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RESEARCH ARTICLE

Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy

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Abstract

This Article deals with selected issues of judicial protection that arise in the context of the sanctions adopted by the EU against Russia and Belarus after the 2022 invasion of Ukraine. As most cases challenging the sanctions are pending, this Article draws lessons from the previous case law on EU restrictive measures. It explores what aspects of the sanctions escape judicial review, then profiles of external (or formal) legality of the sanctions, of internal (or substantive) legality, and concludes by assessing the overall role of the Court in EU foreign affairs. The discussion shows that the case law in this area of EU administrative law converges to a great extent with other areas of EU competence, but tensions remain in how the Court may impose substantial constraints to executive discretion in the field of Common Foreign and Security Policy.

Keywords: Sanctions; Russia; Ukraine; Court of Justice of the European Union; Common Foreign and Security Policy; restrictive measures; judicial review

I. Background

As part of the response to the 2022 Russian war against Ukraine, the EU adopted the most comprehensive sanctions in its history, targeting the Russian and Belarusian economies, as well as hundreds of natural or legal persons.[1] Already in 2014, the EU had imposed sanctions on Russia in response to the escalation of the conflict in Ukraine.[2]

The 2022 sanctions on which this Article focuses were first imposed at the end of February, after Putin signed a decree recognising the 'independence and sovereignty' of the Donetsk and Luhansk regions in Ukraine, and ordered the Russian armed forces into those areas.[3] From 23 February on, and even more following the invasion of Ukraine of 24 February, the EU has imposed

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[1]Other foreign policy action by the EU is surveyed in L Lonardo, *Russia's 2022 War Against Ukraine and the Foreign Policy Reaction of the EU: Context, Diplomacy, and Law* (Palgrave Macmillan, 2023).

[2]Council Decision 2014/145/CFSP of 17 March 2014 OJ 2014 L078 and Council Regulation (EU) 269/2014 of 17 March 2014 OJ 2014 L078, p 6; Council Decision 2014/512/CFSP of 31 July 2014 OJ 2014 L229, p 13 and Council Regulation (EU) 833/2014 of 31 July 2014 OJ 2014 L229, p 1. On those sanctions, see eg P J Cardwell and E Moret, 'The EU, Sanctions and Regional Leadership' (2023) 32(1) *European Security* 1; C Portela et al, 'Consensus Against All Odds: Explaining the Persistence of EU Sanctions on Russia' (2021) 43(6) *Journal of European Integration* 683-699; F Giumelli, 'The Redistributive Impact of Restrictive Measures on EU Members: Winners and Losers from Imposing Sanctions on Russia' (2017) 55(5) *Journal of Common Market Studies* 1062.

[3]See Council Decision (CFSP) 2022/264, Rec 6.

comprehensive sanctions. These have been adopted, in successive waves,[4] through acts amending the 2014 sanctions and are therefore contained in the consolidated version of those acts. In the context of the war, sanctions were also adopted against Belarus.[5]

The rationale of the 2022 sanctions is threefold: to damage Russia's ability to wage war by hitting its economy;[6] to protect the EU's security;[7] and to signal a strong condemnation of Russia's behaviour (the invasion of a sovereign country).[8] These aims, although largely overlapping and mutually reinforcing, are not always harmonious. They are meant to bring Russia's campaign in Ukraine to a halt, while preserving the interests of the EU, the Member States and their citizens, and at the same time minimising the negative consequences on the Russian population. Even though the genesis of the legal act is hardly relevant for the purposes of judicial protection,[9] it appears to be in this case the result of a compromise that merges disparate national security interests, private interests, and political pressures.[10] More analytically, the sanctions are variously aimed at the financial inflows to Russia,[11] its defence and security sector[12] (prohibiting the acquisition of military technology, dual-use goods, or material and services relating to that industry), and other important areas of the Russian economy (aviation, luxury, energy, etc). The EU also sanctioned persons and entities supporting, benefiting from, or providing a substantial source of revenue to the Russian Government.[13] The sanctions against individuals target politicians, activists (including pro-Russian Ukrainians), businessmen, judges, lawyers, military commanders, and other persons or entities with links to the people in the previous categories.[14] Sanctions also prohibit, among others, the provision of architectural and engineering services and IT and legal advisory services.[15] An element of contradiction between the aim of ending Russia's war and the preservation of other

[4]For the sake of legibility, these amending acts are not listed in a single footnotes. References to individual amending acts are made only when necessary. References to the sanctions are to the consolidated version as of 31 August 2023.

[5]The 2022 sanctions against Belarus were adopted as amendments to Common Position 2006/276 concerning restrictive measures against certain officials of Belarus and repealing Common Position 2004/661/CFSP [2006] OJ L 101/5 and to Regulation 765/2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus [2006] OJ L 134/1, with which restrictive measures had been adopted against some Belarusian officials.

[6]European Commission, 'Questions and Answers on the 11th Package of Restrictive Measures Against Russia' (23 June 2023).

[7]Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Rec 8.

[8]One could also speculate that, by sanctioning Russia, the EU wanted to signal to the People's Republic of China that it will not tolerate attempts at changing the status quo in the Taiwan Strait.

[9]It may provide insights to establish the will of the legislator, but the Courts ascertains the latter, a bit circularly, from objective factors (the text of the measures) and not by conducting a historical analysis of the factors that shaped it. Thus in *Rimsevics*, C-202/18 and C-238/18, ECLI:EU:C:2019:139, para 47, the Court resorted to the text of Article 130 of the Treaty on the Functioning of the European Union ('TFEU') as main evidence for the intention of the drafters of the Treaty.

[10]However, it would be a misconception to consider the opposition between public interests and fundamental rights, a key theme of this Article, as a public versus private one for the reasons explained in T Tridimas, 'Wreaking the Wrongs: Balancing Rights and the Public Interest the EU Way' (2023) 29(2) *Columbia Journal of European Law* 189

[11]Council Decision (CFSP) 2022/327, Rec 11; Council Decision (CFSP) 2022/346, Rec 5.

[12]Council Decision (CFSP) 2022/327, note 11 above, Rec 12.

[13]See Council Decision (CFSP) 2022/329 of 25 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine ST/6557/2022/INIT OJ L 50, Rec 11 (25 February 2022). See also S Poli and F Finelli, 'Context Specific and Structural Changes in EU Restrictive Measures Adopted in Reaction to Russia's Aggression on Ukraine' (2023) 3 *Eurojus* 19, p 23; Y Miadzvetskaya and C Challet, 'Are EU Restrictive Measures Really Targeted, Temporary and Preventive? The Case of Belarus' (2022) 6 *Europe and the World: A Law Review*, https://scienceopen.com/hosted-document?doi=10.14324/111.444.ewlj.2022.03.

[14]The Court encourages convergence in the judicial protection against individual sanctions and country sanctions, but when there are tests specific to one or the other regime this will be highlighted. See on the convergence, L Hinojosa-Martínez, 'Rule of Law and Effective Judicial Protection Versus Raison d'État in EU's Political Sanctions: The Relevance of Individual Conduct' in L Hinojosa-Martínez and C Pérez-Bernárdez (eds), *Enhancing the Rule of Law in the European Union's External Action* (Edward Elgar, 2023).

[15]Council Decision 2014/512/CFSP, Art 1k(2). Derogations to enable the right of defence are discussed in Section IV.B.

EU's interests appears in the complex mosaic of rules and derogations built around energy imports;[16] or the permission, by way of derogation, to import pharmaceutical, medical, agricultural, and food products from Russia-owned entities.[17] Some sanctions—such as the censorship of certain media outlets—are also aimed exclusively at protecting the EU's security and its public order,[18] and not at damaging the Russian economy.

The 2022 sanctions are the toughest in the history of EU foreign policy in terms of intensity and scope of the prohibitions and, inevitably, they are the object of burgeoning litigation, with currently nearly one hundred cases pending before EU courts.[19] In fact, it is possible to challenge the sanctions either by lodging an action before the Court of Justice of the European Union at the conditions laid down in Article 263 TFEU or, as recognised in the landmark *Rosneft* case,[20] indirectly, through a preliminary ruling procedure (Article 267 TFEU) originating from an action lodged in the courts of a Member State. A successful challenge to an EU act may result in the annulment—complete or partial—of the measure, but in the case of individual sanctions the annulment will only benefit the applicant.[21] An action for damages against the EU is also available to private parties (Article 340 TFEU).[22]

The litigation 'hits' the EU constitutional structure on a critical point: the EU's highly distinctive competence to conduct a Common Foreign and Security Policy ('CFSP').[23] This field is subject to 'specific rules and procedure' (Article 24 TEU), which concern, among others, specific institutional arrangements: executive decision making and a limited role for the Court. With this background, the role of the judiciary in CFSP is a particularly challenging one as the Court needs to ensure the application of general principles of EU law, among which the protection of fundamental rights, while preserving the specific constitutional structure of the competence.[24] This Article argues that the Court has largely succeeded in doing so in the case law on sanctions, by exercising a broad jurisdiction but a light review of proportionality. However, tensions remain in how to bind the executive to substantial constraints in addition to formal process standards.

[16]See eg Decision 2014/512/CFSP introducing complex exemptions to the import of oil for Bulgaria and Croatia, Article 4o (5)–(6).

[17]Council Decision 2014/512/CFSP, Art 1(aa)3(f).

[18]Council Decision (CFSP) 2022/351, note 7 above, Rec 8. The protection of the EU's public order, as opposed to the public order of the Member States, is a significant innovation in the justification. See S Poli, 'Prime riflessioni sulla sentenza del Tribunale "RT France" sulle misure restrittive contro le attività di disinformazione russe' (2022) IV *Quaderni AISDUE* 111, p 116; Poli and Finelli, note 13 above.

[19]Some of those not discussed in this Article are in C Challet, 'Les sanctions de l'Union européenne adoptées en réaction à la guerre en Ukraine: Défis et enjeux pour le contrôle juridictionnel des mesures restrictives' (2023) 1 *Revue des Affaires Européennes* 169.

[20]*Rosneft Oil Company*, C-72/15, EU:C:2017:236.

[21]If a challenge by a natural or legal person is successful, the Court annuls an act in so far as it concerns the applicant. This does not benefit other people included in the sanctions list. See T Tridimas, 'Economic Sanctions, Procedural Rights and Judicial Scrutiny' (2020) 22 *Cambridge Yearbook of European Legal Studies* 455, p 459.

[22]*Bank Refah Kargaran*, C-134/19 P, ECLI:EU:C:2020:793. For reasons of space, this Article does not deal with remedies.

[23]Art 2(4) TFEU; Title V Treaty on European Union ('TEU').

[24]See among many P J Cardwell, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions' (2015) 17 *Cambridge Yearbook of European Legal Studies* 287; C Hillion, 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy' (2016) 1 *European Papers: A Journal on Law and Integration* 5566; P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 *International and Comparative Law Quarterly* 1; J Heliskoski, 'Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy' (2018) *Europe and the World: A Law Review*, https://scienceopen.com/document?vid=134d81a1-1ada-4f15-b8a7-3f6a9e856a23; P Van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice' (2021) 58 *Common Market Law Review* 1731; S Poli, 'The Right to Effective Judicial Protection with Respect to Acts Imposing Restrictive Measures and Its Transformative Force for the Common Foreign and Security Policy' (2022) 59 *Common Market Law Review* 1045.

