



JUDICIALIZATION AND THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN EU EXTERNAL HUMAN RIGHTS POLICY

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ABSTRACT

This article examines the growing judicialization of fundamental rights protection in the European Union's external action. Once largely confined to the political and diplomatic sphere, this domain has increasingly come under legal scrutiny, with the Court of Justice of the European Union (CJEU) playing a central role in shaping and constraining EU policy through judicial review. This development raises broader constitutional questions concerning the balance between political discretion and judicial oversight, the limits of EU competences, and the relationship between the EU legal order and the European Convention on Human Rights (ECHR), particularly in areas such as the Common Foreign and Security Policy (CFSP), which has traditionally been shielded from judicial control.

Adopting a doctrinal methodology, the article analyses key strands of CJEU case law in light of the principles of autonomy and effective judicial protection, situating these developments within the EU's constitutional framework on external action and fundamental rights. It traces how the Court has progressively expanded its role through a series of incremental steps, including narrowing the CFSP jurisdictional exception, extending rights protection beyond EU territory, and developing remedial avenues such as damages liability, while also engaging with the implications of EU accession to the ECHR.

The article argues that judicialization has become a significant, though uneven, mechanism for integrating fundamental rights into EU external action. While judicial protection is relatively well developed in areas directly affecting individuals, such as restrictive measures, it remains more limited in fields marked by broad political discretion. The analysis thus highlights both the expanding role of the Court and the structural constraints that continue to shape judicial oversight in this domain.

Keywords: *Common Foreign and Security Policy (CFSP), Court of Justice of the European Union (CJEU), Effective judicial protection, EU external action, Fundamental rights, Effective judicial protection*

1. INTRODUCTION

The protection of fundamental rights has become an increasingly visible part of the European Union's external action. What was once largely a political and diplomatic domain is now subject to growing legal scrutiny. This reflects a broader process of judicialization, in which courts, most notably the Court of Justice of the European Union (CJEU), play a more active role in shaping, constraining, and legitimizing policy through legal review.

In this context, judicialization raises several constitutional questions. These relate to the balance between political discretion and judicial oversight, the limits of EU competences, and the relationship between the EU legal order and the wider international human rights system, particularly under the European Convention on Human Rights (ECHR). Such questions are especially pronounced in sensitive areas such as the Common Foreign and Security Policy (CFSP), which has traditionally been relatively insulated from judicial oversight.

Methodologically, the paper adopts a doctrinal approach grounded in the systematic analysis of EU law, with a particular focus on the case law of the Court of Justice. The analysis is centred on selected landmark judgments, read in terms of their reasoning on the autonomy of the EU legal order and the principle of effective judicial protection. These judicial developments are situated within the broader constitutional framework of the EU Treaties, in particular their provisions on external action and fundamental rights.

Against this background, the article examines how judicialization unfolds in the human rights dimension of EU external action. It traces key strands of case law in which the CJEU has progressively defined and expanded its role, including the use of autonomy as a constitutional safeguard, the gradual narrowing of the CFSP jurisdictional exception, the extension of rights protection beyond EU territory, and the development of judicial remedies, including liability. It also considers recent developments concerning EU accession to the ECHR and their implications for the future of judicial oversight.

Overall, the article argues that judicialization has become an important, though uneven, mechanism for integrating fundamental rights into EU external action. Judicial control is most developed in areas such as restrictive measures, where individual rights are directly affected, while remaining more limited in broader fields of foreign policy, where political discretion continues to play a central role. In this way, the analysis highlights both the Court's expanding role and the constitutional constraints within which it operates.

2. LEGAL FOUNDATIONS AND DYNAMICS OF JUDICIALIZATION IN EU EXTERNAL ACTION

From a legal perspective, the EU's external human rights policy is firmly grounded in *primary law* rather than mere political aspiration. Article 2 TEU establishes human rights and the rule of law as foundational values of the Union. This internal commitment is complemented by an external dimension: under Article 3(5) TEU, the Union is required, in its relations with the wider world, to uphold and promote its values and interests and to contribute to the protection of its citizens. These obligations are further specified in Article 21 TEU, which governs EU external action, and Article 205 TFEU. In addition, the Charter of Fundamental Rights applies whenever EU institutions act within the scope of EU law, including in external contexts, insofar as they exercise Union competences. Taken together, these provisions impose a legal duty on the EU to respect and promote fundamental rights externally.¹ Alongside the binding law, the EU Action Plan on Human Rights and Democracy² provides a strategic, though non-binding, framework guiding the Union's external human rights policy.

The Treaty of Lisbon integrated the Common Foreign and Security Policy into the EU's constitutional framework, while maintaining its distinct character as a policy area governed by *special rules and procedures*. Taken together, Articles 24 TEU, 40 TEU, and 275 TFEU establish a system in which the CFSP is largely shielded from judicial review, while preserving a limited but essential role for the Court of Justice of the European Union. In particular, Article 24 TEU sets out the general exclusion of jurisdiction, Article 40 TEU safeguards the constitutional boundaries between CFSP and other EU competences, and Article 275 TFEU enables the Court to review compliance with those boundaries and to protect individual rights through the judicial review of restrictive measures.

The promotion and protection of human rights in EU external action is carried out by a *range of institutional actors* using diverse methods and instruments. The European External Action Service (EEAS) oversees EU Delegations worldwide, monitoring human rights conditions and engaging with local authorities and civil society.³

¹ Charter of Fundamental Rights of the European Union, 2012/C 326/02, Article 51.

² See European External Action Service, *EU Action Plan on Human Rights and Democracy 2020–2027*, 2024, Available at: [https://www.eeas.europa.eu/sites/default/files/documents/2024/Action-Plan-EN_2020-2027.pdf], Accessed 12 April 2026.
[https://www.consilium.europa.eu/media/03fdbrg2/action-plan-en_2020-2027.pdf], Accessed 12 April 2026.

³ See European External Action Service. (n.d.). *Human Rights & Democracy*, [https://www.eeas.europa.eu/eeas/human-rights-and-democracy-core-eu-external-action_en], Accessed 12 April 2026.

Complementing this work, the EU Special Representative (EUSR) for Human Rights was established to enhance the effectiveness and visibility of EU human rights policy. The EUSR has a broad and flexible mandate, allowing adaptation to evolving geopolitical circumstances, and works closely with the EEAS to conduct diplomatic outreach, represent the Union in international forums, and engage with third countries on human rights issues.⁴

The High Representative for Foreign Affairs and Security Policy (HR/VP) ensures coherence between the EU institutions and Member States in the formulation and implementation of external human rights policy. The European Commission contributes by integrating human rights considerations into development cooperation, trade, neighbourhood policy, and humanitarian aid, and by managing dedicated funding instruments such as the NDICI programme for Human Rights and Democracy, which has a budget of €1.5 billion for 2021–2027 and succeeds the European Instrument for Democracy and Human Rights (EIDHR).⁵ The Commission also negotiates trade agreements containing human rights clauses.

