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**THE ROLE OF THE COURT OF
JUSTICE OF THE EUROPEAN
UNION IN THE DEVELOPMENT
OF THE COMMON FOREIGN AND
SECURITY POLICY AFTER THE
TREATY OF LISBON**

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THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE DEVELOPMENT OF THE COMMON FOREIGN AND SECURITY POLICY AFTER THE TREATY OF LISBON

This study investigates the involvement of the Court of Justice of the European Union (CJEU) in the development of the common foreign and security policy (CFSP) after the Treaty of Lisbon. The preliminary results reveal that the competence of the CJEU in CFSP is limited because EU member states (MS) avoid extending the principle of direct effect and other *acquis* of the CJEU in this field. On the basis of the integration through law concept it has been demonstrated that the CJEU (in the realm of rulings as provided by the Treaties) can rule in a way that would almost certainly have an impact on how CFSP is being implemented. This paper provides a reconstruction of the case law in the field and the prospects for integration through legal development.

Key words: Court of Justice of the European Union, CJEU, common foreign and security policy, CFSP, Treaty of Lisbon, integration through law.

JEL Classification: Z

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Introduction

The judicialization of politics is a contentious issue in social and juridical research. This notion can concern how judicial lawmaking impacts the strategic behavior of non-judicial agents of governance [Stone Sweet, 2010: 4]. This means that the judge rules with a normative interpretation and the application of legal norms to facts in the course of resolving disputes.

The Court of Justice of the European Union (CJEU) is a key EU supranational institution and, through the development of its case law in highly sensitive political fields and its control of the legality of the acts of EU institutions, contributes to the process of judicialization. Since its creation the CJEU has been viewed as a driving force for European integration despite its limited competence. For instance, the CJEU defined the main principles of the Community legal order (i.e., primacy, direct effect, state liability in damages). It also re-launched the integration process in the 1970s through negative integration - removing obstacles to market integration [Majone, 2005] - and ensured the autonomy of the Community legal order for both national and international law. The main mission of the CJEU has been to ensure the uniform interpretation and application of European law throughout the Communities and later the Union.

Today, the EU is mostly defined as a *sui generis* organization. The notion of *sui generis* can be described as a special organizational form with its own specific features [Perocevic, 2017]. In the EU, this takes the form of a compromise between those who are keen on keeping their sovereignty and those who are in favor of transferring of an ever-increasing share of sovereignty to the supranational EU institutions.

Following the entry into force of the Treaty of Lisbon in 2009, the structure of the EU has undergone a number of changes. In particular, the EU foreign policy mechanism was formulated more explicitly and the division between the European Community and the EU was abolished [Wessel, 2015: 8]. However the jurisdiction

of the CJEU in the area of common foreign and security policy (CFSP) remains extremely limited and exceptional (see Art. 24(1) TEU).

The CJEU can certainly not ‘supranationalise’ CFSP (as it did with market integration), but it can (in the realm of rulings as provided by Art. 24 TEU), which refers to Art. 40 TEU, i.e. the demarcation between foreign policy and other EU policies, in which the CJEU has competences, and Art. 275 of the Treaty on the Functioning of the European Union (TFEU) which is about sanctions, (i.e. restrictive measures) rule in a way which would almost certainly have an impact on how CFSP is implemented. A reconstruction of this case law (arguments put forward in the proceeding by the parties involved, the Advocate General and finally in the ruling) is valid.

This analysis remains in the realm of the law which justifies staying with the concept of Integration Through Law (ITL). However it is not be a purely theoretical work, because we do not evaluate this theory but use it as an analytical tool investigating the impact of case law on the development of CFSP. The structure of this paper is as follows:

- (1) the legal basis of the CJEU competence in CFSP;
- (2) the theoretical background of the research: the concept of ITL;
- (3) studying the relevant rulings and arguments in order to find out how it evolved in practice (a detailed discussion of case law in the field);
- (4) a discussion of the impact of the case law (possibly with a view towards historical experience – as presented by ITL evidence from an economic perspective – and the current rather disintegrative EU tendencies).

