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**Judicial review of EU restrictive measures
against individuals**

Master's thesis

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Introduction

Restrictive measures, also known as sanctions, are a tool of the EU's policy used to achieve the objectives of preserving peace and international security, preventing terrorism or fighting against nuclear proliferation, as well as supporting democracy, the rule of law, and human rights.¹ Most prominently, the EU does not only engage broad economic sanctions targeting third countries, but makes use of "smart sanctions" aimed at specific individuals.² Those restrictions may comprise of asset freezes, travel bans, trade restrictions, or other limitations placed on certain businesses.

Following the commencement of Russia's aggression against Ukraine in February of 2022, the topic of restrictive measures has found itself at the centre of extensive academic debate. The EU adopted the most wide-spread sanctions regime in its history.³ As of April 2024, thirteen packages of restrictive measures have been adopted against Russia, with almost two thousand natural persons and over four hundred entities targeted.⁴ Hundreds of individuals have been sanctioned also with respect to the involvement of Belarus in Russia's aggression.⁵ Moreover, 51 other EU sanctions regimes are currently in place.⁶

The effect of those targeted sanctions on the rights of individuals comes with the inevitable consequence of abundant litigation before the Court of Justice of the EU, which has been served with an unprecedented number of nearly one hundred applications challenging the restrictive measures imposed.⁷ Consequently, the Court once again finds itself navigating the comprehensive issues that arise with respect to their judicial review. Restrictive measures may be adopted as part

¹ WOUTERS, Jan et al. EU Sanctions. In: WOUTERS, Jan et al. *The Law of EU External Relations*. Oxford University Press, 2021, p. 177. DOI: 10.1093/oso/9780198869481.003.0006; WIMMER, Michael. Inward and Outward-Looking Rationales behind Kadi II. *Maastricht Journal of European and Comparative Law*. 2014, vol. 21, no. 4, p. 677.

² For the sake of simplicity, throughout this thesis, I will use the term "individuals" with reference to natural and legal persons, as well as groups and other non-state entities.

³ LONARDO, Luigi. Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy. *Cambridge Yearbook of European Legal Studies*. 2023, pp. 2–3.

⁴ European Council and the Council of the European Union, EU sanctions against Russia, available at: <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/#individual>. [Accessed on 24 April 2024]

⁵ 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 L 78, 17.3.2014, p. 16–21; Council Regulation (EU) 2022/398 of 9 March 2022 amending Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine, OJ L 82, 9.3.2022, p. 1–8.

⁶ For a comprehensive overview of the current sanctions regimes, see the European Commission Sanctions Map, available at: <https://sanctionsmap.eu/#/main>. [Accessed on 24 April 2024]

⁷ See, for example, T-1106/23 Vinokurov v Council, pending; T-1107/23 Timchenko v Council, pending; or T-1116/23 Khudaverdyan v Council, pending.

of the EU's Common Foreign and Security Policy, as well as part of action within the Area of Freedom, Security and Justice, the provisions on which provide for a specific legal basis for counterterrorism measures.⁸ This thesis intends to focus on CFSP sanctions, however, the issue of their relationship with AFSJ sanctions will also be addressed.⁹ The CFSP is distinct from other areas of EU policy by its political nature and traditionally limited competences of the Court within its realms. Thus, when reviewing targeted sanctions, the Court is faced with a unique challenge. On one hand, it must respect the EU's policy choices and the constitutional restraints placed on judicial powers over them, and on the other, it must ensure that sufficient protection is provided to the fundamental rights of targeted persons. Since the majority of the 2022 Russia sanctions cases remain pending, it is instructive to analyse these issues by examining the principles which have been developed by the Court in existing case law.

The aim of this master's thesis is to explore the manner and intensity in which the Court reviews restrictive measures imposed onto individuals, as well as the requirements it places onto the Council when it adopts those measures. By that analysis, it seeks to assess whether that review may be considered as a sufficient safeguard of the rights of the affected individuals.

This thesis is divided into five chapters. Chapter 1 provides an introduction into the legal framework of restrictive measures, and Chapter 2 gives a short overview of the types of EU restrictive measures employed against individuals. The third and fourth chapters then form the main body of this thesis. In Chapter 3, a comprehensive analysis is conducted of the procedural means of judicial protection which targeted individuals have at their disposal, addressing issues of the Court's jurisdiction over restrictive measures which have arisen in case-law. Chapter 4 then explores the standards of review which the Court applies when assessing the legality of sanctions imposed onto individuals. Finally, Chapter 5 considers the question of the Court's approach to balancing restrictive measures with the protection of selected fundamental rights, including the rights of defence and specific substantive rights.

The main research methods employed in this thesis are the descriptive method (mainly Chapters 1 and 2), analysis and synthesis (Chapters 1 and Chapters 3 through 5), as well as the comparative method (mainly Chapter 4).

⁸ See Article 75 TFEU.

⁹ See Chapter 1.4.

1. The legal framework of restrictive measures

EU restrictive measures are governed by two key sets of rules contained in the Treaties: Article 29 TEU and Article 215 TFEU. Therefore, the process of adoption of sanctions has two steps. First, the Council adopts a CFSP decision, based on Article 29 TEU. This step is part of the EU's external action and comprises of the Member States defining their position to a particular matter falling within the scope of the CFSP, including possible economic and financial sanctions.¹⁰ Second, the Council issues a regulation under Article 215 TFEU, which serves as a means to implement the CFSP decision.¹¹ Specifically, Article 215 provides for sanctions against third countries and sanctions against individuals.¹²

A distinct legal basis for the adoption of restrictive measures is also laid down by Articles 75 TFEU and encompasses measures enacted with the purpose of combatting terrorism, both inside and outside of the Union. These measures form part of the EU's action in the AFSJ and involve joint legislative power of the Council and the European Parliament.¹³ While the focus of this thesis will be on restrictive measures adopted within the CFSP framework, the delimitation between those measures and EU action within the AFSJ will be touched upon below, as it has shown to be a rather controversial matter.¹⁴

In this chapter, I aim to introduce the legal framework of EU restrictive measures against individuals. First, I will briefly address the legal basis for adopting restrictive measures before the Treaty of Lisbon, as much of the landmark case-law explored later in this thesis comes from pre-Lisbon times. Second, I will further elaborate on the content and function of the fundamental provisions of Article 29 TEU and Article 215 TFEU. Third, I will address selected issues arising out of the distinct nature of the CFSP, and finally, the question of delimitation between the sanctions regimes provided for by the CFSP the AFSJ provisions.

1.1. EU restrictive measures before the Treaty of Lisbon

The procedure for the adoption of restrictive measures based on Article 29 TEU and Article 215 TFEU was implemented into the EU legal framework by the Treaty of Lisbon, which entered

¹⁰ EECKHOUT, Piet. *EU External Relations Law*. Oxford University Press, 2011, p. 494.

¹¹ ECKES, Christina. EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions. *Common Market Law Review*. 2014, vol. 51, no. 3, p. 880.

¹² CRAIG, P., & DE BÚRCA, G. *EU law: text, cases, and materials* (7th ed.). Oxford University Press, p. 978.

¹³ *Ibid.*

¹⁴ *See* Chapter 1.4.

into force on 1 December 2009.¹⁵ However, up until that point, EU sanctions policy had already gone through substantial evolution. The beginning of EU action in the area of sanctions can be found in the 1980s, in which the European Political Cooperation framework, the predecessor of the CFSP, emerged.¹⁶ Before the European Political Cooperation, Member States relied on the so-called Rhodesia doctrine based on Article 296 TEC (now Article 347 TFEU),¹⁷ providing that each Member State could implement economic sanctions against third countries under their own national rules.¹⁸ The main aim of the European Political Cooperation was to provide a platform for consultation among the Member States on foreign policy issues,¹⁹ which evolved into a practice of adoption of sanctions regulations on the basis of Article 133 TEC (now Article 207 TFEU) enshrining the common commercial policy.²⁰ The adoption of common commercial policy regulations consisted of two simple steps: a Commission proposal and a qualified majority vote in the Council.²¹

With the adoption of the TEU in 1992,²² a distinct procedure for the adoption of economic sanctions was inserted into the EC Treaty.²³ That procedure was enshrined in Article 301 EC, which read as follows: „*[w]here it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.*” The corresponding Article 60 EC was also inserted into the provisions governing the free movement of capital and payments. Paragraph 1 of that article stated: “*[i]f, in the case envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the*

¹⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

¹⁶ EECKHOUT, Piet. *EU External Relations Law*, p. 503.

¹⁷ Article 347 TFEU reads: “*Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.*”

¹⁸ EECKHOUT, Piet. *EU External Relations Law*, p. 503.

¹⁹ EUR-Lex, Summaries of EU Legislation: Common Foreign and Security Policy, available at: <https://eur-lex.europa.eu/EN/legal-content/summary/common-foreign-and-security-policy.html>. [Accessed on 2 April 2024]

²⁰ EECKHOUT, Piet. *EU External Relations Law*, p. 503.

²¹ Article 207 TFEU.

²² Treaty on European Union, OJ C 191, 29.7.1992, p. 1–112.

²³ EECKHOUT, Piet. *EU External Relations Law*, p. 504.

procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.”

While the procedure envisaged in the EC Treaty exhibits similarities to the two-step procedure now enshrined in the Treaties, the terms “*to interrupt or to reduce economic relations with third countries*” clearly hint that the Community sanction practice focused solely on broad sanctions of economic nature targeting third countries as a whole. This includes mostly trade embargoes, import and export prohibitions, financial sanctions, bans on fund transfers, lending and investment, and sanctions on transport services.²⁴ Moreover, most Community measures implemented UN Security Council Resolutions,²⁵ rather than being of autonomous nature. By contrast, in recent years, the focus has shifted towards what is known as “smart” sanctions, in the sense that they target individuals and entities whose activities support the third-country regime in a certain way, instead of aiming at the state as a whole.²⁶ Consequently, instead of issuing broad embargoes, smart sanctions engage instruments such as asset freezes and travel bans.²⁷

After 9/11, however, the EU began using sanctions against individuals as a tool to combat terrorism.²⁸ Such measures could not be limited to third countries in the sense of the above provision, as it was necessary to target individuals both in and out of the EU. Although the EU continued to use Articles 301 and 60 of the EC Treaty as a legal basis, their strict wording resulted in the necessity of the addition of Article 308 of the EC Treaty,²⁹ also known as the “flexibility clause”.³⁰ The article provided a broad legal basis for situations where EU action should have proved necessary to attain, in the course of the operation of the common market, the objectives of the EU, but the Treaties have not provided for the necessary powers in a specific legal basis. Thus, when such a situation occurred, the Council could unanimously adopt the appropriate measures on proposal by the Commission and after obtaining consent of the Parliament. That being said, an issue arises when looking at the wording of the clause; it refers to action needed to attain objectives

²⁴ KOUTRAKOS, Panos. *EU international relations law*. Oxford: Hart Publishing, 2015, p. 64.

²⁵ EECKHOUT, Piet. *EU External Relations Law*, p. 504.

²⁶ ALÌ, Antonino. The Challenges of a Sanctions Machine: Some Reflections on the Legal Issues of EU Restrictive Measures in the Field of Common Foreign Security Policy. In: ANTONIOLLI, Luisa, Luigi BONATTI and Carlo RUZZA, eds. *Highs and Lows of European Integration*. Cham: Springer International Publishing, 2019, p. 50.

²⁷ EECKHOUT, Piet. *EU External Relations Law*, p. 502.

²⁸ *Ibid.*, p. 505.

²⁹ *Ibid.*

³⁰ Article 308 EC used to read: “*If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.*”

of the EU, i.e. objectives in the former first pillar, not objectives in the former second pillar forming the CFSP.³¹

Indeed, in *Kadi I*,³² the Court held that Article 308 EC could not, on its own, constitute a legal basis for measures falling within the scope of the CFSP.³³ Nevertheless, the Court then accepted that restrictive measures against individuals could be adopted on the basis of Article 308 EC if used in conjunction with Articles 60 and 301 EC. In essence, the Court's reasoning was that since the restrictive measures are of economic and financial nature, and thus fall within the scope *ratione materiae* of Articles 60 and 301 EC, but those provisions do not provide for any powers to impose restrictive measures on addressees which are in no way linked to a third-country regime, the lack of those powers could be "made good" by having recourse to Article 308 EC as a legal basis, in addition to Articles 60 and 301 EC.³⁴ Conversely, the legal successor of Article 308 EC, Article 352 TFEU, now expressly provides in its paragraph 4 that the article cannot serve as a legal basis for attaining objectives pertaining to the common foreign and security policy. Instead, restrictive measures against individuals are now explicitly predicted by Article 215(2) TFEU. That being said, it will be illustrated below that, even after this Lisbon Treaty amendment to the sanctions legal framework, the relationship between restrictive measures targeting third countries and those aimed at combatting terrorism has been subject to discussion before the Court.

Today, the process of adoption of sanctions against individuals operates between the realms of the CFSP and the EU's substantive policy enacted under the TFEU.³⁵ It employs both measures targeted at those linked to the political regimes of third countries and counter-terrorism measures. Typically, CFSP decisions adopted under Article 29 TEU lay down a general framework of restrictive measures, a portion of which is then converted into regulations in line with Article 215 TFEU.

³¹ Under the three-pillar structure, which was in place before the Treaty of Lisbon, the second (CFSP) and third (AFSJ) pillars constituted policies distinct from the general Community policies under the first pillar in many ways. Therefore, a reference to "Community objectives" is read as a reference solely to objectives pursued under the first pillar and not the field of Community external relations. See CRAIG, P., & DE BÚRCA, G. *EU law: text, cases, and materials (7th ed.)*, pp. 315–316.

³² C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008, ECLI:EU:C:2008:461.

³³ *Ibid.*, paras. 200-202.

³⁴ *Ibid.*, para. 216.

³⁵ EECKHOUT, Piet. *EU External Relations Law*, p. 506.

1.2. The fundamental provisions

1.2.1. Article 29 TEU

The first step of the two-tier procedure introduced above comprises of a political decision adopted by the Council under Article 29 TEU, in principle unanimously.³⁶ Article 29 TEU reads: “[t]he Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.” The decision can be proposed by a Member State or the High Representative, possibly with backing from the Commission.³⁷ Essentially, these decisions set out the EU’s political stance on specific issues of foreign policy. Before the Treaty of Lisbon, these types of EU decisions were known as Common Positions and were adopted on the basis of the former Article 15 TEU.³⁸ While CFSP decisions provide guidance, they do not directly enforce sanctions, though they can specify which individuals or groups should be targeted by restrictive measures.³⁹ Therefore, the effect of unanimous enforcement of sanctions by Member States is achieved only by a subsequent decision adopted under Article 215 TFEU, which will be examined below.

That being said, this is not the case unreservedly; as AG Wathelet has pointed out in his Opinion in *Rosneft*, the adoption of a regulation under Article 215 TFEU is not mandatory in so far as restrictive measures against natural or legal persons are concerned.⁴⁰ After all, Article 215 states that “where a [CFSP] decision so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.” Consequently, if the adoption of a TFEU regulation is not predicted in the CFSP decision, it is possible to adopt restrictive measures against individuals simply by way of that CFSP decision. This is the case especially with respect to travel bans, which are normally

³⁶ The requirement of unanimity is provided for by Article 31(1) TEU, which also provides for some exceptions to that requirement.

³⁷ Article 30(1) TEU.

³⁸ Article 15 TEU used to read: “The Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.”

³⁹ WOUTERS, Jan et al. EU Sanctions. In: WOUTERS, Jan et al. *The Law of EU External Relations*. Oxford University Press, 2021, p. 178.

⁴⁰ C-72/15 *Rosneft*, Opinion of Advocate General Wathelet of 31 May 2016, ECLI:EU:C:2016:381, point 72.

confined to Article 29 measures,⁴¹ leaving the Member States to ensure their enforcement in accordance with their national rules.⁴²

1.2.1. Article 215 TFEU

When the Article 29 TEU decision provides so, restrictive measures are set in motion through Council regulations adopted on the basis of Article 215 TFEU. These regulations ensure that Article 29 TEU decisions are applied uniformly in all Member States.⁴³ They are adopted by a qualified majority in the Council after a joint proposal from both the High Representative and the Commission.⁴⁴ Interestingly, the Court has determined in the *Al Quaeda sanctions* case that the joint proposal criterion is met even if the High Representative simply agrees with the Commission's proposal, without offering additional reasons or enhancing the Commission's initial proposition.⁴⁵ When determining the specifics and breadth of sanctions, the Council is afforded considerable discretion; sanctions can range from arms embargoes and travel restrictions to financial sanctions such as asset freezes.⁴⁶

Article 215 TFEU provides for two different types of restrictive measures: paragraph 1 governs sanctions imposed directly against third countries, whereas paragraph 2 provides for sanctions against natural and legal persons and groups or non-state entities, i.e. sanctions against individuals.

1.2.1.1. Article 215(1) TFEU: third country sanctions

Article 215(1) TFEU enshrines so-called third country sanctions and reads as follows: “[w]here a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.”

⁴¹ EECKHOUT, Piet. EU External Relations Law, p. 506.

⁴² See, for example, Council Decision 2011/486/CFSP of 1 August 2011 concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan, OJ L 199, 2.8.2011, p. 57–72, Article 3.

⁴³ C-72/15 Rosneft, Judgment of 28 March 2017, ECLI:EU:C:2017:236, para. 89.

⁴⁴ Article 215(1) TFEU.

⁴⁵ C-130/10 Parliament v Council, Judgment of 19 July 2012, ECLI:EU:C:2012:472, para. 105.

⁴⁶ WOUTERS, Jan et al. EU Sanctions, p. 178.

The provision is a successor of Article 301 EC analysed above.⁴⁷ Much like the former provision, Article 215(1) TFEU speaks of the interruption or reduction of economic and financial relations with third countries. Before this Article was entered into the EU legal order by virtue of the Lisbon Treaty, the concept of targeting third countries had been interpreted broadly by the Court, which ruled in *Kadi I* that the concept may include the rulers of those countries, as well as individuals and entities associated with or controlled by them.⁴⁸ Such reading clearly creates confusion as to the post-Lisbon distinguishment between the first and second paragraph of Article 215. However, this was later clarified by the Court when it held that the provision may only serve as a legal basis for measures directed against the leaders of the states and the persons associated with those leaders.⁴⁹ By contrast, individuals which are not directly connected to the country's leadership may only be targeted with sanctions adopted under paragraph 2.⁵⁰ This requirement ensures the existence of a sufficient link between the persons concerned and the state targeted.⁵¹ The Court has acknowledged the existence of such a sufficient link for example with regard to individuals holding senior posts in the military, police or security operations,⁵² or, in some cases, even leading businessmen in the country concerned.⁵³ By contrast, the sole existence of a family connection with persons associated with the leaders of the country concerned, irrespective of the personal conduct of the person himself, cannot on its own establish a link with state's regime.⁵⁴

As follows, in order for it to be possible for restrictive measures adopted under Article 215(1) TFEU to target specific individuals, those individuals must have a connection with the targeted third country which is "quite obvious".⁵⁵ In this respect, I refer to Chapter 4.2.2. below, in which I further analyse the requirement of the existence of a sufficient link.

1.2.1.1. Article 215(2) TFEU: sanctions against individuals

Article 215(2) TFEU reads: "*[w]here a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or*

⁴⁷ See Chapter 1.1. See also ECKES, Christina. *EU restrictive measures against natural and legal persons*, p. 15.

⁴⁸ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, para. 166.

⁴⁹ C-330/15 P *Tomana and Others v Council and Commission*, Judgment of 28 July 2016, ECLI:EU:C:2016:601, para. 46; C-376/10 P *Tay Za v Council*, Judgment of 13 March 2012, ECLI:EU:C:2012:138, paras. 63-54.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² C-330/15 P *Tomana and Others v Council and Commission*, para. 84.

⁵³ C-376/10 P *Tay Za v Council*, paras. 55, 61-62, 70.

⁵⁴ C-376/10 P *Tay Za v Council*, para. 66.

⁵⁵ *Ibid.*, para. 92.

non-State entities. “ This paragraph allows the Council to adopt restrictive measures against natural or legal persons, as well as groups or non-State entities, in cases not falling into the categories which may be targeted under the previous paragraph.⁵⁶ In particular, the measures concerned are precisely those which, before the Treaty of Lisbon entered into force, required the flexibility clause of Article 308 EC to be included in their legal basis in cases that their addressees were not sufficiently linked to the governing regime of a third country.⁵⁷ Indeed, as noted by Advocate General Bot, the contribution of adding this provision is to supplement the EU’s “legal arsenal” enabling it to adopt restrictive measures against such individuals on a specific legal basis, therefore making the recourse to the flexibility clause unnecessary.⁵⁸ Moreover, as will be discussed in Chapter 1.4. below, Article 215(2) may serve as a legal basis for restrictive measures aimed at specific individuals associated with terrorism.

1.3. The legal nature of the CFSP and its implications in the field of restrictive measures

I consider it necessary to briefly examine the very particular nature of the CFSP. Its peculiarities have a significant impact not only on EU action within the field of restrictive measures, but, more importantly for the purpose of this thesis, on the Court’s competences within that field. Despite the abolition of the three-pillar mechanism⁵⁹ which strictly separated the EU’s external action from the rest of its policies, the CFSP remains subject to specific rules distinct from other areas of EU competence.⁶⁰ Due to the largely political nature of decisions adopted under the CFSP and the corresponding broad discretion of the EU institutions in adopting them,⁶¹ their legal framework remains significantly intergovernmental. This intergovernmental nature is prominent, *inter alia*, in two respects. First, the adoption of legislative acts within the CFSP is excluded. And second, EU courts have very limited jurisdiction with respect do decisions adopted under CFSP provisions.

The exclusion of legislative action within the CFSP is contained in the TEU not once, but twice: in Article 24(1) TEU and Article 31(1) TEU. Such an imperative exclusion may be

⁵⁶ WOUTERS, Jan et al. *EU Sanctions*, p. 179.

⁵⁷ C-330/15 P *Tomana and Others v Council and Commission*, para. 38.

⁵⁸ C-130/10 *European Parliament v Council*, Opinion of Advocate General Bot if 31 January 2012, ECLI:EU:C:2012:50, point 52.

⁵⁹ See note 31 above.

⁶⁰ BARTOLONI, Maria Eugenia. “Restrictive Measures” Under Art. 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the Bank Refah Judgment. *European Papers - A Journal on Law and Integration*. 2021, vol. 2020 5, p. 1360.

⁶¹ CREMONA, Marise. Structural Principles and their Role in EU External Relations Law. *Current Legal Problems*. 2016, vol. 69, no. 1, p. 35.

understood in two ways. Either the ordinary⁶² and special⁶³ legislative procedures enshrined in the TFEU do not apply to the CFSP, or all general normative action is excluded within the framework of the CFSP.⁶⁴ Some authors have leaned towards the latter, the main argument being that the exclusion of the Parliament's decision-making power, and therefore the absence of direct representation of EU citizens, must preclude any normative action which purports to create rights and obligations for individuals.⁶⁵ A similar view was expressed by Advocate General Wahl in his opinion in *H*, where he stated that the EU is not meant, in the field of CFSP, to adopt acts that lay down general abstract rules creating rights and obligations for individuals.⁶⁶

I consider that this interpretation cannot be reconciled with the practice of EU restrictive measures. First, in Chapter 1.2.1., I have mentioned that it is possible to provide for restrictive measures against individuals solely on the basis of an Article 29 TEU Council decision. And second, it is common practice that even when an Article 215 TFEU regulation is adopted, that regulation merely reproduces the content of the CFSP decision, and it is the latter which already provides for a list of persons which are to be subject to the restrictive measures.⁶⁷ Thus, sanctions which certainly directly affect the rights of individuals are adopted within the CFSP framework, despite that being done in a non-legislative procedure. That alone may raise doubts; deciding on individual rights by purely executive action, and without involving the Parliament as a representative of those individuals, is unconventional, to say the least. Even the legal basis for adopting counterterrorism restrictive measures within the AFSJ, Article 75 TFEU, provides for a legislative procedure involving the Parliament.⁶⁸ Thus, it seems incomprehensible why the Parliament is left out of deciding on measures of the same character, only falling within a different policy. The reason for that must be that, as explained above, the Lisbon Treaty merely retained the original legal basis for sanctions that was originally designed for third-country sanctions only,⁶⁹ without giving second thought to whether its use for smart sanctions targeted at individuals should call for the involvement of the democratic legitimacy of the Parliament.

⁶² See Article 294 TFEU.

⁶³ See Article 289(2) TFEU.

⁶⁴ EECKHOUT, Piet. *EU External Relations Law*, p. 479.

⁶⁵ Ibid.; LONARDO, Luigi. *Challenging EU Sanctions against Russia*, p. 5.

⁶⁶ C-455/14 H v Council and Commission, Opinion of Advocate General Wahl of 7 April 2016, ECLI:EU:C:2016:212, point 37.

