

Editorial

The Concept of Implied Jurisdiction and the Court's Role in CFSP

1 INTRODUCTION: CFSP AS PART OF THE EU LEGAL ORDER

It has almost become an urban myth that the Court of Justice of the European Union (CJEU) lacks jurisdiction in relation to the Common Foreign and Security Policy (CFSP). True, CFSP has long been regarded as the European Union's most distinctive policy domain – one characterized by political discretion, unanimity-driven decision-making, and a conspicuous absence of judicial oversight. Yet, recent developments in case law and legal doctrine reveal a profound transformation: CFSP is no longer an enclave shielded from the reach of the courts. Instead, it is increasingly subject to the same legal principles and judicial scrutiny as other areas of EU policy. This shift is not merely procedural but reflects a deeper integration of CFSP into the Union's constitutional framework. Rather than lacking jurisdiction the presumption now is that the Court *does* have jurisdiction, apart from some specific situations.

Central to this evolution is the concept of – what I would like to coin – ‘implied jurisdiction’, a doctrine through which the CJEU has gradually asserted its authority to review CFSP acts, even where the Treaties do not explicitly grant such competence. While Articles 24(1) of the Treaty on European Union (TEU) and 275 of the Treaty on the Functioning of the European Union (TFEU) appear to restrict the Court's role in CFSP matters, the CJEU has interpreted these limitations narrowly. It has instead emphasized its overarching mandate under Article 19 TEU – to ensure that ‘in the interpretation and application of the Treaties the law is observed’ – as a basis for extending its general oversight.

The notion of implied jurisdiction has practical implications for the enforceability of CFSP.¹ While the Court's role remains constrained by the Treaties' explicit exclusions, its expanding jurisdiction signals a broader normalization of

¹ A more elaborative contribution on this topic is in preparation and will be published as R. A. Wessel, *Enforcing CFSP in Court: The Concept of Implied Jurisdiction*, in *Research Handbook in EU Common Foreign and Security Policy* (2nd ed., S. Blockmans & P. Koutrakos eds, Edward Elgar Publishing 2026, forthcoming).

CFSP within the EU legal order. The Court's approach reflects a careful balancing act: acknowledging the unique political sensitivities of foreign and security policy while insisting that the rule of law and fundamental rights must apply uniformly across all areas of Union activity.

The persistent characterization of CFSP as an intergovernmental policy, governed by political consensus rather than legal rules, is increasingly at odds with its actual status within the Union's legal framework. Since the Treaty of Lisbon, CFSP objectives have been fully integrated into the Union's external action framework, as articulated in Article 21 TEU. Moreover, CFSP Decisions are legally binding on Member States, as stipulated in Article 28(2) TEU, which provides that such decisions 'shall commit the Member States in the positions they adopt and in the conduct of their activity'. The duty of loyalty enshrined in Article 24(3) TEU further reinforces the legal nature of CFSP, obliging Member States to support the Union's foreign and security policy 'actively and unreservedly'.

The Court of Justice has long recognized the legal force of CFSP instruments. In its judgment in *Segi* (2007), it already affirmed that CFSP Decisions – then referred to as Common Positions – impose binding obligations on Member States, requiring compliance 'in a spirit of loyalty and mutual solidarity'. As will be shown below, more recently the Court has reiterated that CFSP is subject to the same principles of legality, proportionality, and fundamental rights as other EU policies. The question, therefore, is not whether CFSP is governed by law, but rather how its legality can be effectively enforced.

2 THE COURT'S EXPRESS AND IMPLIED JURISDICTION

The Treaties explicitly confer jurisdiction on the Court in two specific CFSP-related contexts. First, under Article 40 TEU, the Court may adjudicate disputes concerning the correct choice of legal basis, ensuring that CFSP measures do not encroach upon the competences or procedures of non-CFSP policies, and vice versa. Second, Article 275(2) TFEU empowers the Court to review the legality of CFSP Decisions that impose restrictive measures – such as sanctions – on natural or legal persons.

While these provisions are narrow in scope, they have provided the Court with critical footholds to assert its authority. In *Rosneft* (2017), the Court held that it could issue preliminary rulings on the validity of CFSP sanctions, emphasizing that a restrictive interpretation of its jurisdiction would undermine the 'system of effective judicial protection' guaranteed by the Treaties. Similarly, in *Bank Refah Kargaran* (2020), the Court extended its jurisdiction to include damages claims

arising from annulled CFSP sanctions, stressing the ‘necessary coherence’ of the EU’s system of legal remedies.

However, these cases address situations which may be clearly linked to those in which the Court enjoys express jurisdiction, in particular in relation to restrictive measures. Implied jurisdiction refers to the Court’s authority to review CFSP acts not because the Treaties explicitly permit it, but because such review is necessary to uphold the EU’s constitutional framework. This concept is analogous to the doctrine of implied powers in international law, whereby organizations are deemed to possess the competences required to fulfil their mandates effectively. For the CJEU, implied jurisdiction is a logical extension of its mandate under Article 19 TEU: if the Court is to ensure that the law is observed across all EU policies, it must possess the tools to do so – even in the politically sensitive domain of CFSP.

