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# THE LAW AND PRACTICE OF EU SANCTIONS

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## THE LAW AND PRACTICE OF EU SANCTIONS

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## The Law and Practice of EU Sanctions

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### 1) Introduction

Sanctions are a very particular Common Foreign and Security Policy of the European Union. On the one hand, they are measures of general application, i.e. a tool of EU foreign relations that serves general policy objectives; on the other they are individualized decisions to directly interfere with the fundamental rights of singled-out persons. Sanctions are deployed with exceptional frequency. They are a forceful tool that imposes directly applicable obligations on private parties. More case law exists on sanctions than on any other CFSP policy. This is subject to the caveat that the Court of Justice of the European Union (CJEU) has so far predominantly reviewed measures that the EU takes under the TFEU to give effect to the CFSP sanctions decisions rather than directly the CFSP decisions themselves.<sup>1</sup>

This Chapter explains the exceptionalism of sanctions (Section 2), traces the implications of sanctions for other CFSP policies and other fields of law (Section 3), examines the intrinsic tension between the political objectives of sanctions and their regulatory administrative or even criminal character (Section 4), identifies new trends (Section 5) and makes recommendations on how sanctions should be improved (Section 6).

### 2) Sanctions are Exceptional Amongst CFSP

Public policy can be defined as a set of ideas or principles, or a plan of what to do in particular situations that has been agreed to officially by a group of people, a government, or a political party.<sup>2</sup> The EU has at least the intention to adopt sanctions as a policy that is meant to follow pre-conceived principles and serves *ex ante* identifiable objectives.<sup>3</sup> This is

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<sup>1</sup> The exception is the recent case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty's Treasury* (hereafter: *Rosneft*), EU:C:2017:236 and arguably Case C-355/04, *Segi and Others v. Council* (hereafter: *Segi*), EU:C:2007:116.

<sup>2</sup> This definition draws from <http://dictionary.cambridge.org/dictionary/english/policy>.

<sup>3</sup> See: Council, "Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy" (15 June 2012). Retrieved at: <http://data.consilium.europa.eu/doc/document/ST-11205-2012-INIT/en/pdf>.

hence the standard against which EU sanctions should be evaluated, even if they may very well be criticized for being fragmented, inconsistently applied and even adopted in a way that does not achieve equal treatment of similar cases.

### 2.1) Cross-Treaties Bridge

EU sanctions do not easily fit amongst other CFSP policies. They consist of a peculiar combination of a CFSP decision, adopted under Title V of the TEU, and a TFEU regulation adopted pursuant to the TFEU. Indeed, Art 215 TFEU, the only legal basis that has so far been used for sanctions since the entry into force of the Lisbon Treaty, is the closest explicit link between TEU and TFEU. It is not a joint legal basis but a legal basis within the TFEU that requires the prior adoption of a CFSP instrument as a 'prerequisite for the validity of a regulation'.<sup>4</sup> As a result, EU sanctions are adopted on a combination of legal instruments based on a legal basis from each Treaty, which puts the powerful legal instrument of a directly applicable TFEU regulation at the service of CFSP objectives. This is structurally particular in that it is an exception to the rationale of Article 40 TEU that the CFSP and policies under the TFEU should remain separate.<sup>5</sup>

### 2.2) Direct Rights-Relevance of EU Sanctions

EU sanctions are a very particular CFSP policy in that they directly legally target individuals, i.e. natural and legal persons, and list them as supporting either a targeted political regime or terrorism. They also predetermine in every detail the adoption of directly applicable regulations under the TFEU, including the list of targeted persons. Hence sanctions are a CFSP policy with exceptional operational means. They can make use of measures adopted under the TFEU to target individuals and bind EU citizens and businesses. Already the adoption of the CFSP decision itself has fundamental rights consequences, since it has a negative impact on the reputation of those sanctioned.<sup>6</sup> Moreover, the CFSP decision of the Council, which is mirrored in the TFEU Regulation, should be seen as actual origin of the latter's legal effects.

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<sup>4</sup> *Rosneft*, op. cit. *supra* note 1, para 55.

<sup>5</sup> Christina Eckes, "The CSFP and Other EU Policies: A Difference in Nature?", (2015) 20 EFA Rev. 535.

<sup>6</sup> Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (OUP, 2009), Chapter 5. Christina Eckes, "Annotatie, 'Abdulrahim v Council and Commission [2013] Case C-239/12 P (28 May 2013) – Hof van Justitie van de Europese Unie (Grote Kamer)'" , (2013) 8 EHRC .

This makes EU sanctions the *only* CFSP policy, which *by definition* and *directly legally* affects the rights of individuals, including in a very severe manner. They *name* individuals and as a consequence immediately tarnishing their reputation, even without any further action by banks or border agencies.<sup>7</sup> This is different from for example CFSP decisions which mandate EU naval forces to target ‘pirates’ as a category of persons that take actions that make them fall into this category, while they are taking these actions.<sup>8</sup>

In the words of AG Sharpston: ‘It is worth recalling that the consequences of listing are very serious. Funds and other financial assets of economic resources are frozen... for a person, entity or group that is named in the ... list, normal economic life is suspended.’<sup>9</sup>

Other CFSP policies may interfere with fundamental rights.<sup>10</sup> Yet usually this is a matter of either implementation or application by national actors or carrying out under an EU banner. Rights interferences of the latter category usually still raise relevant questions of attribution before it can be established that the action was indeed an act of the EU. In the case of sanctions attribution to the EU is unproblematic since the CFSP decisions immediately labels those listed as supporters of a sanctioned regime or terrorism, as contributing to nuclear proliferation or building concentration camps. They interfere with fundamental rights of individuals immediately by virtue of the legal act itself..

### 2.3) Jurisdiction

Article 275 TFEU excludes the CJEU’s jurisdiction ‘with respect to the provisions relating to the [CFSP]’ and ‘with respect to acts adopted on the basis of those provisions’. Article 275(2) TFEU makes an exception to this exclusion. It stipulates exceptional judicial review by the Court of the legality of CFSP decisions providing for restrictive measures against natural or legal persons. Substantively this can be explained by the above highlighted direct rights-relevance of CFSP sanctions measures. Arguably the direct rights-relevance is the substantive reason for introducing exceptional review of CFSP decisions that impose

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<sup>7</sup> See e.g. the current list of singled-out individuals who allegedly are associated with the ISIL (Da’esh) and Al-Qaida organisations. Annex I to Council Regulation (EC) 881/2002, latest amended by Commission Implementing Regulation (EU) 2017/700, 266<sup>th</sup> amendment, [2017] OJ L 103/22.

<sup>8</sup> See e.g. Council Joint Actions 2008/851/CFSP, on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (*Atalanta*), [2008] OJ L 301/33 and the subsequent amendments.

<sup>9</sup> Opinion of AG Sharpston in Case C-599/14 P, *Council v. LTTE*, EU:C:2016:723, para 102.

<sup>10</sup> E.g. *EUNAVFOR Med* operation *Sophia* has the competence to board, search, seize and divert vessels suspected of being used for human smuggling or trafficking on the high seas. For recent activities see: [https://eeas.europa.eu/csdp-missions-operations/eunavfor-med\\_en](https://eeas.europa.eu/csdp-missions-operations/eunavfor-med_en).



TFEU regulations, irrespective of whether they merely reiterate a CFSP decision.<sup>17</sup> Because the TFEU regulations are in relevant parts prescribed by the underlying CFSP decisions, rulings on most aspects of the procedural and substantive legality of the regulation – even if they do not directly address the legality of the CFSP measure – will also carry great persuasive weight with regard to the legality of the CFSP decision.

