



Reports of Cases

OPINION OF ADVOCATE GENERAL

ĆAPETA

delivered on 23 November 2023¹

Case C-351/22

Neves 77 Solutions SRL

v

Agencia Națională de Administrare Fiscală – Direcția Generală Antifraudă Fiscală

(Request for a preliminary ruling from the Tribunalul București (Regional Court, Bucharest, Romania))

(Reference for a preliminary ruling – Common foreign and security policy (CFSP) – Restrictive measures adopted in view of Russia’s actions destabilising the situation in Ukraine – Council Decision 2014/512/CFSP – Jurisdiction of the Court of Justice – Articles 2, 6, 19 and 24 TEU – Articles 267 and 275 TFEU – Prohibition on brokering services in relation to military goods – Implementation by the Member States – Administrative fine – Confiscation of sums received – Alleged breach of general principles of EU law and fundamental rights – Principle of legal certainty – Principle of *nulla poena sine lege* – Article 17 of the Charter of Fundamental Rights of the European Union – Article 1 of Protocol No 1 to the European Convention on Human Rights – Right to property)

I. Introduction

1. In 2014, as a response to the unprovoked violation of Ukrainian sovereignty and territorial integrity by the Russian Federation, the European Union adopted several restrictive measures against that country. The present case concerns restrictive measures introduced by Decision 2014/512/CFSP.²

2. The most important issue raised by this case is whether the Court can interpret provisions of that decision, given the limitations imposed on its jurisdiction in the area of the common foreign and security policy (‘CFSP’) by Article 24(1) TEU and Article 275 TFEU.

3. The present case is being heard by the Court in parallel with two joined cases, *KS and KD v Council and Others* and *Commission v KS and Others* (Cases C-29/22 P and C-44/22 P; ‘the *KS and KD* cases’), in which my Opinion is being delivered on the same day. The latter cases also raise the question of the scope of the limitations on the Court’s jurisdiction in the CFSP. I will therefore refer to my Opinion in those cases where relevant.

¹ Original language: English.

² Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13).

4. The broader context of both sets of cases is the ongoing negotiations on the accession of the European Union to the European Convention on Human Rights ('ECHR'). All other negotiating chapters, which were opened as a result of Opinion 2/13,³ seem to be closed, except for one remaining issue: the scope of the EU Courts' jurisdiction in the CFSP.

II. The facts in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

5. Neves 77 Solutions SRL ('Neves') is a company created in 2014, having as its main activity brokering in the sale of products in the field of aviation.

6. Neves brokered a transaction between the Ukrainian company SFTE Spetstechnoexport ('SFTE') and the Indian company Hindustan Aeronautics Limited ('Hindustan').

7. In 2009, those two companies entered into a contract, whereby SFTE undertook to supply and repair several aircraft for Hindustan using components that were manufactured in Russia. However, following Russia's invasion of Ukraine in the region of Crimea in 2014, SFTE stopped purchasing the parts and equipment needed for that contract directly from Russia.

8. On 4 January 2019, SFTE contracted with Neves to supply it with 32 R-800L2E radio sets, which were to be delivered to the United Arab Emirates. On 8 January 2019, Neves, in turn, contracted with a Portuguese company to buy the 32 R-800L2E radio sets, 20 of which were manufactured and exported from Russia to the United Arab Emirates. Neves then transferred those 20 radio sets to Hindustan in India as per SFTE's request.

9. By notice of 26 July 2019, the Romanian Department of Export Control ('ANCEX') informed Neves that the R-800L2E radio sets were included in category ML11 on the list of military products subject to the system of control of exports, imports and other transactions in Decree No 901/2019 of the Minister for Foreign Affairs ('Decree No 901/2019').⁴ That notice also indicated that foreign trade involving that product could be carried out, in accordance with Romanian law, only on the basis of the registration confirmation and the licences issued by ANCEX.

10. By notice of 29 July 2019, ANCEX further informed Neves that the brokering transaction relating to the R-800L2E radio sets came within the scope of restrictive measures against Russia introduced by Decision 2014/512/CFSP.

11. Neves responded to the two ANCEX notices, claiming that the radio sets in question were intended for civil use and that Decree No 901/2019, which transposed into Romanian law the EU list of military goods and on which ANCEX relied, did not apply at the time of delivery of those goods. According to Neves, Article 2(2)(a) of Decision 2014/512/CFSP did not apply either, since those radio sets were not sold to Russia.

³ See Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraphs 153 to 258), in which the Court explained the reasons why the draft Treaty providing for the EU's accession to the ECHR as then proposed was not in conformity with the Treaties.

⁴ As indicated in the order for reference, Decree No 901/2019, in force from 5 July 2019 to 6 October 2021, replaced the previous Decree No 156/2018 of the Minister for Foreign Affairs ratifying the list of military products subject to the system of control of exports, imports and other transactions, which was in force from 5 March 2018 to 4 July 2019. The annexes to those decrees contained, in particular, category ML11, entitled 'Electronic equipment, "spacecraft" and components not specified elsewhere in this list'.