Against this backdrop of constitutional distinctiveness of CFSP and unprecedented litigation on sanctions before EU courts, judicial activity acquires an added dimension of complexity. This Article explores selected issues of judicial protection in the area of sanctions.[25] These issues are grouped into four categories that mirror the reasoning of the Court when assessing the valifity of sanctions: elements escaping judicial review; external (or formal) legality of the measures; internal (or substantive) legality; and then the Article concludes with an assessment of the overall role of the Court in the review of the EU's diplomatic choices. Part II considers what escapes judicial review, since the jurisdiction of the Court of Justice of the European Union ('CJEU') is limited to reviewing the legality of 'restrictive measures against natural or legal persons' (Article 275 TFEU), but, as the case law clarifies, the legal acts containing them may include provisions that are not restrictive measures, so the precise contours of the Court's jurisdiction are still blurred. Part III is dedicated to procedural issues, such as locus standi to challenge the measure, and formal legality of the acts, meaning whether they were adopted in compliance with the procedures mandated by EU law, including compliance with the principle of conferral. Part IV is dedicated to the Court's role in checking the conformity of the restrictive measures with substantive rules of EU law, such as general principles, of which the protection of human rights is an integral part. The focus will be on the principle of proportionality and the right to effective judicial protection. Part V reflects on the role of the Court in EU foreign affairs and includes a comparison with the sanctions adopted, in the context of the war, by the US.

II. The Political Element of the Sanctions: What Escapes Judicial Review?

The overall strategy of the Council—targeting the oil sector, the luxury sector, the propaganda machine—is not subject to judicial review.[26] This is because the jurisdiction of the Court is limited, in principle but not in practice,[27] to scrutinise the CFSP acts only in so far as they are 'restrictive measures against natural or legal persons' (Article 275, second paragraph TFEU).[28] To respect that limitation, in order to identify what constitutes a 'restrictive measure against natural or legal persons', the Court has drawn a distinction, among the provisions contained in sanctions, between '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 entities' and 'individual decisions affecting those entities'.[29] Only the second category constitutes a restrictive measure against a natural or legal person for the purposes of Article 275, second paragraph. A more technical discussion of this as applied to the 2022 sanctions is in Section III.A.1.

Why are measures of general application not subject to judicial review? To answer this question, the Court could explicitly introduce a 'political question doctrine';[30] but Treaties and the case law of

[25]This Article does not discuss other EU law containing what a diplomat could consider sanctions, but which are not restrictive measures for the purposes of EU law (ie visa ban, single Resolution Board decisions). A restrictive measure is identified by the necessary (but not sufficient) condition of being adopted pursuant to a CFSP Decision implemented through a TFEU Regulation.

[26]It acquires legal relevance at proportionality stage, when the interference of the measure with fundamental rights is balanced against the objective pursued. See the discussion in Sections IV.A and IV.B.

[27]See for an overview of the evolution of the Court's jurisdiction in this area, Heliskoski, note 24 above; Koutrakos, note 24 above; G Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 *European Constitutional Law Review* 673; R A Wessel, '*Lex Imperfecta*: Law and Integration in European Foreign and Security Policy' (2016) 2016 1 *European Papers: A Journal on Law and Integration* 439.

[28]As well as to monitor compliance with Article 40 TEU, on which see Section III.B.1..

[29]*Manufacturing Support & Procurement Kala Naft v Council*, T-509/10, EU:T:2012:201, para 37; discussion in Heliskoski, note 24 above, p 12.

[30]This entails that a court will only decide legal, not political, questions. For the application to EU law see L Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' (2017) 22 *European Foreign Affairs Review* 571; G Butler, 'In Search of the Political Question Doctrine in EU Law' (2018) 45 *Legal Issues of Economic Integration* 329;

the Court rather show a different demarcation criterion between what is and what is not a restrictive measure against natural or legal person: the effect on the legal sphere of the natural or legal persons concerned. The case law of the Court may be read as meaning that CFSP is a competence whose acts cannot on their own, that is, absent a TFEU Regulation, have legal effects on the rights of individuals but can only create obligations for EU institutions and its Member States. This is also a criterion for the delimitation of the boundaries of CFSP. Thus, a provision whose subject matter relates to the EU's external action cannot be adopted exclusively (ie without implementing Regulation) on a CFSP substantial legal bases *if it has effects on a right of natural or legal persons*.[31] CFSP, that is, can neither create nor remove rights for individuals: the only way for it to do so is if there is an implementing act, adopted on a TFEU legal basis: the classic example is Article 215 TFEU for restrictive measures,[32] on which the Court claimed full jurisdiction in *Rosneft*.[33] A similar interpretation was proposed by AG Wahl in *H*, where he wrote as *obiter* that 'the Union is not meant, in the field of the CFSP, to adopt acts that lay down general abstract rules creating rights and obligations for individuals'.[34] AG Wahl derived that view from the wording of Article 24 TEU, which forbids the adoption of legislative acts in CFSP, but that reasoning is not convincing: legislative acts are acts adopted through the ordinary legislative procedure (Article 289(3) TFEU). The procedure for their adoption is not related to their effects. The rule that CFSP cannot affect rights of individuals can be derived, instead, from a systematic and teleological interpretation of the Treaties. Given the constitutional preference for executive decision making in CFSP, coupled with the limited role of the European Parliament and of the CJEU, there is a strong case for limiting the effect that CFSP measure may have on individuals. In that regard, it must be borne in mind that participation by the Parliament in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.[35] It follows that the European Parliament must be in a condition to exercise the powers conferred to it by the Treaties.[36] On the other hand, the Court held that if the sanctions contain sufficient fundamental rights guarantees for individuals, then this does not affect the democratic character of the EU.[37] In the context of CFSP, it is not the procedure for the adoption of an act that determines its democratic credential, but rather its content: the Council can determine the level of protection of EU

J Odermatt, 'Patterns of Avoidance: Political Questions before International Courts' (2018) 14 I*nternational Journal of Law in Context* 221. And again Part V.

[31]Opinion 2/13, *Accession to ECHR*, ECLI:EU:C:2014:2454, para 140, where the Council argued that: 'Should the Court of Justice decide that the limits set out in Article 40 TEU have not in fact been observed and the act at issue ought not to have been adopted on the basis of the chapter of the EU Treaty relating to the CFSP, it would then have jurisdiction to rule both on the interpretation and the validity of the act in question, as it would not be an act falling within the CFSP. The fact that EU acts in the area of the CFSP which do not affect persons directly cannot be annulled by a judicial body within the EU's system of judicial protection would not mean that that system violates the ECHR'.

[32]On whose effect, see AG Opinion, *Venezuela v Council*, C-872/19 P, ECLI:EU:C:2021:37, para 93.

[33]*Rosneft*, note 20 above, para 106 ('Jurisdiction of the Court is in no way restricted with respect to a regulation, adopted on the basis of Article 215 TFEU, which gives effect to the positions adopted by the Union in the context of the CFSP. Such regulations constitute European Union acts, adopted on the basis of the FEU Treaty, and the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the legality of those acts'.).

[34]AG Opinion, C-455/14 H, ECLI:EU:C:2016:212, para 37. See also the view of the Spanish Supreme Court in *Gómez*, 20084/2020, ECLI: ES:TS:2020:10453A: 'Las obligaciones derivadas de las decisiones PESC tienen una naturaleza esencialmente política' (Sec 3.2.3), with critical comment by Araceli Mangas Martín, 'Sobre la vinculatoriead de la PESC y el espacio aéreo como territorio de un Estado (comentario al Auto del TS español de 26 de noviembre de 2020, sala de lo penal)' 53 *Revista General de Derecho Europeo*, https://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=423307.

[35]*Parliament v Council (Tanzania)*, C-263/14, ECLI:EU:C:2016:435, para 70. On the role of the European Parliament in CFSP, see V Szep, 'Transnational Parliamentary Activities in EU Foreign Policy: The Role of Parliamentarians in the Establishment of the EU's Global Human Rights Sanctions Regime' (2022) 60(6) *Journal of Common Market Studies* 1741.

[36]Ibid, para 71.

[37]*Parliament v Council (Smart Sanctions)*, C-130/10, ECLI:EU:C:2012:472, para 81.

interests, balancing it with fundamental rights, provided that the latter find sufficient safeguards —and the role of the Court is precisely to monitor the existence of sufficient safeguards, albeit it respects the distinctive character of CFSP in the EU constitutional structure, by leaving a wide margin of discretion to the Council for carrying out that balancing.[38]

The case for establishing the Court's jurisdiction to provisions, contained in CFSP acts, that affect the rights of individuals, rests on the central tenet of the EU as a constitutional system subject to the rule of law,[39] in which no institution can adopt acts, affecting individual rights, which are subtracted from judicial review. The argument is reinforced by an exception that confirms the rule, the provision of Article 39 TEU, which is the only one in the Title on CFSP empowering the Council to lay down rules relating to the rights of individuals.[40] Regardless of the area of EU competence, the Court's honours the duty of Article 47 Charter to ensure effective judicial protection for individual rights, by adopting a broad, anti-formalistic view of what acts carry legal effects, considering several factors among which the act's content and substance, as well as to the factual and legal context of which it forms part (this test is not merely whether an act has legal effects, but a somewhat higher threshold, namely whether it affects individual rights).

Coming to another element that could escape judicial review, are the 'association criteria' (based on which an individual is listed by association to someone else) a matter of legal or of political choice? The Court carries out a formal review of them, related to 'external legality' (is the statement of reason understandable?) and it only lightly questions the substantive choice of the Council in the abstract (is it a cogent criterion?). The reasons for listing an individual are not outside the scope of judicial review. The decision of the General Court in *Prigozhina* confirms as much.[41] This is discussed in Section III.B.3. Suffice to state at this stage that while the Council enjoys a very wide, but not limitless political discretion to decide the abstract reasons for listing people (the Council could list people because they are politicians who voted in favour of the annexation of occupied zones, or, hypothetically, because they are members of Putin's favourite football team[42]), the Court still monitors not only the cogency in the abstract of those reasons,[43] but also whether those reasons are backed *in concreto* by sufficient evidence (did the listed politician actually vote in favour of the annexation? Did the footballer actually play for Putin's favourite team?). But while the listing criterion is essentially political, and the Court has the power to (and should) intervene only minimally, the concrete evidence is not, and the Court must prevent arbitrary uses of power.

Another reason to exclude the Court's jurisdiction from measures of general application is that sanctioning Russia (or Belarus, or, in fact, any other third country) is not an automatic consequence of that country behaviour, as it is not subject to triggering conditions as a matter of EU law: the choice to sanction a third country is, instead, a political choice left to the discretion of the Council. Such choice by the Council, in other words, does not rest on objective criteria amenable to judicial review. One could conceive a system in which the imposition of sanctions must be triggered automatically by some factors, such as a violation of international law,[44] but this is not how

[38]See eg *Rosneft*, note 20 above, para 113 and case law there cited. This is discussed at greater length in Section IV.A.

