

Federalising tendencies of the Principle of Sincere Cooperation in the area of Common Foreign and Security Policy

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Introduction

The unique governmental structure of the European Union is known as a ‘supranational organization’, an organization that goes beyond state borders and has legislative powers of its own. Today, the European Union (‘EU’ or ‘Union’) encompasses 27 Member States and hundreds of legal acts are created in Brussels every year.¹ The Member States and EU institutions work together to carry out the tasks laid down in the founding treaties of the Union and are governed in that process by article 4(3) Treaty on the European Union (‘TEU’). This article provides the principle of sincere cooperation between the Member States and the Union.

The text of the article is as follows:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.²

¹Legal Acts – Statistics’ EUR-Lex, (2021) <https://eur-lex.europa.eu/statistics/legislative-acts-statistics.html> accessed 7 September 2021.

² Consolidated version of the Treaty on European Union [2012] OJ C 326/13, art. 4(3).

This broadly formulated article is one of the most important provisions of the Treaty, from which a large number of obligations can and have been derived. It contains three obligations with different natures. Two of these are positively formulated and the other has been formulated in a negative manner.³ Firstly, Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Treaty or resulting from the acts of the institutions of the Union. Secondly, member States must facilitate the achievement of the Union's tasks. These are the positive obligations flowing from the treaty article. The negative obligation present in the article can be found in the last part of the last sentence, which states that the Member States should refrain from any measure that could jeopardise the attainment of the Union's objectives.

This article has formed the (subsidiary) basis for many ground-breaking judgments of the European Court including but not limited to the judgments in *Costa/ENEL*, *Frankovich*, *Pupino*, *Factortame*, *Greek Maize*, and *Marleasing*. All these cases consider different questions and different facts but all rely on article 4(3) TEU. It seems to have become some sort of many-headed hydra or 'magic box'; an amalgam of all sorts of obligations that can be pulled out of a hat as one pleases' and has been considered to be an article with federalising tendencies.⁴ These federalising tendencies will be discussed within the framework of the 'three pillars' that were in place from 1992 until 2009. At the forefront of this article is the question if 'Article 4(3) TEU has federalising tendencies in the area of Common Foreign and Security Policy? The former 'pillar structure' of the Union provides a clear framework to subdivide the case-law in and makes it possible to analyse the impact article 4(3) TEU had in all these cases. Besides this, the 'pillar structure' was still in place when most of

³ Marcus Klamert. *The Principle of Loyalty in EU Law* (1st edn, OUP 2014), 10

⁴ Ole Due, 'Artikel 5 van het EEG-Verdrag: een bepaling met een federaal karakter?' (1992) 5 SEW 355. ; Sacha Prechal, 'Case C-374/89, *Commission v Belgium*, Judgment of the Court of 19 February 1991' [1992] 2 CML 371, 375.

the judgements were rendered and are therefore part of the framework within which these cases and article 4(3) TEU need to be considered.

I. The Three Pillars of the European Union

This structure was provided by the Treaty of Maastricht, signed in 1992. The first pillar grouped the articles of the old Treaty that established the European Economic Community ('EEC'), the European Coal and Steel Community ('ECSC'), and the European Atomic Energy Community ('EAEC'), each still retaining their legal personality. By substituting the 'European Economic Community' for 'European Community', it became official: the Community had adopted an objective with a much wider scope than the economic field. The EC now had a new set of responsibilities in many different fields such as the promotion of environmentally friendly economic growth, employment, social welfare, quality of life and economic and social cohesion.⁵

The second pillar, Common Foreign and Security Policy ('CFSP') was intergovernmental in nature due to the sensitive matters it entailed. It aimed to establish 'common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter; to strengthen the security of the Union in all ways; to promote international cooperation; to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'.⁶ The area of Justice and Home Affairs

⁵ Étienne Deschamps, 'The First Pillar of the European Union' (2016) CVCE

http://www.cvce.eu/obj/cooperation_in_the_fields_of_justice_and_home_affairs-en732e4d22-5fbb-4fb8-896d-b5673195fc43.html

accessed 3 November 2019.

⁶ 'Fact Sheets on the European Union – The Maastricht and Amsterdam Treaties' (*European Parliament*, 2021)

(‘JHA’), later renamed as Police and Judicial Co-operation in Criminal Matters (‘PJCC’), was the third pillar created by the Maastricht Treaty. In article 1(5) of the treaty of Amsterdam, it is stated that the European Union had to ‘maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures concerning external border controls, asylum, immigration and the prevention and combating of crime.’⁷

The third pillar consisted of key areas that belonged to the Union’s objective of providing EC citizens with a high level of safety, such as determining rules and the exercise of control on the Community’s external borders, combating terrorism, serious crime, drug trafficking and international fraud, judicial cooperation in criminal and civil matters, creation of a European Police Office (‘EUROPOL’) with a system for exchanging information between national police forces, controlling illegal immigration, and establishing a common asylum policy.⁸ In 2009, with the Treaty of Lisbon, the pillar structure was abolished, reuniting the areas separated by the treaties of Amsterdam and Maastricht.

Considering that this pillar structure was in place when most of the judgements were rendered, it will be used as a frame of reference and subdivision in this article. In the past, the areas that were broadened most in scope fell within the former pillars one and three and created new obligations for the Member States and the Union. These obligations were often created by the Court by balancing its argumentation on the duty of sincere cooperation as laid down in article 4(3) TEU and will be discussed below. It is less clear if a similar trend has occurred in the former second pillar, the area of Common Foreign and Security Policy. Therefore, this article aims to address the

https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf
accessed 7 September 2021, 2.

⁷ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1.

⁸ The Treaty on the European Union [1992] OJ C 191/1. ; Ibid.

following matter: does article 4(3) TEU have federalising tendencies in the area of Common Foreign and Security Policy? First, the framework for assessing federalising tendencies will be discussed. Secondly, the landmark cases in the former pillars one and three will be analysed. Thirdly, the area of CFSP will be outlined followed by an analysis of several cases falling within the area. Finally, conclusions regarding the federalising tendencies in the area of CFSP will be drawn.