⁶⁷ See, for example, C-72/15 Rosneft, paras. 87-90.

⁶⁸ See Chapter 1.4.

⁶⁹ See Chapter 1.1.

As a matter of fact, this reality of CFSP decisions encroaching on individuals' rights is dealt with by the Treaties, specifically by the provisions relating to the Court's jurisdiction in the CFSP. As enshrined in Article 24(1) TEU and Article 275 TFEU, the Court of Justice in principle lacks jurisdiction over decisions adopted within the CFSP. However, two significant exceptions are provided for by those provisions. The first exception entails the Court's power to monitor compliance with Article 40 TEU,⁷⁰ which essentially requires the Court to ensure that the appropriate legal basis is used,⁷¹ i.e. that the decision taken within the CFSP indeed falls within the scope of that policy. The second exception then explicitly provides for jurisdiction with respect to the review of the legality of restrictive measures against natural or legal persons. This exception is essential to this thesis, and its scope will be subject to deep analysis in Chapter 3. That being said, at this point, I will use it to illustrate the issue raised above: indeed, if the theory were accepted that CFSP decisions cannot produce legal effects onto individuals, the provisions of Article 24(1) TEU and Article 275 TFEU would be directly at odds with this approach. Since those provisions state that the Court may review the legality of CFSP decisions providing for restrictive measures against individuals, they implicitly confirm that decisions affecting the rights of individuals may be adopted within the CFSP.

It follows that the only permissible conclusion to be drawn is that generally, normative action producing legal effects on individuals cannot be taken solely on the basis of CFSP provisions. This limitation to purely executive action then justifies the exclusion of the possibility of judicial review of such decisions, an exclusion which goes against the principle of the Court's general jurisdiction over the application and interpretation of the Treaties enshrined in Article 19(1) TEU,⁷² as well as the *Les Verts* rule⁷³ that no EU institution may avoid review of the conformity of its acts with the basic constitutional charter (then the EC Treaty, now the Treaties).⁷⁴ By contrast, the issue of the effects of CFSP decisions imposing restrictive measures onto individuals is solved by simply

⁷⁰ Article 40 TEU reads: "*The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.*"

⁷¹ CREMONA, Marise. "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 - A Journal on Law and Integration*. 2017, vol. 2017 2, p. 686.

⁷² Article 19(1) reads: "*The Court of Justice of the European Union [...] shall ensure that in the interpretation and application of the Treaties the law is observed.*"

⁷³ C-294/83 *Les Verts v Parliament*, Judgment of 23 April 1986, ECLI:EU:C:1986:166, para. 23.

⁷⁴ C-402/05 P and C-415/05 P *Kadi and Al Barakat*, para. 281.

allowing the Court to review those decisions, in line with the principle of the rule of law enshrined in Article 2 TEU and the principle of effective judicial protection enshrined in Article 47 of the Charter.

After all, this conclusion was essentially also drawn by the Court in the pre-Lisbon case *Segi*,⁷⁵ in which the Court dealt with the possibility of an indirect challenge of validity of a Common Position listing in its annex the applicant as a person allegedly associated with terrorism, and thus subjecting them to restrictive measures.⁷⁶ The Court's jurisdiction to give preliminary rulings on the validity of Common Positions as such was excluded by the former Article 35(1) TEU, which only allowed for preliminary ruling with respect to acts listed in that Common Position.⁷⁷ Reiterating that the principle of the rule of law dictates that all EU institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law,⁷⁸ the Court came to the conclusion that the "acts listed in the Common Position" must be interpreted as any acts adopted by the Council which are intended to produce legal effects in relation to third parties.⁷⁹ Consequently, it held that when the content of a Common Position goes beyond the scope assigned by the Treaty to those acts, and has the result of producing legal effects onto third parties, it must be possible for that act to be subject to the Court's review.⁸⁰

As follows, the fact that an exclusion of judicial review of CFSP measures can only be justified if the CFSP decisions are precluded from giving rise to third-party legal effects was apparent even before the Treaty of Lisbon, which specifically enshrined the possibility of Court review with respect to restrictive measures against natural or legal persons.

1.4. Delimitation between the CFSP and AFSJ policies in the context of restrictive measures against individuals

Finally, the existence of a specific legal basis for counter-terrorism measures, rooted in Article 75 TFEU, has been mentioned in the introduction of this chapter. I have also hinted that while it pursues an objective separate from that of restrictive measures against individuals adopted under Article 215(2) TFEU, their distinction is not always apparent.

⁷⁵ C-355/04 P *Segi and Others v Council*, Judgment of 27 February 2007, ECLI:EU:C:2007:116.

⁷⁶ Council Common Position 2001/931/CFSP of 27 December 2001, on the application of specific measures to combat terrorism, OJ L 344, 28.12.2001, p. 93–96.

⁷⁷ C-355/04 P *Segi and Others v Council*, para. 53.

⁷⁸ *Ibid.*, para. 51.

⁷⁹ *Ibid.*, para. 53.

⁸⁰ *Ibid.*, para. 54.

Article 75 TFEU is located within the provisions on the Area of Freedom, Security and Justice, and provides for the adoption of measures aimed at restricting capital movements and payments with the aim of combatting terrorism.⁸¹ Specifically, it provides for the possibility of the adoption of administrative measures such as the freezing of funds, financial assets or economic gains belonging to, owned or held by natural or legal persons, groups or non-State entities.⁸² This legal basis is distinct from Article 215(2) TFEU in four ways. First, its use does not rely on a link with CFSP provisions and therefore does not presuppose a prior CFSP decision to be adopted as a necessary pre-requisite. Second, it is dedicated specifically to preventing and combatting terrorism, while Article 215(2) TFEU has a much wider scope, which is not explicitly defined. Third, the provision provides a foundation for specific sanctions of freezing funds, financial assets and economic gains, whereas again, Article 215(2) TFEU is worded generally without specifying any particular means. And fourth, the decisions under Article 75 TFEU are adopted in accordance with the ordinary legislative procedure, which encompasses the involvement of the Parliament.⁸³

The issue of the difference between the two legal bases was most significantly discussed by the Court in the *Al Qaeda sanctions case*.⁸⁴ An action for annulment was brought by the Parliament against Council Regulation No. 1286/2009,⁸⁵ which imposed restrictive measures directed against certain persons and entities associated with Usama bin Laden and the Al-Qaeda network. The Parliament questioned the Council's approach of using a CFSP decision adopted pursuant to Article 29 TEU, combined with Article 215(2) TFEU, to implement economic sanctions. The Parliament claimed that the measures should have been taken under Article 75 TFEU, which specifically pertains to economic sanctions imposed with the aim of combatting terrorism.⁸⁶ The motivation behind such claim is evident: as mentioned above, the Parliament bears a decisive role in the legislative procedure surrounding the adoption of Article 75 measures, whereas under Article 215, its impact is severely diminished.⁸⁷

⁸¹ WOUTERS, Jan et al. *EU Sanctions*, p. 179.

⁸² In its entirety, Article 75 TFEU reads: “[w]here necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.”

⁸³ Article 75 TFEU, first paragraph.

⁸⁴ C-130/10 Parliament v Council, para. 59.

⁸⁵ Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L 346, 23.12.2009, p. 42–46.

⁸⁶ C-130/10 Parliament v Council, paras. 12-14.

⁸⁷ BARNARD, Catherine and Steve PEERS, eds. *European Union law*. Oxford New York, NY: Oxford University Press, 2017, p. 756.

However, the Court disagreed with the Parliament's position. First, it referenced the pre-Lisbon *Kadi I* case analysed above, reminding that a bridge had been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty (as it stood before the Lisbon Treaty entered into force) in the sphere of external relations, including the CFSP.⁸⁸ According to the Court, Article 215 TFEU now expressly serves as this bridge, but that is not the case with Article 75 TFEU, which creates no link with decisions taken under the CFSP.⁸⁹ After all, as mentioned above,⁹⁰ the insertion of Article 215(2) TFEU removed doubts regarding the conferral of powers, which inevitably arose following the *Kadi I* ruling that extended the application of Articles 301 and 60 of the EC Treaty to individuals which could not be clearly linked to the government of a third country.⁹¹ Regarding the relationship between the CFSP and AFSJ, while the Court did acknowledge the counterterrorism specificities of Article 75 TFEU, it nevertheless held that its existence does not, on its own, preclude measures aimed at combatting terrorism to be adopted pursuant to Article 215(2) TFEU. In this respect, it articulated that „[w]hile admittedly the combating of terrorism and its financing may well be among the objectives of the area of freedom, security and justice, as they appear in Article 3(2) TEU, the objective of combating international terrorism and its financing in order to preserve international peace and security corresponds, nevertheless, to the objectives of the Treaty provisions on external action by the Union.“⁹² This reasoning was further reinforced by the consideration that the global reach of terrorist activities and the extensive international risk they represent significantly influences the EU's overseas activities, and therefore its foreign policy.⁹³

Thus, the Court ultimately concluded that sanctions imposed were not outside the purview of CFSP action, and affirmed that Article 215(2) TFEU may be used as a legal basis for restrictive measures of economic nature targeting individuals involved in terrorism.⁹⁴ As follows, the *Al Qaeda sanctions* ruling implies that the applicability of Article 75 TFEU to EU anti-terrorist sanctions is somewhat restricted,⁹⁵ and leaves the answer to the question of how to delimit restrictive measures adopted under the two policies still not evident.

⁸⁸ C-130/10 Parliament v Council, para. 59.

⁸⁹ Ibid, para. 59.

⁹⁰ See Chapter 1.2.2.2.

⁹¹ EECKHOUT, Piet. EU External Relations Law, p. 508.

⁹² C-130/10 Parliament v Council, para. 61.

⁹³ Ibid, para. 78.

⁹⁴ Ibid, para. 78.

⁹⁵ CRAIG, P., & DE BÚRCA, G. EU law: text, cases, and materials (7th ed.), p. 979.

2. Types of restrictive measures

For the purposes of the analyses which will be conducted further in this thesis, it is necessary to briefly describe the different types of restrictive measures against individuals which may be adopted by the Council. Sanctions may be divided in the following manner. First, by the origin of the content of the measure, into those implementing UN Security Council Resolutions and those of autonomous EU nature. And second, by the subject who is principally targeted by the measure, into regime sanctions and counterterrorism sanctions.⁹⁶

Regarding the division by origin, where the UN Security Council adopts restrictive measures pursuant to Chapter VII of the UN Charter,⁹⁷ the Council may consider that EU action is necessary to implement that resolution and adopt a CFSP decision which provides for those measures at an EU level.⁹⁸ Throughout this thesis, I will refer to these measures as UN-implemented restrictive measures or sanctions. Conversely, where restrictive measures are adopted without having any basis in a preceding decision of the UN Security Council, and their content is therefore fully within the discretion of the Council, they are considered “autonomous” sanctions,⁹⁹ which is the term that I will use in this thesis.

Regarding the division by subject, there are essentially two categories of EU restrictive measures which differ as to their larger objective. The first of those categories includes what I shall refer to as regime sanctions, meaning that their primary aim is to target the governing regime of a third country. In the context of measures against individuals, this entails the aforementioned “smart sanctions”,¹⁰⁰ which seek to weaken that regime by targeting certain individuals closely connected to it. The second category consists of counterterrorism measures, where the specified individuals themselves are the primary targets, meaning that the measures are directed at specific persons personally involved in or otherwise connected to terrorist acts.¹⁰¹ As I have described in the previous chapter of this thesis, the Court has confirmed that counterterrorism sanctions may indeed be adopted on the basis of Article 29 TEU and Article 215 TFEU.¹⁰²

⁹⁶ WOUTERS, Jan et al. *EU Sanctions*, pp. 189–192.

⁹⁷ *See, for example*, United Nations Security Council Resolution 1267 (1999), regarding restrictive measures adopted against the Taliban.

⁹⁸ *See, for example*, Council Common Position 1999/727/CFSP of 15 November 1999 concerning restrictive measures against the Taliban, OJ L 294, 16.11.1999, p. 1, preamble.

⁹⁹ *See, for example*, 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 L 78, 17.3.2014, p. 16–21.

¹⁰⁰ *See* Chapter 1.1.

¹⁰¹ CREMONA, Marise. “Effective Judicial Review Is of the Essence of the Rule of Law”, pp. 691–692.

¹⁰² *See* Chapter 1.4.

The aforementioned distinguishment of restrictive measures is not enshrined in the Treaties, and as such it is not relevant either for the process of their adoption, nor for the existence of the Court's jurisdiction over them. However, as will be seen in Chapters 3 and 4 of this thesis, the respective differences of the categories of restrictive measures have been a significant topic in the Court's case-law from the viewpoint of the intensity of their review.¹⁰³

¹⁰³ CREMONA, Marise. *“Effective Judicial Review Is of the Essence of the Rule of Law”*, p. 688.

3. Means of judicial protection against restrictive measures

Above, I have introduced two crucial provisions which govern the Court's jurisdiction within the CFSP: Article 29 TEU and Article 275 TFEU. First, both articles clearly state that the CJEU shall *not have* jurisdiction with respect to the provisions governing the CFSP.¹⁰⁴ The first paragraph of Article 275 adds that this exclusion applies also to the acts adopted *on the basis* of those CFSP provisions.¹⁰⁵ In his opinion in *Rosneft*, Advocate General Wathelet aptly identified this exclusion as a “carve-out” from the Court's general jurisdiction over the interpretation and application of the Treaties, established by Article 19(1) TEU.¹⁰⁶ Second, these provisions provide an exception to this exclusion, that being that the Court *does* have jurisdiction to review the legality of CFSP decisions providing for restrictive measures against individuals. The last sentence of Article 24(2) TEU reads: “[the Court has no jurisdiction]with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.” The second paragraph of Article 275 TFEU then contains the following specification: “[h]owever, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.”

Advocate General Wathelet used the term “claw-back clause”¹⁰⁷ with regard to these provisions, a term which I will use to address the clause throughout this thesis. This exception was added into primary law by the Lisbon Treaty, in light of the emerging use of smart sanctions.¹⁰⁸ Its aim is to ensure the effective judicial protection of fundamental rights even within the realms of the CFSP, as the measures target specific individuals as opposed to entire countries.¹⁰⁹

¹⁰⁴ Article 24(2) reads: “The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [...]”

¹⁰⁵ Article 275, paragraph 1 reads: „The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.”

¹⁰⁶ C-455/14 P H v Council and Commission, Judgment of 19 July 2016, ECLI:EU:C:2016:569, para. 40; C-72/15 *Rosneft*, AG Wathelet Opinion, point 47.

¹⁰⁷ C-72/15 *Rosneft*, AG Wathelet Opinion, point 51.

¹⁰⁸ See Chapter 1.

¹⁰⁹ KOUTRAKOS, Panos. Judicial Review in the EU's Common Foreign and Security Policy. *International and Comparative Law Quarterly*. 2018, vol. 67, no. 1, p. 7.

However, the interpretation of the claw-back clause has not been without debate. This chapter will analyse just how far-reaching this clause really is, specifically, what type of procedural means predicted by the Treaties may be used by targeted individuals in order to defend themselves against the restrictive measures imposed onto them. After a general discussion on the scope of the claw-back clause, I will move on to examine the question of the Court’s jurisdiction in the area of restrictive measures with respect to actions for annulment, preliminary rulings on validity, actions for damages and interim measures. I will also discuss selected procedural questions which have emerged in the context of these instruments.

3.1. The scope of the claw-back clause

3.1.1. Article 29 TEU decisions v. Article 215 TFEU regulations

At the outset, it is important to clarify that the discussion about the scope of the claw-back clause revolves around the question of the Court’s jurisdiction solely with respect to *CFSP decisions* providing for restrictive measures against individuals. Post-Lisbon, this means decisions taken by the Council under Article 29 TEU.¹¹⁰ Regulations adopted on the basis of Article 215 TFEU,¹¹¹ on the other hand, are not covered by the carve-out, much less by the claw-back provision.¹¹²

In other words, Article 215 TFEU regulations are subject to full judicial review. Even though this conclusion has not been questioned even in the earliest sanctions case-law,¹¹³ the Court did later address the question explicitly, holding that the Court’s jurisdiction is in no way restricted with respect to a regulation adopted on the basis of Article 215 TFEU, even if it implements decisions adopted in the context of the CFSP.¹¹⁴ Since such regulations constitute EU acts adopted within the EU’s substantive policy based on the TFEU, EU courts must, in accordance with the powers conferred on them by the Treaties, ensure full review their legality.¹¹⁵ As noted by Advocate General Wathelet, a different conclusion would lead to the paradoxical situation in

¹¹⁰ To remind, Article 29 TEU states: “*The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature.*” In the area of restrictive measures, the Council adopts these decision in order to set out restrictive measures to be imposed, often already including an annex of specific individuals which are to be subject to these measures. For the explanation of the adoption procedure, see Chapter 1.

¹¹¹ Article 215 regulations may then be adopted in order to implement the Article 29 TEU decision where that decision so provides. For more details, see Chapter 1.

¹¹² C-72/15 Rosneft, AG Wathelet Opinion, points 69-70.

¹¹³ C-84/95 Bosphorus, Judgment of 30 July 1996, ECLI:EU:C:1996:312, paras. 8-18.

¹¹⁴ C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission, Judgment of 3 September 2008, ECLI:EU:C:2008:461, para. 326; C-72/15 Rosneft, para. 106.

¹¹⁵ Ibid.

which the Court would have jurisdiction to review CFSP decisions providing for targeted restrictive measures adopted under Chapter 2 of Title V of the TEU, as those are what the claw-back clause refers to, but not implementing regulations adopted on the basis of those decisions.¹¹⁶

As follows, the controversy surrounding the scope of the claw-back clause only relates to the Court's jurisdiction to rule on questions relating to the CFSP decisions adopted on the basis of the TEU, which I will now move to address.

3.1.2. What are “restrictive measures against natural or legal persons”

As a preliminary point, it is necessary to clarify what precisely is meant by the reference to “restrictive measures against natural or legal persons” to which the claw-back clause contained in Article 275 TFEU relates. The issue was addressed in the case of *Rosneft*,¹¹⁷ in which the Court dealt with Council Decision 2014/512/CFSP¹¹⁸ concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, and accompanying Regulation 833/2014/68,¹¹⁹ adopted after Russia's annexation of Crimea. The measures in question imposed restrictions on certain financial transactions and on the access of some Russian entities to EU capital markets, as well as export prohibitions regarding certain goods, technology and services required for oil transactions. Rosneft, a Russian company specializing in the oil sector, the majority of whose capital was held by a body owned by the Russian state,¹²⁰ was listed in the annex of the CFSP decision as one of the persons subject to the restrictive measures in question.

Referring to settled case-law, the Court reiterated that restrictive measures resemble both measures of general application, in that they impose, on a category of addressees determined in a general and abstract manner, a prohibition on making available funds and economic resources to certain persons listed in the annexes of those restrictive measures, but also individual decisions, since they directly affect those persons.¹²¹ It then went on to state that it is precisely that individual nature which permits access to EU courts under Article 275 TFEU.¹²² For this reason, the claw-back clause cannot cover generally applicable measures which only determine the persons affected by reference to objective criteria, rather than identifying specific natural or legal persons. Thus,

¹¹⁶ C-72/15 *Rosneft*, AG Wathelet Opinion, point 70.

¹¹⁷ C-72/15 *Rosneft*, Judgment of 28 March 2017, ECLI:EU:C:2017:236.

¹¹⁸ Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. OJ L 229, 31.7.2014, p. 13–17.

¹¹⁹ Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. OJ L 229, 31.7.2014, p. 1–11.

¹²⁰ KOUTRAKOS, Panos. *Judicial Review in the EU's Common Foreign and Security Policy*, p. 18.

¹²¹ C-72/15 *Rosneft*, para. 102.

¹²² C-72/15 *Rosneft*, para. 103.

those provisions of a CFSP decision that subject certain *activities* to restrictive measures, and which are consequently applicable generally to all operators involved in those activities, do not constitute “restrictive measures against natural or legal persons”, but rather measures of general application.¹²³ In *Rosneft*, that concerned the provisions of the CFSP decision establishing and embargo on certain material in the oil sector. Therefore, although Rosneft, due to the subject of its business, was undoubtedly affected by those prohibitions, such an effect was not sufficient to regard them as measures directed against individuals. This was recently confirmed in *BSW v Council*, where the applicant unsuccessfully tried to challenge a CFSP decision in which it was not specifically identified.¹²⁴ The Court stated that measures applicable to objectively determined situations, and to a category of persons envisaged in general and in the abstract, do not constitute restrictive measures against individuals, therefore the Court has no jurisdiction to rule on them.¹²⁵

By contrast, when the CFSP decision refers to specific entities in respect of which a prohibition of carrying out economic operations is prohibited, i.e. typically by naming them in an annex to that decision, such a provision must be considered as a “restrictive measure against natural or legal persons”.¹²⁶ For these reasons, the Court held that notwithstanding the fact that such measures may also individually target other entities, the fact remains that the individual nature of those measures must allow for them to be subject to judicial review in accordance with the second paragraph of Article 275 TFEU. As a result, Rosneft’s action was deemed admissible in so far as it concerned the prohibitions which it was explicitly made subject to by virtue of being listed in the annex.¹²⁷

It follows from the above that what at first seems like a simple concept – restrictive measures that target individuals – is in reality a bit more complex. Certain provisions of an Article 29 TEU decision may be considered to fall under Article 275 TFEU, while a different provision of the same decision may not. That being said, it seems that for potential applicants, the rule is, after all, quite simple – if your name is included in the decision or its annex, the Court will have jurisdiction to rule on your application. If, on the other hand, you are not, and the decision affects you merely by virtue of the activities which it targets, then your action will be dismissed. This is relevant particularly in the case of regime sanctions, where the primary target is the third country

¹²³ C-72/15 *Rosneft*, paras. 97-98 and 104.

¹²⁴ T-1042/23 *BSW - management company of “BMC” v Council*, Judgment of 6 March 2024, ECLI:EU:T:2024:150, not published.

¹²⁵ T-1042/23 *BSW v Council*, paras. 25-26.

¹²⁶ C-72/15 *Rosneft*, paras. 100 and 104.

¹²⁷ C-72/15 *Rosneft*, para. 104.

whose economy is to be impacted as a result of the measures. By contrast, counter-terrorism sanctions primarily target specific individuals which the Council considers to be associated with terrorism, thus there is no doubt that these are to be considered “restrictive measures against natural or legal persons”.

Lastly, it is also worth noting that one may think whether this whole discussion is not irrelevant, at least from a practical point of view, when it is possible to attack the Article 215 TFEU regulations which are fully subject to the Court’s review and which also, as a general rule, contain an annex listing the targeted entities. All the more in view of the fact that the TFEU regulations are often a copy-paste of the CFSP decisions,¹²⁸ as I have described in Chapter 1 above. Well, the answer is simply no, it is not. First, as described in Chapter 1.1. above, the adoption of an Article 215 regulation is not mandatory in so far as sanctions against individuals are concerned.¹²⁹ It follows that restrictive measures may be imposed solely by a CFSP decision, with no supplementary TFEU measure existing which would be easily challengeable. Second, even in cases where both types of measures have been adopted, the Article 215 TFEU regulation builds upon the CFSP decision, and as such the question of the validity of that underlying decision is significant for the assessment of the validity of the implementing regulation. This is the reason why in virtually every action for annulment, the applicant pleads the invalidity of both the TFEU regulation and the CFSP decision on which it is based. Similarly, if illegality of the regulation is established and, as a consequence, it is annulled, the Council must inevitably take steps to amend the equivalent provisions of the CFSP act in the extent of the illegality,¹³⁰ so as to comply with its obligation stemming from Article 266 TFEU.¹³¹

3.1.3. Just an action for annulment, or?

Coming to the question of what procedural means may be used to achieve judicial review of CFSP decisions providing for sanctions against individuals, the specific wording of each of the relevant provisions is important. While Article 24(2) TEU merely refers to the “review of legality” of certain CFSP decisions, Article 275 TFEU contains an explicit reference to review in

¹²⁸ See, for example, C-72/15 Rosneft, AG Wathelet Opinion, point 93, in which the AG pointed out that the provisions of the TFEU regulation repeat, almost word for word, the provisions of the underlying CFSP decision.

¹²⁹ C-72/15 Rosneft, AG Wathelet Opinion, point 72.

¹³⁰ C-72/15 Rosneft, AG Wathelet Opinion, point 93.

