Non-Contractual Liability For EU Sanctions: Towards the Normalization of CFSP*

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In Case C-134/19 P Bank Refah Kargaran, *the Court of Justice of the European Union (CJEU) made an important pronouncement over its jurisdiction on Common Foreign and Security Policy (CFSP), as it held that it can hear an action for damages allegedly suffered by a natural or legal person because of restrictive measures adopted under CFSP. This article reflects on this important development in the case law of the CJEU, by putting it in the context of what scholarship on the topic has referred to as the 'normalization' of CFSP. In addition, the article comments upon the potential significance of the decision in* Bank Refah *for the EU's external posture. The decision, this article argues, recognizes the opportunity to seek damages stemming from CFSP acts – including decisions adopted under the Common Security and Defence Policy (CSDP), that is decisions establishing military operations of civilian missions, and, in those contexts, acts or conduct attributable to EU bodies.*

Keywords: damages, non-contractual liability, CFSP acts, normalization, CSDP missions and operations, restrictive measures, jurisdiction, CJEU, sanctions.

1 INTRODUCTION

In *Bank Refah*,[1] the Court of Justice of the European Union (CJEU or the Court) made an important pronouncement over its jurisdiction on Common Foreign and Security Policy (CFSP), as it held that it can hear an action for damages allegedly suffered, by a natural or legal person, because of restrictive measures adopted under CFSP (section 2). Departing from a literal interpretation of the text of the Treaty, the Court contributed resolutely to the trend of normalization of CFSP. 'Normalization' here refers to the process whereby rules of general application of EU law are applied to CFSP, even though this policy presents major aspects of constitutional distinctiveness that, at least on a literal reading, would seem to preclude the application of certain measures of EU law proper. Examples of this trend are given, and the previous literature is recalled, in section 3. In section 4, this article explores in

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1 Case C-134/19 P *Bank Refah Kargaran v. Council of the European Union* ECLI:EU:C:2020:793.

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what sense *Bank Refah* 'normalized' the action for damages stemming from acts adopted on a CFSP legal basis (Articles 24–46 of the Treaty on European Union (TEU)). Since Article 275 of the Treaty on the Functioning of the European Union (TFEU) only allows for the Court's jurisdiction to review the *legality* of restrictive measures, the letter of the TFEU forecloses a finding of jurisdiction over a claim *for damages* stemming from such restrictive measures. The Court instead took the view that a general rule of EU law, namely that the CJEU does have jurisdiction in order to ensure that in the interpretation and application of the Treaties the law is observed (Article 19 TEU), ought to apply in this case, thus contributing to the normalization of CFSP (the Court also explained how other systemic reasons militate in the same direction). The Court contributed to the normalization trend also more subtly, by applying the case law over the substantive conditions for non-contractual liability, developed for legislative acts, to CFSP Decisions.[2] In addition to being indicative of the trajectory of increased normalization of CFSP, *Bank Refah* carries important implications for the EU's external posture (section 5). This is because the rationale of the judgment in *Bank Refah* can be extrapolated to other CFSP Decisions, in particular military operations and civilian missions adopted in the context of Common Security and Defence Policy (CSDP). In the light of the manifold activities carried out by the EU under CFSP, the opportunity for claimants to seek damages may act as an important tool to ensure the Union's accountability in this domain. This article also discusses any potential difficulties that may arise with the first of those conditions in the field of CSDP.

2 THE JUDGMENT IN BANK REFAH KARGARAN

In 2010, Bank Refah Kargaran was included in the list of restrictive measures adopted by the European Union against the Irani banking sector.[3] The sanctions had been adopted in the context of the most important counter-proliferation issue ever faced by the EU,[4] with a view to make Iran desist from its nuclear programme. In 2013, the General Court[5] struck down the inclusion of Bank Refah on the restrictive measures for lacking sufficient reasons.[6] Later, Bank Refah's name was entered again on a list of restrictive

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2 CFSP Decisions are not legislative acts pursuant to Art. 24 TEU.

3 In particular, in Annex II of Council Decision concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, at 39), and Annex V to Council Regulation (EC) No 423/2007 concerning restrictive measures against Iran (OJ 2007 L 103, at 1). For the subsequent legislative history of those provisions, *see* Case C-134/19 P *Bank Refah Kargaran* ECLI:EU:C:2020:396, AG Opinion paras 6–10.

4 *The EU and the World: Players and Policies Post-Lisbon*, 75 (A. Missiroli ed., European Union Institute for Security Studies 2016).

5 T-24/11 *Bank Refah Kargaran v. Council* EU:T:2013:403.

6 Case C-134/19 P *Bank Refah Kargaran, supra* n. 1, para. 28.

measures, but the action for annulment of these measures was dismissed by the General Court.[7] In 2018, Bank Refah brought a new action before the General Court, asking for compensation for the material and non-material damage it allegedly suffered as a result of its inclusion in the restrictive measures. The General Court held that it did not have jurisdiction to hear an action for damages relating to compensation for loss allegedly suffered as a result of the adoption of decisions taken within the framework of the CFSP under Article 29 TEU.[8]

In a Grand Chamber judgment, the European Court of Justice (ECJ) found instead that it could exercise jurisdiction over the action for damages, following Advocate General (AG) Hogan's opinion. This procedural issue is possibly the most consequential point of the decision from an EU law perspective. In principle, the jurisdiction of the CJEU on acts adopted pursuant to CFSP is curtailed by Article 24(2) TEU. The Court can only monitor compliance of those acts with Article 40 TEU (i.e., acts that are adopted pursuant to the correct procedure) and review the *legality* of certain decisions as provided for by the second paragraph of Article 275 TFEU. This Article, in turn, provides for the Court's jurisdiction 'to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 […], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council [in the CFSP]'. Article 275 TFEU seems to exclude action for damages from the Court's jurisdiction because an action for damages goes beyond mere legality review.[9] Notwithstanding this textual indication, the Court reasoned – not dissimilarly from the view adopted by AG Hogan[10] – that systemic and teleological considerations mandate the extension of its jurisdiction to actions for damages based on CFSP Decisions providing for restrictive measures. In particular, Article 24(2) TEU and 275(1) TFEU are exceptions to the general rule of Article 19 TEU, and they ought to be interpreted narrowly[11]: the action for damages has a 'specific purpose' dictating conditions for its use[12]; and the fundamental value of the rule of law (Articles 2 and 21 TEU) and the principle of effective judicial protection (Article 47 of the Charter of Fundamental Rights of the EU) make the jurisdiction of the CJEU necessary. In that regard, the Court found that the

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7 T-65/14 *Bank Refah Kargaran v. Council* (not published) EU:T:2016:692.