II. Assessing federalising tendencies

The European Union is a *sui generis* organization with supranational and intergovernmental aspects. From the very start of project Europe, further integration has been discussed and pleaded for. A very famous example is the speech made by Winston Churchill in 1946, in which he indeed refers to a 'United States of Europe'. This was the only way that he thought peace could be maintained in Europe after World War II.⁹ Even though a 'United States of Europe' never came to be, some federalising tendencies are noticeable in the legislation of the European Union. This may be surprising as federalism is generally thought of in light of the constitutional relationship between States and their central government instead of in the context of the EU.¹⁰ The Union is clearly not a federal state as the Member States retain their sovereignty as well the clear lack of a constitutional provision binding states to a federal government. Instead, the Union was established through treaties.¹¹ Even though this is the case, the Union, and primarily the Court, seems to have been widening the scope of Union law,

⁹ 'Winston Churchill: calling for a United States of Europe' <https://europa.eu/european-union/sites/europaeu/files/docs/body/winston_churchill_en.pdf> accessed 7 September 2021.

¹⁰ Elke Cloots et al. (eds), *Federalism in the European Union* (Bloomsbury Publishing 2012), 84.

¹¹ *Ibid.*

a practice and notion that is referred to as ‘federalising tendencies’.¹²

One of the provisions in the Union treaties that is often connected to or even accused of such tendencies is the duty of sincere cooperation and how the Court has strategically used it on multiple occasions. The duty of sincere cooperation is a fundamental principle of Union law that has fulfilled many different functions already. It has been considered an EU version of the international principle of *pacta sunt servanda*, a federalising principle, and a multi-faceted legal principle aimed at coherence.¹³ Three approaches can be distilled from the functions this principle has embodied up until now. According to Justice Ole Due, the principle has been considered 1.) an interpretation-tool that substantiates more specified provisions; 2.) as the sole legal basis for obligations arising from the objectives of the Union and; 3.) as the expression of a general principle that binds the Member States and the Union institutions vis-à-vis one another to cooperate loyally and sincerely to ensure the attainment of the Union’s objectives.¹⁴ These three functionalities of the duty of sincere cooperation will first be discussed and then be used to categorize and analyse a number of EU landmark cases within the overarching framework of the former three-pillar structure of the EU.

i. The duty of sincere cooperation as an interpretation-tool:

The duty of sincere cooperation as an interpretation-tool was first used by the Court in the *Deutsche Grammophon* case. In this case, the Court held that

¹² Ole Due, ‘Art. 5 van het EEG-Verdrag. Een bepaling met federaal karakter?’ [1992] SEW, 355.

¹³ Andrés Delgado Casteleiro and Joris Larik, ‘The Duty to Remain Silent: Limitless Loyalty in EU External Relations?’ (2011) 36 E.L. Rev 522, 524.

¹⁴ Due (n 12) 356.

'According to the second paragraph of Article 5 (now 4(3) TEU) of the treaty, Member States 'shall abstain from any measure which could jeopardize the attainment of the objective of this treaty'. This provision lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme'¹⁵ (emphasis added).

In *Deutsche Grammophon* as well as *Commission v Belgium*, the Court found that there was not only a breach of the specific provision in question but also of the duty of sincere cooperation, which specifies the notion that the objectives of the treaties must be safeguarded.¹⁶ Those objectives are extremely broad, as well as the use of article 4(3) TEU, which has, for instance, formed a basis for recovery of unduly paid sums, in situations in which a regulation does not put forth a sanction for a violation of criminal law, and in situations of recognition of foreign diplomas.¹⁷ In name of ensuring the attainment of the objectives of the Treaties, the Court has granted itself leeway in interpreting the issues that were brought before it and made use of the provision of Article 4(3) TEU as a way to facilitate said interpretation.

ii. *The duty of sincere cooperation as the sole legal basis for obligations for Member States:*

The use of the duty of sincere cooperation in this regard has the most far-reaching federalising tendencies of the three functions mentioned above. It has been used in a number of judgements as the sole legal basis to come to a conclusion that widens the scope of European Union law, without any further

¹⁵ C-78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECLI: EU:C:1971:42 489, 499.

¹⁶ C-374/89 *Commission v Belgium* [1991] I-367.

¹⁷ C-48/89 *Commission v Italy* [1990] I-2425. ; C-74/86 *Commission v Germany* [1988] I-2139. ; C-71/76 *Jean Thieffry v Conseil de l'ordre des avocats à la cour de Paris* [1977] ECR I-00765.

substantiation or specification by any other legal provision. This is at the basis of many ground-breaking judgments of the Court such as *Factortame*, *Franovich*, *Marleasing*, and *Commission v Greece*. In these cases, obligations for the Member States have been created based on the duty of sincere cooperation. These include, for instance, the doctrine of state liability, the creation of interim measures, the principle of consistent interpretation, and the duty to provide the Commission with information.¹⁸ These far-reaching obligations created by the Court have had a lasting impact on the way in which European Law has developed.

iii. *The duty of sincere cooperation as a general principle that binds the Union and the Member States vis-à-vis each other:*

This function of the principle has the lowest impact with regard to federalising tendencies and has even been codified in article 4(3) TEU. It mostly encapsulates the interrelationship between the levels of the European Union and that of the Member States. For instance, it covers the general duty of Member States to consult and inform the Commission. This duty of cooperation does not only play a role between the Member States and the EU institutions but also between the Member States themselves. It has for instance played a role in cases involving the right of movement of workers and the recognition of foreign diplomas.¹⁹

iv. *Broadening the scope of EU law*

These three aspects of the duty of sincere cooperation show that the principle has federalising tendencies and goes beyond a mere duplication of *pacta sunt servanda* in European Union law. Merely

¹⁸ C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433. ; Joined cases C-6/90 and C-9/90 *Andrea Franovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357. ; C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-04135. ; C-132/88 *Commission of the European Communities v Hellenic Republic* [1990] ECR I-01567.

¹⁹ Due (n 12) 365.

considering it to be the European Law version of that international principle would disregard the role it has played in fleshing out the European legal order with effect utile reasoning as a justification in many judgements.²⁰ Such federalising tendencies have resulted in a broadening of the reach of the European Union and sometimes even pushing beyond duties that are generally only reserved to Member States. Through this federalising rhetoric was based on the duty of sincere cooperation, many important notions of Union law have been developed, sometimes even throwing off the balance between the levels of the Union and straining the relationship between the Member States and the Union due to the encroachment upon State sovereignty.

The duty of sincere cooperation and the three-pronged federalising notion that is part of the application of the article in case law will be applied below to landmark judgements rendered by the Court. This will be done through a historical analysis of these cases that have widened the scope of Union law in the first and the third pillars. The following cases fall within the former first pillar and are subdivided based on their general theme: the application of EU law; (in) effective judicial protection; and the duty to enforce Union law. The third pillar is focused on the sub-theme of trans-pillar interpretation. All sub-themes are capped off by an interim conclusion and application of the three federalising aspects of the duty of sincere cooperation.

