KD, on the Jurisdiction of the CJEU within the CFSP: Taking Conferral Seriously? — Thomas Verellen Blog.

[20] Case C-156/21 Hungary v Parliament and Council [2022] EU:C:2022:97, paras 127 and 232; Case C-157/21 Poland v Parliament and Council [2022] EU:C:2022:98, paras 145 and 264.

[21] Tímea Drinóczi and Pietro Faraguna, 'The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States' in Jan de Poorter and others (eds) European Yearbook of European Constitutional Law 2022 (Springer 2023), 59. Armin von Bogdandy and Stephan Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417, 1430.

[22] Pablo Cruz Mantilla de los Ríos, 'European Constitutional Identity as the Unamendable Core of the EU Treaties' (2024) 20 European Constitutional Law Review 545.

[23] Jurgen Bast and Armin Von Bogdandy, 'The Constitutional Core of the Union: on the CJEU's New, Principled Constitutionalism' (2024) 61 Common Market Law Review 1471.

precise standards imposed by Article 2 TEU focused mainly on the Court's judgments on rule of law deficiencies in the Member States, although the latter explicitly referred to CFSP caselaw in respect to Article 2 TEU and effective judicial protection.[24]

The relevance of this thesis lies precisely in the attempt to connect these different strands of caselaw into a single discourse. Rather than conceiving it as evidence of the Court's expansionist approach, this thesis will try to link CFSP caselaw to the concept of EU constitutional core to achieve three intertwined goals. First, to illustrate how the Court has confirmed the existence of an EU constitutional core, which encompasses the values of Article 2 TEU. Second, to demonstrate how it has operationalized Article 2 TEU by connecting abstract values to operational provisions within the Treaties. Third, to show how the Court has attributed hierarchical superiority and non-derogability to the EU constitutional core and how these special features affect its relationship with other EU primary law norms.

1.3 Methodology

The pursuit of these objectives evidently calls for the description of the law[25] and the identification of legal propositions from legal materials, that are able to explain the normative basis for judicial decision.[26] Therefore, to provide an answer to the research question, the thesis employs a doctrinal method on two different lines of caselaw. Section 2 sets the scene by analysing few landmark judgements of the CJEU whereby the crucial role played by Article 2 TEU in the EU constitutional framework shaped the relationship between EU law and international law, as well as the law of the Member States. A combination of caselaw analysis and scholars' works provide the explanatory doctrinal framework to understand CFSP caselaw,[27] namely, the 'EU constitutional core'. Using this concept as a lens to read the CFSP cases, it will be possible to provide an account of the Court's practice that is coherent with the EU legal order as a whole.[28]

For the selection of the cases of Section 2, the research relies upon previous

[24] Peter Van Elsuwege, Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 European Constitutional Law Review 10, footnote 10, where the authors highlight how 'it is noteworthy that Court judgments in connection with rule of law questions in EU Member States explicitly refer to the case law in relation to CFSP-related matters, as far as the references to Art. 2 TEU and the principle of effective judicial protection under EU law are concerned.'

[25] Jan Smits, 'What is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans Micklitz and Edward Rubin (eds), Rethinking Legal Scholarship (Cambridge University Press 2017) 207-228.

[26] Jason NE Varuhas, 'Mapping Doctrinal Methods' in Paul Daly and Joe Tomlinson (eds), Researching Public Law in Common Law Systems (Edward Elgar Publishing 2023) 76.

[27] Sanne Taekema, Wibren van der Burg, 'Contextualising Legal Research: A Methodological Guide' (Edward Elgar Publishing 2024) 55, defining the explanatory framework as 'the theory or set of theories that we will use in our research to better understand the phenomena and problems that we are studying'.

[28] ibid 46.

academic works[29] whereas for Section 3, it undertakes the analysis of a selected set of judgments on CFSP which are generally conceived as being the most important as they result in an expansion of judicial review.[30] This qualitative criterion is combined with a temporal one, as the thesis will cover judgments delivered between the entry into force of the Treaty of Lisbon in 2009 until September 2024. As a matter of fact, the latest Treaty amendment brought changes in the powers of the EU judiciary over CFSP, remedying the lack of jurisdiction envisaged until 2009.[31]

1.4 Assumptions and limitations

EU law can be studied through different approaches: from an international law perspective[32] to an administrative law perspective.[33] This thesis adopts a constitutional approach, thereby assuming that the Treaties and the EU legal order have constitutional features.[34] Additionally, it embraces the idea suggested by Pierre Pescatore of the Treaties being imbued with purpose-driven functionalism:[35] EU primary law is grounded on the idea that there are constitutional objectives of paramount importance to attain.[36]

The study of a limited number of cases delivered by the CJEU in a defined temporal scope and in respect to a single policy represents the main limitation to this thesis. Yet, the purpose of this work is not to provide a systemic account of the caselaw nor to draw universal conclusions on the content of the EU constitutional core. As a matter of fact, further investigation is required to understand what this concept encompasses alongside the values of Article 2 TEU. Rather, the aim of the research is to understand how the CJEU reacts in pathological cases, namely, when its lack of jurisdiction contradicts the legal obligations flowing from EU founding values. CFSP thus provides fertile ground for this exercise: being 'as close to high politics as a policy area

[29] Pablo Cruz Mantilla de los Rios, 'La identitad constitucional de la Union Europea: una categoria juridica en construccion' (2022) 70(2) Revista de Derecho Publico 173; Lucia Serena Rossi, 'La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) 3 Revue Trimestrelle de Droit Europeen 639.
[30] Carolyn Moser, Berthold Rittberger, 'The CJEU and EU (de-)constitutionalization: Unpacking jurisprudential responses' (2022) 20(3) ICON 1054.
[31] Maria Gisella Garbagnati-Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55(1) International & Comparative Law Quarterly 77.
[32] Jed Odermatt, 'The European Union in International Law' in International Law and the European Union (Cambridge University Press 2021) 9-32.
[33] Aldo Sandulli, 'Il ruolo del diritto in Europa: L'integrazione europea dalla prospettiva del diritto amministrativo' (Franco Angeli, 2018).
[34] On the Treaties having constitutional features, Joseph H. Weiler, 'The Transformation of Europe' (1991) 100(8) The Yale Law Journal 2403-2483; Ramses A. Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy' in Robert Schutze (ed.) Globalisation and Governance: International problems, European Solutions (Cambridge University Press 2018).
[35] Pierre Pescatore, ' Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice ', in Miscellanea W.J. Ganshof van der Meersch, vol. 2, (Bruylant 1972) 325-363.
[36] Koen Lenaerts, José A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) 9 EUI Working Paper 24.

can get',[37] the drafters of the Treaties envisaged a specific provision that limits judicial review, rather than allowing the CJEU to exercise judicial restraint on its own as required by the principle of separation of powers. This jurisdictional limitation poses a challenge to the CJEU in upholding the EU's reputation of being a Union based on the rule of law.

1.5 Outline

The thesis is divided into five sections. After this introduction, Section 2 lays down the basis to answer the research question, as it provides a brief account of landmark rulings whereby the Court has attributed to Article 2 TEU special features that were able to reshape the relationship of EU law with international law (Section 2.1.) and with the national identities of the Member States (Section 2.2.). Against this background, Section 3 delves into the analysis of the selected cases on CFSP to assess how and why Article 2 TEU led to the extension of the CJEU's jurisdiction. Section 4 summarizes the key findings of the analysis of the previous sections, clarifying the *fil rouge* that connects the different strands of caselaw. Finally, Section 5 summarizes the key findings and suggests prospects for further academic research.

[37] Koutrakos (n 19) 3.

2 The Emergence of an EU Constitutional Core

The delivery of the Conditionality judgments in February 2022 fixed a remarkable constitutional moment in the EU legal order. For the first time in explicit terms, the CJEU referred to an 'EU identity', rooted in the values of Article 2 TEU. The latter are not mere policy statements, but source of legal obligations for the EU institutions and the Member States. This finding was not an impulsive solution to counteract the value crisis in Poland and Hungary, but rather the result of decades of jurisprudential developments identifying EU values as an untouchable core of highest category within the Treaties. This appears clearly from caselaw whereby the CJEU has outlined the EU constitutional core as the original source of the autonomy of the EU legal order (Section 2.1.), as a limit to abuses of the national identity clause in Article 4(2) TEU (Section 2.2) and as a limit to the activity of the Council of the EU in the CFSP (section 3).

2.1 Constitutional Core and Autonomy of the EU legal order

When it was created in 1952, the European project was merely conceived as limited economic cooperation with a view to securing greater peace and prosperity for its Member States.[38] Today, the EU has evolved into a more complex entity, which, for some, is the expression of a 'Union of Values' ideal.[39] A sign of change in the nature of the European Community ('EC') was already outlined in Article 6 of the Treaty of Amsterdam, which recognized 'the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law' not only as common to all Member States, but also as foundational to the EC.[40] However, the reference to common principles reflected the preoccupation for further enlargement and the need to ensure homogeneity across the Member States rather than a shift from economic to constitutional values, as confirmed by the limited role that those principles played in the caselaw of the CJEU.[41]

When *Kadi*[42] reached the Kirchberg, it provided a good opportunity to emphasize the importance of those founding principles underpinning the EC. In that case, the applicant was seeking the annulment of a Community Regulation implementing a United Nations Security Council Resolution ('UNSCR') fighting terrorism. To assess the legality of the Community act, an indirect review of the UNSCR was necessary. This aspect led

[38] Gráinne de Búrca, 'Europe's Raison d'Etre' (2013) Public Law and Legal Theory Research Paper Series, New York University School of Law.
[39] Matteo Bonelli, 'A Union of Values: safeguarding democracy, the rule of law and human rights in the EU member states' [Doctoral Thesis, Maastricht University] 2019, 73.
[40] Treaty of Amsterdam (1997) OJ C 340, Article 6.
[41] Luke Dimitrios Spieker, 'EU values before the Court of Justice' (Oxford University Press, 2023) 77.
[42] Case T-315/01 Kadi v Council and Commission [2005] EU:T:2005:332.

the Court of First Instance to conclude that it could not 'review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order'[43] as they fell outside the ambit of the Court's jurisdiction.[44] Conversely, on appeal, the ECJ clarified that the EU judiciary is called to ensure 'in principle the full review, of the lawfulness of all Community acts in light of the fundamental rights forming an integral part of the general principles of Community law'.[45] The obligation to protect fundamental rights derives from the rule of law and, at the same time, is illustrative of the autonomous nature of the Community legal order.[46] Furthermore, while it is acceptable that certain international law obligations may impair the functioning of the internal market, no derogation from the founding principles of Article 6(1) Treaty of Amsterdam can be authorised.[47]