8 T-552/15 *Bank Refah Kargaran v. Council* ECLI:EU:T:2018:897, paras 25–32.

9 The illegality of an act being only one of the conditions for the establishment of non-contractual liability of the EU. Case C-123/18 P *HTTS v. Council* EU:C:2019:694, para. 32 and jurisprudence cited therein.

10 Case C-134/19 P *Bank Refah Kargaran* AG Hogan Opinion, para. 67.

11 Case C-134/19 P *Bank Refah Kargaran*, para. 32. This is settled case law: C-658/11 *Parliament v. Council*, EU:C:2014:2025, para. 70.

12 Case C-134/19 P *Bank Refah Kargaran*, para. 33.

coherence of the system of remedies would be jeopardized if the Court only had jurisdiction over implementing regulations, and not over CFSP Decisions.[13] This is because the two may not be identical.[14] The ECJ nevertheless rejected the appeal on the substance, in that the substantive conditions necessary to give rise to the non-contractual liability of the Union were not met. The Court held that the inadequacy of the statement of reasons for an act imposing a restrictive measure is not, in itself, sufficiently serious to give rise to non-contractual liability of the European Union.[15]

3 THE NORMALIZATION OF CFSP

Bank Refah is a decisive step toward the normalization of CFSP. The finding of jurisdiction over a damages action, as well as the application of the jurisprudence on legislative acts in this foreign policy context, are developments with potentially far-reaching consequences for the system of judicial protection in CFSP and ultimately for the Union's external posture. To fully appreciate the significance of this development, it will be placed in the context of CFSP's legal-constitutional distinctiveness and the relevant literature.

The CFSP is 'subject to specific rules and procedures' (Article 24 TEU). It thus enjoys, by textual constitutional provision, a distinctive position within EU law. Doctrinally, the 'specific rules and procedures' concern procedures for decision-making and special institutional arrangements within the Council[16]; the effect of CFSP acts and remedies against them (including the absence, in principle, of judicial review – a point of particular relevance for the present discussion); and the non-applicability of certain provisions of general application (Article 48(7) TEU does not apply to decisions with military implications or those in the area of defence); similarly, there are special provisions for military expenses (Article 41(2) TEU). The textually-provided constitutional 'eccentricity' of CFSP is a well-studied phenomenon.[17] It has

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13 *Ibid*., para. 39.
14 *Ibid*., para. 41.
15 *Ibid*., paras 33 and 62.
16 There is a High Representative, who is both President of the Foreign Affairs Council and Vice President of the Commission. A Political and Security Committee is entrusted with decision-making in CFSP crisis management operations, and the distinctiveness of CFSP is reflected down to the working groups, separated in those who deal with CFSP and those who work with other external relations; the European External Action Service assists the HR. An introductory overview is in S. Marquardt, *The Institutional Framework, Legal Instruments and Decision-Making Procedures*, in *Research Handbook on the EU's Common Foreign and Security Policy* 22 (S. Blockmans & P. Koutrakos eds, Elgar 2018).
17 M. Cremona, *The Position of CFSP/CSDP in the EU's Constitutional Architecture*, in Blockmans & Koutrakos eds, *supra* n. 16; P. Koutrakos, *Judicial Review in the EU's Common Foreign and Security Policy*, 67 Int'l. & Comp. L. Q. 1 (2018); G. Butler, *The Ultimate Stumbling Block? The Common Foreign and*

been said that 'most EU lawyers would maintain that – in particular because of the (perceived) absence of the two key characteristics of EU law: primacy and direct effect – the CFSP belongs to a different world'.[18] Similarly, Thym insists on the (albeit imperfect) intergovernmental character of CFSP to single out the policy as characterized by 'executive governance' (*Exekutivgewalt*) in light of the political and operational characteristics of its rules.[19] Political scientists such as Keukeleire and Delreux also see CFSP norms as being of different nature for EU law proper.[20]

Against this background, however, scholarship has long acknowledged that the practice of EU institutions points rather towards a normalization of CFSP, meaning that even in the context of this special policy EU institutions tend to apply rules of general application.[21] Already in 1999, Wessel wrote on the 'normalization' of CFSP within the EU legal order[22] – a position maintained by scholars with renewed and strengthened arguments also after the entry into force of the Lisbon Treaty: the constitutional distinction between the CFSP and other policies is not as prominent as it has been represented for example in political discourse, and it is in anyways fading away in the Court's jurisprudence.[23] Building on this analysis, other studies have employed the lens of normalization to describe institutional action in CFSP. The trend has been noted precisely in the establishment of the Court's jurisdiction over acts that, under a literal interpretation of Article 275 TFEU, appear to be excluded from judicial review.[24] A similar trend has been noted in the case law on country sanctions.[25] Further, the application of the 'centre of gravity' test to solve disputes under Article 40 TEU (i.e., involving the delimitation of the boundaries of CFSP) has also been regarded as an instance of

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Security Policy, and Accession of the European Union to the European Convention on Human Rights, 39 Dublin U. L. J. 229 (2016); R. Wessel, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*, 1(2) Eur. Papers (2016); P. A. S. de Santa María, *Mejorando La Lex Imperfecta: Tutela Judicial Efectiva y Cuestión Prejudicial En La PESC (a Propósito Del Asunto Rosneft)*, 58 Revista de Derecho Comunitario Europeo 871 (2017); R. Gosalbo Bono, *Some Reflections on the CFSP Legal Order*, 43(2) Com. Mkt. L. Rev. 337 (2006).