III. Federalising tendencies in the former first pillar

i. The application of European Law in the Member States

²⁰ Ibid 366.

Costa/ENEL

The principle of supremacy was created in the judgment of a conflict between Mr. Costa, an Italian citizen who owned shares in the electricity company Edisonvolta, and the nationalization of the electricity sector in Italy. Costa argued that the practice of the nationalization of the electricity industry violated the Treaty of Rome and the Italian Constitution.²¹

The Italian Constitutional Court in the judgement of March 1964 ruled that the Treaty of Rome, which was incorporated into Italian Law in 1958, could not prevail over the law that stipulated the nationalization of the electricity industry, which was enacted in 1962.

The Giudice Conciliatore decided to ask a preliminary ruling of the Court of Justice, which was immediately met with protests from the Italian Government and ENEL, stating that there were no grounds for raising the questions referred.²²

The milestone decision that consolidated the principle of supremacy had at the foundation of its arguments the principle of sincere cooperation. The Court stated: ‘The Executive force of Community Law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.’²³

Klamert argues that the aforementioned passage is the core of the Court’s reasoning.²⁴ Article 5(2) EC (now 4(3) TEU), obliged Member States to ‘abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.’ The abstention obligation regarding loyalty discarded the public international law principle of *lex posterior derogat priori*, this being the conflict-avoidant function of loyalty - a function that only could have been derived from Article 5(2) EC. This was the only Treaty-based justification that could be used to explain why national law must yield to Union law. That rationale established

²¹ C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI: EU:C:1964:66.

²² *Ibid.*

²³ *Costa v Enel* (n 21) 594.

²⁴ Klamert (n 3) 72.

the principle of sincere cooperation as a major tool to Europeanize national law. It was the sole legal basis used for the creation of one of the most important harmonizing principles of EU Law: supremacy.

Marleasing

The questions in the *Marleasing* case were brought forth after a dispute arose between Marleasing SA, the plaintiff in the main proceedings, and several defendants including La Comercial Internacional de Alimentación SA (La Comercial) about contractual matters.²⁵ Marleasing SA's primary claim was that contracts without cause, or whose cause is unlawful, have no legal effect. This was stated regarding a founder's contract establishing 'La Comercial', which Marleasing required to be declared void as the establishment of the company lacked cause and was a sham transaction carried out in order to defraud the creditors of Barviesia SA, a co-founder of the defendant company.

The national court observed that in accordance with article 395 of the Act concerning the Conditions of Accession of Spain and the Portuguese Republic to the European Communities, Spain was under an obligation to put the directive into effect from the date of accession onward, which had not been done. Taking the view that the dispute raised a problem concerning the interpretation of Community law, the national court referred to the Court of Justice. The question was whether the directive, which had not been implemented in national law, was directly applicable to preclude a declaration of nullity of a public limited company on a ground other than those set out in the directive. The Court of Justice decided that 'a national court hearing a case which falls within the scope of Council Directive 68/151/EEC is required to interpret its national law in the light of the wording and the purpose of that directive in order to

²⁵ C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-04135, paras 2-3.

preclude a declaration of nullity of a public limited company on a ground other than those listed in the Directive'.²⁶

Thus the Court acknowledged that, based on the principle of sincere cooperation as the sole legal basis, domestic courts of the Member States are under the duty to interpret national law in a way that gives effect to European Law, to ensure they do not compromise the common objective of the treaties, which is now known as 'consistent interpretation'. The Court expanded on that, stating that the obligation to interpret EU law consistently applies, regardless of the question of whether the national provisions were adopted before or after the rules of European law that are at stake. Moreover, it is not necessary that the relevant provisions of national law have been introduced with the aim of complying with European law: all national laws must be interpreted in conformity with the applicable EU law.²⁷

ii. (In)effective judicial protection

Francovich

Andrea Francovich and Danila Bonifaci were two Italian citizens that suffered economic hardship because the companies that they worked for went insolvent. After successfully suing their former employers in the Italian courts, both decided to start proceedings against the Italian State, claiming that the Italian Republic had failed to implement Directive 80/987 that guaranteed employees a minimum level of protection under Community law in the event of the insolvency of their employer.²⁸

²⁶ Ibid, para 13.

²⁷ Jan H. Jans and others, *Europeanisation of Public Law*. Europa Law Publishing, 2015, 76-77.

²⁸ C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357, paras 3-6.

The 'Pretura di Vicenza' and the 'Pretura di Bassano del Grappa' then referred to the Court of Justice for a preliminary ruling and posed a number of questions on the interpretation of the EEC Treaty and Council Directive 90/987 regarding the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.²⁹ In its decision, the Court of Justice made clear that Union law required the existence of state liability, stating that the basis for this liability was to be found in Article 4(3) TEU, based on which the states are required to exercise their powers in accordance with Union law and in respect of Union loyalty.³⁰

After the Court recognized state liability as a principle of Union law, it formulated the conditions for state liability. If a Member State fails to fulfil its obligation to take all measures necessary to achieve the prescribed result from a directive, there will be a right for reparation if the three specific conditions are fulfilled.³¹ *Francovich* was a very important case in the history of EU law because it was shown for the first time that there was a direct obligation for states to give compensation for unlawful acts of the national administration based on EU law. It is also relevant to remember that the interpretation tool utilised to Europeanize the area of state liability was the principle of loyal cooperation, which has been a very important tool for the Court of Justice to explore areas once unheard of from EU law's domain and ensure effective judicial protection.

Factortame

The claimants, ship-owners from Spain, made use of the fish reserves of the United Kingdom, utilising loopholes in the Merchant Shipping Act of 1894 which allowed them to fish in

²⁹ Ibid.

³⁰ Jans (n 21) 439.

³¹ Ibid 440.

the UK's waters and then sell the fish caught in Spain.³² The Secretary of State for Transport decided to modify the Merchant Shipping Act of 1894, thus creating the Merchant Shipping Act 1988, which corrected past loopholes, preventing Spanish ship-owners from using UK's fishing quotas. The Spanish ship-owners objected to the modified act, which consisted of very strict controls over ship registration, and claimed it was discriminatory. The claimant ship owners then sought an injunction to prevent the Merchant Shipping Act 1988 from coming into force. The House of Lords urgently referred the matter to the Court of Justice, because UK courts are not empowered to issue injunctions against the Crown.

