Effective Judicial Protection and Its Limits in the Case Law Concerning Individual Restrictive Measures in the European Union

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I. Introduction

Restrictive measures are enacted to counter terrorism or exercise pressure on third countries that breach international law (or, more broadly, values of the European Union) in order to end these violations.[1] Individual sanctions, rather than global sanctions (against third countries, as a whole), have become the norm in sanction policies at both the United Nations (UN) and the European Union level. The practice of subjecting natural and legal persons to autonomous restrictive measures for purposes connected to the Common Foreign and Security Policy (CFSP) has evolved throughout the years in the EU.[2] New designation criteria appeared in the Council decisions instituting restrictive measures after 2010: abuses of human rights were at the basis of sanctions as stand-alone criteria or in connection with others (such as the promotion of democracy). Furthermore, measures regarding misappropriation of State funds by former members of third countries' governments were enacted with respect to the EU South-

1 Monographs on the topic of restrictive measures are numerous. Amongst others, see C. Beaucillon, *Les mesures restrictives de l'Union européenne* (Brussels: Bruylant, 2014); C. Portela, *European Union Sanctions and Foreign Policy* (London: Routledge, 2011). See also edited collections: N. Ronzitti (ed), *Coercitive Diplomacy, Sanctions and International Law* (Leiden: Brill | Nijhoff, 2016); I. Cameron (ed), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Cambridge: Intersentia 2013); A. Z. Marossi and M. R. Basset (eds), *Economic Sanctions under International Law* (The Hague: Springer, 2015).

2 The EU was provided with a competence to adopt measures restricting the economic relations with third countries with the Maastricht Treaty (see Articles 60 and 301 of the Treaty of the European Community -TEC). Sanctions freezing the assets of individuals were based on the mentioned provisions and on Article 308 of the TEC given the lack of an explicit competence to adopt this kind of measures vis-a-vis individuals.

ern and Eastern neighbours. The EU has also enlarged the circle of non-State actors who could be targeted to include not only third countries' leaders and members of the State apparatus, but also those who are associated with these leaders (such as family members), or persons providing political, logistical, and material support to these leaders. Natural and legal persons benefiting from links with the political leadership (such as businessmen or compagnies), or simply helping them in supporting the regime's propaganda (as in the case of journalists) are also included in the circle. As a result, the chances of being targeted by restrictive measures for non-State actors in third countries, as well as former members of third countries' governments, have multiplied in the last ten years.

It is necessary to examine to what extent natural and legal persons enjoy a right to judicial protection within the EU. This right is protected under the general principles of EU law or/and under Article 47 of the Charter of Fundamental Rights of the EU, which applies to all areas of EU law, including the CFSP. This principle requires on the one hand, that private parties be able to contest restrictive measures before a judge and, on the other hand, that the remedies at their disposal be effective. The Court of Justice has strengthened the right to an effective protection to the benefit of those who are included in the list of sanctions, as will be shown below. However, the right to effective judicial protection bears limits within the CFSP.

II. Access to Justice for Non-State Actors Targeted by Restrictive Measures in the Case Law of the Court of Justice

Although neither the Treaty on European Union (TEU), nor the Treaty of the European Community (TEC) provided for the EU's competence to enact restrictive measures against non-state actors, the latter were targeted by EU sanctions, even before the United Nations started the practice.[3] The EU's explicit competence to adopt decisions instituting restrictive measures *vis-a-vis* natural and legal persons was provided for the first time by Article 215, paragraph 2, of the Treaty on the Functioning of the European Union (TFEU). Yet, the Court of Justice played a significant role in turn-

3 S. Poli, "The Turning of Non-State Entities from Objects to Subjects of EU Restrictive Measures", in E. Fahey, S. Bardutzky (eds), *Framing the Subjects and Objects of EU Law* (Cheltenham: Edward Elgar, 2017), 158-181.