[39]The classic authorities are *Les Verts*, C-294/83, ECLI:EU:C:1986:166, and more recently *Rosneft*, note 20 above.

[40]Providing that 'the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter [on CFSP], and the rules relating to the free movement of such data'.

[41]*Prigozhina v Council*, T-212/22, ECLI:EU:T:2023:104.

[42]This is an extreme example if it was the only one justifying inclusion, and I discuss limits to the Council's discretion below. In *Rotenberg*, T-720/14, ECLI:EU:T:2016:689, the Court acknowledged that the Council could list someone for being Putin's 'former judo sparring partner', but this was not the sole criterion justifying the inclusion.

[43]*Qaddafi*, T-322/19, ECLI:EU:T:2021:206, para 101, and case law there cited.

[44]The drafters of the UN Charter also opted for the UN Security Council not to be legally bound to declare a threat or a breach to international peace and security. See E Luck, 'Council for All Seasons: The Creation of the Security Council and Its Relevance Today' in V Lowe et al (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* (OUP, 2008).

EU sanctions are fashioned because Article 28 and 29 TEU (and other CFSP legal bases) identify no definite triggering conditions.[45] This discretion left to the political institution by the Treaties is a reflection of the specific rules and procedures of CFSP: primary law, in this field, does not specify how objectives are to be pursued with the same level of detail as in the case of some internal competences. Instead, the terms of the balancing of public interests and fundamental rights to be incorporated in an act of secondary law are left to the Council in such an open way that, even if the Court were to intervene, its role could only be minimal.[46] The lack of definite triggering conditions also entails that there is no requirement that the UN Security Council has endorsed the EU sanctions, nor that the UN Security Council has adopted sanctions of its own for the Council to validly adopt restrictive measures.[47] From an efficiency and effectiveness perspective, this is commendable as it enables the EU to use sanctions as political leverage. The EU fundamental Treaties, through the rules on CFSP and on the conclusions of international agreements, put the EU and Member States' diplomats—not the judiciary—charge of bargaining with Russia, a bargaining that is more effective if it contemplates the opportunity to lift sanctions in exchange of concessions by Russia, and to reintroduce them in case of non-compliance by Russia with those concessions (this is the so-called 'snapback'). The Joint Comprehensive Plan of Action of 2015 (the so-called Iran 'nuclear deal') negotiated by the permanent members of the UN Security Council and Germany included the opportunity to re-introduce sanctions in case of non-compliance.[48] The opportunity of a 'snapback' of sanctions can be codified in a deal with Russia, as it was in the Iran nuclear deal, where it was foreseen that 'an "EU snapback" will take the form of a decision by the Council of the European Union, based on a recommendation by the High Representative of the European Union for Foreign Affairs and Security Policy, France, Germany and the United Kingdom. Such a decision will reintroduce all the EU sanctions taken in connection with the Iranian nuclear programme that have been suspended and/or terminated […], and in accordance with regular EU procedures for the adoption of restrictive measures'.[49] To preserve legal certainty, the snapback ought not have retroactive effect, meaning that contracts concluded between the lifting of sanction and the snapback would not be affected. In this regard, it is anyways debatable whether these are merely 'restrictive measures', since they seem to rather herald a policy shift. The EU loses leverage if the sanctions, rather than being temporary, merely accompany a choice not to rely on Russian energy ever again.[50] This may entail that the sanctions present issues of legal basis, discussed in Section III.B.1.

Although, as highlighted, the EU can lawfully adopt sanctions even when there is no violation of international law, the EU has nonetheless used strong language to characterise the actions of Russia as a gross violation 'of international law and the principles of the United Nations Charter and undermining European and global security and stability',[51] and, the so-called disinformation campaigns targeting EU citizens are defined as 'a significant and direct threat to the Union's public order and

[45]Article 28(1) TEU ('Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions'.). On Article 29 TEU, see discussion below in Section III.B.1: Legal basis.

[46]For this reason, the Court recognises an ample margin of discretion to the choices of the Council in this area: *RT France*, T-125/22, para 52 in deciding on the appropriateness of relying on Article 29 TEU for the imposition of sanctions, the Court held that 'the Council has a broad discretion in determining the persons and entities that are to be subject to the restrictive measures that the European Union adopts in the field of the common foreign and security policy'.

[47]*Rosneft*, T-715/14, para 159.

[48]Which the Trump administration in fact did.

[49]See German Foreign Office, 'Information Note on EU Sanctions to Be Lifted under the Joint Comprehensive Plan of Action' (2016), p 8, https://www.auswaertiges-amt.de/blob/202508/42e1387ec0e39fc310ddfb5567eae821/160116-implementationday-eu-note-businessguidelines-data.pdf.

[50]The Iran nuclear deal foresaw the lifting of *all* sanctions in exchange of Iran's assurance of the exclusively peaceful nature of its nuclear programme. The deal included the opportunity to re-introduce sanctions in case of non-compliance, which the US in fact did.

[51]Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *OJ L57, Rec 4 (28 Feb 2022)*.

security'.[52] This suggests that the Council does wants to ground the imposition of sanctions in a violation of a rule of international law, that is, ultimately, to a violation of an EU value:[53] since the proportionality of a measure is also assessed by reference to the importance of its objective, it stands to reason that the EU highlights the magnitude of the Russian offence. It has done so both unilaterally (i.e. through the language used in the sanctions), and multilaterally (ie by supporting international courts in investigating alleged violations of international law committed in Ukraine[54]).[55]

The end of the conflict does not entail the automatic end of the sanctions. In the case of censorship against Russia-sponsored media outlets, the Recital of the act provides that 'these measures should be maintained until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States'.[56] These may relate to the proportionality of the measure (that must not go beyond what is necessary to achieve its aim[57]), but as there is no triggering condition, so the there is no condition which, if fulfilled, imposes a duty on the EU to lift the sanctions.

It is submitted that in any case the Council cannot disregard rules derived from international law or general principles of EU law[58] regardless of whether fundamental rights of individuals are affected. In the *Smart sanctions* case, the Court explicitly stated as much: 'it is to be noted that the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union',[59] thus, it made no distinction between the Union's institution acting under CFSP or another competence. This entails that there are cases in which a substantial review ought to be carried out because the decision should not be left to unfettered political discretion. For example, a sanction cannot be imposed in violation of rules of international law binding on the EU. Thus, the EU includes exemptions for the provisions of legal aid, thus giving effect, among others, to Article 6 ECHR. The confiscation of Russian assets subject to sanctions would also need to be assessed in the light of its compliance with rules of international law. Considering instead a purely hypothetical scenario, it ought to be excluded that the Council could impose sanctions—which would be in violation of rules codified in the Geneva Conventions of 1949[60]—against an organisation that provides humanitarian assistance to Russian troops. This is admittedly difficult to square with the letter of Article 275 TFEU, but it is perfectly in line with the case law of the Court. The provision must be read in its context, where it is an exception to the rule that the Court has jurisdiction in areas covered by the Treaties, and must therefore be interpreted narrowly.[61]

[52]Council Decision (CFSP) 2022/351, note 7 above, Rec 8.

[53]See Art 3(5) TEU (linking international law with EU values).

[54]F Hoffmeister, 'The Order of the International Court of Justice of 16 March 2022 and the European Union's Foreign Policy Reaction' (*EU Law Live*, 30 March 2022), https://eulawlive.com/op-ed-the-order-of-the-international-court-of-justice-of-16-march-2022-and-the-european-unions-foreign-policy-reaction-by-frank-hoffmeister/.

[55]In *RT France*, note 46 above, paras 160–67, the Court found that to safeguard the Union's values, fundamental interests, security, and integrity is an objective of public interest under Article 21(2)(a) TEU, and that 'putting an end to the state of war and the violations of international humanitarian law, to which war is liable to lead, also meets an objective of fundamental general interest for the international community (see, to that effect, judgment of 30 July 1996, *Bosphorus*, C-84/95, EU:C:1996:312, paragraph 26)'. The General Court relied on the resolution of 2 March 2022, entitled 'Aggression against Ukraine' (A/ES-11/L.1) of the UN General Assembly to confirm the existence of a violation of international law.

[56]Council Decision (CFSP) 2022/351, note 7 above, Rec 10, which the General Court interpreted as cumulative conditions in *RT France*, note 46 above, para 155

[57]The fact that these measures are reversible is also a reason invoked by the General Court to justify not granting interim measures for applicants. See eg *Ismailova v Council* T-234/22, Order, para 48; *RT France*, note 46 above, Order.

[58]Hillion, note 24 above, p 57 ('Neither Art. 24, para. 1, TEU nor Art. 40, para. 2, TEU shields the CFSP from the application of principles governing the EU external action in particular, and of those underpinning the EU legal order in general'.).

[59]*Parliament v Council (Smart Sanctions)*, note 37 above, para 83.

[60]All EU Member States are Parties to the Geneva Conventions and their Additional Protocols and thus under the obligation to abide by their rules.

[61]*European Parliament v Council (Mauritius)*, C-658/11, ECLI:EU:C:2014:2025, para 70.

III. Jurisdictional Requirements and External (or Formal) Legality

A. Jurisdictional and Procedural Requirements

1. Locus standi

A natural or legal person has *locus standi* to annul regulatory acts that are of direct concern to it, or provisions of direct and individual concern to it, or measures addressed to it (Article 263 TFEU fourth paragraph).[62] Legal persons include third countries, as the Court established in *Venezuela*.[63] This finding in the *Venezuela* judgment enables Russia, Belarus, and even—hypothetically—Ukraine to challenge the restrictive measures. The challenge would not be admissible against all the provisions in the sanctions, but only against those fulfilling the conditions of Article 263 fourth paragraph TFEU.

As mentioned, that paragraph distinguishes three cases. First, regulatory acts of direct concern to a natural or legal person. The Court has established that a regulatory act refers to acts of general application and does not include legislative acts.[64] Restrictive measures are non-legislative acts: a CFSP Decision cannot be a legislative act, as Article 24 TEU precludes it. A TFEU Regulation based on Article 215 TFEU, which is adopted under the non-legislative procedure laid down in that provision, cannot be regarded as a legislative act either.[65] It follows that if restrictive measures are of general application, meaning that they have a 'general scope' and affect the applicants by reason of their objective status,[66] then they are regulatory acts. Hence, provided that other procedural requirements were met, Russia could challenge measures prohibiting sales, supplies, transfers etc 'to any natural or legal person, entity or body in Russia'.[67] A regulatory act is of direct concern if it does not entail implementing measure.[68] This presumably entails that a CFSP Decision cannot be of direct concern, but only a TFEU Regulation can. It would otherwise be difficult to reconcile the contradictory findings in *Rosneft* (where the measure of general application in a CFSP Decision was deemed to be outside the Court's jurisdiction[69]) and in *Venezuela* (where a similarly worded measure in a TFEU Regulation was considered a regulatory act of direct concern[70]).[71]

Second, acts of direct and individual concern, and third, measures addressed to natural or legal persons. These can be considered together. Although, pre-Lisbon, in *Kadi* the Court appeared to distinguish between the *addressee* of a sanction and someone *directly and individually concerned* by the sanctions,[72] it is clear that a person who is listed in an Annex has standing to challenge the measure is so far as it applies to them (it is not necessary to establish whether they can do so because they are addressees of the measure, or whether they can because they are directly and individually concerned by it). Many among these individuals have already lodged actions for annulment before the General Court. One could expect some reluctance from EU legal persons to

[62]In theory, each Member State also has standing to challenge the sanctions, but since these are adopted by unanimity it is a purely academic discussion. The same rules on standing apply to EU institutions. To the best of my knowledge, this challenge by an EU institution happened only in one instance, in *Parliament v Council (Smart Sanctions)*, note 37 above.