In the judgement of 19 June 1990, the Court of Justice decided that, based on the principle of sincere cooperation and the principle of precedence of Community law, and in accordance with its case-law, 'Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule'.³³ This ruling was a very important milestone in EU law, since the Court of Justice established that the Member States must provide for the possibility of immediate and provisional judicial protection in a procedure through interim relief, and based this on the principle of sincere cooperation. The Court stated that: 'in accordance with the case-law of the Court, it is for the national courts, in application of the principle of cooperation laid down in Article 5

³² C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433, para 2.

³³ C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433, para 25. ; See C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECLI:EU:C:1978:49. ; C-811/79 *Amministrazione delle finanze dello Stato v Ariete* [1980] ECLI:EU:C:1980:195. ; C-826/79 *Amministrazione delle finanze dello Stato v Sas Mediterranea importazione, rappresentanze, esportazione, commercio (MIRECO)* [1980] ECLI:EU:C:1980:198.

of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law.³⁴

*The Court has also held that any provision of a national legal system and any legislative, administrative, or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.*³⁵

In *Factortame*, the Court of Justice used the principle of sincere cooperation as the sole legal basis to ensure effective judicial protection in areas of interest of Union law. Besides showing a clear tendency of federalization of EU law in formerly uncharted areas, in this particular case, it also had a massive impact in the UK national courts. This becomes clear when considering *M v. Home Office*, in which the House of Lords determined that a court can grant an interim injunction against the Crown in a case governed exclusively by national law. According to the Lords, the fact that judicial protection of persons in a national context would be worse than a case that had a European dimension was unacceptable.³⁶

This decision made by a domestic court shows that the federalising effects of the principle of sincere cooperation has a wider scope than ever could have been expected. As a result of its flexibility for interpretation in a multitude of themes (state liability, interim relief) it is evident that it can even mutate the domestic law of the Member States, giving indirect effect to Union law in the national judicial systems.

³⁴ *Factortame* (n 27) para 19.

³⁵ *Ibid* paras 19-20.

³⁶ *Jans* (n 21) 423.

Unibet

Unibet, an online gambling platform from the UK, purchased advertising space in a number of different Swedish media with the objective of promoting its gaming services on the internet. In accordance with the Law on Lotteries, the Swedish State took a number of measures, including obtaining injunctions and commencing criminal proceedings against those media companies, which had agreed to provide advertising space to Unibet.³⁷ The online gambling company considered that the prohibition was contrary to Article 49 EC on the freedom to provide services and sought a declaration that the domestic law on lotteries was contrary to EU law before the Swedish administrative Courts in separate proceedings. The Swedish courts held that Unibet could not bring such an action, but instead had to challenge Swedish law in the course of the criminal or administrative proceedings concerning the specific sanctions taken against Unibet.³⁸

The case was brought to the Supreme Court of Sweden, which referred to the Court of Justice to ask whether the principle of effective judicial protection under EU law required that there would be a separate self-standing action in national law to review measures of a legislative nature which were alleged to be contrary to EU law, or if it was adequate that they be questioned indirectly, in the court of enforcement proceedings.³⁹ In its decision, the Supreme Court based its arguments on the principle of sincere cooperation and ruled that the principle of effective judicial protection does not require the national legal order of a Member State to set up a free-standing action for an examination of incompatibility of national provisions with EU law, provided that other effective legal remedies (which may not be less favourable than those governing similar domestic actions)

³⁷ C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-02271, para 17.

³⁸ *Ibid* para 19.

³⁹ *Ibid* para 30.

make it possible that a question of compatibility can be determined as a preliminary issue.

The Court also held that the principle of effective judicial protection must require the possibility to obtain interim relief and suspend the application of the national measure until the competent court has ruled on the compatibility with EC law (as in *Factortame*). Once again, the Court used the principle of sincere cooperation as the legal basis to expand another principle: ‘effective judicial protection’. This again demonstrates the flexibility of this principle and its wide scope that governs the integration of the legal systems of the Union and the Member States.

iii. The Duty to enforce Union law

Greek Maize

The Commission of the European Communities discovered that two consignments of ‘allegedly’ Greek maize, which a company registered in Greece had exported to Belgium, in fact, consisted of Yugoslavian maize. As a result of this fraud, which had the support of Greek civil servants, levies that were supposed to be paid to the European Union under a Union regulation had not been collected.⁴⁰

The Commission called on the Greek authorities to take particular measures to resolve the issue, such as payment of the levies of Yugoslav maize to the Commission and the institution of criminal or disciplinary proceedings against the authors of the fraud and their accomplices. Because the Greek authorities failed to fulfil their obligations, the Commission initiated proceedings under article 238 TFEU (new). It submitted that Greece had failed to fulfil its obligations under Article 4(3) TEU (new) by omitting to initiate all the criminal or disciplinary proceedings

⁴⁰ C-68/88 *Commission of the European Communities v Hellenic Republic (Greek Maize)* [1989] ECR 02965, paras 1-4.

provided for by the national law against the perpetrators of the fraud and all those who collaborated in its commission and concealment.⁴¹ In its decision, the Court of Justice upheld the claim brought by the Commission, stating that:

“(...) Article 4.3 TEU (new) of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.”⁴²

In this decision, the Court of Justice used the general principle of sincere cooperation once again as the sole legal basis to expand its reach, introducing the duty to enforce Union law under an obligation to employ measures and penalties that fulfil the requirements of equivalence, effectiveness, proportionality, and dissuasiveness. This obligation applies to all national authorities involved in implementing Union law, including the judicial authorities, who need to assure that sanctions will comply with the requirements set forth by the European Court of Justice.⁴³

⁴¹ Jans (n 21) 270.

⁴² *Greek Maize* (n 34) paras 23-24.

⁴³ Jans (n 21) 271.