ing these targets from mere "objects of restrictive measures" to "subjects", even before the mentioned provision was included in EU primary law.[4] Indeed, the EU judiciary has made it possible for non-state actors to challenge regulations imposing economic sanctions in the context of annulment actions, despite the fact that, under former Article 46 TEC, the Court had virtually no competence over foreign and security policy matters.[5] In the *Organisation des Modjahedines du peuple d'Iran* (*OMPI*) case, the General Court established its jurisdiction to hear an action for annulment directed against a common position adopted on the basis of former Articles 15 and 34 TEU (third pillar), although only strictly to the extent that, in support of such an action, the applicant alleged an infringement of the Community's competences.[6] In *Segi,*[7] the Court of Justice interpreted Article 35, paragraph 1, TEU as allowing for preliminary rulings on the validity or interpretation of common positions[8] which intend to produce legal effects *vis-a-vis* third parties.[9] The competence to review the legality of these acts in actions brought by Member States and or the Commission was also recognised, under Article 35, paragraph 6, TEU.[10] The wide in-

4 For example, in the Judgment of 17 January 2007, *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK)*, C-229/05 P, EU:C:2007:32, para 112, the Court held that: "Since, by Decision 2002/460, the Community legislature took the view that the PKK retains an existence sufficient for it to be subject to the restrictive measures laid down by regulation 2580/2001/EC, it must be accepted, on grounds of consistency and justice, that that entity continues to have an existence sufficient to contest this measure. The effect of any other conclusion would be that an organisation could be included in the disputed list without being able to bring an action challenging its inclusion".

5 M-G. Garbagnati Ketvel, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy", *International & Comparative Law Quarterly* 55, no. 1 (2006), 79.

6 See Judgment of 12 December 2006, *OMPI,* T-228/02, EU:T:2006:384. For an insightful examination of the early case- law on the right of access to a court, see C. Eckes, "Sanctions against Individuals. Fighting Terrorism within the European Legal Order", *European Constitutional Law Review* 4, no. 2 (2008), 205.

7 Judgment of 27 February 2007, *Segi and others*, C-355/04 P, EU:C:2007:116.

8 At the time of the Segi ruling, common positions to combat terrorism were adopted under the legal basis provisions of the CFSP (former Article 15 TEU) and the third pillar (former Article 34 TEU).

9 Judgment of 27 February 2007, *Segi, supra* note 7, paras 54-55.

10 In contrast, the EU judiciary excluded that an action in damages could be brought by the applicant against common positions, given that this would have been against the principle of conferral.

terpretation of the scope of the Court's competence in this ruling is consistent with the principle that the EU is based on the rule of law: if natural and legal persons can be hit by restrictive measures, these subjects should also be able to seek the annulment of their inclusion in the backlist and question the validity of the EU act in a preliminary ruling procedure. Therefore, the Court strengthened the position of non-State actors as subjects of restrictive measures even before the Treaty of Lisbon did so.

With the Treaty changes of 2009, the Court of Justice's lack of competence with respect to provisions within the scope of Chapter 2 of title V of the TEU – as provided for in Article 24, paragraph 1, TEU and Article 275, paragraph 1, TFEU – contemplated an important exception. Under Article 275, paragraph 2, TFEU,[11] the EU judicature may "rule in proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union". This provision shows that the masters of the Treaties were willing to recognise a limited form of judicial oversight in this area. The rationale was "to offer legal safeguards to natural and legal persons, as opposed to countries".[12] Individuals affected by sanctions can not only impugn the regulation adopted on the basis of Article 215 TFEU, but they may also dispute CFSP decisions instituting restrictive measures.

Article 275, paragraph 2, TFEU did not specify whether the judicial oversight over the sanctions could be carried out only in the context of an annulment action or if this oversight could also be carried out in a preliminary ruling procedure on the validity of these measures. This issue was not

11 The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the Common Foreign and Security Policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

12 C. Eckes, "EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions", *Common Market Law Review* 51, no. 3 (2013), 869, at 882.

clarified until 2017 with the *Rosneft* ruling,[13] which concerns a number of prohibitions or restrictions adopted by the EU against the Russian Federation in the context of the conflict with Ukraine.[14] In this ruling, the scope of the exceptions laid down by Article 275, paragraph 2, TFEU to the EU Court of Justice's lack of jurisdiction, with respect to the provisions of the CFSP, is defined for the first time. The mentioned judgment was delivered shortly after those in the *Elitaliana*[15] and *H*[16] cases, and it fills an important gap in the case law of the Court of Justice.[17] As result of the three rulings, the exceptions to the Court of Justice's lack of jurisdiction, as far as the CFSP is concerned, should be interpreted in a restrictive manner. In particular, in *Rosneft,* such an interpretation is anchored to the respect of the general principle of the right to effective judicial protection and Article 47 of the Charter of Fundamental Rights.