The European Parliament acts as a global advocate for human rights, for example, through initiatives such as the Sakharov Prize for Freedom of Thought, while exercising democratic oversight over EU external action.⁶ The Council of the European Union adopts human rights guidelines, sanctions, and common positions, and approves the EU Action Plan on Human Rights and Democracy. Finally, EU Member States implement these positions in international organizations, including the United Nations, OSCE, and Council of Europe, and coordinate their national foreign policies with EU-level commitments.⁷

⁴ See EU Special Representative, Available at: [<https://www.gilmore.ie/eu-special-representative/>] and Council Decision (CFSP) 2019/346 of 28 February 2019 appointing the European Union Special Representative for Human Rights, Available at: [<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0346&from=EN>], Accessed 12 April 2026.

⁵ See European External Action Service, *Human Rights and Democracy at the Core of EU External Action*, Available at: [https://www.eeas.europa.eu/eeas/human-rights-and-democracy-core-eu-external-action_en. Neighbourhood], Accessed 12 April 2026; Development and International Cooperation Instrument – Global Europe, Available at: [<https://www.eib.org/en/products/mandates-partnerships/ndici/index>], Accessed 12 April 2026; [https://enlargement.ec.europa.eu/funding-technical-assistance/neighbourhood-development-and-international-cooperation-instrument-global-europe-ndici-global-europe_en], Accessed 12 April 2026

⁶ Lazarou, E.; Leclerc, G.; Politis Lamprou, P., *The European Parliament in EU external action*. BRIEFING. EPRS (European Parliamentary Research Service), PE 769.564, April 2025, Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/769564/EPRS_BRI%282025%29769564_EN.pdf], p. 5, Accessed 12 April 2026.

⁷ See Council of the European Union, *EU Action Plan on Human Rights and Democracy 2020–2027*, Available at:

The European Union promotes human rights in non-EU countries through *a combination of positive incentives, or “carrots,” and negative measures, or “sticks”*. Positive incentives include financial assistance and dedicated funding programmes, such as the NDICI, as well as political and human rights dialogues.⁸ The EU maintains regular consultations with third countries, issues demarches, and publishes public statements addressing human rights violations. These dialogues are often guided by the EU Action Plan on Human Rights and Democracy (2020–2027).⁹

The EU also links trade benefits to human rights compliance. Under the Generalised Scheme of Preferences Plus (GSP+), beneficiary countries must ratify and effectively implement 27 international conventions covering human rights, labour rights, environmental protection, climate change, and good governance, as set out in the GSP Regulation.¹⁰ Human rights clauses are further embedded in association agreements, partnership agreements, and trade agreements, such as the Cotonou Agreement¹¹ and the EU–Ukraine Association Agreement,¹² where human rights are treated as an essential element of cooperation. Additional positive measures include the deployment of election observation missions¹³ and support for human rights defenders.¹⁴

[https://www.consilium.europa.eu/media/03fdbrg2/action-plan-en_2020-2027.pdf], Accessed 12 April 2026.

⁸ E.g. EU–Central Asia Human Rights Dialogues, Available at: [https://www.eeas.europa.eu/sites/default/files/eu_human_rights_dialogues_in_central_asia.pdf], Accessed 12 April 2026.

⁹ See e.g. European Centre of Excellence for Civilian Crisis Management, *EEAS: EU Action Plan on Human Rights and Democracy 2020–2027*, Available at: [<https://www.coe-civ.eu/kh/eu-action-plan-on-human-rights-and-democracy-2020-2027>], Accessed 12 April 2026.

¹⁰ See Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, 2012 OJ L 303/1, Available at: [<https://gsphub.eu/about-gsp> and <https://gsphub.eu/about-gsp/gsp-plus>], Accessed 12 April 2026.

¹¹ See e.g. Article 9 (Essential Elements and Fundamental Element) and Article 96 (Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law) of the 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, Available at: [https://eur-lex.europa.eu/eli/agree_internation/2003/159/oj/eng], Accessed 12 April 2026.

¹² See Articles 2 and 3 of the EU–Ukraine Association Agreement, [2014] OJ L161/3, Available at [https://publications.europa.eu/resource/cellar/4589a50c-e6e3-11e3-8cd4-01aa75ed71a1.0006.03/DOC_1], Accessed 12 April 2026.

¹³ See the EU Database on Election Missions, Available at: [<https://ec.europa.eu/info/strategy/relations-non-eu-countries/types-relations-and-partnerships/election-observation/mission-recommendations-repository/home>], Accessed 12 April 2026

¹⁴ See EU Guidelines on Human Rights Defenders, 2008, Available at: [https://www.eeas.europa.eu/eeas/eu-guidelines-human-rights-defenders_en] and [[https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739386/EPRS_ATA\(2023\)739386_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739386/EPRS_ATA(2023)739386_EN.pdf)], Accessed 12 April 2026.

Negative measures are used to respond to serious human rights violations. Beyond advocacy and diplomatic actions, such as statements, campaigns, diplomatic protests, the suspension of political dialogues, and active engagement in multilateral forums, including the UN Human Rights Council, UN General Assembly, OSCE, and Council of Europe, the EU may impose targeted sanctions under the EU Global Human Rights Sanctions Regime.¹⁵ These sanctions can target specific individuals, entities, or, in some cases, entire countries. Agreements may be suspended,¹⁶ trade benefits may be withdrawn or threatened, and arms exports may be prohibited when States commit serious human rights abuses.¹⁷

Having outlined the institutional actors and the incentives shaping their behaviour, it is now necessary to clarify what is meant by ‘judicialization’ in this context. In the European Union, judicialization generally refers to the expanding role of the Court of Justice in shaping both legal and, increasingly, political decision-making. It denotes a shift whereby issues that were once resolved primarily through political negotiation between institutions or Member States are increasingly subject to judicial interpretation and control. This development has been driven in part by structural features of the EU legal order, most notably the principles of supremacy and direct effect, which enable individuals and companies to challenge EU acts before the Court and to invoke EU law before national courts. As a result, the Court’s case law has played a central role in the development and consolidation of EU law.¹⁸

Judicialization is not limited to the EU’s internal sphere. The Court has become increasingly involved in reviewing and shaping the Union’s external action, a sphere traditionally dominated by political institutions such as the European Council and the Council. In this context, judicialization manifests itself in several ways. First, the Court plays a key role in clarifying the division of competences between the

¹⁵ See, Council of the European Union, *Sanctions against Human Rights Violations*. Available at: [<https://www.consilium.europa.eu/en/policies/sanctions-human-rights-abuses/>], Accessed 12 April 2026.

¹⁶ Article 96 of the Cotonou Agreement provides that if a party violates obligations concerning human rights, democratic principles, or the rule of law, the parties must first attempt to resolve the issue through consultations and political dialogue. If consultations fail or in urgent situations, appropriate and proportionate measures may be adopted in accordance with international law. Suspension of the agreement is a last resort, and any measures must be lifted once the violation has been addressed.