IV. Consistent ‘trans-pillar’ interpretation and federalising tendencies in the former third pillar

Pupino

The Pupino case produced important effects in the area of the former third pillar, regarding the federalist tendencies of the duty of sincere cooperation in once unchartered areas, such as PJCC. In 2001, criminal proceedings were started in Italy against Maria Pupino, a kindergarten teacher suspected of inflicting ‘serious injuries’ against a number of her pupils that were younger than five years at the time.⁴⁴ Under Italian law, a criminal procedure comprises two distinct stages. During the first stage, the Public Prosecutor’s office makes enquiries and, under the supervision of a judge in charge of preliminary enquiries, gathers evidence on the basis of which it will assess whether the prosecution should be abandoned or the matter should proceed to trial.⁴⁵ A decision to send the investigated person to trial starts the second stage of the proceedings (the adversarial stage) in which the judge in charge of preliminary enquiries does not take part. The proceedings properly begin in this stage. From this stage onwards, the parties’ submissions may be accepted as evidence in the technical sense of the term. This setup exists because, in this phase, the evidence must be subjected to cross-examination in order to acquire the value of ‘evidence’ in the full sense of the word.⁴⁶

However, there are exceptions to that rule, most importantly as laid down by article 392 of the Italian Criminal Procedure Code (‘CPP’), which allows evidence to be established early, during the preliminary enquiry period, when taking evidence from victims of certain restrictively listed offences of a

⁴⁴ C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR 05285, para 12.

⁴⁵ *Ibid* para 13.

⁴⁶ *Criminal Proceedings against Maria Pupino* (n 38) para 14.

sexual nature that are under the age of 16 years. According to Italy's national court, those additional derogations are designed to protect, first, the dignity of a minor witness, and, secondly, the authenticity of the evidence.⁴⁷ In this case, the Public Prosecutor's Office asked the judge in charge of preliminary enquiries to take the testimony of eight children that fell under the protective scope of Article 392 of the CPP. Under national provisions in question, the application of the Prosecutor's office would have been dismissed, but considering that, 'apart from the question of the existence or otherwise of a direct effect of Community law', the national court must 'interpret its national law in the light of the letter and the spirit of Community provisions', and, having doubt as to the compatibility of the mentioned articles to the Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, the national court referred the case to the European Court of Justice.

The Court of Justice held that the principle of sincere cooperation between the Union and its Member States requires that all appropriate measures are taken to ensure the fulfilment of their obligations under European law. Consequently, the principle of sincere cooperation must also be binding between Member States and Union institutions in the area of police and judicial cooperation.⁴⁸ Due to the ruling in the *Pupino case*, it became clear that the principle of sincere cooperation had an important role to play as an interpretation tool to Europeanise areas that were previously considered to be independent, such as the former third pillar that was inherently based on an intergovernmental network. The Court stated in its decision in *Pupino*:

It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all

⁴⁷ Ibid para 15.

⁴⁸ Stefan Lorenzmeier, *The Legal Effect of Framework Decisions – A Case note on the Pupino Decision of the European Court of Justice*. *Zeitschrift für Internationale Strafrechtsdogmatik* 583, 2006, 12, 584.

*appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in her opinion.*⁴⁹

The Advocate General stated:

*That is apparent from an overview of the provisions of the Treaty on European Union article 1 EU lays down the objective of creating a new stage in the process of achieving an ever closer union among the peoples of Europe, on the basis of which relations between the Member States and between their peoples can be organized in a manner demonstrating consistency and solidarity. That objective will not be achieved unless the Member States and institutions of the Union cooperate sincerely and in compliance with the law. Loyal cooperation between the Member States and the institutions is also the central purpose of Title VI of the Treaty on European Union, appearing both in the title – Provisions on Police and Judicial Cooperation in Criminal Matters – and again in almost all the articles.*⁵⁰

When reading the aforementioned reasoning, it becomes evident that the principle of loyal cooperation was used as a legal basis in the federalization of the pillars toward European Union law. In the words of Klamert, ‘these indirect effects and this a certain unity of the former first and third pillars were, in principle, confirmed by the Court’s decision of 2005 in *Pupino*. (...) even though framework decisions did not have direct effect, they had

⁴⁹ *Criminal Proceedings against Maria Pupino* (n 38) para 42.

⁵⁰ C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285, Opinion of AG Kokott, para 26.

an indirect effect in national law.⁵¹ All these cases highlight the role the duty of sincere cooperation played in the former pillars one and three and show that the impact of this duty cannot be overestimated.

V. Sincere cooperation and jurisdiction in the area of CFSP

In 1969, the area of Common Foreign and Security Policy ('CFSP') was created. Back then, this area was governed by international law and decisions were only taken by unanimity. In the Maastricht Treaty, it was laid down that this area would fall under the pediment of the Union and would form the second of the three pillars. This meant that suddenly, the Union also played a role in an area that used to be the sole competence of the Member States. Even when the pillar structure was abolished, the fact remained that this area was still intergovernmental by nature, thus remaining different from the former areas of Police and Judicial Cooperation and the Communities. These were supranational in nature, whereas the former CFSP area is still excluded from a number of EU competencies. For example, the use of 'legislative acts' is not permitted in this field; it is still subject to specific rules and procedures as stipulated in article 24(2) TEU. This includes, among others, a complete exclusion of the regular legislative procedure which leads to regulations and directives.⁵² This means that the regular decision-making process of the Union ('QMV') is not used and instead, unanimity prevails and that the Court of the EU does not have jurisdiction with regards to specific CFSP matters. Although, it is surprising that decisions falling within the scope of CFSP made in accordance

⁵¹ Klamert (n 3) 94.

⁵² Ramses A. Wessel 'Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality' (2019) <<https://research.utwente.nl/en/publications/legal-acts-in-eu-common-foreign-and-security-policy-combining-leg>> accessed at 2 November 2019, 3.

with article 28(2) TEU are binding and limit the Member States in their capacity to act contrary to it or adopt a national policy on this matter.⁵³ Indeed, they must even amend or adapt their own policy to ensure conformity with what was decided at the EU level. These two sides of the same coin are surprising, to say the least. Yet, the binding nature and reach of article 28(2) TEU can be explained as even before Lisbon, the Court rendered a verdict on the binding nature of these acts (formerly named Common Positions). In *Segi*, the Court stated that:

‘A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular to ensure fulfilment of their obligations under European Union law.’⁵⁴

Perhaps it does not come as a surprise that the Court once again refers to the duty of sincere cooperation to broaden the scope and reach of the EU law and thereby created the binding nature of these CFSP decisions. The core of this principle is of such a broad nature that it requires unconditional cooperation between the Member States and the Union, which is used in *Segi* to ensure compliance and conformity of national policy with these decisions. This is not the only atypical occurrence within the area that is connected with the duty of sincere cooperation.

Title I of the TEU contains the common provisions applicable to the entirety of the treaty and the objectives that flow from it.⁵⁵ Within this Title, the duty of sincere cooperation

⁵³ Ibid.