#### 2.4) The Actual Decision Takes Place Outside of the EU Legal Order

Three types of EU sanctions can be distinguished: Firstly, EU sanctions giving effect to UN Security Council resolutions that impose sanctions, i.e. the sanctions at stake in the Kadi case, implementing Security Council Resolution 1267; secondly, supplementary measures that are adopted by the EU and that are related to but go beyond UN sanctions, i.e. autonomous EU sanctions against Iran and Democratic People’s Republic of Korea focusing on the worsening of the human rights situation that run parallel to and supplement the UN sanctions against the regimes of these countries; and thirdly, autonomous EU sanctions that are unrelated to a UN sanctions regime, i.e. autonomous counter-terrorist sanctions based on Common Position 2001/931/CFSP and the new ISIL (Da’esh)/Al Qaida regime (Section 5.1 below).<sup>18</sup>

Where EU sanctions are adopted to give effect to UN Security Council Resolutions, the EU in principle faithfully follows all changes made to UN sanctions.<sup>19</sup> If the UN Security Council Sanctions Committee adds a name, the Commission adds the name. If the UN Sanctions Committee deletes a name, the Commission deletes that name.<sup>20</sup> The UN Sanctions Committee lists persons and entities based on a statement of case submitted by a UN member state.<sup>21</sup> It remains the choice of that state what information is made public.<sup>22</sup> The information is routinely considered too sensitive to share even with the UN Sanctions Committee. Thus, often the Sanctions Committee does not actually have information to

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<sup>17</sup> Ibid., paras 105-6 on the close link between the CFSP decision and the TFEU regulation.

<sup>18</sup> Thomas Biersteker and Clara Portela, “EU sanctions in context: three types”, (2015) 26 EU ISS.

<sup>19</sup> See for examples: Council Implementing Regulation (EU) 2017/199 implementing Council Regulation (EC) 1183/2005, [2017] OJ L 32/1; Council Implementing Decision 2017/203/CFSP implementing Council Decision 2010/788/CFSP, [2017] OJ L 32/22, which changed the identifying information for 21 people and 1 entity listed on the sanctions list against the Democratic Republic of Congo; Commission Implementing Regulation (EU) 2017/44 amending Council Regulation (EC) 1210/2003, [2017] OJ L 6/36 on Iraq sanctions.

<sup>20</sup> UN targeted sanctions regimes are imposed under Charter VII, Article 41 of the UN Charter, binding on all states.

<sup>21</sup> Consolidated Security Council Sanctions Committee List. See: <https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list>

<sup>22</sup> Security Council Resolution 1735 (2006), para 6.



share with the EU.<sup>23</sup> In short, not only does the Commission not ask any questions; there are in fact no structures in which the EU could ask any questions about the substantive justification of UN listings. This external control over an EU policy is also a particularity of sanctions.

## 2.5) Level of National Disobedience

The CFSP decision is directly binding on EU member states and requires them to take the appropriate measures to give effect to its objectives. When CFSP Council decisions set out arms embargoes and travel bans, these measures are directly implemented at national level. By contrast asset freezes and export bans, i.e. economic measures, are an EU competence. They are implemented by EU regulations. Nonetheless, 16 of the 27 Member States continue to adopt parallel financial sanctions within the framework of their national legislation,<sup>24</sup> which are often identical to the EU lists.<sup>25</sup> Some national laws are for example expressly intended to implement UN Security Council Resolution 1373 (2001) but do not refer to the relevant EU laws implementing that resolution.<sup>26</sup> This is a breach of EU law, which prohibits parallel national measures that ‘implement’ directly applicable EU regulations.<sup>27</sup> Yet so far the Commission has not introduced any proceedings against those Member States that keep their own national lists.

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<sup>23</sup> See also: Armin Cuyvers, “Give me one good reason: the unified standard of review for sanctions”, (2014) 5 CML Rev. 1759.

<sup>24</sup> See: UK Supreme Court, *Her Majesty’s Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC)* (Appellants); *Her Majesty’s Treasury (Respondent) v. Mohammed al-Ghabra (FC)* (Appellant); *R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v. Her Majesty’s Treasury* (Appellant), judgment of 27 January 2010 [2010] UKSC 2, para 22. See for example For the UK see: Counter-Terrorism Act 2008 and the Terrorist Asset-Freezing Act 2010. For NL see: *Sanctieregeling terrorisme 2007-II*.

<sup>25</sup> E.g., the EU and UK list of individuals and entities threatening the sovereignty and territorial integrity of Ukraine consist of 150 individuals and 37 entities. See: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2017.067.01.0034.01.ENG&toc=OJ:L:2017:067:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.067.01.0034.01.ENG&toc=OJ:L:2017:067:TOC) and [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/512570/ukraine\\_sovereignty.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/512570/ukraine_sovereignty.pdf) respectively. The EU and NL list of terrorist suspects giving effect to UN Security Council Resolution 1373 are equally identical. See:

[http://www.eeas.europa.eu/cfsp/sanctions/consol-list\\_en.htm](http://www.eeas.europa.eu/cfsp/sanctions/consol-list_en.htm)  
<https://www.government.nl/documents/reports/2016/01/15/national-terrorism-list>.

<sup>26</sup> See e.g. Article 2 of the Dutch Regulation on sanctions for the suppression of terrorism 2007-II (‘Sanctieregeling terrorisme 2007-II’), which refers neither to Council Regulation (EC)2580/2001, [2001] OJ L 344/70 nor to Council Common Position 2001/931/CFSP, [2001] OJ L 344/93.

<sup>27</sup> Case 39/72, *Commission v. Italy*, EU:C:1973:13 ; Case 50/76, *Amsterdam Bulb BV v. Produktschap voor Siergewassen*, EU:C:1977:13.

### 3) Implications of Sanctions for Other Policies

#### 3.1) Full Set of Judicial Remedies: Strengthening Fundamental Rights and the Rule of Law under CFSP

Sanctions have made a significant contribution to the constitutionalisation of CFSP, understood as the development and application of common EU norms and principles.<sup>28</sup> As identified by Piet Eeckhout, ‘there is a tendency to apply broadly the same constitutional rules, principles, and disciplines to European foreign policy as are applied to the EU’s internal policies.’<sup>29</sup> This increasingly includes CFSP. Because of the great amount of sanctions litigation this policy area has given the CJEU a particular opening to apply general constitutional rules of EU law to a hybrid combination of TFEU regulations that hinge on and effectively copy CFSP decisions. Moreover, the recent case of *Rosneft*<sup>30</sup> is a good example where the Court applied constitutional rules and principles purely to CFSP. It is the first case in which the Court ruled on its scope of jurisdiction over a CFSP sanctions decision<sup>31</sup> and it comes as one out of four recent rulings of the CJEU in which the Court addressed the scope of its jurisdiction over CFSP more in general.<sup>32</sup> In *Rosneft*, the Court explained that the different entry points of jurisdiction (Article 40 TEU and Article 275(2) TFEU) have different implications under the different types of procedures. The CJEU found that in absence of any express limitation, its jurisdiction to review compliance with Article 40 TEU extended to the preliminary ruling procedure.<sup>33</sup> This interpretation is applicable across all CFSP policies.

Article 275(2) TFEU by contrast specifically refers to Article 263(4) TFEU and could hence be interpreted as limiting this entry point to direct actions for annulment. Yet the CJEU, following the AG Opinion,<sup>34</sup> found that it also had jurisdiction to rule on the *legality* of CFSP sanctions decisions in preliminary ruling procedures.<sup>35</sup> This is in line with the case of

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<sup>28</sup> Christina Eckes, “Common Foreign and Security Policy: The Consequences of the Court’s Extended Jurisdiction”, (2016) 22 ELJ 492.

<sup>29</sup> Piet Eeckhout, “The Constitutionalization of European Foreign Policy”, Proceedings of the Annual Meeting (American Society of International Law), (2013) 107 International Law in a Multipolar World 171.

<sup>30</sup> *Rosneft*, op. cit. *supra* note 1, para 66 et seq.

<sup>31</sup> *Segi*, op. cit. *supra* note 1, was decided under the former third pillar.

<sup>32</sup> Case C-455/14 P, *H v. Council et al (hereafter: H.)*, EU:C:2016:569; Case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo*, EU:C:2015:753 and Opinion 2/13, EU:C:2014:2454, EU Accession to the ECHR.

<sup>33</sup> *Rosneft*, op. cit. *supra* note 1, paras 62-63. See further chapter 4.

<sup>34</sup> Opinion AG Wathelet in Case C-72/15, *Rosneft*, EU:C:2016:381, para 61 et seq.