¹⁷ See e.g. the ban on exports to Russia of dual-use goods and technology for military use, drone engines, arms and civilian firearms, ammunition, military vehicles and paramilitary equipment, etc., Available at: [<https://www.consilium.europa.eu/en/policies/sanctions-against-russia/>], Accessed 12 April 2026.

¹⁸ See e.g. Weiler, J.H.H., *The Transformation of Europe*, Yale Law Journal Vol. 100, 1991, pp. 2403–2483, or Stone Sweet, A., *The Judicial Construction of Europe*, Oxford: Oxford University Press, 2004, esp. Chapter I (The European Court and Integration).

EU and its Member States in external relations.¹⁹ Second, under Article 218(11) TFEU, it may assess the compatibility of envisaged international agreements with EU law prior to their conclusion, thereby preventing potential conflicts, as illustrated by its opinion practice.²⁰ Third, the Court exercises judicial review over EU sanctions, allowing individuals and companies subject to restrictive measures, such as asset freezes or travel bans, to challenge their legality.²¹

Beyond sanctions, the Court's role also extends to the broader protection of fundamental rights in EU external action. Even when acting internationally, EU institutions remain bound by the Charter of Fundamental Rights and the general principles of EU law, which set limits on foreign and security policy measures. While sanctions litigation often centres on procedural guarantees, the Court's fundamental rights review has a wider reach, encompassing areas such as international agreements and data transfer regimes. This is evident in landmark judgments such as *Kadi* and *Schrems*, where the Court demonstrated its willingness to subject external action to constitutional standards of rights protection.²²

This evolving role of the Court of Justice of the European Union is most clearly illustrated in its case law. The following section, therefore, examines key judgments through which the Court has progressively shaped, and at times expanded, the judicial control of human rights in EU external action.

3. CASE LAW: HOW THE CJEU JUDICIALIZES EXTERNAL HUMAN RIGHTS POLICY

The main body of this paper follows a *temporal-doctrinal* narrative: first, it explores how the Court used the concept of autonomy of EU law as a constitutional shield (*Kadi*, *Opinion 2/13*), then it goes on to investigate how the Court has broke the CFSP exception (*Rosneft*, *KS and KD*), to be followed by the brief analysis of the *Front Polisario* case where Luxembourg had to address issues of territoriality, sovereignty and the protection of rights (self-determination) beyond the borders of

¹⁹ See e.g. *Opinion 1/76* (Draft Agreement establishing a European laying-up fund for inland waterway vessels), ECLI:EU:C:1977:63; *Opinion 1/94* (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property), ECLI:EU:C:1994:384; *Opinion 2/15* (Free Trade Agreement between the European Union and the Republic of Singapore), ECLI:EU:C:2017:376.

²⁰ See e.g. *Opinion 2/13* (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), ECLI:EU:C:2014:2454.

²¹ See below in Section 3.

²² See e.g. Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [on UN Security Council sanctions] [2008] ECLI:EU:C:2008:461, or Case C-362/14 *Schrems v Data Protection Commissioner* [on EU-US Safe Harbour agreement] [2015] ECLI:EU:C:2015:650.

the EU. Later, through *Bank Refah*, and *KS and KD*,²³ the section investigates the rise of EU liability in external action. Finally, it turns to the most recent developments by focusing on the newly proposed draft of EU accession to the ECHR, considering its possible implications for the future shape of judicial control, while acknowledging that any assessment at this stage remains necessarily tentative in the absence of the Court's final opinion.

3.1. Autonomy First: Fundamental Rights as Internal Constitutional Limits on External Action

A useful starting point for understanding judicialization in EU external action is the tension between the EU's involvement in broader international frameworks, such as the United Nations and the ECHR system, and the Court of Justice's consistent emphasis on preserving the autonomy of the EU legal order. From this perspective, judicialization is not simply about expanding human rights protection, but reflects a more basic constitutional concern: fundamental rights primarily operate as internal limits on the Union's external action.

This dynamic is most clearly illustrated in the *Kadi* litigation and in *Opinion 2/13*. Both concern sensitive areas of external action, UN-linked counter-terrorism sanctions and the EU's accession to the European Convention on Human Rights, yet in both instances the Court prioritised the preservation of its constitutional framework.

The facts of the *Kadi* saga are well known. Following the 9/11 attacks, the UN Security Council adopted Resolution 1267 and subsequent measures establishing a sanctions regime targeting individuals associated with Al-Qaida and the Taliban. The EU implemented these obligations through a Regulation freezing the assets of listed persons, including Yassin Abdullah Kadi and the Al Barakaat Foundation. The applicants challenged the measures, arguing that they violated fundamental rights, including the rights to property, to defence, and to effective judicial protection.

At first instance, the General Court upheld the Regulation, effectively giving precedence to UN obligations and limiting its review to possible violations of *jus cogens*.²⁴ On appeal, however, the Court of Justice took a markedly different approach.²⁵ While confirming that the EU had competence to implement UN

²³ *KS and KD* will be examined in two respects: first, as illustrating the Court's expansion of its jurisdiction over certain CFSP-related external actions, and second, as clarifying the availability of remedies, in particular the EU's non-contractual liability.

²⁴ Case T-315/01 *Kadi v Council and Commission* and Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECLI:EU:T:2005:332.

²⁵ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461.

sanctions, it held that such implementation must comply with the constitutional principles of the EU legal order, including fundamental rights. The Court rejected the idea that UN law enjoys automatic primacy within the EU and insisted on full judicial review of EU implementing measures.²⁶

In doing so, the Court required that individuals subject to sanctions be afforded procedural safeguards, such as the right to be heard, access to reasons, and effective judicial protection. The judgment thus established that, even where the EU implements binding UN Security Council resolutions, the resulting EU acts remain subject to full review under EU fundamental rights standards, rather than being limited to a review confined to *jus cogens* norms.²⁷ In this way, *Kadi I* effectively constitutionalised due process guarantees in the context of external sanctions.

This approach was confirmed and strengthened in *Kadi II*. After Kadi had been removed from the UN list, he was re-listed under a subsequent EU regulation implementing updated UN measures. The General Court annulled the re-listing, finding that the reasons provided were not supported by sufficient evidence,²⁸ and the Court of Justice upheld that judgment on appeal.²⁹ It emphasised that the EU cannot rely uncritically on UN determinations but must itself ensure that listings are adequately substantiated and compatible with fundamental rights. In particular, the Court insisted on a rigorous standard of review, requiring that the reasons for listing be sufficiently clear and supported by evidence to enable effective judicial scrutiny.³⁰

Taken together, the *Kadi* judgments illustrate the first stage of judicialization in EU external action: the assertion of constitutional autonomy as a prerequisite for meaningful protection of fundamental rights. Rather than deferring to international frameworks, the Court made clear that external commitments must be mediated through the EU's internal constitutional order, with the consequence that EU-implemented sanctions must comply with fundamental rights guarantees

²⁶ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] paras. 282-286.

²⁷ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] paras. 326-327.