18 R. Wessel, *Resisting Legal Facts: Are CFSP Norms as Soft as They Seem*?, 20(1) Eur. For. Affairs Rev. 123, 130 (2015).

19 D. Thym, *Intergouvernementale Exekutivgewalt. Die Verfassung Der Europäischen Außen-, Sicherheits- Und Verteidigungspolitik*, 50 Archiv des Völkerrechts 125, 126 (2012).

20 S. Keukeleire & T. Delreux, *The Foreign Policy of the European Union*, 15 (2d ed., Palgrave Macmillan 2014).

21 For a systematic analysis, *see* L. Lonardo, *Coping with Distinctiveness: Common Foreign and Security Policy Within EU Law* (PhD Thesis 2020).

22 R. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer 1999).

23 G. Butler, *Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law*, 24 Columbia J. Eur. L. 637 (2018); Wessel, *supra* n. 18, at 439; Wessel, *supra* n. 22.

24 Koutrakos, *supra* n. 17, at 1; Butler, *supra* n. 23; G. Butler, *The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy*,13 Eur. Const. L. Rev. 673 (2017).

25 C. Beaucillon, *Opening up the Horizon: The ECJ's New Take on Country Sanctions*, 55(2) Com. Mkt. L. Rev. 387, 394 (2018) referring to the 'Lisbonization' of the Court's case law.

normalization[26]; and the role of national courts in this process has been analysed.[27] In addition, the literature on decision-making already suggested that a 'normalization' of CFSP has taken place since the 90s, and in particular with the Lisbon Treaty. For example, Wessel expressed the view that, through the new rules on the right of initiative and the voting rules, the CFSP became a form of 'progressive supranationalism'.[28] The language of normalization is also used by political scientists to describe the increased power of the EU in defence policy.[29] The intergovernmental character of CFSP,[30] or its resistance to normalization under the trajectory of EU integration,[31] is often stressed outside legal scholarship. As the above-mentioned show, there is an established trend towards a normalization in the interpretation of the CFSP; and the Court's decision in *Bank Refah* unequivocally contributes to it. However, the judgment is not the final step. The application of certain hallmark principles of EU law in the CFSP, such as supremacy and direct effect, is still moot – as absent Treaty reform the Court can only go so far in pursuing a trajectory of normalization.

4 BANK REFAH AND THE NORMALIZATION OF ACTIONS FOR DAMAGES

EU restrictive measures are first adopted through a decision by the Council acting by unanimity.[32] The enactment of further acts then depends on the subject matter of the measures. Where the Council adopts sanctions with a non-economic objective (e.g., travel bans, arms embargoes), implementation is left upon Member States, which implies that no further instruments are required at the EU level.[33] Where, instead, the restrictive measures are of an economic nature,

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26 P. Van Elsuwege & G. Van der Loo, *Legal Basis Litigation in Relation to International Agreements: Commission v. Council (Enhanced Partnership and Cooperation Agreement with Kazakhstan)*, 56 Com. Mkt. L. Rev. (2019); Editorial, *A Stronger Common Foreign and Security Policy for a Self-Reliant Union?*, Com. Mkt. L. Rev. 1675 (2018).

27 L. Lonardo, *May Member States' Courts Act as Catalysts of Normalisation of the European Union's Common Foreign and Security Policy?*, Maastricht J. Eur. & Comp. L. (2021).

28 R. Wessel, *Initiatives in CFSP and Extraordinary Council Meetings – Art. 30 TEU, The Treaty on European Union (TEU): A Commentary* (Springer 2013).

29 J. Haaland Matlary, *European Union Security Dynamics in the New National Interest*, 3 (Palgrave Macmillan 2009); H. Ojanen, *The EU and Nato: Two Competing Models for a Common Defence Policy*, 44 J. Com. Mkt. Stud. 57, 62 (2006).

30 D. Angelucci & P. Isernia, *Politicization and Security Policy: Parties, Voters and the European Common Security and Defence Policy*, Eur. Union Pol. 1, 2 (2019); E. Sellier, *Small Steps Towards a Comprehensive Approach After Lisbon: The Common Foreign and Security Policy and the Fight Against Terrorism*, 9 New J. Eur. Criminal L. 109, 111 (2018).

31 A. Menon, *Defence Policy and the Logic of 'High Politics'*, in *Beyond the Regulatory Polity?* 66 (Ph. Genschel & M. Jachtenfuchs eds, Oxford University Press 2013).

32 Article 215 TFEU.

33 Council of the European Union, Sanctions Guidelines (Update) Doc. 5664/18, para. 7.

the decision is supplemented by a regulation adopted by the Council, acting by qualified majority.[34] The regulation does not have a CFSP legal basis, but is instead adopted pursuant to the TFEU.

The possibility to seek redress for damage caused by an act adopted on the basis of a CFSP legal basis (herein, a CFSP Decision) was not recognized by the Court until *Bank Refah*. The fact that the opportunity was not recognized before was partially due circumstances relating to litigation (e.g., the parties did not seek such remedy),[35] and partially because, as mentioned, neither of the 'exceptions to the exception' in Articles 24(2) TEU or 275(1) TFEU explicitly allow claims for damages based on CFSP Decisions. Further, the question whether the legality review envisaged by this latter provision could be read as encompassing actions for damages had previously been answered in the negative. In the pre-Lisbon era, the CJEU had rejected this possibility explicitly in *Segi*[36] and *Gestoras Pro Amnistia*.[37] Post-Lisbon, this pattern was seemingly left unaltered, especially since there were no normative developments providing for this possibility[38]: in *Opinion 2/13*, AG Kokott expressly ruled out the possibility that Article 275(2) be read broadly with a view to including preliminary references and actions for damages[39]; similarly, in *Rosneft* AG Wathelet explicitly excluded this possibility, suggesting that actions for damages relating to CFSP acts did not fall within the scope of the second subparagraph of Article 275 TFEU.[40] On that occasion, the Court did not need to decide on the issue. Again, in *Jannatian*, the General Court stressed that 'a claim seeking compensation for the damage allegedly suffered as a result of the adoption of an act relating to the CFSP [fell] outside the jurisdiction of the Court'.[41]

The above entailed that, until the appeal judgment in *Bank Refah*, the jurisdiction of the Court with respect to damages in the context of restrictive measures was limited to regulations adopted pursuant to Article 215 TFEU, but not to CFSP Decisions pursuing the same purpose. This distinction was rightly

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34 *Ibid*.; *See also* Art. 215 TFEU.