<sup>35</sup> *Rosneft*, op. cit. *supra* note 1, paras 71-81.

*Segi* and with the CJEU's settled case-law on the full set of judicial remedies.<sup>36</sup> Yet, it specifically confirms both a fundamental right and rule of law reading of judicial review, which also extends across the whole of CFSP.<sup>37</sup>

Attempts have been made to broaden structurally the entry point for jurisdiction under Article 275(2) TFEU. The term 'restrictive measures' used in this provision is within the EU context a technical term referring to sanctions, such as asset freezing and travel bans. However, fuelled by the dissatisfaction that the Court's limited jurisdiction under CFSP may leave individuals without the necessary judicial protection, the question arose whether Article 275(2) TFEU could be interpreted much more broadly in order to establish a general rationale that CFSP measures, which adversely affect the rights of individuals in a direct manner, must be subject to judicial review. Textually this came together in the question of how narrow the term 'restrictive measures' in Article 275(2) TFEU should be interpreted. Indeed, the Commission suggested a wide reading covering all direct adverse effects of CFSP policies, which would have also conveniently (albeit perhaps only partially) addressed the problem that the Court's limited jurisdiction creates in the context of EU accession to the ECHR.<sup>38</sup> AG Wahl in the case of *H* by contrast suggested a narrow reading, which the CJEU followed. In his words:

'I do not believe that the concept of 'restrictive measures', although nowhere expressly defined in the Treaties, may, as the applicant suggests, be considered to cover all EU acts which adversely affect the interests of individuals. A textual, systematic and historical interpretation of Article 275 TFEU, in fact, reveals that concept to be of more limited scope.'<sup>39</sup>

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<sup>36</sup> *Ibid.*, paras 67-68: It is part of the 'complete system of legal remedies or procedures that persons bringing proceedings must, when an action is brought before a national court or tribunal, have the right to challenge the legality of provisions contained in European Union acts'.

<sup>37</sup> *Ibid.*, paras 69-75.

<sup>38</sup> Opinion 2/13; Opinion AG Wahl in Case C-455/14 P, *H v. Council and Commission*, EU:C:2016:212 (H.), para 34: 'The Commission considers that Articles 24(1) TEU and 275 TFEU should be read as excluding the jurisdiction of the CJEU only with regard to CFSP acts which are an expression of sovereign foreign policy ('actes de Gouvernement'), and not acts merely implementing that policy. In the alternative, the Commission takes the view that Articles 24(1) TEU and 275 TFEU exclude the CJEU's review of alleged breaches of CFSP provisions alone, but not of alleged breaches of other EU provisions. Thus, the CJEU would be empowered to review the lawfulness of acts adopted in the framework of the CFSP when the alleged invalidity stems from a possible infringement of non-CFSP provisions. Nonetheless, the present appeal is, according to the Commission, inadmissible for the following reasons: first, the contested decisions cannot be considered mere acts of implementation, since they are of an operational nature; second, the grounds for annulment submitted by the appellant at first instance either required the General Court to interpret Decision 2009/906 (for which that court lacked jurisdiction) or had to be directed against the Italian authorities (and thus submitted in the context of an action lodged before the Italian courts).', criticized by AG Wahl in paras 60-66.

<sup>39</sup> Opinion AG Wahl in *H*, *op. cit. supra* note 32, para 74.

Arguably the Court's jurisdiction should extend to actions for damages for harm caused by CFSP sanctions decisions.<sup>40</sup> While non-contractual liability in Article 340 TFEU is applicable under Union law in its entirety this does not as such address the issue of *jurisdiction*. In this context it is relevant to realise that the dividing line between the TEU and the TFEU is not easily drawn in the context of sanctions. In a recent sanctions case for example, the General Court awarded compensation for non-material damage for an unlawful listing of an entity as supporting nuclear proliferation in Iran.<sup>41</sup> The Court did so specifically for the reputational damage resulting from the public sanctions measures. However, while the Court stated at the outset that the Council regulation adopted under the TFEU is a direct consequence of the adoption of a CFSP decision under the TEU it did not consider this fact in the context of non-material damages. While this case confirms that an unlawful listing in a TFEU regulation may lead to compensation it does not immediately allow the conclusion that the Court would accept jurisdiction for a stand-alone CFSP listing. Logically, the CFSP listing caused the reputational damage. It is the first public listing of the applicant's name and is only copied into the regulation.

However, AG Wathelet in *Rosneft* specifically argued that:

'[...]A]ctions for damages which relate to a CFSP act are covered by the 'carve-out' provision in the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, but not by the 'claw-back' provision in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU.'<sup>42</sup>

In practical terms the denial of damages for harm caused by CFSP decisions could leave individuals without compensation even if their listing was found to be illegal by the Court within its exceptional jurisdiction under Article 275(2) TFEU. This would be the case in a situation where the applicants challenged the CFSP decision, rather than also the regulation, or if they were only listed in the CFSP decision but not in the regulation.<sup>43</sup>

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<sup>40</sup> Christina Eckes, "EU Counter-Terrorist Sanctions against Individuals: Problems and Perils", (2012) EFA Rev., 113-132.

<sup>41</sup> Case T-384/11, *Safa Nicu Sepahan Co. v. Council*, EU:T:2014:986, paras 78-92. See also: Case T-293/12, *Syria International Islamic Bank PJSC v. Council*, EU:T:2014:439, para 70, where the Council accepted that the Court is competent to establish whether it has jurisdiction to award damages for CFSP measures.

<sup>42</sup> AG Wathelet in *Rosneft*, op. cit. *supra* note 34.

<sup>43</sup> This was the case for *Segi*, op. cit. *supra* note 1.

### 3.2) Institutional Consequences: Closed Evidence

Sanctions have in the past regularly been annulled because the Council was unable to substantiate the reasons for listing. This speaks to the need for a closed-evidence procedure. Article 105 of the General Court's Rules of Procedure, which entered into force on 1 July 2016, sets out that information is 'confidential' if publication of that information 'would harm the security of the Union or that of one or more of its Member States or the conduct of their international relations'.<sup>44</sup> This will give the Council for the first time the ability to support their listing decisions with closed evidence. Indeed the adoption of Article 105 was triggered in particular by the procedural difficulties of dealing with information in sanctions cases.<sup>45</sup> However, Member States would have to trust the closed evidence procedure sufficiently to share national intelligence supporting the decision of their competent national authorities. This should not be taken for granted.

The General Court's new rules of procedure do not specifically refer to sanctions or to CFSP. Hence, information related to the CFSP is treated as any other confidential information. The difficulties of being unable to share confidential information in sanctions cases hence triggered the creation of a general closed evidence procedure, which now allows also for more judicial secrecy in other areas. This could ultimately lead to a spillover of secret judicial proceedings to other, non CFSP areas. This would be most likely for asylum or criminal law, e.g in cases with a national security dimension.

### 3.3) Implications under National Law

In some Member States an explicit national rule attaches additional consequences to an EU sanctions listing. National law may for example exclude accepting refugees who are members or supporters of any of the groups listed under the EU sanctions regime. In a preliminary reference from a German court, the Court of Justice was asked to rule on this consequence of EU sanctions under national asylum law.<sup>46</sup> A German asylum authority had decided that membership of an organization included on the terrorist lists justified excluding the person from refugee status. The CJEU held that exclusion from refugee status must be decided on a case-by-case basis, but also stated that inclusion on an EU sanctions list is a

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<sup>44</sup> General Court, Rules of procedure, [2015] OJ L 105/1.

<sup>45</sup> The introduction to Chapter 7 of the Rules of Procedure specifically refers to restrictive measures, even if Article 105 is phrased in general terms and could be applied to other security matters.

<sup>46</sup> Joined Cases C-57 & 101/09, *Bundesrepublik Deutschland v. B and D*, EU:C:2010:661.