[63]*Venezuela v Council*, note 32 above.

[64]*Inuit*, C-583/11 P, EU:C:2013:625, paras 60–61. In *Montessori*, C-622/16 P to C-624/16 P, para 28, the Court stated that regulatory acts are 'all non-legislative acts of general application', whereas the General Court in *Silver*, para 78, adopted a narrower view.

[65]*Venezuela v Council*, note 32 above, para 92.

[66]Ibid.

[67]For example, this is how the prohibition of selling technology and material related to gas and oil extraction is formulated, in Article 3(1) of Regulation (EU) No 833/2014.

[68]*Venezuela v Council*, note 32 above, para 92.

[69]*Rosneft*, note 20 above, para 99.

[70]*Venezuela v Council*, note 32 above, para 91

[71]L Lonardo and E Ruiz Cairó, 'The European Court of Justice Allows Third Countries to Challenge EU Restrictive Measures: Case C-872/19 P, *Venezuela v Council*' (2022) 18 *European Constitutional Law Review* 114, p 128.

[72]*Kadi*, C-402/05 P and C-415/05, ECLI:EU:C:2008:461, paras 241–42

challenge sanctions, in principle: yet, this has already happened (for example in *RT France* or in cases involving lawyers' associations[73]).

2. Time limitations

Most of the 2022 sanctions are adopted via amendments to the 'basic acts', namely to the Decisions and implementing Regulations which constituted the 2014 sanctions. Formal changes (such as a change in the number of a provision) in a challenged act that occur after an application has been lodged can be dealt with by merely amending the *petitum*, in the interests of procedural economy and the proper administration of justice.[74] But what about changes of substance? This raises the question of whether a new right of action arises every time the act is amended. The case law clarifies that w here a provision in an act is amended, a fresh right of action arises, not only against that provision alone, but also against all the provisions which, even if not amended, form a whole with it'.[75]

The test is therefore to ascertain what provisions 'form a whole with' a new provision. A restrictive view is that only when the new provision (Article B) interacts with the previous one (Article A) *by way of explicit renvoi* then rises a fresh right of action with regard to Article A. This entails that the time limitation of (in principle) 2 months to challenge Article A starts anew upon publication of Article B.[76]

The permissive view is that an old provision forms a whole with a new provision any time the rationale or scope of the old provision is affected, even in the absence of an explicit renvoi. This is too broad because one could then challenge the totality of the original 2014 sanctions every time they are amended, even several years later, but this result cannot be accepted: the restrictive view is to be preferred if there is to be no circumvention of the time limitations set by the statute of the Court.

B. External (or Formal) Legality of the Sanctions

1. Legal basis

The principle of conferral guarantees that 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.[77] As Lenaerts and Gutierrez Fons explain, this is a safeguard that vertical federalism provides to individual liberty, as it ensures that that 'the different governments will control each other'.[78] The principle of institutional balance, in accordance to which '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'[79] is the horizontal correlative, protecting individual liberty horizontally ('each [government] will be controlled by itself').[80] This is why the Court monitors that EU acts are adopted pursuant to the correct 'legal basis'—in other words, the Court ensures both that the EU had the power to adopt a measure (principle of conferral) and that it did so in accordance with the procedural requirements established in the Treaties (principle of institutional balance).

[73] *Ordre des avocats à la cour de Paris*, T-798/22; *Ordre néerlandais des avocats du barreau de Bruxelles*, T-797/22.

[74] Koenraad Lenaerts et al, *EU Procedural Law*, 1st ed (Oxford University, Press 2014), p 809. See eg *Yusuf and Al Barakaat International Foundation v Council and Commission*, T-306/01 [2005] ECR II-3533, paras 72–76,

[75] *NRW Bank v Single Resolution Board*, C-662/19 P, ECLI:EU:C:2021:846, para 47.

[76] For the calculation of time limitations, see Lenaerts et al, note 74 above, pp 748 ff.

[77] Art 5(2) TEU.

[78] J Madison, 'The Federalist No 51' in A Hamilton, J Madison, and J Jay, *The Federalist Papers* (Oxford University Press, 2008), p 256, quoted in K Lenaerts and J A Gutiérrez-Fons, 'A Constitutional Perspective' in R Schütze and T Tridimas, *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press, 2018), https://oxford.universitypressscholarship.com/view/10.1093/oso/9780199533770.001.0001/isbn-9780199533770-book-part-5.

[79] Art 13(2) TEU.

[80] Madison, note 78 above.

The need for this scrutiny is 'reinforced' in the area of CFSP, where Article 40 TEU (with Article 275 TFEU) confers jurisdiction to the Court to monitor the mutual non-affectation of CFSP competences and other EU competences.

So far, the Court has never found a breach of Article 40 TEU. It has taken a broad view of what can be adopted on the basis of Article 28 and 29 TEU: asset freezes, travel bans, import bans, etc.[81] In *Rosneft*, it found that the challenged provisions of the 2014 sanctions did not breach Article 40 TEU despite being very detailed. The Court reasoned that the fact that the CFSP Union's position was very detailed did not mean, *eo ipso*, that it encroached on the EU's regulatory implementing procedure (Article 215 TFEU), especially if there was a high degree of technicality involved.[82] The correctness of the legal basis of a Union's act, in other words, does not depend on how detailed the act is. As per settled case law, instead, the legal basis is determined by objective criteria that are amenable to judicial review, which include the aim and content of the measure.[83] However, the 'level of detail' of a measure is, arguably, an aspect of its 'content'. The Court did not explicitly draw any distinction between these two concepts, but the case law seems settled on the fact that a CFSP Decision which contains all the details of the restrictive measure (and which is therefore identical to a TFEU Regulation) is not of its own a reason to invalidate that Decision.

The actions lodged against the 2022 sanctions contain many challenges relating to the appropriateness of the legal basis,[84] and it cannot be excluded that some sanctions may 'encroach upon the Union's legislative competences',[85] meaning that they may breach Article 40 TEU. The examples of sanctions adopted to fight disinformation, and of those *de facto* pursuing energy policy, will be briefly discussed.

In *RT France*,[86] the General Court endorsed the Council's choice to rely on Article 29 TEU to impose a ban on broadcasting for a number of Russian-sponsored media outlets. The notion of 'the Union's position' in that Article can be interpreted broadly to include, among restrictive measures, also censorship. This is in line with the previous case law, in which the Court confirmed that travel bans (in addition to asset freezes or other economic measures) can validly constitute restrictive measures.[87] This broad reading may be difficult to reconcile with the requirement, in Article 215 TFEU, that restrictive measures consists in the interruption or reduction of 'economic and financial relations' with a natural or legal person. Censorship and travel bans are neither necessary nor sufficient to interrupt 'economic and financial relations' (this practice of the Council is challenged for example in the currently pending *Timchenko* case, in which the applicant argues that a CFSP act cannot have effect of restricting free movement, and that an internal market legal basis is necessary instead[88]). In *RT France*, the General Court could have argued in greater detail for why foreign policy competences are more suitable than internal market competences (and the ordinary legislative procedure) to address the challenge of disinformation. Alternative legal bases like Article 53 TFEU[89]

[81]See R Wessel and V Szep, 'Balancing Restrictive Measures and Media Freedom: *RT France v Council*' (2023) 60 *Common Market Law Review* 1384.

[82]*Rosneft*, note 20 above, para 90.

[83]See, among many, *Parliament v Council (Mauritius)*, note 61 above, para 43.

[84]See among others, *RT France*, note 46 above, discussed below; *Timchenko*, T-252/22; *BSW*, T-258/22.

[85]This is how the challenge was formulated in *Timchenko*, note 84 above.

[86]*RT France*, note 46 above. RT France lodged an appeal (*RT France v Council*, C-620/22 P) against that decision, as well three other cases against the Council's measure (T-169/23; T-75/23; T-605/22), but have later decided not to continue the actions and all cases have been removed from the Court's registry.

[87]Wessel and Szep, note 81 above.

[88]*Timchenko*, note 84 above.

[89]For example, Article 6(1)(a) Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (adopted in Article 53 TFEU) states that Member States (not the Council) are responsible to ensure that 'audiovisual media services provided by media service providers under their jurisdiction do not contain any […] incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the

or Article 114 TFEU might have deserved closer scrutiny. The choice to rely on a CFSP legal basis also affects the role of the European Parliament, because it severely limits its influence in the decision-making process.[90]

In the case of energy, the sanctions against Russia pursue the EU policy to diversify Europe's sources of energy, to ensure energy security through solidarity and cooperation between EU countries and to improve energy efficiency and reduce dependence on energy imports. In particular, the combination of rules and exceptions related to energy products in Regulation 833/2014[91] pursue an energy policy in which the Council tried to balance the Union's security of supply, energy efficiency, and the functioning of an internal energy market. The pursuit of energy policy through sanctions is innovative, indeed almost experimental. There are other legal bases in the Treaties that, as the discussion below shows, appear to be more suitable. As the Court clarified in a case concerning precisely energy, the choice of legal basis does not depend 'on the legal basis used for the adoption of other European Union measures which might, in certain cases, display similar characteristics'.[92] It must be based on other objective factors, including the aim and content of that measure'.[93] Those factors will determine the outcome of what the Court calls 'centre of gravity test' for the choice of the correct legal basis. It is true that, with regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable,[94] such a measure will have to be founded, exceptionally, on the various corresponding legal bases, but this does not hold in cases where different voting rules for the adoption of acts are involved (such as when CFSP is involved).[95]

An alternative, and arguably more appropriate legal basis is Article 194(2) TFEU. Article 194 TFEU provides in paragraph 1, that EU policy on energy is to aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy market, ensure security of energy supply in the EU, promote energy efficiency and energy saving and the development of new and renewable forms of energy and promote the interconnection of energy networks. Under the first subparagraph of Article 194(2) TFEU '[w]ithout prejudice to the application of other provisions of the Treaties', the Parliament and the Council are to establish the measures necessary to achieve those objectives by acting in accordance with the ordinary legislative procedure provided for in Article 294 TFEU, in the context of which the Parliament participates fully in the procedure. The 'other provisions of the Treaty' do not refer to CFSP: as the Court has held, they refer to more specific provisions related to energy, such as, among others, Articles 122 TFEU and 170 TFEU, concerning severe difficulties arising in the supply of energy products and trans-European networks respectively.[96]

The aim and objectives of Regulation 833/2014 mostly relate to the maintenance of international security for the following reasons: in terms of contents, most of the provisions relate to the interruption of economic relations with Russia, so that if a quantitative criterion were to be

Charter'. See further elaboration in L Lonardo, 'Censorship in the EU as a Result of the War in Ukraine. RT France v Council of the European Union' (2023) 48(6) *European Law Review* 707.