The constitutional salience of these few words can be appraised on two levels. First, the CJEU has identified a set of rules which enjoys non-derogable status and higher ranking in respect to other provisions within the Treaties.[48] Already in the 1980s, Pierre Pescatore argued that 'a clear hierarchy of values has emerged in the case law of the Court of Justice, as certain Treaty provisions are emphasized over others for being more 'essential' or 'fundamental''.[49] While at his time of writing those values had economic connotations, in *Kadi* there is a clear shift to the values of constitutionalism.[50] Democracy, rule of law and protection of fundamental rights became the new DNA of the European Community:[51] with a single shot, the ECJ conferred simultaneously constitutional features and an ethos-related element to the EC.[52] This was not a revolution occurred in a vacuum, but the legitimate descendant of a tradition began with 'The Classics' of the CJEU.[53] As a matter of fact, Gattini defines Kadi as 'a direct, if late,

[43] ibid para 283.
[44] ibid para 225.
[45] Case C-402/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] EU:C:2008:461, para 326.
[46] ibid para 316.
[47] ibid para 303.
[48] Katja S. Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights' (2009) 9(2) Human Rights Law Review 297.
[49] Bast and Von Bogdandy (n 23) 1494 translating Pierre Pescatore, "Die Gemeinschaftsverträge als Verfassungsrecht" in Grewe, Rupp and Schneider (eds.), Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit (Nomos, 1981) 331.
[50] Monica Claes and Matteo Bonelli, 'The Rule of Law and the Constitutionalisation of the European Union' in Werner Schroeder (ed.) Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation (Hart Publishing 2016) 273.
[51] Joseph H.H. Weiler, 'Deciphering the Political and Legal DNA of European Integration' in Julie Dickson and Pavlos Eleftheriadis (eds.) Philosophical Foundations of European Union Law (Oxford University Press 2012).
[52] Frank Schorkopf, 'Value Constitutionalism in the European Union' (2020) 21 German Law Journal, 957.
[53] Giuseppe Martinico, 'Building Supranational Identity: Legal Reasoning and Outcome in Kadi I and Opinion 2/13 of the Court of Justice' (2016) 2(8) Italian Journal of Public Law 246.

offspring of the *Van Gend en Loos* and *Costa/Enel* jurisprudence'.[54]

In 1963, the sui generis nature of the 'the new legal order' established by the drafters of the Treaties was intertwined with direct effect of Community norms and, as later clarified in *Costa v Enel*, with their precedence (primacy) over conflicting national legislation.[55] In 1986, the CJEU finally embraced the constitutional language[56] and clarified in *Les Verts* that the Community was 'based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter'.[57] By relying upon these stable jurisprudential roots, *Kadi* enabled the CJEU to take a step forward: 'liberty, democracy and respect for human rights and fundamental freedoms' were unveiled as core principles which take precedence over other provisions of the Treaties.[58]

Second, the values now enshrined in Article 2 TEU are linked to the concept of autonomy of the EU legal order. It is important to bear this connection in mind when reading, in particular, CJEU's judgements concerning the relationship of EU law with international law after the entry into force of the Treaty of Lisbon. In this respect, the most prominent example is provided by *Opinion 2/13* on the EU accession to the ECHR.[59] After sixty years of judicial interaction and structural amendments both in EU primary law as well in the ECHR, in the summer of 2013 the final DAA of the EU to the ECHR was adopted.[60] Pursuant to Article 218(11) TFEU, the Commission requested an ex-ante review of the compatibility of the envisaged agreement to the CJEU. In an unexpected turn of events,[61] the high hopes to finally fulfil the Treaty-mandated accession

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[54] Andrea Gattini, 'Joined Cases C–402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008' (2009) 46 Common Market Law Review 224.
[55] Case C-6/64 Costa v Enel [1964] EU:C:1964:66.
[56] Martinico (n 53) 241.
[57] Case C-294/83 Parti écologiste 'Les Verts' v European Parliament [1986] EU:C:1986:166, 23.
[58] Allan Rosas and Louise Armati, 'EU Constitutional Law: An Introduction' 3rd ed. (Hart 2018) 53–55; for a similar view, Ziegler (n 48).
[59] In the literature, other judgments of the CJEU have been defined as illustrative of values representing a non-derogable core, such as Case Opinion 1/91 Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] eu:c:1991:490; Case Opinion 1/09 on the Creation of a Unified Patent Litigation System [2011] EU:C:2011:123; Case Opinion 1/17 on the EU-Canada Agreement [2019] EU:C:2019:72. See Mantilla de los Rios (n 29); Rossi, (n 29).
[60] Federico Fabbrini, Joris Larik, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights' (2016) Yearbook of European Law 16.
[61] For a critical appraisal of the Court's conclusions, see for example, Bruno de Witte, Šejla Imamović, 'Opinion 2/13 on accession to the ECHR: defending the EU legal order against a foreign human rights court' (2015) 40(5) European Law Review 683-705; Leonard F.M. Besselink, 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13' (Verfassungsblog, 23 December 2014, https://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-

obligation[62] came to an end when the Court concluded that the DAA was not compatible with the Treaties, it being liable 'to adversely affect the specific characteristics and autonomy of EU law'.[63] Once again, the concept of autonomy was used as a shield to preserve the constitutional framework established by the Treaties, as outlined in Articles from 13 TEU to 19 TEU.

Particularly, the CJEU's jurisdiction was emphasized as essential to preserve the nature of EU law.[64] A similar argument was already put forward in *Opinion 1/09* on the creation of a unified patent litigation system,[65] which arguably reflected the unwillingness of the CJEU to give up its monopoly on the correct interpretation and validity of EU law. However, if one reads *Opinion 2/13* with the awareness that the Court understands the jurisdiction conferred upon it by the Treaties as a concrete expression of the abstract value of the rule of law,[66] the CJEU's conclusions confirm the connection between EU autonomy and EU values already delineated in Kadi. This link appears more clearly in respect to the principle of mutual trust. The latter is based on the fundamental premise that all Member States are equally committed to Article 2 TEU:[67] any agreement able to affect this principle – and, thus, the values underpinning it – would in turn undermine the autonomy of the EU legal order.[68] Therefore, in *Opinion 2/13* the ECJ confirmed the higher status of values,[69] somewhat concealed under 'autonomy' cosmetics, over a Treaty provision mandating an obligation like Article 6(2) TEU.

opinion-213-2/ ; Sionhaid Douglas Scott, 'Opinion 2/13 on EU accession to ECHR: a Christmas Bombshell from the European Court of Justice', (Verfassungsblog, 24 December 2014, https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/).

[62] TEU (n 5) Article 6(2).

[63] Case C-2/13 Opinion pursuant to Article 218(11) TFEU on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454, para 258.

[64] Mantilla de los Rios (n 29); Case Opinion 1/09 on the Creation of a Unified Patent Litigation System [2011] EU:C:2011:123, para 85. Case C-2/13 Opinion pursuant to Article 218(11) TFEU on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454, paras 206; 234; 254.

[65] Case Opinion 1/09 on the Creation of a Unified Patent Litigation System [2011] EU:C:2011:123, para 85.

[66] Case C-64/16 Associaçao Sindical dos Juìzes Portugueses [2018] EU:C:2018:117.

[67] Case C-2/13 Opinion pursuant to Article 218(11) TFEU on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454, 168.

[68] Eleonora di Franco and Mateus Correia de Carvalho, 'Mutual Trust and the EU accession to the ECHR: are we over the Opinion 2/13 Hurdle?' (2023) 8(3) European Papers, 1221. Similarly, Case C-; Case Opinion 1/17 on the EU-Canada Agreement [2019] EU:C:2019:72, para 110.

[69] Rossi (n 29) 640 'ainsi, il peut être consideré que, en tant qu'expression des principes fondateurs et des valeurs suprêmes de l'Union, l'article 2 TUE se situe à un niveau supérieur par rapport à toutes les autres normes des traités'.

2.2 A Clash of Constitutional Cores: EU v Member States

Higher ranking and non-derogability of the EU constitutional core also hold true in the relationship between the EU and its Member States, as confirmed by two Treaty provisions. First, Article 49 TEU links compliance to Article 2 TEU with EU membership. In *Wightman*, the ECJ confirmed that the 'common values referred to in Article 2 form part of the very foundations of the European legal order (..) to which Member States 'have freely and voluntarily committed themselves.'[70] In *Repubblika*, to preserve EU values from Member States deficiencies, the ECJ developed the principle of non-regression: Member States cannot adopt legislation diminishing the protection of values once they have joined the EU.[71]

Second, Article 7 TEU foresees a political mechanism that encompasses both clear risks of infringement of values, pursuant to the first paragraph, and serious breaches that have already occurred, pursuant to the second paragraph. The effects of the activation of Article 7(2) TEU, notably, the suspension of voting rights by the European Council, are emblematic of the fundamental role played by Article 2 TEU. At the same time, the procedural hurdles to trigger the sanction mechanism make it, *de facto*, an impossible path to pursue, as recent events showed. When faced with the values crisis in Hungary and Poland, the EU was thus confronted with an existential dilemma: compliance with values was an indispensable pre-requisite to obtain EU membership, yet no appropriate safeguard to ensure their protection was envisaged once a state joined the EU. It falls outside the scope of this thesis to provide a detailed reconstruction of the EU's reaction to uphold core values against illiberal states.[72] It is here sufficient to briefly recall the ECJ's findings in the landmark judgement *Associaçao Sindical dos Juìzes Portugueses* ('ASJP').[73]

For a long time, values were conceived as a mere proclamation from which no specific legal obligations derived[74] and, consequently, their protection could be guaranteed only through the political avenue of Article 7 TEU. In 2018, however, the CJEU reconfigured the EU constitutional order[75] and linked the abstract value of the

[70] Case C-621/18 Wightman [2018] EU:C:2018:999, para 63.
[71] Case C-896/19 Repubblika V ii-Prim Ministru [2021] EU:C:2021:311, para 63.
[72] In the abundant literature on the topic, for example Grainne de Burca, 'Poland and Hungary's EU membership: on not confronting authoritarian governments' (2022) 20(1) ICON, 13; Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.
[73] C-64/16 Associaçao Sindical dos Juìzes Portugueses [2018] EU:C:2018:117.
[74] Dimitry Kochenov, 'On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed' (2015) 6 University of Groningen Faculty of Law Research Paper Series 148.
[75] Michal Ovádek, Has the CJEU just Reconfigured the EU Constitutional Order?' (Verfassungsblog 28 February 2018, https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/.

rule of law[76] to a concrete provision, notably, Article 19 TEU. By confirming the previous findings that associated the rule of law with judicial review and judicial protection,[77] the Court transformed values into a benchmark against which assessing the activity of the Member States, also in fields falling outside the scope of EU law.[78]

The CJEU's understanding of Article 2 TEU being the core around which the EU legal order revolves already emerged from the caselaw mentioned above. Yet, in February 2022 this core translated into the identity of the EU, a limit to the mandate to respect national constitutional identities stated in Article 4(2) TEU.[79] As is well known, after lengthy debates,[80] in 2020 the European Parliament ('EP' or 'Parliament') and the Council of the EU adopted the Conditionality Regulation, a legislative act aimed at protecting the EU's financial interests against the rule of law deficiencies in the Member States.[81] The validity of the act was challenged in two separate actions by Poland and Hungary. Among the several pleas in law put forward, both states alleged the infringement of Article 4(2) TEU, provision that protects the 'national identities' of the Member States. The Court, for the first time, employed the concept of EU constitutional identity and linked it to the values of Article 2 TEU,[82] by stating that 'they are not a mere statement of policy guidelines or intentions (..) but are an integral part of the very identity of the European Union as a common legal order'[83] as well as 'a source of legal obligations for the Member States thanks to the principles that give them concrete expression.'[84] The Conditionality judgments clarified that national identity claims are legitimate only in so far as they comply with the values of Article 2 TEU,[85] thus providing an example of the existence of a hierarchy within Treaty provisions, with Article 2 TEU placed on the highest seat.