¹³¹ Article 266 TFEU reads: “[t]he institution, body, office or entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.”

proceedings initiated pursuant to Article 263 TFEU,¹³² i.e. an action for annulment. However, Article 24 TEU specifically refers to the review being conducted in accordance with Article 275 TFEU. A literal reading of these provisions would thus suggest that CFSP decisions providing for restrictive measures against natural and legal persons may be reviewed solely on the basis of a direct action for annulment. This interpretation was presented as clear by Advocate General Kokott in her View in Opinion 2/13,¹³³ in which she stated that “[o]nly highly exceptionally do the Courts of the EU have jurisdiction in relation to the CFSP in accordance with the second paragraph of Article 275 TFEU, such jurisdiction encompassing, first, the monitoring of compliance with the ‘non-affected’ clause (Article 40 TEU) and, secondly, actions for annulment by individuals (natural or legal persons) against restrictive measures adopted by the Council in the context of the CFSP”.¹³⁴ Moreover, the General Court itself stated in *Jannatian* that the jurisdiction conferred only includes the “review of whether Article 40 TEU has been complied with and actions for annulment brought by individuals, under the conditions set out in the fourth paragraph of Article 263 TFEU”.¹³⁵

It begs the question whether this reading of the claw-back clause is correct, or whether it may open up other paths to judicial review. As I will discuss in the following chapters of this thesis, the former opinion was the status quo in the EU legal system for a long time, up until the CJEU’s 2017 Grand Chamber ruling in *Rosneft*.¹³⁶ Eventually, the Court established its jurisdiction not only with respect to actions for annulment, but also preliminary rulings on the validity of restrictive measures and actions for damages caused by them. Before delving into that discussion, however, I will first analyse the non-controversial (at least, as regards the Court’s jurisdiction over it) and arguably most important tool for the review of targeted sanctions – an action for annulment under Article 263 TFEU.

¹³² CREMONA, Marise. “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 - A Journal on Law and Integration*. 2017, vol. 2017 2, p. 689.

¹³³ Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454. In the Opinion itself, the Court merely noted in paras. 251-252 that the Court has not yet had the opportunity to define the extent of its limited jurisdiction in the CFSP, and concluded that for the purposes of that Opinion, it was sufficient to declare that, as EU law then stood, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court.

¹³⁴ View of Advocate General Kokott of 13 June 2014, Opinion procedure 2/13, ECLI:EU:C:2014:2475, para. 84.

¹³⁵ T-328/14 *Janatian v Council*, Judgment of 18 February 2016, ECLI:EU:T:2016:86, para. 30.

¹³⁶ C-72/15 *Rosneft*.

3.2. Action for annulment

3.2.1. Jurisdiction of the Court

As I have established above, the question of the Court's jurisdiction to rule on an action for annulment against restrictive measures is not one of controversy, considering the explicit reference to Article 263 TFEU contained in Article 275 TFEU. The only issue which had the need to be clarified by the Court was when those measures qualify as being "against natural or legal persons", which was explained in Chapter 3.1.2. of this thesis. Consequently, I will move to analyse the matter of standing to bring the action.

3.2.2. Procedural standing

3.2.2.1. Direct concern, or direct and individual concern? The applicable test

Article 263 TFEU provides for different categories of standing depending on what type of act is being challenged by the action for annulment.¹³⁷ The first category includes acts addressed to the applicant. The second category includes acts not specifically addressed to the applicant, but which are of direct and individual concern to them. Lastly, the third category entails regulatory acts which are of direct concern to the applicant and do not entail implementing measures.

First, as regards the classification of restrictive measures, it can be said that both Article 29 TEU decisions and Article 215 regulations are considered a regulatory act within the meaning of the third category. According to settled case-law, the concept of "regulatory act" covers in principle any act of general application which is non-legislative, meaning that it has not been adopted in accordance with the ordinary legislative procedure or special legislative procedure within the meaning of Article 289 TFEU.¹³⁸ It is clear already from the discussions above that the Court considers decisions and regulations providing for restrictive measures to be of general application, notwithstanding the fact that persons who are subject to the sanctions are expressly named in annexes thereto.¹³⁹ Regarding the process of adoption, Article 24 TEU precludes legislative action in the CFSP,¹⁴⁰ therefore an Article 29 TEU decision clearly cannot be a legislative act. As for the Article 215 regulations, although being marked "regulations", they are

¹³⁷ TFEU, Article 263, fourth paragraph.

¹³⁸ LENAERTS, Koen, Kathleen GUTMAN and Janek Tomasz NOWAK. *The Action for Annulment*. In: LENAERTS, Koen, Kathleen GUTMAN and Janek Tomasz NOWAK. *EU Procedural Law*. Oxford University Press, Oxford, 2023, p. 337. *See also* Judgment of 7 March 2013, T-94/10 *Rütgers Germany and Others v ECHA*, ECLI:EU:T:2013:107, para. 58 and the case-law cited.

¹³⁹ C-402/05 P and C-415/05 P *Kadi and Al Barakat*, para. 241.

¹⁴⁰ The second paragraph of Article 24(1) TEU reads: "The adoption of legislative acts shall be excluded."

adopted solely by the Council in accordance with the procedure set out in Article 215(1) TFEU, thereby not in an ordinary or special legislative procedure. Consequently, those regulations are also regarded as a non-legislative regulatory act within the meaning of the fourth paragraph of Article 263 TFEU.¹⁴¹

Second, the Court has held in relation to Article 215 TFEU regulations that they do not entail implementing measures, as the prohibitions laid down in them apply without leaving any discretion to the addressees responsible for implementing them (i.e. for example persons prohibited from engaging in trade with the targeted individuals), nor do they require the adoption of implementing measures by the EU or the Member States.¹⁴² As for CFSP decisions providing for restrictive measures, the matter seems to be more complicated. On one hand, it is common practice that the CFSP decisions are supplemented by a TFEU regulation which “implements” it. On the other hand, as mentioned above, it is not obligatory to adopt these supplementing measures.¹⁴³ This is relative, of course, since if the CFSP decision provides that a TFEU regulation shall be adopted, it essentially renders its adoption mandatory. The question is therefore whether in such a case, the CFSP decision can be regarded as an “implementing measure”. The Court has yet to provide a clear answer in this regard.

It is settled case-law that the a regulatory act entails no implementing measures when it directly affects the legal situation of natural or legal persons without requiring other measures.¹⁴⁴ This means that the legal effects of the act materialize from the act itself and not only through those implementing measures.¹⁴⁵ Thus, it seems to me that in cases where the content of the two measures is almost identical, as it often is,¹⁴⁶ the legal effects on the targeted individual should materialize already by the adoption of the CFSP decision. However, the counterargument is that if the CFSP act expects the adoption of a TFEU regulation, that materialization comes only with such adoption. The matter is open to further discussion, which is outside the scope of this thesis, however, suffice to say that in practice, the question has never caused significant obstacles with respect to the admissibility for actions for annulment brought against CFSP sanctions decisions.

¹⁴¹ C-872/19 P *Venezuela v Council*, Judgment of 22 June 2021, ECLI:EU:C:2021:507, para. 92.

¹⁴² C-872/19 P *Venezuela v Council*, para. 90; T-715/14 NK *Rosneft and Others v Council*, Judgment of 13 September 2018, ECLI:EU:T:2018:544, para. 91.

¹⁴³ See Chapter 3.1.2.

¹⁴⁴ LENAERTS, Koen, Kathleen GUTMAN and Janek Tomasz NOWAK. *The Action for Annulment*, p. 338.

¹⁴⁵ *Ibid.*, p. 339. See also C-384/16 P *European Union Copper Task Force v Commission*, Judgment of 13 March 2018, ECLI:EU:C:2018:176, para. 45.

¹⁴⁶ C-72/15 *Rosneft*, AG Wathelet Opinion, point 93.

In the annulment procedure in *Rosneft*,¹⁴⁷ for example, after establishing that the provisions of the contested decision and the contested regulation regarding access to capital markets were regulatory measures and of direct concern to the applicant, the Court held that it was not necessary to examine whether those provisions entail implementing measures, as the condition relating to individual concern was also satisfied.¹⁴⁸ Thus, it simply shifted from examining the third category of standing to the second category of standing. It follows that the Court did not feel constrained to analysing the applicant's procedural standing under the third test, i.e. regulatory acts which are of direct concern to the applicant and do not entail implementing measures. Instead, since it found that the applicant was also individually concerned, it instead used the second test, i.e. an act which is of direct and individual concern to the applicant and established that the applicant has standing.

This uncertainty as to what test of procedural standing is applicable in the case of restrictive measures permeates throughout the whole body of the Court's sanctions case-law. While in some cases, even ones which are very recent, the Court has analysed the applicant's standing on the basis of the "directly concerned" test in the context of regulatory acts,¹⁴⁹ in other cases, it has instead applied the "directly and individually concerned" test.¹⁵⁰ AG Wathelet, for example, voiced the opinion that applying the criterion of individual concern in the context of restrictive measures against individuals "*would infringe the provisions of Article 263 and the second paragraph 275 TFEU and would therefore be contrary to the system of judicial protection instituted by the FEU Treaty and the right to an effective legal remedy enshrined in Article 47 of the Charter*".¹⁵¹ I agree partially. While it follows from the fourth paragraph of Article 263 TFEU that when an act is identified as a regulatory act within the meaning of that provision, only the test of direct concern should be applied, it seems to me that, in the specific case of restrictive measures against individuals, the right to an effective remedy might in reality be more safeguarded when applying the test of direct and individual concern. This is for the following reasons.

First, proving direct concern will not be difficult in most cases. According to settled case-law, in order to establish that a person is directly concerned by an EU act, two cumulative criteria must be fulfilled.¹⁵² First, the contested measure must directly affect the legal situation of the

¹⁴⁷ T-715/14 *Rosneft*.

¹⁴⁸ T-715/14 *Rosneft*, para. 72.

¹⁴⁹ See, for example, T-258/22 *BSW v Council*, paras. 28-47; C-872/19 P *Venezuela v Council*, paras. 61-74.

¹⁵⁰ See, for example, C-229/05 P *PKK and KNK v Council*, Judgment of 18 January 2007, ECLI:EU:C:2007:32, paras. 70-74; T-181/08 *Tay Za v Council*, Judgment of 19 May 2010, ECLI:EU:T:2010:209.

¹⁵¹ C-72/15 *Rosneft*, AG Wathelet Opinion, point 90.

¹⁵² T-258/22 *BSW v Council*, para. 34 and the case-law cited.

individual, and second, it should leave no discretion to the addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone.¹⁵³ It has been stated above that the Court considers the latter condition is fulfilled in the case of decisions and regulations providing for restrictive measures. As for the direct effect on one's legal situation, in typical cases where the natural or legal persons are included by name in an annex to a restrictive measure, then considering the individual nature of those measures recognized by the Court, I argue that they will not have a hard time convincing the Court that their legal position is directly affected.

However, it appears from the analysis above that, as regards CFSP decisions, the concept of “does not entail implementing measures” is not quite as clear, and as such it cannot be presumed that this condition will be fulfilled in every event of a challenge against that decision. The notion of individual concern, on the other hand, seems not to be very problematic when it comes to these decisions. In practice, it is not difficult to establish that this condition has been met, as the concerned individuals will usually be identified by name in the annexes of the measures. As held in *National Iranian Oil Company*, such an inclusion in a list of persons or entities subject to restrictive measures “allows that person or entity access to the Courts of the European Union, in that it is similar, in that respect, to an individual decision, in accordance with the fourth paragraph of Article 263 TFEU”.¹⁵⁴ As follows, despite being an act of general application, restrictive measures can, in essence, be materially equated to decisions which are directly addressed to an applicant; although the Court has never expressed itself in a way that would suggest that targeted individuals should formally fall within the “addressees” category of procedural standing under Article 263 TFEU. In any case, in such instances, individual concern is not too hard to prove. The Court's approach that these entities will most likely be individually concerned can be observed even in the earlier sanctions case-law, where the Court held that they appear to be directly and individually concerned due to the mere fact that they are named in an annex to a restrictive measure. Moreover, it has been concluded above that in order for a CFSP decision to be a “restrictive measure against natural or legal persons” within the meaning of Article 275 TFEU, and, consequently, for the Court to have jurisdiction with respect to it, it must specifically identify the person targeted. Considering that the same factor essentially determines individual concern, it thus follows that in any case in which the action for annulment will be deemed admissible from

¹⁵³ Ibid.

¹⁵⁴ C-440/14 P *National Iranian Oil Company v Council*, Judgment of 1 March 2016, ECLI:EU:C:2016:128, para. 44.

the viewpoint of the Court's jurisdiction, it will also be found admissible from the viewpoint of the applicant's procedural standing.¹⁵⁵

To conclude, in my opinion, the Court's inclination to shift between the relevant tests of procedural standing is framed by the effort to permit targeted persons the widest possible access to EU courts. In other words, if the applicant's standing can be easily established under one test, i.e. the test of individual and direct concern, why spend time analysing whether the measure in question entails implementing measures, and vice versa. This effort is surely legitimized by the principle of effective judicial protection, especially with respect to sanctions which restrict the fundamental rights of the listed entities. However, concerns about legal certainty may be raised, as the applicants cannot know in advance which criteria the Court will apply, and thus the fulfilment of which they need to demonstrate.

3.2.2.2. Other selected issues of procedural standing

Finally, I would like to point out two cases in which the Court dealt with two very specific issues relating to standing to bring an action for annulment against restrictive measures. First, the standing of third countries to bring an action for annulment, and second, the standing of an entity which, under national law, no longer existed.

The first of those cases is *Venezuela v Council*,¹⁵⁶ in which the state of Venezuela, as the applicant, challenged the validity of a CFSP decision concerning restrictive measures in view of the situation in Venezuela,¹⁵⁷ as well as the implementing TFEU regulations.¹⁵⁸ Even though the provisions challenged concerned export restrictions on the state,¹⁵⁹ and as such that case seems like one which merely relates to third-country sanctions, the Court in fact approached Venezuela as an individual who is entitled to effective judicial protection, therefore I consider it relevant to this thesis.

¹⁵⁵ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, para. 241.

¹⁵⁶ C-872/19 P *Venezuela v Council*.

¹⁵⁷ Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela, OJ L 276, 7.11.2018, p. 10–11.

¹⁵⁸ Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela, OJ L 295, 14.11.2017, p. 21–37; Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela, OJ L 276, 7.11.2018, p. 1–2.

¹⁵⁹ FINELLI, Francesca. The Right of Third States to Challenge EU Restrictive Measures before the Court: *Venezuela v Council*. In: BUTLER, Graham and Ramses A WESSEL, eds. *EU External Relations Law: The Cases in Context*. Hart Publishing, 2022, p. 1003.

The General Court dismissed Venezuela’s application on the basis that it was not directly concerned by the contested provisions.¹⁶⁰ The Court of Justice took a different approach. First, as a preliminary point, it addressed whether a third state could be regarded as a “legal person” in the context of Article 263 TFEU. The Council maintained that it could not, with the reasoning that since third countries are not part of the EU legal system, which is limited to Member States, they have no rights conferred to them by the Treaties and thus cannot have access to EU courts.¹⁶¹ In my view, such an argument cannot be accepted, as if this logic were to be applied to natural persons, this would mean that third-country citizens affected by EU restrictive measures could not defend their rights in EU courts. Indeed, the Court of Justice dismissed this contention and, after reiterating that the term “legal person” cannot be construed restrictively, held that the principle of effective judicial protection and the rule of law “*militates in favour of finding that a third state should have standing to bring proceedings*”, provided that the other conditions set out in Article 263 TFEU are satisfied.¹⁶²

Second, the Court of Justice assessed the question of whether Venezuela could be considered as a person directly affected by the contested measures. Unlike in the case of listed natural persons and companies, in the case of a third country affected by general export prohibitions, however, the matter of direct concern is not quite so clear.

Advocate General Hogan argued that even though Venezuela was not specifically identified as a targeted person, such a fact did not prejudice it being directly affected by the sanctions, as they were designed to affect the state. In his view, an opposite interpretation would be “*highly artificial and unduly formalistic*”.¹⁶³ The Court followed the Advocate General’s opinion. It held that since the prohibitions prevent Venezuela from obtaining numerous goods and services, those provisions directly affect its legal situation, notwithstanding the fact that it was not entirely impossible to obtain these goods and services, as it could procure them outside the territory.¹⁶⁴ Consequently, not only did the Court confirm that third states may benefit from the right to effective judicial protection in the same manner as any other persons, but the judgement opened up the door to EU courts to third countries targeted by regime sanctions, therefore possibly largely expanding the scope of potential future litigation in the area of restrictive measures.

¹⁶⁰ T-65/18 *Venezuela v Council*, Judgment of 20 September 2019, ECLI:EU:T:2019:649.

¹⁶¹ C-872/19 P *Venezuela v Council*, paras. 28 and 60.

¹⁶² C-872/19 P *Venezuela v Council*, para. 50.

¹⁶³ C-872/19 P *Venezuela v Council*, Opinion of Advocate General Hogan of 20 January 2021, ECLI:EU:C:2021:37, point 109.

¹⁶⁴ C-872/19 P *Venezuela v Council*, paras. 69 and 71.

The second case worth mentioning is *PKK and KNK v Council*.¹⁶⁵ The case concerned a Council decision which placed PKK, the Kurdistan's Workers' Party, on the list of terrorist entities.¹⁶⁶ The decision was challenged by the umbrella organization KNK, the Kurdistan's National Congress, and Mr. O. Ocalan, who brought the action on behalf of the PKK.¹⁶⁷ In April 2002, the PKK decided during its congress that all activities under the name of the PKK would cease as of April 2002, and that any activities taken under the name of the PKK would be deemed illegitimate.¹⁶⁸ The Court of First Instance ("CFI") dismissed both applications as inadmissible, holding that the PKK could not be validly represented by Mr. Ocalan since the organization no longer existed, and that the KNK was not individually concerned by the decision.¹⁶⁹ I will focus my analysis on the issue of the admissibility of the PKK's application.

After stating that the PKK is directly and individually concerned by the measures,¹⁷⁰ as well as that when it comes to assessing admissibility of actions lodged against restrictive measures, excessive formalism should be avoided,¹⁷¹ the CFI went on to hold that since the PKK did not exist, it could not have validly appointed Mr. Ocalan as its representative.¹⁷² The contradiction here is apparent. It is difficult to reconcile how an entity may be so clearly directly and individually concerned, which necessarily entails having an existing legal position which may be affected, yet when it comes to assessing whether it may appoint a representative, it somehow does not exist. As Cuyvers put it, in the logic of the CFI's judgement, the PKK both exists and does not exist at the same time.¹⁷³ Furthermore, this approach raises a significant concern; an entity, which presumably does not exist, can be named in a sanctions list, yet it cannot challenge this listing before a Court. In other words, it can be attacked, but not defended.

This last point was solved by the Court of Justice and Advocate General Kokott in a rather simple manner; both concluded that in order to satisfy the requirements of effective judicial

¹⁶⁵ C-229/05 *PKK and KNK v Council*.

¹⁶⁶ Council Decision 2002/460/EC of 17 June 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/334/EC.

¹⁶⁷ T-229/02 *PKK and KNK v Council*, Judgment of 3 April 2008, ECLI:EU:T:2008:87.

¹⁶⁸ CUYVERS, Armin. Case C-229/05 P, *PKK & KNK v. Council*, Judgment of the Court of Justice (First Chamber) of 18 January 2007, [2007] ECR I-439. *Common Market Law Review*. 2008, vol. 45, no. Issue 5, p. 1488.

¹⁶⁹ T-229/02 *PKK and KNK v Council*, paras. 41 and 56.

¹⁷⁰ *Ibid.*, para. 27.

¹⁷¹ *Ibid.*, para. 28.

¹⁷² *Ibid.*, paras. 37-41.

¹⁷³ CUYVERS, Armin. Case C-229/05 P, *PKK & KNK v. Council*, Judgment of the Court of Justice (First Chamber) of 18 January 2007, [2007] ECR I-439, p. 1496.

protection, it is necessary to at least grant a listed entity the legal capacity to bring an action for annulment against its inclusion in that list,¹⁷⁴ or rather that it must continue to have an existence sufficient to contest the restrictive measure.¹⁷⁵ In the words of the Court, “[i]t follows that since, by Decision 2002/460, the Community legislature took the view that the PKK retains an existence sufficient for it to be subject to the restrictive measures laid down by Regulation No 2580/2001, it must be accepted, on grounds of consistency and justice, that that entity continues to have an existence sufficient to contest this measure. The effect of any other conclusion would be that an organization could be included in the disputed list without being able to bring an action challenging its inclusion.”¹⁷⁶ What is more, the Court reiterated the rule of the necessity to avoid excessive formalism, which the CFI failed to follow; procedural rules governing admissibility of actions for annulment must be “applied by adapting them, to the extent necessary, to the circumstances of the case”.¹⁷⁷ However, it was very explicit in limiting this to the exceptional circumstance of an alleged terrorist entity which can hardly be expected to be validly incorporated under national law.¹⁷⁸

At first, the conclusions reached in the judgment in *PKK and KNK v Council* seem to solve the issue identified above quite logically; if the EU takes measures against you, you must have sufficient legal personality to challenge it. However, Cuyvers identified another aspect; by placing an entity on a list, the Council essentially has the power to “create” a legal entity within the sphere of EU law, even when it does not exist in the national legal order. This therefore begs the question whether the solution, from the point of view of consistency and justice, should not rather be that where the Council is unable to prove that a listed entity still exists, it should be ordered to remove the entity from that list.¹⁷⁹

To conclude this chapter, it is apparent from the above that although the issue of the Court’s jurisdiction over actions for annulment challenging sanctions against individuals is not one of controversy, other questions pertaining to admissibility arise. In specific, the question of procedural standing deserves, in my view, more attention than it has been given by the professional public so far.

¹⁷⁴ C-229/05 *PKK and KNK v Council*, Opinion of Advocate General Kokott of 27 September 2006, ECLI:EU:C:2006:606, point 53.

¹⁷⁵ C-229/05 *PKK and KNK v Council*, paras. 111-112.

¹⁷⁶ C-229/05 *PKK and KNK v Council*, para. 112.

¹⁷⁷ C-229/05 *PKK and KNK v Council*, para. 114.

¹⁷⁸ CUYVERS, Armin. Case C-229/05 P, *PKK & KNK v. Council*, Judgment of the Court of Justice (First Chamber) of 18 January 2007, [2007] ECR I-439, p. 1502.

¹⁷⁹ *Ibid.*, p. 1497.

3.3. Preliminary ruling on validity

3.3.1. Jurisdiction of the Court

In Chapter 3.1.3., I have discussed whether the wording of Article 24(1) TEU and Article 275 TEU suggests that an action for annulment is indeed the only procedural means which may be used with respect to CFSP decisions providing for restrictive measures against natural or legal persons. Does this therefore indicate that the reference to Article 263 TFEU contained in the latter provision means that an indirect challenge under Article 267 TFEU, i.e. a preliminary reference on the validity of the decision, does not fall within the scope of the Court's jurisdiction? The Grand Chamber judgement in *Rosneft*¹⁸⁰ put this question to bed once and for all; no, it does not.

Before delving into the Court's analysis, it is important to highlight the relationship between a direct challenge by virtue of an action for annulment under Article 263 TFEU, and an indirect challenge raised a plea of invalidity in proceedings before a national court, which must then make a reference for a preliminary ruling on validity under Article 267 TFEU. The latter is a mechanism which serves its purpose in situations where the question of the validity of an underlying EU act is crucial in determining the validity of a national measure based on it.¹⁸¹ In the case of restrictive measures, this will entail national rules and decisions which are designed to give effect to CFSP acts adopted under Article 29 TEU. Since the long-standing *Foto-Frost* rule dictates that national court may not themselves invalidate an EU act, they must bring the matter of its invalidity before the Court.¹⁸² According to settled case-law, these two avenues thus constitute “a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions”.¹⁸³ It follows that it is well established in the EU legal order that these two mechanisms are closely intertwined; the question is whether such a finding may influence the specific nature of the CFSP jurisdiction carve-out.

In *H v Council and Commission*,¹⁸⁴ the Court emphasized that the jurisdiction carve-out introduces a derogation from the rule of general jurisdiction which Article 19 TEU confers on the

¹⁸⁰ C-72/15 *Rosneft*.

¹⁸¹ LENAERTS, Koen, Kathleen GUTMAN and Janek Tomasz NOWAK. Cooperation between National Courts and the Court of Justice: The Reference for a Preliminary Ruling. In: LENAERTS, Koen, Kathleen GUTMAN and Janek Tomasz NOWAK. *EU Procedural Law*. Oxford University Press, 2023, p. 91. DOI: 10.1093/oso/9780198833086.003.0003

¹⁸² C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, Judgment of 22 October 1987, ECLI:EU:C:1987:452, para. 20.

¹⁸³ KOUTRAKOS, Panos. JUDICIAL REVIEW IN THE EU'S COMMON FOREIGN AND SECURITY POLICY. *International and Comparative Law Quarterly*. 2018, vol. 67, no. 1, p. 21. DOI: 10.1017/S0020589317000380; See also C-50/00 P *UPA*, Judgment of 25 July 2002, ECLI:EU:C:2002:462, para. 40; C-583/11 P *Inuit*, Judgment of 3 October 2013, ECLI:EU: C:2013:625, para. 92.