12. On 6 and 9 August 2019, Neves received from SFTE sums totalling EUR 2 984 961.40 as payment for the radio sets delivered pursuant to the contract of 4 January 2019.

13. On 12 May 2020, the Romanian National Tax Administration Agency – Tax Fraud Department (‘ANAF’)⁵ issued an infringement notice against Neves. ANAF considered that Neves had committed an offence under Article 26(1)(b) of Decree-Law 202/2008 for having infringed Articles 3(1), 7(1) and 24(1) of that decree-law and Article 2(2)(a) of Decision 2014/512/CFSP. That decree-law regulates the manner of implementation at the national level of international sanctions, including those imposed by the European Union. The provisions of that decree-law on which ANAF relied provide that acts imposing international sanctions (including EU decisions under the CFSP) bind public authorities and all natural or legal persons located in Romania. They also introduce the obligation that natural or legal persons notify the competent authorities if they have established a relationship or have been in a de facto relationship relating to transactions covered by international sanctions.

14. Accordingly, Neves was fined RON 30 000 (approximately EUR 6 000), and the sum of RON 14 113 003 (EUR 2 984 961.40) was confiscated, representing the sums it received on 6 and 9 August 2019 from SFTE.

15. In that infringement notice, ANAF indicated that, although ANCEX had informed Neves that the R-800L2E radio sets were on the list of military products subject to the system of control of exports, imports and other transactions, and that the brokering transaction concerning that product came within the scope of Decision 2014/512/CFSP, Neves had continued operations relating to the sale of those products by collecting the sums received in a Romanian bank account.

16. Neves contested the infringement notice before the Judecătoria Sectorului 1 Bucureşti (Court of First Instance, Sector 1, Bucharest, Romania). By judgment of 2 November 2020, that court dismissed Neves’ complaint as unfounded.

17. Neves brought an appeal against that judgment before the Tribunalul Bucureşti (Regional Court, Bucharest, Romania), the referring court in the present case.

18. The referring court explains that, on the basis of the national measures implementing EU restrictive measures, Neves incurred an administrative penalty consisting of a fine, as well as an additional penalty of confiscation of the amounts that it received for the brokering transaction from SFTE. The referring court further notes that the domestic legislation introduced a separate obligation to notify the competent authorities of any transaction falling within the scope of the prohibition on brokering services set out in Article 2(2)(a) of Decision 2014/512/CFSP, under penalty of automatic confiscation of any proceeds resulting from the breach of that obligation.

19. The referring court essentially wonders whether, taking account of Neves’ claims regarding the lack of proportionality of the penalty of full confiscation in the light of the case-law of the European Court of Human Rights (‘ECtHR’) on the right to property guaranteed by Article 1 of

⁵ As indicated in the order for reference, the Romanian National Anti-Money Laundering Agency had previously filed a complaint against Neves concerning an alleged money-laundering offence, but that complaint was closed on 11 May 2020 on the ground that no criminal offence was found to have been committed.

Protocol No 1 to the ECHR,⁶ the national implementing measures run counter to certain general principles of EU law and rights contained in the Charter of Fundamental Rights of the European Union ('the Charter').

20. Additionally, the referring court asks whether the prohibition on brokering services laid down in Article 2(2)(a) of Decision 2014/512/CFSP applies to the situation in the main proceedings, involving goods that come from Russia and that have not been physically imported into the territory of a Member State.

21. The referring court observes that the Court has not previously ruled on the provisions of Decision 2014/512/CFSP whose interpretation is requested, and that the circumstances of this case differ from those giving rise to the judgment in *Rosneft*.⁷

22. Under those circumstances, the Tribunalul București (Regional Court, Bucharest) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

- '1. Can Decision 2014/512/CFSP, in particular Articles 5 and 7 thereof, in the light of the principles of legal certainty and *nulla poena sine lege*, be interpreted as permitting (by way of a civil penalty) a national measure authorising the confiscation of the entire proceeds of a transaction, such as the one referred to in Article 2(2)(a) of Decision 2014/512/CFSP, in the event that an act categorised by domestic law as a summary offence is found to have been committed?
2. Is Article 5 of Decision 2014/512/CFSP to be interpreted as allowing Member States to adopt national measures providing for the automatic confiscation of any proceeds resulting from a breach of the obligation to notify a transaction falling within the scope of Article 2(2)(a) of Decision 2014/512/CFSP?
3. Is the prohibition laid down in Article 2(2)(a) of Decision 2014/512/CFSP applicable where goods constituting military equipment, which were the subject of brokering transactions, were never physically imported into the territory of the Member State?'

23. Written observations were submitted to the Court by the European Commission. In addition, by way of measures of organisation of procedure provided for in Article 62 of the Rules of Procedure of the Court of Justice, the Romanian Government and the Commission were requested to answer additional questions in writing, including a question relating to the existence of the jurisdiction of the Court in the present case.

24. A hearing was held on 27 June 2023 at which Neves, the Netherlands and Austrian Governments, the Council and the Commission presented oral argument.