‘factor to be considered’ in evaluating whether someone has committed a ‘serious non-political crime’ or an ‘act against the principles of the UN’.<sup>47</sup>

EU autonomous counter-terrorist sanctions are often but not always based on national criminal proceedings that are intended to give effect to Framework Decision 2002/475/JHA on combatting terrorism.<sup>48</sup> Member states retain great discretion on the details of implementation, since framework decisions are ‘binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods.’<sup>49</sup> The definition of what constitutes a terrorist objective or a link with terrorism is consequently not necessarily identical in the different legal orders, national or European. The Dutch legislature, for instance, added specific provisions on terrorism to the existing criminal law, which allows an increase of the maximum penalty for acts with a terrorist objective by up to 50 per cent.<sup>50</sup> This demonstrates the circular interaction and interlocking of the EU and the national legal contexts: EU law requires member states to take action against terrorist activities, member states do so, and EU sanctions may then attach additional consequences to the national counter-terrorist actions.

At times there is another loop to this circularity where the EU law measure is used to justify a criminal conviction or the prohibition of an organization at the national level.<sup>51</sup> In the Netherlands for instance, all legal persons, listed by the EU pursuant to Common Position 2001/931/CFSP are prohibited *ipso jure*.<sup>52</sup> In Sweden and in Italy, the courts consider being on the UN list of terrorist suspects a relevant fact when, in the course of criminal proceedings, they determine whether the accused is connected with terrorism or not.<sup>53</sup> The circularity is complete when a national decision is adopted ‘pending the adoption’ of an EU measure, then used to justify the adoption of the latter and immediately repealed when the EU measure comes into force.<sup>54</sup>

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<sup>47</sup> Ibid., para 90.

<sup>48</sup> For example, Case T-47/03, *Sison v. Council and Commission (hereinafter ‘Sison I’)*, EU:T:2007:207; Case T-341/07, *Sison v. Council (hereinafter ‘Sison II’)*, EU:T:2011:687. In these cases, the national decision concerned the rejection of refugee status in the Netherlands rather than criminal proceedings.

<sup>49</sup> Article 34(2)(b) TEU (pre-Lisbon).

<sup>50</sup> E.J. Husabø and I. Bruce, *Fighting Terrorism through Multilevel Criminal Legislation* (Martinus Nijhoff Publishers, 2009), 184.

<sup>51</sup> See Case C-550/09 *Generalbundesanwalt beim Bundesgerichtshof v. E and F*, EU:C:2010:382.

<sup>52</sup> ‘Van rechtswege verboden’, Art 2:20 Section 3 of the Civil code (Burgerlijk Wetboek).

<sup>53</sup> See Sixth report of the Analytical Support and Sanctions Monitoring Team, UN S/2007/132 (8 March 2007), box 1, 14. Retrieved at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2007/132](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2007/132).

<sup>54</sup> See Case T-348/07, *Al Aqsa v. Council*, EU:T:2010:373, para 177.

Furthermore, the breach of EU sanctions legislation leads to so-called secondary sanctions under national law. Pursuant to Article 83(2) TFEU, minimum rules for secondary sanctions could in principle be established by the Union. However, since this has not yet happened, member states remain in charge of the adopting secondary sanctions. Secondary sanctions do not necessarily have to be criminal, but they have to be effective. Again, the specific national provisions differ considerably. In Austria secondary sanctions are regulated in the national sanctions law.<sup>55</sup> Any natural or legal person who makes funds available to a listed individual faces a fine of up to €50,000, and, if more than €100,000 are made available, imprisonment of up to one year or 360 *Tagessätze*.<sup>56</sup> In Germany, deliberate breaches are punishable by imprisonment for a period of between six months and five years.<sup>57</sup> The ECJ ruled that, where the EU listing has been found flawed because the listed individuals had not been given the necessary opportunity to exercise their procedural rights, the listing is illegal and cannot justify secondary sanctions under national law.<sup>58</sup> The CJEU held that the EU listing ‘cannot, in any circumstances, be relied upon ... as a basis for a criminal conviction in respect of facts relating to that period [in which those listed did not enjoy the necessary procedural rights], without infringing the principle of the non-retroactivity of provisions which may form the basis for a criminal conviction.’<sup>59</sup> The latter demonstrates the dependence of national criminal secondary sanctions on the EU listings. Yet, secondary sanctions can also result in a challenge of the underlying EU listing. In 2017 the CJEU ruled in a preliminary reference concerning secondary sanctions<sup>60</sup> that the listing of an organization could be challenged in a preliminary ruling request in the context of national proceedings against secondary sanctions imposed on natural persons for having supported that organization, including after the period for bringing an action for annulment against that listing in the EU Courts had expired.

### 3.4) EU Counter-Terrorist sanctions as Part of EU Counter-Terrorist

Autonomous EU counter-terrorist sanctions are not only a particular type of sanctions but also a particular type of EU counter-terrorist policies. This raises the question of how

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<sup>55</sup> See Section 12(1) Sanktionengesetz (SanktG).

<sup>56</sup> Fine calculated on the daily rate of income.

<sup>57</sup> Section 34(4)Nr.2, (5), (6)Nr.4, (7) *Aussenwirtschaftsgesetz* (AWG).

<sup>58</sup> Case C-550/09, *Generalbundesanwalt beim Bundesgerichtshof v. E und F*, EU:C:2010:382.

<sup>59</sup> *Ibid.*, para 59.

<sup>60</sup> Case C-158/14, *A, B, C & D v. Minister van Buitenlandse Zaken (hereafter: A. and others)*, EU:C:2017:202.

they interact with other counter-terrorist policies. In a recent preliminary ruling, a Dutch court suggested that the definition of a ‘terrorist act’ within the field of EU sanctions<sup>61</sup> should be interpreted in line with the general Framework Decision on Combatting Terrorism.<sup>62</sup> The CJEU rejected this interpretation.<sup>63</sup> Rather than seeing EU counter-terrorist policies as one coherent whole, it focused on the objective and nature of each of the legal instruments. It argued that the objective of the Framework Decision was to approximate the definition of terrorist offences imposing penalties for past conduct and that it fell within the sphere of the Area of Freedom, Security and Justice (AFSJ). The autonomous EU sanctions regime by contrast essentially constituted a CFSP policy and imposed *preventive*, rather than *punitive* measures. The Court also recalled that the relationship between national and EU law is different in both contexts. While the Framework Decision aimed to approximate national criminal law, sanctions were adopted according to a system operating on two levels, in the sense that the Council may include on that list only persons and entities in respect of which a decision taken by a competent national authority exists.<sup>64</sup> In particular the difference in objective and nature justified in the eyes of the Court that, while the Framework Decision specifies that it does not govern actions by armed forces during periods of armed conflict, the autonomous EU sanctions regime was not subject to that limitation. The CJEU’s fragmented purposive interpretation limits the implications of one policy field for others..The CJEU’s classification of EU sanctions as preventive rather than punitive as an argument for not applying rights protection that is offered under more general counter-terrorist instruments is problematic in and of itself. Firstly if sanctions remain in place for very long periods of time they restrict rights in a manner comparable to criminal measures, so the classification as preventive should be irrelevant from a rights perspective.<sup>65</sup> Secondly, this classification allows a class of counter-terrorist measures that is not subject to the same rights protection than other counter-terrorist measures. This seems not only unnecessary in the particular case, but also undesirable from the perspective of legal certainty, coherence, and rights protection. It confirms once more that sanctions are constructed to operate as far as possible outside of the system of rights guaranteed under EU law.

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<sup>61</sup> Common Position 2001/931 and Regulation 2580/2001, *op. cit. supra* note 26.

<sup>62</sup> Council Framework Decision 2002/475/JHA, [2002] OJ L164.

<sup>63</sup> *A. and others* *op. cit. supra* note 60.

<sup>64</sup> *A. and others* *op. cit. supra* note 60, para 84.

<sup>65</sup> Christina Eckes, “EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions”, (2014) 51 CML Rev. 869.



The CJEU decided to treat the different legal instruments as reflecting a different internal logic and subjected them to different limits. This results in a situation in which those sanctioned, e.g. if they take part in an armed conflict, may benefit from certain immunities under international humanitarian law with regard to the Framework Decision, but are at the same time targeted by EU restrictive measures and secondary sanctions under national criminal law. It also limits the spill-over from TFEU policies to CFSP and *vice versa*.