We also discuss the question of whether ITL can be extended to (i.e., adequately reflect upon and help understand) those fields that have remained in the purview of the MS such as foreign policy or whether it needs other analytical and

theoretical tools to make sense of MS behavior. A reflection on judicial activism is given here (who argues in such a way and why?).

1. The legal basis of the competence of the CJEU in CFSP

The provisions of the Treaty of Lisbon formalize that the CJEU shall not have jurisdiction with respect to the provisions of CFSP (Art. 24(1) TEU). However, the CJEU can, in the realm of rulings as provided by Art. 24 TEU which refers to Art. 40 TEU and Art. 275 TFEU, rule in a way which would almost certainly have an impact on how CFSP is implemented. For instance, according to Art. 275 TFEU the CJEU can review “the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council”.

Changes in the jurisdiction of the CJEU in the Lisbon Treaty are quite modest. The limited competence conferred on the CJEU as an institution of CFSP is one of the notable features of the structure created by the authors of the Treaty. Despite the relative expansion of its jurisdiction in the field, the CJEU rules only in exceptional circumstances. The authors of the Lisbon Treaty sought to preserve and confirm the established case law in CFSP [Šaltinytė, 2016: 276]. However, we cannot suppose certainly whether the jurisdiction of the CJEU in CFSP has become clearer. Such an Opinion was provided by the Advocate General in Case 455/14 P:

It is safe to say that, despite a relative broadening of its jurisdiction, the CJEU’s exercise of judicial review with regard to CFSP matters arises only in exceptional circumstances. Nevertheless, the precise contours of that jurisdiction are not fully clear [AG, Case 455/14 P, 2016: 2].

Despite these inherent limitations in the provisions of the founding Treaty, in *Rosneft* the CJEU was able to interpret its powers broadly by reversing the logic and arguing that, as a general rule, the CJEU has full jurisdiction under Art. 263 and 267 TFEU to review the legality of acts of EU institutions “intended to produce legal effects vis a vis third parties”. Thus, the limitation set in Art. 24

represents an exception to this general rule and, accordingly, should be interpreted restrictively.

2. Integration Through Law

The Integration Through Law project (ITL) originates in Cappelletti, Secombe, Weiler [1986]. There has been much emphasis on the observation that “law is both the object and the agent of integration” [Augenstein, Dawson, 2012: 14, Cappelletti, Secombe, Weiler, 1986]. This assumption can be embedded in the broader debate about the mutual conditioning of legal structures and the political process.

Other effects of ITL on shaping the contours of EU law as an academic discipline are discussed by Augenstein (2012) and others. The paper reviews the descriptive accounts of legal integration in the EU, which have changed over the last twenty years. It develops a set of provisions regarding the revisited version of ITL. First, the constitutional framework of EU legal integration is revealed. Secondly, the conceptions and roles of the law in European integration are redefined. Finally, the perspectives of the ITL are considered.

ITL is perceived in the present paper in light of the European integration project. The key theoretical foundations of the concept are as follows. First, the common denominator is the value of the rule of law. This value is defined in the Treaty of Lisbon and can be identified with the ‘language of law’ in which intentions are translated into legal language [Dehousse & Weiler, 1990; Gibbs, 2012].

Secondly, the CJEU is a driver of European integration. The CJEU takes a particular place in institutional structure of the EU. In the aftermath of declaring the main principles of EU law: direct effect and primacy, the CJEU also asserted that it had the authority to make such a declaration [Cahill, 2012: 20]. Despite the fact that today the CJEU no longer drives European integration, it continues to make high-profile judgments and attract public attention.