⁶ The referring court refers to ECtHR, judgment of 6 April 2009, *Ismayilov v. Russia* (CE:ECHR:2008:1106JUD003035203), and ECtHR, judgment of 9 October 2009, *Moon v. France* (CE:ECHR:2009:0709JUD003997303).

⁷ Judgment of 28 March 2017 (C-72/15, EU:C:2017:236; '*Rosneft*').

III. Analysis

A. EU restrictive measures generally and those relevant for the present case in particular

1. Adoption and implementation of restrictive measures

25. Within the framework of the CFSP, the Council may decide to impose restrictive measures against third countries, entities or individuals, pursuant to CFSP objectives as set out in Article 21 TEU.

26. In general terms, the purpose of restrictive measures is to bring about a change in policy or activity by the target country, part of country, government, entities or individuals.⁸ According to the EU sanctions map,⁹ there are currently over 40 (mostly country-related) EU restrictive measures in force.

27. Restrictive measures are adopted by the Council on the basis of Article 29 TEU, and are implemented at the EU or national level.

28. The measures concerning issues which fall within the competence of the Member States, or within shared competences that were not yet exercised at the EU level, are implemented only at the national level. Member States are under the obligation to adopt adequate measures, as they are legally bound to act in conformity with Council decisions in the CFSP.¹⁰ It has been the practice so far that measures such as arms embargoes and travel bans are implemented directly by the Member States.¹¹

29. Restrictive measures that fall within EU competence are, in principle, implemented at the EU level. Thus, measures interrupting or reducing, in part or completely, economic relations with a third country, including measures freezing funds and economic resources, are adopted by the Council, on a joint proposal of the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, as a regulation under Article 215 TFEU ('Article 215 regulation').¹² Such regulations are binding and directly applicable throughout the European Union and thus ensure the uniform application of restrictive measures in all the Member States.¹³ Additionally, unlike a CFSP decision, an Article 215 regulation can directly create obligations for individuals in the Member States. Nevertheless, even if implemented through an Article 215 regulation, putting EU restrictive measures in practice might require additional measures at the national level.

⁸ See, for example, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU common foreign and security policy, General Secretariat of the Council, Brussels, Doc. 5664/18, 4 May 2018 ('Sanctions Guidelines'), point 4.

⁹ Available at: <https://www.sanctionsmap.eu/#/main>.

¹⁰ See the second sentence of Article 29 TEU.

¹¹ See, for example, Sanctions Guidelines, cited in footnote 8 to this Opinion, point 7. See further, for example, Portela, C., *European Union sanctions and foreign policy: When and why do they work?*, Routledge, London/New York, 2010, in particular pp. 19 to 28; Eckes, C., 'EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions', *Common Market Law Review*, Vol. 51(3), 2014, p. 869.

¹² Article 215(1) TFEU essentially corresponds to what used to be former Article 60 EC, relating to restrictive measures with regard to capital movements and payments, and former Article 301 EC on the interruption or reduction, in part or completely, of economic relations with one or more third countries. Furthermore, Article 215(2) TFEU allows the Council to adopt restrictive measures against natural or legal persons and groups or non-State entities, which before the Lisbon Treaty required former Article 308 EC (now Article 352 TFEU). See, in that respect, judgment of 19 July 2012, *Parliament v Council* (C-130/10, EU:C:2012:472, paragraphs 51 to 53).

¹³ See *Rosneft*, paragraph 89, and judgment of 6 October 2020, *Bank Refah Kargaran v Council* (C-134/19 P, EU:C:2020:793, paragraph 38).

30. CFSP decisions under Article 29 TEU and Article 215 regulations do not necessarily have entirely the same content. A CFSP decision might comprise measures falling within and outside the competences under the FEU Treaty, in which case an Article 215 regulation would not implement the entire content of that decision.¹⁴ If a CFSP decision is implemented by an Article 215 regulation, it may be elaborated in further detail in that regulation.

2. Restrictive measures against Russia relevant for the present case

31. In response to Russia's invasion of the region of Crimea in Ukraine, already in March 2014, the European Union adopted Decision 2014/145/CFSP.¹⁵ That decision provided for travel restrictions and the freezing of funds and economic resources of certain persons. It was implemented by Regulation 269/2014.¹⁶

32. Thereafter, as Russia failed to cooperate with the European Union's demands, the Council introduced a package of further EU restrictive measures by Decision 2014/512/CFSP. Restrictions were introduced in relation to financial services, dual-use goods, sensitive technologies and military goods.¹⁷ Those measures have been amended numerous times, in the light of Russia's continued military aggression against Ukraine.¹⁸ However, the present case concerns only the measures enacted by Decision 2014/512/CFSP.