In addition, the position is taken that, to the extent to which the Court of Justice has competence to rule on the legality of restrictive measures, it is necessary that the control on the validity of the sanctions is carried out by the EU judicature, and not by national courts, for the same reasons mentioned in *Foto-Frost*.[18] The EU judiciary provides private parties with the right to question the validity of a CFSP decision in the framework of a preliminary ruling, thus providing an additional window of opportunity for them to contest these measures beyond the annulment action.[19] Certainly,

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13 Judgment of 28 March 2017, *Rosneft Oil Company*, C-72/15, EU:C:2017:236.

14 R. J. Neuwirth, A. Svetlicinii, "The Economic Sanctions over the Ukraine Conflict and the WTO: 'Catch-XXI' and the Revival of the Debate on Security Exceptions", *Journal of World Trade* 49, no. 5 (2015), 891.

15 Judgment of 12 November 2015, *Elitaliana* v *Eulex Kosovo*, C-439/13 P, EU:C:2015:753.

16 Judgment of 19 July 2016, *H.* v *Council of the European Union,* C-455/14 P, EU:C:2016:569.

17 As noted in Opinion 2/13, until 2015 the Court had not had the opportunity to "define the extent to which its jurisdiction was limited in CFSP matters", see Opinion of 18 December 2014, 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, para 251.

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

19 For positions favourable to this interpretation of Article 275, paragraph 2, TFEU, see C. Hillion, "A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy", in M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations Law Constitutional Challenges* (Oxford: Hart, 2014), 47.

as a result of the *TWD* ruling,[20] natural and legal persons, whose legal standing to challenge CFSP decisions is uncontested, should first challenge these measures in an annulment action (as Rosneft did), within the time limit laid down by Article 263 TFEU; otherwise, the action could be declared inadmissible. However, apart from this procedural rule that could exceptionally lead to the inadmissibility of the preliminary ruling procedure,[21] private parties' right of access to justice is strengthened as a result of *Rosneft*.

An ambiguity remains as to whether judicial oversight stretches to include the competence to interpret a CFSP decision and hear an action in damages, under Article 340 TFUE. It is submitted that, as the primary law currently stands, it is possible to argue that the competence to interpret the provisions of a CFSP decision is included in terms of ruling on its validity; in contrast, it is more difficult to argue that extra-contractual responsibility is embedded in Article 275, paragraph 2, TFEU.

The question may be raised as to whether or not natural and legal persons could have access to justice before the European Court of Human Rights (ECtHR) in case the validity of a restrictive measure is not questioned by a national court in the framework of a preliminary ruling procedure. The answer is positive, as may be inferred from the *Al-Dulimi* ruling of 2016.[22] In this judgment of the Grand Chamber of the ECtHR, Switzer-

20 Judgment of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90.

21 However, in a recent case, Judgment of 14 March 2017, *A and others*, C-158/14, EU:C:2017:202, the Court recognised that: "A request for a preliminary ruling concerning the validity of an act of the European Union can be dismissed only in the event that, although the action for annulment of an act of the European Union would unquestionably have been admissible, the natural or legal person capable of bringing such an action abstained from doing so within the prescribed period and is pleading the unlawfulness of that act in national proceedings in order to encourage the national court to submit a request for a preliminary ruling to the Court of Justice concerning the validity of that act, thereby circumventing the fact that that act is final as against him once the time limit for his bringing an action has expired" (para 70).

22 ECtHR, *Al-Dulimi and Montana Management Inc.* v *Switzerland*, Appl. N. 5809/08, Judgment of 21 June 2016. For insightful comments on Al-Dulimi and also on the inconsistencies on the ECtHR's case law on access to justice, see A. Peters, The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber Al-Dulimi, *EJIL:Talk!,* 30 June 2016, www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi.

land was held to violate the right of access to a court since its judicial authorities had refused to review the merit of the national measure confiscating Mr Al Dulimi's property, done in order to comply with a UN Security Council (UNSC) resolution of 2003. The view of the ECtHR was that the domestic court should have carried out judicial review for the purpose of avoiding arbitrary designations by the UNSC.[23] It is submitted that the legal avenues offered to individuals wishing to challenge restrictive measures are therefore strengthened as a result of the two rulings, and that the roles of the Court of Justice and the ECtHR are complementary in providing human rights scrutiny. Indeed, in case an EU domestic court does not question the validity of a CFSP decision and implements the UNSC resolution at the origin of the sanction, the victim of a possible breach of a right protected by the ECHR may turn to the ECtHR. It should be noted that, from the perspective of an individual affected by a CFSP decision setting up restrictive measures, implementing a UNSC resolution, in an EU Member State, it is preferable that a national court raises a preliminary ruling procedure. Indeed, the rule on the previous exhaustion of domestic