A parallel can be drawn between these two judgments and the *Lisbon Urteil* of

[76] Jeremy Waldron, 'Is the Rule of Law an essentially contested concept (in Florida)?' (2002) 21(2) Law and Philosophy (2002 Kluwer Academic Publishers).
[77] Bonelli (n 39).
[78] Matteo Bonelli, Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 European Constitutional Law Review 631, referring to a 'new functional sphere of EU law'.
[79] Drinóczi and Faraguna (n 21) 59.
[80] Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23 German Law Journal 136.
[81] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (Rule of Law Conditionality Regulation) [2020] OJ LI 433/1.
[82] Tímea Drinóczi and Pietro Faraguna, Constitutional Identity in and on EU terms (Verfassungsblog 21 February 2022) <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/>.
[83] Case C-157/21 Hungary v Parliament and Council [2022] EU:C:2022:98, paras 145 and 264.
[84] ibid para 264.
[85] Drinóczi and Faraguna (n 21) 77.

the German Constitutional Court ('GCC').[86] In that case, the GCC identified Article 79(3) of the German Basic Law as constituting the roots of the German constitutional identity:[87] that provision states that certain core principles cannot be amended neither by the national legislator[88] nor due to the membership to the EU.[89] Among them, the GCC identified the principle of democracy, which ultimately boiled down to the right to vote of German citizens. As a consequence, the German Constitution precluded the conferral to the EU of competences which could jeopardize the right to vote of German citizens and, thus, the constitutional identity of Germany. Against this background, the choice to refer to Article 2 TEU as 'the very identity' of the EU was arguably not accidental: by using the same language of national constitutional courts, the ECJ highlighted that EU values constitute a normative core that must be protected at all times and, consequently, poses a limit to other Treaty provisions which might adversely affect it.

[86] German Constitutional Court, 2 BvE 2/08, 30 June 30 2009, Lisbon Decision.
[87] ibid para 208.
[88] ibid para 216.
[89] Drinóczi and Faraguna (n 21) 64.

3 The EU Constitutional Core in the Common Foreign and Security Policy

In the previous section, it has been shown how the ECJ has identified in Article 2 TEU (at least a part of) the EU constitutional core, albeit not in explicit terms. In the following pages, it will be illustrated how the protection of the EU constitutional core in the politically sensitive area of the CFSP has unfolded. To this aim, this section will analyse a selected set of cases delivered after the entry into force of the Treaty of Lisbon whereby Article 2 TEU enabled a narrow interpretation of the jurisdictional 'carve-out'[90] laid down in Article 24(1) TEU and an extensive reading of the 'claw back'[91] stated in Article 275(2) TFEU.

3.1 The distinctive features of the Common Foreign and Security Policy

Although the Treaty of Lisbon abolished the former pillar structure and created a single European Union with legal personality,[92] the CFSP still retains its features of 'otherness'[93] as it is 'still subject to specific rules and procedures'.[94] Among its distinctive features lies the limited jurisdiction that Article 24(1) TEU confers upon the CJEU. The presence of an explicit 'carve-out' in primary law reflects Member States' reluctance in supranationalizing their foreign policies. Indeed, the drafters of the Treaties wanted to avoid that, through its typical teleological approach,[95] the CJEU could replicate the economic integration occurred with the establishment of an internal market in foreign affairs.[96] At the same time, the well-known shortcomings in judicial protection and the tension with the value of the rule of law could no longer go unnoticed.[97] As a consequence, the Treaty of Lisbon introduced two scenarios in which the Court regains

[90] The expression was first used in Case C-72/15 Rosneft [2017] Opinion of Advocate General Wathelet EU:C:2016:381, para 52.
[91] ibid para 51.
[92] TEU (n 5) article 47.
[93] Paul James Cardwell, 'On 'ring-fencing' the Common Foreign and Security Policy in the legal order of the European Union' (2013) 64 Northern Ireland Legal Quarterly.
[94] TEU (n 5) article 24.
[95] Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1997) 20(3) Fordham International Law Journal, 664; also, Koen Lenaerts and José A. Gutierrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) 20 Columbia Journal of European Law, 27.
[96] On the idea that negative integration occurs thanks to the caselaw of the ECJ, Fritz Schapf, 'Governing in Europe: Effective and Democratic?' (Oxford University Press, 2011), 43; Susanne K. Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' (2008) 10(3) Journal of Comparative Policy Analysis Research and Practice 301.
[97] This was especially evident in respect to the lack of judicial review of restrictive measures. Although the Maastricht Treaty conferred upon the EU the competence to adopt sanctions against third countries, but not individuals, the Council's practice led to individuals becoming targets of restrictive measures. However, no judicial remedy was available against CFSP acts. See Sara Poli, 'The turning of non-state entities from objects to subjects of EU restrictive measures' in Samo Bardutzky, Elaine Fahey, (eds.) Framing the subjects and objects of contemporary EU law (Edward Elgar Publishing, 2017) 158.

jurisdiction in the second subparagraph of Article 24(1) TEU.

While formally minor, the first is a substantial amendment of former Article 47 TEU.[98] The latter could be compared to a shield protecting the *acquis communautaire* of the former European Communities pillar from the intergovernmental CFSP.[99] Conversely, the current constitutional framework aims at a mutual 'non-affectation':[100] the CJEU now has the task to ensure that the implementation of CFSP measures does not impact other EU external action policies, but also vice versa.

The second amendment is the heritage of the failed Constitutional Treaty[101] and allows the EU judiciary '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'.[102] Albeit closer to the 'complete system of legal remedies'[103] that the CJEU claims to offer, the amendments introduced in 2009 are a mere crack in the shield of immunity that surrounds the EU institutions and acts implementing the CFSP. Is the choice of limiting judicial review to certain acts (decisions imposing restrictive measures) and to certain actions (action for annulment) compatible with EU founding values, identified by the Court as the EU constitutional core? The CJEU did not shy away from the challenge imposed by this question and, stone by stone, it has extended its jurisdiction with the view to uphold and preserve EU values in CFSP, regardless of the constitutional peculiarities distinguishing the area of high politics. This appears evidently especially after the (in)famous *Opinion 2/13* on the EU accession to the ECHR, which constituted a pivotal moment in the way the CJEU phrases its reasoning to establish jurisdiction.

3.2 CFSP after Lisbon: What Role for Democratic Oversight?

While the EU constitutional core encompasses the value of democracy, the role for the democratic institution par excellence, namely, the Parliament, in the implementation of the CFSP is extremely limited. To use the words of Zoller,

[98] Treaty of Amsterdam (n 40) Article 47.
[99] Carlo Curti-Gialdino, 'Some reflections on the "acquis Communautaire"', (1995) 32 Common Market Law Review 1105, referring to the pillar structure of the Maastricht Treaty as a temple and on the desire of the Member States 'to preserve the purity of the Community framework (the maintenance and respect of the acquis) and, for the future, to draw the intergovernmental component back into the classic institutional model (the development of the acquis).
[100] Peter Van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the gap filling role of the Court of Justice' (2021) 58 Common Market Law Review 1737.
[101] Alicia Hinarejos, 'Judicial Control of CFSP in the Constitution: A Cherry Worth Picking?' (2006) 25(1) Yearbook of European Law 363.
[102] TFEU (n 7) Article 275(2).
[103] Case C-294/83 Parti écologiste 'Les Verts' v European Parliament [1986] EU:C:1986:166, 23.

the relationship between democracy and foreign affairs has always been difficult. Regardless of the political system, it appears that in foreign affairs the executive has always enjoyed prerogatives and discretion which would have been unthinkable in any other policy areas.[104]

The traditionally limited role envisaged for parliaments in the 'in the area of national interests and sovereign wills par excellence'[105] can be explained by reference to the nature of acts concretizing foreign policy: they are short-term in character and are not designed to establish a permanent framework, as they respond to unpredictable international events,[106] which make the adoption of legislative instruments ill-suited.[107]

In this respect, the constitutional framework established by the Treaties makes no exception. In particular, the EP exercises budgetary functions in relation to the administrative expenditures to implement CFSP, as they are charged on the EU budget.[108] Moreover, pursuant to Article 36(1) TEU, the High Representative has a duty to regularly consult the EP 'on the main aspect and basic choices of the CFSP'. At the same time, Article 36(2) TEU confers to the EP the right to address questions and make recommendations to the Council and the High Representative. This aspect can be conceived as the basic degree of operationalization of 'parliamentary accountability', which is one of the aspects of democratic accountability.[109] The latter essentially requires that institutions directly elected by the citizens hold accountable the executive for its activity in the design and implementation of policies.[110]

At the same time, the exclusion of parliamentary oversight over the implementation of the CFSP has been criticized in the literature, defining the phenomenon as 'collusive delegation'. The term denotes the phenomena according to which national executives escape national democratic scrutiny by establishing an intergovernmental policy at supranational level which lacks a democratic supervisory body.[111] The situation becomes even more problematic when considering the concrete

[104]Elisabeth Zoller, 'Droit des relations extérieures' (Presses Universitaires de France, 1992) 368.
[105] Koskenniemi (n 4).
[106] Eileen Denza, 'The Intergovernmental Pillars of the European Union' (Oxford University Press 2002) 312.
[107] 7 On a position against a general 'parliamentarization' of CFSP, Daniel Thym, 'Beyond Parliament's Reach? The role of the European Parliament in CFSP' (2006) 11 European Foreign Affairs Review 124-127.
[108] TEU (n 5) Article 41(2).
[109] Deirdre Curtin, Peter Mair and Yannis Papadopoulos, 'Positioning Accountability in European Governance: An Introduction' (2010) 33(5) West European Politics 397.
[110] Jan Wouters and Kolja Raube, 'Seeking CSDP Accountability through interparliamentary scrutiny' (2012) 47(4) The International Spectator 150.
[111] Nathaniel Lalone, 'Accountability in the EU's Common Foreign and Security Policy: Lessons from the Common Commercial Policy' in Esther Barbe, Anna Herranz (eds) The Role of Parliaments in European Foreign Policy: Debating on Accountability and Legitimacy, (Foreign Policy Governance in Europe Research Network) 39; Péter Bajtay, 'Democratic and efficient foreign

application of these (few) primary law rules. As pointed out in the literature, information is not fully disclosed and, when it is, it happens too late.[112] In this way, the executive precludes the EP to exercise the minimum democratic prerogatives it holds in CFSP. Representative of the questionable Council's practice of not sufficiently involving the EP is the interinstitutional litigation between the Parliament and the Council on the conclusion of the EU-Mauritius agreement.[113] The two pleas in law put forward by the EP revolved around alleged procedural violations. Although the agreement had a CFSP provision as legal basis, the Treaty of Lisbon envisaged a single, general procedure for the conclusion of all types of international agreements.[114] Therefore, the EP sought clarifications on the meaning of 'agreement exclusively relating to CFSP' under Article 218(6) TFEU while simultaneously claiming an infringement of its right to information stated in Article 218(10) TFEU. The latter requires the EP to be 'immediately fully informed at any stage of the proceeding'.[115] However, the final Council Decisions approving the adoption and signing of the EU-Mauritius Agreement were sent months after its adoption and after their publication in the Official Journal of the European Union. Whether the agreement should be declared void due to the infringement of an essential procedural requirement[116] necessary invoked a preliminary question: had the Court jurisdiction at all? To be sure, the dispute did not concern either compliance with Article 40 TEU nor the review of the legality of restrictive measures.