33. Article 2 of that decision establishes various prohibitions related to arms and related military goods.¹⁹ Article 2(2)(a) thereof sets out a prohibition on brokering services in relation to military goods. It provides that the following shall be prohibited:

'to provide technical assistance, *brokering services* or other services related to military activities and to the provision, manufacture, maintenance and use of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts therefor, directly or indirectly to any natural or legal person, entity or body in, or for use in Russia'.²⁰

¹⁴ For instance, restrictions on admission to the territory of the Member States are likely to be included in CFSP decisions, but not in Article 215 regulations. See, in that respect, judgment of 6 October 2020, *Bank Refah Kargaran v Council* (C-134/19 P, EU:C:2020:793, paragraph 41).

¹⁵ Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16), as amended most recently by Council Decision (CFSP) 2023/1767 of 13 September 2023 (OJ 2023 L 226, p. 104).

¹⁶ Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6), as amended most recently by Council Regulation (EU) 2023/1215 of 23 June 2023 (OJ 2023 L 159 I, p. 330).

¹⁷ See Decision 2014/512/CFSP, recitals 7 to 12.

¹⁸ That decision has been amended most recently by Council Decision (CFSP) 2023/1517 of 20 July 2023 (OJ 2023 L 184, p. 40).

¹⁹ See also, in that regard, recital 10 of Decision 2014/512/CFSP, providing that: 'Member States should prohibit the sale, supply, transfer or export to Russia of arms and related materiel of all types. The procurement from Russia of arms and related materiel of all types should also be prohibited.'

²⁰ Emphasis added.

34. On the same day as Decision 2014/512/CFSP, the Council adopted Regulation 833/2014,²¹ on the basis of Article 215 TFEU, in order to implement that decision. Regulation 833/2014 did not initially contain a prohibition on brokering services in relation to military goods.²² Article 4(1)(a) of that regulation provided that it shall be prohibited:

‘to provide, directly or indirectly, technical assistance related to the goods and technology listed in the Common Military List, or related to the provision, manufacture, maintenance and use of goods included in that list, to any natural or legal person, entity or body in Russia or for use in Russia’.

35. Only recently, on 23 June 2023, the Council amended Article 4(1)(a) of Regulation 833/2014,²³ and included the wording ‘and brokering services’ after the words ‘technical assistance’.²⁴ That amendment is, however, not applicable *ratione temporis* to the situation in the main proceedings.

36. At the relevant time, therefore, the prohibition on brokering services in relation to military goods set out in Article 2(2)(a) of Decision 2014/512/CFSP was not implemented by Regulation 833/2014.

37. The Council’s explanation as to why that prohibition was not implemented in an Article 215 regulation was the following. Exports of arms is a matter of Common Position 2008/944/CFSP,²⁵ which regulates all such exports, and not only those towards countries in relation to which the European Union has imposed an arms embargo. It provides that Member States must issue a licence for any export of military equipment. Therefore, nobody can export arms from the European Union without a licence obtained by the body established for that purpose in each Member State. That same common position obliges Member States to deny a licence for an arms export, inter alia, if the export is inconsistent with an arms embargo that is binding on Member States.²⁶ To facilitate the application of that common position, a Common Military List of the European Union was adopted.²⁷ All goods on that list are subject to export controls under Common Position 2008/944/CFSP.²⁸

²¹ Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1). That regulation has been amended many times, most recently by Council Regulation (EU) 2023/1214 of 23 June 2023 (OJ 2023 L 159 I, p. 1).

²² Originally, the prohibition on brokering services related to dual-use goods and technology (Article 4(1)(c), now Article 2(2)(a), of Regulation 833/2014). With subsequent amendments of that regulation, the prohibition on brokering services has been extended to, inter alia, goods contributing to Russia’s military, technological and industrial capabilities (Articles 2a and 3k), firearms (Article 2aa), oil and gas-related goods (Articles 3, 3b, 3m and 3n), aviation and space-related goods (Article 3c), maritime-related goods (Article 3f), iron and steel (Article 3g), luxury goods (Article 3h) and gold (Article 3o).

²³ See Regulation 2023/1214, cited in footnote 21 to this Opinion, Article 1(19).

²⁴ That provisions now reads: ‘to provide, directly or indirectly, technical assistance *and brokering services* related to the goods and technology listed in the Common Military List, or related to the provision, manufacture, maintenance and use of goods included in that list, to any natural or legal person, entity or body in Russia or for use in Russia’ (emphasis added).

²⁵ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (OJ 2008 L 335, p. 99). Generally, under Article 1 of that common position, Member States must assess export licence applications (which include, inter alia, applications for brokering licences) for items on the EU Common Military List on a case-by-case basis according to several (eight) criteria listed in Article 2 thereof.

²⁶ See Article 2(1)(a) of Common Position 2008/944/CFSP.

²⁷ See Article 12 of Common Position 2008/944/CFSP. The EU Common Military List was originally agreed in 2000 (OJ 2000 C 191, p. 1), and has been subsequently updated numerous times, most recently on 20 February 2023 (OJ 2023 C 72, p. 2).

²⁸ However, that common military list is also used for other purposes, including outside of the CFSP. See, for example, Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (OJ 2009 L 146, p. 1), as amended most recently by Commission Delegated Directive (EU) 2023/277 of 5 October 2022 (OJ 2023 L 42, p. 1).