Thirdly, this is an autonomous legal order: the EU legal system is formed as an independent source of law. In such an order, the CJEU is the “ultimate umpire of its [EU legal order] legality” and determines the limits of EU competences [Avbelj, 2012: 62]. It was stipulated in a landmark decision of the CJEU:

By contrast with ordinary international treaties, the European Economic Community Treaty has created its own legal system which became an integral part of the legal systems of Member States which their courts are bound to apply [Costa, Case 6/64].

Fourthly, the CJEU defined the main principles of the Community’s legal order (i.e., primacy, direct effect, state liability in damages). The direct effect is that the EU “enables individuals to invoke and rely on provisions of EU law directly before national courts without the need for implementation” [Case 26/62, Van Gend en Loos]. The Van Gend en Loos criteria imply a clear, precise obligation, not depending on implementing measures.

3. Case law in CFSP

Provisions of Art. 275 TEU: Rosneft case. The CJEU competence in CFSP is strictly limited because MS seek to avoid extending the principle of the direct effect and other *acquis* of the CJEU. CFSP is carried out on the basis of intergovernmental cooperation, as MS seek to preserve their sovereignty in foreign policy. Despite these inherent limitations in the provisions of the founding Treaty, the CJEU used different tactics in order to assert its competence in foreign policy or to make MS realize the importance of granting the CJEU additional powers.

The first case includes situations when the CJEU interprets its jurisdiction broadly. Thus, in *Rosneft* the CJEU interpreted its powers broadly to include the competence to rule on preliminary references concerning the validity of restrictive measures adopted by the EU. The CJEU argued that, as a general rule, it has full jurisdiction under Art. 263 and 267 TFEU to review the legality of the acts of EU institutions “intended to produce legal effects vis a vis third parties”. Thus,

according to the CJEU, the limitation set in Art. 24 TEU (that the CJEU shall not have jurisdiction to review acts adopted in CFSP) represents, in fact, an exception to this general rule and, accordingly, should be interpreted restrictively.

Because of this reasoning the CJEU concludes that the provision of Art. 275 TFEU granting it jurisdiction “to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Art. 263 of this Treaty” should be understood as encompassing both direct actions (proceedings brought via Art. 263 TFEU) and preliminary references brought in accordance with Art. 267 TFEU. As the CJEU pointed out in par. 70, the reference in Art. 275 TFEU to Art. 263 TFEU is meant “to determine not the type of procedure under which the [CJEU] may review the legality of certain decisions, but rather the type of decisions whose legality may be reviewed by the [CJEU], within any procedure that has as its aim such a review of legality”.

Kadi I and II cases. The second group of cases involving the CJEU in the development of CFSP includes situations when it seeks to maximize the external sovereignty of the EU. In this regard, the *Kadi I and II* and Opinion 2/13 can be illustrative.

First, *Kadi I and II* demonstrate that the CJEU can pose an obstacle to implementing the UN Security Council sanction resolutions by the EU if they violate the general principles of EU law, including human rights, as guaranteed by the European Convention of Human Rights (ECtHR). In its judgment in September 2008 (Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat v the Council and the Commission*) the CJEU declined the premise of the Court of First Instance (Judgments in Case T-315/01 *Kadi v Council and Commission* [and Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*]) which the challenged regulations enjoyed immunity from judicial review as they were adopted in order to implement international obligations which left no margin of discretion for EU institutions.

On the contrary, the CJEU not only maintained that EU regulations could be reviewed but also insisted that on the issues of the respect of human rights there should be a full review, a position later reiterated in *Kadi II* (Case C-584/10 P - *Commission and Others v Kadi*). The case demonstrated the CJEU's readiness to exercise thorough judicial control over the legality of actions in this field. The judgment has been criticized by scholars of international law as it challenges the supremacy of public international law [Kokott & Sobotta, 2012; Wessel, 2011; de Búrca, 2010].

The CJEU and ECtHR relationship: EU accession to ECHR.