23 In this ruling, Switzerland was found to breach Article 6, paragraph 1, of the ECHR since, in 2008, the Swiss Federal court refused to examine the merit of the action brought by a number of former officials of the Iraq government against the confiscation of their properties, enacted by Switzerland to implement a UNSC Resolution of 2003. The reason leading the domestic court to take such a decision was that, under Art. 103 of the UN Charter, the obligations deriving from the latter Treaty prevail over those stemming from other sources of international law, except for the *jus cogens*. In addition, the UNSC resolution at stake did not leave any degree of flexibility to national authorities. The ECtHR excluded that there was a conflict of obligations between the UN Charter and the ECHR. There was no need to apply the equivalent protection test. The examination of the text of the UNSC resolution leads to conclusion that: '[...] where a [UNSC] resolution [...], does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided' (para 146). The Court went on to state that: 'Any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Article 6 of the Convention.' See, for a comment, V. P. Tzevelekos, "The Al-Dulimi Case before the Grand Chamber of the European Court of Human Rights: Business as Usual? Test of Equivalent Protection, (Constitutional) Hierarchy and Systemic Integration", *Questions of International Law* (2017), 5.

remedies, applicable in context of the ECHR,[24] will inevitably delay the judgment of the ECtHR, whereas, in the EU, as a result of the *Rosneft* ruling, all national courts may raise a question on the validity of CFSP decisions instituting restrictive measures, and they are likely to receive a relatively speedy answer.[25]

Finally, it may be wondered whether or not the interpretation of Article 275, paragraph 2, TFEU provides for the widest form of access to justice for natural/legal persons and other non-state entities targeted by sanctions. The answer is negative as far as non-state entities blacklisted by a third country sanction regime are concerned.[26] Indeed, leaving aside that the notion of "restrictive measures" was interpreted narrowly to include only the sanction policy,[27] in the *Rosneft* ruling, the Court of Justice has substantially confirmed that natural and legal persons may challenge the listing decision resulting from the CFSP decision instituting restrictive measures against natural and legal persons.

However, the provisions of the same act that impose, in a general and abstract manner, on the EU operators to comply with a certain behaviour (prohibition to sell goods/services to the natural and legal persons subject-

24 Article 35, paragraph 1, ECHR.

25 The High Court of Justice of England and Wales referred its questions to the Court of Justice on 9 February 2015, and the Rosneft ruling was released on 28 March 2017. The notion of effective judicial protection entails also the notion of reasonably speedy protection. For this point, see E. Spaventa, "Annotation to Case T-256/07, People's Mojahedin Organization of Iran v. Council", *Common Market Law Review* 46*,* no. 4 (2009), 1239, at 1258.

26 In contrast, suspected terrorists or terrorist groups face fewer legal obstacles in challenging restrictive measures since they are interested in contesting the listing decision, only. And the interpretation of the legal standing requirements of Article 263, paragraph 4, TFEU has never been an obstacle for these addresses of sanctions. Before the Lisbon Treaty entered into force, the Court considered annulment actions against regulations laying down freezing orders admissible to the extent that the applicants were 'individually and directly concerned' by these acts, within the meaning of Article 230 paragraph 4, TEC. This implied that the name of the applicant had merely to be included in the list of addresses.

27 See Opinion of 16 May 2017, 2/13, *supra* note 17, para 252 and the comments made by S. O. Johansen, "Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?", *International & Comparative Law Quarterly* 66, no. 1 (2017), 181, at 200. See also the restrictive interpretation provided by the Court of Justice in the judgement of 19 July 2016, *H*, *supra* note 16, para 36.

ed to the sanctions) fall outside the Court of Justice's competence.[28] Indeed, Article 275, paragraph 2, TFEU empowers the Court to assess the legality of restrictive measures *vis-a-vis* natural and legal persons.[29] Only the listing decision qualifies as a restrictive measure. As a result, in the case in which an economic operator, like Rosneft, falls within the scope *ratione personae* of a third country sanction regime, he will not be able to contest provisions prohibiting or restricting the selling of a certain technology,[30] even if such an operator is one out of three listed in the annexes of the CFSP decision.