⁵⁴ C-355/04 *Segi, Aritza Zubimendi Iñaga and Aritza Galarraga v Council of the European Union* [2007] ECLI:EU:C:2007:116, para 52.

⁵⁵ Klamert (n 3) 11. ; Christophe Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’ in M.

can be found. Title V, general provisions on the CFSP, contains a mirror provision of article 4(3) TEU in article 24(3) TEU: The Member States shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.⁵⁶ The repetition of this duty seems in many regards a relic left in the text as a reminder of the pre-Lisbon days in which such repetition was necessary.⁵⁷ Its function at this point in time is not entirely clear, nor is its role in relation to article 4(3) TEU. When considering the placing of the article in Title V, it becomes clear that article 24(3) TEU and the duty that flows from it is at the very basis of CFSP and, just as its Title I counterpart, governs the relationship between the Member States and the Union.

Article 24(3) and 4(3) TEU concern the same duty of sincere cooperation and encapsulate the Member States' positive obligation to support the Union's CFSP prohibition to do anything that could jeopardise the attainment of the Union's tasks.⁵⁸ This duty to support and the obligation to refrain from acts that could jeopardise the fulfilment of Union tasks derive from article 4(3) TEU and are not merely applicable to areas other than CFSP. Although both articles are codifications of the duty of sincere cooperation, differences still exist. One of the main differences between the provisions on the duty of sincere

Cremona (ed), *Developments in EU External Relations Law, Collected Courses of the Academy of European Law* (OUP, 2008), 67.

⁵⁶ Consolidated version of the Treaty on European Union (n 1) art. 24.

⁵⁷ Peter van Elsuwege 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law' (2019)

<https://www.researchgate.net/publication/330961755_The_Duty_of_Sincere_Cooperation_and_Its_Implications_for_Autonomous_Member_State_Action_in_the_Field_of_External_Relations_Member_State_Interests_and_European_Union_Law> accessed at 2 November 2019, 287.

⁵⁸ Christophe Hillion and Ramses A. Wessel, 'Restraining External Competences of EU Member States under CFSP' in M Cremona and B. De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing 2008).

cooperation is the institution tasked to ensure compliance with the provision. The Commission has to ensure the Member States abide by the duty as laid down in article 3(4) TEU whereas for article 24(3) TEU, the High Representative and the Council are tasked with that responsibility.⁵⁹ From a practical point of view, this means that the Commission cannot initiate a legal action against a Member State in case of a breach of its CFSP duties. Nonetheless there are situations in which this would occur still which fall within the jurisdiction of the Court due to the overarching scope of article 4(3) TEU.⁶⁰ This means that if a Member State were to fail in its duty to cooperate because it failed to comply with a CFSP obligation -which would jeopardise the attainment of the EU's objectives- the Commission would not be able to bring the Member State to Court due to non-compliance with the CFSP objectives under Article 24(3) TEU because the Court has no jurisdiction over those matters as per article 24(1) TEU.⁶¹ Instead, the Commission could bring the Member State to Court based on the overarching principle as laid down in article 4(3) TEU. As previously acknowledged, this provision can stand alone as a legal basis for litigation without referring to other, more specific Treaty obligations.⁶²

Even though it remains peculiar that a specialist of the duty of sincere cooperation is reiterated in the title on CFSP and some differences can be noted, it does not mean that article 24(3) TEU may limit or hinder the principle as laid down in Article 4(3) TEU. In the pre-Lisbon era, it was determined already that Member States cannot rely on the *lex specialis* to justify infringement of article 4(3) TEU and the horizontal

⁵⁹ Consolidated version of the Treaty on European Union (n 1) art. 24(3).

⁶⁰ Van Elsuwege (n 50) 287.

⁶¹ Ibid.

⁶² Christophe Hillion, 'A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy' (2014) <<https://ssrn.com/abstract=2388165>> accessed at 2 November 2019, 68.

application of this principle was acknowledged.⁶³

I. Analysis of *Rosneft*, *H v Council*, and *Elitaliana*

As discussed earlier, article 24(1) TEU states that the Court has no jurisdiction in the area of CFSP. This is surprising when considering the development taking place in recent case-law, which shows that the Court is slowly but steadily interfering in this area. Below, three recent cases will be analysed that show this development and the widening of the jurisdiction of the Court on the basis of reference to article 4(3) TEU and its affiliate provisions.

i. H v Council

In 2014, the General Court decided that it had no jurisdiction in *H v Council* as it concerned a matter that fell within the scope of CFSP. When considering article 24(1) TEU *strictu sensu*, that conclusion would be correct. The case at hand dealt with the matter of jurisdiction of the Court to rule on a staff dispute in Bosnia and Herzegovina and was raised by a functionary of the European Union Police Mission ('EUPM'), thereby falling within the former area of CFSP.⁶⁴ This would mean that the Court has no jurisdiction in the matter due to the derogation as laid down in article 24(1) TEU. In his Opinion on *H v Council*, AG Wahl argued that the lack of jurisdiction of the Court of Justice means that the Member State courts have jurisdiction to deal with the matter at hand.⁶⁵ The AG referred to *Unibet*, *Reve*, and *Unión de Pequeños* to show that national courts have this responsibility. As was stated in *Unibet*, national courts are responsible to provide

⁶³ Hillion and Wessel (n 52) 95.

⁶⁴ C-455/14 *H v Council of the European Union, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina* [2016] ECLI:EU:C:2016:569.

⁶⁵ C-455/14 *H v Council of the European Union, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina* [2016] ECLI:EU:C:2016:569, Opinion of AG Wahl, para 89.

remedies (subject to the *Rewe*-criteria) to ensure effective judicial protection in areas of Union law. In *Unibet*, the Court decided that, based on the principle of sincere cooperation, effective judicial protection needed to be offered by the Member States if no Union rule existed on the matter. National courts need to establish remedies and procedures that made sure effective judicial protection is ensured.⁶⁶

The national courts had to

*‘interpret the procedural rules governing actions brought before them ... in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective ... of ensuring effective judicial protection of an individual’s rights under [Union] law.’*⁶⁷

The principle of effective judicial protection is, as affirmed in *Unión de Pequeños Agricultores v Council*, an expression of the principle of sincere cooperation as laid down in article 4(3) TEU.⁶⁸ In *H v Council* and the Opinion of AG Wahl, this was reiterated once more. Problematic is though that in the case at hand, the decision had to be confirmed or invalidated by a court. In *Foto-Frost*, it was decided that only the Court of Justice has the authority to invalidate norms of Union law - national courts do not. According to the Court: ‘Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.’ This would mean that in *H v Council*, the Court of

⁶⁶ Anthony Arnall, ‘The Principle of Effective Judicial Protection in EU law: An Unruly Horse?’ (2011) 36(1) ELR 51, 54.

