Joined Cases C-293/17 and C-294/17

Proceedings brought by

Coman and Others (C-293/17)

Relu Adrian Coman (C-294/17)

Hamilton Secuianu (C-294/17)

Claudiu Manuel Tarau (C-294/17)

Georgiana-Raluca Teodorescu (C-294/17)

Valentin Lilian Iorga (C-294/17)

and by

Council of the European Union (C-293/17)

Romanian Government (C-293/17 and C-294/17)

European Commission (C-293/17 and C-294/17)

Parliament of Romania (C-294/17)

Parliament of the Netherlands (C-294/17)

Portuguese Government (C-294/17)

Council of the European Union (C-293/17)

Romanian Government (C-293/17 and C-294/17)

Estonian Government (C-293/17 and C-294/17)

European Commission (C-293/17 and C-294/17)

(Reports of cases — Citizenship of the Union — Freedom of movement and residence within the territory of the Member States — Right of a third-country national who is the spouse of a Union citizen to reside with his spouse in the territory of a Member State — Concept of 'spouse' — Article 21 TFEU — Directive 2004/38/EC — European Union Law — Scope — Obligation to recognise a marriage concluded in accordance with the law of a Member State — Marriage between persons of the same sex — Right of the spouse of a Union citizen who is a national of a third country to reside in the Member State of which his spouse is a national — Article 7 of the Charter of the European Union — Respect for private and family life — Article 9 TEU — Respect for the national identity of the Member States — Article 4(2) TEU — Protection of the fundamental rights of LGBTI persons — Article 2 TEU — Respect for the values on which the Union is founded — Article 7 TEU — Protection of the values of the Union — Obligation of the Member States to provide for remedies sufficient to ensure effective legal protection — Article 47 of the Charter — Right to a fair trial — Right to be heard — Right to an effective remedy — Right to have one's case heard within a reasonable time — Article 18 TFEU — Prohibition of discrimination on grounds of nationality — Article 19 TFEU — Combating discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation — Article 51 of the Charter — Scope of the Charter — Article 52(3) thereof — Meaning and scope of the rights guaranteed — Article 52(4) thereof — Fundamental rights forming part of the general principles of EU law — Article 52(5) thereof — Principles — Article 53 thereof — Level of protection — Article 165 TFEU — Respect for the cultural and linguistic diversity of the Union — Article 167(4) TFEU — Taking cultural aspects into account when the Union acts under other provisions of the Treaties — Article 4(3) TEU — Principle of sincere cooperation

30 Judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793; '*Bank Refah*').

31 Judgment of 25 March 2021, *Carvalho and Others* v *Parliament and Council* (C-565/19 P, not published, EU:C:2021:252; '*Carvalho*').

32 For a discussion about the effectiveness of the remedy in damages even if the jurisdictional hurdle is overcome, see Fink, M., 'The action for damages as a fundamental rights remedy – Holding Frontex liable', *German Law Journal*, Vol. 21(3), 2020, p. 532.

33 See, for example, Butler, G., *Constitutional law of the EU's common foreign and security policy – Competence and institutions in external relations*, Hart Publishing, Oxford, 2019, pp. 185 to 188; Carrasco, C.M., 'Human rights in the EU's common security and defence policy', in Wouters, J., Nowak, M., Chané, A.-L. and Hachez, N. (eds), *The European Union and human rights – Law and policy*, Oxford University Press, Oxford, 2020, p. 408, in particular p. 429; Johansen, S.O., *The human rights accountability mechanisms of international organizations*, Cambridge University Press, Cambridge, 2020, pp. 143 and 144; Poli, S., 'The right to effective judicial protection with respect to acts imposing restrictive measures and its transformative force for the common foreign and security policy', *Common Market Law Review*, Vol. 59(4), 2022, p. 1045, in particular p. 1057.

34 See, for example, Hillion, C., 'A powerless court? The European Court of Justice and the EU common foreign and security policy', in Cremona, M. and Thies, A. (eds), *The European Court of Justice and external relations law – Constitutional challenges*, Hart Publishing, Oxford, 2014, p. 47, in particular pp. 66 to 69; Eckes, C, 'Common foreign and security policy – The consequences of the Court's extended jurisdiction', *European Law Journal*, Vol. 22(4), 2016, p. 492, in particular pp. 510 and 511.

35 That case-law, therefore, reversed the position which Advocate General Kokott took in her View in Opinion 2/13, that the exclusion of jurisdiction in the CFSP is a rule with a very limited number of exceptions. See View of Advocate General Kokott in Opinion 2/13 *(Accession of the European Union to the ECHR)*, EU:C:2014:2475, in particular points 84 and 89.

36 Judgment of 24 June 2014, *Parliament* v *Council* (C-658/11, EU:C:2014:2025, paragraph 70; '*Mauritius*').

37 See *Elitaliana*, paragraph 42, and *H*, paragraph 40. Instead of 'narrowly', the Court sometimes uses the term 'restrictively' (see, for example, judgment of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492, paragraph 66)), and *Bank Refah*, paragraph 32) or 'strictly' (see, for example, judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 74; '*Rosneft*')).