²⁸ Case T-85/09 *Yassin Abdullah Kadi v European Commission*, [2010], ECLI:EU:T:2010:418; see esp. paras. 165-171, 181-184 and 192-193. The GC refused to rely on confidential information not disclosed to the applicant, and found that allegations (association with Al-Qaeda, financial support) were not supported by evidence.

²⁹ Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* [2013] ECLI:EU:C:2013:518.

³⁰ See especially paras. 111-114 and 130-134.

and be supported by sufficiently clear and evidence-based reasons to allow for effective judicial review.

The limits of this autonomy came into sharper focus in the context of the EU's relationship with the European Convention on Human Rights. The EU's proposed accession to the Convention is one of the most controversial episodes in its external judicial politics. Under the Treaty of Lisbon, the EU was empowered to accede to the ECHR, leading the Commission, the Council, and the European Parliament to negotiate a draft accession agreement. In 2010, the Commission requested the Court to assess its compatibility with EU law. In 2014, the CJEU issued *Opinion 2/13*,³¹ rejecting the agreement. The Court argued that even with safeguards, accession could allow the European Court of Human Rights to issue judgments affecting the allocation of competences, potentially undermining the CJEU's interpretive monopoly and the internal balance of EU law.

Central to the Court's reasoning is the principle of autonomy. EU law's *sui generis* nature requires protecting both the Union's competences and the CJEU's exclusive interpretive authority. *Opinion 2/13* reflects this concern in the context of the Common Foreign and Security Policy, where the Court has limited jurisdiction. Allowing the ECtHR to review CFSP acts could subject the EU to external judgments without prior CJEU interpretation, a risk the Court viewed as constitutionally unacceptable.³² As Jean-Paul Jacqué notes, this would effectively submit control of EU policies to a non-EU body.³³

The case law shows that judicialization in the EU is, in many ways, double-edged. The principle of autonomy has been used both to strengthen and to limit human rights protection. On the one hand, cases such as *Kadi* demonstrate how autonomy can reinforce internal review by requiring that external measures comply with fundamental rights and be subject to effective judicial scrutiny. On the other hand, *Opinion 2/13* illustrates how the same principle can be invoked to resist external oversight, effectively shielding sensitive areas such as CFSP and the Area of

³¹ *Opinion 2/13* (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), ECLI:EU:C:2014:2454.

³² Douglas-Scott, S., *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, VerfBlog, 2014/12/24, Available at: [<https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/>], Accessed 12 April 2026.

³³ Jacqué, J.P., *What next after Opinion 2/13 of the Court of Justice on the accession of the EU to the ECHR?*, European Union, 2016, Available at: [[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556975/IPOL_STU\(2016\)556975_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556975/IPOL_STU(2016)556975_EN.pdf)], Accessed 12 April 2026.

Freedom, Security, and Justice (AFSJ) from review by the ECtHR and contributing to a more self-contained system of rights protection.³⁴

3.2. Proceduralization through Sanctions Jurisprudence

For a long time, CFSP was a “no-go zone” for judicial review, with the CJEU limiting its jurisdiction over politically sensitive measures. This began to change with *Rosneft* and *KS and KD v Council*, which opened the door to scrutiny of CFSP-related restrictive measures and CSDP missions. *Rosneft* allowed judicial review of sanctions through annulment action³⁵ and preliminary reference,³⁶ while *KS and KD*³⁷ extended attention to human rights implications, including the rights of defence and proportionality. These cases dismantled the immunity shield surrounding foreign policy instruments and laid the doctrinal foundation for routine sanctions litigation. The subsequent so-called Russian sanctions cases mark the consolidation phase, operationalising the framework established in *Rosneft* and further proceduralising judicial oversight. Together, these developments illustrate a broader trend toward the judicialization of the EU’s external action, showing that even politically sensitive measures can be subject to structured legal scrutiny.

The *Rosneft* case concerned EU sanctions imposed in 2014 on Rosneft, Russia’s largest oil and gas company, in response to the annexation of Crimea and the destabilization of eastern Ukraine. The sanctions were adopted under CFSP and implemented domestically by the United Kingdom. Rosneft challenged both the validity of the Council decision³⁸ and the UK implementing measures before UK courts, which subsequently referred questions to the CJEU for a preliminary ruling. The case raised key issues regarding the Court’s jurisdiction over CFSP acts, the lawfulness of restrictive measures, and the ability of national courts to seek review of such decisions under Article 267 TFEU.

The Court confirmed that it has jurisdiction to give preliminary rulings on acts adopted under the CFSP,³⁹ particularly where the reference concerns the legality of

³⁴ Douglas-Scott, *op. cit.*, note 34. See also Basedow, J. R., *A theory of external judicial politics: the ECJ as cautious gatekeeper in external relations*, West European Politics, Vol. 46 No. 3, 2023, pp. 550–572.

³⁵ Case T-715/14 *Rosneft and Others v Council* [2018] ECLI:EU:T:2018:544.

³⁶ Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty’s Treasury and Others* [2017] ECLI:EU:C:2017:236.

³⁷ Joined Cases C-29/22 P, *KS and KD v Council and Others* and C-44/22 P, *Commission v KS and Others* [2024] ECLI:EU:C:2024:725.

³⁸ This action was dismissed, see Case T-715/14.

³⁹ Van Elsuwege, P., *Judicial review and the common foreign and security policy : limits to the gap-filling role of the Court of Justice*. Common Market Law Review, Vol. 58 No. 6, 2021, pp. 1731–1760, 1743.

restrictive measures targeting natural or legal persons, or the broader relationship between CFSP measures and other Union policies under Article 40 TEU. The Court emphasized the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights, noting that individuals whose rights are affected by CFSP-linked measures must have access to review and remedies before courts.⁴⁰ While the Court ultimately upheld the sanctions against Rosneft, it emphasised that such measures must comply with the principle of proportionality and respect fundamental rights.

The doctrinal significance of *Rosneft* is that it opened the door to judicial review in an area where courts had mostly stayed away. The Court made clear that some CFSP-linked restrictive measures can be examined for legality and compliance with fundamental rights, without questioning the wider political choices behind CFSP decisions. In that sense, it created a way for courts to review sanctions while leaving the broader foreign policy decisions largely untouched. This was the first real “crack” in the CFSP immunity shield and set the stage for later cases where judicial oversight of sanctions and other external action measures became more routine.⁴¹

The *KS and KD* litigation arose in the context of the EU’s CSDP mission in Kosovo (EULEX), where the applicants, relatives of individuals who disappeared during the 1999 Kosovo conflict, alleged serious human rights violations stemming from failures in the mission’s investigative capacity. They argued that the lack of effective investigations, linked in part to structural deficiencies and insufficient staffing, violated their fundamental rights, in particular the right to life, the prohibition of inhuman or degrading treatment, and the rights to a fair trial and an effective remedy under both the EU Charter and the ECHR. After a Human Rights Review Panel had already identified violations, the applicants brought an action for damages before the General Court under Articles 268 and 340 TFEU.

Procedurally, the case followed a complex trajectory. In 2021, the General Court dismissed the action as inadmissible, holding that it lacked jurisdiction due to the CFSP carve-out in Articles 24 TEU and 275(1) TFEU.⁴² On appeal, however, the

⁴⁰ Case C-72/15, see e.g. paras 69, 73 and 76.