At first glance, the answer could be straightforward. If one compares the wording of Article 24 TEU and Article 19 TEU, it would not be unreasonable to conclude that they are twin provisions. The former establishing limited judicial review as the rule in CFSP; the latter granting broader powers to the CJEU in respect to the remaining fields falling within the scope of EU law. While such interpretation would have been coherent with the former pillar structure, it could not be endorsed under the constitutional framework designed by the Treaty of Lisbon. Bearing the objectives pursued by the latest treaty amendment, the Court in no more than a paragraph was able to define Article 24(1) TEU and Article 275(1) TFEU as 'derogations from the general rule enshrined in Article

policy? Parliamentary diplomacy and oversight in the 21st century and the post-Lisbon role of the European Parliament in shaping and controlling EU foreign policy' (2015) 11 EUI Working Paper 13.

[112] Sophie Dagand, Karl Von Wagau, Isabelle Bosse-Platière, Corine Caballero-Bourdot, 'Le Parlement Européen dans la PSDC' (2010) 4 Cahiers de l'IRSEM 38.

[113] Case C-658/11 European Parliament v Council [2014] EU:C:2014:2025.

[114] Nicole Lazzerini, 'Il ruolo del Parlamento Europeo e della Corte di Giustizia nella conclusione di accordi PESC' (2014) 3 Rivista di diritto internazionale 834. The creation of a single procedure reflects the abolition of the pillar structure and the introduction of a provision stating horizontal objectives to pursue in all policy areas, see TEU (n 5) article 21.

[115] TFEU (n 7) Article 218(10).

[116] TFEU (n 7) Article 263(2); Koen Lenaerts, Kathleen Gutman, Janek Tomasz Nowak, EU Procedural Law (Oxford Academy 2023) 300.

19 TEU, to be interpreted narrowly'.[117] The reasoning is then corroborated with the argument that Article 218 TFEU is a general provision which is not subject to the special rules of CFSP, thereby triggering the Court's duty to ensure the correct application of EU law.[118] Significantly, the Court interpreted the duty to inform the Parliament 'immediately and at any stage of the procedure' as a procedural reflection of the broader democratic value enshrined in Article 2 TEU,[119] to which any EU policy is subject. The constitutional framework designed by the Treaties implied a lower degree of democratic oversight in CFSP, not an exemption from it.[120]

In light of the findings above, the outcome of the ruling has been positively appraised in the literature as it ensures democratic and judicial accountability of the executive in an area that had previously been immune from scrutiny.[121] The reasoning of the Court, however, is not entirely clear. Reading Article 24 TEU as an exception to Article 19 TEU is not supported neither by a textual interpretation of the Treaties nor by the *travaux préparatoires* leading to current Article 24 TEU.[122] As a matter of fact, the scope of judicial review in CFSP was highly debated among the Member States: if some representatives pushed for an extension of judicial scrutiny, some others preferred keeping foreign policy exempted from judicial accountability.[123] Consequently, Article 24 TEU is the compromise between very different positions:[124] an extensive reading of the exceptional cases where judicial review is possible arguably contradicts the intention of the drafters of the Treaties.

Only a few years later did the ECJ provide clarifications on what might have been the reasoning behind this statement in a very different line of caselaw. As demonstrated above, *ASJP* constitutes the first, explicit example of operationalization of the value of the rule of law: Article 2 TEU was linked to Article 19 TEU. Applying this conclusion retroactively, *Parliament v Council* (EU-Mauritius Agreement) can thus be understood as delineating the first traces of the superiority of the Article 2 TEU, it being the EU

[117] Case C-658/11 European Parliament v Council [2014] EU:C:2014:2025, para 70.
[118] ibid para 72.
[119] ibid para 81.
[120] Case C-130/10 European Parliament v Council [2012] EU:C:2010:472, para 82.
[121] Steven Peers, 'The CJEU ensures basic democratic and judicial accountability of the EU's foreign policy' (2014) EU Law Analysis; Peter Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: European Parliament v. Council (Pirate Transfer Agreement with Mauritius)' (2015) 52 Common Market Law Review 1391.
[122] Maria Gisella Garbagnati-Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55(1) International & Comparative Law Quarterly 100, stating that 'most proposals to the effect of extending the jurisdiction of the ECJ over foreign policy and security matters proved politically unacceptable for the Member States' and this was reflected by the provision ultimately adopted in the final text of the Constitution.
[123] Hinarejos (n 101) 367.
[124] ibid, referring to Professor Arnull's definition of the provision as 'unhappy compromise', Written Evidence by Anthony M. Arnull in The Future of the European Court of Justice. Report With Evidence. 6th Report of Session 2003–04 (HL Paper 47 2004) 55, 57.

constitutional core, over the jurisdictional limitations over CFSP measures. In particular, since it gives concrete expression to the EU constitutional core, Article 19 TEU acquires special significance and is enabled to prevail over the constraints of Article 24 TEU, which preclude the concretization of the rule of law dimension of the EU constitutional core. A similar conclusion can be inferred also in respect to the second plea in law. By finding that Article 218(10) TFEU was applicable to all types of international agreements, the Court could have simply relied on the structure of the provision. The placement of the right to information of the EP in a different paragraph would suggest that it constitutes the default rule: it would apply when neither consultation nor consent do. This would be coherent with the intention of the Lisbon Treaty to ensure consistency across EU external action policies.[125]Conversely, the Court chose to stress the democratic dimension of the EU constitutional core, which is reflected in the degree of involvement of the EP: democratic oversight may thus vary as a result of the choice made by the framers of the Treaties,[126] but cannot be completely disregarded. In this way, the Court traced the hierarchical superiority and non-derogability features of the EU constitutional core while simultaneously unpacking its content.

3.3 (Re)defining the contours of the Court's jurisdiction through the rule of law: the caselaw post Opinion 2/13

Preliminary signs of the special features of the EU constitutional core were already outlined in CFSP caselaw shortly after the entry into force of the Lisbon Treaty. Yet, the change of paradigm in the CJEU's reasonings corresponds to the delivery of *Opinion 2/13* on the EU accession to the ECHR. The significance of this Opinion lies not only in its ability to protect the EU constitutional core covered as 'autonomy' of the EU legal order (Section 2), but also in it constituting a pivotal moment that changed the CJEU's approach to CFSP cases.

Among the (sub)reasons put forward to justify the incompatibility of the DAA, the limited scope of judicial review in CFSP held important weight. By stating that 'it has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters',[127] the Court suggests that it is the role of the EU judiciary to define which acts enjoy judicial immunity. Accordingly, the caselaw post *Opinion 2/13* pursues the mission of clarifying the extent of judicial powers in foreign policy. To this end, two strands of caselaw are illustrative of this phenomenon. On the one hand, the line of cases distinguishing between political choices, which escape judicial review, and acts of

[125] TEU (n 5) Article 21.
[126] Case C-130/10 European Parliament v Council [2012] EU:C:2010:472, para 82.
[127] Case C-2/13 Opinion pursuant to Article 218(11) TFEU on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454, para 251.

implementation (*Elitaliana, H*), subject to the CJEU's jurisdiction. On the other hand, the line of cases clarifying the scope of the 'claw-back' provision in article 275(2) TFEU (*Rosneft, Bank Refah, Neves 77*). At the end of the road, *KS&KD* represents the ring unifying these two strands: to grant effective judicial protection, the Court has reconstrued its jurisdiction to encompass all CFSP measures, except for political and strategic choices and acts directly linked thereto.

3.3.1 Drawing the Line: Political choices v Acts of Implementation

The first strand of caselaw attempts to distinguish between political choices, which are immune to judicial review, from acts of implementation. To this end, the ruling *H v Council*[128] provides a good example on the demarcation of the thin line separating political acts from day-to-day management activities. The dispute originated from the decision of the Head of Mission of the EU Police Mission (EUPM) in Bosnia-Herzegovina to redeploy the applicant, an Italian magistrate, to another location for operational reasons. After the action for annulment against the CFSP redeployment decision and the request for the award of damages were rejected by the General Court, the applicant brought an appeal before the Court of Justice. Similarly to *Parliament v Council* (EU-Mauritius Agreement), the jurisdiction of the Court on the matter was not crystal clear as the Treaty exceptions did not seem to encompass the reviewability of an act like the contested one. To overcome the Treaty limitations, the Court drew inspiration from Justice Brennan in *Baker v Carr*.[129] In that case, he stated that 'it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance'.[130] Similarly, the CJEU clarified that the mere fact that an act is adopted in the context of the CFSP 'does not necessarily lead to the jurisdiction of the EU judicature being excluded'.[131] It thus seems that the substance of the act is essential to establish the CJEU's jurisdiction.