38. That general system regulating arms exports is, as explained by the Council, the reason why prohibitions of direct arms exports to countries under sanctions (arms embargoes) are not included in Article 215 regulations. The adoption of such regulations is necessary whenever the enforcement of restrictive measures requires the imposition of an obligation on individuals in the Member States, as such an obligation cannot be imposed directly by a CFSP decision itself. However, as all Member States had to create licensing systems and oblige all arms exporters on their territory to obtain such a licence, there is no need for an Article 215 regulation.

39. However, the Council considers that Common Position 2008/944/CFSP does not clearly require Member States to impose licencing obligations for brokering services in relation to military goods, even though Article 1(2) thereof provides that export licence applications also include applications for brokering services.²⁹ That is why the practice varies, as it is sometimes deemed necessary, and sometimes not, to implement the prohibition on brokering services in relation to military goods by an Article 215 regulation.³⁰

40. Even if I do not find the Council's explanation convincing, that does not change the fact that the prohibition on brokering services in relation to military goods was not included in Regulation 833/2014 in the version applicable to the present case.

B. Reformulation of the questions and the Court's jurisdiction

41. The Tribunalul București (Regional Court, Bucharest) framed its preliminary questions as a matter of interpretation of certain provisions of Decision 2014/512/CFSP. However, as is clear from its explanation as to why it referred, that court essentially seeks the Court's guidance regarding the compatibility of national implementing measures with EU fundamental rights and principles.

42. Romanian law chose to sanction persons who engage in brokering services contrary to EU restrictive measures by an administrative fine and confiscation of the entire gain resulting from the prohibited transaction as a civil law sanction. Those sanctions are the choice made by the national legislator in application of EU restrictive measures, including those imposed against Russia. Such measures are not required by Decision 2014/512/CFSP, nor does any participant to these proceedings claim that they are.

43. Thus, the first two questions, even if framed as asking for an interpretation of certain provisions of Decision 2014/512/CFSP, do not in fact require an interpretation of that decision. Instead, they require that the Court interpret certain principles of EU law to which the national court refers, namely legal certainty, *nulla poena sine lege* and the right to property.

44. I, therefore, propose to reformulate the first two questions referred.

²⁹ The Council also explained that, in its view, the situation relating to brokering services is not more clear under Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering (OJ 2003 L 156, p. 79).

³⁰ Indeed, it appears that there are at present several EU restrictive measures (Central African Republic, Democratic Republic of the Congo, Iran, North Korea, South Sudan, Sudan, terrorism (restrictive measures with respect to ISIL (Da'esh) and Al-Qaeda) and Venezuela), in which there are provisions setting out a prohibition on brokering services related to military goods in both the CFSP decision and the Article 215 regulation. In contrast, for a number of other EU restrictive measures (Belarus, Lebanon, Myanmar (Burma) and Zimbabwe), such a prohibition on brokering services related to military goods is only found in the CFSP decision, and not in the Article 215 regulation.

45. The first question in essence asks whether the principles of legal certainty and *nulla poena sine lege* and the fundamental right to property are to be interpreted as precluding national measures providing for the confiscation of the entire proceeds of the transaction prohibited by Article 2(2)(a) of Decision 2014/512/CFSP.

46. The second question in essence asks whether those EU rights and principles are to be interpreted as precluding national measures providing that such confiscation is automatic and follows from a breach of the obligation to notify a transaction falling within the scope of Article 2(2)(a) of Decision 2014/512/CFSP.

47. The third question requires an interpretation of Decision 2014/512/CFSP itself, as it relates to the notion of brokering services that it prohibits.

48. I do not see any obstacles preventing the Court from answering the first two questions as reformulated. The Court has jurisdiction to interpret general principles of EU law and fundamental rights as expressed in the Charter. That is so, even if the Court's interpretation is relevant for the assessment by a national court of the lawfulness of national measures that implement the CFSP.

49. As I suggested in my Opinion in the *KS and KD* cases,³¹ the Court would have jurisdiction to interpret general principles of EU law and fundamental rights as expressed in the Charter also when that interpretation is relevant for the assessment of the lawfulness of the CFSP decision. That is not the situation in this case. However, had Decision 2014/512/CFSP itself imposed confiscation as a measure to be implemented by Member States, the reference by a national court would be a reference asking about the validity of a CFSP measure. The Court's jurisdiction to hear such a reference is not excluded by Article 24(1) TEU and Article 275 TFEU.

50. The reason I have proposed such an interpretation of Article 24(1) TEU and Article 275 TFEU is because they are an exception to the Court's general jurisdiction under the Treaties and must be interpreted narrowly.³² If so interpreted, those Treaty provisions do not exclude the Court's jurisdiction to review compliance of all CFSP measures, including those of general application, with fundamental rights protected under the EU legal order. To interpret Article 24(1) TEU and Article 275 TFEU as excluding the Court's jurisdiction in such cases would not be consistent with the constitutional foundations of the European Union. It would deprive the Court of its constitutional role to ensure that the EU institutions and bodies do not infringe fundamental rights guaranteed by the EU legal order. It would therefore leave individuals without effective judicial protection of their EU-based fundamental rights. That could not have been the intention of the authors of the Treaties when they limited the Court's jurisdiction in the CFSP.