[90] See eg Article 36 TEU.

[91] Article 3m(1) contains the main rule ('It shall be prohibited to purchase, import or transfer, directly or indirectly, crude oil or petroleum products, as listed in Annex XXV, if they originate in Russia or are exported from Russia'.). Exceptions, aimed at ensuring the functioning of the internal energy market, are contained in Articles 3m(6) (Croatia may, under certain conditions, continue to buy Russian fossil fuel until the end of 2022); Article 5aa(3)(a) (it is permitted to contract with Russian-owned entities for 'transactions which are strictly necessary for' the import of certain energy products; Article 5k (2)(e) (Member States may award, or continue the execution of, public procurement contracts intended for activities related to energy), etc.

[92] *Parliament v Council (Energy Infrastructures)*, C-490/10, ECLI:EU:C:2012:525, para 44.

[93] Ibid.

[94] *Parliament v Council*, C-155/07, (EIB) ECLI:EU:C:2008:605, para 36.

[95] Ibid.

[96] *Parliament v Council (Energy Infrastructures)*, note 92 above, para 67.

applied,[97] the content of the measures do gravitate toward CFSP rather than energy policy. It would need to be established that the pursuit of objectives related to energy is merely 'incidental' to these sanctions. In the case of a Regulation providing for the implementation of a common framework for the notification to the Commission of data and information on investment projects in energy sectors, the Court held that the measure related to energy policy and not to the information gathering powers of the Commission recognised by Article 337 TFEU. The decisive factor, in that case, was that 'the collection of information introduced by the contested regulation can only be justified by an objective consistent with achieving some of the specific tasks entrusted to the European Union by Article 194(1) TFEU, concerning the energy policy'.[98] In the case of Regulation 833/2014, the same conclusion cannot be reached. The measures can be justified by objectives other than energy policy, namely the maintenance of international security.

Yet, this does not mean that energy policy is a merely incidental objective of the sanctions. In fact, even though the provisions relating to energy do not regulate the matter in great detail, they clearly pursue the objectives of Article 194(1)—security of supply and energy efficiency—at least as much as those relating to the maintenance of international security. The energy-related provisions of the sanctions pursue also the first and third objectives of the Energy Union (diversify Europe's sources of energy and improving energy efficiency). But even if energy policy is a merely incidental aim of the sanctions, it is not straightforward that Article 40 TEU mandates the application of a traditional 'centre of gravity test' to an asymmetric situation such as the choice between CFSP and energy policy,[99] since the latter foresees the involvement of the European Parliament as democratic institution representative of the people.[100] Since the European Parliament must be in a condition to exercise the powers conferred to it by the Treaties,[101] this could lead to a preference for TFEU legal basis where an act does not pursue a TFEU policy in a merely incidental way.[102]

2. Compliance with international law: The case of secondary sanctions and extraterritoriality

In term of competence, could the EU lawfully impose secondary sanctions? Secondary sanctions are those imposing penalties on persons outside an entity's jurisdiction: a classic example of primary sanctions is when entity A sanctions country B by preventing entities in A from contracting with those in country B; to further isolate B's economy, country A may also impose sanctions on country C by forbidding entities in C from contracting with entities in B (those by A against C are secondary sanctions). The US routinely imposes secondary sanctions, whereas the EU adopted in the 1990s a 'blocking statute' to protect EU entities from the adverse effect of those US extraterritorial sanctions.[103] Now the situation is different from how it used to be then, and the EU itself may wish to adopt secondary sanctions (this time, in alignment with the US). Given the broad powers of the Council under Article 28 and 29 TEU, the validity of EU secondary sanctions ultimately depends on their validity under international law binding on the EU (the EU having already adopted other measures with extraterritorial application[104]).[105] The enactment of

[97]As the Court did, for example, in *Commission v Council (Kazakhstan)*, C-244/17.

[98]*Parliament v Council (Energy Infrastructures)*, note 92 above, para 73.

[99]L Lonardo, '*Commission v Council* (Kazakhstan): The Subject-Matter Question in EU External Relations Law, or the Asymmetry of Art. 40 TEU' (2020) 45 *European Law Review* 427.

[100]See above Part II.

[101]Ibid, para 71.

[102]See also Lonardo, note 99 above, p 429.

[103]Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

[104]M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, 1st ed (Oxford University Press, 2019), https://academic.oup.com/book/32240.

[105]On which, see J Meyer, 'Second Thoughts on Secondary Sanctions' (2009) 30 *University of Pennsylvania Journal of International Law* 905; P C R Terry, 'Secondary Sanctions: Why the US Approach Is Unlawful and the EU's Response Is Ineffective' (2022) 17 *Global Trade and Customs Journal* 370.

extraterritorial legislation appears to be prohibited by international law, although the precise scope and content of this prohibition are hard to identify.[106] There are some permitted grounds for extraterritoriality,[107] and indeed international law may impose extraterritorial duties on states.[108] One could argue that, since one objective of EU external action is to 'consolidate and support democracy, the rule of law, human rights and the principles of international law',[109] its pursuit justifies, in the absence of a clear prohibition under customary international law, the imposition of secondary sanctions or anyways of extraterritorial obligations.[110] In the preamble of the blocking statute, however, the EU had taken the view that extraterritorial sanctions 'violate international law'.[111]

One could take the view that the EU has in fact adopted secondary sanctions.[112] The most recent example at the time of writing is provided by the EU's decision to freeze assets of companies that are neither EU nor Russia based (they are registered in China, Uzbekistan, and other third countries instead). For these companies, there are two different designation criteria which ought to be kept distinct.

In the first case, the measures adopted by the EU require a direct link with an EU-based natural or legal person: the third country companies in question are only sanctioned in so far as they are 'facilitating infringements of the prohibition against circumvention of the provisions of'[113] the Russia sanctions. Their validity under international might be questionable (although they are not secondary sanctions under the definition provided above). But while there is an element of extraterritoriality, this appears to be nonetheless justifiable in light of the requirement that there be a substantial connection with EU jurisdiction (if there is 'circumvention', then there must be a substantive EU rule involved[114]). The extraterritorial element is nonetheless in contrast with the principles of EU sanctions design,[115] and, more starkly, with the view expressed in the blocking statute that extraterritorial sanctions 'violate international law'.[116]

In the second case, however, any substantial link with the EU evaporates: sanctions are imposed against third country companies because they are 'significantly frustrating' the sanctions.[117] The

[106]See also L Lonardo, 'The Extraterritorial Reach of EU Law: A Matter of External Trust?' in F Casolari and M Gatti, *The Application of EU Law Beyond its Borders* (CLEER Papers, 2022), p 10.

[107]J Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford University Press, 2012), p 457.

[108]M Langford, F Coomans, and F Gómez Isa, 'Extraterritorial Duties in International Law' in M Langford, W Vandenhole, M Scheinin, and W van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press, 2012), p 51.

[109]Art 21(2)(b) TEU.

[110]*Fridman and others v Council*, T-635/22, currently pending, contests the validity of a reporting obligation imposed on Member States authorities and which has extraterritorial effects, as detailed by F Finelli, 'Countering Circumvention of Restrictive Measures: The EU Response' (2023) 60 *Common Market Law Review* 733, 474. See also Challet, note 19 above, p 173.

[111]Council Regulation (EC) No 2271/96, preamble, stating that 'by their extra-territorial application such laws [adopted by a third country and which purport to regulate activities of natural and legal persons under the jurisdiction of the Member State], regulations and other legislative instruments violate international law'.

[112]See eg T Ruys and F Rodríguez Silvestre, 'Secondary Sanctions after Russia's Invasion of Ukraine: A Whole New World?' (Grili Working Paper, 2023), No 11/2023, https://www.law.ugent.be/grili/sites/default/files/working-paper/grili_working_paper_ruys-rodriguez_silvestre_chapter_handbook_secondary_sanctions_sept_2023.pdf (scrutinizing standard jurisdictional clauses of EU sanctions and the 'price cap' for Russian oil (Article 3n of Regulation 833/2014), or clauses prohibiting import of good that originate in Russia or were exported from there (Article 3g of Council Regulation (EU) No 833/2014)). On the illegality of the oil cap, see also D Kiku and I Timofeev, 'New Stage of EU Sanctions Policy: Extraterritorial Measures' (*Modern Diplomacy*, 22 October 2022), https://moderndiplomacy.eu/2022/10/22/new-stage-of-eu-sanctions-policy-extraterritorial-measures/.

[113]Council Regulation (EU) No 269/2014, note 2 above, Art 3(1)(h)(1).

[114]*Afrasiabi and others*, C-72/11, EU:C:2011:874, para 60 (circumvention means 'activities which have the aim or result of enabling their author to avoid the application of' EU measures).

[115]General Secretariat of the Council, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Doc 5664/18, para 88 (2018). Finelli, note 110 above, p 747.

[116]See note 111 above.

[117]Council Regulation (EU) No 269/2014, note 2 above, Art 3(1)(h)(2).

sanctions therefore aim at regulating the conduct of operators entirely outside the EU's jurisdiction. While this may be admissible under EU law, it may not be possible under international law (and certainly not in line with 'international comity', a principle which, former AG Hogan suggested,[118] ought to inspire EU foreign policy).

3. Statement of reasons

Like any EU act, restrictive measures need to provide reasons for their adoption. In *Kiselev,*[119] the General Court held that the obligation to state reasons on which an EU sanction is based is an essential *procedural* requirement, to be distinguished from the question whether the reasons given are well founded, the latter question pertaining instead to the *substantive* legality of the contested act.[120] The obligation to state reasons, corollary of the right of the defence, is enshrined in Article 296(2) TFEU and, according to established case law,[121] it has a twofold purpose. Firstly, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the EU courts. Secondly, to enable those courts to review the legality of that act.[122] For this reason, the GC has established that addressees of EU sanctions are entitled to obtain, as far as feasible, the evidence used against them when receiving notification of the imposition of the sanction.[123]

These formal requirements are easy to satisfy, and the Court is very light in the review of the cogency in the abstract of the listing criteria. Rightly so, since the criterion for sanctioning someone is a matter of political discretion of the Council—and since the protection of fundamental rights can be monitored at a different stage, namely when considering whether the evidence relied on by the Council is sufficient to support at least one of the listing criteria. The Court has intervened more in the area of listing 'by association' (that is, when people are sanctioned by virtue of being associated with someone, rather than because they have materially done something). A test offered by the case law on what makes an association criterion 'cogent in the abstract' is the requirement in *Tay Za* that restrictive measures listing a group of individuals should be directed 'only against the leaders of such countries and the persons associated with those leaders';[124] in *Tomana* the Court further specified that a family association link with the leaders is not, of its own, sufficient (not even in the abstract) to justify listing.[125] The recent judgment in *Prigozhina* adds an important specification, namely that test for a valid association is that the listed persons and the leaders are generally linked by common interests ('sont de façon générale liées par des intérêts commun'[126]). The 2014 and 2022 sanctions seem to satisfy the *Tay Za* rule even when they target judges,[127] human rights defenders,[128] or members of electoral commissions[129]—that is, people who are not Russia's 'leaders' but whose

[118]AG Hogan Opinion, *Venezuela v Council*, note 32 above, para 65.