35 G. 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), https://eulawlive.com/op-ed-non-contractual-liability-and-actions-for-damages-regarding-restrictive-measures-through-cfsp-decisions-jurisdiction-of-the-cjeu-confirmed-by-graham-butler/(accessed 9 Mar. 2021), voicing surprise at the fact that claims for non-contractual liability for wrongful inclusion in restrictive measures are so rare in front of EU courts.

36 C-355/04 P *Segi and Others v. Council*, ECLI:EU:C:2007:116, paras 46–48.

37 C-354/04 P *Gestoras Pro Amnistía and Others v. Council*, ECLI:EU:C:2007:115, paras 46–48.

38 K. Gutman, *The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection*, 48 Com. Mkt. L. Rev. 649, 701 (2011). *See also* K. Lenaerts, I. Maselis & K. Gutman, *EU Procedural Law* 481 (OUP 2014).

39 Opinion 2/13, Opinion of AG Kokott, ECLI:EU:C:2014:2475, at paras 89–94.

40 Case C-72/15 *Rosneft*, Opinion of AG Wathelet, ECLI:EU:C:2016:381, n. 36.

41 Case T-328/14 *Mahmoud Jannatian v. Council*, ECLI:EU:T:2016:86, para. 31.

decried for creating gaps and inconsistencies in accountability within the CFSP,[42] particularly as it did away with two considerations: firstly, that the adoption of sanctions has *ipso facto* fundamental rights consequences,[43] regardless of the instrument through which they are adopted; secondly, that in so doing, the Court created an imbalance between CFSP decisions and TFEU regulations.[44] The decision in *Bank Refah* corrects these inconsistencies, which were a relic of the pre-Lisbon era. Admittedly, this result was reached through a systematic[45] and teleological[46] interpretative process, pivoting around the respect for the rule of law[47] and for effective judicial protection,[48] which departs from the text of the Treaty. However, we consider that the reasoning led to the correct result, in this instance. Actions for damages are necessary to guarantee respect for both the rule of law and effective judicial protection, and the desirability of this objective justifies a minor departure from the letter of Article 275 second paragraph TFEU. The departure is marginal because a review of legality is a logical requirement for an action for damages (and indeed it may even be carried out in the context of an action for damages[49]), so much so that one could stretch the notion of 'review of legality' allowed by Article 275(2) TFEU so as to encompass, as (very) special manifestation thereof, the action for damages. In the relevant paragraph, the Court merely states that 'Article 275 TFEU does not *expressly* mention the jurisdiction of the CJEU to rule on harm allegedly caused by restrictive measures taken in CFSP Decisions',[50] as if to justify its interpretation as merely a supplement to (rather than a departure from) the Treaty text. To be sure, an annulment action to which an action for damages cannot follow would still not be deprived of purpose, and, in very limited areas, a system permitting only the first and not the second could be tolerable, if undesirable. Yet the peculiar constitutional arrangement of CFSP, where the action for damages is allowed against an implementing regulation but

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42 K. Gutman, *The Non-Contractual Liability of the European Union: Principle, Practice and Promise*, in *Research Handbook on EU Tort Law* 28 (P. Giliker ed., Edgar Elgar 2017). *See also* C. Eckes, *The Law and Practice of EU Sanctions*, in *Research Handbook on the EU's Common Foreign and Security Policy* 213 (S. Blockmans & P. Koutrakos eds Edward Elgar 2018); G. Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* 187 (Hart Publishing 2019); S. Poli, *The Common Foreign Security Policy After Rosneft: Still Imperfect But Gradually Subject to the Rule of Law*, 54 Com. Mkt. L. Rev. 1799, 1831 (2017).

43 P. J Cardwell, *The Legalisation of European Union Foreign Policy and the Use of Sanctions*, 17 Cambridge Y. B. Eur. Legal Stud. 287, 302 (2015); Eckes, *supra* n. 42, at 207, *citing* C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (OUP 2009); Case C-599/14 P *Council v. LTTE*, ECLI:EU:C:2016:723, Opinion of AG Sharpston, para. 102.

44 Eckes, *supra* n. 42, at 213.

45 Case C-134/19 P *Bank Refah, supra* n. 1, paras 32 and 34.

46 *Ibid*., para. 33.

47 *Ibid*., para. 35.

48 *Ibid*., para. 36.

49 Case C-123/18 P *HTTS v Council, supra* n. 9, paras 38–40.

50 Case C-134/19 P *Bank Refah, supra* n. 1, para. 31 (emphasis added).

not against the original CFSP decision, seems both undesirable, needlessly incoherent, and ultimately inconsistent with the aim of ensuring effective judicial protection.