A similar approach was adopted already in *Elitaliana*,[132] a dispute where a CFSP act related to the award of a public contract whose expenditure would be subject to the Financial Regulation. The necessary applicability of EU public procurement law was a key factor to trigger the Court's jurisdiction.[133] This finding was the first criterion to differentiate among CFSP acts: only those that relate both formally and substantially to CFSP can escape judicial review.[134] *H v Council* should, therefore, be understood

[128] Case C-455/14 P H v Council [2016] EU:C:2016:212.
[129] U.S. Supreme Court, Baker v Carr, 369 U.S. 186 (1962).
[130] ibid para 10.
[131] Case C-455/14 P H v Council [2016] EU:C:2016:212, para 43.
[132] Case C-439/13 P Elitaliana v Eulex Kosovo [2015] EU:C:2015:753.
[133] ibid para 49.
[134] Solution later suggested in Case C-72/15 Rosneft [2017] Opinion of Advocate General Wathelet EU:C:2016:381, para 49 and in Case C-14/19 P SatCen v KF [2020] Opinion of Advocate General Bobek, para 61.

as the first practical application of the criterion developed in *Elitaliana*. Since the dispute required the applicability of secondary EU rules on staff management, the Court could establish its jurisdiction as 'the limited scope of judicial review could not be considered to be so extensive as to encompass EU general rules'.[135] To reach this conclusion, the divergent views purported by the Commission and the Advocate General ('AG') were not of guidance. Whereas the former suggested to draw a distinction between acts of sovereign foreign policy and acts of implementation, the latter dismissed this interpretation as neither the Treaties, nor the caselaw nor even the Commissions' submissions contained criteria to make such distinction.[136] For this reason, the AG recommended the CJEU to declare lack of jurisdiction to hear the action.[137]

The Court's lack of engagement with these two opposing views was explained with reasons of procedural economy.[138] However*, H v Council* already hints at a distinction between acts of management and political choices attributable to the Council, although not phrased in the Commission's terms. The choice to conceal this conclusion can be linked to the difficulty of exhaustively defining what a non-justiciable political decision is.[139] Arguably, at the time of the ruling the Court was just at the beginning of its (re)defining activity and it had not yet had the opportunity to develop sufficient and appropriate criteria.[140]

The connection with a non-CFSP measure could have already been sufficient to convincingly (and implicitly) reconstrue the scope of CFSP as only encompassing political choices. However, the Court went a step further by adding a simple and yet striking particular:[141] an explicit reference to the value of the rule of law to further corroborate its creative conclusion[142] that the Staff Regulation was applicable in the case at hand. As the applicant had been seconded by the Italian government, it was unclear whether EU rules could be applied at all. It was exactly for this reason that the General Court had declared the action inadmissible at first instance.[143] However, a different outcome

[135] Case C-455/14 P H v Council [2016] EU:C:2016:212, para 55.
[136] Case C-455/14 P H v Council [2016] Opinion of Advocate General Wahl, EU:C:2016:212, para 61.
[137] ibid para 104.
[138] Peter Van Elsuwege, 'Upholding the rule of law in the Common Foreign and Security Policy: H v. Council' (2017) 54 Common Market Law Review, 853.
[139] Case C-455/14 P H v Council [2016] Opinion of Advocate General Wahl, EU:C:2016:212, paras 60-61.
[140] Similar wording to Case C-2/13 Opinion pursuant to Article 218(11) TFEU on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454.
[141] In Elitaliana, the Court limited itself to link the CFSP act to a non-CFSP act and relied on the previous finding that the lack of jurisdiction in CFSP is the exception and not the rule.
[142] Van Elsuwege (n 138) 855.
[143] Case T-271/10 H v Council [2014] EU:T:2014:702, para 50 'attributable in principle to the Italian authorities'.

would have meant that only staff seconded by the EU institutions, and not the one seconded by the Member States would be granted effective judicial review.[144] In other words, the Court seemed to suggest that had it adopted a textual reading of primary law, the rule of law in its expression of judicial protection would have not been complied with.[145] Once again, EU values partly corrected primary law, this time less silently than before.

3.3.2 Drawing the Line Part II: The Scope of Article 275(2) TFEU

The second strand of caselaw aims at clarifying the scope of the claw-back[146] provision of article 275(2) TFEU. This occurs through a careful balancing activity between two components of the rule of law: on the one hand, the right to effective judicial protection; on the other hand, the principle of separation of powers.[147]

A first illustrative example is provided by *Rosneft*,[148] which faced the CJEU, for the first time, with a request for a preliminary ruling on validity of a CFSP Decision and implementing TFEU Regulation.[149] As the only legal remedy explicitly provided for by Article 275(2) TFEU is the action for annulment, the preliminary question represented a textbook example of inadmissibility, at least in respect to the CFSP Decision. Conversely, the *Les Verts*-mandated obligation to ensure judicial protection could have been fulfilled in respect to the implementing Regulation, which fell within the CJEU's general jurisdiction. Such solution, however, would have been 'likely to provide an inadequate answer to concerns of the referring court'.[150] Thus, to overcome the textual limitations of Article 275 TFEU, the Court mixed old and new logics.[151]

First, the 'complete system of legal remedies' to review the legality of EU acts as established by the Treaties rests on two complementary pillars: the action for annulment

[144] Case C-455/14 P H v Council [2016] EU:C:2016:21257, para 57.
[145] As an example, Case C-72/15 Rosneft [2017] EU:C:2017:236, para 76, where the Court justify the decision to establish jurisdiction over a preliminary reference on the validity of CFSP acts as it would otherwise be 'inconsistent with the system of effective judicial protection established by the Treaties.'
[146] The term is borrowed from Case C-72/15 Rosneft [2017] EU:C:2016:831, Opinion of Advocate General Wathelet, para 51.
[147] 7 On the principle of separation of powers being a component of the rule of law, Case C-279/09 DEB [2010] EU:C:2010:811, para 58; of 10 November 2016, Case C-452/16 Poltorak PPU [2016] EU:C:2016:858, para 35; C-477/16 Kovalkovas PPU [2016] EU:C:2016:861, para 36.
[148] Case C-72/15 Rosneft [2017] EU:C:2017:236.
[149] To impose restrictive measures, the Council adopts a CFSP Decision based on article 29 TEU. If they are of economic nature and target natural and/or legal persons, a subsequent regulation based on article 215(2) TFEU shall be adopted.
[150] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 53. Although intertwined, the CFSP Decision and the TFEU Regulation may differ, as the latter is more technical. On the matter, Sara Poli, 'Le misure restrittive autonome nel diritto dell'Unione Europea' (Editoriale Scientifica 2019) 20.
[151] Matteo Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature' (2019) 12(2) Review of European Administrative Law 47.

and the preliminary reference procedure. Since CFSP Decisions require implementation by the Member States, precluding national courts from referring a question to the CJEU, especially when they have doubts on the validity of EU acts,[152] would be inconsistent with the essential characteristics of the system of judicial protection, notably, its completeness.[153] By stressing the importance of judicial protection and by focusing (solely) on the concept of 'legality' stated in Article 275(2) TFEU, the Court concluded that the provision determines not the type of procedure, but the type of decisions that can be object to judicial review.[154] This finding, however, does not result neither from the wording of the provision nor the objectives or context in which Article 275(2) TFEU was drafted,[155] but rather from the teleo-systemic approach[156] that the CJEU tends to resort to in difficult cases. The preference to this method was already evident in *Van Gend en Loos*,[157] when the Court stated that 'it is necessary to consider the spirit, the general scheme and the wording of the provision in question'.[158] This reasoning enabled the Court to define the former European Coal and Steal Community as a 'new legal order of international law'.[159] This 'classic' of the CJEU's jurisprudence is also illustrative of the 'stone-by stone' approach characterizing hard cases, when reaching the required consensus might be challenging.[160]As President Lenaerts clarified, in those circumstances 'the persuasiveness of its argumentative discourse is built up progressively'.[161] It follows that the Court limits itself to answer the necessary questions to solve the case before it, sometimes using vague statements that are better refined and clarified in subsequent cases, if further litigation requires it.[162] In *Van Gend en Loos,* the novelty of the legal order established by the Treaty was linked to direct effect and subsequently, with *Costa v. Enel,* to the precedence (primacy) that EC Treaty provisions enjoyed over conflicting national legislation.[163] From the CJEU's reasoning, it is unclear whether direct effect and primacy are the results or the (hidden) premises of the new Community law. A similar circular reasoning comes back, to a certain degree, also in

[152] Case C-314/85 Foto-Frost [1987] EU:C:1987:452, para 16, whereby the Court declared that national courts cannot invalidate EU acts.
[153] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 69.
[154] ibid para 70.
[155] Case C-658/11 European Parliament v Council [2014] EU:C:2014:2025, para 51.
[156] Xerramon Bengoetxea, 'The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence' (Clarendon Press, 1993), 233; J. Mertens de Wilmars, 'Réflexions sur les méthodes d'interprétation de la Cour de Justice des Communautés Européennes' (1986) 22 Cahiers du Droits Européen.
[157] Fennelly (n 95).
[158] Case C-26/62 Van Gend en Loos [1963] EU:C:1963:1, p. 12.
[159] ibid.
[160] Koen Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach' (2015) International Comparative Jurisprudence 1.
[161] Koen Lenaerts, 'How the ECJ thinks: a study on judicial legitimacy' (2013) 36 Fordham International Law Journal 1303.
[162] Lonardo (n 10) 837.
[163] Case C-6/64 Costa v Enel [1964] EU:C:1964:66, p. 594.

Rosneft.

After finding that the wording of Article 275(2) TFEU does not exclude the preliminary reference as a remedy to review the legality of restrictive measures, the CJEU invokes the value of the rule of law in Article 2 TEU and the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights ('CFR'),[164] 'the essence of the rule of law'.[165] Contrary to *Kadi*, the rule of law is not explicitly defined as a value from which no derogation is allowed nor as hierarchically superior to other Treaty provisions. Yet, the reasoning of the Court leads to Article 2 TEU and Article 47 CFR as having the power to redefine the jurisdictional contours set by Article 275(2) TFEU. As a matter of fact, the superiority of Article 2 TEU then channeled into Article 47 CFR – it being the operational provision of the rule of law – ultimately corrects the scope of the 'claw-back provision', in order to ensure the attainment of the objectives they pursue. The parallelism with *Van Gend en Loos* lies in this aspect: the hierarchical superiority of EU values is the result of the reasoning developed in Rosneft itself, whereby the Court interprets the legal obligations deriving from Article 2 TEU as superior to the constraints of Article 24 TEU and Article 275(2) TFEU.