[119]*Kiselev v Council of the European Union*, T-262/15, EU:T:2017:392.

[120]Ibid, para 52.

[121]See eg *Ben Ali v Council*, T-200/14, EU:T:2016:216, para 94, and case law cited therein.

[122]See eg *Bank Mellat*, C-176/13, EU:C:2016:96, para 74; *Mayaleh v Council*, T-307/12 and T-408/13, EU:T:2014:926, para 105.

[123]*Pye Phyo Tay Za v Council of the European Union*, T-181/08, EU:T:2010:209.

[124]*Tay Za II*, C-376/10 P, ECLI:EU:C:2012:138, paras 62–65. See also *Rosneft*, note 47 above, para 152.

[125]*Tomana*, T-190/12, para 235.

[126]*Prigozhina*, note 41 above, para 93. On this notion see the comment by C Challet, 'Judgment in *Prigozhina v Council* (T-212/22): Some Serious Sanctions Homework Is Needed from the Council' (*EU Law Live*, 27 March 2023), https://eulawlive.com/op-ed-judgment-in-prigozhina-v-council-t-212-22-some-serious-sanctions-homework-is-needed-from-the-council-by-celia-challet/.

[127]For example, some Ukrainian judges are listed in the Annex of Regulation 833/2014 for taking 'biased decisions in politically motivated cases against opponents of the illegal annexation of Crimea'.

[128]For example Russian kremlin-loyalists who justify the invasion.

[129]For example some Russian or Ukrainians are listed Annex of Regulation 833/2014 for organising the Russian presidential elections in Crimea or other referenda there or in the Donbass.

association with them (whose 'commonality of interests') could be substantiated as a matter of fact: but this is, as mentioned, a question of evidence or 'internal legality' and will therefore be discussed in the relevant Section.

IV. Substantive Requirements or Internal Legality

The discussion in the previous Part concerned the compliance of sanctions with formal or procedural requirements, whereas this Part is dedicated to the compliance of sanctions with substantive rules of EU law. Individual freedom is protected by the Court, against possible abuses by EU institutions, by means of the general principles of EU law (of special relevance are the principles of proportionality, legal certainty, and non-discrimination[130]), which include the protection of fundamental rights[131] (of special relevance are the right to effective judicial protection, property, and family life[132]).

A. Proportionality

The scrutiny of the proportionality of a measure entails, in the case of sanctions, a light review of the suitability of the measure but a more intrusive scrutiny of their necessity when the right of defence is invoked.

When it comes to suitability, the Court has shown much deference to the Council and has been prepared to recognise that the 'primordial importance of maintaining peace'[133] is an overriding objective, for the attainment of which only 'manifestly inappropriate' (the *Kala Naft* test) measures would be struck down. In *Kala Naft*, the Court found that the EU could target the Iranian oil and gas sector by restricting the applicant's fundamental rights to property and to conduct a business (through a complete asset freeze), in the light of the seriousness of the reports concerning the Iranian nuclear programme and the need to maintain international security (without scrutinising whether less restrictive alternatives were available). It reached that conclusion by reasoning that 'the European Union legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. It concluded from this that the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.[134] On the necessity, it can be stated already at this stage that, when it comes to the interference with fundamental rights, the General Court has already had the occasion to state that less restrictive alternatives to an asset freeze (such as a requirement for prior authorisation or for later justification) would not be sufficiently effective.[135]

This is how the Court respects the 'specific rules and procedures' (Article 24 TEU) of the field of CFSP. These characteristics, as Opinion 2/13 clarifies, are a reflection of the autonomous sovereign choice of the EU legal order to entrust the pursuit of its objectives to various policies governed by their 'own particular characteristics'.[136] In particular, the constitutional structure of CFSP is such that it is objectives-driven, and is not defined, as it happens in the internal sphere, by policies

[130]For reasons of space, this Article discusses only the first of them.

[131]*Stauder*, 29/69 [1969] ECR 419; *Kadi*, note 72 above, para 285.

[132]For reasons of space, this Article discusses only the first of them.

[133]*Bank of Industry and Mine v Council*, C-358/15, ECLI:EU:C:2016:338, para 57.

[134]*Council v Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, para 120. The case law there cited is part of a chain going back to *UK v Council*, C-84/94, para 58, relating to social policy.

[135]T-193/22 R OT, ECLI:EU:T:2022:307, para 65.

[136]An idea also expressed by Opinion 2/13, note 31 above, para 172 ('The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to

detailed in the Treaties.[137] It was mentioned that there is a link, identified by Lenaerts and Gutierrez Fons, between the principle of conferral, institutional balance, and the protection of individual freedom. The light application of the principle of proportionality by the Court in the review of sanctions is a manifestation of that link: the discretion left to the Council depends ultimately on the way the legal basis is formulated. Unlike what happens in other areas of EU competence, the terms of the balancing between the pursuit of public interests are left entirely to the Council. By way of example, Article 65(1) TFEU allows for derogations from EU rules on free movement of capital by specifying the ground on which Member States may do so. Similarly, Article 72 TFEU states that the powers of the EU in the Area of Freedom Security and Justice 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. These provisions provide concrete benchmarks (because they define the interests) that the legislator must take into account when acting in those policy areas.[138] Nothing of this kind exists for CFSP, leaving the very terms of the balancing to the discretion of the Council.

This has the consequence that the Court does not intervene in themes of substantial governance when it comes to CFSP,[139] as anyways explicitly mandated in Article 24 TEU and 275 TFEU which limit the Court's jurisdiction. But even when the Court does have jurisdiction, in light of the abovementioned discretion generally left to EU political institutions (in the context of CFSP, the Council), the Court has repeatedly stated the well-established formula that 'the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.[140]

The Court's scrutiny will therefore be limited just to monitoring that an act is not manifestly inappropriate—and this is so in light of the overriding political and security objectives of CFSP. More than proportionality, indeed, the Court seems to adopt a lenient test of mere 'reasonableness'. The *Rosneft* saga is instructive. In the first ever preliminary ruling delivered in the context of a CFSP sanction, the Court found a 'reasonable relationship between the content of the contested acts and the objective pursued by them'.[141] Later, the General Court went into further detail on the suitability (they use the term rationality) of the 2014 sanctions targeting the Russian oil sector for the attainment of their objective: 'there is […] a rational connection between the targeting of undertakings in the Russian oil sector, on the basis notably of their estimated total assets of over RUB 1 trillion, in view of the importance of that sector for the Russian economy, and the objective of the restrictive measures in the present case, which is to increase the costs of the Russian Federation's actions to undermine Ukraine's territorial integrity, sovereignty and independence, and to promote a peaceful settlement of the crisis'.[142] What does this mean for the 2022 sanctions? While the suitability (or rationality) of each provision must be checked against the objectives pursued by the sanctions, there is a strong indication that the benchmark of the validity of the 2014 sanctions on these grounds signal that the 2022 sanctions will hardly be found to be not suitable in the abstract to achieve the objectives of halting Russia's war.

contribute—each within its specific field and with its own particular characteristics—to the implementation of the process of integration that is the raison d'être of the EU itself'.).

[137]M Cremona, 'Structural Principles and their Role in EU External Relations Law' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing, 2018).

[138]AG Sharpston Opinion, *Commission v Poland, Hungary and Czech Republic*, C-715/17, C-718/17 and C-719/17, para 202 (defining Article 72 TFEU 'un rappel au legislat eur'). This argument, based on the formulation of the provisions of the fundamental Treaties, was made in the context of the Area of Freedom, Security and Justice in the presentation by Gian Marco Galletti, 'Articles 7 and 24 Charter' at of the conference 'The Interaction between Primary Law and Secondary Law in the Area of Freedom, Security and Justice' held at KU Leuven on 10 March 2023.

[139]Cremona, note 137 above, p5.

[140]Ibid; *Kala Naft*, note 134 above, para 120.

[141]*Rosneft*, note 47 above, para 147.

[142]Ibid, para 157.

Another way in which the Court respects the discretion left by primary law to the Council is by shielding the EU legal order from international law. As the ECJ had held in *Bank Melli* that, since proportionality is distinctive to the EU legal order, a UN Security Council Resolution cannot be a ground against which to assess the proportionality of an EU act.[143] Repeating the argument of *Kadi*, in *Ayadi and Hassan*,[144] the ECJ found that EU acts shall be reviewed 'in the light of the fundamental rights forming part of the general principles of' EU law; it therefore set aside the GC judgment which only reviewed the restrictive measures in light of *jus cogens*. By subtracting external influences on the principle of proportionality, the CJEU strengthens, at least formally, the discretion left to the EU decisionmakers. The fact that proportionality is a soft ground for review does not, however, mean that the Court does not review the reasons for the adoption of acts. As mentioned below, with a view to protect fundamental rights, the Court has been more intrusive in its review when the right of defence was invoked.

B. Article 47 Charter

Quantitatively, the most invoked aspect of the right to effective judicial protection in the context of sanctions concerns the motivation for the listing of natural or legal persons. Article 47 Charter, providing the right to an effective remedy, requires the EU courts to ensure that a decision which affects a person individually is taken on a sufficiently solid factual basis.[145]

In *Prigozhina*, one of the first 2022 sanctions cases decided on the merits, the mother of the man that used to be responsible for the operation of the Wagner Group (a band of mercenaries active, among others, in Ukraine) was listed as she was the owner of a company in a group owned by her son. As a matter of external legality, that statement of reasons is sufficient to justify the listing. What the Court scrutinises is merely the formal correspondence of the evidence of the Council with the statement for the listing provided by the Council itself.[146] In *Prigozhina*, however, the applicant was listed on factual allegations that were proven incorrect. When the Court considered the accuracy *in concreto* of the facts presented by the Council, it found that as a matter of fact the mum of Prigozhin *used to* be the owner of a company, but she was not at the time of the imposition of sanctions.[147] Similarly, in the interim order of the General Court in *Mazepin*,[148] sanctions were suspended because the Council used outdated evidence, which could not justify the listing criterion. In both cases, the measure had to be annulled with regard to the applicant (or suspended), because, since the Council could not prove that the persons fulfilled the main listing criterion, no other commonality of interests could be found to substantiate the association between Prigozhina and her son,[149] or between Mazepin and his father, other than the family relationship.