Could the identified gap in the system of remedies be filled by entrusting national courts with a role in this area? This question should be answered in the negative. National courts would not be in a position to determine the validity of EU acts[51] – and thus to award damages as necessary (following *Bank Refah* and *Rosneft*,[52] there is little doubt that a finding of (CJEU) jurisdiction would be confirmed even in a preliminary ruling procedure, for that is the purpose of the complete system of remedies). Further, claims brought by individuals in domestic courts for non-contractual liability against Member States (for implementing the CFSP decision in national law) would also likely be unsuccessful. Those actions (so-called *Francovich* claims) are predicated on the imputability of the damages, and as AG Hogan wrote in his opinion, 'individual Member States cannot be held liable for damage caused by a national measure taken in order to comply with such a [CFSP] decision, since any possible illegality, causing damage, cannot be imputed to them', as they are obliged to comply by Article 29 TEU.[53] The corollary conclusion from these limitations and the duty to safeguard the rule of law and judicial protection is that the jurisdictional asymmetry[54] between CFSP decisions and restrictive measures adopted pursuant to Article 215 TFEU with respect to damages claims could not stand without prejudice to the completeness and coherence of the system of remedies.[55] The conclusion is not prejudiced, as the Court stressed, by *Segi* and *Gestoras Pro Amnistia*, because the limitations they acknowledged reflected the different institutional framework applicable to the CFSP pre-Lisbon.[56]

Bank Refah contributes to the normalization of CFSP also in so far as it applies to a CFSP *decision* the substantive conditions for non-contractual liability applied to legislative acts under Article 340(2). With the exception of *Plaumann*, where the Court made the admissibility of a damages claim contingent upon a successful annulment claim,[57] the Court has generally asserted that the action for damages is

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51 Case 314/85 *Foto Frost v. Hauptzollamt Lübeck-Ost*, ECLI: ECLI:EU:C:1987:45, paras 15–17.

52 *See* C-72/15 *Rosneft*, ECLI:EU:C:2017:236, paras 66–67 with reference to review of legality.

53 Case C-134/19 P *Bank Refah*, Opinion, *supra* n. 10, para. 64.

54 On the concept of jurisdictional asymmetry, *see* E. Bartoloni, *'Restrictive Measures' Under Art. 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the Bank Refah Judgment*, 5(3) Europ. Papers 1359, 13650 and 1365 (2020).

55 Case C-134/19 P *Bank Refah, supra* n. 1, paras 40–43, especially considering that the two instruments may be substantively different.

56 *Ibid*., paras 47–48.

57 Case 26/62 *Plaumann & Co. v. Commission* ECLI:EU:C:1963:17, para. 6.

an independent remedy,[58] on the basis that a dissimilar finding would 'be contrary to the independent nature of this action as well as to the efficacy of the general system of forms of action created by the Treaty'.[59] However, it has also placed limitations thereto. A first factor pointing to this is that the Court has at times underlined the existence of a relationship of complementarity between the action for annulment and the action for damages.[60] Further, the Court has been alert at policing the boundary between actions for annulment and damages, placing limitations on the ability to seek damages where doing so might circumvent an action for annulment.[61] More specifically, the Court has rejected the admissibility of damages claims based on damage resulting 'from an individual […] measure which has become definitive, which the party concerned could have challenged by means of an annulment'.[62] The rationale being that in such cases, the claim entered does not actually seek to obtain damages, but rather 'the withdrawal of an individual decision addressed to the applicants which has become definitive – so that it has the same purpose and the same effect as an action for annulment'.[63] While these passages do not, in principle, affect the independent status of this remedy, they highlight that the boundary between the two remedies is rather fine. The Court's quest for normalization in *Bank Refah* may have thinned out this boundary even further. It is true that both the judgment and the opinion of the AG underscore the independent status of the action for damages, and its particular role in the system of remedies provided within the Treaties.[64] Yet, the Court built upon the wording of the second paragraph of Article 275 in assessing whether damages should extend to CFSP decisions establishing restrictive measures.[65] Similarly, the AG interpreted the question as an enquiry on the proper meaning

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58 This finding is further supported by the fact that the action for damages is the only judicial action explicitly provided within the CFREU, specifically within Art. 41(3) CFREU.

59 M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law*,185 (Oxford 2018), *citing* Case 4/ 69 *Lutticke v. Commission* ECLI:EU:C:1971:40, para. 6; Case 5/71 *Zuckerfabrik Schoppenstedt v. Council*, ECLI:EU:C:1971:116, para. 3.

60 K. Gutman, *Liability for Breach of EU Law by the Union, Member States and Individuals: Damages, Enforcement and Effective Judicial Protection*, in *Research Handbook on EU Institutional Law* 447 (A. Lazowski & S. Blockmans eds, Edward Elgar 2016), citing two cases in support of this view, namely C-131/03 P *Reynolds Tobacco and Others v. Commission* ECLI:EU:C:2006:541, paras 82–84 and Joined Cases T-172/98, T-175/98 to T-177/98, *Salamander and Others v. European Parliament and Council* ECLI:EU:T:2000:168, para. 77. *See also* Lenaerts, Maselis & Gutman, *supra* n. 38, at 493.

61 Lenaerts, Maselis & Gutman, *supra* n. 38, at 490; *See* Gutman, *supra* n. 38, at 704, who argued that this tendency was particularly visible in certain staff cases, e.g., Case 4/67 *Muller (nee Collignon) v. Commission* ECLI:EU:C:1967:51, p. 372; Case C-346/87 *Bossi v. Commission* ECLI:EU:C:1989:59, paras 31–32.

62 Case T-86/03 *Holcim (France) v. Commission* ECLI:EU:T:2005:157, paras 49–51.

63 Gutman, *supra* n. 38, at 704, *citing* T-166/98 *Cantina Sociale di Dolianova and Others v. Commission* ECLI:EU:T:2004:337, para. 122; T-180/00 *Astipesca v. Commission* ECLI:EU:T:2002:249, para. 139.

64 Case C-134/19 P *Bank Refah Kargaran, supra* n. 1, para. 33; Case C-134/19 P *Opinion of AG Hogan, supra* n. 10, paras 59–60.