⁴¹ See e.g. Poli, S., *The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*, Common Market Law Review, Vol. 54, No. 6, 2017, p. 1799-1834; Elsuwege, P., *Judicial Review of the EU’s Common Foreign and Security Policy: Lessons from the Rosneft case*, VerfBlog, 2017/4/06, Available at:

[<https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/>], Accessed 12 April 2026; Lonardo, L., *An Assessment of the Reasoning by Implied Hierarchy in the Case Law of the Court of Justice in Common Foreign and Security Policy*, in Lonardo, L.; Loxa, A. (eds), *The Reasoning of the Court of Justice of the EU: A Normative Assessment*, Oxford, 2026, pp. 160-186.

⁴² Order of the General Court of 10 November 2021 in Case T-771/20, *KS and KD v Council and Others* [2021] ECLI:EU:T:2021:79.

Court of Justice, in the joined cases *KS and KD v Council and Others*,⁴³ adopted a more nuanced approach. It found that the General Court had erred by treating a range of administrative and operational issues as falling within the political sphere. The Court of Justice therefore partially set aside the judgment and clarified that EU courts may exercise jurisdiction over certain CFSP-related acts or omissions. The case was subsequently remitted to the General Court, which in 2025 again dismissed the claims, this time on more specific grounds, including questions of attribution and insufficient substantiation against the named defendants.⁴⁴

The central contribution of the Court of Justice lies in its clarification of the scope of the CFSP jurisdictional limitation. It reaffirmed that, although CFSP remains subject to specific restrictions, it does not constitute a “law-free” zone. The decisive criterion is whether the contested conduct is directly linked to *political or strategic choices*. Only such high-level decisions, such as the definition or continuation of a mission’s mandate or the allocation of resources, fall outside judicial review.⁴⁵ By contrast, *operational and administrative matters*, including the day-to-day management of EULEX, staffing decisions, procedural arrangements, and the availability of review and remedy mechanisms, remain in principle justiciable.⁴⁶ In particular, alleged failures to investigate crimes or to ensure accountability mechanisms may be assessed for compliance with fundamental rights.⁴⁷

In this respect, the judgment marks a significant doctrinal development. By explicitly recognising that conduct linked to a CSDP mission may be reviewed in light of fundamental rights, drawing on both the Charter (notably Articles 2 and 4) and the ECHR (Articles 6 and 13), the Court extended the logic previously suggested in *Rosneft* to the context of EU external missions. At the same time, it preserved a residual sphere of non-reviewable political discretion.

Overall, the *KS and KD* case represents a cautious but important step in integrating CFSP action into the EU’s broader system of judicial protection. It narrows, though does not eliminate, the gap in effective remedies in the field of EU external action, by allowing a more fine-grained distinction between non-reviewable stra-

⁴³ Joined Cases C-29/22 P and C-44/22 P *KS and others v Council and Others* [2024] ECLI:EU:C:2024:725.

⁴⁴ Case T-771/20 RENV, Order of the General Court of 25 September 2025, *KS and KD v Council and Others*.

⁴⁵ Joined Cases C-29/22 P and C-44/22 P, paras. 118–121.

⁴⁶ *Ibid.*, paras 122–130.

⁴⁷ Lonardo, L., *Judicial Protection Clashes with the Principles of Conferral and Institutional Balance*. *Joined Cases C-29/22 P and C-44/22 P KS and KD*, European Papers Vol. 9, No 2, 2024, pp. 830–844. Available at:

[https://www.europeanpapers.eu/system/files/pdf_version/EP_EF_2024_I_017_Luigi_Lonardo_00786.pdf], esp. pp. 841–843. Accessed 12 April 2026, esp. pp. 841–843.

tegic decisions and reviewable operational conduct where individual rights are at stake.⁴⁸

3.2.1. The Normalisation of Sanctions Litigation: The Russian Cases

Building on this development, EU case law soon witnessed a significant expansion in sanctions litigation, particularly following the 2014 annexation of Crimea and, more prominently, the 2022 invasion of Ukraine.⁴⁹ The expansion of restrictive measures, especially asset freezes and travel bans targeting listed individuals and entities, brought a steady flow of cases before the EU courts. What had previously been a relatively limited body of case law thus developed into a sustained stream of disputes, many centred on fundamental rights such as effective judicial protection and the right to a fair trial. In response, the courts have annulled measures where reasoning or evidence proved insufficient, thereby reinforcing procedural safeguards.⁵⁰

This growing body of sanctions litigation has strengthened the role of fundamental rights in EU external action, though mainly in procedural terms. Rather than directly limiting foreign policy choices, the Court focuses on how sanctions are adopted and applied, requiring clear reasoning, sufficiently specific evidence, and

⁴⁸ See further e.g. Kleinlein, T., 'Normalising' the Common Foreign and Security Policy: Human Rights, Political Questions, and the Court of Justice's Jurisdiction, *European Constitutional Law Review*, Vol. 21, No. 4, 2025, pp. 685-704; Butler, G., *From search to discovery of the political question doctrine in EU law*, *European Law Review* 2025, Vol. 50, No. 6, pp. 761-774; Verellen, T., *Case note: Order of the General Court of 25 September 2025 in KS & KD, T-771/20 RENV*, *Review of European Litigation*, 3/2025, Available at:

[<https://europeanlitigation.eu/en/2025/12/03/case-note-order-of-the-general-court-of-25-september-2025-in-ks-kd-t-771-20-renv-2/>], Accessed 12 April 2026; Cantraine, E., *Effective Remedies or Empty Promises? The General Court's Order in KS and KD and the Limits of Judicial Protection in the Common Foreign and Security Policy*, *European Law Blog*, December 2025, available at [<https://www.european-lawblog.eu/pub/x6bjk05z/release/2/>], accessed 12 April 2026; Verellen, T., *Effective judicial protection in the CFSP after KS and KD*, *Maastricht Journal of European and Comparative Law*, Vol. 33 Issue 1, 2026,, pp. 14-31 Available at: [<https://journals.sagepub.com/doi/10.1177/1023263X251411828>], Accessed 12 April 2026.

⁴⁹ See e.g. European Parliamentary Research Service, *Timeline of EU sanctions*, 2023, Available at: [<https://epthinktank.eu/2023/03/13/eu-sanctions-on-russia-overview-impact-challenges/timeline-of-eu-sanctions/>] and European Parliamentary Research Service, *EU sanctions against Russia timeline V7_standalone*, 2025, Available at: [https://epthinktank.eu/2025/02/20/eu-sanctions-against-russia-2025-state-of-play-perspectives-and-challenges/eu-sanctions-against-russia-timeline-v7_standalone/], Accessed 12 April 2026.