This interpretation, that is to say, that the mentioned provisions are of general nature, is frequently used in the case law of the Court of Justice[31] and General Court,[32] and may be criticised. Is Rosneft not a legal person targeted by a CFSP decision, which instituted a restrictive measure *vis-a-vis* natural and legal persons, as provided for by Article 275, paragraph 2, TFEU? Surely this is the case, and the Court has broadly construed "the notion of natural and legal persons" incorporated in Article 275, paragraph 2, TFUE to include emanations of the state;[33] it is not even excluded that third countries could rely on Article 263, paragraph 4, TFUE to contest re-

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28 Both AG Whatelet and the Court of Justice excluded the so-called "oil sector provisions" (Article 4 and 4a) of the CFSP decision contested in *Rosneft*. See the *Rosneft, supra* note 13, paras 95-99 and opinion of AG Wathelet of 31 May 2016, *Rosneft,* EU:C:2016:381, paras 81-85.

29 Judgment of 28 March 2017, *Rosneft, supra* note 13, para 98.

30 Such as Articles 4 and 4a of the CFSP decision at stake in the *Rosneft* case.

31 The Court of Justice holds that it is the individual nature of the restrictive measures that permits access to the Courts of the European Union in its Judgement of 23 April 2013, *Gbagbo and Others* v *Council*, C-478/11P to C-482/11P, EU:C:2013:258, para 57.

32 Judgment of 17 February 2017, *Islamic Republic of Iran Shipping Lines*, T-14/14 and T 87/14, EU:T:2017:102, paras 37-39; Judgement of 4 June 2014, *Sina Bank*, T-67/12, EU:T:2014:348, para 38; and Judgement of 4 June 2014, *Hemmati*, T-68/12, EU:T:2014:349, para 31.

33 For an interpretation that "emanations of third states" qualify as natural and legal persons within the meaning of Article 275, paragraph 2, TFUE, see Judgement of 4 September 2015, *National Iranian Oil Company PTE Ltd (NIOC)*, T-577/12, EU:T:2015:596. This position contrasts with the practice of the ECtHR. Under Article 34 of ECHR, these applicants would not have legal standing to submit an individual application to the ECHR since this right is reserved for persons, non-governmental organizations, or group of individuals, the *ratio legis* being that a state cannot enjoy fundamental rights. However, the Court has not found similar limitations either in the Charter of Fundamental Rights of the European Union or in the

strictive measures. It is a choice of the Court to interpret the notion of "restrictive measures instituted *vis-a-vis* legal and natural persons" as excluding that natural and legal persons may challenge provisions of general nature included in the sanctions. Article 275, paragraph 2, TFEU could be interpreted, in the light of the right to an effective protection, as extending the Court's jurisdiction to all the provisions of the contested restrictive measures, and not only those including Rosneft in the list of addresses of the restrictive measures. The distinction between provisions of a general nature and those of an "individual nature" (the listing decision) within the CFSP decision that instituted restrictive measures is artificial and not anchored to the text of Article 275, paragraph 2, TFEU. Therefore, it should be abandoned.

The Court's interpretation does not sit comfortably alongside another preliminary ruling, released approximately 14 days before *Rosneft*, which made it possible for individuals to challenge the validity of the provisions of a CFSP decision instituting restrictive measures against a designated terrorist group, despite the fact that the appellants in the proceedings were not listed by that act.[34] If third parties can contest the legality of restrictive measures, why, then, can Rosneft, which is listed in the contested decision, not impugn an export prohibition that directly affects its activity?

III. The Court of Justice's Contribution to an Effective Judicial Protection through the Scrutiny of Restrictive Measures

Having clarified that the EU judicature provides a meaningful access to justice to non-state actors whose interests are affected by restrictive measures, let us now turn to the substance of the actions contesting the legality of these measures. In the years that followed the entry into force of the Lisbon Treaty, the *contentieux* on restrictive measures has grown constantly.[35]

Treaties. See Judgment of 28 November 2013, *Council/Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776. See also Judgment of 29 January 2013, *Bank Mellat* v *Council*, T-496/10, EU:T:2013:39, paras 35-46, and Judgment of 5 February 2013, *Bank Saderat Iran* v *Council*, T-494/10, EU:T:2013:59.