The outcome of the case has been positively appraised by some scholars as it is coherent with the complete system of legal remedies upon which the EU is founded.[166] At the same time, it illustrated the inherent tensions between the principles composing the rule of law. Although the latter has been defined as an essentially contested concept,[167] the jurisprudence of the Court has clarified its meaning in the EU legal order. If, as mentioned above, *Les Verts* linked the rule of law to access to court and judicial review, in *DEB* its operation was connected to the principle of the separation of powers.[168] In the EU institutional structure, the latter is reflected in the principle of institutional balance stated in Article 13(2) TEU, according to which each institution shall act within the limits of their competences.[169] Particularly in respect to the adoption of restrictive measures, the EU judiciary recognized that the Council enjoys broad discretion as it has to undertake complex assessments.[170] It follows that when a natural or legal person challenges the validity of sanctions imposed against them, the Court needs to strike the right balance between the right to effective judicial protection and

[164] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.
[165] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 73.
[166] Poli (n 18) 1799.
[167] Waldron (n 76).
[168] Case C-279/09 DEB [2010] EU:C:2010:811, para 58.
[169] Jean-Paul Jacqué, 'The Principle of Institutional Balance' (2004) 41 Common Market Law Review 383.
[170] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 113 and caselaw cited therein.

the political prerogatives entrusted to the Council by the Treaties. The distinction drawn between restrictive measures of general application, escaping judicial review, and individual sanctions, whose validity can be challenged, is representative of this difficult balancing activity. While criticized in the literature as it subjects the right to judicial protection to the type of act adopted by the Council,[171] this distinction is not merely artificial, but an example of judicial restraint.[172] As measures of general application impose on a category of addressees determined in a general and abstract manner a specific prohibition[173] they should be deemed as expression of political discretion granted to the executive in foreign affairs. Judicial review should thus be reduced to preserve the balance between fundamental rights' protection and separation of powers.

3.4 The Post-Rosneft Era: A (true) complete system of legal remedies?

As any seminal judgment, Rosneft left many questions open and set the foundational stone that enabled the Court, in subsequent cases, to clarify the scope of Article 275(2) TFEU. Consequently, the Court could incrementally expand its jurisdiction through reference to 'settled caselaw'[174] and strengthen the EU constitutional core by clarifying the arguments put forward in 2017.

The second stone of the *Rosneft* saga was set in October 2020. In *Bank Refah*, the ECJ was faced with a new constitutionally salient question: does the (now extended) jurisdiction of the EU courts encompass actions for damages pleas against restrictive measures imposed through a CFSP Decision? This aspect had not yet been clarified in previous cases since, quite surprisingly, applicants did not resort to such a remedy.[175] With little reluctance, the ECJ answered in the affirmative.

The novelty of the ruling lies not only in the outcome, but also in the logical order of the arguments put forward to support the reasoning. After recalling that restrictive measures of economic nature that are imposed through a TFEU Regulation fall within the scope of Article 19 TEU, the ECJ explicitly recognized that 'Article 275 TFEU does not expressly mention the jurisdiction of the Court of Justice of the European Union to

[171] As a matter of fact, such distinction is only relevant when the contested measure is a CFSP Decision and it becomes irrelevant when the object of review is a regulation; Poli (n 150).
[172] Graham Butler, 'Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law' (2018) 24(3) Columbia Journal of European Law 664, referring to Case C-348/12 P Council v. Manufacturing Support & Procurement Kala Naft [2013] as shaping 'the primitive contours of the political question doctrine in CFSP'.
[173] Case C-478/11 P Gbagbo and Others v Council [2013] EU:C:2013:258, para 56.
[174] For example, the reasoning in Neves 77 the Court initiates with reference to settled case law to further expand jurisdiction, see para 39.
[175] Graham Butler, 'Non-Contractual Liability and Actions for Damages Regarding Restrictive Measures Through CFSP Decisions: Jurisdiction of the CJEU Confirmed' (EU Law live, 7 Oct. 2020).

rule on harm allegedly caused by restrictive measures taken in CFSP Decisions.'[176] With this statement, one might have expected a similar outcome to *Jannatian*, whereby the General Court had concluded that 'a claim seeking compensation for the damage allegedly suffered as a result of the adoption of an act relating to the CFSP falls outside the jurisdiction of the Court.'[177] Yet, at this second stage of the reasoning, the provisions operationalizing the rule of law, namely, Article 19 TEU and Article 47 CFR, fulfil their gap-filling role 'to avoid a lacuna in the judicial protection of the natural or legal persons concerned'.[178]

For some, the admission that the text of the Treaty does not expressly mention the remedy stated in Article 340(2) TFEU is a way to justify that the interpretation 'supplements and does not depart from the Treaty text'.[179] Still, reading the judgment through the lenses of the EU constitutional core, it is possible to conclude *Bank Refah* makes the existence of a hierarchy within primary law even more evident. The rule of law and Article 47 CFR come to the rescue of Article 275(2) TFEU, to make it compliant with effective judicial protection, 'the essence of the rule of law'.[180] The reasoning is made persuasive thanks to the reference to previous caselaw, and the consistent (re)use of language and terminology, which ensures coherence and uniformity within the system and reinforces the normative value of the CJEU's jurisprudence.[181]

It is now settled that national courts can make a preliminary reference to the CJEU if they have doubts on the validity of CFSP measures. However, whether the preliminary ruling on the interpretation was a pursuable path was not yet agreed upon. Thus, the third (and last) stone of the *Rosneft* saga revolved around the following question: can a national court make a reference seeking the interpretation of CFSP measures? To be sure, a similar request had already emerged in *Rosneft*, but it was not addressed by the Court.[182] Thus, the preliminary reference submitted in *Neves 77*[183] put on a silver platter the opportunity clarify to what extent the preliminary reference under Article 267 TFEU is a legal remedy against CFSP measures.[184] As the referring court

[176] Case C-134/19 P Bank Refah [2020] EU:C:2020:793, para 31.
[177] Case T-328/14 Jannatian [2016] EU:T:2016:86, para 31.
[178] Case C-134/19 P Bank Refah [2020] EU:C:2020:793, para 39.
[179] Alina Carrozzini, Luigi Lonardo, 'Non-contractual liability for EU sanctions: Towards the normalization of CFSP' (2021) 26(3) European Foreign Affairs Review 466.
[180] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 73.
[181] Gar Yein Ng, 'De Facto Precedent at the Court of Justice of the European Union' (2024) 13 International Journal of Language and Law 45; Karen McAuligge, Aleksandar Trklja, 'Introduction — Precedent in EU Law: The Linguistic Aspect' (2024) 13 International Journal of Language & Law 5.
[182] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 38, preliminary question 3 letter c. Conversely, Case C-72/15 Rosneft [2017] EU:C:2016:831 Opinion of Advocate General Wathelet, para 75.
[183] Case C-351/22 Neves 77 Solutions [2024] EU:C:2024:723.
[184] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 69.

sought clarifications on CFSP Decision 2014/512, the same act object of review in *Rosneft*,[185] the caselaw saga circles back to where it all began.

Whether the 'claw-back provision' also encompassed the interpretation of CFSP measures had already been discussed by AG Wathelet in his Opinion to *Rosneft*. He argued for a positive answer, concluding that 'if the European Union Courts can perform the broader task, that is to say, review the legality of decisions providing for restrictive measures (..) then they can certainly perform the narrower task, which is to interpret the terms of such decisions'.[186] If at the core of AG Wathelet's reasoning there were the preservation of the uniformity of EU law across Member States and the *effet utile* of CFSP measures,[187] AG Ćapeta took a different stand on the matter in her Opinion to *Neves 77*. By looking at the question through the lenses of the principle of separation of powers, she interpreted the Treaty limitations as an expression of the wish of the drafters of the Treaties 'to exclude the Court from policymaking in the CFSP'.[188] The AG identifies essential differences between the preliminary ruling on the validity and the preliminary ruling on interpretation, which preclude the availability of both remedies against CFSP measures. For the sake of institutional balance, the Court could perform the former only by remaining bound to the meaning attributed to the contested measure by its author.[189] For the same reason, the Court was precluded from carrying out the latter as it would require the identification 'the correct meaning' of a CFSP provision, a task that falls within the exclusive political prerogatives of the Council.

In this '*aut.. aut'* situation, the Court opted for the *tertium (non) datur*, anchored to the value of the rule of law. *Neves 77* could easily be built upon the previous finding that Article 275 TFEU determines 'the type of decisions and not the procedure through which the assessment of legality of EU acts could occur'.[190] Yet, the solution provided by the Court moves from the duty to patrol the boundaries dividing CFSP and non-CFSP policies, as expressed in Article 40 TEU. As a matter of fact, the request to interpret a CFSP Decision was a consequence of national legislation implementing criminal sanctions on the basis of a provision within the CFSP Decision which, however, was not transposed in the TFEU Regulation. According to the judgment, the Court's duty to ensure a complete system of legal remedies 'cannot be impaired by the Council's failure

[185] ibid para 32.
[186] Case C-72/15 Rosneft [2017] EU:C:2016:831 Opinion of Advocate General Wathelet, para 75.
[187] ibid para 76, 'that is particularly necessary since, as the referring court indicates in paragraphs 30 to 34 of its request for a preliminary ruling, the competent authorities of the various Member States already hold diverging views on certain essential points.'
[188] Case C-351/22 Neves 77 [2023] Opinion of Advocate General Ćapeta, EU:C:2023:907, para 71.
[189] ibid 72.
[190] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 70.

to take all the necessary measures',[191] particularly when the Treaties circumscribe its powers.[192] Effective judicial protection, as part of the EU constitutional core, prevails once again over the written text of Article 275(2) TFEU and further extends the Court's jurisdiction, for some, at the expenses of the Council's prerogatives.[193]

The continuity with *Rosneft* also appears in the tension that emerges between effective judicial protection and separation of powers. While in the former case the Court was able to strike an (almost) even balance between the principles mentioned above, a task typical of constitutional courts, in *Neves 77* the protection of fundamental rights took precedence. The unanswered question is whether the interpretative guidance of the Court in respect to CFSP acts can be sought generally or if two cumulative conditions need to be met: namely, the Council's duty to adopt certain measures pursuant to the first paragraph of Article 215 TFEU and the failure to fulfil its obligation.[194] Only future caselaw will provide answers. Still, if a careful reader joins the dots left by previous judgments, it is almost inevitable to conclude that the Treaty limitations no longer circumscribe the CJEU's jurisdiction in CFSP to the exceptions of the second subparagraph of Article 24(1) TEU.

3.5 The light at the end of the tunnel? The KS&KD Episode

As some authors already suggested in 2020, *Bank Refah* 'left open the question about the broader scope of non-contractual liability and actions for damages for other matters within the CFSP.'[195] Consequently, *KS&KD* is the (for now, last) piece of the complex jigsaw puzzle that displays the boundaries of the Court's jurisdiction in CFSP.