⁵⁰ See e.g. Case T-271/23 *Alfa-Bank JSC v Council* [2025] ECLI:EU:T:2025:559; Case T-273/24 *Pavel Ezubov v Council* [2025] ECLI:EU:T:2025:628; Case C-703/23 P *Elena Petrovna Timchenko v Council* [2025] ECLI:EU:C:2025:608; Case T-573/23 *Positive Group PAO v Council*, ECLI:EU:T:2025:867; Joined Cases C-696/23 P, C-704/23 P, C-711/23 P, C-35/24 P and C-111/24 P *Dmitry Alexandrovich Pumpyanskiy and Others v Council* [2026] ECLI:EU:C:2026:245.

respect for due process. This has encouraged a more individualised, evidence-based approach to listings, with less reliance on broad or associative justifications.⁵¹ As a result, restrictive measures are now subject to a more regularised, rights-based form of review, increasingly resembling administrative law in both structure and practice.⁵²

Against this background of increasingly structured judicial review in CFSP sanctions, similar questions begin to arise in a different, yet related, context: the EU's external agreements. The *Front Polisario* litigation brings these issues into focus, shifting attention to the territorial reach of EU law and the role of human rights in the judicial scrutiny of external trade and association agreements.

3.3. Judicial Control of EU External Agreements: Territorial Scope and Human Rights

The “Polisario saga” refers to a series of judgments by the Court of Justice of the European Union concerning the EU's trade and fisheries agreements with Morocco and their application to Western Sahara, a non-self-governing territory whose status is disputed and whose people are internationally represented by Front Polisario. For years, the EU had treated Western Sahara in practice as falling within the territorial scope of its agreements with Morocco, despite its distinct status under international law. This practice was challenged in 2012, when Front Polisario initiated litigation, arguing that such agreements violated the Sahrawi people's right to self-determination and their sovereignty over natural resources.

The first wave of litigation culminated in the 2015 General Court judgment (*Front Polisario I*),⁵³ which recognised Front Polisario's standing and annulled the agreement insofar as it applied to Western Sahara. On appeal, however, the Court of Justice in 2016⁵⁴ avoided directly ruling on standing and instead adopted a doctrinally cleaner approach: it held that the EU-Morocco agreement did not apply to Western Sahara at all. Relying on the principle of *pacta tertiis*⁵⁵ and the “separate

⁵¹ Challet, C., *Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the European Union*. College of Europe, 2020, Available at: [https://www.coleurope.eu/sites/default/files/research-paper/researchpaper_4_2020_celia_challet_0.pdf], Accessed 12 April 2026.

⁵² See Luigi, L., *Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy*, Cambridge Yearbook of European Legal Studies Vol. 25, 2023, pp. 40–63.

⁵³ Case T-512/12 *Front Polisario v Council* [2015] ECLI:EU:T:2015:953.

⁵⁴ Case C-104/16 P *Council v Front Polisario*, [2016] ECLI:EU:C:2016:973.

⁵⁵ Article 34 of the Vienna Convention on the Law of Treaties (1969), General rule regarding third States: “A treaty does not create either obligations or rights for a third State without its consent.”.

and distinct status” of the territory, the Court reasoned that Morocco could not consent on behalf of Western Sahara, with the result that there was legally nothing to annul.⁵⁶ This move simultaneously depoliticized the dispute and embedded key principles of international law into EU external relations.

Following this ruling, the EU renegotiated its agreements with Morocco to explicitly include Western Sahara, claiming that consultations with local actors satisfied the consent requirement. This triggered a second wave of litigation (*Front Polisario II*), in which the General Court in 2021,⁵⁷ and subsequently the Court of Justice,⁵⁸ clarified and tightened the legal framework. The Court confirmed that Western Sahara must be regarded as a territory separate and distinct, with the consequence that EU agreements cannot automatically extend to it. Any such extension requires a separate legal basis, grounded in the right to self-determination of the territory.⁵⁹

The Court also clarified who is entitled to express that right.⁶⁰ It emphasized that the relevant right-holder is the “people” of Western Sahara, not merely the “population” currently residing in the territory. This distinction is crucial, as it shifts the focus away from actors present on the ground, particularly those linked to Moroccan administration, and toward the collective entitled to self-determination.⁶¹ In this context, the Court acknowledged the representative role of Front Polisario, thereby identifying a legitimate interlocutor capable of expressing the will of the Sahrawi people.⁶²

Finally, the Court drew a clear line between consultation and consent, insisting that the former cannot substitute for the latter.⁶³ Consultation processes, especially those involving primarily locally present or Moroccan-affiliated actors, do not meet the legal standard required for the valid extension of EU agreements. At the same time, the Court elaborated on the conditions under which consent may be

⁵⁶ Case C-104/16 P, paras. 92 and 107.

⁵⁷ Joined Cases T-344/19 and T-356/19 *Front Polisario v Council* [2021] ECLI:EU:T:2021:640.

⁵⁸ Joined cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario* [2024] ECLI:EU:C:2024:835.

⁵⁹ Joined cases C-779/21 P and C-799/21 P, para. 134.

⁶⁰ Odermatt, J., *Whose Consent?: On the Joined Cases C-779/21 P, Commission v Front Polisario and C-799/21 P, Council v Front Polisario*, VerfBlog, 2024/10/05, Available at: <https://verfassungsblog.de/commission-v-front-polisario/>, Accessed 12 April 2026.

⁶¹ Joined cases C-779/21 P and C-799/21 P, paras. 127 to 130.

⁶² Joined cases C-779/21 P and C-799/21 P, paras. 89-90.

⁶³ Istrefi K.; Cebulak P., *European Commission and Council of the European Union v. Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario)*, American Journal of International Law, Vol. 119, No. 4, 2025, pp. 651-659, at p. 655.

established. While it did not entirely exclude the possibility of presumed (implicit) consent, it subjected it to strict safeguards: agreements must not impose obligations on the Sahrawi people, must ensure tangible and verifiable benefits proportionate to the resources exploited, and must include mechanisms for sustainability and effective monitoring.⁶⁴ Even where these conditions are met, such presumed consent remains open to challenge if the people's representatives demonstrate that they are not in fact satisfied.⁶⁵

From the perspective of the judicialization of EU external relations, the *Front Polisario* case law marks a significant expansion of judicial control over the Union's external action. Most notably, the Court of Justice transformed the principle of self-determination from a largely political or rhetorical commitment into a justiciable legal constraint. By recognizing the standing of Front Polisario and linking it to the collective right of the Sahrawi people,⁶⁶ the Court effectively opened the EU legal order to claims brought on behalf of non-EU populations affected by EU agreements.

A second important dimension concerns the Court's proceduralization of human rights, in particular, how it clarifies who actually holds the right to consent. Consent is no longer treated as a broad political idea, but as a legal entitlement belonging to a specific collective: the "people" entitled to self-determination. In this light, the Court's distinction between "people" and "population" becomes especially significant. It makes clear that it is not enough to involve those living in the territory if they do not genuinely represent the will of the rights-holder.⁶⁷ Seen this way, representation, participation, and consent are not just formalities: they serve as procedural safeguards to ensure that the will expressed is truly that of the people concerned.