38 See *Rosneft*, paragraphs 60 to 81.

39 See *Rosneft*, paragraph 70.

40 See *Rosneft*, in particular paragraphs 66 to 69, 76 and 78.

41 See *Rosneft*, in particular paragraphs 78 and 79 (referring, in particular, to the judgment of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452)).

42 See *Bank Refah*, paragraphs 26 to 49, in particular paragraph 33.

43 See *Bank Refah*, paragraphs 31 and 32.

44 See *Elitaliana*, paragraphs 41 to 50.

45 See *H*, paragraphs 39 to 60. See also judgment of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492, paragraph 66).

46 See *Mauritius*, paragraphs 69 to 74.

47 Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer (OJ 2011 L 254, p. 1).

48 In a similar case involving an agreement with Tanzania, the Court took a different approach and established its jurisdiction on the basis of the second paragraph of Article 275 TFEU. See judgment of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:435, paragraph 42; '*Tanzania*').

49 Those arguments were raised in support of the first part of KS and KD's single ground of appeal and the Commission's first ground of appeal.

50 See *H*, paragraphs 41 and 58; *Rosneft*, paragraphs 72 to 75 and 81; and *Bank Refah*, paragraphs 34 to 36. See further, for example, Hillion, C., 'The EU external action as mandate to uphold the rule of law outside *and* inside the Union', *Columbia Journal of European Law*, Vol. 29(2), Special Issue 2023, p. 228.

51 See *Bank Refah*, paragraphs 45 to 47.

52 The CFSP is still in some respects a specific policy. The institutional balance established among the EU institutions is different, with a weaker role for the Parliament and the Commission; the Council mostly decides by unanimity; and legislative acts are excluded. See, for example, Cremona, M., '"Effective judicial review is of the essence of the rule of law" – Challenging common foreign and security policy measures before the Court of Justice', *European Papers*, Vol. 2(2), 2017, p. 671.

53 See judgments of 16 February 2022, *Hungary* v *Parliament and Council* (C-156/21, EU:C:2022:97, paragraph 127), and of 16 February 2022, *Poland* v *Parliament and Council* (C-157/21, EU:C:2022:98, paragraph 145).

54 Judgment of 16 February 2022, *Hungary* v *Parliament and Council* (C-156/21, EU:C:2022:97, paragraph 232). See also judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442, paragraph 67).

55 See *H*, paragraph 41; *Rosneft*, paragraph 72; and *Bank Refah*, paragraph 35.

56 See judgment of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 23); see also, more recently, for example, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 281; '*Kadi I*'), and of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 54).

57 See judgment of 27 February 2018 (C-64/16, EU:C:2018:117, paragraph 32); see also, more recently, for example, judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442, paragraph 69).

58 See judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 32).

59 See *Kadi I*, paragraphs 281 to 284; see also, for example, Opinion 2/13, paragraph 169.

60 Opinion of Advocate General Poiares Maduro in *Kadi* v *Council and Commission* (C-402/05 P, EU:C:2008:11, point 34).

61 Opinion of Advocate General Poiares Maduro in *Kadi* v *Council and Commission* (C-402/05 P, EU:C:2008:11, point 44).

62 See judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, in particular paragraphs 55 to 60 and 67; '*Ledra Advertising*').

63 Thus, in paragraphs 35 to 39 of the order under appeal, the General Court considered that the present case is not about staff management, so *H* does not apply; it is not about public procurement, so *Elitaliana* does not apply; and it is not about restrictive measures, so *Bank Refah* does not apply.

64 Those arguments were raised in support of the first and second parts of KS and KD's single ground of appeal and the Commission's first and third grounds of appeal.

65 Thus, the Court found that an action for annulment could be brought against the Parliament, even if the Treaty, as it then read, did not provide for such a possibility.

66 Opinion of Advocate General Mancini in *Les Verts* v *Parliament* (294/83, not published, EU:C:1985:483, point 7; [1986] ECR 1339, in particular p. 1350).

67 See *Carvalho*, paragraphs 67 to 79, in particular paragraph 78 (referring to the Court's findings in the judgments of 25 July 2002, *Unión de Pequeños Agricultores* v *Council* (C-50/00 P, EU:C:2002:462, paragraph 44), and of 1 April 2004, *Commission* v *Jégo-Quéré* (C-263/02 P, EU:C:2004:210, paragraph 36)).

68 Those arguments were raised in support of the third part of KS and KD's single ground of appeal and the Commission's fourth ground of appeal.

69 Opinion of Advocate General Bobek in *SatCen* v *KF* (C-14/19 P, EU:C:2020:220, point 69).

70 See order under appeal, paragraph 41.

71 Those arguments were raised in support of the fourth part of KS and KD's single ground of appeal and the Commission's second ground of appeal.

72 In that respect, even if, when interpreting legislation, the Court strives to understand the legislative intention and interpret a rule accordingly, given that intention is often not clearly expressed in either the legal act or its legislative history, legislative intent itself also becomes a matter of the Court's choice.