In *Prigozhina*, the General Court appears to merge the external review of legality (the abstract validity of the association criteria) with the internal review. However, it is submitted that they ought to be kept separate, and that the court should monitor the association as evidenced by the Council, not the validity of the criterion in the abstract. The question of whether a mother and a son (or a father and a son) are sufficiently 'associated' to justify sanctions should not be a question for Courts to determine, because it is the Council's prerogative to conduct foreign policy by putting pressure in the way they deem fit on the Russian leaders—it is, instead, a factual question: do these people share common interests, and how can the Council prove that they do? When the General Court refers to the existence of 'economic or financial links or a commonality of

[143] *Bank Melli Iran v Council*, C-548/09 P, ECLI:EU:C:2011:735, para 107 (recalling *Kadi I*, para 369).
[144] *Ayadi and Hassan*, C-403/06, ECLI:EU:C:2009:496, para 73.
[145] See discussion below for the case law.
[146] *Prigozhina*, note 41 above, para 97 ('au vu du critère d'inscription en cause').
[147] Ibid, para 92.
[148] *Mazepin v Council*, T-743/22.
[149] Ibid, para 94.

interests',[150] it ought to monitor matter of facts (the existence of such common interests can be ascertained objectively). Obviously, the factual determination that two people have common interests (which, in the formulation of the General Court, appears to be different from merely economic or financial ones) requires a degree of arbitrariness: should they be common political interests, contingent, long term, or what else? The Court ought to monitor precisely that the Council does not uses power arbitrarily by exceeding the limits of its discretion.

The Court also considers whether the Council commits a manifest error of assessment of the evidence. In *OMPI*, a case decided pre-Lisbon, the Court repeated the usual formula that EU institutions enjoy a broad margin of discretion and held that 'because the [EU] Courts may not […] substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power'.[151] This *OMPI* test was derived not from other EU policies (as the *Kala Naft* test of manifestly disproportionate measures' was), but from the case law of Strasbourg.[152] That limited review applies, especially, to the assessment of the appropriateness of the evidence on which such measures are based.[153] The CJEU held that Article 47 Charter, providing the right to an effective remedy, requires the EU courts to ensure that a decision which affects that person individually is taken on a sufficiently solid factual basis.[154] That entails a verification of the factual allegations underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on. On the contrary, it must check whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, are substantiated by sufficiently specific and concrete evidence.[155] What is sufficiently specific and concrete will be subject to a case-by-case assessment. The Court needs to strike a balance between the level of abstraction that information based on intelligence will have, and the right of defence of applicants to concrete information. This may be particularly complex if the Council does not want to share the evidence it relied upon, or cannot do so because derives from another source (such as the UN or a third country).[156]

So what is a 'manifest error of assessment'? The case law on the 2014 sanctions provides guidance. In *Azarov*, the ECJ held that a manifest error of assessment was the reliance of the Council, for the renewal of sanctions, on judicial authorities of Ukraine without checking that they had respected the right to effective judicial protection and the right of defence of the addressee of the measures.[157]

The use of a presumption is permissible, but its strength is in reverse correlation to a listed person's proximity with power: the more tenuous the link to the political leadership and formal institutions of the country, the more specific the Council needs to be to justify the listing. This means that not in all cases individual, specific and concrete reasons why restrictive measures are imposed on the applicant will be necessary. But the further the Council goes from the 'hard core' of the

[150]Ibid.

[151]*Organisation des Modjahedines du peuple d'Iran v Council*, T-228/02 [2006] ECR II-4665, para 159.

[152]*Leander v Sweden*, Judgment of 26 March 1987 (Ser A) No 116, Sec 59 (Eur Ct HR); *Al-Nashif v Bulgaria*, para 158, Secs 123–24.

[153]*Mayaleh v Council*, note 122 above.

[154]*Commission and Others v Kadi,* C-584/10 P, C-593/10 P and C-595/10 P, Judgment of 18 July 2013, EU:C:2013:518, para 119; *Ipatau v Council*, C-535/14 P, Judgment of 18 June 2015, EU:C:2015:407, para 42; *Council v Bank Mellat*, note 122 above, para 109.

[155]As held by constant case law, eg *Kadi II*, note 154 above, para 119; *Azarov*, T-331/14, EU:T:2016:49, para 43.

[156]Articles 103 and105 of the Rules of Procedure of the General Court lay down the conditions under which that court can access secret information without disclosing it to the applicant.

[157]*Mykola Yanovych Azarov*, C-416/18 P, paras 34–36. See also Poli, note 24, p 1074.

targeted country,[158] the more specific the criteria will be, lest it incur in an inversion of the burden of proof.[159] The 2022 sanctions introduce an irrebuttable presumption that governmental entities and public companies or bodies in Russia are implicated in the war. This appears to be consistent with the duties of the Council: the case law on the sanctions against Iran has clarified that there is no need, for example, of an explicit statement of reasons relating to the financial services offered by a Central Bank to a Government.[160] The case law on the 2014 sanctions shows that a company operating in the oil sector could be sanctioned regardless of its (direct or indirect) involvement in Ukraine;[161] but that a pro-Russian public official ought to be de-listed if no longer in power and no other links to the Russian élite remains;[162] and stringent requirements are needed in the case of private companies.[163] To err on the side of caution, the Council could have specified one by one the companies held by *Prigozhina*.[164]

Some authors have drawn attention to the perils of leaving discretion to the Council to choose association criteria which may reflect biased policy choices, especially considering the degree of stigmatisation that sanctions carry.[165] Another line of criticism concerns the risk of arbitrariness: 'depending on the wording of the sanctioning text, similar factual situations may lead to a different requirement of motivation'.[166]

Other aspects of effective judicial protection concern the right to access to justice and the right to be heard.[167] On the first, the 2022 sanctions introduced explicit derogations for transactions allowing for legal representation (and, more broadly, for any proceedings, including arbitration).[168] This is not dissimilar to what happens in the US: all current US sanctions programmes authorise the legal representation of sanctioned parties in US litigation and US administrative proceedings (but typically not in litigation proceedings outside the US).[169]

On the second, it shall be recalled that the right to be heard in all proceedings, laid down in Article 41(2)(a) of the Charter, is inherent in respect for the rights of the defence, and guarantees every person the opportunity to make known his or her views effectively during an administrative

[158]C Beaucillon, 'Opening Up the Horizon: The ECJ's New Take on Country Sanctions' (2018) *Common Market Law Review* 387, p 407 (offers a taxonomy of the proximity of individuals to the target state).

[159]In pending case *Khudaverdyan*, T-335/22, the applicant claims that there is a reversal of the burden of proof, even though the statement of reasons seems in line with the previous case law on presuming that businessmen benefit from a regime.

[160]*Central Bank of Iran*, C-266/15 P, ECLI:EU:C:2016:208.

[161]*Rosneft*, note 47 above, para 160 ('It should be borne in mind that the objective of the restrictive measures at issue is not to penalise certain entities because of their links with the situation in Ukraine, but to impose economic sanctions on the Russian Federation, in order to increase the costs of its actions to undermine Ukraine's territorial integrity, sovereignty and independence, and to promote a peaceful settlement of the crisis'.).

[162]*Dmitry Vladimirovich Ovsyannikov*, T-714/20, ECLI:EU:T:2022:674. For other example of presumptions in previous sanctions regimes, see S Poli, 'Judicial Challenges to EU Restrictive Measures by Individual State Organs, "Emanations of Non-EU Member States" and Third Countries: The Limits to the Council's Discretion' in G Adinolfi, A Lang, and C Ragni, *Sanctions by and Against International Organizations* (Edward Elgar, forthcoming).

[163]See Hinojosa-Martínez, note 14 above (discussing the case of the Iranian financial sector).

[164]*Prigozhina*, note 41 above, para 102.

[165]G Sullivan and B Hayes, 'Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights' (*ECCHR*, 2011); see also *Bosphorus*, C-84/95 [1996] ECLI:EU:C:1996:312, para 22 ('Any measure imposing sanctions has, 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'.).

[166]Hinojosa-Martínez, note 14 above.

[167]See the challenge in pending Case T-255/22 on the right to be heard.

[168]Eg Regulation (EU) No 833/2014, Art 5aa. But not for the Russian government and certain other entities, a prohibition which resulted in challenges by some lawyers' associations and discussed in Challet, note 19 above.

[169]C DeLelle and N Erb, 'Key Sanctions Issues in Civil Litigation and Arbitration' ('It was argued the Office of Foreign Assets Control (OFAC) would violate the Due Process Clause of the Fifth Amendment of the US Constitution if designated parties named as defendants in US litigation were prohibited from obtaining counsel due to US sanctions prohibitions'.). See eg *American Airways Charters Inc. v Regan*, 746 F.2d 865, 867, 875 (D.C. Cir. 1984)'.

procedure and before the adoption of a decision in relation to that person that is liable to affect his or her interests adversely. This entails that listing in sanctions must be notified individually, if possible.[170] In addition, the case law acknowledges that the right to a hearing may be limited if the urgency of the procedure necessitates it.[171] In the case of asset freeze, prior notification would defy the purpose of the measure.[172] By applying that case law, in *RT France* the General Court found that a hearing was not necessary,[173] but the two situations (a person whose assets will be frozen or a media company subject to censorship) are not really comparable: the former can move assets to another jurisdiction, whereas in the latter case there is no urgency. This line of case law shows the tensions between imposing substantial constraints to the Council while preserving the effectiveness of EU law.

V. The Role of the Judiciary in EU Sanctions

The EU is not the only one to have imposed sanctions, and zooming out to the US, its main ally in this war, is fruitful to reflect on the relationship between judiciary and executive in foreign affairs. This is the case both because questions of judicial protection arise in that jurisdiction as well, and because, in the US, theoretical reflections on the role of apical courts in a constitutional system have matured over centuries. The sanctions adopted by the US include embargoes against areas in Ukraine that Russia annexed or recognised as 'independent', the listing of hundreds of Russian persons, and the imposition of export and import bans on certain types of goods. Other US sanctions prohibit certain Russian banks from processing payments using US financial institutions or restrict US persons' ability to engage in transactions with the Central Bank of Russia.[174] The fact that these regimes (three, if one includes the UK[175]) are significantly but imperfectly overlapping entails the need, for economic operators, to monitor compliance with several sanctions. To take one example, a Russian company might be subject to EU sanctions but not to UK or US sanctions. In such cases, it may be possible for UK (or US) persons to do business with the Russian company provided that there is no connection with a situation covered by the EU sanctions.[176] This is not to suggest that there ought to be convergence on how sanctions cases are decided across US and EU. It may be a criterion that the CJEU could take into account, because the effectiveness of EU law is a relevant consideration (as recalled again below), but questions of EU law must be answered with regard to the autonomous legal system. In particular, as the Court held in Opinion 2/13, 'the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU'.[177] Different courts

[170]If impossible, publication in the Official Journal suffices, see order in T-193/22 R OT, ECLI:EU:T:2022:307, para 31.

[171]*France v People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, para 67

[172]*RT France*, note 46 above, para 80 ('In the case of the initial decision placing a person's or an entity's name on the list of persons and entities whose funds are frozen, the Council is not required to inform the person or entity concerned beforehand of the grounds on which it intends to rely in order to list that person or entity. So that its effectiveness may not be jeopardised, such a measure must be able to take advantage of a surprise effect and to apply immediately'.). Reference is to *France v People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, para 61.

[173]*RT France*, note 46 above, para 84.

[174]Executive Order 14065 (21 February 2022); Executive Order 14068 (11 March 2022); Directive 2 to Executive Order 14024 (24 February 2022); Directive 4 to Executive Order 14024 (28 February 2022). For the details, see J D Buretta and M Y Lew, 'US Sanctions', https://globalinvestigationsreview.com/guide/the-guide-sanctions/third-edition/article/us-sanctions#footnote-082.