34 Judgment of 14 March 2017, *A and others*, *supra* note 21.

35 The number of new cases concerning restrictive measures increased from 21 (in 2010) to 62 (in 2014). See EU Court of Justice, *Annual Report-Judicial Activity*,

It should be emphasised that the Council enjoys a wide margin of discretion in the CFSP; the Court of Justice cannot interfere with the power to decide the scope *ratione personae* of restrictive measures or choose their designation criteria. Yet, the EU judiciary exercises full judicial control over the CFSP acts, whose legality may be questioned before it for breach of the rights enjoyed by individuals in the EU and for a manifest error of assessment by the Council. The Court has greatly enhanced the procedural rights of the targets of restrictive measures, both with respect to sanctions of UN-origin, a context in which the absence of due process rights is conspicuous,[36] and autonomous EU sanctions. Since the Council should respect the right to an effective judicial protection and the right to a defence, it is bound to duly motivate the inclusion in the list of a natural and legal person by providing a summary of the reasons leading to their inclusion in the list, even if the sanction is of UN-origin;[37] this will enable the targets of these measures to make their observations known to the EU institutions and prepare their defence in a possible action for annulment of those measures before the EU Courts. The reasons justifying the decision to list[38] (or re-list) a natural or a legal person or a group of individuals should also not be too vague. The Council must have a set of indicia sufficiently specific, precise, and consistent[39] to establish that there is a sufficient link between the person subject to a measure freezing his funds and the regime being combated; the factual evidence at the basis of listing de-

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2014, 183. See, for comments, V. B. Bertrand, "La particularité du contrôle juridictionnel des mesures restrictives: les considérations impérieuses touchant à la sûreté ou à la conduite des relations internationales de l'Union et de ses Etats membres", *Révue Trimestrielle de Droit Européen* 51, no. 3 (2015), 555.

36 For a recent in-depth study, see D. Hovell, "Due process in the EU United Nations", *American Journal of International Law* 110, no. 1 (2016), 1.

37 In adopting restrictive measures, the Council must respect the same principles, regardless of whether such measures are autonomously by the EU or they are of UN-origin.

38 Judgment of 30 November 2016, *Rotenberg*, T-720/14, EU:T:2016:689.

39 Judgment of 21 April 2015, *Anbouba*, C-605/13 P, EU:C:2015:248, para 53. In *Kadi II*, concerning counter- terrorism measures, the Court of Justice held that the effectiveness of judicial review requires that the listing decision is taken on sufficiently solid factual basis. See Judgment of 12 July 2013, *Commission* v *Kadi*, EU:C:2013:518, C-584/10 P, C-593/10 P, and C-595/10 P, para 119 (hereinafter: *Kadi II*).

cision must not be drawn from internet-based sources.[40] Failure to comply with these principles will lead the Court to annul the contested measures.

It should also be noted that actions in damages are available as a remedy to non-State parties in case they incur a damage as a result of a serious breach of a rule of law intended to confer rights on individuals and there is a causal link between the breach and damage. The addresses of the sanctions are empowered to claim for damages resulting from the adoption of a regulation made necessary by the enactment of a CFSP decision.[41] The Court has also afforded individuals the right to protect their reputation, by laying down the principle that the interest of the applicant in bringing proceedings may continue to exist despite the removal of his name from the list at issue. This case law applies both in relation to restrictive measures designed to counter terrorism[42] and in relation to third-country regimes.[43]

If one looks at the outcome of the *contentieux*, in some cases the annulment of a listing decision by the Court led the Council to de-list the successful applicant;[44] but there are also situations in which the General

40 Judgment of 17 December 2014, *Hamas*, T-400/10, EU:T:2014:1095, para 110. However, the Court has been ready to accept press articles as evidence of the use of Russian weapons by the Eastern Ukrainian separatists. See Judgment of 25 January 2017, *Almaz-Antey*, T-255/15, EU:T:2017:25, paras 147-148.

41 However, as far as action in damages *vis-à-vis* a CFSP decision instituting a restrictive measure are concerned, these are inadmissible. See Judgment of 28 January 2016, *Jannatian*, T-328/14, EU:T:2016:36, para 31, concerning a restriction on admission. This form of restrictive measures are decided through CFSP decisions and can only be challenged at national level.