51. In contrast, it could have been the intention of the authors of the Treaties to exclude the Court's jurisdiction to interpret CFSP measures merely in order to clarify their meaning for the purpose of their application in the Member States. Article 24(1) TEU and Article 275 TFEU should therefore be interpreted so as to exclude such jurisdiction. I will explain this position in more detail in my answer to the third question.

³¹ See points 53 to 155 of my Opinion in the *KS and KD* cases.

³² That was recognised by the Court in the judgments of 24 June 2014, *Parliament v Council* (C-658/11, EU:C:2014:2025, paragraph 70; '*Mauritius*'); of 12 November 2015, *Elitaliana v Eulex Kosovo* (C-439/13 P, EU:C:2015:753, paragraph 42); and of 19 July 2016, *H v Council and Others* (C-455/14 P, EU:C:2016:569, paragraph 40).

C. The first and second questions

52. The first two questions relate to the potential unlawfulness of the confiscation measures imposed by Romanian law. There are three possible reasons of such unlawfulness that were raised by the referring court: breach of the principle of legal certainty, the principle of *nulla poena sine lege* and the right to property.

53. To my mind, and as indicated by the Commission, those first two principles are not relevant in the present case.

54. The principle of legal certainty, in the sense in which it was relied upon by Neves, precludes a new rule of law applying retroactively to a situation acquired before its entry into force.³³ In the present case, Neves contends that Decree No 901/2019, by which Romania established the list of military goods, transposing in that way the EU list, was not yet in force at the time when it entered into the transaction relating to the radio sets at issue. However, Decree No 901/2019 contains a list of military goods that is identical to the list set out in Decree No 156/2018, which was in force at the relevant time. Therefore, no problem of retroactive application of the law arises in the present case.

55. The principle of *nulla poena sine lege* relates to the legality and foreseeability of criminal offences and penalties.³⁴ Given that the confiscation imposed by the national measures is not a criminal penalty, but a civil law sanction, I fail to see how that principle could be implicated in the present case.

56. However, confiscation certainly interferes with the right to property, as guaranteed by Article 17(1) of the Charter. That right is not absolute and may, as provided for by Article 52(1) of the Charter, be limited in a proportionate way in order to achieve legitimate public aims.

57. To assist the referring court, it is necessary to interpret the Charter in order to clarify whether the right to property may be limited in order to achieve public objectives of Decision 2014/512/CFSP.

58. A similar question was already considered by the Court in *Rosneft*.³⁵ In that case, the Court rejected a challenge to the validity of certain provisions of Decision 2014/512/CFSP imposing individual restrictive measures and the corresponding provisions of Regulation 833/2014, which had been raised on the ground that they permitted the confiscation of assets and interference with property rights. The Court recalled its judgment in *Bosphorus*,³⁶ in which it considered that restrictive measures, by definition, have consequences which affect rights to property and the freedom to pursue a trade or business, which in that case allowed for their justification even when they caused harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions. The Court concluded in *Rosneft* that such limitations can *a fortiori* be justified with respect to the consequences of targeted restrictive measures on the entities subject to those measures.³⁷

³³ See, for example, judgment of 25 January 2022, *VYSOČINA WIND* (C-181/20, EU:C:2022:51, paragraph 47).

³⁴ See, for example, judgment of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraphs 49 and 50).

³⁵ See *Rosneft*, in particular paragraphs 148 to 151.

³⁶ See judgment of 30 July 1996, *Bosphorus* (C-84/95, EU:C:1996:312, paragraph 22). That judgment was delivered in the context of the implementation of the embargo against the Federal Republic of Yugoslavia (Serbia and Montenegro).

³⁷ *Rosneft*, paragraph 149.

59. In *Rosneft*, the Court further observed that the objectives pursued by the restrictive measures against Russia are the protection of Ukraine's territorial integrity, sovereignty and independence and the promotion of a peaceful settlement of the crisis in that country. Their achievement is part of the wider objective of maintaining peace and international security, in accordance with Article 21 TEU.³⁸ Those objectives were deemed to justify interference with the applicant's right to property.

60. One may thus conclude that the objectives of the restrictive measures against Russia can be a justification for the limitation of the right to property. The next question to be answered is whether confiscation is a proportionate measure to achieve those legitimate aims, and whether it is not overly intrusive to provide for automatic confiscation for the failure to notify a transaction prohibited by those restrictive measures.

61. National measures implementing EU restrictive measures must be such as to enable the achievement of the objectives of the restrictive measures. In that sense, they need to have dissuasive effect. In choosing appropriate measures in that respect, Member States enjoy a margin of appreciation. That is necessary, as the situation in each Member State might differ. Which measures are sufficient to dissuade companies and individuals from engaging in prohibited transactions might require a country-specific answer. To my mind, as the Commission suggested, providing for confiscation in addition to a fine might indeed be necessary because application of the fine alone cannot produce the desired effect given that its amount is negligible in comparison to the amounts received in payment for the prohibited transaction.