65 *Ibid*., judgment, para. 31.

to be attributed to the second paragraph of Article 275.[66] It might thus be possible that in future actions, the availability of a damages claim might be tied to a prior finding of unlawfulness.[67] This reasoning was at the basis of the finding in *Bank Refah* that the inadequacy of the statement of reasons for an act imposing a restrictive measure is not, in itself, sufficiently serious[68] so as to automatically give rise to non-contractual liability of the European Union.[69] With such a finding the Court confirms that the case law on inadequacy in the statement of reasons for a legislative measure[70] can be extrapolated to restrictive measures (as it had held in *HTTS*[71] concerning a Regulation), including – and this is an important novelty not immediately borne by the cited precedent of *HTTS* – when the measures in questions are CFSP Decisions (as opposed to TFEU Regulations). It will be recalled that in relevant jurisprudence, the Court had stressed that the 'sufficiently serious' criterion served the purpose of avoiding:

> the risk of having to bear the losses claimed by the persons concerned obstructing the institution's ability to exercise to the full its powers in the general interest, whether that be in its legislative activity, or in that involving choices of economic policy or in the sphere of its administrative competence, without however thereby leaving individuals to bear the consequences of flagrant and inexcusable misconduct.[72]

Thus, notable as it is, the Court's extension of this criterion to CFSP acts represents at the same time an extension of its ability to decide where exactly that balance is struck.

5 CONSEQUENCES FOR THE UNION'S EXTERNAL POSTURE

The novelty of *Bank Refah* consists in the recognition that damages may be awarded as a result of CFSP acts, including decisions adopted under the CSDP – i.e., decisions establishing military operations of civilian missions, and, in that context, acts and/or conduct attributable to EU bodies. By reason of the

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66 *Ibid*., paras 57–60.

67 P. Van Elsuwege & J. De Coninck, *Action for Damages in Relation to CFSP Decisions Pertaining to Restrictive Measures: A Revolutionary Move by the Court of Justice in Bank Refah Kargaran?* (9 Oct. 2020), http://eulawanalysis.blogspot.com/2020/10/action-for-damages-in-relation-to-cfsp.html (accessed 9 Mar. 2021).

68 The requirement of a 'sufficiently serious breach' exists for discretionary measures. *See* e.g., R. Mańko, *Action for Damages Against the EU* (European Parliament Brief 2018), https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf (accessed 9 Mar. 2021).

69 Case C-134/19 P *Bank Refah Kargaran, supra* n. 1, paras 33, 62.

70 Case 106/81 *Kind v. EEC* [1982] ECR 2885, para. 14: 'Any inadequacy in the statement of the reasons upon which a measure contained in a regulation is based is not sufficient to make the Community liable'.

71 C-123/18 P *HTTS* v Council, *supra* n. 9, para. 103.

72 P. Svoboda, *Sison III: EU Non-Contractual Liability for Damages and the So-Called Smart Sanctions*, 4 Law. Q. 343 (2012), *citing* T-351/03 *Schneider Electric v. Commission* ECLI:EU:T:2007:212, para. 125 *and* T-212/03 – *MyTravel v. Commission* ECLI:EU:T:2008:315, para. 42.

particular factual scenario, the judgment leaves open a number of questions which future litigation will undoubtedly shed light into, such as (1) the link between the annulment of a measure and the award of damages; (2) issues of attribution; (3) the quantification of damages, which, as will be recalled, may be pecuniary and non-pecuniary (as Bank Refah had sought).[73] The contribution made by the judgment however remains undeniable. To demonstrate this, this section explains why *Bank Refah* can be extrapolated to CFSP decisions other than those imposing sanctions.

The judgment is based on three teleological and systematic considerations,[74] with only one of them not being applicable to CFSP decisions not imposing restrictive measures. This particular consideration relates to the lack of coherence between the *existence* of jurisdiction to award damages arising from harm caused by TFEU regulations implementing restrictive measures, and the *absence* of such jurisdiction with regard to CFSP decisions imposing restrictive measures. Nevertheless, this factor is not a driving consideration in the Court's reasoning in *Bank Refah*. Other justifications (upholding the rule of law, effective judicial protection, and affording a broad interpretation of Article 19 TEU) would be equally applicable to other CFSP decisions, and it would be sufficient to invoke those for the Court to affirm jurisdiction in such contexts without being inconsistent with its jurisprudence. Finally, no limits are mentioned in the judgment as to the exportability of these two factors.

'Foreign policy' cases in which the EU's non-contractual liability might be engaged are not only the vast array of sanctions but also EU conduct in the context of CSDP missions and operations. It will be recalled that liability can arise as a result of both acts and conduct (such as omissions), 'whether of an administrative, legislative, judicial or factual nature'.[75] In other words, 'conduct that does not consist of any formal legal act is capable of triggering liability if unlawful'.[76] Restrictive measures cover a broad range of situations since they have a geographic or thematic nature[77]: when it comes to country measures, the current sanction regime targets thirty-five countries[78]; as far as thematic sanctions are concerned, they currently target suspected terrorists, natural or legal persons involved in

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[73] Indeed, in *Safa Nicu Sepahan*, the General Court found for the first time that the adoption and maintenance of the restrictive measures against a company caused it recoverable non-material harm. Case T-384/11 *Safa Nicu Sepahan v. Council*, ECLI:EU:T:2014:986, para. 80. *See also* K. Havu, *Damages Liability for Non-material Harm in EU Case Law*, 44(4) Eur. L. Rev. 497 (2019).

[74] Case C-134/19 P *Bank Refah Kargaran, supra* n. 1, paras 32–34.

[75] M. Fink, *EU Liability for Contributions to Member States' Breaches of EU Law*, 56 Com. Mkt. L. Rev. 1227, 1233 (2019) *citing* A. Türk, *Judicial Review in EU Law*, 241 (Edward Elgar 2009); M. Van der Woude, *Liability for Administrative Acts Under Article 215(2) EC*, in *The Action for Damages in Community Law* 119–121 (T. Heukels & A. McDonnell eds, Kluwer 1997).

[76] *Ibid*.

[77] Sanctions Guidelines, *supra* n. 33, paras 1–6.