Finally, in Opinion 2/13 the CJEU concluded that there was an incompatibility between the draft agreement on the EU's accession to the European Convention on Human Rights (ECHR) and the Founding Treaties. One of the seven grounds for concern listed by the CJEU was that the agreement could jeopardize the autonomy of the EU legal order:

The autonomy enjoyed by EU law in relation to the laws of the [MS] and in relation to international law requires that the interpretation of those fundamental rights [recognised by the Charter (which under Art. 6 (1) TEU, has the same legal value as the Treaties)] be ensured within the framework of the structure and objectives of the EU

[...]

Having regard to the foregoing, it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy.

The aim of the CJEU was to ascertain whether the conditions it defined as mandatory for accession were met. This opinion was delivered by the CJEU contrary to the positions of the all MS who supported the draft agreement.

Another important issue raised by the CJEU related to CFSP as an accession to the ECHR would render the EU's external actions subject to the control of the ECtHR, including issues that could not be reviewed by the CJEU due to its limited jurisdiction. The case law demonstrates that the CJEU seems "reluctant to tolerate any other judicial control over CFSP" [Hillion, Wessel, 2018: 2]. As Opinion 2/13 states:

Accordingly, the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR. In that context, the EU and its institutions, including the [CJEU], would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR.

The CJEU stresses the inadmissibility of the ECtHR obtaining jurisdiction in fields where the CJEU does not have full competence:

Nevertheless, the [CJEU] has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order.

For instance, two options were suggested by the CJEU in Opinion 2/13 as a pre-condition for the EU's successful accession to the ECHR. The first one was to exclude CFSP from control of the ECtHR. This condition was unacceptable for the Council of Europe. The second condition was providing CJEU competence in CFSP.

The concern of the CJEU might be understood as follows: can effective legal protection in CFSP be ensured by the complex multi-level system of the EU? The

reasoning of the CJEU is to ascertain whether an external judicial authority gains access to powers in a field that is beyond the control of the CJEU.

While the CJEU adopts in Opinion 2/13 an approach of ‘blackmailing’: as one of the appropriate conditions of accession to ECHR, it has put forward an extension of its own competence in the field; it suggests obviously unacceptable conditions for the Council of Europe.

4. Perspectives of ITL

Almost thirty years after the publication of the Cappelletti, Seccombe, Weiler paper, subsequent generations of researchers have transformed the original concept of ITL. For instance, each of the authors of the publication under the editorship of Augenstein (2012) moves beyond the dominant narrative of ITL and suggests a narrative of the Europeanization of law as the best way to understand the fragmented complexity of EU law; introducing discussions on the role of law in regard to the new modes of governance.

In light of ITL, the discussion on the role of the CJEU in the development of CFSP is reduced to the issue of combating the contradictions and paradoxes that arise. For example, the discussion on the integration-delimitation issue, which refers directly to the consequences of the elimination of the ‘three pillars’. The call for coherence, the development of integration and complexity can be considered as one of the challenges for CFSP.

The vision of EU foreign policy has always been ambiguous. This follows from the fact that MS continue to perceive CFSP as a policy area that has not developed beyond the intergovernmental European Political Cooperation [Wessel, 2018]. The changing attitudes to the CFSP’s development are still difficult.

On the one hand, institutional adaptation can lead to the ‘normalisation’ of CFSP. This notion can be understood in this paper as “the consolidation of EU foreign policy and constitutionalisation as part of the Union’s legal order by

studying treaty modifications and institutional adaptations” [Wessel, 2019]. The normalisation of CFSP can also be reflected in the shifts based on the new legal provisions of the Lisbon Treaty or novel interpretations of the legal provisions by the CJEU.

On the other hand, there is a demand from the world community for a clearer foreign policy position of the EU. The nature of such a demand can be found in the desire to justify the external potential of the EU’s internal development. The ability of the EU to become a strong global actor depends largely on its ability to cope with internal difficulties (institutional issues) and overcome disintegration trends (e.g. European debt crisis, migration crisis, multiculturalism policy).