62. Even if it may take into consideration national specificities, a national court must also take into consideration the requirements of EU law relating to the assessment of proportionality. In accordance with Article 52(3) of the Charter, for the purposes of interpreting Article 17 of the Charter, it is necessary to take into account the case-law of the ECtHR relating to Article 1 of Protocol No 1 to the ECHR, which establishes the protection of the right to property, as the minimum threshold of protection.³⁹

63. In cases in which the ECtHR found confiscation measures to be disproportionate, it did so because they imposed an excessive burden on individuals, as they did not take into consideration factors such as the lawful origin of the confiscated sums and the fact that an intent to deceive the authorities had been lacking. Another factor in some cases has been whether the confiscation measure had been an additional sanction.⁴⁰

64. In the present case, confiscation is imposed as an automatic measure which arises as a consequence of the failure to notify the prohibited transaction. I can agree that, in principle, automatic confiscation which does not allow a court to assess the circumstances of the case might prove problematic from the point of view of its proportionality. Nevertheless, it seems that

³⁸ *Rosneft*, paragraph 150.

³⁹ See, for example, judgments of 21 May 2019, *Commission v Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 72), and of 5 May 2022, *BPC Lux 2 and Others* (C-83/20, EU:C:2022:346, paragraph 37).

⁴⁰ See, for example, ECtHR, judgment of 15 January 2021, *Karapetyan v. Georgia* (CE:ECHR:2020:1015JUD006123312, § 37). See also, in that regard, for example, ECtHR, judgment of 6 April 2009, *Ismayilov v. Russia* (CE:ECHR:2008:1106JUD003035203, § 35), and ECtHR, judgment of 24 September 2021, *Imeri v. Croatia* (CE:ECHR:2021:0624JUD007766814, § 86). In particular, the ECtHR upheld the imposition of a fine and a confiscation measure in circumstances in which the applicant company had carried out its activities without the required permits under national law: see ECtHR, judgment of 24 April 2017, *S.C. Fiercolect Impex S.R.L. v. Romania* (CE:ECHR:2016:1213JUD002642907, in particular §§ 62 to 73).

Romanian law attaches automaticity of the confiscation to the fact that the *prohibited and thus unlawful transaction* was not notified. Therefore, if a judge finds that the transaction was legal, the automatic confiscation would not follow as a consequence.

65. For that reason, which it is for the referring court to verify, I am of the opinion that the automatic confiscation is a limitation of the right to property which is proportionate to the aim of dissuading persons from breaching restrictive measures against Russia, which were themselves adopted to achieve legitimate public objectives.⁴¹

66. Therefore, I consider that the first and second questions should be answered to the effect that national measures providing for the confiscation of the entire proceeds of a transaction undertaken in breach of Decision 2014/512/CFSP is a proportionate limitation of the right to property. That is so, even if the confiscation is an automatic consequence of the failure to notify the transaction to the competent national authorities.

D. The third question

67. By its third question, the referring court asks whether the prohibition laid down in Article 2(2)(a) of Decision 2014/512/CFSP is applicable where the military goods, which were the subject of brokering transactions, were never physically imported into the territory of a Member State.

68. By this question, the referring court requires that the Court interpret a general provision of a CFSP decision imposing restrictive measures against a third country.

69. The Court has not yet had the opportunity to clarify whether Article 24(1) TEU and Article 275 TFEU exclude such jurisdiction.

70. I am of the opinion that Article 24(1) TEU and Article 275 TFEU indeed exclude the Court's jurisdiction to interpret provisions of CFSP measures in order to clarify their meaning.

71. Such an interpretation is consistent with the purpose of the limitation of jurisdiction set out in those two Treaty provisions. By those provisions, the authors of the Treaties essentially sought to exclude the Court from policy-making in the CFSP. If the Court can choose between several possible meanings of a legal rule, it necessarily influences the policy choice made by the author(s) of that legal rule. That is so, even if judicial interpretation is constrained, among other things, by the need to interpret a rule in conformity with the intention of its author(s). Such intention is not always obvious, which means that it itself becomes a matter of judicial interpretation.⁴²

72. Is such a position in contradiction with my understanding that the Court can assess compliance with fundamental rights of all CFSP measures, including those of general application (see points 49 and 50 of this Opinion)? After all, the intellectual steps to be taken in judicial review require an understanding of the rule that is being interpreted and the rule in relation to which it is interpreted. Therefore, when the Court assesses the conformity of a CFSP measure with the Charter, it need not only interpret the Charter, but also the CFSP rule whose lawfulness is being

⁴¹ Additionally, the Commission indicated that, in the present case, automatic confiscation had been imposed on Neves for the deliberate failure, after being warned, to comply with the obligation in national law not to carry out the transaction without prior notification to the competent authorities.