### 3.5) Extraterritorial Effects

Sanctions have certain extraterritorial effects. EU citizens are bound by them, irrespective of where they are. So are companies and organizations incorporated under the law of a Member State, including branches of companies in third countries.<sup>66</sup> The EU also invites certain third countries to align with its imposed sanctions measures.<sup>67</sup> Alignment with EU sanctions is seen as an act of political commitment.<sup>68</sup> In the latest renewal of sanctions against Russia over the conflict in Ukraine, only Montenegro, Albania, Norway and Ukraine aligned themselves with the EU. In 2015 this group still included Iceland, Lichtenstein and Georgia.<sup>69</sup> It is not clear why they did not align themselves with the EU for the specific sanctions regime. At times third countries choose to follow suit with EU imposed sanctions, without publicly aligning themselves.<sup>70</sup> Furthermore non-alignment can be due to time pressure. A request for alignment is without previous political dialogue and the third country may simply not have enough time to decide if it would align itself.<sup>71</sup> This does not exclude that it nonetheless implements the sanctions later on.<sup>72</sup>

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<sup>66</sup> Fact lists EU sanctions. Retrieved at:

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/135804.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/135804.pdf)

<sup>67</sup> The alignment is published in a separate declaration from the High Representatives in a Press release, see e.g. Press release 239/17 of 5 May 2017 regarding the restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

<sup>68</sup> Elin Hellquist, "Either with us or against us? Third-country alignment with EU sanctions against Russia/Ukraine", (2016) 29 CRIA 997, 1001

<sup>69</sup> Press release 622/15 of 28 June 2015 regarding restrictive measures in response to the illegal annexation of Crimea and Sevastopol.

<sup>70</sup> Sanctions may have more effect for one country than for another. Iceland suffered from the Russian boycott of Icelandic fish. After 2016 it stopped publicly aligning itself with the EU sanctions. See Baldur Thorhallsson and Pétur Gunnarsson, "Iceland's Relations with its Regional Powers: Alignment with the EU-US sanctions on Russia", (2017) NUPI Working Paper 874.

<sup>71</sup> *Ibid.*, 24, confirmed by interviews with Icelandic officials.

<sup>72</sup> For Iceland see: <https://www.mfa.is/foreign-policy/sanctions/>. For Lichtenstein see: <http://www.lv.li/#/114812?scrollto=true>.

#### 4) Tension between legal rules and political objectives

The intrinsic tension between legal rules and procedures and political objectives could not be more apparent. The EU institutions purport that '[s]anctions are one of the EU's established tools to promote the CFSP objectives of peace, democracy and the respect for the rule of law, human rights and international law.'<sup>73</sup> They consider sanctions as 'always [forming] part of a wider, comprehensive policy approach involving political dialogue and complementary efforts.'<sup>74</sup> The repeated annulments of EU sanctions measures predominantly for infringing procedural rights of those listed<sup>75</sup> could be read as a situation in which individual rights limit the ability of the EU to take political decisions.

Previously, comprehensive state sanctions, as those imposed on Iraq in reaction to its 1990 invasion of Kuwait, also had a severe humanitarian impact and suffered from a great lack of precision in targeting those who contributed the most to the situation that triggered the imposition of the sanctions in the first place. The move from measures of general application, such as comprehensive state embargoes, to measures targeting specific persons that restrict their rights at a level of severity comparable to criminal measures was intended to limit humanitarian consequences and hence fundamental rights violations. Yet, it also triggers more far reaching procedural guarantees for those sanctioned in a Union of law. This somewhat counter-intuitively may result in a situation where it is more difficult for the Council to defend the measure with more limited fundamental rights consequences (targeted sanctions) in court than the measure with more far-reaching fundamental rights consequences (trade embargoes).

##### 4.1) Re-Listing

In practice, the EU institutions have been able to maintain the sanctions, despite the repeated annulments by the EU Courts. The Council regularly re-listed natural and legal persons after the EU Courts had annulled their listing. This may be justified and reasonable if the procedural flaws of the listing decision can be remedied in the re-listing decision. However, it is at least *prima facie* less justified if the reason for annulment was that the reasons for listing could not be substantiated and that the reasons for listing are only reformulated in the re-listing decision. The Council is not obliged to demonstrate that the re-

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<sup>73</sup> See: [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/423/Sanctions%20policy](https://eeas.europa.eu/headquarters/headquarters-homepage_en/423/Sanctions%20policy).

<sup>74</sup> Ibid.

<sup>75</sup> See footnote 14 above and Section 5.4 below.

listing is based on new or newly discovered relevant facts. Nor does the Council have to specifically explain why the person is relisted or why the information was missing in the original listing.

The specific example of Mr. Kadi has attracted the most attention in this regard. Mr. Kadi had not been delisted following the decisions of the CJEU of 3 September 2008,<sup>76</sup> as the Court had maintained the effects of the listing up to three months. Subsequently, the Commission provided the narrative summary of reasons provided by the UN to list Mr. Kadi on the UN Sanctions List and allowed Mr. Kadi to comment on the narrative summary.<sup>77</sup> However, it maintained the position that Mr. Kadi should be included on the EU sanctions list due to association with the Al-Qaida network.<sup>78</sup> The Commission did not and most likely could not produce new or better reasons for listing Mr. Kadi since his case concerned EU sanctions giving effect to a decision of the UN Security Council Sanctions Committee. Finally in October 2012, the EU delisted Mr. Kadi, following the delisting by the Security Council only days earlier.<sup>79</sup>

The regular re-listings have been the means deployed by the Council to avoid that the Court's interventions of annulling individual sanctions decisions interfere with the political objectives of these sanctions. This has been facilitated by the fact that the Court regularly maintains the effects of the annulled decisions for a transition period, presumably with the aim to allow the Council to re-list. Hence the regular annulments, while they may have negatively impacted on the credibility of the EU's sanctions policy, have not reduced the legal or factual effects of asset freezing or travel bans.

#### 4.2) General policy objectives and specific fundamental rights restrictions

The political objectives, including the symbolic or signalling functions of sanctions regimes cannot be easily explained without raising difficult fundamental questions of justice. Does the EU legal order allow justifying measures that strongly interfere with the fundamental rights of targeted individuals with general policy objectives? While sanctions

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<sup>76</sup> Joined Cases C-402 & 415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, EU:C:2008:461.

<sup>77</sup> Case T-85/09, *Yassin Abdullah Kadi v. European Commission*, EU:T:2010:418, paras 53-57.

<sup>78</sup> Commission Regulation (EC) 1190/2008, [2008] OJ L322/25. amending for the 101st time Council Regulation (EC)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, [2008] OJ L 322/25.

<sup>79</sup> Commission Implementing Regulation (EU) 933/2012 amending for the 180th time Council Regulation (EC)881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al Qaida network, [2012] OJ L 278/11.

decisions essentially concerns a familiar weighing of the common good and the rights of individuals it is difficult to justify them in a Kantian ethical framework using individuals as means to serve a more general purpose. However, a combination of different purposes for a rights-sensitive measure is widely accepted, including for criminal punishment. Hence, part of the motivation to punish can be the protection of the population, including from other perpetrators who are discouraged from breaching the law because they fear the example of those punished. Yet, any punishment finds its limits in the severity of the criminal act, the damage and the subjective responsibility of the perpetrator. This is where the difficulties within the context of sanctions begin. The limits of subjective responsibility are in general terms guaranteed by the proportionality principle. Yet the proportionality principle is not able to ensure these limits in the context of sanctions because of the way it is interpreted in this context.<sup>80</sup> The tension between the general purpose and the individual rights restriction may also be one of the reasons why the EU does not identify the objectives more clearly and make an argument how any specific objective is served by targeting a particular person.

#### 4.3) Change in Behaviour

The 2012 EU Sanctions Guidelines state that '[i]n general terms, restrictive measures are imposed by the EU to bring about a change in policy or activity by the target country, part of country, government, entities or individuals, in line with the objectives set out in the CFSP Council Decision.'<sup>81</sup> Sanctions are aimed at changing the 'policy' of the third country regime or the 'activity' of those targeted, i.e. to achieve a change in behaviour. The EU has suspended sanctions for political developments in the country. This has for example been the case for Belarus and Zimbabwe.<sup>82</sup> However, there is no publicly available information that the EU has ever delisted an individual from any of the targeted sanctions lists because that person or entity has demonstrated a change in behaviour.