The Court first signalled its willingness to adopt this approach in *H* (2016), a case concerning a staff member of the EU Police Mission in Bosnia and Herzegovina. The Court rejected the argument that the derogatory status of CFSP under Articles 24(1) TEU and 275 TFEU could exclude all judicial review of staff management decisions. Instead, it ruled that the Court’s jurisdiction could not be interpreted so restrictively as to preclude review of acts that affect individuals’ rights. This reasoning has also been applied to public procurement disputes, as in *Elitaliana* (2015).

The Court’s 2024 judgment in *KS and KD* represents a watershed moment in the enforcement of CFSP. The case concerned allegations that EULEX Kosovo – a CSDP mission – had failed to investigate war crimes adequately, thereby violating the applicants’ fundamental rights. The Court faced a dilemma: the acts in question did not involve restrictive measures, nor did they concern a dispute over the correct legal basis. Yet, to decline jurisdiction would leave a significant gap in judicial protection, something that would be contrary to the Court’s key assignment under Article 19 TEU. The Court’s solution was to draw a distinction between, on the one hand, ‘genuine’ CFSP acts – such as political or strategic decisions – which remain beyond its jurisdiction, and, on the other, acts with direct legal effects on individuals, which must be subject to review to uphold the rule of law. Crucially, the Court tied its jurisdiction to the application of general EU principles – such as fundamental rights and the rule of law – to CFSP. As the Court stated in that judgment: ‘The inclusion of the CFSP in the EU constitutional framework means that the basic principles of the EU legal order also apply in the context of that policy’.

This reasoning builds on the Court’s earlier emphasis in *Rosneft* on the necessity of ‘effective judicial protection’ and in *Bank Refah Kargaran* on the ‘coherence’ of the EU’s system of legal remedies. Together, these judgments

establish that the Court's jurisdiction in CFSP is not confined to the Treaty's explicit exceptions but extends to any situation where the absence of judicial review would undermine the EU's constitutional guarantees.

The recognition of implied jurisdiction has three significant consequences. First, it expands the scope of legality control, allowing the Court to review CFSP acts that affect individuals' rights, even if they are not restrictive measures. This includes disputes involving staff, procurement decisions, and – critically – allegations of human rights violations by CFSP missions. Second, it enhances compliance enforcement: while the Treaties assign compliance monitoring to the Council and the High Representative, the Court's implied jurisdiction enables it to indirectly enforce CFSP obligations when they intersect with general EU law, such as fundamental rights or the principle of sincere cooperation. Third, it limits Member States' discretion by preventing them from invoking the 'intergovernmental' nature of CFSP to evade judicial scrutiny when their actions violate EU principles. The *KS and KD* judgment suggests that even omissions – such as a failure to investigate abuses – may be reviewable if they breach fundamental rights.

3 CONCLUSION: TOWARDS A FULL REVIEW OF CFSP?

Despite these advances, the Court's role in CFSP remains circumscribed. The *KS and KD* judgment explicitly excludes 'political or strategic choices' from judicial review, leaving a core of CFSP activity – such as high-level diplomatic decisions or military operations – beyond the Court's reach. This reflects a broader pattern: while the Court has gradually eroded CFSP's exceptionalism, it has not claimed – and is unlikely ever to claim – full jurisdiction over the policy.

Three areas illustrate these constraints. First, the Court cannot review the internal deliberations of the Council or the European Council in CFSP matters. The unanimity requirements set out in Article 31 TEU and the role of the High Representative remain matters of political, rather than judicial, enforcement. Second, the Court's jurisdiction over civilian and military missions under the Common Security and Defence Policy is fragmented. While it can review acts that affect individuals, such as staff disputes, it cannot scrutinize operational decisions, such as rules of engagement, due to the broad immunities granted to these missions and the inherently political nature of their mandates. Third, there remains a compliance gap: the Treaties provide no clear mechanism for enforcing CFSP Decisions against Member States that fail to comply. Although the Commission could theoretically use Article 258 TFEU to challenge violations of CFSP obligations, the political sensitivity of such cases makes this an unlikely prospect.

Yet, the concept of implied jurisdiction reflects a broader normalization of CFSP within the EU legal order. The Court has moved from treating CFSP as a judicial no-go zone to recognizing it as a policy area where the rule of law, fundamental rights, and effective judicial protection must prevail. A substantive – rather than a strictly procedural – analysis of the cases brought before the Court, will continue to help it to decide on its jurisdiction. This shift is not an exercise in judicial activism but a constitutional necessity: if CFSP is part of the EU's legal order, it cannot be entirely exempt from the principles that govern that order. Nevertheless, the Court's approach remains prudent. By limiting its review to acts with legal effects on individuals and excluding 'genuine' political choices, it avoids encroaching on areas where Member States' foreign policy prerogatives are most sensitive. The result is a hybrid system: CFSP is subject to judicial oversight where EU principles are at stake, but its core political functions remain insulated from judicial intervention.

This balance is likely to persist. While some scholars advocate for full judicial review of CFSP, the political realities of foreign and security policy – and the Treaties' explicit carve-outs – make this improbable. Instead, the Court's implied jurisdiction offers a pragmatic middle ground: it ensures that CFSP is not a lawless domain, while respecting the policy's unique character. The message is clear: CFSP is in principle enforceable in court, but only where the Court's intervention is necessary to uphold the EU's constitutional fabric. The era of CFSP exceptionalism is waning – but it is not yet over.

*Ramses A. Wessel
Professor of European Law,
University of Groningen and
Co-Editor-in-Chief of this journal,
Email: r.a.wessel@rug.nl.*