Third, the judgments bring consent to the centre of the legal framework governing the exploitation of natural resources in disputed territories. By linking self-determination to permanent sovereignty over natural resources, the Court makes consent a necessary condition for the inclusion of such territories in EU agreements. Finally, the Court clearly rejects the idea that consent can be presumed or substituted, even where agreements appear to produce positive economic outcomes. This is perhaps the clearest indication of the normative shift brought about by the *Front Polisario* case law. Consent cannot simply be inferred or replaced by an assessment of benefits. Instead, the right to self-determination acts as a real con-

⁶⁴ Joined cases C-779/21 P and C-799/21 P, paras. 152-153.

⁶⁵ *Ibid.*, para. 156.

⁶⁶ *Ibid.*, para. 90.

⁶⁷ *Ibid.*, paras. 128 to 130.

straint on EU external action. In practical terms, this means that EU agreements with third States cannot be extended to disputed territories without the consent of the people concerned.

The *Front Polisario* case law thus clarifies the substantive and procedural limits governing EU external action. The next question, however, is what follows when those limits are breached, bringing into focus the role of remedies and, in particular, the evolution from annulment to compensation.

3.4. Completing the System of Remedies: From Annulment to Compensation

This section traces the evolution of the EU system of remedies from a primary focus on annulment toward a more complete framework that includes actions for damages. Through the case law in *Bank Refah* and *KS and KD*, it shows how compensation has emerged as a necessary complement to judicial review in ensuring effective protection of rights.

The judgment in *Bank Refah Kargaran v Council* is often presented as a turning point in translating judicial review in EU external relations into tangible consequences. Building on earlier case law such as *Rosneft*, the Court grounded its reasoning in the need for coherence of judicial protection: if individuals can challenge the validity of restrictive measures, that protection would be incomplete without the possibility of obtaining compensation for harm suffered. In that sense, the Court confirmed that EU external action, here, financial sanctions adopted under the CFSP, may give rise to non-contractual liability where sufficiently serious breaches of rights occur. This step is central to the broader “judicialization” narrative, as it moves beyond symbolic annulment toward remedies with material effect.

The background to the case illustrates this development. In Case T-24/11, the General Court annulled the inclusion of Bank Refah on the sanctions list due to an inadequate statement of reasons and ordered its removal.⁶⁸ The applicant subsequently sought damages for losses allegedly caused by the listing. While the General Court accepted that it had jurisdiction, it dismissed the claim, holding that a mere breach of the duty to state reasons was not, in itself, sufficient to establish non-contractual liability.⁶⁹

⁶⁸ Case T-24/11 *Bank Refah Kargaran v Council* [2013] ECLI:EU:T:2013:403.

⁶⁹ Case T-65/14 *Bank Refah Kargaran v Council* [2016] ECLI:EU:T:2016:692.

On appeal, however, the Court of Justice clarified the jurisdictional framework.⁷⁰ It held that the principle of effective judicial protection requires the EU courts to rule on actions for damages brought by persons affected by CFSP restrictive measures. To deny such jurisdiction would undermine the coherence of the system of remedies.⁷¹ In doing so, the Court effectively extended its reach beyond the traditionally narrow limits associated with CFSP under Article 275 TFEU, confirming that damages actions are available in this field.

At the same time, the Court upheld the General Court's assessment on the substance. It agreed that the inadequacy of the statement of reasons, contrary to Article 296 TFEU, does not automatically constitute a sufficiently serious breach capable of triggering EU liability. In line with the established conditions for non-contractual liability, there must be a rule of law conferring rights on individuals and a sufficiently serious violation of that rule. Since those conditions were not met, the damages claim ultimately failed.⁷²

While *Bank Refah* established that damages may complement annulment within the EU system of remedies, *KS and KD* tests the limits of that logic in the more complex setting of CSDP missions. The case concerns claims for EU non-contractual liability arising from the operational conduct of EULEX Kosovo. As outlined above, the applicants sought damages for alleged investigative failures, invoking fundamental rights under the Charter and the ECHR. The General Court initially declined jurisdiction, relying on the CFSP carve-out.⁷³ On appeal, however, the Court of Justice clarified that this exclusion does not extend to all CFSP-related conduct: acts or omissions of an operational nature may, in principle, be subject to

⁷⁰ Case C-134/19 P *Bank Refah Kargaran v Council* [2020] ECLI:EU:C:2020:793. See Eckes, C., *Constitutionalising the EU Foreign and Security Policy: The ECJ accepts jurisdiction over claims for damages under the Common Foreign and Security Policy (CFSP)*, VerfBlog, 2020/10/18, Available at: [https://verfassungsblog.de/constitutionalising-the-eu-foreign-and-security-policy/], Accessed 12 April 2026.

⁷¹ Case C-134/19 P, paras. 39 and 43.

⁷² See further e.g. Bartoloni, M.E., 'Restrictive Measures' Under Article 215 TFEU: Towards a Unitary Legal Regime? *Brief Reflections on the Bank Refah Judgment*, European Papers, Vol. 5, No 3, 2020, pp. 1359-1369; Van Elsuwege, P.; De Coninck, J., *Action for damages in relation to CFSP decisions pertaining to restrictive measures: A revolutionary move by the Court of Justice in Bank Refah Kargaran?* EU Law Analysis, 9 October 2020, Available at: [https://eulawanalysis.blogspot.com/2020/10/action-for-damages-in-relation-to-cfsp.html], Accessed 12 April 2026; Verellen, T., *In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran)*, European Papers, Vol. 6, No 1, 2021, pp. 17-24; Breitler, C., *Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?*, European Law Blog, 13 October 2022. [https://doi.org/10.21428/9885764c.ac0f3540], Accessed 12 April 2026.

⁷³ Order of the General Court of 10 November 2021 in Case T-771/20, *KS and KD v Council and Others* (not published, EU:T:2021:798).

judicial review.⁷⁴ Following remittal, the General Court nevertheless dismissed the claims on narrower grounds, including attribution and insufficient substantiation.

The main contribution of the judgment lies in this jurisdictional clarification (Joined Cases C-29/22 P and C-44/22 P), but it also confirms that EU non-contractual liability can, in principle, arise in the context of crisis-management missions. At the same time, the Court leaves the substantive threshold untouched. Liability remains subject to the settled conditions: a sufficiently serious breach of a rule conferring rights on individuals, actual damage, and a direct causal link.⁷⁵

In *KS and KD*, these requirements were not met. The significance of the case therefore lies not in lowering the standard of liability, but in confirming that the existing framework applies to CSDP-related conduct, provided it does not fall within protected political or strategic choices. The judgment thus marks a limited but meaningful development: it brings operational conduct within the scope of potential review for damages, without altering the underlying constraints. In this way, it reduces the risk that alleged wrongdoing in EU external missions is shielded from scrutiny solely by virtue of its CFSP context.⁷⁶

Against this background, the question of external judicial control re-emerges in the renewed effort to secure EU accession to the ECHR, as reflected in the 2023 Draft Accession Agreement and the Court's evolving position.