⁴² See point 112 of my Opinion in the *KS and KD* cases.

assessed. Nevertheless, no such contradiction arises if one accepts that, in carrying out a review of lawfulness, the Court is bound by the meaning attributed to the reviewed measure by its author, which submits it either as a party in a direct action before the Court or as a participant in the preliminary ruling procedure. What the Court is allowed to assess, notwithstanding the jurisdictional limitation under Article 24(1) TEU and Article 275 TFEU, is whether a CFSP rule as understood by its author is permitted in the light of EU fundamental rights and principles.

73. On the contrary, when the Court is seised in the preliminary ruling procedure, as in the present case, with a request to explain the meaning of a CFSP rule which is not clear to the referring court, it is faced with a rule to which different meanings may necessarily be attributed. In that procedure, the meaning advocated by the author(s) of the rule is only one possible meaning, with other participants having different views. The preliminary ruling procedure, therefore, requires that the Court decide which is the ‘correct’ meaning.

74. One may justifiably ask why should the Court follow the meaning proposed by the author of a rule when assessing that rule’s lawfulness, but be able to attribute a meaning to the rule different from the one offered by its author when interpreting it in the preliminary reference procedure?

75. The reason lies in the different purpose of the two types of jurisdiction carried out by the Court. The assessment of lawfulness of a CFSP measure (whether, for example, in actions for annulment, preliminary rulings on validity or actions for damages) aims at establishing that a rule having the meaning intended by the Council cannot be accepted in the EU legal order. In other words, the Court cannot second-guess what the Council meant, but it can check whether what the Council meant is in conformity with EU fundamental rights and principles.

76. In contrast, in the context of a reference for a preliminary ruling on interpretation, this concerns the meaning of the rule as it was understood by different actors, such as its author(s), the parties to the main proceedings and the referring court itself. After the rule leaves the decision-making process, it acquires a ‘life of its own’, so to speak. If it is possible to attribute multiple meanings to the rule in its application (and this is possible only if those attributed meanings are not contrary to EU fundamental rights and principles), there is no reason why one meaning should prevail over another. For the sake of uniformity, the EU constitutional order vested the Court with the power to choose one of the possible meanings. That power was excluded in the CFSP.

77. This jurisdictional limitation necessarily comes with a price for the uniformity of CFSP law. Inasmuch as the notion of brokering services may be interpreted in different ways, it may acquire one meaning in the courts of one Member State and a different meaning in the courts of another Member State. Nevertheless, it must be assumed that the authors of the Treaties accepted the possibility of such divergences when limiting the Court’s jurisdiction by Article 24(1) TEU and Article 275 TFEU. It is possible that the authors of the Treaties preferred such divergences to be resolved by political, and not judicial, mechanisms. If the role of ensuring uniformity is to be given to the Court, in the way in which it enjoys it under the FEU Treaty, the jurisdictional limitation based on those two provisions will have to be removed by amendment of the Treaties.

78. If, however, a CFSP decision is implemented not by the Member States, as in the present case, but by the European Union through an Article 215 regulation, the Court will enjoy full interpretative jurisdiction in respect of that regulation and can exercise it through the

preliminary ruling procedure.⁴³ An Article 215 regulation is a FEU Treaty measure by which the European Union chooses the meaning to attribute to a rule of a CFSP decision. As it might not be clear which meaning the EU chose, the Court is, under the Treaties, given the task to clarify this in order to ensure the uniform application of that regulation.

79. More concretely, that would mean that, had Regulation 833/2014 implemented Article 2(2)(a) of Decision 2014/512/CFSP in full by including the prohibition on brokering services in relation to military goods, it would be for the Court to interpret whether the notion of brokering services covers transactions relating to goods which were never physically imported into the territory of a Member State. However, the Court's interpretation would only concern that regulation, and not that CFSP decision.

80. In that sense, the Commission's argument that the Court has jurisdiction to interpret Decision 2014/512/CFSP because the prohibition on brokering services in relation to military goods should have been implemented through Regulation 833/2014 cannot be accepted. Even if it were true that the Council erroneously did not include brokering services in an Article 215 regulation, the interpretation of the notion of brokering services contained in such regulation would not affect the meaning of that term in the CFSP decision. For that reason, it is not necessary to analyse whether the obligation to implement the prohibition on brokering services in relation to military goods existed under the Treaties.

81. On the basis of the foregoing, I propose that the Court find that it lacks jurisdiction to answer the third question.

IV. Conclusion

82. I propose that the Court answer the questions referred for a preliminary ruling by the Tribunalul București (Regional Court, Bucharest, Romania) as follows:

The principle of legal certainty, the principle of *nulla poena sine lege* and the fundamental right to property do not preclude national measures providing for the confiscation of the entire proceeds of a transaction undertaken in breach of Decision 2014/512/CFSP. That is so, even if the confiscation is an automatic consequence of the failure to notify the transaction to the competent national authorities.

The Court of Justice does not have jurisdiction to give a ruling on the third question.

⁴³ See, in that respect, *Rosneft*, paragraph 106.