⁶⁷ *Unibet* (n 31) para 44.

⁶⁸ C-50/00 *Unión de Pequeños Agricultores v Council* [2002] EU: C:2002:462, para 41. ; Constanța Mățușescu and Steluta Ionescu, ‘Effective Judicial Protection. Landmarks of Recent Case Law of the Court of Justice of the European Union’ in T. Ciulei, G. Gorghiu (eds), *Communicative Action & Transdisciplinarity in the Ethical Society* (Romania: Lumen Proceedings, 2018), 158.

Justice does not have jurisdiction to consider the matter and national courts do not have the competence to invalidate the decision in question.⁶⁹ This would leave a lacuna in the system of legal protection as neither national nor EU Courts can be the final arbiter. In the case at hand, the Court came to the conclusion that:

“[T]he scope of the limitation, (...) on the Court’s jurisdiction [...] cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions.”⁷⁰

But, as AG Wahl said, it is:

“[...] the result of a conscious choice made by the drafters of the Treaties, which decided not to grant the CJEU general and absolute jurisdiction over the whole of the EU Treaties. The Court may not, accordingly, interpret the rules set out in the Treaties to widen its jurisdiction beyond the letter of those rules or to create new remedies not provided therein.”⁷¹

As for the jurisdiction of the Court, the AG affirmed that:

“But the general rule that, (...), the CJEU lacks jurisdiction in the field of CFSP may not be overlooked. I do not believe that Articles 24(1) TEU and 275 TFEU can be interpreted as allowing any alleged infringement of a non-CFSP

⁶⁹ Opinion of AG Wah (n 60) paras 102-103.

⁷⁰ *H v Council* (n 59), paras 32, 42-43.

⁷¹ Opinion of AG Wahl (n 60).

*provision by a CFSP act to be heard by the CJEU.*⁷²

When comparing the Opinion of AG Wahl with the judgement of the Court, it becomes clear that the AG remains close to the wording in article 24(3) TEU and 275 TFEU and the Court actually diverges from such a narrow reading. The Court acknowledges that this matter falls within the scope of CFSP yet considers it relevant that the staff members that are the focal point of the dispute in *H v Council* are in fact on a mission related to an operational action of the European Union.⁷³ It decides that even though an act may be based on a CFSP provision, it does not automatically mean that the Court has no jurisdiction over the matter. In fact, as this concerned an administrative matter of staff management no different than that of the other Union bodies, the Court held that the derogation of Article 24(1) TEU does not prevent the Court's jurisdiction. The mere CFSP basis does not automatically side line the European Court – it takes more to do that.

ii. Elitaliana

In *Elitaliana*, the Court stated that the expenditures for the European Rule of Law Mission in Kosovo ('EULEX Kosovo') were paid for by the Union, in accordance with the Financial Regulation. This regulation falls squarely within the jurisdictional scope of the Court and is used in a similar manner as staff management was in *H v Council*. Although article 24(1) TEU provides a derogation from jurisdiction in matters relating to CFSP, the mere fact that in *Elitaliana*, expenditures as per the Financial Regulation were discussed, gave the Court jurisdiction and once again, the derogation laid down in Article 24(1) TEU was deemed irrelevant.⁷⁴

⁷² Ibid paras 71, 50.

⁷³ *H v Council* (n 59), para 42.

⁷⁴ C-439/13 *Elitaliana SpA v Eulex Kosovo* [2015] ECLI: EU:C:2015:753, para 49.

What is surprising in this case is that the Court did not discuss the duty of sincere cooperation yet the AG mentioned it in his opinion. AG Jääskinen noted in his opinion that when it comes to the jurisdiction of the Court in the area of CFSP:

‘[...] it is worth noting the importance of the constitutional principles to which the EU institutions must adhere when they act in the field of external action, observance of which must be monitored by the Court. Together with the principle of sincere cooperation now laid down in Article 4(3) TEU, observance of those principles is required for the purpose of attaining European Union objectives, which comprise, inter alia, the CFSP.’⁷⁵

iii. Rosneft

A similar line of reasoning on the jurisdiction of the Court was used in *Rosneft*. In this case, the Court was asked to rule on the validity of economic sanctions imposed on Russia after the annexation of Crimea took place. It was the first time that a request for a preliminary ruling on the validity of a CFSP act came before the Court. Again, the derogation of Article 24(1) TEU came into play with regard to this matter. This derogation applicable to CFSP is not as strict as it may seem, as it actually excludes ‘certain decisions’ that are ‘[...] provided for by the second paragraph of article 275 TFEU’ from the scope of the derogation.⁷⁶ This means that the legality of ‘certain decisions’ are actually open to being reviewed by the Court and do not fall within the derogation on jurisdiction. This ‘exception to the exception’ combined with the integration of the area of CFSP actually gives the Court more power in the area than before. Crucial to the scope and reach of the Court is the core question addressed in *Rosneft*: can the Court issue a preliminary ruling regarding the legality of an act based on a CFSP provision? The

⁷⁵ C-439/13 *Elitaliana SpA v Enllex Kosovo* [2015] ECLI: EU:C:2015:753, Opinion of AG Jääskinen, para 28.

⁷⁶ C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECLI: EU:C:2017:236, para 65.

act in question is based on Regulation 833/2014 which is based on article 215 TFEU. The latter falls squarely within the scope of review by the Court. In *Rosneft*, the Court hooks onto the last sentence of Article 24(1) TEU, which refers to certain decisions that fall within its jurisdiction. This refers not to the type of procedure searched after but the type of decision. The Court thereby interprets this provision broadly and extended its jurisdiction. This broad reading on the jurisdiction of the Court is based on a selective reading of the Treaty provisions and seems to go against the spirit of the provisions to support an integrationist approach taken by the Court.⁷⁷ This becomes clear when considering the starting point of the judgement. The Court did not start with the exemption to the rule of jurisdiction, in fact, the need to have a complete legal system and remedies in place to review the legality of certain acts was first emphasised. The *effet utile* reasoning through reference to the need to ensure effective judicial protection again narrows the scope of the carve-out created by article 24(1) TEU. Just as in *H v Council*, the Court's reasoning followed the *Foto-Frost* logic: only the Court of Justice is allowed to rule on the validity of EU measures.