¹⁸⁴ C-455/14 P *H v Council and Commission*, Judgment 19 July 2016, ECLI:EU:C:2016:569.

Court and as such it must be interpreted narrowly.¹⁸⁵ The need for such narrow interpretation stems from the principle of rule of law, enshrined in Article 21 TEU governing the EU's external action (to which Article 23 relating to the CFSP refers), an inherent part of which is the existence of effective judicial review designed to ensure compliance with the provisions of EU law.¹⁸⁶ In *Rosneft*, the Court followed-up on both of these conclusions. With respect to effective judicial protection, it held that while it is true that Article 47 of the Charter of Fundamental Rights of the European Union (“**Charter**”), which enshrines that principle, cannot confer jurisdiction on the Court where the Treaties exclude it, it nevertheless implies that the exclusion of the Court's jurisdiction in the field of CFSP must be interpreted strictly.¹⁸⁷ Similarly, Article 19(1) TEU also precludes a strict interpretation, as it would be contrary to the objective of that provision, which is to ensure that the law is observed in the interpretation and application of the Treaties.¹⁸⁸

However, such general arguments cannot suffice to reason the conclusion that the Court's jurisdiction must be established, which is why they were not the only grounds for the Court's ruling. First, it was established that is not commensurate to examine solely the questions raised in the main proceedings in light of the implementing TFEU regulation. The Court stated that since the prior adoption of a valid CFSP decision is the prerequisite for the validity of the TFEU regulation, the question of that decision's validity is highly relevant.¹⁸⁹ Next, it moved to present a contextual argument based on the aforementioned notion of a “*complete system of legal remedies*”, which requires that the Court be able to bring the question of the validity of an EU act before EU courts since it cannot rule on the matter itself.¹⁹⁰

Regarding the central question of the interpretation of the text of Article 24 TEU and Article 275 TFEU, the Court reached the conclusion that neither of the Treaties indicates that an action for annulment constitutes the sole means for reviewing the legality of decisions providing for restrictive measures against individuals, in particular to the exclusion of a reference for a preliminary ruling on validity. It grounded this conclusion by stating that Article 24(1) TEU refers to the second paragraph of Article 275 TFEU not in order to determine the *type of procedure* in

¹⁸⁵ *Ibid.*, para. 40.

¹⁸⁶ *Ibid.*, para. 41.

¹⁸⁷ C-72/15 *Rosneft*, paras. 72-74.

¹⁸⁸ *Ibid.*, para. 75.

¹⁸⁹ *Ibid.*, paras. 53-55.

¹⁹⁰ *Ibid.*, para. 67. The only exception to this rule is if the applicant unquestionably had the right to bring an action for annulment against the provisions in question and failed to do so within the time limit prescribed by Article 263 TFEU. See C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland*, Judgment of 9 March 1994, ECLI:EU:C:1994:90, para. 17.

which the Court may review the legality of certain CFSP decision, but rather the *type of decisions* whose legality may be reviewed. According to the Court, this can be done in any procedure that has as its aim such a review of legality.¹⁹¹

I am not particularly convinced. I agree with the position of Koutrakos and Thanou that the textual argument misconstrues the wording of Article 24(1),¹⁹² and that the prism through which the Court sees the concept of review of legality goes beyond the letter of the carve-out provisions.¹⁹³ The provision refers to the “*review of legality of certain decisions as provided for by the second paragraph of Article 275 [TFEU].*” Article 275 then explicitly states that the Court shall only have jurisdiction to rule „*on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons*“. Thus, in my view, Article 24(1) TEU refers to the *conditions* of Article 275 TFEU as a whole, which very clearly states that only Article 263 TFEU proceedings are permissible. Moreover, the TFEU rule, which is just as high on the EU legal hierarchy as that of the TEU,¹⁹⁴ also repeats the exclusion of the Court’s jurisdiction but for these specific proceedings. Similarly, no indication can be found in Article 24(1) TEU that an action for annulment would constitute merely an example of the procedure aiming to review.¹⁹⁵

Lastly, the Court presented two more arguments. First, it pointed out the central responsibility which the Member States have in implementing the restrictive measures, whose national policies must conform to the EU position enshrined in the Council decisions. Consequently, when doubts are cast on their validity, national courts must be able to make a reference for a preliminary ruling.¹⁹⁶ Second, it pointed to the aforementioned *Foto-Frost* rule and its necessity for the coherence of the system of judicial protection, further supported by the objective of Article 267 TFEU, which is to ensure the uniform application of EU law by national courts, an objective which is just as imperative in the field of restrictive measures against individuals.¹⁹⁷ Due to the aforementioned reasons, the Court ultimately held that it does have

¹⁹¹ C-72/15 Rosneft, para. 70.

¹⁹² KOUTRAKOS, Panos. *Judicial Review in the EU’s Common Foreign and Security Policy*, pp. 22–23.

¹⁹³ THANOU, Stella. Individual restrictive measures and actions for damages before the General Court of the European Union. *ERA Forum*. 2020, vol. 20, no. 4, p. 604.

¹⁹⁴ As both Treaties are part of EU primary law and thus have the same legal force.

¹⁹⁵ KOUTRAKOS, Panos. JUDICIAL REVIEW IN THE EU’S COMMON FOREIGN AND SECURITY POLICY, pp. 23–24.

¹⁹⁶ C-72/15 Rosneft, para. 70.

¹⁹⁷ *Ibid.*, paras. 78-80.

jurisdiction to give a preliminary ruling on the validity of a CFSP decision providing for restrictive measures against natural and legal persons.¹⁹⁸

All in all, the judgement in *Rosneft* opened up a completely new avenue of review which will certainly further reinforce the degree of judicial protection granted to individuals targeted by restrictive measures. However, it is not without faults. I have already voiced my opinion that the Court did not adequately substantiate its interpretation of the wording of the carve-out provisions. Nor am I fully convinced by the argument of the necessity to ensure uniform application of EU law, as the same logic can surely be applied to CFSP acts that do not qualify as “restrictive measures against individuals”, in respect of which the Member States have just as many responsibilities of implementation, yet they are completely excluded from the Court’s jurisdiction. In his Opinion, Advocate General Wathelet stated that the elimination of those kinds of provisions of the CFSP decision from the Court’s jurisdiction does not have as a result a lacuna of judicial protection, since the TFEU regulation which was in question in *Rosneft* repeated the provisions of the CFSP decision “almost word for word”.¹⁹⁹ Hence, judicial protection is ensured by virtue of the challengeability of the TFEU regulation. Consequently, in the event that the regulation was annulled, the Council would nevertheless be obliged to take the necessary measures to make the equivalent provisions of the CFSP decisions compatible with the Court’s judgement.²⁰⁰ That is surely true, however, that same reasoning could be applied to restrictive measures which do target individuals. Koutrakos also pointed out that the reference to the Member States’ central role in the implementation of CFSP policy, on which the Court relied in order to extend the scope of its jurisdiction, disregarded a second dimension, that being that it is precisely that political role of Member States in the CFSP that justifies the specific design of the policy and the limited powers of the Court therein.²⁰¹

In conclusion, these considerations lead me to believe that the Court’s judgement was ultimately guided by the effort to provide the CFSP with the same guarantees of protection of fundamental rights and the functionality of the EU legal system which are inherent to other parts of the EU legal order. However, the question remains whether the establishment of such an objective falls to the Court and not the drafters of the Treaties, or rather, whether deficiencies contained in the Treaties are to be repaired by the Court’s interpretation. It may also be up to

¹⁹⁸ Ibid., para. 81.

¹⁹⁹ C-72/15 *Rosneft*, AG Wathelet Opinion, point 93.

²⁰⁰ C-72/15 *Rosneft*, AG Wathelet Opinion, point 93.

²⁰¹ KOUTRAKOS, Panos. *Judicial Review in the EU’s Common Foreign and Security Policy*, pp. 24–25.

discussion whether it was genuinely necessary for the Court to overcome the obstacles in the wording of the Treaties in the name of ensuring effective judicial protection. After all, in reality, the use of the preliminary ruling on the validity of restrictive measures against individuals will be limited to instances in which the question of validity is raised by the national court's own motion,²⁰² as the *Textilwerke Deggendorf* rule precludes individuals from indirectly challenging a measure before a national court if they could have challenged it by an action for annulment before the Court.²⁰³

3.3.2. Preliminary ruling on the interpretation of a CFSP decision – a future possibility?

The Court in *Rosneft* did not address the possibility of it having jurisdiction to give a preliminary ruling on the interpretation of a CFSP decision, despite the matter being very clearly intertwined with the issue of a preliminary reference on validity and despite Advocate General Wathelet examining the issue.²⁰⁴ In his opinion, the Advocate General pointed to the Court's existing case-law, which declares that "*appraisal of the validity of a measure necessarily presupposes its interpretation*"²⁰⁵. This principle led the Advocate General to take the view that if the EU courts can perform the broader task of review of legality of decisions providing for restrictive measures against individuals, then they can certainly perform the narrower task of interpretation of the terms of such decisions. In particular, he pointed out this would enable the Courts to avoid invalidating a CFSP act which they could otherwise have preserved by giving it an interpretation which is consistent with EU law.²⁰⁶ The idea that the Court should retain jurisdiction over such CFSP acts was also raised by Advocate General Ćapeta in her recent Opinion in *Neves 77 Solution*,²⁰⁷ albeit in a different manner. The Advocate General proposed that the necessary narrow interpretation of the carve-out dictates that any CFSP measure, i.e. not only one which provides for restrictive measures against individuals, should be subject to the Court's jurisdiction as regards its compliance with fundamental rights protected under the EU legal order.²⁰⁸ In her view, to interpret Article 24(1) TEU and Article 275 TFEU as excluding

²⁰² *I.e.*, if the national court itself considers that the EU restrictive measures might be unlawful, without the unlawfulness being claimed by the targeted individual before that national court. Theoretically, this could happen for example if the Council Decision or Regulation was challenged by the national court as a whole, including its annex listing all targeted individuals. However, needless to say that such situations will rarely occur.

²⁰³ C-188/92 TWD *Textilwerke Deggendorf*, para. 17.

²⁰⁴ C-72/15 *Rosneft*, AG Wathelet Opinion, point 74.

²⁰⁵ C-221/88 *CECA v Busseini*, Judgment of 22 February 1990, ECLI:EU:C:1990:84, para. 14.

²⁰⁶ *Ibid.*, point 75.

²⁰⁷ C-351/22 *Neves 77 Solutions*, Opinion of Advocate General Ćapeta of 23 November 2023, ECLI:EU:C:2023:907.

²⁰⁸ *Ibid.*, paras. 49-50.

jurisdiction in those cases would be inconsistent with the constitutional foundations of the EU and would deprive the Court of its constitutional role to ensure that EU institutions do not infringe fundamental rights of individuals, leaving them without effective judicial protection.²⁰⁹ Conversely, for what concerns the interpretation of a CFSP decision merely for the purpose of its application in the Member States, jurisdiction should be excluded.²¹⁰ Thus, in one sense, the Advocate General offered a narrower solution than Advocate General Wathelet by limiting the Court's jurisdiction solely to matters of interpretation of fundamental rights. In another sense, the solution was wider, as Advocate General Ćapeta proposed, also in an Opinion given in another case,²¹¹ that this conclusion should apply to all CFSP measures irrespective of their character.

The essential counterargument against the stance taken by the Advocates General is that it seems it would be difficult to extend the Court's jurisdiction to a procedure of interpretation, which does not directly entail the "review of legality" within the meaning of Article 24(1) TEU and Article 275 TFEU.²¹² The question is therefore how far the Court can stretch the use of a narrow interpretation and effective judicial protection arguments. That being said, it will be shown in the following chapter that this difficulty did not stand in the way of the Court establishing its jurisdiction with respect to an action for damages caused by CFSP decisions providing for restrictive measures against natural or legal persons. Hence, in my view, the door to the possible future competence of the Court to give preliminary rulings on their interpretation is perhaps not entirely closed; possibly, we will see what stance the Court will take on this issue in its judgement in the *Neves 77 Solutions* case,²¹³ which is still pending at the time of writing this thesis.

3.4. Action for damages

3.4.1. Jurisdiction of the Court

In Chapter 3.1.3. above, I have mentioned that the General Court has previously held in *Jannatian v Council* that the claw-back clause contained in Article 275 TFEU entails only jurisdiction with respect to actions for annulment brought in accordance with Article 263 TFEU.²¹⁴

²⁰⁹ *Ibid.*, para. 50.

²¹⁰ *Ibid.*, para. 51.

²¹¹ See C-29/22 P KS and KD v Council and Others, Opinion of Advocate General Ćapeta of 23 November 2023, ECLI:EU:C:2023:901, paras. 45 et seq.

²¹² FINELLI, Francesca. The Right of Third States to Challenge EU Restrictive Measures before the Court: Venezuela v Council. In: BUTLER, Graham and Ramses A WESSEL, eds. EU External Relations Law: The Cases in Context. Hart Publishing, 2022, p. 889.

²¹³ C-351/22 *Neves 77 Solutions*, pending.

²¹⁴ T-328/14 *Jannatian v Council*, para. 30.

That case considered a claim for damages brought by an applicant which alleged that they suffered damage as a result of the adoption of a CFSP act. The Court dismissed the action and explicitly stated that such a claim is outside the scope of its jurisdiction.²¹⁵ That conclusion was also confirmed by later cases adjudicated on by the General Court,²¹⁶ and followed-up on pre-Lisbon case-law according to which actions for damages relating to acts adopted within the Community third pillar were manifestly inadmissible.²¹⁷ The professional public voiced the opinion that an argument to the contrary is not supported by either the wording or the context of Article 24(1) TEU and Article 275 TFEU,²¹⁸ and so did Advocate General Wathelet in his Opinion in *Rosneft*.²¹⁹ In that Opinion, the Advocate General advocated for a broad interpretation of the claw-back clause and supported the interpretation that preliminary rulings on validity do fall within the scope of the Court's powers, yet to include actions for damages and actions for failure to act was apparently an interpretation that was *too* broad.²²⁰

The Court's approach, however, changed significantly with the judgement of *Bank Refah Kargaran*,²²¹ in which the Grand Chamber of the Court of Justice ruled that EU courts should have the jurisdiction to adjudicate on an action for damages for the harm caused by restrictive measures imposed by CFSP decisions.²²² The General Court, in line with its previous case-law, denied its jurisdiction with respect to alleged damage caused by the CFSP decision and only ruled on the claim pertaining to damage allegedly caused by the Article 215 TFEU regulation, over which EU courts have full jurisdiction. That claim was dismissed on the grounds that no sufficiently serious breach of EU law occurred.²²³ Both the Advocate General and the Court of Justice disagreed with the dismissal of the Court's jurisdiction, and, consequently, the line of the General Court's previous case-law was overturned.

The reasoning of Advocate General Hogan essentially revolved around the necessity to ensure coherence throughout the EU legal system. While he admitted that "*fidelity to the actual text of the Treaty is especially important*", he went on to say that "*Article 275 TFEU cannot*

²¹⁵ *Ibid.*, para. 31.

²¹⁶ T-558/15 *Iran Insurance Company v Council*, Judgment of 13 December 2018, ECLI:EU:T:2018:945, para. 54; T-559/15 *Post Bank Iran v Council*, Judgment of 13 December 2018, ECLI:EU:T:2018:948, paras. 54-55.

²¹⁷ C-354/04 P *Gestoras Pro Amnistia and Others v Council*, Judgment of 27 February 2007, ECLI:EU:C:2007:115, paras 46–48; C-355/04 P *Segi and Others v Council*, paras 46–48.

²¹⁸ KETVEL, Maria-Gisella Garbagnati. The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy. *International and Comparative Law Quarterly*. 2006, vol. 55, no. 1, pp. 116–117.

²¹⁹ C-72/15 *Rosneft*, AG Wathelet Opinion.

²²⁰ C-72/15 *Rosneft*, AG Wathelet Opinion, footnote 36.

²²¹ C-134/19 P *Bank Refah Kargaran v Council*, Judgment of 6 October 2020, ECLI:EU:C:2020:793.

²²² *Ibid.*, para. 43.

²²³ T-65/14 *Bank Refah Kargaran v Council*, Judgment of 10 December 2018, ECLI:EU:T:2018:897, paras. 30-32.

nevertheless be interpreted literally, without deviation”, claiming that the entire Treaty must be read in a holistic and harmonious fashion and citing the Court’s conclusions in *Rosneft* that necessary coherence is inherent to any system of judicial protection.²²⁴ This coherence, in his view, would be severely undermined if one were to accept that the Court may rule on actions for damages with regard to acts adopted on the basis of Article 215 TFEU, which invariably simply reproduce the CFSP decision, and yet it could not do so with regard to the original decision.²²⁵ Such a reading of the Treaties would be of a “*resolutely literal and uncompromising fashion*”,²²⁶ and was most likely not the intention of the drafters of the Treaties, as they could not have had the intention to prevent an applicant, who was successful in an annulment claim, from claiming damages in respect of what may possibly have been a very serious breach of EU law.²²⁷ Interestingly, this link to an action for annulment was also included in the conclusion of the Opinion, when the Advocate General stated that he considers that the Court does have jurisdiction to hear an action for damages which is *directly related to or ancillary to* an action for annulment.²²⁸ The question is, therefore, whether the Advocate General meant to suggest that the exercise of jurisdiction shall be conditional upon a successful annulment of the restrictive measure. No such indication of a necessary link with an action for annulment was made by the Court. Lastly, Advocate General Hogan rejected the claim that effective judicial protection could be safeguarded by the possibility of bringing an action for damages against a Member State under the *Francovich* doctrine²²⁹ (for damage caused by the implementing national measures). Member States cannot be held liable for an illegality which originated at the EU level, as they merely comply with an EU act which leaves them no discretion in its implementation.²³⁰

The Court of Justice followed the Opinion and presented, in essence, four arguments to support the existence of the Court’s jurisdiction. First, the CFSP exclusion shall be interpreted narrowly.²³¹ Second, although it follows from case-law that an action for damages is not part of thy system of review of the legality of EU acts,²³² it remains an integral component of the EU

²²⁴ C-134/19 P *Bank Refah Kargaran*, Opinion of Advocate General Hogan of 6 October 2020, ECLI:EU:C:2020:396, point 61.

²²⁵ *Ibid.*, point 63.

²²⁶ *Ibid.*, point 68.

²²⁷ *Ibid.*, point 66.

²²⁸ *Ibid.*, point 71.

²²⁹ C-6/90 and C-9/90 *Francovich and Others*, Judgment of 19 November 1991, ECLI:EU:C:1991:428.

²³⁰ C-134/19 P *Bank Refah Kargaran v Council*, AG Hogan Opinion, point 64.

²³¹ C-134/19 P *Bank Refah Kargaran*, para. 32.

²³² C-131/03 P *Reynolds Tobacco and Others v Commission*, Judgment of 12 September 2006, ECLI:EU:C:2006:541, para. 83.

system of legal remedies.²³³ Third, similarly as in *Rosneft*, the possibility of such jurisdiction is inherent to safeguarding the right to effective judicial protection and the rule of law.²³⁴ And fourth, the coherency justification raised by the Advocate General. The Court held that Article 215 TFEU serves as a “bridge” between the objectives of the TEU in matters of the CFSP and the actions of the EU involving economic measures falling within the scope of that policy, so as to ensure their uniform application in all Member States. This close nature of the two measures calls for the necessity of a coherent system so as to avoid a lacuna in judicial protection.²³⁵ Furthermore, the fact that the TFEU regulations essentially reproduce the decisions taken pursuant to Article 29 TEU cannot substantiate the claim that effective judicial protection will be ensured by the mere review of the TFEU regulations. The Court highlighted that while this is often the case, the two might not always be completely identical. For example, travel bans are likely to be included in the CFSP decisions without necessarily being included in the TFEU regulations. What is more, the Court acknowledged that the sole fact that a person is publicly designated in a CFSP decision as a person subject to restrictive measures is capable of causing harm to the individual concerned.²³⁶

It follows that what the Court in *Rosneft* began, it took one step further in *Bank Refah Kargaran*. The logic of the intertwined nature between an action for annulment and a preliminary ruling on validity evolved into an even wider argument, that being the *Les Verts* doctrine²³⁷ of a “complete system of legal remedies”, which, as Butler and Wessel put it, is alive and well – when the Court wants it to be.²³⁸ That being said, in *Bank Refah Kargaran*, the Court did not even try to substantiate its conclusion by a textual interpretation of Article 24(1) TEU and Article 275 TFEU. Instead, it based its judgement on the “bigger picture”, indicating that ensuring the functionality of the EU system necessarily entails looking past the wording of the provisions of the Treaties. As a result, its emphasis on the coherence between the sanctions provisions of the TFEU and the TEU suggested that it considers these two areas interdependent,²³⁹ and further pushed the narrative that the CFSP is becoming less of a distinct policy and more one that is integrated into general EU legal order.

²³³ C-134/19 P *Bank Refah Kargaran*, paras. 33-34.

²³⁴ *Ibid.*, paras. 35-36.

²³⁵ *Ibid.*, paras. 37-39.

²³⁶ *Ibid.*, paras. 41-43.

²³⁷ C-294/83 *Les Verts*.

²³⁸ BUTLER, Graham and Ramses A WESSEL. Jurisdiction of the Court for Non-contractual Liability and Actions for Damages Claims within the CFSP: *Bank Refah Kargaran*. In: *EU External Relations Law: The Cases in Context*. Hart Publishing, 2022, p. 998.

²³⁹ BARTOLONI, Maria Eugenia. “Restrictive Measures” Under Art. 215 TFEU, p. 1366.

In conclusion, *Bank Refah Kargaran* constitutes another evolution of what some might see as the Court's stretching into a competence that is clearly limited by the Treaties. My criticisms of the *Rosneft* judgement apply even more so here. Nonetheless, just as in that case I have pointed out that it seems to me that the Court must compensate deficiencies which have arisen due to the drafting of the Treaties, I agree here with Butler and Wessel, who put forward that these inconsistencies lead the Court to be "*repeatedly confronted with a conflict between the alleged lack of jurisdiction and the duty to ensure legal protection throughout the Union as far as possible*".²⁴⁰

3.4.2. Establishing the EU's liability

By opening up the possibility to claim damages suffered by restrictive measures imposed by CFSP decisions, the ruling in *Bank Refah Kargaran* has surely strengthened the protection of natural and legal persons targeted. Still, the question remains how possible, from a practical point of view, it in fact is for individuals to comply with the notoriously strict conditions required to establish the EU's liability, even more so in an area so sensitive and politically charged like the CFSP. I will not go into all the details of the issue, as that would exceed the scope of this thesis, but I do find it necessary to invite a brief comment.

According to settled case-law, in order for the EU to incur non-contractual liability under the second paragraph of Article 340 TFEU,²⁴¹ three cumulative conditions must be fulfilled.²⁴² First, the EU institution's conduct must have been unlawful, second, actual damage must have been suffered, and third, there must be a causal link between the conduct complained of and the damage pleaded.²⁴³ Regarding the first condition, in the case of the adoption of restrictive measures, the Council's unlawful conduct may consist of, *inter alia*, a breach of the relevant rules for the adoption of sanctions, of the substantive conditions for listing a person, a violation of their procedural rights,²⁴⁴ or possibly even a failure of the Council to reassess within the prescribed

²⁴⁰ BUTLER, Graham and Ramses A WESSEL. Jurisdiction of the Court for Non-contractual Liability and Actions for Damages Claims within the CFSP: *Bank Refah Kargaran*, p. 999.

²⁴¹ The second paragraph of Article 340 TFEU reads: "*In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.*"

²⁴² T-47/03 Sison, Judgment of 11 July 2007, ECLI:EU:T:2007:207, para. 233 and the case-law cited.

²⁴³ T-384/11 Safa Nicu Sepahan, Judgment of 25 November 2014, ECLI:EU:T:2014:986, para. 47 and the case-law cited.