In 2008, the EU established EULEX Kosovo, a Common Foreign Defence Policy ('CFDP') civilian mission aimed at providing support to specific institutions and, among other tasks, at investigating crimes allegedly occurred in Kosovo during the war. The two applicants, KS and KD, sought compensation for the alleged breach of fundamental rights[196] resulted from EULEX Kosovo's failure to properly investigate the disappearance of their relatives. Although the applicants relied on the jurisprudential developments outlined above to argue that the EU courts had jurisdiction to hear a claim of non-contractual liability, the General Court found the action inadmissible. As a matter of fact,

[191] Case C-351/22 Neves 77 Solutions [2024] EU:C:2024:723, para 48.
[192] See the different formulation between Article 215(1) TFEU and Article 215(2) TFEU.
[193] Case C-351/22 Neves 77 [2023] Opinion of Advocate General Ćapeta, EU:C:2023:907, para 71.
[194] Arguing that the preliminary reference of interpretation should be admitted for all CFSP measures falling within the Court's jurisdiction, Lorenzo Grossio, 'One step too far, one step too close. The rocky road towards defining the scope of judicial review in CFSP matters in light of KS and KD v Council and others and Neves77 Solutions' (2024) 3 Review of European Litigation.
[195] Butler (n 176).
[196] At first instance, the applicants referred to Articles 2 and 3 ECHR, Articles 2 and 4 of the Charter, Article 6(1) and 13 ECHR, Article 47 Charter.

since the case at issue did not concern either operational management of CFDP missions' personnel (*H v Council*) or an act that is linked to a TFEU provision (*Elitaliana)* nor restrictive measures (*Bank Refah*),

the alleged unlawful acts or omissions (..) do not fall within the jurisdiction of the Courts of the European Union as regards their legality and cannot, therefore, constitute a source of illegality capable of giving rise to non-contractual liability on the part of the European Union before those Courts.[197]

Faithful to its post-Lisbon habit in CFSP,[198] the ECJ did not endorse the view of the GC and found in favor of the applicants, in a seemingly coherent fashion to the recent jurisprudence. However, on a closer look, the judgment displays the difficulty of the Court in striking the right balance among constitutional principles: on the one hand, the principle of conferral and institutional balance, on the other, the principle of effective judicial protection as a reflection of the EU constitutional core.[199]

The politically sensitive circumstances of the case led the Court to (apparently) give up to its typical 'rule of law logic'[200] and rejected the human rights-based arguments raised by the parties and the AG. As a matter of fact, AG Ćapeta had suggested that even when political or strategic choices might infringe fundamental rights, the EU Courts must be able to hear such a complaint by an individual, although it is likely to be deferential to the reasons offered by the Council in its assessment as to whether those choices are in breach of fundamental rights.[201]

Yet, the Court did not endorse these arguments and, drawing from the caselaw of the European Court of Human Rights ('ECtHR'), stressed that effective judicial protection is not absolute.[202] *KS&KD* seemed to have unveiled the shortcomings in effectively upholding the founding values: the development and preservation of the EU constitutional core, which encompasses also the protection of human rights, stopped at the Treaties' edge. Still, a careful reading of the judgment shows that *KS&KD* replicates the well-known 'rule of law technique', but in disguise. First, the Court recalled the

[197] Case T-771/20 KS&KD [2021] EU:T:2021, 798, para 39.
[198] For example, Case T-187/13 Jannatian v Council [2014] EU:T:2014:134 and Case C-134/19 P Bank Refah [2020] EU:C:2020:793; Case T-65/18 Venezuela v Council [2019] EU:T:2019:649 when the General Court ruled that a third state did not fall within the notion of 'natural and legal person' under Article 263(4) TFEU whereas the European Court of Justice reached the opposite conclusion in Case C-872/19 P Venezuela v Council [2021] EU:C:2021:507.
[199] Lonardo (n 10) 837.
[200] Special Edition 'EU Accession to the European Convention of Human Rights: an EU Law Scholars' Perspective', Federico Casolari (ed.) (EU Law Live 2024), 9.
[201] Joined Cases C-29/22 P and C-44/22 P KS&KD v Council and others [2023] Opinion of Advocate General Ćapeta, para 120.
[202] Joined cases C-29/22 P and C-44/22 P KS&KD v Council [2024] EU:C:2024:725, paras 78-80.

settled rule that the exclusion of judicial review in CFSP matters should be interpreted narrowly.[203] Second, it acknowledged that the CFSP is part of the EU constitutional framework and, thus, subject to values of Article 2 TEU. Contrary to previous cases, however, solely relying on the rule of law to establish jurisdiction would not have been sufficient:[204] *KS&KD* did not require stretching an already existing jurisdiction, but rather the outright redefinition of it. Thus, the Court developed a two-step test combining a textual reading of the 'claw-back' provisions with the 'evident' effects of previous caselaw.[205] First, the Court will ascertain if the situation in the specific case falls within one of the two 'claw-back' provisions.[206] If that is not the case, it will verify whether, 'the acts and omissions at issue are not directly related to the political or strategic choices'.[207] With this technique, the Court was able to rebuild the scope of its jurisdiction *a contrario*: it did not stretch the boundaries from the inside, i.e., providing an extensive reading of the ''claw-back' provisions, but it narrowed the 'carve-out' from the outside. Authors like Sarmiento and Iglesias have labelled the Court's technique as a 'political question doctrine that operates in reverse order'.[208] The latter is a reflection of the principle of separation of powers and requires judges to exercise judicial restraint whenever they are faced with decisions that are the expression of the political prerogatives of the executive. It has mostly developed in the US, but also in some Member States a similar declination of this doctrine exists.[209] Although suggested not only by academics[210] but also by AGs,[211] the Court has never upheld this doctrine in the EU legal order until, at least for some, September 2024.[212] Nevertheless, rather than an *ex abrupto* revolution of the CJEU's jurisdiction, *KS&KD* is the example par excellence of the stone-by-stone approach adopted in hard cases and of the effects of the

[203] ibid para 62.
[204] Sara Iglesias Sanchez, 'The Jurisdiction of European Courts in the CFSP: between exceptionalism and consistency of legal remedies in a Union based on the rule of law' (Weekend Edition, EU Law Live, May 2025) 9.
[205] Joined cases C-29/22 P and C-44/22 P KS&KD v Council [2024] EU:C:2024:725, para 116.
[206] ibid para 115.
[207] ibid para 116.
[208] Daniel Sarmiento and Sara Iglesias Sánchez, 'Insight: "KS and Neves 77: Paving the Way to the EU's Accession to the ECHR" (EU Law Live, September 2024). Similarly, Tanja Hilpold, 'Europäische Zeitschrift für Wirtschaftsrecht (EuZW): Über eine „negative Doktrin der politischen Frage" zum Beitritt der Union zur EMRK?' (2024) 24 European Journal of Business Law 1149.
[209] For example, in France an 'acte de gouvernement' doctrine exists; in Italy, 'atto politico'.
[210] Luigi Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' (2017) 22(4) European Foreign Affairs Review 571–588; Graham Butler, 'In search of a Political Question Doctrine in EU law' (2018) 45(4) Legal Issues of Economic Integration 329–354.
[211] Case C-120/94 Commission v Greece [1996] ECLI:EU:C:1995:109, Opinion of Advocate General Jacobs, para 48; Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v. Council and Commission [2008] Opinion of Advocate General Maduro, para 45.
[212] Sarmiento and Iglesias Sánchez (n 208); Thomas Verellen, Political Question Doctrine for the CFSP (Verfassungsblog, 24 September 2024) <https://verfassungsblog.de/political-question-doctrine/>.

superiority and non-derogability of the EU constitutional core.[213] Albeit anchored to a tradition of civil law systems,[214] the CJEU's referral to settled caselaw to support its reasoning fulfils a two-fold task. On the one hand, as it reflects the principle of legal certainty, a fundamental sub-component of the rule of law,[215] it contributes to the idea of the EU being a Community based on the rule of law. Furthermore, it reinforces the position of the CJEU being a 'constitutional court' that fulfils the task of ensuring coherence in the *sui generis* legal order established by the Treaties. On the other hand, *KS&KD* confirms the corrective ability of the EU constitutional core over the constraints of Article 24(1) TEU as emerged in the decade-long jurisdictional caselaw on CFSP.

[213] Lonardo (n 10) 837.
[214] On this point see Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?' in Pavlos Eleftheriadis and Julie Dickson (eds.) Philosophical Foundations of European Union Law (Oxford University Press, 2012) 307.
[215] Vasillios Skouris, 'Common Lawyers and their influence on the EU Court of Justice' (2014) 4 Il Diritto dell'Unione Europea 689-692.

4 Reviewing Foreign Policy or developing the EU Constitutional Core?

In this final section, some conclusions will be drawn from the analysis of the caselaw carried out in the previous paragraphs. In particular, the connection between the concept of EU constitutional core, developed in the literature to identify the values of Article 2 TEU, and the caselaw on CFSP will be outlined. The latter illustrates the ongoing process of operationalization of EU values – the EU constitutional core - and the unfolding of their special features, namely, hierarchical superiority and non-derogability.

4.1 The Kirchberg like Karlsruhe: Disentangling the Content of the EU Constitutional Core

At the end of Section 2, it has been shown how the 'identity' language used by the CJEU resembled the one employed by the GCC in the *Lisbon Urteil*. The latter has clearly mapped the content of the 'core' of the German Constitution, those rules which cannot be derogated from and not even a constitutional amendment may alter.[216] Conversely, in the Conditionality judgments the CJEU's elaboration of the concept of 'EU constitutional identity' was modestly limited to the identification of EU values being 'an integral part of the identity of the EU.'[217] At the same time, the finding that those values 'are given concrete expression in principles comprising legally binding obligations for the Member States'[218] raised further questions. What are those principles, and which obligations derive from the EU Constitutional Core? How do these obligations interact with other EU primary law provisions if they do not align? The Court's post-Lisbon jurisprudence in CFSP provides an answer to these questions: it is a laboratory for the development of the EU constitutional core, the definition of its content and the illustration of how it operates when other Treaty provisions pose an obstacle to its concretization.

Judgment by judgment, the CJEU confirms that the EU Constitutional Core encompasses Article 2 TEU: the values upon which the EU is founded resemble the eternity clause of the German Constitution. They enjoy a special position within EU primary law, as it appears that not even other Treaty norms can affect their fulfilment. Yet, the additional step in CFSP caselaw is anchoring abstract values to concrete provisions within the Treaties, thereby identifying the specific legal obligations flowing from Article 2 TEU. The first illustrative example of definition of the content of the EU constitutional core is provided in *Parliament v Council* (EU-Mauritius Agreement). The involvement of the EP in the conclusion of an international agreement, according to

[216] Faraguna and Drinóczi (n 21) 64.
[217] Case C-157/21 Hungary v Parliament and Council [2022] EU:C:2022:98, 264.
[218] ibid.

Article 218(10) TFEU, is a concrete expression of the value of democracy, which shapes the very functioning of the EU institutions.[219] Furthermore, as this provision gives concrete expression to one dimension of the EU constitutional core, it assumes special significance and prevails over other Treaty provisions – in this case, Article 218(6) TFEU – which represents an hurdle to the realization of democratic oversight, albeit at its basic degree of mere information, in the conclusion of CFSP international agreements.