73 Opinion of Advocate General Wathelet in *Rosneft* (C-72/15, EU:C:2016:381, point 52).

74 See, for example, 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(6), 2021, p. 1731, in particular p. 1739. See also Lonardo, L., 'The political question doctrine as applied to common foreign and security policy', *European Foreign Affairs Review*, Vol. 22(4), 2017, p. 571.

75 The Court has so far not stated whether a sort of 'political question doctrine' exists in EU law. Nevertheless, the Court has used the concept of direct effect for a similar purpose. In certain foreign policy issues, especially in the assessment of the compatibility of EU acts with the WTO law, it has refrained from exercising its jurisdiction of judicial review in order to account for the political room for manoeuvre left to parties to that organisation. See, for example, judgment of 12 December 1972, *International Fruit Company and Others* (21/72 to 24/72, EU:C:1972:115, paragraphs 18 and 27); see also my Opinion in *EUIPO* v *The KaiKai Company Jaeger Wichmann* (C-382/21 P, EU:C:2023:576, in particular points 59 to 64).

76 For the connection between the institutional balance and the principle of democracy, see judgment of 6 September 2017, *Slovakia and Hungary* v *Council* (C-643/15 and C-647/15, EU:C:2017:631, paragraph 160).

77 It is worth referring again to the judgment in *Ledra Advertising*, in which the Court considered that it can hear an action for damages even in relation to the involvement of the Commission in the adoption of an act outside of the EU legal framework (see points 87 to 89 of this Opinion). Only in that way is the Court able to control whether the Commission has crossed the 'red line' drawn by fundamental rights.

78 See, in that respect, Article 52(1) of the Charter.

79 See, for example, judgment of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776, paragraphs 120 to 126), and *Rosneft*, paragraphs 146 to 150.

80 See, in that regard, Opinion of Advocate General Wathelet in *Rosneft* (C-72/15, EU:C:2016:381, point 46), in which he considered that the reference to 'these provisions' in Article 24(1) TEU excludes only the Court's power to review CFSP acts in relation to provisions of Chapter 2 of Title V of the TEU, and not in relation to any other provisions of the EU Treaty, nor in relation to the provisions of the FEU Treaty.

81 In that respect, I disagree with the position expressed by Advocate General Wathelet in his Opinion in *Rosneft* (C-72/15, EU:C:2016:381, point 75) that interpretation is a narrower task than legality review. It is, of course, inevitable that the Court understands (and thus interprets) the rules whose legality it assesses. However, interpretation may be required outside of legality review in order to secure the uniform application of such rules. Interpretation is, to my mind, a broader power, as it allows the Court to make a choice between different possible meanings of the same rule.

82 See Opinion of Advocate General Wathelet in *Rosneft* (C-72/15, EU:C:2016:381, in particular points 39 to 76).

83 See Opinion of Advocate General Wathelet in *Rosneft* (C-72/15, EU:C:2016:381, point 42).

84 See points 67 and 68 of and footnote 48 to this Opinion.

85 See, in that respect, Cremona, cited in footnote 52 to this Opinion, p. 687, who considered that the reference in the second paragraph of Article 275 TFEU to actions for annulment 'reflects the *Kadi* case-law on the need for effective judicial protection where restrictive measures are adopted against individuals'.

86 That was the position of Advocate General Kokott in her View in Opinion 2/13 *(Accession of the European Union to the ECHR)*, EU:C:2014:2475, points 95 and 96. In the present appeals, the French Government takes a similar position.

87 See View of Advocate General Kokott in Opinion 2/13 *(Accession of the European Union to the ECHR)*, EU:C:2014:2475, points 82 to 103.

88 See View of Advocate General Kokott in Opinion 2/13 *(Accession of the European Union to the ECHR)*, EU:C:2014:2475, in particular points 84 and 89. I also note that, in his Opinion in *H* (EU:C:2016:212, points 89 to 104), Advocate General Wahl considered that jurisdiction fell to the national courts, but his analysis was based on the fact that, save for the specific exceptions expressly laid down in the Treaties, the general rule is that the EU Courts have no jurisdiction in the CFSP (see, in particular, points 53, 66 and 71); he also found that considerations based on the rule of law were irrelevant in those proceedings (see point 49).

89 See, for example, judgments of 18 April 2013, *Commission* v *Systran and Systran Luxembourg* (C-103/11 P, EU:C:2013:245, paragraph 60), and of 15 July 2021, *OH (Immunity from jurisdiction)* (C-758/19, EU:C:2021:603, paragraph 22).

90 See, for example, Gutman, K., 'Action for damages – Court of Justice of the European Union (CJEU)', in Ruiz Fabri, H. (ed.), *Max Planck Encyclopedia of International Procedural Law*, Oxford University Press, Oxford, 2019, point 4.

91 See, in that regard, Schermers, H.G. and Waelbroeck, D.F., *Judicial protection in the European Union*, 6th edition, Kluwer Law International, The Hague/London/New York, 2001, § 1047.