²⁴⁴ THANOU, Stella. Individual restrictive measures and actions for damages before the General Court of the European Union, p. 606.

period the inclusion of a person on the sanctions list.²⁴⁵ The largest obstacle however presents itself in the form of an additional requirement later imposed by case-law, relating to the unlawfulness of the conduct. That requirement consists of the obligation of the applicant²⁴⁶ to prove that a “sufficiently serious breach of a rule of law intended to confer rights on individuals” has occurred.²⁴⁷ In particular, such a sufficient breach may be found when an institution has “manifestly and gravely disregarded the limits of its discretion”.²⁴⁸ Nonetheless, the mere fact that an act providing for restrictive measures has been annulled by the Court does not constitute proof of such a sufficiently serious breach.²⁴⁹

Indeed, EU courts have been seized with several actions for damages with respect to harm allegedly caused by the imposition of restrictive measures, which have been for the most part unsuccessful.²⁵⁰ One exception is the case of *Safa Nicu Sepahan*,²⁵¹ where both the General Court and the Court of Justice found that a sufficiently serious breach of EU law occurred. In particular, the General Court had found that the Council manifestly disregarded the limits of its discretion when it maintained the applicant on the list of sanctioned entities for almost three years, without gathering evidence substantiating the maintenance of that listing.²⁵² It was held that since the Council’s obligation to substantiate the restrictive measures adopted arises from the requirement to observe fundamental rights of the persons concerned, the Council does not enjoy any discretion in this regard. Consequently, since the Council did not have any information or evidence which substantiated the restrictive measures concerning the applicant to the requisite legal standard, and because it was continuously unable to produce such information or evidence before the Court, the breach of law was determined as sufficiently serious.²⁵³ That finding was confirmed by the Court of Justice on appeal.²⁵⁴

²⁴⁵ T-9/13 National Iranian Gas Company, Judgment 29 April 2015, ECLI:EU:T:2015:236, paras. 142 and 143. The General Court held that while a delay in the reassessment cannot on its own lead to the annulment of the measures, such a fact does not prejudice the right of the applicant to seek compensation of the damages possibly suffered because of the failure to meet the reassessment deadline.

²⁴⁶ T-384/11 *Safa Nicu Sepahan*, para. 58.

²⁴⁷ T-384/11 *Safa Nicu Sepahan*, para. 50 and the case-law cited.

²⁴⁸ *Ibid.*, paras. 52-54.

²⁴⁹ T-692/15 *HTTS*, Judgment of 13 December 2017, ECLI:EU:T:2017:890, para. 48.

²⁵⁰ *See, inter alia*, T-49/04 *Hassan v. Council and Commission*, Judgment of 12 July 2006, ECLI:EU:T:2006:201; T-228/02 *Organisation des Modjahedines du peuple d’Iran v. Council*, Judgment 12 December 2006, ECLI:EU:T:2006:384; T-293/12 *Syria International Islamic Bank v. Council*, Judgment of 11 June 2014, ECLI:EU:T:2014:439; T-572/11 *Hassan v. Council*; T-168/12 *Georgias and Others v. Council and Commission*, Judgment of 18 September 2014, ECLI:EU:T:2014:781.

²⁵¹ T-384/11 *Safa Nicu Sepahan*; C-45/15 P *Safa Nicu Sepahan*, Judgment of 30 May 2017, ECLI:EU:C:2017:402.

²⁵² T-384/11 *Safa Nicu Sepahan*, para. 69.

²⁵³ *Ibid.*, paras. 59-69.

²⁵⁴ C-45/15 P *Safa Nicu Sepahan*, para. 33.

As for the second and third condition, i.e. the existence of actual harm and a causal link between the harm and the restrictive measures imposed, in *Safa Nicu Sepahan*, the General Court ruled that the applicant had suffered non-material damage to its personality rights, in particular to their reputation. Specifically, the evidence presented by the applicant proved that their listing, which represented an accusation of involvement in nuclear proliferation, had affected the behaviour of third parties with respect to the applicant, even more so since they were maintained on the list of sanctioned entities for almost three years.²⁵⁵ This damage was found to be of direct consequence of the unlawful listing of the applicant and his maintenance on such a list.²⁵⁶ The claim of material damage, on the other hand, was dismissed by the General Court on the grounds that the applicant had not put forward sufficient evidence to prove the existence of real and certain loss or to establish that the adoption of restrictive measures was the determining cause of the alleged damage.²⁵⁷

In general, to demonstrate the existence of causal link between alleged damage and the imposition of sanctions has proven to be particularly difficult, since most sanctions regimes are a two-tier mechanism involving both EU measures and national measures adopted by individual Member State bodies.²⁵⁸ Thus, the applicant has to prove that the alleged damage was caused by the EU decision itself and not by further actions of a Member State implementing that decision.

In conclusion, although the Court has found a path within the Treaties enabling targeted persons to claim damages caused to them by restrictive measures, claiming those damages is a burdensome task. This, however, is more a consequence of the particular nature of the sanctions system, rather than of the Court imposing more strenuous conditions as opposed to other areas of EU policy, since the Court seems to apply the traditional requirements for establishing the EU's liability.²⁵⁹

3.5. Interim measures

The last procedural instrument which I will address are interim measures. Under Article 279 TFEU, the Court may in any cases before it prescribe any necessary interim measures. In the case of sanctions, applications for interim measures will predominantly entail a request for the suspension of the operation of the act providing for the restrictive measures in question. In

²⁵⁵ T-384/11 *Safa Nicu Sepahan*, paras. 88-89 and 91.

²⁵⁶ *Ibid.*, paras. 80-85.

²⁵⁷ *Ibid.*, paras. 93-152.

²⁵⁸ THANOU, Stella. Individual restrictive measures and actions for damages before the General Court of the European Union, p. 612.

²⁵⁹ *Ibid.*, pp. 608-609.

accordance with Article 156(1) of the Rules of Procedure of the General Court (“**RoP**”), such an application will only be admissible if the applicant has challenged that act in an action before the General Court, i.e., typically by an action for annulment. As for the conditions that must be fulfilled in order for a request for interim measures to be successful, three cumulative conditions must be fulfilled.²⁶⁰ First, the order must be justified, *prima facie*, in fact and in law.²⁶¹ This condition is met where at least one of the pleas in law relied on by the applicant in support of the main action appears, *prima facie*, not to be unfounded.²⁶² Second, it must be urgent in so far as the order must take effect before a decision on the main action so as to avoid serious and irreparable harm to the applicant’s interests, and third, where necessary, the judge hearing the application must weigh up the competing interests at stake.²⁶³

Much like actions for damages, applications for interim measures in individual sanctions cases have been largely dismissed, with the overriding reason for dismissal being the lack of urgency.²⁶⁴ This is a consequence of the fairly strict conditions for proving the risk of serious and irreparable harm, in particular the latter. According to settled-case law, damages of a purely financial nature cannot, save in exceptional circumstances, be regarded as irreparable, as potential future pecuniary compensation is capable of making good that damage.²⁶⁵ Thus, potential economic and financial harm may justify granting interim relief only where it appears that, in the absence of that relief, the applicant would find itself in a position that could imperil its existence before final judgment in the main action.”²⁶⁶ Consequently, mainly in the event of asset freezes which are of economic nature, proving the risk of serious and irreparable harm can prove particularly difficult.

However, even applications alleging non-financial damage have been dismissed by the Court. In the context of restrictive measures against Syria, the applicant claimed that the

²⁶⁰ Pursuant to Article 156(3) RoP, the applicant must explain why these conditions are fulfilled in its application, therefore the burden of proof rests on the applicant.

²⁶¹ T-743/22 R Mazepin v Council, Order of 1 March 2023, not published, para. 22; T-125/22 R RT France, Order of 30 March 2022, ECLI:EU:T:2022:199, para. 21; C-162/15 P(R) Evonik Degussa v Commission, Order of 2 March 2016, ECLI:EU:C:2016:142, para. 21 and the case-law cited.

²⁶² C-423/20 P(R) Council v Sharpston, Order of 10 September 2020, ECLI:EU:C:2020:700, para. 21 and the case-law cited.

²⁶³ T-743/22 R Mazepin v Council, para. 22; T-125/22 R RT France, para. 21; C-162/15 P(R) Evonik Degussa v Commission, para. 21 and the case-law cited.

²⁶⁴ See, *inter alia*, T-125/22 R RT France v. Council; T-116/22 R Belavia v. Council, Order of 24 November 2022, ECLI:EU:T:2022:726; T-117/22 R Grodno Azot and Khimvolokno Plant v Council, Order of 1 February 2023, ECLI:EU:T:2023:42; T-782/22 R Cogebi and Cogebi v. Council, Order of 27 March 2023, ECLI:EU:T:2023:162.

²⁶⁵ T-125/22 R RT France, para. 33; C-35/15 P(R) Commission v Vanbreda Risk & Benefits, Order of 23 April 2015, ECLI:EU:C:2015:275, para. 24, and the case-law cited.

²⁶⁶ T-468/08 R AES-Tisza kft v Commission, Order of 23 December 2008, ECLI:EU:T:2008:621, para. 29.

publication of his inclusion in the list of sanctioned persons posed and imminent threat both to his own his life and personal safety and to the lives and personal safety of his family, as they were subject to attacks and death threats.²⁶⁷ The Court did not grant the interim relief, holding that the applicant failed to substantiate that the alleged harm is a consequence of the restrictive measures imposed. In particular, the Court found the reasons for the alleged attacks in the applicant being denounced as a supporter of the Syrian regime by groups opposing that regime.²⁶⁸ In another case, the claim based on a violation of the right to property fell on the establishment of a *prima facie* case, with the Court of Justice ruling on appeal that the importance of the aims pursued by the restrictive measures is such as to, *prima facie*, justify negative consequences, even of a substantial nature.²⁶⁹ In later case-law, the Court has also declined to accept the argument that damage is by definition serious and irreparable if it affects the sphere of fundamental rights.²⁷⁰

Lastly, in *RT France*, the applicant was a French branch of a network controlled by the Russian State. The restrictive measures taken by the EU against Russia had resulted in its broadcasting activities directed at the EU being suspended, so as to avoid the dissemination of propaganda.²⁷¹ Next to harm of economic nature, the applicant also claimed that serious damage to its reputation would occur in the absence of interim relief. The Court dismissed this assertion and held with reference to existing case-law that such damage, assuming that it has been established, is already caused by the publication of the restrictive measures themselves and would continue for as long as those measures were not annulled in the main proceedings. In other words, the Court explained that the purpose of proceedings for interim relief is not to secure compensation for damage already suffered, which would be compensated by the potential annulment of the contested act, but to prevent future damage.²⁷²

One instance in which the Court has decided to grant interim relief is the recent case of *Mazepin v Council*.²⁷³ The applicant is a Formula 1 driver who was included in the Russian

²⁶⁷ T-579/11 R Akhras v Council, Order of 12 December 2011, ECLI:EU:T:2011:729, paras. 1 and 22.

²⁶⁸ *Ibid.*, paras. 34-38.

²⁶⁹ C-317/00 P(R) 'Invest' Import und Export and Invest Commerce v Council, Order of 13 November 2000, ECLI:EU:C:2000:621, paras. 59-60.

²⁷⁰ T-125/22 R RT France, para. 52.

²⁷¹ Council Decision (CFSP) 2022/351 of 1 Mar. 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, 2 Feb. 2022, p. 5-7, recital 7; Council Regulation (EU) 2022/350 of 1 Mar. 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, 2 Mar. 2022, p. 1-4, recital 7.

²⁷² T-125/22 R RT France, para. 48; T-765/20 R The Floow v Commission, Order of 24 March 2021, ECLI:EU:T:2021:167, para. 34 and the case-law cited.

²⁷³ T-743/22 R Mazepin v Council.

sanctions list due to being the son of a leading Russian businessman.²⁷⁴ He claimed that the measures prevent him from negotiating his recruitment as a professional Formula 1 driver or as a driver in other motor sport championships taking place in the European Union, particularly the Formula 1 Grand Prix, as well as training for these championships, which he needed to be able to do in order to obtain the renewal of a license necessary for the participation in these Formula 1 competitions.²⁷⁵ I will not go into the substance of the case here, as it will be described later on in this thesis, but suffice to say at this point that not only did the Court find the existence of a prima facie case regarding the unlawfulness of the inclusion of the applicant in the annex to the restrictive measures, but it also held that the condition of urgency was satisfied. According to its reasoning, in the absence of the suspension sought, it would be particularly difficult, if not impossible, for the applicant to resume his career as a Formula 1 driver after the end of the main proceedings, taking into account the fact that he would not be able to train regularly in Formula 1 cars in the meantime and the likelihood that he would not be able to renew his licence after an interruption.²⁷⁶ Consequently, the Court suspended the operation of the restrictive measures in so far as they concerned the applicant and prevented him in training and participating in EU-based Formula 1 championships.

As follows, while applications for interim relief may be a useful tool which targeted entities may use to seek protection of their interests, it seems that, in reality, securing such interlocutory protection is particularly difficult. That being said, it seems logical that the Court would be strict, considering that the suspension of the operation of a restrictive measure for a period of months, before a decision on the action in the main proceedings is taken, constitutes a decision which significantly impacts its effectiveness.

3.6. Conclusion on means of judicial protection

To conclude this chapter on means of judicial protection, it is evident from the above that the evolution in the Court's case-law signifies a call for widening the access to judicial protection for persons made subject to restrictive measures prescribed by CFSP decisions. It started with merely actions for annulment, found its way to preliminary rulings on validity, and continued even to actions for damages, despite obvious obstacles in the wording of the Treaties. However, while targeted entities now have a wide arsenal of procedural tools which they may use to defend

²⁷⁴ Ibid., para. 8.

²⁷⁵ Ibid., para. 18.

²⁷⁶ Ibid., para. 78.

themselves against restrictive measures imposed on them, in reality, their options remain limited. Actions for annulment are still the most significant mechanism, and the Court is aware of this; its extensive approach to procedural standing of targeted persons aims to provide widest possible access to those actions. By contrast, an indirect challenge through a preliminary reference on validity will mostly remain merely a theoretical possibility for those persons, as the Court's case-law precludes them from initiating that challenge if they could have brought an action for annulment. Since it has been established that such possibility will most likely always be available, the door to an indirect challenge remains closed. For what concerns actions for damages for harm caused by restrictive measures, the Court has proven to be reluctant in upholding the claims raised by targeted persons, for whom it appears particularly difficult to fulfil the strict conditions of establishing the EU's liability. The same can be said for applications for interim measures; fulfilling conditions for granting them is a very demanding task. It therefore seems to me that, although the Court has gone far beyond the text of the Treaties to establish its jurisdiction over such actions, the practical importance of doing so remains in doubt.

4. Standard of review of restrictive measures

The previous chapter of this thesis dealt with the procedural *means* through which restrictive measures against individuals may be reviewed by the CJEU. In this chapter, I will focus on the *standard* applied in this review in order to assess the degree to which the Court scrutinizes those sanctions. The first subsection deals with the question of what standard the Court applies in the review of the legality of restrictive measures. The second subsection then explores the differences in the Court's approach to the applicable standard of review of different types of sanctions, namely UN-implemented sanctions and autonomous sanctions, as well as counter-terrorism sanctions and regime sanctions.

4.1. Standard of review of the legality of restrictive measures

In this thesis, I have repeatedly highlighted the particular nature of restrictive measures as part of the CFSP, a policy which is endowed with a significant political charge. This political character of restrictive measures, aimed at maintaining international peace and security, differentiates CFSP measures from standard EU acts, and the question arises how to balance the accountability of EU policy makers and their ability to efficiently achieve their policy goals.²⁷⁷ With that follows the

²⁷⁷ CHACHKOT, Elena. Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence. Yale Journal of International Law. 2019, vol. 44, no. 1, p. 6.

issue of what, within the described jurisdictional constraints already imposed, should be the subject of the Court’s scrutiny of restrictive measures. In other words, what precisely are the factors which the Court considers when reviewing the legality of restrictive measures imposed onto individuals? How to strike a balance between protecting the rights of the targeted individuals and preserving the Council’s discretion in designing the CFSP policy? In this chapter, will attempt to clarify the standard which the Court applies when reviewing restrictive measures against natural or legal persons.

As a starting point, I will use the Council’s submission in the case of *Alchaar v Council*,²⁷⁸ in which it put forward the consideration that since it has broad discretion as to the appropriateness of the restrictive measures adopted, the Court’s review should be limited to a “simple review of legality” and should not substitute the Council’s assessment of evidence, facts and circumstances justifying the adoption of a measures.²⁷⁹ As will be illustrated below, this limited review suggested by the Council has, to some extent, found its place in the Court’s jurisprudence.²⁸⁰ However, in terms of the intensity of judicial review of the exercise of the Council’s discretion, it is necessary to distinguish between two subjects of review.²⁸¹ First, the general listing criteria, meaning the establishment of generally and abstractly defined categories of persons to whom the restrictive measures shall be applicable, and within which the later specified individuals must fall. And second, individual listing grounds, meaning the reasons for listing a concrete individual in the annex to a restrictive measure.²⁸²

4.1.1. General listing criteria: the “manifestly disproportionate” standard

As mentioned, general listing criteria consist of the identification of a group of persons, defined in an abstract manner, which are to be targeted by the restrictive measures adopted. In the case of regime sanctions adopted against Russia, for example, such a category has been defined as “*natural persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, and natural or legal persons, entities or bodies*”

²⁷⁸ T-203/12 *Alchaar v Council*, Judgment of 3 July 2014, ECLI:EU:T:2014:602.

²⁷⁹ *Ibid.*, para. 81.

²⁸⁰ *See* Chapters 4.1.1. and 4.1.2.

²⁸¹ T-578/12 *National Iranian Oil Company v Council*, Judgment of 16 July 2014, EU:T:2014:678, para. 108.

²⁸² FILPO, Fabio. Evidence standards in the judicial review of restrictive measures. *ERA Forum*. 2020, vol. 20, no. 4, p. 622.

associated with them“.²⁸³ With respect to counter-terrorism sanctions, the determined categories have included “*natural or legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism*”, as well as entities owned or controlled by those persons and natural or legal persons, groups or entities acting on behalf of or at the direction of those persons.²⁸⁴

It has been established by the Court that the Council enjoys broad discretion in defining these general criteria.²⁸⁵ Such discretion is granted with the reasoning that defining them involves political, economic and social choices on the Council’s part, in which it must undertake complex assessments.²⁸⁶ In other words, by establishing general listing criteria, the Council implements the CFSP objectives laid down in Article 21 TFEU, and as such its appreciations are considered policy choices that leave a broad margin of appreciation.²⁸⁷

For these reasons, the legality of the general listing criteria can be affected only if the measure is “*manifestly inappropriate or disproportionate*” in relation to the objective which the Council is seeking to pursue by the adoption of the restrictive measures in question.²⁸⁸ For example, in the context of regime sanctions, the Court has even held in *Sharif v Council* that it is within the Council’s discretion to make presumptions that certain categories of persons contribute to the functioning of the sanctioned third-country regime, drawing certain conclusions on the basis of “*common experience derived from the normal course of events*”.²⁸⁹ Such presumptions, even if they are difficult to rebut, remain within the acceptable limits so as long as they are not manifestly disproportionate to the legitimate aims pursued.²⁹⁰ In that case, the Court considered that the listing criterion defined as “*leading businesspersons operating in Syria*” was proportionate to the objective of the restrictive measures, that being to condemn and end the violent repression pursued

²⁸³ 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 L 78, 17.3.2014, p. 16–21, Article 2(1).

²⁸⁴ Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism OJ L 344, 28.12.2001, p. 70–75, Article 2(3).

²⁸⁵ C-605/13 P *Anbouba v Council*, Judgment of 21 April 2015, ECLI:EU:C:2015:248, para. 41 and the case-law cited.

²⁸⁶ C-348/12 P *Council v Manufacturing Support & Procurement Kala Naft*, Judgment of 28 November 2013, ECLI:EU:C:2013:776, para. 120 and the case-law cited.

²⁸⁷ FILPO, Fabio. *Evidence standards in the judicial review of restrictive measures*, p. 626.; HARPAZ, Guy. Common Foreign and Security Policy, counter-terrorism measures and judicial review: Hamas and LTTE. *Common Market Law Review*. 2018, vol. 55, no. 6, pp. 1933–1934.

²⁸⁸ C-348/12 *Kala Naft*, para. 120 and the case-law cited; T-578/12 *National Iranian Oil Company v Council*, para. 108.

²⁸⁹ T-5/17 *Sharif v Council*, Judgment of 4 April 2019, ECLI:EU:T:2019:216, para. 91.

²⁹⁰ *Ibid.*, paras. 91 and 100.

by the Bashar Al-Assad regime against the civilian population in Syria, since that category of persons provides essential material and financial support to the Syrian regime.²⁹¹ Consequently, it was up to the applicant to demonstrate that the presumption could not be applied to him.²⁹² This imposition of the burden of proof differs significantly from the case of individual listing grounds, where the burden of proof rests with the Council, which must provide sufficient reasons for the listing of the applicant and it cannot be asked of that applicant to adduce evidence of its unreasonableness.²⁹³

It follows that the limited judicial review of the Court does not apply to checking whether the facts which form the basis of the Council's assessment are correct,²⁹⁴ but rather whether that assessment is not vitiated by manifest errors causing the general listing criteria to be significantly disproportionate to the objective pursued. While the Court's respect for the Council's policy choices is justified on the basis of the principle of separation of powers,²⁹⁵ the difference between the standard of judicial review of general listing criteria and individual listing grounds may lead to circumvention by the Council of its obligation to sufficiently reason the listing of a specific individual.²⁹⁶ To explain, in the case of the Iranian sanctions regime, which was at stake in *Sharif v Council*, the listing criteria originally only provided for the sanctioning of persons "*responsible for the violent repression against the civilian population in Syria, persons and entities benefiting from or supporting the regime, and persons and entities associated with them*".²⁹⁷ Therefore, in the case of leading businesspersons operating in Syria, it was up to the Council to provide sufficient evidence in each individual case that the businessperson in question was a person benefiting of supporting the regime or one associated with such a person. However, the Council then amended the decision in question so as to specifically include the category of leading businesspersons in the general listing criteria,²⁹⁸ thus "moving up" the reason for listing the individual into a sphere where less intense judicial review is applied.²⁹⁹ Thus, by broadening the scope of the category of persons

²⁹¹ Ibid., paras. 97-98.

²⁹² Ibid., para. 108.

²⁹³ C-584/10 P, C-593/10 P and C-595/10 P Commission and others v Kadi, Judgment of 18 July 2013, ECLI:EU:C:2013:518, paras. 121–122.

²⁹⁴ FILPO, Fabio. Evidence standards in the judicial review of restrictive measures, p. 626.

²⁹⁵ Ibid.

²⁹⁶ See Chapter 4.1.2.

²⁹⁷ Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria, OJ L 147, 1.6.2013, p. 14–45, Article 28(1).

²⁹⁸ Council Decision (CFSP) 2015/1836 of 12 October 2015 amending Decision 2013/255/CFSP concerning restrictive measures against Syria, OJ L 266, 13.10.2015, p. 75–82, recital 6 and Article 27(2)(a).

²⁹⁹ CREMONA, Marise. "Effective Judicial Review Is of the Essence of the Rule of Law", p. 696.; FILPO, Fabio. Evidence standards in the judicial review of restrictive measures, p. 622.

provided for in the general listing criteria, the Council can avoid this stricter review pertaining to individual listing grounds, the scope of which I will now elaborate on.

4.1.2. Individual listing grounds: the “sufficiently solid factual basis” standard

With respect to individual listing grounds, i.e. reasons on which the EU authorities base its conclusion that a specific individual falls within the scope of the general listing criteria, the Court still conducts limited review, albeit much stricter than in the case of general listing criteria.

The Court has established that it is the task of the EU courts to determine whether the situation of the person or entity listed in an annex to a restrictive measure corresponds to the abstract listing criteria defined by the Council.³⁰⁰ In other words, the Court must ensure that the legal conditions for applying the decision or regulation prescribing restrictive measures are fulfilled.³⁰¹ Still, the Court has acknowledged that a “restricted” or “limited” review is to be carried out with regard to the exercise of the Council’s discretion in determining the list of sanctioned persons.³⁰² This limited review applies especially to the Council’s assessment of the considerations of appropriateness of imposing the measure in question.³⁰³ However, unlike in the case of general listing grounds, the Council’s discretion does not prevent the Court from determining whether the facts on which the Council has relied are true and accurate.³⁰⁴ Thus, as highlighted in the case of *Bank Melli Iran*,³⁰⁵ the Court’s powers of review extend to the assessment of the facts and circumstances relied on as justifying the listing of the person concerned, as well as to the verification of the evidence and information on which that assessment is based. The standard which the Court applies in this regard is the following: in order to ensure the right to effective judicial protection, the decision which affects the listed individual must be taken on a “sufficiently solid factual basis”.³⁰⁶

³⁰⁰ T-390/08 *Bank Melli Iran v Council*, Judgment of 14 October 2009, ECLI:EU:T:2009:401, para. 37; *see also* T-190/12 *Tomana v Council*, Judgment of 22 April 2015, ECLI:EU:T:2015:222, para. 222.

³⁰¹ T-228/02 *OMPI v Council*, para. 154.

³⁰² T-400/10 *Hamas v Council*, Judgment of 17 December 2014, ECLI:EU:T:2014:1095, para. 132; T-208/11 *LTTE*, Judgment of 16 October 2014, ECLI:EU:T:2014:885, para. 220.

³⁰³ T-190/12 *Tomana v Council*, paras. 216-217; T-390/08 *Bank Melli Iran v Council*, para. 36.

³⁰⁴ T-190/12 *Tomana v Council*, para. 218.