This approach was reiterated in *ASJP*, defined as the 'breakthrough' that enabled the operationalization of the value of the rule of law.[220] However, *ASJP* reaps the results of the seeds previously sowed in *Rosneft.* Already in *Les Verts*, the right to effective judicial protection was associated with the rule of law and played a gap-filling role when lacunae in the system of judicial protection emerged.[221] The novelty in *Rosneft* lies in the identification of concrete primary law provisions that operationalize this principle - namely Article 2 TEU, Article 19 TEU and Article 47 CFR - on which the Court relies to provide an extensive reading of the 'claw-back' of Article 275(2) TFEU. In this way, the Court defined the primitive contours of operationalization of the rule of law, which were invoked and explicitly stated in ASJP.[222] At the same time, *Rosneft* hints at the special features of the constitutional core as it defines, for the first time, effective judicial protection as the 'essence of the rule of law'.[223] This wording resonates with the formulation of Article 52(1) CFR, whereby any limitation of the rights enshrined therein finds as a limit the 'essence of those rights and freedoms'. In simple words, the Court suggests that not only does the EU constitutional core seats at the highest level within the Treaties, but it cannot be derogated from. Consequently, a minimum degree of effective judicial protection, as required by Article 19 TEU and Article 47 CFR, shall always be granted. As the appropriate legal remedy to fulfil this obligation varies according to the specific case, the jurisdiction of the CJEU is adjusted to encompass the complete toolbox of legal remedies provided by the Treaties.

This becomes evident with the reasoning developed in *Bank Refah*, where Article 47 CFR reshaped the scope of judicial review in CFSP. Although the Court had previously concluded that this provision could not confer jurisdiction where the Treaties

[219] Arguably, identifying the involvement of the EP in decision-making enabled the CJEU to ultimately conclude that article 10 TEU, which states that EU is based on representative democracy, gives concrete expression to the value of democracy in article 2 TEU. See Case C-502/19 Junqueras Vies [2019] EU:C:2019:1115, para 63.
[220] Luke Dimitrios Spieker, EU Values Before the Court of Justice (Oxford University Press 2023) 19.
[221] Van Elsuwege, Gremmelprez, (n 24) 8.
[222] ibid 10, footnote 10.
[223] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 73. This was then referred to in C-64/16 Associaçao Sindical dos Juìzes Portugueses [2018] EU:C:2018:117.

excluded it,[224] *Bank Refah* showed it could correct Article 275(2) TFEU. From this perspective, the relationship between Article 2 TEU and other Treaty provisions resembles the relationship between EU law and conflicting national legislation, with a minor difference. The primacy and direct effect of EU law entail the disapplication of national legislation which conflict with it: national courts are required to set aside the latter to ensure the effectiveness of EU law.[225] A similar process occurs also when the EU constitutional core and other provisions of the Treaty do not align. Arguably, the Court follows a three-step operation: first, it identifies the specific provision giving concrete expression to Article 2 TEU (operationalization); second, it relies on the operational provision to amend the relevant 'conflicting' norm that hampers the realization of the EU constitutional core (amendment). Ultimately, those 'conflicting' provisions are set aside and replaced by a fairly corrected version of them, which aligns with the EU constitutional core. The logic behind *Neves 77* supports this interpretation. As a matter of fact, he CJEU's jurisdiction was triggered by the failure of the Council to fulfil the obligations imposed upon it by the Treaties. Therefore, it appears that not only EU primary law norms but also practice of an EU institution may escape the EU Constitutional Core. In this way, the Court kills two birds with one stone: it affirms the superiority of the EU constitutional core and defines its content anchoring it to provisions envisaged within the Treaties.

The much-discussed judgment in *KS&KD* confirms these special features of EU values as the EU constitutional core. The jurisdictional limitations on the Court's powers over CFSP acts have been described as a constitutional oddity. Adjusting the scope of judicial review according to the degree of political discretion of the decision-maker is natural, subtracting an entire area from judicial reach, regardless of the actual nature of the decision, is not.[226] Possibly aware of this inconsistency with the founding values, the CJEU has actively engaged in ensuring that the limited judicial review conferred upon it by the Treaties in CFSP could be reconciled with the EU constitutional core. To establish its jurisdiction over an action for non-contractual liability for the alleged breach of fundamental rights occurred in the context of a CFSP mission, the Court did not explicitly pursue its traditional 'rule of law' logic to extend the jurisdictional 'claw-back'. Rather, it concluded that the EU constitutional core-based jurisprudence had created an additional, parallel sphere of jurisdiction alongside the text of the Treaties, which reconstrued the scope of judicial review around 'political and strategic choices'. Although less fundamental rights-friendly than the AG's opinion,

[224] Case C-72/15 Rosneft [2017] EU:C:2017:236, para 74.
[225] Parallelism with Case C-106/77 Simmenthal S.p.a. [1978] EU:C:1978:49, para 22.
[226] Eleanor Spaventa, 'Remedying Constitutional Heresies: the Charter, Damages and Jurisdiction in the Common Foreign and Security Policy' in Keith Armstrong, James Scott and Anne Thies (eds) Essays in Honour of Marise Cremona (Hart Publishing 2024) 14.

the Court's reached a similar, albeit more nuanced result, which can be reconciled with the Strasbourg method. As a matter of fact, the exclusion of political and strategic choices from judicial review aligns with the caselaw of the ECtHR.[227] Simultaneously, it accommodates the unwillingness of some Member States to have their foreign policy choices reviewed.[228]

Nonetheless, if one lesson can be learnt by the CJEU's approach to constitutionally significant cases is that the jump can never be too long.[229] Many aspects are deliberately defined in ambiguous terms to be able to attribute them a specific meaning in a second moment.[230] Consequently, it is not surprising that *KS&KD* left open a fundamental question: what is a strategic and political choice? The Court has not provided any explicit criteria to define this category of EU acts, although the argument could be made that in *H v Council* a tentative distinction between political acts and acts of implementation had already been made. Additionally, while AG Ćapeta suggested that breaches of fundamental rights cannot be deemed as a political choice of the EU, and thus escape judicial review, the Court has not pronounced on this matter.[231] Does this mean that a CFSP measure can adversely affect fundamental rights and yet be exempted from judicial scrutiny, it being the expression of the political prerogatives of the Council? Or, rather, that the ability of a measure to impact fundamental rights is a key criterion to exclude its political nature? As some scholars argued, this is just the tip of the ice of the different dimensions of this judgment that require clarification.[232] For example, the CJEU will be called to clarify which obligations arise on the Council when it carries out CFSP missions and the role of the EU more in third countries more generally.[233] To this end, future research is advocated for to further unpack the content of the EU constitutional core not only for the implementation of a value-compliant CFSP, but for the correct application of EU law more broadly both by the Member States and EU institutions.[234]

[227]Special Edition (n 200) 19 referring to the European Court of Human Rights caselaw mentioned in KS&KD in para 78 of the judgment. ECtHR, Markovic and Others v. Italy (App. No. 1398/03) 14 December 2006, paras 93 and 99.
[228] ibid 12.
[229] Lenaerts (n 160) 1.
[230] Lonardo (n 10) 837.
[231] Joined Cases C-29/22 P and C-44/22 P KS&KD v Council and Others [2023] Opinion of Advocate General Ćapeta, EU:C:2023:901, para 121.
[232] Editorial Comment, From Opinion 2/13 to KS and KD: Confronting a legacy of constitutional tensions, (2024) 61 Common Market Law Review 1461.
[233] ibid.
[234] Case C-769/22 Commission v Hungary [2025] Opinion of Advocate General Ćapeta, EU:C:2025:408, para 159 'Article 2 TEU (..) enables the functioning of the EU legal order'.

5 Conclusion

The increasing importance of EU values in the CJEU's jurisprudence, especially in judgments relating to the CFSP, combined with the lively scholarly discussions on them being the constitutional core of the EU begs the question of what this core actually entails. To this end, this thesis sought to describe how the caselaw on CFSP contributes to the development and definition of the EU constitutional core, starting from the assumption the EU Treaties have constitutional features and that certain constitutional objectives are of the utmost importance.[235]

In this regard, Section 2 highlighted how the CJEU has been apt to preserve the core values of the EU. From the Court's purview, compliance with Article 2 TEU is not subject to any negotiation as it constitutes the root of the special characteristics of the EU legal order, such as its autonomous nature: no international law obligations may alter this feature of EU law. At the same time, respecting EU values not only is an essential precondition for candidate countries to conclude the accession process, but also a fundamental requirement for the Member States to enjoy all the rights deriving from their membership to the EU. Remarkably, the reaction of the CJEU to the value crisis in Poland and Hungary shed light on the nature conferred to Article 2 TEU by the Court already in the early 2000s with Kadi: it constitutes an integral part of the very identity of the EU. The constitutional dialogue with their colleagues in Karlsruhe back to the (in)famous *Lisbon Urteil* was source of inspiration for the Kirchberg judges. As a matter of fact, when drafting the Conditionality judgments, the ECJ borrowed their constitutional language and, albeit in less bold terms, found the constitutional core of the EU. At the same time, the precise content and obligations deriving from it remained (temporarily) in the shade.

In this respect, Section 3 focuses on the caselaw in CFSP as a study case for the development of the EU constitutional core. As a matter of fact, the values of Article 2 TEU increasingly gained a central role in the CFSP jurisprudence, either to ensure sufficient democratic oversight in foreign affairs choices or to extend the scope of judicial review also to instances whereby a literal interpretation of the Treaties would have excluded it. Particularly, *Opinion 2/13* laid down the foundational stone for the bold(er) stream of cases aiming at clarifying the boundaries of the CJEU's jurisdiction in CFSP. This resulted into a departure from the text of the Treaties provoked by the legal obligations identified by the Court as deriving from article 2 TEU. Arguably, the most remarkable example is *KS&KD*, which appears to be the last piece of the jigsaw puzzle, but might rather be the first brick of a new, necessary line of cases.

[235] Pescatore (n 35).

Section 4 ultimately systematizes the selected set of cases analysed in the previous section to outline how the CFSP jurisprudence helps the development of the EU constitutional core and defines how it interacts with other provisions of the Treaties. In particular, the research aimed to show that through the caselaw the Court was able to fulfil a three-fold task. First, it confirmed the existence of a set of rules, namely, Article 2 TEU, that enjoys hierarchical superiority over other Treaty provisions as well as non-derogability. Second, it translated abstract values into operational provisions, thus clarifying the legal obligations imposed upon the EU institutions and the Member States. Third, it displayed the effects of the superiority of the constitutional core: it results in the disapplication of EU primary law norms that undermine the complete application of the EU constitutional core and their replacement with an amended version that is constitutional core compliant.

However, by focusing on a single policy area, this work provides only a glimpse into the content of the EU constitutional core. As a matter of fact, further research on other fields of EU law might demonstrate that other constitutional principles alongside Article 2 TEU compose the EU constitutional core. Therefore, legal scholarship should investigate not only on the specific standards that Article 2 TEU imposes on the Member States and the EU institutions but also dig deeper into the content of the EU constitutional core and the interaction of its sub-components.

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