42 Judgment of 28 May 2013, *Abdulrahim*, C-239/12 P, EU:C:2013:331, paras 71 and 82. See E. Cimiotta, "Rimozione dall'elenco di sospetti terroristi e interesse a proseguire l'azione di annullamento del provvedimento di listing: il caso Abdulrahim davanti alla Corte di giustizia dell'Unione europea", *Diritti umani e diritto internazionale* 8, no. 2 (2014), 451.

43 See, amongst others, Judgment of 4 June 2014, *Ali Sedghi*, T-66/12, EU:T:2014:347, and Judgment of 26 October 2015, *Portnov,* T-290/14, EU:T:2015:806.

44 See, e.g., Council Decision 2014/776/CFSP of 7 November 2014, OJ 2014 L 325/19; Council Implementing Decision 2014/730/CFSP of 20 October 2014, OJ 2014 L 301/36; Council Decision 2015/837/CFSP of 28 May 2015, OJ 2015 L 132; Council Implementing Decision 2016/2000/CFSP of 15 November 2016 implementing Decision 2013/255/CFSP, OJ 2016 L 308/20; Council Decision 2017/83/CFSP of 16 January 2017, OJ 2017 L 12/92.

Court annulled the re-listing of a person.[45] In addition, individuals won an action for failure to act against the Commission[46], and, in one case, the EU was also found responsible for the non-material damage caused to a company in the context of the nuclear proliferation sanction regime against Iran (in *Safa Nicu Sepaham*).[47] Therefore, effective judicial protection is guaranteed to the addresses of sanctions in the EU legal order.

Having this positive picture in mind, we should acknowledge that only in a minority of cases were applicants de-listed as a result of the Court's annulment of their inclusion in the list. Restrictive measures have never been considered to be incompatible with the right to property or to carry out an economic activity since the restrictions of these rights were justified by the primary importance of maintaining international peace and security.[48] Recently, an action for annulment, introduced by a Russian journalist, claiming that his inclusion in the blacklist breached the right to freedom of expression, was rejected.[49] In addition, most of the cases concerning actions in damages failed.[50]

It is true that a substantial number of actions challenging the legality of restrictive measures were fully (or partially) upheld by the Court if one looks only at those considered admissible, especially in 2014 and 2015.[51] However, in many cases, the Council better motivated inscription in the list[52] or provided additional evidence rather than de-listing the applicant; in others, it has reacted by extending the scope *ratione personae* of the

45 See, e.g., judgement of 24 May 2016, *Good Luck Shipping*, EU:T:2016:308; Judgement of 18 October 2016, *Sina Bank,* T-418/14, EU:T:2016:619.

46 Judgment of 21 March 2014, *Yusef,* T-306/10, EU:T:2014:141.

47 Judgment of 25 November 2014, *Safa Nicu Sepahan Co.*, T-384/11, EU:T:2014:986.

48 Judgment of 24 October 2009, *Bank Melli Iran*, T-390/08, EU:T:2009:401, para 71.

49 Judgment of 15 June 2017, *Kiselev*, T-262/15, EU:T:2017:392.

50 M. Messina, "Il controllo giurisdizionale delle misure restrittive antiterrorismo e il risarcimento del danno da "listing" nel diritto dell'Unione europea", *Diritto dell'Unione europea*, no. 3 (2016), 605, at 631.

51 S. Poli, *supra* note 3, 174-175.

52 For example, in 2017, Mr Rotenberg, a businessman in Mr Putin's close circle, was re-listed after his first listing decision had been partially annulled by the General Court. See Judgment of 30 November 2016, *Rotenberg*, *supra* note 38.

CFSP decision,[53] so as to make possible the listing of the person/entity who had won the annulment action. Indeed, "the restrictive measures adopted both by the [UN] Security Council and by the EU are progressive and justified by the lack of success of the measures adopted previously.[54]" The decision to re-list has been challenged in subsequent actions, but it has often been rejected by the General Court[55] or on appeal.[56]

The outcome of the case law can be explained by acknowledging that the Court of Justice must ensure that the law is respected, but, at the same time, it is also bound to interpret the Treaty without jeopardising the Council's power to act effectively in the sphere of the CFSP. The latter obligation derives from Article 13, paragraph 2, TEU, which imposes on all institutions to loyally cooperate with each other. The Court has also interpreted the provisions of CFSP decisions contested by individuals in such a way as to preserve the effectiveness[57] of the sanction and underlined that the importance of the objectives pursued by restrictive measures is such as to justify that operators, who are not responsible for the breach-

53 This is Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions, as amended by Council Decision 2014/659/CFSP of 8 September 2014, OJ 2014 L 271/54.