The aim of achieving a change in behaviour is highly problematic in the context of sanctions regimes, in particular with regard to those persons who are more remote to the regime.<sup>83</sup> The generality of the policy objectives of the legal instruments, e.g. aiming for

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<sup>80</sup> See Section 5.4 below.

<sup>81</sup> Restrictive measures guidelines, op. cit. *supra* note 3, II.A.4.

<sup>82</sup> See, e.g., Council Decision 2013/160/CFSP amending Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe, [2013] OJ L 90/95.

<sup>83</sup> The problems connected to the assessment of a change in behaviour were brought to the point by the CJEU in *Tay Za* with regard to sanctions against the most remote group of targets, family members of those suspected to

‘democratisation’ of a country, makes it in fact impossible to link the objectives to the behaviour of individuals in the vast majority of cases. Is it possible to demonstrate that someone is no longer supporting terrorism or a third country regime, in particular if the original support was economic and that person’s funds are frozen? Or does their listing ultimately depend on a policy change of the third country regime, as in the case of Myanmar, or a regime change, as in the case of Iraq or Libya?

## 5) New trends?

### 5.1) Ever more sanctions, EU powers and objectives

Since their inception within the EU context in 2002, instruments and objectives used in the EU’s targeted sanctions policy have multiplied. Currently, the EU has restrictive measures in force against 30 countries, and additionally separate sanctions regimes against terrorist groups, most significantly against persons and entities associated with Al Qaida and ISIL (Da’esh), but also against terrorist offences in general.<sup>84</sup> Of these 30 regimes six were implemented before 2000, eight between 2000 and 2010, and sixteen after 2010.

A recent example of an autonomous EU sanctions regime against ISIL (Da’esh)/Al Qaida, adopted in September 2016. This new regime is targeting foreign fighters, persons travelling outside the EU to join the cause of terrorism.<sup>85</sup> It will allow the EU for the first time to designate people for being associated with terrorism (ISIL (Da’esh)/Al-Qaida) that have not been previously identified by the UN or by the competent authorities of the Member States. Until the adoption of this new regime, all listing decisions under the autonomous EU counter-terrorism sanctions regime had been taken in a composite administrative procedure in which national authorities took the relevant decision which then triggered the EU listing. The EU, by contrast, had only been competent to draw up listings without input of national authorities in the context of regime sanctions. As these counter-terrorist sanctions are not related to any political regime governing any geographically identifiable territory, they constitute the most indeterminate sanction tool the EU deploys. This new regime should

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economically support and benefit from the regime in focus: Case C-376/10 P, *Tay Za v. Council*, EU:C:2012:138, para 67.

<sup>84</sup> European Commission, “European Union, Restrictive measures (sanctions) in force”. Last updated 26 April 2017. Retrieved at: [https://eas.europa.eu/sites/eas/files/restrictive\\_measures-2017-04-26-clean.pdf](https://eas.europa.eu/sites/eas/files/restrictive_measures-2017-04-26-clean.pdf)

<sup>85</sup> Council Regulation (EU) 2016/1686, [2016] OJ L 255/1 and Council Decision 2016/1693/CFSP repealing Common Position 2002/402/CFSP, [2016] OJ L 255/25, see in particular the last alternative of Article 3(1).

hence be seen as an extension of the powers of the Council.

The objectives that targeted sanctions regimes pursue have equally multiplied. Besides internal conflicts, nonproliferation, counter-terrorism, democratisation and protection of civilians, including their human rights, have become objectives of sanctions imposed by both the UN and the EU. The EU sanctions against Russia are an example of a sanctions regime that is characterized by a great diversity of objectives and measures. They were introduced in March 2014.<sup>86</sup> In the first year, not only the list of persons and entities but also listing criteria were amended every month.<sup>87</sup> The following range of prohibited actions and protected objectives gives a good impression of increasing diversification of objectives and measures: protection of the territorial integrity, sovereignty and independence of Ukraine; the misappropriation of public goods; a ban on imports of goods originating in Crimea or Sevastopol unless they have Ukrainian certificates; a prohibition to invest in Crimea;<sup>88</sup> a ban on providing tourism services in Crimea or Sevastopol;<sup>89</sup> goods and technology for the transport, telecommunications and energy sectors or the exploration of oil, gas and mineral resources may not be exported to Crimean companies or for use in Crimea; technical assistance, brokering, construction or engineering services related to infrastructure in the same sectors must not be provided.<sup>90</sup>

## 5.2) Institutional Tug-of-War

Since the entry into force of the Lisbon Treaty, the EEAS had formally been given an important institutional role in the adoption of sanctions. With regard to autonomous sanctions in particular, the 2012 Guidelines stipulate that the EEAS ‘should have a key role in the preparation and review of sanctions regimes as well as in the communication and outreach activities accompanying the sanctions, in close cooperation with Member States, relevant EU delegations and the Commission’. The review is conducted by the relevant

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<sup>86</sup> Council Decision 2014/145/CFSP, [2014] OJ L 78/16.

<sup>87</sup> See for an overview of all the amendments: Restrictive measures in force, *op. cit. supra* note 84, 115.

<sup>88</sup> Europeans and EU-based companies can no longer buy real estate or entities in Crimea, finance Crimean companies or supply related services. In addition, they may not invest in infrastructure projects in six sectors.

<sup>89</sup> European cruise ships may not call at ports in the Crimean peninsula, except in case of emergency. This applies to all ships owned or controlled by a European or flying the flag of an EU Member State.

<sup>90</sup> See Council Regulation (EU) 692/2014, [2014] OJ L 183/9, last amended by Council Regulation (EU) 1351/2014 concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol; See for the other sanctions regimes Council Regulation (EU) 269/2014, [2014] OJ L 78, last amendment of the criteria for listing in Council Regulation 959/2014 and Council Regulation (EU) 208/2014, [2014] OJ L 66/1 concerning restrictive measures against persons.

Council working parties and committees, where appropriate on the basis of EU Heads of Mission reports.<sup>91</sup> Heads of Missions may for instance help to ensure unambiguous identification of the targeted persons<sup>92</sup> and are ‘invited to provide, where appropriate, their advice on proposals for restrictive measures or additional designations’.<sup>93</sup> The strong involvement of the EEAS underlines the hybrid CFSP/TFEU nature of sanctions, since the EEAS is equally of a hybrid nature, dealing with both CFSP and TFEU policies.<sup>94</sup> The EEAS involvement, with its focus on external policies, including CFSP, does not make the use of a legal basis under the Area of Freedom, Security and Justice (Article 75 TFEU) more likely.

In November 2016 the Foreign Relations Counsellors Working Party (RELEX) agreed that the assessment of the impact and functioning of autonomous EU sanctions against ISIL (Da’esh)/Al Qaida and the examination of appropriate possible improvements should be entrusted to the former CP 931 Working Party with an enlarged scope and a new name COMET WP.<sup>95</sup> COMET WP has the mandate to ‘examine and evaluate information with a view to listing and de-listing of persons, groups, undertakings and entities, as well as assess whether the information available meets the [relevant] criteria’, ‘make recommendations for listings and de-listings’, ‘prepare the regular review’, and ‘assess the impact and functioning’. COMET WP largely works in secret.<sup>96</sup> The six-monthly rotating Council Presidency chairs it. The documents are held by the Council Secretariat. As mentioned above, the ISIL (Da’esh)/Al Qaida regime provides for the first time the possibility that the EU itself takes autonomous listing decisions that are not based on UN lists or on the decision of competent national authorities. This may justify a new institutional arrangement. Yet these new institutional developments are also a clawing back of competences from the EEAS.<sup>97</sup>

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<sup>91</sup> Council sanctions guidelines, *op. cit. supra* note 74, II.A.6.

<sup>92</sup> *Ibid.*, II.D.22.