[175]In the UK, the sanctions are contained in the Russia (Sanctions) (EU Exit) Regulations 2019 as amended on several occasions in 2022.

[176]A Hood, R Tauwhare, and C Smith 'New UK, EU and US Sanctions on Russia' (*FieldFisher*, 21 November 2023), https://www.fieldfisher.com/en/services/international-trade/trade-sanctions-blog/new-uk-eu-and-us-sanctions-on-russia.

[177]Opinion 2/13, note 31 above, para 170, with reference to *Internationale Handelsgesellschaft*, EU:C:1970:114, para 4, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paras 281–85.

interpret their role differently.[178] In the US, persons subject to sanctions restrictions and other interested parties can seek to overturn designations, asset freezes or sanctions provisions through litigation.[179] The challenges can invoke violation of due process, right to travel, unconstitutional vagueness,[180] or violation of other federal law.[181] Cases challenging the government's designation, in particular, can be difficult to win because US courts are extremely deferential to the government given that it operates 'in an area at the intersection of national security, foreign policy, and administrative law'.[182] Occasionally, a challenge to similarly worded measures can be unsuccessful in the US but successful in the EU. In the *Fulmen case,* an Iranian company that was listed by the EU (and, as a consequence of a deal to that effect, by the US) successfully challenged the measure in EU courts, obtaining an annulment. Despite this annulment, US courts held that that the US competent body's rejection of the applicant's de-listing request was not arbitrary, given the substantial record and the 'extreme deference' owed to the government given national security concerns.[183] The same could happen for Russian or Belorussian interests.

On a more theoretical side, there is disagreement on the extent to which the judiciary should decide controversies in foreign affairs. This in turns entails different questions. One is the respect of institutional balance. Hamilton considered the judiciary to be 'the least dangerous branch' of government for the rights enshrined in a constitution,[184] and that, as a consequence, it was also the weakest branch,[185] which could in no case pose a threat to the executive. For others, it is a question of activism or restraint: the scope of judicial review ought to be limited to disputed *judicial* questions, because 'the constitutional law-makers must be allowed a free foot. In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since *their* question is a naked judicial one'.[186] The US supreme Court has developed a (by now very controversial) political question doctrine whereby it would not intervene on purely political issues, but the case law on terrorist sanctions appear to have severely undermined the impact of that doctrine.[187] Another view is that the extent of judicial intervention depends on the allocation of powers decided by a polity, regardless of textual arguments. This means asking whether the rules of CFSP are 'maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution, and from the resulting support of public

[178]One may take the view that fundamental rights are best served by competing courts (in Europe: national courts, CJEU, and European Court for Human Rights). T Tridimas and R Schütze, 'The Principle of Proportionality' in T Tridimas, *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press, 2018), https://oxford.universitypressscholarship.com/view/10.1093/oso/9780199533770.001.0001/isbn-9780199533770-book-part-10.

[179]The restrictions as well as leading cases are discussed by C DeLelle and N Erb, 'Key Sanctions Issues in Civil Litigation and Arbitration' (*Global Investigations Review*, 8 July 2022), https://globalinvestigationsreview.com/guide/the-guide-sanctions/third-edition/article/key-sanctions-issues-in-civil-litigation-and-arbitration#footnote-132.

[180]*Open Soc'y Justice Initiative v Trump*, 510 F Supp 3d 198, p 213 (SDNY 2021).

[181]*Askan Holdings, LTD v United States Dep't of the Treasury*, 2021 US Dist LEXIS 182330, at *5 (DDC 23 September 2021) (finding a violation of the Freedom of Information Act).

[182]Impresa Cubana Exportadora de Alimentos y Productos Varios v United States Dep't of Treasury, 606 F Supp 2d 59, p 68 (DDC 2009)

[183]US Dist LEXIS 58308, App No 1:18-cv-2949, paras 12–25 (2020).

[184]A Hamilton et al (eds), note 78 above, p 378 ('The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment'.).

[185]Ibid. He also cites Montesquieu, *Spirit of Laws, Vol 1*, p 186 ('Of the three powers above mentioned, the judiciary is next to nothing'.).

[186]J Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129, p 135 (emphasis in original). The words cited are not Thayer's view, who was merely reporting an earlier conception of narrow judicial review.

[187]See generally N Mourtada-Sabbah and B E Cain (eds), *The Political Question Doctrine and the Supreme Court of the United States* (Lexington Books, 2007).

opinion'[188] (to use the vivid prose of Dicey)—on which courts have no power—or whether they are something more, justifying more vigorous judicial review. All of the above suggest that the question is not merely one of judicial involvement. What is at stake is more broadly the role of courts in helping other institutions in drawing the boundaries of what is permitted under the principle of conferral and other general principles of EU law.[189]

The case law provides a general indication of how EU courts have interpreted their role in this area. The ECJ has guaranteed extensive protection procedurally, including by taking a broad view of the scope of its jurisdiction. By contrast, it has been by and large very deferential to the choices of the Council as a matter of substance. Although access to EU courts is costly and complex, the review of sanctions—and the many annulments in which it resulted—offers meaningful redress also for third country nationals, even though no damages have ever been awarded for wrongful inclusion in a sanction. In the context of sanctions, litigation has regarded a conflict between fundamental rights and EU public interests, and not, formally, between fundamental rights and national interests,[190] because the challenges are to EU measures as opposed to national ones. If litigation was to involve national law in the future, it is not inconceivable that the ECJ might weight fundamental rights differently when these are pitted against one national public interest than when (more than the sum of?) the interests of 27 countries is at stake. Admittedly, it is difficult to tell procedure and substance apart. Adherence to formal process standards in the designation criteria for individuals entails a substantive assessment of evidence. In order to respect the (minimalistic) role that the drafters of the Treaties have carved for the Court, it endeavoured to separate conceptually the statement of reasons by the Council and the evidence presented by it. It keeps the review of the former to a minimum, and scrutinises the latter in more detail. The result is a constitutional dialogue in which the Court has largely succeeded in striking a delicate equilibrium between offering some protection of individual rights and not overstepping the 'horizontal' limits imposed upon it by the Treaties and the principle of institutional balance, and the interlocutor, the Council, learns to adapt its sanctioning practice which is in turn tested against through litigation. In this, the dynamic is remindful of what the Court does in competition law,[191] public procurement,[192] or in matters relating to board of appeals of agencies,[193] where the judicature will not substitute itself to EU institutions, but leaves them instead a broad margin of discretion in matters entailing complex choices, striking down only 'manifestly inappropriate' measures (the *Kala Naft* test[194]) or those containing a 'manifest error of assessment' (the *OMPI* test[195]). The way sanctions cases are decided bears some resemblance to what happens in other matters of EU administrative law. But the case law on this area of EU administrative law also has a 'vertical' dimension. When deciding questions of legal basis, the Court is in fact increasingly shedding light on the twilight zone at the intersection between the CFSP and national foreign policies, where it is unclear whether authority lies

[188]Law of the Constitution 2 3d ed, Ch ii, p 127.

[189]For a similar argument in the context of the US, L Henkin, 'Foreign Affairs and the Constitution' (1987) 66 *Foreign Affairs* 284, p 285.

[190]Although the interests of the EU and of a Member State may coincide.

[191]*Commission v Tetra Laval*, C-12/03 P [2005] ECR I-987, para 39 ('The Court recognises that the Commission has a margin of discretion with regard to economic matters'.).

[192]See eg Case T-4/13, para 95 ('The Commission has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers'.).

[193]In the context of energy: *European Union Agency for the Cooperation of Energy Regulators*, C-46/21 P, para 57 ('Where the authorities of the European Union have a broad discretion, in particular in relation to highly complex scientific and technical facts, to determine the nature and scope of the measures which they adopt, review by the courts of the European Union must be limited to verifying whether there has been a manifest error of appraisal or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion'.).

[194]*Council v Manufacturing Support & Procurement Kala Naft*, note 134 above, para 120. The case law there cited is part of a chain going back to *UK v Council*, C-84/94, para 58, relating to social policy.

[195]*Organisation des Modjahedines du peuple d'Iran v Council*, note 151 above, para 159 ('*OMPI*').

in the EU or in national authorities. In drawing these boundaries, the case law is remindful of dynamics observed in other areas of EU competence: it has taken a broad view of EU competences, generally favouring EU institutions perhaps to the detriment of national ones. The broad interpretation given by EU courts to technical requirements discussed in this article (jurisdiction and locus standi above all) has enabled the Court to intervene in many controversies so that it could properly monitor the application of the principle of conferral and of other general principles of EU law by other institutions also in the context of CFSP. The Court has cast a broad net, understanding its role broadly. By admitting challenges to sanctions via preliminary rulings in *Rosneft*, it has recognised a significant role for the national courts and established an immediate dialogue with them. This is coupled with a broad view of who can challenge sanctions (*Venezuela*), which amounts to an empowerment of national or legal persons (including third countries). Although not in cases related to sanctions but to CFSP more broadly, it has protected the democratic character of the EU as a polity by protecting the prerogatives of the Parliament (*Tanzania*).

Although the Court helps the Council striking a fine balance between the pursuit of EU interests and the respect of general principles, the judicial approach can be criticised on two accounts: procedurally, it disrespects the letter of the Treaties and (perhaps more importantly), it substitutes the intention of the Court to that of the drafters of the Treaties;[196] and as a matter of substance it can be questioned whether it afford meaningful substantive guarantees. The judgments are imbued with effectiveness that avoid the imposition of substantive constraints on the Council. Limitations or derogations from fundamental rights are justified by the invocation of an exceptional context (in *RT France*[197]) or of 'the need to ensure that the freezing measures are effective and, in short by overriding considerations to do with safety or the conduct of the international relations of the Union and of its Member States' (*OMPI*).[198]

VI. Conclusion

The EU responded to Russia's 2022 war against Ukraine with the most comprehensive set of sanctions in its history. It was, arguably, the strongest foreign policy action ever taken by the EU in response to a single event. Inevitably, these sanctions raise a variety of legal issues of practical and academic interest, including questions on their validity and their constitutional implications. The EU's distinctive competence in conducting a Common Foreign and Security Policy, under which the sanctions are adopted, adds complexity to the judicial review process: the Court of Justice of the European Union faces the challenge of preserving fundamental rights and other general principles of EU law while respecting CFSP's specific institutional arrangements.

This Article argued that the Council enjoys considerable latitude in imposing sanctions, given the absence of fixed triggering conditions (including for conditional 'snapback' mechanisms that could be used to obtain leverage) and the largely discretionary nature of such measures. The Article contended that the ECJ has nonetheless guaranteed extensive protection procedurally, albeit this entailed taking a broader view of the scope of its jurisdiction than can be derived from a literal interpretation of the Treaties. The Court has been by and large very deferential to the choices of the Council as a matter of substance. This shows that the case law on this area of EU administrative law converges to a great extent with other areas of EU competence. This convergence is to be welcomed as it strikes a good balance between the commitment to upholding fundamental rights while recognizing the Council's political discretion within the CFSP framework.

[196]Koutrakos, note 24 above, p 25; Van Elsuwege, note 24 above, p 1758.
[197]*RT France*, note 46 above, para 92
[198]*France v People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, para 67

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