[78] For an overview, *see* https://sanctionsmap.eu/#/main (accessed 9 Mar. 2021).

proliferation of chemical weapons,[79] and since 2020 alleged perpetrators of cyber-attacks (in addition, since December 2020, the EU).[80] *Bank Refah* builds on previous jurisprudence establishing that the unlawful inclusion of a natural or legal person in restrictive measures might give rise to the EU's non-contractual liability, at the same time opening up judicial review over a broader area within the CFSP/CSDP.[81] Thus, the judgment lies the groundwork for providing a meaningful remedy to hold the EU accountable in delicate contexts such as military operations or civilian missions to claimants from the EU and the rest of the world. This is a necessary and most welcome development, especially in the light of the accountability gaps identified in the context of such missions.[82] Absent any elaboration on the substantive requirements in the judgment, it is also foreseeable that non-contractual liability in the context of CSDP missions would be subject to the same requirements as other EU acts/conduct, namely the existence of: (1) unlawful conduct attributable to an EU institution or body; (2) actual damage suffered by the applicant; (3) a causal link between the challenged conduct and the alleged damage pleaded.[83] The Court's commitment to such a possibility appears self-evident especially in light of its recent acceptance that third states may have standing to bring proceedings against restrictive measures affecting them.[84]

There nonetheless exist several aspects which may render damages difficult to award in the CSDP. The first of these relates to the issue of attribution. As will be recalled, conduct must be attributable to the EU in order to engage its non-contractual liability. As the case law in the field of Economic and Monetary Union shows, the issue of attribution of acts (or factual conduct of individuals[85]) to the EU is likely to constitute a stumbling block to the establishment of EU's extra-contractual liability,[86] and this is the case even when there is a degree of EU involvement in the planning, management, or execution of the operation that

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79 Sanctions Guidelines, *supra* n. 33, paras 1–6.

80 *See Council Decision (CFSP) 2019/797 of 17 May 2019 Concerning Restrictive Measures Against Cyber-Attacks Threatening the Union or Its Member States and Council Regulation (EU) 2019/796 of 17 May 2019 Concerning Restrictive Measures Against Cyber-Attacks Threatening the Union or Its Member States*.

81 On which *see* Havu, *supra* n. 73.

82 S. Johansen, *Accountability Mechanisms For Human Rights Violations by CSDP Missions: Available and Sufficient?*, 66 Int'l. & Comp. L. Q. 181 (2017) and for a detailed study of accountability mechanisms in this context *see* C. Moser, *Accountability in EU Security and Defence: The Law and Practice of Peacebuilding* (OUP 2020).

83 *See* e.g., T-384/11 *Safa Nicu Sepahan*, *supra* n. 73, para. 50.

84 Case C-872/19 P *Venezuela v. Council* ECLI:EU:C:2021:50, paras 90–95.

85 On which *see* N. Xanthoulis, *Administrative Factual Conduct: Legal Effects and Judicial Control in EU Law*, 12(1) Rev. Eur. Administrative L. 39 (2019).

86 T. Tridimas, *Indeterminacy and Legal Uncertainty in EU Law*, in *EU Executive Discretion and the Limits of Law* (J. Mendes ed., Hart 2019).

damaged a claimant. The example of the Eurogroup is telling.[87] Granted, the General Court ruled, in *Chrystostomides* and in *Bourdouvali*,[88] that statements of the Eurogroup could give rise to non-contractual liability of the EU. On appeal, however, the ECJ reversed this finding as it held, very formalistically, that the Eurogroup is not an EU institution or body established by the Treaties for the purposes of Article 340 TFEU. It is thus likely that CSDP conduct might give rise to similar issues since 'the legal status of CSDP missions and staff differ[s] from the other entities within the framework of EU external action'.[89] A finding of joint liability between EU and Member States is also unlikely to take place; procedural limitations aside,[90] the concurrence of liability has thus far been recognized as possible in two selected situations: (1) where the Union fails to take steps to prevent a breach of Union law[91]; (2) where MS implement unlawful Union law.[92] The idiosyncrasy of the CSDP renders this transposition difficult.

Two more difficulties lie in the determination, required by settled case-law, that a discretionary act contains a *sufficiently flagrant violation* of a rule of law *intended to confer rights on individuals*.[93] On the first, it should be noted that the requirement of 'sufficiently serious' breach is assessed in inverse proportion to the discretion that the institution enjoys.[94] The Court has repeatedly held that 'the European Union legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments'.[95] This is especially the case in CFSP, where the Council 'is called upon to undertake complex assessments'.[96] As a result of the broad discretion enjoyed by EU institutions when acting under the CFSP, to qualify as 'sufficiently serious' a breach ought to be truly egregious. On the second, it is

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87 The Eurogroup is an informal gathering of ministers and 'cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union'. *See* Joined Cases C-105/15 P to C-109/15 P *Mallis and Malli* EU:C:2016:702, para. 61.

88 Case T-680/13 EU:T:2018:486 *K. Chrysostomides & Co. and Others v. Council and Others* and Case T-786/14 *Bourdouvali and Others v. Council and Others* EU:T:2018:487.

89 Case C-730/18 P *SC v. Eulex Kosovo*, Opinion of AG Tanchev, para. 8. *See* further Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ, English Special Edition 1962 (I), at 135), as last updated (OJ 2019 C 420, at 22). *See* Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service (OJ 2010 L 201, at 30), Art. 6.

90 Article 274 TFEU suggests that the CJEU would have exclusive jurisdiction in this ambit, but a potential dispute may nonetheless be filed before a national court.

91 Case 4/69, *Lutticke v. Commission, supra* n. 59. *See also* Joined Cases 5, 7 and 13 to 24/66, *Kampffmeyer,* ECLI:EU:C:1967:31.

92 Case 96/71 *R and V Haegemann*, ECLI:EU:C:1972:88.

93 Case 5/71 *Aktien-Zuckerfabrik Schoppenstedt v. Council, supra* n. 59.

94 T-429/05 *Artedogan* ECLI:EU:T:2010:60, para. 55. *See also* T. Tridimas, *Liability for Breach of Community Law: Growing Up and Mellowing Down?,* Com. Mkt. L. Rev. 311 (2001).