³⁰⁵ T-390/08 *Bank Melli Iran v Council*.

³⁰⁶ *Ibid.*, para. 218; C-280/12 *P Council v Fulmen and Mahmoudian*, Judgment of 28 November 2013, ECLI:EU:C:2013:775, para. 64 and the case-law cited.

As held in *Kadi II*³⁰⁷ and reaffirmed by constant case-law,³⁰⁸ the concept of “sufficiently solid factual basis” entails the verification whether the reasons provided for the listing of an individual are substantiated by a sufficiently concrete, precise and consistent body of evidence.³⁰⁹ According to the Court, at the very least, one of those reasons must be sufficiently detailed and specific so that it in itself constitutes a sufficient basis to support the decision.³¹⁰ In the specific context of UN-implemented sanctions, this entails a verification of the factual allegations in the summary of reasons underpinning the UN-level listing, provided by the UN Sanctions Committee.³¹¹ In that regard, the Court has held that the Council must assess whether it needs to seek assistance from the UN Security Council to obtain the disclosure of information or evidence, or whether it can verify those reasons on the basis of information already available to it.³¹²

The burden of proof in that regard lies with the EU authority, who must, in the event that the listing is challenged, adduce evidence to support that the reasons relied on against the person concerned are well founded.³¹³ While it is not necessary for it to produce before the Court *all* the information and evidence underlying the reasons for the listing,³¹⁴ it is necessary for the information or evidence that has been provided to *support* the reasons relied on against the listed person.³¹⁵ Conversely, if the EU authorities do not provide evidence which might substantiate the listing, the Court will annul the restrictive measures in so far as it concerns the individual concerned.³¹⁶ A very recent example can be found in the case of *Belshyna v Council*,³¹⁷ where the Council listed the applicant claiming that it fell under the general listing criterion of “persons responsible for the repression of civil society in Belarus” because it had dismissed employees who demonstrated and went on strike following the 2020 presidential elections.³¹⁸ The Council, however, based its assessment solely on two online articles reporting on this event and did not

³⁰⁷ C-584/10 P *Commission and Others v Kadi*, para. 119.

³⁰⁸ See, inter alia, T-331/14 *Azarov v Council*, EU:T:2016:49, para 43; C-176/13 P *Council v Bank Mellat*, para 109; C-280/12 P, *Council v Fulmen and Mahmoudian*, para. 64; -190/12 *Tomana v Council*, para. 218.

³⁰⁹ T-617/18 *Kanyama v Council*, Judgment of 12 February 2020, ECLI:EU:T:2020:49, para. 93 and the case-law cited.

³¹⁰ C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi*, para. 130.

³¹¹ *Ibid.*, para. 119.

³¹² T-107/15 and T-347/15 *Uganda Commercial Impex v Council*, Judgment of 18 September 2017, ECLI:EU:T:2017:628, para. 53.

³¹³ *Ibid.*, para. 124.

³¹⁴ For more information of obtaining evidence by the Council, see, for example, *FILPO, Fabio. Evidence standards in the judicial review of restrictive measures.*

³¹⁵ C-280/12 P *Council v Fulmen and Mahmoudian*, paras. 65-67; T-190/12 *Tomana v Council*, para. 219.

³¹⁶ C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi*, para. 153.

³¹⁷ T-115/22 *Belshyna v Council*, Judgment of 20 March 2024, ECLI:EU:T:2024:187.

³¹⁸ *Ibid.*, paras. 65-66.

provide any further evidence corroborating the content of those articles. Consequently, the Court annulled the restrictive measures in so far as they concerned the applicant.³¹⁹

Turning to the issue what exactly are these “reasons” which the Council must prove, this entails, in particular, proving that there is a sufficient link between the entity subject to a restrictive measure and the situation being combated by that measure.³²⁰ To illustrate, drawing on the examples used in the previous chapter, in the case of the counter-terrorism sanctions regime, the Council will have to substantiate that the listed individual is a person “*committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism*” or “*acting on behalf of or at the direction of those persons*”.³²¹ In *Kadi II*, for example, the sanctions regime in question was directed specifically at persons associated with Usama bin Laden, and the Court examined whether the Council had presented sufficiently detailed and specific reasoning as to why Kadi is to be considered as falling within that category, ultimately holding that it did not.³²²

In the case of regime sanctions, using the example of the Russia sanctions regime, this means proving that the listed person is a “*person responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine*”, or at least one associated with such persons.³²³ I have partially explored the issue of what the Court considers to be a sufficient link, in particular with respect to regime sanctions, in Chapters 1.3.1. and 1.3.2. of this thesis. To draw on that discussion, in the *Tay Za* case, for example, Advocate General Mengozzi identified essentially three categories of persons to whom the restrictive measures in question were addressed.³²⁴ The first category comprises the rulers of the sanctioned regime, the inclusion of which has not given rise to debate, as they are unequivocally linked to the sanctioned regime. The second category comprises persons associated with those rulers, which may include family members, but also persons who benefit from the economic policies of the regime in question, i.e. typically leading businessmen. The third category then includes the family members of such persons who benefit from the regime’s economic policies.³²⁵

³¹⁹ Ibid., paras. 73-82.

³²⁰ C-330/15 P *Tomana and Others v Council and Commission*, para. 46; C-376/10 P *Tay Za v Council*, paras. 63-54.

³²¹ Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism OJ L 344, 28.12.2001, p. 70–75, Article 2(3).

³²² C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi*, para. 163.

³²³ 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 L 78, 17.3.2014, p. 16–21, Article 2(1).

³²⁴ C-376/10 P *Tay Za v Council*, Opinion of Advocate General Mengozzi of 29 November 2011, ECLI:EU:C:2011:786, point. 40.

³²⁵ Ibid., point 40.

With respect to the family members included in the second and third categories, the Court has consistently held that persons may not be subject to restrictive measures solely on account of the existence of a family link, irrespective of their personal conduct.³²⁶ In the context of the 2022 restrictive measures adopted against Russia, the Court clarified that in order to fall within scope of “associated persons”, there must exist a link which goes beyond a family relationship and which comprise of the existence, at the time of the adoption of the restrictive measures, of common interests, economic or other.³²⁷ For these reasons, the Court has recently annulled the listing of Formula 1 driver Nikita Mazepin,³²⁸ due to the failure of the Council to discharge its burden of proof regarding the existence of common interests going beyond a family link between Mazepin and his father.³²⁹ By contrast, in the case of the sister of Syrian leader Bashar Al-Assad, this family link was found to be adequately strong to justify the presumption that she profited from the Syrian regime.³³⁰ As for the category of leading businesspersons, while the Court did acknowledge in *Tay Za v Council* that persons in charge of certain businesses in a given country may, in principle, be subjected to restrictive measures as persons associated with the leaders of that country, the Council may do so only in reliance on precise, concrete evidence which enables it to establish that those businessmen benefit from the economic policies of the regime.³³¹ On that basis, again in the context of the Russia sanctions, the Court has for example ruled that where the applicant was a leading businessman involved in the oil and gas industry sectors which represent a substantial source of revenue for the Russian government, it was justified to conclude that he was linked to the Russian regime by virtue of common interests.³³² In another case, the fact that the businessman benefited from the privatisation carried out by the Lukashenko regime in Belarus, as well as that he used to sit on the board of a public body advising on Belarusian business legislation, was deemed as sufficiently precise and concrete evidence of the applicant benefited from that regime.³³³

It thus follows that, when it comes to deciding who may subject to restrictive measures, the Council may not simply rely on presumptions that a certain person contributes to the situation

³²⁶ C-376/10 P *Tay Za v Council*, para. 66; T-190/12 *Tomana v Council*, para. 127.

³²⁷ T-212/22 *Prigozhina v Council*, Judgment of 8 March 2023, ECLI:EU:T:2023:104, paras. 92-93 and the case-law cited; T-743/22 *Mazepin v Council*, Judgment of 20 March 2024, ECLI:EU:T:2024:180, para. 74.

³²⁸ See Chapter 3.5. above.

³²⁹ T-743/22 *Mazepin v Council*, para. 155.

³³⁰ T-202/12 *Bouchra Al Assad v Council*, Judgment of 12 March 2014, ECLI:EU:T:2014:113, paras. 96-97.

³³¹ C-376/10 P *Tay Za v Council*, paras. 55, 61-62 and 70.

³³² T-270/22 *Pumpyanskiy v Council*, Judgment of 6 September 2023, ECLI:EU:T:2023:490, paras. 44-69.

³³³ T-141/21 *Shakutin v Council*, Judgment of 7 June 2023, ECLI:EU:T:2023:303, paras. 148-166.

which the measures aim to combat but must present sufficiently concrete and precise reasons and evidence as to why it has reached that conclusion. It is true, as noted by Chachkot,³³⁴ that the Court's judicial review of the substantive legality is still significantly limited and grants due deference to the Council's policy choices, especially regarding the appropriateness of the listings. Still, I find that the judicial scrutiny of the reasons presented for the listing of a specific individual is capable, at the very least, of excluding cases of arbitrary listings of persons who are only very distantly linked with the targeted regime or terrorist organization. Moreover, as observed by Lenaerts, such instances of the Court's judicial deference in relation to substantive choices are counterbalanced by a strict process review.³³⁵ This is certainly the case with jurisprudence in the field of restrictive measures, where the Court puts great emphasis on the observance of procedural rights of the listed persons within the process of adoption. In particular, the Court is known to intensely scrutinize the observation of the rights to defence, specifically the right to be heard and the right to a statement of reasons, which I will further analyse in Chapter 5 of this thesis.

4.2. Standard of review depending on the type of restrictive measures – a difference in the Court's approach?

In chapter 2 of this thesis, I have introduced a distinction between different categories of restrictive measures, dividing them by origin into UN-implemented sanctions and autonomous sanctions, and by subject into counter-terrorism sanctions and regime sanctions. Although all adopted on the same legal basis, the specific differences in the nature of these categories of sanctions do lead to some questions as to whether the standard of review applied by the Court to all of them is alike, or whether divergences can be identified in the Court's approach. For these reasons, I will analyse in this chapter the standard of review applied by the Court to, first, sanctions implementing UN Security Council resolutions and autonomous sanctions, and second, counter-terrorism sanctions and regime sanctions.

4.2.1. Sanctions implementing UN Security Council resolutions v. autonomous sanctions

When it comes to restrictive measures of UN origin, there is one key factor in play which is not a central issue in the case of autonomous EU sanctions; international law. More specifically, the interplay between safeguards provided by the EU legal order and the binding obligations which

³³⁴ CHACHKOT, Elena. *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, p. 14.

³³⁵ LENAERTS, Koen. The European Court of Justice and Process-Oriented Review. *Yearbook of European Law* 31 (1), 2012, 3–16, p. 4.

arise for the EU and Member States out of international law. Thus, when the Council adopts restrictive measures meant to implement a UN Security Council resolution prescribing such measures, the question arises to what degree may the EU courts scrutinize the content of such a decision, since it is determined by the Security Council and not the EU, while still holding true to general principles inherent to the EU legal order. My goal is not to delve into a discussion about the relationship between EU law and international law, as that is a complicated topic well outside the scope of this thesis, albeit very interesting. What I will focus on is the Court's approach to the review of UN-implemented restrictive measures. This approach is essentially consolidated in one line of case-law: the *Kadi* saga.

Starting from 1999, the UN Security Council adopted a set of resolutions on the basis of Chapter VII of the UN Charter aimed at combatting terrorist actions of the Taliban, beginning with Resolution 1267 (1999) in which it set out measures to be imposed against the Taliban, in particular flight bans and asset freezes.³³⁶ On the UN level, a Sanctions Committee was established, its responsibility was, inter alia, to designate the entities connected to the Taliban, and specifically Usama bin Laden, whose resources should be subject to the asset freezes prescribed by the resolution.³³⁷ The EU considered that its action was necessary to implement this resolution³³⁸ and adopted a set of Common Positions and regulations prescribing flight bans and asset freezes under the conditions set out by the Security Council resolution and the Sanctions Committee.³³⁹ Amongst the persons designated by the Sanctions Committee was Yassin Abdullah Kadi, who was consequently listed in the annex to the EU regulations providing for restrictive measures.³⁴⁰ Kadi challenged his listing by bringing an action for annulment against the relevant regulations before the (then) CFI.³⁴¹

³³⁶ United Nations Security Council Resolution 1267 (1999); see also Council Common Position 1999/727/CFSP of 15 November 1999 concerning restrictive measures against the Taliban, OJ 1999 L 294, p. 1, preamble.

³³⁷ T-315/01 Yassin Abdullah Kadi v Council, Judgment of 21 September 2005, ECLI:EU:T:2005:332, paras. 10-11 and 14.

³³⁸ *Ibid.*, para. 11.

³³⁹ Starting with Common Position 1999/727/CFSP concerning restrictive measures against the Taliban, OJ 1999 L 294, p. 1.

³⁴⁰ Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000 OJ L 277, 20.10.2001, p. 25–26; Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000, OJ L 67, 9.3.2001, p. 1–23.

³⁴¹ T-315/01 Kadi v Council.

When assessing its competence to review the UN-implemented restrictive measures, the CFI essentially held that those measures fall outside the scope of its jurisdiction and that it has no authority to call into question their lawfulness and thus cannot review that lawfulness in light of EU law.³⁴² This includes even indirect review through the contested implementing Community measures, as they merely put into effect the Security Council resolutions without any discretion being exercised.³⁴³ On the contrary, it stated that it is obliged, as far as possible, to interpret and apply EU law in a manner compatible with the obligations of the Member States under the UN Charter.³⁴⁴ Nonetheless, the Court identified one exception to this exclusion of competence: according to its reasoning, EU courts are empowered, highly exceptionally, to indirectly review the lawfulness of the Security Council resolutions with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law from which no derogation is possible.³⁴⁵ As these superior rules are to include in particular “*mandatory provisions concerning the universal protection of human rights*”,³⁴⁶ the CFI went on to examine Kadi’s pleas alleging the breach of his fundamental rights, in particular the right to be heard, the right to effective judicial protection, and the right to respect for property.³⁴⁷

Each one of these pleas was rejected. In particular, with respect to the right to be heard, the CFI ruled that since the Council enjoys no discretion in determining the content of the restrictive measures, including in selecting the persons to be placed on the sanctions list, the principle of EU law relating to the right to be heard does not apply in such circumstances. The CFI reasoned this conclusion by stating that even if the Council were to provide a hearing for the person concerned, such a hearing could not lead it to a review of its position.³⁴⁸ With regard to the right of effective judicial protection, the CFI admitted that because of its rejecting its jurisdiction over UN-implemented sanctions and because no international court has been established to hear cases regarding UN sanctions, the targeted persons have no access to a judicial remedy with regard to the measures imposed.³⁴⁹ However, it went on saying that such a lacuna in judicial protection is

³⁴² Ibid., para. 225.

³⁴³ Ibid., para. 225 and 231.

³⁴⁴ Ibid., para. 225.

³⁴⁵ Ibid., para. 226 and 231.

³⁴⁶ Ibid., para. 231.

³⁴⁷ Ibid., para. 233.

³⁴⁸ Ibid., para. 258.

³⁴⁹ Ibid., paras. 277-285.

not in itself contrary to jus cogens,³⁵⁰ especially since designated persons may apply to the Sanctions Committee for re-examination, thus affording adequate protection.³⁵¹

It follows that the CFI's judgement set out a significantly strict threshold of review with respect to UN-implemented restrictive measures and gave priority to the respect of the Member States' obligations arising of the UN system over the safeguarding of general principles of EU law. Indeed, although finding the absence of a fair hearing and of judicial protection, guarantees which are an inherent part of the EU legal system, the CFI dismissed Kadi's case because such violations, in its view, did not reach the level of a violation of jus cogens. The CFI came to the same conclusions in the case of *Yusuf and Al Barakaat*³⁵² concerning other listed entities under the same sanctions regime.

The CFI's approach in *Kadi* and *Yusuf and Al Barakaat* stands in stark contrast to the judgement in *OMPI*, which came a bit over a year later and in which the CFI concluded in the context of UN-implemented restrictive measures that the Council was obligated to ensure the applicant's right to a fair hearing.³⁵³ This distinction was based on one significant difference between the two cases; in *OMPI*, the Security Council resolution only provided for the obligation of the UN Member States to freeze assets of persons associated with terrorism, but left the identification of the specific individuals to be listed up to the Member States, in this case the Community, through which EU Member States had decided to act.³⁵⁴ Thus, the composition of the list of targeted persons fell within the exercise of the Community's own powers and entailed an exercise of its discretion, thereby making it bound to observe the rights guaranteed by Community law.³⁵⁵ Such a difference in treatment on the basis of which body decides on the listing did not go without criticism,³⁵⁶ nonetheless, it turned out to be short-lived,³⁵⁷ given the later ruling of the Court of Justice in the joint appellate proceedings *Kadi and Al Barakaat*,³⁵⁸ which I will turn to now.

³⁵⁰ *Ibid.*, para. 286.

³⁵¹ *Ibid.*, para. 290.

³⁵² T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*, Judgment of 21 September 2005, ECLI:EU:T:2005:331.

³⁵³ T-228/02 *OMPI*, para. 107.

³⁵⁴ *Ibid.*, paras. 101-102.

³⁵⁵ *Ibid.*, para. 107.

³⁵⁶ MURPHY, Cian C. *EU counter-terrorism law: pre-emption and the rule of law*. Oxford: Hart, 2012, p. 131.

³⁵⁷ REDMOND, Trevor. *Judicial Protection in Autonomous Restrictive Measures Involving Composite Administrative Procedures: OMPI*. In: BUTLER, Graham and Ramses A WESSEL, eds. *EU External Relations Law: The Cases in Context*. Hart Publishing, 2022, p. 517.

³⁵⁸ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*.

Both the Court of Justice and Advocate General Maduro took a different approach than that of the CFI in the first instance judgements. The Advocate General wrote in his Opinion that “it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order.”³⁵⁹ In his words, although EU courts cannot be “institutionally blind”, the Court cannot with regard to the view of those institutions “turn its back on the fundamental values what lie at the basis of the Community legal order” and which it has the duty to protect.³⁶⁰ For those reasons, the Advocate General concluded that when a situation arises in which the Community’s fundamental values are at stake, the Court may be required to reassess, and even possibly annul, Community measures even when they reflect the “wishes” of the Security Council.³⁶¹

The Court of Justice followed the Advocate General and dismissed the CFI’s argumentation that its review should be limited to checking the measures’ compliance with the rules of jus cogens. The Court of Justice started by recalling several fundamental principles of Community law: the *Les Verts* rule³⁶² that no EU institution or Member State may avoid review of the conformity of its acts with the basic constitutional charter (the EC Treaty);³⁶³ that an international agreement cannot affect the allocation of powers fixed by the Treaties and their observance by the Court;³⁶⁴ that fundamental rights form an integral part of the general principles of law whose observance the Court ensures;³⁶⁵ and that respect for human rights is a condition of the lawfulness of Community acts.³⁶⁶

Drawing from these principles, it went on to establish that obligations flowing from an international agreement cannot prejudice the constitutional principles of the EC Treaty, including the requirement of observance of fundamental rights by Community acts and the review of the compliance with such requirement by the Court.³⁶⁷ In other words, it departed from the CFI’s considerations and ruled that although EU courts cannot review the lawfulness of the Security Council resolutions, they are fully entitled (within the scope of the powers conferred on them by

³⁵⁹ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, Opinion of Advocate General Maduro of 16 January 2008, ECLI:EU:C:2008:11, point 24.

³⁶⁰ *Ibid.*, point 44.

³⁶¹ *Ibid.*, point 44.

³⁶² C-294/83 *Les Verts*, para. 23.

³⁶³ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, para. 281.

³⁶⁴ *Ibid.*, para. 282.

³⁶⁵ *Ibid.*, para. 283.

³⁶⁶ *Ibid.*, para. 284.

³⁶⁷ *Ibid.*, para. 285.

the Treaties) to review Community acts intended to give effect to those resolutions, without that review entailing any challenge to the primacy of that resolution in international law.³⁶⁸ The necessity to ensure the in principle full review of the Community restrictive measures was even more emphasized following the Court's assessment that the mechanism of re-examination before the Sanctions Committee did not constitute a sufficient guarantee of effective judicial protection.³⁶⁹

The Court of Justice also took a different view on the issue of the Council's discretion in the process of the adoption of sanctions. According to its ruling, the UN Charter does not impose a particular model for the implementation of the Security Council resolutions, thereby leaving the UN Member States a free choice amongst the various possible modes of transposition.³⁷⁰ For these reasons, and in accordance with its previous findings regarding the principle of full review, it went on to consider the applicants' pleas regarding the right to be heard in light of the Community requirements for safeguarding of that right, ultimately ruling that a violation had occurred.³⁷¹ It is appropriate to note that the same approach has also been taken by the European Court of Human Rights, which in *Nada and Others v Switzerland*³⁷² cited the conclusions reached by the Court of Justice in *Kadi*³⁷³ regarding the choice of the mode of transposition of Security Council resolutions and went on to review the measures adopted by Switzerland which were meant to give effect to a resolution prescribing restrictive measures.

In conclusion, for a while, that being the time between the CFI and the Court of Justice judgements in *Kadi I*, UN-transposed restrictive measures held a position in the EU legal order that was significantly distinct from autonomous restrictive measures. However, that state did not last long, as the Court of Justice swept in and reminded that although the EU (then the European Community) is part of the international legal order, the fundamental principles enshrined in the Treaties will always take precedence. Still, the appellate decision in *Kadi I* did not entirely clarify the position of UN-transposed sanctions within the Court's review, in particular whether the standard of such review should be the same as that applied to autonomous sanctions.

³⁶⁸ Ibid., paras. 285-288.

³⁶⁹ Ibid., paras. 321-326.

³⁷⁰ Ibid., para. 298.

³⁷¹ Ibid., paras. 338-353.

³⁷² European Court of Human Rights, *Nada and Others v Switzerland* [GC], no. 10593/08, 12 September 2012.

³⁷³ Ibid., para. 176.

The issue came up again in *Kadi II*,³⁷⁴ which concerned the re-listing of Kadi after the judgement in *Kadi I*. Advocate General Bot in his Opinion rejected the application of the standard of judicial review established in case-law on autonomous sanctions to UN-transposed restrictive measures.³⁷⁵ He argued that, unlike in the case of autonomous sanctions, the review of the restrictive measures should not call into question the merits of the listing, with the exception of cases whether the implementation procedure on the EU level has highlighted a “flagrant error” in the factual findings made, their legal assessment, or the proportionality of the measures.³⁷⁶ Instead, the Advocate General suggested, in essence, that the Court should only scrutinize the procedural lawfulness with regard to the EU implementation of the UN restrictive measures.³⁷⁷

The Court of Justice did not follow the Advocate General’s Opinion. Instead, it cited the conditions established in case-law on autonomous counter-terrorism restrictive measures³⁷⁸ and held that the Court must assess whether the decision to include an individual on the list of targeted persons was taken on a sufficiently solid factual basis,³⁷⁹ a concept which I have scrutinized in previous chapters of this thesis.³⁸⁰ In the UN context, this means that at least one of the reasons included in the summary of reasons provided by the Sanctions Committee must be substantiated.³⁸¹ As follows, although the Court of Justice did not explicitly confirm that the standard of judicial review of UN-transposed restrictive measures should be the same as that applied to autonomous restrictive measures, such a conclusion can be inferred from the Court’s references to the case-law on autonomous sanctions.³⁸²

To conclude, the analysis of the Kadi saga inevitably leads to the verdict that despite the early efforts of the CFI, the Court no longer differentiates between the standard applicable in the review of restrictive measures implementing UN Security Council resolutions and in the review of autonomous restrictive measures. Nor does an indication to the contrary follow from later case-law. In my view, there is indeed no reason to take a different approach. Regardless of the origin of

³⁷⁴ C-584/10 P, C-593/10 P and C-595/10 P Commission and Others v Yassin Abdullah Kadi, ECLI:EU:C:2013:518.

³⁷⁵ Opinion of Advocate General Bot in C-584/10 P Commission v Kadi, point 67.

³⁷⁶ Ibid., point 110.

³⁷⁷ Ibid., points 67-110. See also ECKES, Christina. Christina Eckes, “EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions”, (2014), 51, *Common Market Law Review*, Issue 3, pp. 869-905. 2014, p. 896.

³⁷⁸ The case-law referred to includes, *inter alia*, C-417/11 P Council v Bamba, Judgment of 15 November 2012, ECLI:EU:C:2012:718; C-27/09 P France v People's Mojahedin Organization of Iran, Judgment of 21 December 2011, ECLI:EU:C:2011:853; or T-327/03 Al-Aqsa v Council, Judgment of 11 July 2007, ECLI:EU:T:2007:211.

³⁷⁹ C-584/10 P, C-593/10 P and C-595/10 P Commission v Kadi, para. 119.

³⁸⁰ See Chapter 4.1.2.