The interdependence of both perspectives means that, first, CFSP can become more supranational and, secondly, the EU can act more coherently on the world stage. Thus, the prospect of ITL expanding depends on the ability of EU institutions (especially the CJEU) to maintain the right balance between unity and diversity in shaping rules and to deciding on the elimination of the ‘three pillars’ system.

The concept of judicial activism can be perceived as fuzzy. Despite the fact that the term has become common, its meaning is not precisely well-established. Researchers and practitioners using the term, however, do not define it.

In the current paper this notion depicts how a judge approaches judicial control. The term can be viewed as generating scenarios in which a judge sets out a ruling. Such a ruling may complete or even transform previous case law in favor of supporting a particular non-legal or political position [Spitzer, 2018]. We can also approach judicial activism as entailing scenarios of “result oriented judging, [and the] invalidation of actions of other branches” [Vilhena de Freitas, 2015: 174].

We highlight several factors contributing to the strengthening of judicial activism. First of all, international courts and courts in regional integration organisations have more opportunities for lawmaking. This is facilitated by the

processes occurring at different stages of integration or by the conditions stipulated by Treaties, which clearly define the limits of the court competences. Moreover, we take into account the special status of the CJEU as the guarantor of compliance with the law in the interpretation and application of Treaties in the context of regional integration.

Secondly, there is virtually no political control over the actions of the CJEU. The vertical separation of powers only enhances this freedom of action, namely, the scope of intervention can be wide and lead to the priority of competence known as the pre-emption clause. The lack of a clear separation of powers only exacerbates the situation. Under these conditions, it is logical to assume that the degree of activity of the CJEU is increasing.

Thirdly, the teleological method of interpreting cases is encouraged by the structure of the institutional balance in the EU. In particular, the wording of the articles in the founding treaties provides a framework and thereby promotes the activity of the CJEU.

We also point out a few factors that reduce the degree of judicial activism. First, the legitimacy of the CJEU is much weaker than, for instance, the legitimacy of the supreme or constitutional courts in unitary or federal states. This follows from the lack of a homogeneous political structure and the absence of the concept of 'European' or 'European people' (which is exactly equivalent in meaning to the concepts of 'American' or 'Russian'). The CJEU cannot appeal to such a concept, on whose common values the institution can rely at the time of innovative rulings in case law.

Secondly, the CJEU is attempting to find the right balance in shaping the rules in a centrifugal or centripetal manner. The freedom of action of the CJEU in adopting decisions is limited. The CJEU creates the principles of law for the functioning and maintenance of the current system and not to create substantive law and positive obligations.

5. Conclusion

This paper sheds light on the issue of the role of the rule of legal institutions in the development of European integration. We evaluate the role of the CJEU in CFSP and trace the influence of the CJEU, a formally non-political institution. In doing so, we first outlined the legal basis of the CJEU competence in CFSP. We reveal the features of amendments introduced with the entry into force of the Lisbon Treaty, with an emphasis on demolishing the second pillar. Secondly, we show how ITL could help to reconsider the development of CFSP. Thirdly, we discuss case law in CFSP (*Rosneft*, *Kadi*, Opinion 2/13). We propose arguments to demonstrate how things have evolved in practice. Then we discuss the question whether ITL could be extended and what judicial activism might imply in such a context.

We conclude that CFSP is firmly embedded in the EU legal order. The scope of CFSP intersects with other EU policy areas. This results in a complex interaction and the participation of the CJEU in litigation on CFSP issues. The CJEU cannot disregard the common values and principles of the EU, which, in fact, confirm the basic logic of the judicialisation of politics and the application of horizontal principles.

A more fine-grained research design is needed to disentangle the delicate and sensitive interaction of the CJEU with other EU institutions on CFSP. In particular, to see how judicial practice helps broaden the competence of such institutions as the European Parliament in CFSP. Such an analysis would make a valuable contribution to understanding the intrinsic complexity of fragmented EU law.

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