95 C-440/14 P *National Iranian Oil Company v. Council* EU:C:2016:128, para. 77.

96 C-72/15 *Rosneft, supra* n. 52, para. 113.

disputable whether a decision authorizing a CSDP mission is intended to confer rights to individuals. It is generally recognized that a measure must fulfil the following four requirements in order to be considered as 'protecting the individual': it must 'create an advantage which can be defined as a vested right'[97]; it must be 'designed for the protection of the interests of individuals'[98]; it must 'give rise to rights for individuals which Member State courts must protect'[99]; and it must either grant rights whose content is 'sufficiently identifiable' or refer to general interests, but also protect the 'individual interests of the persons concerned'.[100] However, CSDP decisions, and those adopted by the Political and Security Committee in the life of an operation, tend to be of operational nature, and by reason of their subject matter do not dispose of the rights of individuals. Indeed, one might contend that a measure affecting individual rights cannot be lawfully adopted on a CFSP legal basis, as it would otherwise violate the non-affectation clause of Article 40 TEU.[101] In a nutshell, the case for the argument that CFSP cannot affect rights of individuals can be derived from a systematic and teleological interpretation of the Treaties. The argument is functional, as it does not find express literal grounds in the Treaties. Given the constitutional preference for executive decision-making in CFSP, coupled with the limited role of the democratically elected institution and of the CJEU, there is a strong case for limiting the effect that CFSP measures may have on individuals. The case builds, essentially, on the central tenet of the EU as a constitutional system subject to the rule of law,[102] in which no institution can adopt acts, affecting individual rights, which are subtracted from judicial review (as some CFSP acts, instead, are). The argument is reinforced by exception that confirms the rule, the provision of Article 39 TEU: 'the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States

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97 Gutman, *supra* n. 42, at 53, citing T-437/10 *Gap Granen & Producten v. Commission*, EU:T:2013:248, para. 22; T-279/11 *T & L Sugars and Sidul Açúcares v. Commission* EU:T:2016:683, para. 39; T-103/12 *T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v. European Commission* EU:T:2016:682, para. 44. *See also* T-297/12 *Evropaïki Dynamiki v. Commission* (not published) EU:T:2014:888, para. 76; T-113/96 *Dubois et Fils v. Conseil et Commission* ECLI:EU:T:1998:11, paras 63–65 (emphasis added).

98 *Ibid*.; *See also* C-83/76 *Bayerische HNL v. Council and Commission* ECLI:EU:C:1978:113, para. 5.

99 *Ibid*., Gutman. *See also* Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and the Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* ECLI:EU:C:1996:79, para. 54.

100 *Ibid*., Gutman. In other words, the provisions must not concern the protection of the public at large, but rather individuals. *See* Melanie Fink, *supra* n. 75, at 200; S. Prechal, *Protection of Rights: How Far?*, in *The Coherence of EU Law: The Search for Unity in Divergent Concepts* 163–164 (S. Prechal & B. van Roermund eds, OUP 2008).

101 This argument is elaborated and defended in L. Lonardo, *Coping with Distinctiveness: Common Foreign and Security Policy Within EU Law* (PhD Thesis 2020).

102 The classic authorities are cases C-294/83 *Les Verts* ECLI:EU:C:1986:166 and more recently C-72/15 *Rosneft, supra* n. 52; and C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

when carrying out activities which fall within the scope of this Chapter [on CFSP], and the rules relating to the free movement of such data'.

6 CONCLUSION

Bank Refah is a decisive step in the ongoing process toward the normalization of CFSP as it brings to light many developments. The first of these, as discussed in Sections 2 and 3, is of both procedural and substantive nature: the Court, through this judgment, has filled a long-overdue gap in its system of judicial remedies, namely the absence of avenues to seek damages for CFSP acts. At the same time, through this recognition, it has also shortened the distance between the CFSP and other areas of external action, thereby normalizing further this field. This development is critical because it highlights once more the increasingly unbearable tension between the rigid and almost capricious constitutional rules concerning CFSP and their inadequacy in front of the challenges evidenced by by growing EU action in the field. The CJEU is forced to bold and acrobatic reasoning to deliver a fair judgment. The case is also notable because it is liable to affect the EU's external position. Indeed, non-contractual liability is quintessential to 'compel public authorities to meet their legal obligations'.[103] Most importantly, it is also a 'necessary extension of the principle of effective judicial protection [,] access to the courts'[104] and good administration.[105] By fixing the asymmetry between CFSP acts and regulations in restrictive measures, the CJEU is effectively extending the protection afforded by these principles to a much broader spectrum of acts – or conduct, as section 5 on the CSDP highlighted – within the CFSP. This has two consequences: the first, as section 4 showed, is the creation of a parallelism in treatment between CFSP acts and regulations; the second instead is that it may influence regulatory changes within this field, and further align action therein with external values, by virtue of the punitive threat Article 340(2) TFEU enshrines. The possibility that judicial review of sanctions may engender policy changes had already been noted in relation to targeted sanctions.[106] *Bank Refah* nonetheless leaves one open question, namely the status of the action for damages. As section 4 has attempted to show, even though both the judgment and the Opinion of the AG underscore the independence of the action for damages, the logic pervading

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[103] M. Fink, *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable*, 21 German L. J. 532, 535 (2020), *citing* E. Angle, *Tort Law and Human Rights*, in *Comparative Tort Law: Global Perspectives* 70, 92 (M. Bussani & A. Sebok eds, Edward Elgar 2015).

[104] C-234/02 *P Mediator v. Lamberts* ECLI:EU:C:2003:394, Opinion of AG Geelhoed, paras 82–3.

[105] Gutman, *supra* n. 38, at 446–447.

[106] E. Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 Yale J. Int'l. L. 34–44 (2019), who argues that 'sometimes the Council even "forgoes sanctions that were less important" and no longer re-issues them after they are struck down by the court'.

the Court's argumentation may have actually strengthened the link between damages and annulment. This is the case especially in relation to the connection it creates between measures with a general aim and CFSP acts. Whether this is an unwarranted development is undetermined at this point. It is nonetheless foreseeable that it might result in increased litigation within the CSDP and with it, added evidence of the normalization of the CFSP.