³⁸¹ Ibid., para. 119.

³⁸² ECKES, Christina. *EU restrictive measures against natural and legal persons*, pp. 897–898.

the content of the measures imposed, the fact remains that the restrictive measures themselves are adopted by EU institutions, on the basis of the EU Treaties, and result in the same severe consequences for the targeted persons. As follows, the restrictive measures are part of the EU legal system, and as such they must be subject to the judicial protection which that system provides. To decide otherwise would mean to place blind reliance on the adequacy of the UN system and its respect for EU-guaranteed fundamental rights.

4.2.2. Counterterrorism sanctions v. regime sanctions

In the case of counter-terrorism sanctions and third-country sanctions, no issue arises as to a distinction in the origin of the listings. Instead, as noted in Chapter 2 of this thesis, the two categories differ in who constitutes the subject of the restrictive measures in question. Counter-terrorism measures are directed at specific persons personally involved in or otherwise connected to terrorist acts, and their listing thereby implies specific conduct which can be classified in that manner.³⁸³ In the case of regime sanctions, on the other hand, the primary subject is the third state whose regime the EU aims to weaken by making subject to restrictive measures persons who are in some way connected to that regime, or whose activities provide economic benefits to it. The listing of an entity therefore does not require personal conduct, but it suffices that the person in question merely falls into a generally defined category of persons defined by the Council.³⁸⁴ For example, in *National Iranian Oil Company v Council*, the Court upheld the possibility of listing persons whose activities were generally capable of encouraging Iran's nuclear proliferation by providing certain resources or material, even if those activities had no actual direct or indirect connection with such proliferation.³⁸⁵ The question therefore emerges whether this divergence in the nature of the two types of sanctions has impacted the Court's approach to their review.

The answer is no, but just as with UN-transposed sanctions, the issue was not always so clear. In *Tay Za v Council*, the General Court had drawn a distinction between counterterrorism and regime sanctions with respect to the rights of defence.³⁸⁶ Highlighting the aforementioned difference in who each of the individual categories of restrictive measures are directed at,³⁸⁷ the General Court held that in the case of sanctions taken against a third country specifically applying to an individual, there are no proceedings initiated against that individual, since the restrictive

³⁸³ CREMONA, Marise. "Effective Judicial Review Is of the Essence of the Rule of Law", pp. 691–692.

³⁸⁴ Ibid.

³⁸⁵ C-440/14 P *National Iranian Oil Company v Council*, para. 80.

³⁸⁶ T-181/08 *Tay Za v Council*.

³⁸⁷ Ibid., paras. 121-122.

measure adopted is one of general application, even if the persons concerned are identified by name.³⁸⁸ Consequently, according to the General Court, in a procedure resulting in the adoption of sanctions against a third country which apply to certain categories of individuals, the rights of defence are not applicable to them.³⁸⁹ In essence, this would mean that when an EU act provides for restrictive measures aimed at the sanctioning of a state, persons affected by them cannot plead an infringement of its due process rights, even if they are explicitly listed in the annex of such measures and thus ultimately individually concerned by them.³⁹⁰

This finding is hardly comprehensible. As Pantaleo argued, it seems all the more necessary to communicate to the targeted person the reasons for their listing and to make known their view in cases where the listing grounds may be based on often very general allegations.³⁹¹ Nor did such a position have any precedents in case-law. In *Bank Melli Iran*, for example, the Court of Justice analysed whether the applicant had been provided with sufficient reasons for its listing, an inherent part of the rights of defence, and that case concerned sanctions targeted at a third country (Iran, in that case).³⁹²

In the appellate proceedings in *Tay Za v Council*,³⁹³ Advocate General Mengozzi stated that he was not convinced by the General Court's reasoning. Specifically, he wrote that he failed to see „*what legal subtlety might explain why the individual rights of persons suspected of participating in terrorist activities are better safeguarded than those of persons suspected of cooperating with an authoritarian regime which the European Union intends to combat.*“³⁹⁴ The Advocate General then went on to say that, in terms of due process rights, individuals subject to restrictive measures which principally aim at third countries should be equated to individuals subject to counterterrorism measures, as “[i]t would be pure fiction to consider that, because it is aimed at a third State, that regulation can escape all requirements connected with any individual rights that may be at issue”.³⁹⁵

As for the Court of Justice, it quashed the General Court's judgement due to the finding of a lack of legal basis, therefore it did not get to addressing the distinction drawn as regards the rights

³⁸⁸ Ibid., para. 123.

³⁸⁹ Ibid., para. 123.

³⁹⁰ PANTALEO, Luca. Case C-376/10 P, *Pye Phyto Tay Za v. Council*, Judgment of the European Court of Justice (Grand Chamber) of 13 March 2012. *Common Market Law Review*. 2012, vol. 49, no. Issue 5, pp. 1774–1775.

³⁹¹ Ibid., pp. 1775–1776.

³⁹² C-548/09 P *Bank Melli Iran v Council*, Judgment of 16 November 2011, ECLI:EU:C:2011:735, paras. 86-93.

³⁹³ C-376/10 P *Tay Za v Council*.

³⁹⁴ C-276/10 P *Tay Za v Council*, AG Mengozzi Opinion, point 57.

³⁹⁵ Ibid., points 57-62.

of defence. However, in the later case of *Bamba v Council*,³⁹⁶ both the General Court and the Court of Justice once again assessed the applicant's rights to defence without raising the possibility of them not being applicable in the context of third-country sanctions.³⁹⁷ Finally, the issue was put to rest by the General Court itself in the case of *Alchaar v Council*.³⁹⁸ In its submissions, the Council suggested that that Court's review be particularly limited in the case of regime sanctions as opposed to sanctions adopted against persons involved in acts of terrorism.³⁹⁹ The General Court explicitly dismissed this argument and held that such a distinction between the two types of measures finds no support in the Court's case-law.⁴⁰⁰ On the contrary, it pointed to the conclusions drawn in the Kadi saga regarding the principle of effective judicial protection, and reiterated that such considerations of effectiveness cannot justify lessening of the judicial review exercised over restrictive measures adopted against individuals.⁴⁰¹

In conclusion, it seems that the General Court ruling in *Tay Za v Council* represented an anomaly in the Court's approach, which otherwise requires the rights of all targeted entities to be safeguarded without drawing a distinction as to whether the restrictive measures are aimed at combatting terrorism or sanctioning a third-country regime.

4.3. Conclusion on the standard of review

To summarize the findings of this chapter on the standard of review, it follows that although the Court applies limited review of the substance of the restrictive measures, these limits are placed much lower with respect to the reasons for listing a specific individual in an annex to a restrictive measure. Despite the Council's discretion regarding the appropriateness of that listing, the EU courts are entitled to verify whether the Council's decision was based on a sufficiently solid factual basis. For that reason, the Council bears the burden of proof in regard to the reasons determining that a specific individual should be included in the annex to a restrictive measure. That burden is discharged if at least one of those reasons is deemed sufficient enough to support the Council's decision; on the other hand, if the burden is not satisfied, the Court will annul the measure. Conversely, when it comes to defining the general listing criteria, the Court shows much more restraint, limiting itself to assessing whether the criteria defined by the Council are not manifestly

³⁹⁶ T-86/11 *Council v Bamba*, ECLI:EU:T:2011:260, paras. 37-56; C-417/11 P *Council v Bamba*, ECLI:EU:C:2012:718.

³⁹⁷ *Ibid.*, paras. 49-64.

³⁹⁸ T-203/12 *Alchaar v Council*.

³⁹⁹ *Ibid.*, para. 81.

⁴⁰⁰ *Ibid.*, para. 85.

⁴⁰¹ *Ibid.*, para. 85.

disproportionate. This is problematic particularly in that it provides the possibility for the Council to “move up” a criterion from being an individual listing ground by simply including it directly in the definition of the category of targeted persons, thus circumventing stricter review. Lastly, as follows from the analysis in chapters 4.2.1 and 4.2.2., despite attempts in early case-law, the Court no longer distinguishes in the standard of review of different types of restrictive measures; therefore, the same requirements apply regardless of whether it adopts measures targeting regimes or terrorists, or whether it does so autonomously or on the basis of a preceding UN Security Council resolution.

5. Balancing restrictive measures with fundamental rights

“As is clear from Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.”⁴⁰² This quote can be found in the judgement of the Court’s Grand Chamber in the case of *Segi*, given in the pre-Lisbon days when the Charter was not yet a part of the EU legal order. Even more significantly, it was rendered in the context of restrictive measures adopted under the second and third pillar, where the Court had very limited jurisdiction.⁴⁰³ It follows that there was never any doubt that fundamental rights form a frame of reference for the review of restrictive measures adopted by the EU; this is readily apparent from the appellate judgement in *Kadi*, where the Court put great emphasis on the necessity of safeguarding fundamental rights even in the context of UN-implemented sanctions and placed those rights on the hierarchy of values above the respect for international obligations.⁴⁰⁴ This emphasis has grown even stronger with the adoption of the Charter, which transferred what previously formed general principles of EU law into primary law. As its Article 51 states that the Charter’s provisions are applicable to EU institutions without ruling out certain areas of activities, it follows that the institutions must respect even in the specific area of the CFSP.⁴⁰⁵ This conclusion has also been confirmed by the Court, which recalled that respect for fundamental rights is required in all actions of the EU, including those in the area of the CFSP.⁴⁰⁶

In the area of restrictive measures, the rights at stake include, in particular,⁴⁰⁷ the right to effective judicial protection, the issue of which has permeated this entire thesis,⁴⁰⁸ the rights of defence, the right to property and the freedom to conduct a business,⁴⁰⁹ the freedom of

⁴⁰² C-355/04 P *Segi and Others v Council*, para. 51.

⁴⁰³ KOUTRAKOS, Panos. *Judicial Review in the EU’s Common Foreign and Security Policy*, p. 28. For the issue of jurisdiction in the pre-Lisbon days, see Chapter 1.1.

⁴⁰⁴ See Chapter 4.2.1.

⁴⁰⁵ KOUTRAKOS, Panos. *Judicial Review in the EU’s Common Foreign and Security Policy*, p. 28.

⁴⁰⁶ T-288/15 *Ezz and Others v Council*, Judgment of 27 December 2018, ECLI:EU:T:2018:619, para. 58 and the case law cited; T-125/22 *RT France v Council*, Judgment of 27 July 2022, ECLI:EU:T:2022:483, para. 131.

⁴⁰⁷ SVOBODA, Pavel. *Contrôle juridictionnel des sanctions internationales de l’UE devant la Cour de justice de l’UE. AUC IURIDICA*. 2023, vol. 69, no. 1, pp. 24–25.

⁴⁰⁸ See especially Chapters 3 and 4.

⁴⁰⁹ Especially when it comes to asset freezes and restrictions of trade.

expression,⁴¹⁰ the right to liberty,⁴¹¹ and the right to human dignity.⁴¹² This chapter aims to address selected issues which arise in the sphere of these fundamental rights during the adoption of restrictive measures. First, I will analyse how rights of defence are protected during the process of adoption, with a focus on the right to be heard and the EU's corresponding obligation to state reasons. Second, I will explore the Court's approach to balancing restrictive measures with selected fundamental rights, in particular the right to property, the freedom to conduct a business, and the freedom of expression. The goal of this chapter is not to delve into a complex analysis of the abundant case-law concerning fundamental rights in the sanctions context, but to pinpoint the essential principles which illustrate the Court's approach.

5.1. The rights of defence

In the context of administrative procedures, Article 41(2) of the Charter provides for the right to good administration, which consists of three fundamental guarantees: the right to be heard, the right of every person to have access to their file, and the obligation of the administration to give reasons for its decisions.⁴¹³ The first two guarantees have been regarded by the Court as the rights of defence,⁴¹⁴ and the obligation to state reasons is inherently linked to those rights, which is why I shall also address it in this chapter. This chapter will focus on the analysis of Court's case law with respect to the right to be heard and the obligation to state reasons, as these two guarantees have garnered the most of the Court's attention and their violation is one of the most common reasons for the annulment of restrictive measures.

5.1.1. The right to be heard

Under Article 41(2)(a) of the Charter, every person has the right to be heard *before* any individual measure taken which would affect them adversely. First, it is apparent by now that restrictive measures are acts which adversely affect the listed persons.⁴¹⁵ Second, I have dealt with this right in the preceding chapters in order to illustrate the Court's approach to different types of sanctions, concluding that the current case-law places emphasis on its safeguarding regardless of the origin and the subject of the sanctions.⁴¹⁶

⁴¹⁰ For example, in the case of limitations placed on the broadcasting of media.

⁴¹¹ In the case of travel bans.

⁴¹² As the publication of the listing of an entity comes with public condemnation.

⁴¹³ C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi*, para. 99.

⁴¹⁴ *Ibid.*, para. 99.

⁴¹⁵ *See, in particular*, Chapter 3.2.3. dealing with direct and individual concern of the targeted persons in relation to standing to bring an action for annulment.

⁴¹⁶ *See* Chapters 4.2.1. and 4.2.2.

That being said, in the field of restrictive measures, significant limitations have been placed on the right to be heard. With reference to the case-law of the European Court of Human Rights, the Court has ruled that restrictions on the right to a fair hearing are permissible if they are legally justified particularly on grounds of public policy, public security or the maintenance of international relations.⁴¹⁷ On those grounds, according to established case-law, the EU authorities are not required to hear the targeted person prior to including their name in the sanctions list for the first time, nor are they required to communicate the grounds on which the decision on their listing was taken before that listing is realised.⁴¹⁸ This conclusion is legitimised by the need to ensure the effectiveness of the restrictive measures; in order not to jeopardise that effectiveness, the imposition of restrictive measures must have a “surprise effect” and be applied immediately.⁴¹⁹ This is particularly important in the case of asset freezes, the logic being that if the person was informed beforehand that a restrictive measure will be taken against them, they would have the opportunity to dispose of those funds in order to escape the consequences of the asset freeze. Instead, the person shall be notified either at the same time that the listing occurs or immediately after the decision is adopted.⁴²⁰

By contrast, in the absence of the proven need to give a surprise effect to those measures in order to ensure their effectiveness, the targeted person must be heard and the grounds for the listing communicated to them prior to the adoption of the restrictive measures, in line with the requirement prescribed by Article 41(2)(c) of the Charter.⁴²¹ Moreover, this limitation of the right to be heard is applicable only in the case of the initial listing of a certain person. When it comes to taking the decision on maintaining the same person’s name on the list, there is no longer a need for a surprise effect, since the assets are already frozen. For that reason, any subsequent decision on maintaining the targeted persons on the sanctions list must be preceded by the possibility of a hearing and the notification of new evidence.⁴²² This was later specified so as to only be applicable when the Council indeed relies on new evidence in order to maintain the applicant on the sanctions list. Conversely, if the measures are maintained on the basis of the same grounds as those that

⁴¹⁷ T-228/02 OMPI, para. 119; European Court of Human Rights, *Tinnelly & sons Ltd and others and McElduff and others v United Kingdom*, nos. 20390/92 and 21322/93, 10 July 1998, para. 78.

⁴¹⁸ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, paras. 339-341; T-228/02 OMPI, para. 129; T-715/14 *Rosneft*, para. 137.

⁴¹⁹ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, paras. 340; T-228/02 OMPI, para. 129; T-715/14 *Rosneft*, para. 137.

⁴²⁰ T-228/02 OMPI, para. 129; T-715/14 *Rosneft*, para. 137; C-27/09 *France v PMOI*, para. 61.

⁴²¹ T-715/14 *Rosneft*, para. 139.

⁴²² T-228/02 OMPI, para. 131

justified the adoption of the initial listing, the Council is not bound to hear the person in question before the adoption of the maintaining act.⁴²³

The importance which the Court attributes to the right to be heard can be illustrated by reference to cases in which the Council has relied on decisions of third-country authorities in order to justify the listing of an individual in a measure. In *LTTE*,⁴²⁴ a case involving counter-terrorism sanctions, the statement of reasons provided by the Council included several decisions of British and Indian authorities regarding attacks which were imputed to LTTE.⁴²⁵ The Court held that for the Council to be entitled to act on the basis of such decisions, it must first carefully verify that the legislation of that third country ensures protection of the rights of defence and a right to effective judicial protection, one which is equivalent to that guaranteed at EU level.⁴²⁶ Moreover, there cannot be evidence showing that the third state in practice fails to apply that legislation.⁴²⁷ The reasoning behind this logic is that, unlike EU Member States, such third states are not only not subject to the provisions of the Charter, but many of them are also not bound by the ECHR.⁴²⁸ Hence, the Court held that while the Council could have relied on the decisions of British authorities, since the UK, as a then-Member State, enjoyed the presumption of the existence of an adequate level of fundamental rights protection, it could not have acted on the decisions of Indian authorities without verifying whether those guarantees are in place.⁴²⁹

The benchmark presented by the Court in *LTTE* was therefore the country being subject to obligations placed by the Charter and the ECHR; the question therefore remained whether this implied that non-EU states, which are bound by the ECHR, would enjoy the same presumption as EU Member States.⁴³⁰ This question was ultimately answered in the Court of Justice's judgement in the *Azarov*⁴³¹ case, which related to restrictive measures linked to the misappropriation of state

⁴²³ T-141/21 *Shakutin v Council*, para. 74; C-330/15 *P Tomana v Council*, para. 67.

⁴²⁴ T-208/11 *LTTE*.

⁴²⁵ *Ibid.*, para. 84.

⁴²⁶ *Ibid.*, para. 139.

⁴²⁷ *Ibid.*, para. 139.

⁴²⁸ *Ibid.*, para. 138.

⁴²⁹ *Ibid.*, para. 151.

⁴³⁰ HARPAZ, Guy. *Common Foreign and Security Policy, counter-terrorism measures and judicial review*, p. 1932.

⁴³¹ C-530/17 *Azarov v. Council*, Judgment of 19 December 2018, ECLI:EU:C:2018:1031.

funds⁴³² in Ukraine.⁴³³ After confirming the applicability of the *LTTE* case-law requirements also to restrictive measures targeting the misappropriation of state funds,⁴³⁴ the Court clearly stated that the mere fact that the third state is a party to the ECHR cannot render superfluous the verification to be carried out by the Council that the national decision was taken in compliance with fundamental rights, in particular the rights of defence and the right to effective judicial protection.⁴³⁵ Thus, the Court rejected the presumption of compliance with EU-level guarantees for ECHR signatory states.

It follows that although the right to be heard is applicable in the context of the adoption of sanctions, their sensitive nature calls for certain limitations to be set in order to ensure that the measures may effectively achieve their objective. This restriction is, in my view, justified. First, the Court has been very clear on the matter that it applies only to the initial listing and where the need for surprise effect is proven. And second, the restriction is not ultimate; the Council is still obligated to inform the targeted person of the listing as soon as possible after the decision is taken, thus still giving that person the opportunity to make their view known and provide the Council with evidence in support of their claim that the listing is unjustified. This opportunity is ultimately the essence of the right to be heard, as is apparent from the consequences of its violation: according to the Court, the mere fact that the right to be heard was not respected cannot, on its own, result in the annulment of the contested act, but the applicant must demonstrate that, had they been allowed the possibility of presenting their arguments, the outcome of the procedure might have been different.⁴³⁶ Therefore, in the annulment procedure, the applicant must explain which arguments and information they could have relied on and why these could result in a different conclusion on the Council's part.⁴³⁷

⁴³² Such restrictive measures are imposed with the view to support third states in their democratic transitions, by targeting persons supporting the undemocratic regime. For more information, *see, for example*, CHALLET, Celia and Dorin-Ciprian GRUMAZ. EU Restrictive Measures and Third Countries' Evidence. *European Foreign Affairs Review*. 2023, vol. 28, no. 1.

⁴³³ Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 66, 26–30; Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 66, 1–10.

⁴³⁴ C-530/17 Azarov v. Council, paras. 27-28, 32 and 37.

⁴³⁵ *Ibid.*, para. 36.

⁴³⁶ T-715/14 Rosneft, paras. 141-142.

⁴³⁷ *Ibid.*, para. 143.

5.1.2. The obligation to state reasons

The right to be heard is directly linked to the corresponding obligation of the EU authorities to state the reasons of their decisions, enshrined in Article 296(2) TFEU⁴³⁸ and Article 41(2)(c) of the Charter. According to settled case-law, the purpose of that obligation is twofold; first, to enable the person concerned to ascertain the reasons for the measures adopted, and second, to enable the Court to exercise its power of review over that measure.⁴³⁹ At this point, it is necessary to distinguish between the obligation to state the reasons as an essential procedural requirement, i.e. a formal statement of the grounds on which a decision is based, and the question whether the reasons given are well founded, which is a matter of the substantive legality of the act.⁴⁴⁰ This means that the act may sufficiently describe the reasons for which it was adopted, even if those reasons are vitiated by errors and do not constitute a sufficiently solid factual basis justifying the adoption of the measure, which is the standard applied by the Court in the review of the substantive legality of individual listing grounds (see Chapter 4.1.2. above).

As for the requirements placed on the content of the statement of reasons, the Council cannot simply repeat the conditions set out in the general listing criteria, but must state actual and specific reasons why it considers that the general listing criteria are applicable to person concerned.⁴⁴¹ It is not necessary to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must also be assessed with regard to the context of the measures and the legal rules governing the matter.⁴⁴² This context argument has been largely relied on in case-law regarding regime sanctions. In *Bamba*,⁴⁴³ for example, the Court ruled on an action for annulment brought by an Ivorian director of a media group accused of disseminating disinformation campaigns in the Ivory Coast.⁴⁴⁴ It was deemed sufficient that the contested act clearly specified the general context of the situation in the country which the restrictive measures aimed to combat, as this context was necessarily known to the applicant in view of her (proven) professional position in the country's media.⁴⁴⁵ Similarly, in the annulment procedure initiated by

⁴³⁸ Article 296(2) TFEU reads: “*Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.*”

⁴³⁹ See, *inter alia*, T-256/11 *Ezz and Others v Council*, para. 107; C-417/11 P *Council v Bamba*, paras. 50 and 53 and the case-law cited.

⁴⁴⁰ T-262/15 *Kiselev v Council*, Judgment of 15 June 2017, ECLI:EU:T:2017:392, para. 52.

⁴⁴¹ T-228/02 *OMPI*, paras. 143-144; T-86/11 *Bamba v Council*, Judgment of 8 June 2011, ECLI:EU:T:2011:260, para. 47.

⁴⁴² T-715/14 *Rosneft*, para. 112.

⁴⁴³ C-417/11 P *Council v Bamba*.

⁴⁴⁴ *Ibid.*, para. 20.

⁴⁴⁵ *Ibid.*, paras. 54-59.

Rosneft,⁴⁴⁶ the Court ruled that the Council was not obligated to explain why it chose to target entities active in the Russian oil sector, since because of its position on that market, the applicant must have been aware of the importance of that sector for the Russian economy. Consequently, the Council's decision to adopt restrictive measures against the players in that industry, including the applicant, could be readily understood in the light of the declared objective of those restrictive measures.⁴⁴⁷ The same conclusion was reached in *BSW v Council*, where it was held that the reasons for adopting sanctions against actors in the iron and steel sectors in Belarus could be understood in the context of the declared objective of incentivising Belarus to refrain from the involvement in Russia's 2022 aggression against Ukraine.⁴⁴⁸

This heavy reliance on contextual arguments has been criticized by some for relativising the obligation to state reasons.⁴⁴⁹ In my view, if paired with sufficient evidence proving the involvement of the targeted entities in the relevant public sector, it is not such as to impair the function of the statement of reasons. In *Rosneft*, it was undisputed that 50% of the shares of the company were held by Russian state-owned entities.⁴⁵⁰ In *Bamba*, the Council had also provided sufficient evidence to prove that Ms. Bamba was involved in the disinformation campaigns aimed at obstructing peace on the Ivory Coast.⁴⁵¹ Therefore, if the sanctioned person is demonstrably active in a field closely linked to the targeted regime, it is not, in my opinion, to the detriment of the rights of defence to presume that such a person understood the context in which the Council had decided to impose restrictive measures on a category of persons to which it belongs.

Lastly, I come to the question what happens if the Court finds that the statement of reasons provided by the Council is not sufficient. Unlike in the case of a violation of the right to be heard, the absence of a proper statement of reasons is a deficiency which will automatically result in the annulment of the contested measure. This is because where an act is not sufficiently reasoned, the Court is not in a position to review the lawfulness of that act.⁴⁵² Such a finding is essential, as it means that although the substantive illegality of the measures cannot influence the question of compliance with the statement of reasons, this does not go both ways; on the contrary, if the

⁴⁴⁶ T-715/14 *Rosneft*.

⁴⁴⁷ *Ibid.*, paras. 121-126.

⁴⁴⁸ T-1042/23 *BSW v Council*, paras. 79-80.