iv. Federalising tendencies and the expansion of Union law

These judgments helped narrow the exclusion of jurisdiction in the area of CFSP. Instead of arguing that the exception of jurisdiction as laid down in article 24(1) TEU was the general rule –which would have been consistent with the peculiar nature of the area of CFSP- the Court decided to interpret the exception narrowly and refer to the principle of effective judicial protection, a principle derived from the duty of sincere cooperation, and separate the question from the original legal

⁷⁷ Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) ICLQ 67 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9570284E9D3285480CE2FC6006422B93/S0020589317000380a.pdf/judicial_review_in_the_eus_common_foreign_and_security_policy.pdf> accessed at 2 November 2019, 25.

basis.⁷⁸ Different from earlier landmark cases, these judgements mostly refer to the principle of effective judicial protection instead of the duty of sincere cooperation. It is sometimes, such as in *Rosneft*, referred to but often not pursued further. In this case, AG Wathelet even explicitly referred to the principle of sincere cooperation in the paragraph on the legal framework but did not pursue this line of reasoning.⁷⁹ The main focus of the judgment remained the question of effective judicial protection.⁸⁰

This approach was used to provide a complete and composite system of legal protection as laid down in article 19 TEU. This article does not specify in what areas of Union law effective judicial protection must be offered and therefore does not exclude the area of CFSP. AG Kokott affirmed this view in Opinion 2/13 and stated that:

*[...] in matters relating to the CFSP, effective legal protection for individuals is afforded partly by the Courts of the EU (...) and partly by national courts and tribunals (...).*⁸¹

The Court uses the principle of effective judicial protection and the rule of law to ensure that the objectives flowing from the Treaties are guaranteed. In the aforementioned cases, the Court hardly ever refers to article 4(3) TEU even though the principle is mentioned in passing by the AG or the Court itself. Interestingly, the Court does not discuss this principle when discussing the aforementioned cases even though the AG explicitly refers to it in his opinion. The reason behind this might be that the Court first needs to establish jurisdiction in the area before looking into the duty of sincere cooperation, but this is pure speculation. What must be kept in mind when reading the reasoning of the Court in the aforementioned cases is the

⁷⁸ Mătușescu and Ionescu (n 63) 158.

⁷⁹ C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECLI: EU:C:2017:236, opinion of AG Wathelet, para 6.

⁸⁰ *Ibid* 212, 170.

⁸¹ Opinion of AG Kokott, *Opinion procedure 2/13 initiated following a request made by the European Commission* [2014] ECLI:EU:C:2014:2475, para 103.

implicit duty to ensure, in full mutual respect, the attainment of the objectives of the Union which, in these cases is providing a complete system of legal protection. Instead of focusing on the duty of sincere cooperation as it did in the former pillars one and three, the Court used the more specific provision of Article 19(1) TEU instead which, as affirmed in *Reve*, flows from the duty of sincere cooperation.⁸² Indeed, Member States must ensure the application and respect for EU law within their territories. Their national courts must collaborate with the Court of Justice to ensure the application of the treaties. What this means is that the federalising traits of article 4(3) TEU are less clear in the area of CFSP when compared to the former pillars one and three. Instead of article 4(3) TEU, Article 19(1) TEU seems to serve the function of the competence-creep – the article used to broaden the scope of EU law - in this area. This is due to the fact that is used by the Court to chisel away at the exception to jurisdiction formed by article 24(1) TEU and to integrate the area in the legal system of the Union.

Again, the Court has used a general principle to expand its jurisdiction. Where article 4(3) TEU played a major role in expanding Union law in the former pillars one and three, it seems to play second fiddle to article 19(1) TEU in the area of CFSP. Having said that, it cannot be forgotten that article 19(1) TEU was derived, among others, from article 4(3) TEU. This was affirmed in *Reve* and *Unión de Pequeños Agricultores v Council*. The principle of effective judicial protection flows forth from the duty of mutual sincere cooperation, which must therefore be considered as an interpretation tool which facilitates the interpretation of the questions that come before the Court. The duty of sincere cooperation as an interpretation tool shows a similar federalising nature in the area of CFSP as in former pillars one and three, but it does not take center stage. Instead, article 19(1) TEU plays the leading role in the area.

This is not surprising when looking back on the landmark cases of the past. For instance, in *Factortame* and

⁸² C 33/76 *Reve-Zentralfinanz eG and Reve-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR I-01989, para 5. ; Mătușescu and Ionescu (n 64) 158. ; *Unibet* (n 31) 54.

Francovich, remedies were created based on Article 4(3) TEU to ensure effective judicial protection. What the landmark cases in the former pillars one and three and the current changes made in former pillar two have in common is that the Court focuses on the attainment of the goal of effective judicial protection. Instead of using article 4(3) TEU as a legal ground, the Court now bases itself on article 19(1) TEU, the special-rule that only (relatively) recently became part of the Treaties. This article in itself has been used by the Court as the sole legal basis to argue that the exclusion of jurisdiction in the area of CFSP must be interpreted strictly and counts as the general rule in that area instead of the derogation on jurisdiction as laid down in article 24(1) TEU. It can therefore tentatively be concluded that article 19(1) TEU has federalising tendencies in the area of CFSP as it forms the sole legal basis for jurisdiction. Article 4(3) TEU, from which article 19(1) TEU was derived, functions as an interpretation tool that is kept in mind by the Court when deciding on matters that fall within the area of Common Foreign and Security Policy. This development again shows that these general principles of Union law can broaden the reach of the law and the Court more specifically, and contributes to the integration of the former area of CFSP into the mainstream Union law.

Conclusion

The exclusion of Article 24(1) TEU concerning jurisdiction of the European Court shows the peculiar nature and history of the former area of CFSP within the larger framework of the Treaties. Recent case-law has shown that the Court is slowly chiselling away at this exemption to jurisdiction through reference to the importance of ensuring effective judicial protection. This principle, encapsulated in article 19 TEU, has been used as the sole legal basis of a judgement on multiple occasions. This principle shows clear federalising tendencies and has facilitated the further expansion of EU competence. The principle of sincere cooperation, which was used as a basis for numerous landmark cases, such as *Factortame* and *Frankovich*, only plays a secondary role in recent cases regarding the former area of CFSP. It is used as an interpretation tool which provides further

substantiation for Article 19 TEU. The Court has used both principles as federalising tools to further EU competence and the way in which they were and are used differ from the past to the present. How this will develop in the future still remains to be seen.

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