<sup>93</sup> *Ibid.*, Annex I Recommendations for working methods for EU autonomous sanctions, para 3.

<sup>94</sup> EEAS 2.0: A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service, Thursday, 7 February 2013, available at:

<https://www.ceps.eu/publications/eeas-20-legal-commentary-council-decision-2010427eu-establishing-organisation-and>.

<sup>95</sup> Council Foreign Relations Counsellors Working Party, “Fight against the financing of terrorism – Establishment of a Council Working Party on restrictive measures to combat terrorism (COMET WP)”, (23 November 2016), 14612/1/16 REV 1. Retrieved at: <http://www.statewatch.org/news/2016/dec/eu-council-comet-terrorist-lists-wp-14612-16-rev1.pdf>.

<sup>96</sup> See *ibid.*, practical arrangements on page 4: even organizational information of the working party falls short of being classified but is labelled ‘restraint’, which in actual fact makes it inaccessible.

<sup>97</sup> Compare also: EEAS 2.0: A legal commentary, *op. cit. supra* note 94.

### 5.3) Ever vaguer listing criteria

While the sanctions criteria of counter-terrorist sanctions have always been very broad and arguably rather vague, e.g. requiring an association with an alleged terrorist organization, the sanctioning criteria used in regime sanctions have equally become broader and vaguer over time. An example is the sanctions regime against Iran, which has been fundamentally adapted to make the sanctions more likely to stand in Court. They started with a focus on individuals who contribute to the proliferation of nuclear materials and changed to supporting generally those governing Iran. Two appeal cases before the CJEU specifically examined the criterion of ‘support to the Government of Iran’ set out in Article 20(1)(c) of Council Decision 2010/413/CFSP, as amended by Council Decision 2012/635 CFSP.<sup>98</sup> The ECJ explained that the ‘purpose behind the addition of that criterion was to target the relevant person or entity’s own activities which, even if they have no actual direct or indirect connection with nuclear proliferation, are nonetheless capable of encouraging it by providing the Government of Iran with resources or facilities of a material, financial or logistical nature which allow it to pursue proliferation activities.’<sup>99</sup> It further upheld the General Court’s conclusion that financial services ‘such as the holding of accounts, the performance and conclusion of financial transactions or the purchase and sale of bonds, constitute material, logistical and financial support to that State and, as a result, support to the Government of that State’, qualified as financial support even if the Central Bank of Iran did not place ‘its own financial resources at the disposal of the Government of Iran’.<sup>100</sup> This is considerably extending the circle of targeted persons.

Another recent example is the sanctions regime against Syria. Article 3(1) and Article 4(1) of Decision 2011/273 provided for the adoption of restrictive measures against persons responsible for the violent repression against the civilian population in Syria and persons associated with them, as listed in the annex to that decision.<sup>101</sup> The following section will *inter alia* discuss how broadly this particular listing criterion is interpreted.

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<sup>98</sup> *Central Bank of Iran*, op. cit. *supra* note 16; Case C-440/14 P, *National Iranian Oil Company v. Council*, EU:C:2016:128.

<sup>99</sup> *Central Bank of Iran*, op. cit. *supra* note 16, para 44.

<sup>100</sup> *Ibid.*, paras 45-6.

<sup>101</sup> Council Decision 2011/273/CFSP concerning restrictive measures against Syria, [2011] OJ L 121/11.



#### 5.4) Trends in Litigation

The Court's decisions on the legality of sanctions measures occur in the following setting. The Council designates an individual, sets out a number of reasons, and the individual challenges the listing in an action for annulment. The applicant usually disputes amongst others the factual accuracy of the listing reason put forward by the Council. The right to judicial review under Article 47 EU Charter of Fundamental Rights requires that the ECJ is in the position to ensure that the listing 'decision, which affects that person individually, is taken on a sufficiently solid factual basis. That entails, in this instance, a verification of the factual allegations in the summary of reasons underpinning the contested acts, in order to review whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support those acts, is substantiated.'<sup>102</sup> The burden of proof lies with the Council to demonstrate that the listing criteria are met.<sup>103</sup> Most annulments then happen because the Council is unable or unwilling to produce evidence, or even information and clues, supporting the reasons for designation.

Recent cases, for instance regarding the sanctions regimes against Russia and Zimbabwe, continue to turn on similar issues as previous case law in the context of other sanctions regimes: choice of the legal basis, manifest error of assessment, obligation to state reasons, rights of the defence, fundamental rights, and proportionality. Yet one new trend is the bringing together of large number of individuals and entities in collective challenges.<sup>104</sup>

The most relevant trend, however, is that the litigation statistics have improved in two regards: fewer cases are brought and of these the Council wins more cases. The reasons for this are not so much that the Council is producing more or better evidence. The reason rather lies in the case law of the EU Courts itself, in which the Court has accepted that certain legal constructions, such as presumptions based on inferences, can lead to a reversal of the burden of proof. Other circumstances such as the construction of the proportionality test stand in the way of strict scrutiny of the specific listing, as opposed to the general policy

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<sup>102</sup> Case C-193/15 P, *Tarif Akhras v Council*, ECLI:EU:C:2016:219, para 56. With reference to the judgments in Case C-584, 593 & 595/10, *Commission and Others v. Kadi*, EU:C:2013:518, para 119; Case C-630/13, *Anbouba v. Council*, EU:C:2015:247, para 46; and Case C-605/13, *Anbouba v. Council*, EU:C:2015:248, para 45.

<sup>103</sup> See for two cases that concerned inter alia the burden of proof: Case C-72/11, *Afrasiabi and Others and Anbouba v. Council*, C-630/13 P, EU:C:2015:247.

<sup>104</sup> See e.g., a case brought by 109 individuals and 12 companies against their designation on the sanctions list against Zimbabwe, Case T-190/12, *Tomana and others v. Council and Commission*, EU:T:2015:222; appeal: C-330/15 P, *Tomana and Others v Council and Commission*, EU:C:2016:601.

decision that sanctions are imposed. Finally, the Court considers it sufficient if the Council substantiates one out of the many reasons brought forward to justify a listing.

As to the first point, the CJEU appears to have changed its position on the acceptability of presumptions that the targeted individual meets the listing criteria, which are not codified under secondary law and which lead to a reversal of the burden of proof based on inferences. In 2012 the Grand Chamber of the ECJ overturned the General Court's position in the case of *Tay Za v. Council* that the family members of those in charge of businesses could be targeted by sanctions based on a presumption (for which no provision was made in the relevant secondary law) that they benefit from the economic policies of the targeted regime. The ECJ held 'that, by finding that it may be presumed that the family members of leading business figures benefit from the functions exercised by those businessmen, so that such family members also benefit from the economic policies of the government, and that there is therefore a sufficient link [...] between the appellant and the [targeted regime] the General Court erred in law.'<sup>105</sup>

Whether or not presumptions based on inferences should be permissible as a matter of principle is a different question. The case law demonstrates a development in the Court's position on their acceptability. In the more recent case of *Afrasiabi*, the ECJ emphasized the need for a contextual assessment<sup>106</sup> and the difficulties that the Council encounters in producing evidence 'because of the state of war that prevails in Syria'.<sup>107</sup> It held that 'the Council discharges the burden of proof that lies on it if it presents to the [EU Courts] a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the person subject to a measure freezing his funds and the Syrian regime.'<sup>108</sup> This led the Court to the conclusion that the applicant's status as a businessman and his leading positions in the networks of Syrian businessmen such as the Chambers of Commerce, and his role as a representative of Syrian businessmen constituted such 'a set of indicia sufficiently specific, precise and consistent to establish that [the applicant] was providing economic support to the Syrian regime or benefiting from it.'<sup>109</sup> Hence, while in *Tay Za* a presumption that family members of those associated with a regime benefit from that closeness to the

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<sup>105</sup> Case C-376/10 P, *Tay Za v. Council* (EU:C:2012:138), paras 69-71.