⁴⁴⁹ *See, for example*, OVER DE LINDEN, Heleen. The Court of Justices Difficulty with Reviewing Smart Sanctions as Illustrated by *Rosneft*. *European Foreign Affairs Review*. 2019, vol. 24, no. 1, p. 35.

⁴⁵⁰ T-715/14 *Rosneft*, para. 122.

⁴⁵¹ C-417/11 P *Council v Bamba*, para. 54.

⁴⁵² T-228/02 *OMPI*, paras. 172-174.

Council fails to properly comply with that obligation, the issue of substantive validity will be irrelevant, as the Court will never get to assessing it.

To conclude this chapter on the rights of defence, in Chapter 4.1.2., I have stated that the Court counterbalances judicial deference in its review of the substantive legality of restrictive measures by a stricter review of procedural safeguards. With regard to the above, this holds true, and it is especially apparent when it comes to the Court's scrutiny of the compliance with the right to be heard, where it places significant obligations on the Council not only at the stage of the adoption of the measure, but already at the preceding stage of gathering evidence substantiating that adoption. But the strict approach is evident also with respect to the obligation to state reasons; failure to comply with that obligation is one of the most common reasons for annulling restrictive measures.⁴⁵³ This increased scrutiny is justified, *inter alia*, by the close relationship between the rights of defence and the right to an effective remedy; as held in *Kadi I*, if the targeted person is unable to defend their rights with regard to the measures adopted against them, their right to an effective legal remedy is also infringed.⁴⁵⁴

5.2. Substantive fundamental rights

5.2.1. The right to property and the freedom to conduct a business

As the Court held already in the 1996 judgement in *Bosphorus*,⁴⁵⁵ “any measures imposing sanctions have, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions”.⁴⁵⁶ Although *Bosphorus* is a judgement issued before the age of smart sanctions, this consideration applies all the same today, particularly with respect to asset freezes. However, the Court has repeatedly held that those rights, guaranteed by Articles 16 and 17 of the Charter, are not absolute and may, under certain conditions, be subject to restrictions justified by objectives of public interest pursued by the EU.⁴⁵⁷ After all, the

⁴⁵³ See, *inter alia*, T-316/11 *Kadio Morokro v Council*, Judgment of 16 September 2011, ECLI:EU:T:2011:484; T-421/11 *Qualitest v Council*, Judgment of 5 December 2012, ECLI:EU:T:2012:646; T-493/10 *Persia International Bank v Council*, Judgment of 6 September 2013, ECLI:EU:T:2013:398; T-24/11 *Bank Refah Kargar v Council*; T-489/10 *Islamic Republic of Iran Shipping Lines and Others v Council*, Judgment of 16 September 2013, ECLI:EU:T:2013:453; T-565/12 *National Iranian Tanker Company v. Council*, Judgment of 3 July 2014, ECLI:EU:T:2014:608.

⁴⁵⁴ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, para. 349.

⁴⁵⁵ C-84/95 *Bosphorus*. See also C-317/00 P(R) ‘*Invest*’ *Import und Export and Invest Commerce v. Commission*, para. 59.

⁴⁵⁶ *Ibid.*, para. 22.

⁴⁵⁷ T-390/08 *Bank Melli Iran v Council*, para. 113; C-348/12 P *Kala Naft*, paras. 21-22; C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, para. 355; T-1042/23 *BSW v Council*, para. 111 and the case-law cited.

permissibility of such limitations is now explicitly laid down in Article 52(1) of the Charter.⁴⁵⁸ Under that Article, in order for a limitation on the exercise of a fundamental right to be justified, three conditions must be satisfied. First, the limitation in question must be provided for by law, i.e. the measure must have a proper legal basis. Second, that limitation must refer to an objective of general interest, recognized as such by the EU. And third, the limitation must be proportional to the aim sought and must not impair the essence of the right at issue.⁴⁵⁹

Regarding the first condition of legal basis, this relates to issues raised above in the context of the substantive legality of restrictive measures. In specific, for the condition to be fulfilled, the Council must convincingly argue that the listed individual falls into the category of persons defined in the general listing criteria (see Chapter 4.1.2.).⁴⁶⁰ The fulfilment of the second requirement is not problematic from the Court's perspective; the objectives of maintaining international peace and security, which restrictive measures seek to attain, are generally excepted as a justification for the limitation of the right to property and the freedom to conduct a business.⁴⁶¹ This is reinforced by the fact that those objectives are now specifically grounded in Article 21(2)(c) TEU which lists the objectives of the EU's external action.

As for the third condition of proportionality, the Court has consistently held that the importance of the aims described is such as to, prima facie, justify negative consequences for the persons targeted, even ones of substantial nature.⁴⁶² Nor has it been found to be problematic that restrictive measures often affect the rights of persons who are not directly responsible for the situation which led to the adoption of the measures in question.⁴⁶³ Moreover, restrictive measures providing for asset freezes usually include a provision which provides for the possibility of authorising the use of frozen funds in order to meet basic needs or to meet certain commitments, and of granting specific authorisations permitting the release of funds.⁴⁶⁴ That circumstance has

⁴⁵⁸ Article 52(1) of the Charter reads: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

⁴⁵⁹ T-1042/23 BSW v Council, paras. 112-113 and the case-law cited.

⁴⁶⁰ For a case in which the applicant succeeded with the plea that the restriction of his right to property lacked legal basis, see T-187/11 Trabelsi v Council, Judgment of 28 May 2013, ECLI:EU:T:2013:273, para. 96.

⁴⁶¹ C-72/15 Rosneft, para. 115; T-735/14 Gazprom Neft v Council, Judgment of 28 May 2013, ECLI:EU:T:2018:548, para. 166; T-1042/23 BSW v Council, para. 116.

⁴⁶² See, *inter alia*, C-317/00 P(R) ‘Invest’ Import und Export and Invest Commerce v. Commission, para. 59; T-1042/23 BSW v Council, para. 118; T-735/14 Gazprom Neft v Council, para. 171; C-72/15 Rosneft, para. 150.

⁴⁶³ C-402/05 P and C-415/05 P Kadi and Al Barakaat, para. 361.

⁴⁶⁴ See, for example, 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 L 78, 17.3.2014, p. 16–21, Article 2(3) and (4).

supported the Court in its conclusion that asset freezes as such do not constitute a disproportionate interference with the right to property and the freedom to carry out a business.⁴⁶⁵

For these reasons, the Court has been very hesitant to accept pleas of the violation of the right to property and the freedom to conduct a business in order to justify the annulment of restrictive measures.⁴⁶⁶ One exception can be found in the notorious *Kadi I* case.⁴⁶⁷ However, while the Court did uphold Kadi's claim of an unjustified restriction of his right to property, pointing to the fact that he had been maintained on the list of sanctioned entities for the period of almost three years, the reason for this finding was ultimately the lack of procedural safeguards: the court based its decision on the fact that the restrictive measure in question was adopted without providing Kadi with any guarantee enabling him to put his case to the competent authorities.⁴⁶⁸

5.2.2. Freedom of expression

The second fundamental right which I will shortly address is the freedom of expression. The Court's approach to this right in the context of restrictive measures can essentially be summarized by the analysis of one recent case, *RT France*.⁴⁶⁹ I have already dealt with this case in the context of interim measures;⁴⁷⁰ to reiterate, RT (Russia Today) France is a French branch of a network controlled by the Russian State, and was made subject to restrictive measures adopted against Russia due its dissemination of propaganda.⁴⁷¹ In specific, RT France was prohibited from conducting broadcasting activities directed at the EU.⁴⁷² In the main proceedings, the applicant alleged, *inter alia*, an infringement of its freedom of expression and information, guaranteed by Article 11 of the Charter.

First, the Court pointed it out that the freedom of expression is a fundamental right which may also be subject to limitations, provided that the three conditions of Article 52(1) of the Charter, which I have explained in the previous chapter, are satisfied.⁴⁷³ It then went on to analyse whether

⁴⁶⁵ See, for example, T-313/22 *Abramovich v Council*, Judgment of 20 December 2023, ECLI:EU:T:2023:830, paras. 162-169.

⁴⁶⁶ See, *inter alia*, T-256/11 *Ezz and Others v Council*; T-383/11 *Makhlouf v. Council*, Judgment of 13 December 2013, ECLI:EU:T:2013:431; T-8/11 *Bank Kargoshaei and Others v. Council*, Judgment of 16 September 2013, ECLI:EU:T:2013:470.

⁴⁶⁷ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*.

⁴⁶⁸ C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, para. 369.

⁴⁶⁹ T-125/22 *RT France*.

⁴⁷⁰ See Chapter 3.5.

⁴⁷¹ Council Decision (CFSP) 2022/351 of 1 Mar. 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, 2 Feb. 2022, p. 5-7, recital 7; Council Regulation (EU) 2022/350 of 1 Mar. 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, 2 Mar. 2022, p. 1-4, recital 7.

⁴⁷² *Ibid.*

⁴⁷³ T-125/22 *RT France*, para. 144.

the restrictions placed impaired with the essence of the freedom of expression and concluded that they do not. In this regard, the Court pointed to the fact that, first, the measures are temporary in nature and may only be maintained as long as Russia's aggression against Ukraine and the applicant's broadcasting of propaganda persists.⁴⁷⁴ Second, the measures did not prohibit every activity inherent in the freedom of expression an information, but only broadcasting activities aimed at the EU. Thus, RT France could still carry out other activities, such as conducting research and interviews, as well as broadcasting outside of the EU.⁴⁷⁵

As regards the assessment of proportionality, the Court recalled that propaganda and disinformation campaigns are an integral part of modern warfare, therefore restrictive measures targeting such activities are capable of and appropriate and necessary for achieving the objectives of international peace and security.⁴⁷⁶ Then, just as in cases relating to the right to property, it stated that such objectives are such as to prevail over the negative consequence which those measures represent for certain persons, even if they are significant.⁴⁷⁷ However, the Court then followed up with an analysis peculiar to the issue of freedom of expression; it articulated that the exercise of that freedom carries with it duties and responsibilities, which are all the more important in cases where media outlets cover propaganda activity justifying and supporting actions of the Russian state which have been classified as illegal aggression by the international community.⁴⁷⁸ Consequently, those outlets cannot call for enhanced protection of press freedom, especially in cases such as those of the applicant, when the media outlet is under direct or indirect control of the aggressor state.⁴⁷⁹ Therefore, as a result of all the foregoing considerations, the Court held that the limitation placed on RT France's freedom of expression by the imposition of restrictive measures was indeed proportionate to the aim pursued by those measures.⁴⁸⁰

The case of *RT France* illustrates the manner in which the Court approaches an issue which is relatively new in the field restrictive measures case-law: using restrictive measures targeting the spreading of misleading information as a means to combat regimes which are a threat to international peace and security, rather than by merely exerting pressure on sanctioned states by virtue of economic instruments such as asset freezes. In the near future, the Court will have at least

⁴⁷⁴ Ibid., paras. 154-155.

⁴⁷⁵ Ibid., paras. 156-157.

⁴⁷⁶ Ibid., paras., 162 and 193-200.

⁴⁷⁷ Ibid., para. 202.

⁴⁷⁸ Ibid., paras. 205-206.

⁴⁷⁹ Ibid., para. 206.

⁴⁸⁰ Ibid., para. 213. The same conclusion was drawn with respect to the claimed violation of the freedom to conduct a business: *see* para. 277.

two more opportunities to adjudicate on the matter of restrictions imposed on the freedom of expression; not only has RT lodged an appeal against the General Court decision,⁴⁸¹ but it has also brought another action for annulment against the Russia sanctions targeting it, once again putting forward pleas alleging an infringement of its freedom of expression, freedom to conduct a business, as well as the principle of non-discrimination.⁴⁸²

So far, the Court’s approach to restrictions on the freedom of expression, albeit supported by specific reasoning relating to the nature of propaganda and disinformation, essentially correlates with that taken with respect to the “traditional issue” of restrictions on the right to property and the freedom to conduct a business. Ultimately, the conclusion to be drawn is that the Court generally accepts that it is inevitable for the imposition of restrictive measures to encroach on certain fundamental rights. This is supported by the fact that the Court considers restrictive measures a preventive tool, rather than a punitive one,⁴⁸³ leading to a lower level of scrutiny as regards its imposition on individuals’ rights.⁴⁸⁴ However, the question left unanswered is what restriction, in the Court’s view, would be regarded as manifestly disproportionate.

⁴⁸¹ C-620/22 P RT France v Council, appeal brought on 27 September 2022 by RT France against the judgment of the General Court (Grand Chamber) delivered on 27 July 2022 in Case T-125/22, OJ C 432, 14.11.2022, p. 14–15.

⁴⁸² T-169/23 RT France v Council, action brought on 29 March 2023, OJ C 173, 15.5.2023, p. 40–41.

⁴⁸³ See, *inter alia*, C-584/10 P, C-593/10 P and C-595/10 P Commission and Others v Kadi, para. 130.

⁴⁸⁴ ECKES, Christina. *EU restrictive measures against natural and legal persons*, p. 885.

Conclusion

Restrictive measures against individuals have become an increasingly important tool of the EU's foreign policy, used to promote essential objectives of the rule of law, democracy and security. However, the use of that tool inevitably comes with severe consequences in the sphere of fundamental rights of the targeted individuals, which calls for the necessity of the Court to strike a balance between safeguarding those rights and ensuring that the restrictive measures reach their aim. All that within the sphere of the CFSP, an EU policy exceptional by its political nature and the limited jurisdiction of the Court therein.

The aim of this master's thesis was to explore the manner and intensity in which the Court reviews restrictive measures imposed onto individuals, as well as the requirements it places onto the Council when it adopts those measures. By that analysis, it sought to assess whether that review may be considered as a sufficient safeguard of the rights of the affected individuals.

To lay the ground for that assessment, Chapter 1 introduced the legal framework of restrictive measures, as well as the particular issue of decision-making within the CFSP. It concluded that unlike other CFSP decisions, restrictive measures against individuals undoubtedly produce legal effects on the rights of those individuals, thus calling for the necessity for an exception to the exclusion of the Court's jurisdiction within the CFSP. Chapter 2 then briefly described the types of restrictive measures adopted by the EU, dividing them by origin into UN-implemented and autonomous sanctions and by subject into counterterrorism and regime sanctions. This distinguishment served to provide a basis for further discussions on differences in the Court's approach with respect to them.

Chapter 3 extensively analysed the scope of the jurisdiction exception. It illustrated that from a seemingly narrow provision providing only for the possibility of an action for annulment, the Court developed a complete system of legal remedies, extending also to preliminary rulings on validity and actions for damages, as well as encompassing interim measures proceedings. That development was permeated by the principle of ensuring effective judicial protection of targeted individuals, although concerns were raised about the consistency of the Court's approach with the wording of the Treaties. The potential future possibility of preliminary rulings on the interpretations of restrictive measures against individuals was also explored, with the takeaway being that the Court's previous approach suggests that the door to that possibility is perhaps open. The chapter also discussed practical issues such as the procedural standing of applicants when bringing an action for annulment, or the likelihood of targeted persons succeeding with their claims for damages and interim protection. With regard to the first issue, it was concluded that the Court's decision-making, albeit quite unclear from the view of the applicable legal standard, is framed by

the effort of affording targeted persons the widest possible access to EU courts. By contrast, with respect to the second issue, it was found that although the Court has paved the way towards access to EU courts, the stringent conditions for granting the aforementioned claims in reality significantly diminish the odds of the applicants' success.

Chapter 4 then elaborated on the standard of review applied by the Court to restrictive measures targeting individuals. Most notably, it pointed to the substantial differences in the intensity of review of general listing criteria in contrast to individual listing grounds. In the latter case, the Court increasingly scrutinizes whether the Council established a sufficiently solid factual basis for the adoption of restrictive measures against a specific person. This scrutiny, while still marked with judicial deference particular to the CFSP, was found sufficient at least to eliminate potential arbitrary selections of targeted persons by the Council. On the other hand, in the case of general listing criteria, the Court limits itself only to assessing whether those criteria are not manifestly disproportionate to the aim pursued. Concerns were raised particularly about the possibility of the Council "moving up" listing grounds into the general listing criteria, thus circumventing the Court's stricter review. Furthermore, the chapter analysed the evolution of the standard applied by the Court to different types of restrictive measures. From drawing in my view unjustified distinctions in earlier case law, the Court has gradually blurred those distinctions and now applies the same standard of review regardless of the type of restrictive measure in question.

Lastly, Chapter 5 dealt with the review conducted by the Court with respect to fundamental rights of the targeted persons in the context of restrictive measures against individuals. First, its review of procedural safeguards was analysed, focusing on what obligations pertaining to the rights of defence it imposes onto the Council. It was concluded that since early case law, significant emphasis has been placed on providing targeted individuals with the right to be heard before the adoption of restrictive measures, even going so far as requiring the Council to ensure that right has been guaranteed during the adoption of a national decision which it seeks to rely on. Nonetheless, a limitation on that right is placed when safeguarding the effectiveness of sanctions requires a surprise effect, in which case informing the person targeted, and providing them with the opportunity to oppose their listing, is postponed to immediately after the sanction is adopted. It was voiced that this limitation may be considered justified particularly in the case of asset freezes, where informing the person prior to the adoption of the restrictive measure may significantly hinder the effectiveness of that measure. The importance of the Council's obligation to state reasons was also highlighted. The necessity for those reasons to clearly identify a sufficient link between the targeted person and the objective pursued by the restrictive measures places an important burden on the Council, even in a sphere where it enjoys wide discretion as to the

appropriateness of the measures adopted. This burden is emphasised by the fact that any failure to comply with the obligation to state reasons automatically results in the annulment of the sanction, as it deems it unreviewable.

Second, Chapter 5 addressed the Court's approach to selected substantive rights, namely the right to property, the freedom to conduct a business, and the freedom of expression. A very restrained approach was identified. It can be seen that the Court readily accepts that restrictive measures entail even significant restrictions of substantive fundamental rights, yet when balancing the objectives pursued by restrictive measures with those rights, it leans heavily towards the former. The Court is very hesitant to accept pleas of the violation of substantive rights in order to justify the annulment of restrictive measures. Instead, it establishes a presumption that the aim of sanctions is such as to *prima facie* justify even substantially negative consequences within the sphere of the targeted individuals' rights, unless that consequence is manifestly disproportionate. However, it has yet to be seen what situation could be seen by the Court as so manifestly disproportionate, if any.

It follows from the above that, for what concerns the access of individuals to procedural means enabling the review of measures imposed against them, the *possibility* of that review has become very far-reaching. Similarly, the Court intensely checks whether due regard has been given to procedural rights of the targeted persons during the adoption of restrictive measures. For those reasons, I conclude that the *procedural safeguards* afforded provide sufficient guarantees of the protection of individual rights, namely the right to effective judicial protection and the rights of defence. However, the same cannot be said for the *intensity* of that review and the potential *success* of court actions lodged by targeted individuals. First, the Court shows significant restraint in reviewing the substantive validity of restrictive measures. Although particularly the requirement of a 'sufficient solid factual basis' places certain limits on the Council's discretion in listing individuals, the Court still largely respects that discretion and only limits itself to rectifying situations of arbitrariness. Second, the Court is very hesitant in upholding pleas consisting of the violation of substantive fundamental rights, as it simply accepts the reality that restrictive measures consist of significant restrictions of those rights, and deems that reality justified. Annulments of restrictive measures are therefore scarce, and when they occur, it is most commonly for procedural reasons such as the Council's failure to state reasons, or, more rarely, for the absence of a 'sufficient link'. Actions for damages are even less successful, as it has been shown that fulfilling the conditions for establishing the EU's liability for harm caused by sanctions is particularly difficult, if not impossible.

In conclusion, as the Court's case law currently stands, judicial review of restrictive measures provides, in my view, sufficient safeguards of the targeted individuals' rights by imposing substantial procedural requirements but falls short when it comes to substantive review. However, the question remains whether the limitations placed onto the Court's powers within the CFSP could allow for the widening of that substantive review, thus providing greater guarantees of individuals' rights. An answer could be provided in the Court's future judgements regarding the current Russia sanctions regime; although the few judgements issued to date have not brought any significant developments and seem to follow already established principles, the tens of undecided cases could possibly provide an opportunity for the Court to put those principles to test. It will be seen whether the Court will continue to retain its position on limited substantive review of restrictive measures against individuals, or if it will find a way in the Treaties in order to widen its scope, much like it did in when it extended the scope of its jurisdiction over sanctions.

List of abbreviations / Seznam zkratek

AFSJ	Area of Freedom, Security and Justice
CFSP	Common Foreign and Security Policy
Charter	The Charter of Fundamental Rights of the European Union
Commission	European Commission
Council	Council of the European Union
Court	Court of Justice of the European Union (the General Court and the Court of Justice, respectively)
EC	Treaty establishing the European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
High Representative	High Representative of the Union for Foreign Affairs and Security Policy
Parliament	European Parliament
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	Treaty on the European Union and Treaty on the Functioning of the European Union
UN	United Nations
UN Charter	Charter of the United Nations

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Judicial review of EU restrictive measures against individuals

Abstract

This thesis explores the topic of review conducted by the Court of Justice of the European Union (“CJEU”) of restrictive measures against individuals adopted by the Council of the EU (“Council”) within the EU’s Common Foreign and Security Policy (“CFSP”). These measures seek to achieve the EU’s objectives of international security, peace, or the rule of law, and encompass, for example, asset freezes, travel bans or trade restrictions. However, they come with the inevitable effect of limiting fundamental rights of the targeted individuals. The question addressed is therefore whether the manner and intensity of the CJEU’s review constitutes a sufficient safeguard of those rights. It is particularly relevant since the CFSP is distinct from other areas of EU policy by its significantly intergovernmental nature and the limited competences of the CJEU within its realms. Thus, when reviewing targeted sanctions, the CJEU is faced with a unique challenge. On one hand, it must respect the EU’s policy choices and the constitutional restraints placed on its judicial powers over them, and on the other, it must ensure that sufficient protection is provided to the fundamental rights of targeted persons.

The answer to that question is sought by a thorough analysis of the principles developed in the CJEU’s restrictive measures case-law. First, with respect to the question of how far the CJEU’s limited jurisdiction stems, and, therefore, what means of effective judicial protection targeted individuals have at their disposal. The action for annulment is addressed, as well as preliminary rulings, actions for damages and applications for interim measures. Second, with respect to the standard applied by the CJEU in the review of the restrictive measures’ legality, specifically what requirements are placed onto the Council when deciding whether a specific individual will be targeted. And third, with respect to the balancing conducted by the CJEU between the objectives of the restrictive measures imposed and specific fundamental rights.

Key Words: restrictive measures, sanctions, EU Common Foreign and Security Policy, Court of Justice of the European Union, EU law, fundamental rights

Soudní přezkum unijních sankcí proti jednotlivcům

Abstrakt

Tato práce se zabývá tématem přezkumu sankcí vůči jednotlivcům přijatých Radou EU („Rada“) v rámci Společné zahraniční a bezpečnostní politiky EU ("SZBP"), který provádí Soudní dvůr Evropské unie ("SDEU"). Tato opatření se snaží dosáhnout cílů EU v oblasti mezinárodní bezpečnosti, míru nebo právního státu a zahrnují například zmrazení majetku, zákazy cestování nebo obchodní omezení. Nevyhnutelně s sebou však nesou omezení základních práv osob, proti nimž jsou namířena. Řešená otázka tedy zní, zda způsob a intenzita přezkumu ze strany SDEU zajišťuje dostatečnou ochranu těchto práv. Je o to důležitější, jelikož SZBP se od ostatních oblastí činnosti EU odlišuje svou výrazně mezivládní povahou a omezenými pravomocemi SDEU. Při přezkumu cílených sankcí tak SDEU čelí jedinečné výzvě. Na jedné straně musí respektovat politická rozhodnutí EU a ústavní omezení svých soudních pravomocí v této oblasti, na druhé straně však musí zajistit dostatečnou ochranu základních práv osob, proti nimž jsou sankce namířeny.

Odpověď na tuto otázku je hledána prostřednictvím důkladné analýzy zásad vypracovaných v judikatuře SDEU k omezujícím opatřením. Nejprve ve vztahu k otázce, kam až sahá omezená pravomoc SDEU, a tedy jaké prostředky účinné soudní ochrany mají zasažené osoby k dispozici. Adresována je žaloba na neplatnost, jakož i rozhodnutí o předběžné otázce, žaloba na náhradu škody a návrh na vydání předběžného opatření. Zadruhé, ve vztahu k standardu, který SDEU uplatňuje při přezkumu zákonnosti omezujících opatření, konkrétně k požadavkům kladeným na Radu při rozhodování o tom, kteří jednotlivci budou zasaženi. A zatřetí, ve vztahu k vyvažování, které provádí SDEU mezi cíli uložených omezujících opatření a konkrétními základními právy.

Klíčová slova: omezující opatření, sankce, Společná zahraniční a bezpečnostní politika EU, Soudní dvůr Evropské unie, právo EU, základní práva