3.5. Revisiting Strasbourg? External Oversight and EU Autonomy

The revised Draft Agreement on the Accession of the European Union to the European Convention on Human Rights (2023)⁷⁷ represents the latest attempt to enable the EU to accede to the ECHR and submit to the jurisdiction of the Strasbourg Court. It is the outcome of renewed negotiations (2020–2023) within the “46+1 Group”, following the impasse created by *Opinion 2/13*, and is currently pending before the Court of Justice under *Opinion 1/25*, requested by the

⁷⁴ Joined Cases C-29/22 P and C-44/22 P *KS and Others v Council and Others* [2024] ECLI:EU:C:2024:725.

⁷⁵ See e.g. Case T-600/21 *WS v European Border and Coast Guard Agency (Frontex)* [2023] ECLI:EU:T:2023:492, para. 52.

⁷⁶ See further e.g. Kleinlein, *op. cit.*, note 48, pp. 697-702; Butler, G., *op. cit.*, note 48; Verellen, T., Case note ..., *op. cit.*, note 48.; Cantraine, E., *op. cit.*, note 48; Verellen, T., Effective judicial protection ..., *op. cit.*, note 48, p. 24.

⁷⁷ Council of Europe Steering Committee for Human Rights (CDDH), CDDH Ad Hoc Negotiation Group (“46+1”) on the Accession of the European Union to the European Convention On Human Rights, 30 March 2023, 46+1(2023)35FINAL, Available at: [<https://rm.coe.int/report-to-the-cddh/1680aa9816>], Accessed 12 April 2026.

Commission in November 2025. Accordingly, the following assessment remains necessarily tentative.

A central unresolved issue concerns the extension of external judicial review to CFSP acts. In *Opinion 2/13*, the Court rejected arrangements that would confer exclusive jurisdiction on the Strasbourg Court in areas where its own jurisdiction is limited, finding them incompatible with the autonomy of EU law.⁷⁸ While the 2023 Draft Accession Agreement does not explicitly resolve this tension, its mechanisms, notably attribution rules and the co-respondent procedure, suggest that at least some CFSP-related conduct could fall within Strasbourg review, albeit in an uncertain and implicit manner.⁷⁹

Recent case law, in particular *KS and KD*, may be read as a partial internal response, as the Court of Justice narrows the jurisdictional gap by distinguishing between non-reviewable political choices and reviewable acts affecting individual rights. On this basis, a tentative model emerges in which applicants must first exhaust remedies within the EU legal order, with Luxembourg exercising review where possible, before the Strasbourg Court intervenes, potentially with the EU participating as a co-respondent.⁸⁰

Yet important uncertainties remain, especially where the Court of Justice declines jurisdiction on “political or strategic” grounds. Whether, and to what extent, the Strasbourg Court would defer in such situations is unclear. Overall, the 2023 Draft Accession Agreement appears as a pragmatic but incomplete compromise, leaving the precise balance between EU autonomy and external human rights oversight only partially settled.

Johansen argues that the CFSP gap could, in principle, be addressed by granting the Court of Justice limited jurisdiction over fundamental rights violations in CFSP through a Treaty amendment, but this route is politically and procedurally difficult. As an alternative, some propose extending the Court’s jurisdiction via an international agreement (such as the accession agreement itself), yet this remains

⁷⁸ Johansen, S.O., *The (Im)possibility of a CFSP “Internal Solution”*, European Papers, Vol. 9, No 2, 2024, pp. 783-800, Available at: [https://www.europeanpapers.eu/system/files/pdf_version/EP_eJ_2024_2_SS2_10_Stian_Obi_Johansen_00783.pdf], p. 784, Accessed 12 April 2026.

⁷⁹ See Article 1 (esp. paras. 3 and 4), and Article 3 (co-respondent mechanism) of DAA 2023,

⁸⁰ Parodi, M., *Between lights and shadows. Towards a new Opinion of the Court of Justice on the accession of the Union to the ECHR*, Eurojus.it rivista, 2 March 2026, Available at: [https://rivista.eurojus.it/between-lights-and-shadows-towards-a-new-opinion-of-the-court-of-justice-on-the-accession-of-the-union-to-the-echr/?generate_pdf=10991], at p. 16; Lock, T., *Implications of the Revised Draft EU Accession Agreement for the ECHR*, European Convention on Human Rights Law Review, 2025, pp. 1–37, p. 26; and Johansen, S.O., *op. cit.*, note 80, p. 785.

legally contentious and politically sensitive, as it may be seen as circumventing the formal Treaty revision process.⁸¹

In this light, the 2023 Draft Accession Agreement offers a cautious and still incomplete pathway toward external human rights oversight, contingent on both judicial interpretation and political acceptance. Whether it ultimately reconciles EU autonomy with effective Strasbourg control remains an open question.⁸²

4. CONCLUSIONS

Taken together, the case law points to a gradual but clear development: judicialization in EU external action has shifted from an initial focus on constitutional autonomy to a more practical, rights-based system of review. Early judgments, such as *Kadi*, established that external action must comply with internal constitutional standards, making fundamental rights enforceable limits. At the same time, *Opinion 2/13* showed that this autonomy cuts both ways, strengthening internal review while limiting external control and reinforcing a largely self-contained system.

Later case law develops this framework in a more incremental way. In *Rosneft* and *KS and KD*, the Court opens parts of CFSP to judicial review, especially where individual rights are concerned, while still leaving room for political discretion. The sanctions cases, including those linked to Russia, suggest that review in this area is becoming more routine and structured. At the same time, the *Front Polisario* judgments extend the reach of fundamental rights beyond EU territory, treating self-determination and consent as concrete legal constraints rather than abstract principles.

The case law on remedies, particularly *Bank Refah*, further strengthens this trend by confirming that effective judicial protection requires not only annulment but also the possibility of compensation. This helps close some of the earlier gaps in CFSP, even if not completely. Still, the broader picture remains incomplete. The 2023 Draft Accession Agreement, now pending in *Opinion 1/25*, shows that the relationship between EU judicial review, CFSP, and Strasbourg oversight is not

⁸¹ Johansen, *op. cit.*, note 80, at pp. 799-800.

⁸² See further Jörg Polakiewicz and Irene Suominen-Picht, *A Council of Europe Perspective on the European Union's Accession to the European Convention on Human Rights*, European Papers, Vol. 9, 2024, No 2, pp. 729-744, Available at: [https://www.europeanpapers.eu/system/files/pdf_version/EP_eJ_2024_2_14_SS2_7_J%C3%B6rg_Polakiewicz_Irene_Suominen-Picht_00780.pdf]; Krommendijk, J., One step closer after KS and KD: EU accession to the ECHR, Realaw blog (Review of European Administrative Law), 1 Oct 2024, Available at: [<https://realaw.blog/2024/10/01/one-step-closer-after-ks-and-kd-eu-accession-to-the-echr-by-jasper-krommendijk/>].

fully settled. Judicialization has clearly advanced, but it remains uneven and continues to be shaped by ongoing constitutional constraints.

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