<sup>106</sup> *Ibid.*, para 60.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

regime was rejected, in *Afrasiabi* the presumption that a well-connected businessman in Syria is supporting the regime or benefiting from it was accepted. Moreover the ECJ explicitly confirmed that a *set of indicia* is sufficient to discharge the burden of proof that lies on the Council when taking a listing decision. Effectively this amounts to threshold that is lower than ‘probable cause’.

As to the second issue, the ECJ confirmed that the starting point for the test of whether sanctions are proportionate could be the abstract objective of maintaining international peace and security. It upheld the General Court’s proportionality assessment of the Iranian regime sanctions. The General Court had first acknowledged that the measures caused considerable harm to the applicant, both financially and to its reputation.<sup>110</sup> When assessing the proportionality, the General Court had then simply held that ‘the difficulties caused to the applicant as a result of the contested acts are not disproportionate to the importance of the aim of maintaining international peace and security that is pursued by those acts.’<sup>111</sup> The remainder of the proportionality assessment was dedicated to explaining how the harm to the applicant had been limited in the specific case. The General Court had not considered to what extent – in terms of quality or quantity – the applicant’s support of the regime with quite general financial services had contributed to the overpowering general aim of maintaining international peace and security. This is an indirect way of limiting judicial review: by taking weighty abstract objectives as the yardstick the proportionality test is voided of meaning.<sup>112</sup>

As to the third point, in the case of *Afrasiabi* the Council had first put forward reasons for listing including that the applicant, Mr Akhras, besides being a prominent businessman benefiting from and supporting the Syrian regime and a member of the Board of the Federation of Syrian Chambers of Commerce, was the founder of the Akhras group, had close business relations with President Assad’s family and provided industrial and residential premises for improvised detention camps and logistical support for the regime.<sup>113</sup> In the proceedings the Council could only substantiate the most general reason, namely that he is

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<sup>110</sup> Ibid., para 118.

<sup>111</sup> Ibid., para 119.

<sup>112</sup> I made this point earlier in Eckes, ‘From counterterrorist to third country sanctions’, op. cit. *supra* note 65.

<sup>113</sup> Case C-72/11, *Afrasiabi and Others*, EU:C:2011:874, paras 58. See: Steven Blockmans, ‘Curbing the circumvention of sanctions against Iran over its nuclear programme: *Afrasiabi*’ (2013) 50 CML Rev. 623.

‘a prominent businessman who is part of the economic ruling class in Syria.’<sup>114</sup> It should be added that the other originally stated reasons for listing, for which the Council did not or could not put forward any evidence, however could arguably be seen to have caused the most reputational damage. By confirming that substantiating one of the reasons for listing is sufficient to make the listing lawful, the ECJ effectively opens the door to a practice of giving a combination of more specific and more general reasons, which damage the listed person’s reputation to different degrees, without ever having to put forward any evidence for most and potentially the gravest of these reasons.

## 6) Conclusion and Recommendations

EU sanctions targeted at specific individuals, be it sanctions against terrorist suspects or regime supporters, have replaced comprehensive state sanctions. At the same time, the combination of ever vaguer listing criteria and the fact that the ECJ accepts sets of indicia as sufficient to justify a listing also reduces the targeted nature of sanctions and allows them to target categories of people. What seems fairly certain is that for the moment sanctions are here to stay.

However, the EU sanctions policy continues raise fundamental rights concerns. Some of these concerns could be addressed by taking Declaration 25 on Articles 75 and 215 TFEU, as it was attached to the Lisbon Treaty, more seriously. This Declaration reads as follows:

The Conference recalls that the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure.’

This does not seem to leave room for a combination of a presumption of association of a regime in the broadest sense possible because someone is an economically active person under this regime, or even a family member of such an economically active person.

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<sup>114</sup> Ibid., 59.

The requirements of tailoring the sanctions criteria to the specific regime should be translated into a requirement that they are directly linked to the objectives of that regime.

Since targeted sanctions were introduced in 2002, the adoption procedures, including the statement of reasons and notification, have improved. Yet it is difficult for the EU to create a procedure that stands up in a Union of law, in which individuals are subjected to far-reaching rights restrictions, possibly without any personal wrongdoing, in order to serve political objectives. This was possible for comprehensive state sanctions, because measures against entire states belong to the realm of international law and international relations and are by definition political, even if they entail far-reaching fundamental rights implications for large parts of a population.

This tension must be addressed with greater care. The specific sanctions regime should state as precisely as possible the link between the CFSP objectives as set out in Article 21 TEU: the protection of peace, democracy and the respect for the rule of law, human rights and international law and the measures imposed on specific individuals or groups of people. The EU Guidelines should attempt to explain in more detail what could constitute a change in policy or behaviour in this context that should lead to delisting. One requirement should be that only those who are actually in the position to contribute to achieving the objectives – in terms of the quality and quantity of the alleged support – could justifiably made targets of sanctions. Furthermore, any change can only be evaluated against the backdrop of previous behaviour. This seems impossible if the person was listed on the basis of an inferred presumption of involvement.

The tension between the policy goals and the specific restriction of the rights of individualised persons may also be the reason why the EU Courts have constructed a level of judicial review which leads to fewer annulments and ultimately to less litigation being brought against EU sanctions. Indeed, the combination of the presumptions based on inferences that place the burden of proof effectively on those to whom the presumption applies, the broader and vaguer listing criteria, and the acceptance of a test of proportionality that weighs any individual rights infringement against the overpowering objective of international peace and security, have made sanctions litigation less successful. It has simply lowered the threshold of justification.

The consequence that sanctions have for the legal culture, as well as for trust and confidence in the legal system, must be considered. These costs go beyond the infringement

of human rights in any particular case. Sanctions should not set dangerous precedents of quasi-criminal charges located in the grey zone of criminality. The EU should for reasons of credibility commit to meeting the procedural standards of criminal law, even if the general position of the EU institutions and the Court remains that sanctions are preventive and not punitive. Yet, the case law of the Court that effectively lowers the burden of proof effectively gives the Council room to go in the opposite direction.

Additionally, detailed and repeated impact assessments should be made for each sanctions regime, considering the legal and political costs as well as possible. Public and private costs of sanctions should also be separately considered in these assessments. The latter are often disregarded and even sometimes the private bodies and individuals, such as financial institutions,<sup>115</sup> are unaware of their full extent.<sup>116</sup> In the globally interconnected world, financial institutions, for instance, not only have to conduct customer name checks against numerous parallel and complementary sanctions lists, they also have to monitor to whom customers transfer funds and from whom they receive funds.

Finally, measures like the new autonomous EU sanctions against ISIL (Da'esh)/Al Qaida, in which the EU actually designates individuals truly autonomously, should be based on Article 75 TFEU rather than Article 215 TFEU. This would effectively remove this type of sanctions from the realm of CFSP and bring them within the Area of Freedom, Security and Justice (AFSJ). Both under Articles 75 and 215(2) TFEU, sanctions are adopted by the Council acting by qualified majority following a Proposal of the Commission (Article 75 TFEU) or a Joint Proposal from the Commission and the High Representative (Article 215 TFEU). However, since Articles 215 and 75 TFEU set out very different procedures for the basic policy decision (CFSP decision or AFSJ framework, respectively), the choice of the legal basis is crucial not only for the division of competences between the EU and its Member States but also for the influence of the different EU institutions. The involvement of Parliament would increase democratic scrutiny. This is particularly relevant where the EU institutions take the substantive listing decision, rather than rubber stamping the decisions of competent national authorities, as it has been the case under the Al Qaida regime up to

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<sup>115</sup> For an impression of the complexity of combatting the financing of terrorism, see: World Bank, *Combating Money Laundering and the Financing of Terrorism – A Comprehensive Training Guide: Workbook 1. Effects on Economic Development and International Standards* (World Bank, 2009); House of Lords European Union Committee, "Money Laundering and the Financing of Terrorism", (2008-09) 1321 HL Paper.

<sup>116</sup> Wim Wensink, Michael van de Velde and Lianne Boer, *Estimated costs of EU counterterrorism measures* (European Parliament Directorate-General for internal policies, 2011)

now, the adoption of a legal framework pursuant to the rules and standards of the ordinary legislative procedure is necessary to avoid the impression of arbitrary exercise of executive power.



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