54 Judgment of 28 November 2013, *Council/Manufacturing Support & Procurement Kala Naft*, *supra* note 33, para 126; Judgment of 5 April 2017, *Sharif University of Technology*, C-385/16 P, EU:C:2017, 258, para 56.

55 See Judgment of 14 March 2017, *Bank Tejerat*, T-346/15, EU:T:2017:164; Judgment of 17 February 2017, *Islamic Republic of Iran Shipping Lines*, joined cases T-14/14 and T-87/14, EU:T:2017:102; Judgment of 30 November 2016, *Export development bank of Iran*, T-89/14, EU:T:2016:693; Judgment of 30 November 2016, *Bank Refah Kargaran*, T-65/14, EU:T:2016:692; Judgment of 26 October 2016, *Hamcho and Hamcho International*, T-153/15, EU:T:2016:630; Judgment of 26 October 2016, *Jaber*, T-154/15, EU:T:2016:629; Judgment of 26 October 2016, *Kaddour*, T-155/15, EU:T:2016:628.

56 Judgment of 7 April 2016, *Central Bank of Iran*, C-266/15 P, EU:C:2016:208; Judgment of 1 March 2016, *National Iranian Oil Company*, C-440/14 P, EU:C:2016:128. See also appeals brought by the Council against the General Court's decision annulling the listing decision in Judgment of 26 July 2016, *Council* v. *Hamas*, C-79/15 P, EU:C:2017:584; Judgment of 26 July 2016, *Council* v. *LTTE*, C-599/14 P, EU:C:2017:583.

57 Judgment of 14 April 2016, *Mehdi Ben Ali*, T-200/14, EU:T:2016:216, para 133; Judgment of 27 February 2014, *Ezz*, T-256/11, EU:T:2014:93, para 66.

es of their countries, may suffer negative consequences as a result of the application of these measures.[58]

However, an assessment of the Court of Justice's case law in the area of restrictive measures cannot be strictly based on the number of de-listing decisions resulting from successful annulment actions. The EU judiciary cannot do more than impose on the Council to respect procedural standards. When assessing the merit of an action against a restrictive measure, the Court's task is merely to check that the Council has not acted in an arbitrary manner.[59]

IV. Recent Developments in the Court of Justice's Case Law: A Decline in the Level of Judicial Protection?

Having highlighted the strengths and weaknesses of the case law on restrictive measures by taking the perspective of natural and legal persons subject to them, it is necessary to dwell on two recent developments,

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58 Judgment of 18 February 2016, *Council* v *Bank Mellat*, C-176/13, EU:C:2016:96, para 204.

59 A similar standard of review was recognised by the European Court of Human Rights as the one prescribed by Article 6, paragraph 1, of the ECHR on national authorities of State parties to the ECHR. In the *Al Dulimi* ruling, Switzerland was found to breach the mention provision of the ECHR since, in 2008, the Swiss Federal court refused to examine the merit of the action brought by a number of former officials of the Iraq government against the confiscation of their properties, enacted by Switzerland to implement a UNSC Resolution of 2003. The view of the Court was that the domestic court should have carried out judicial review for the purpose of avoiding arbitrary designations by the UNSC. The reasons leading the domestic court to take such a decision was that, under Article 103 of the UN Charter, the obligations deriving from the latter Treaty prevail over other those stemming from sources of international law, except for the *jus cogens*. In addition, the UNSC resolution at stake did not leave any degree of flexibility to national authorities. The ECtHR excluded that there was a conflict of obligations between the UN Charter and the ECHR. The position was taken that: "[...] where a [UNSC] resolution [...], does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided". (para 146). The Court went on to state that: "Any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Article 6 of the Convention".

which could decrease the robustness of judicial protection afforded to natural and legal persons targeted by restrictive measures.

The first development concerns the standard of proof for including a natural or legal person on a blacklist. It is not clear whether or not the General Court has lowered the standard of proof required to list a person involved in terrorist activities with respect to that applicable in *Kadi* imposing on the Council to have a sufficiently solid factual basis from which to insert the name of a natural/legal person in the Council decisions instituting restrictive measures.[60] In *Al Gabra*,[61] the General Court admitted that a person could be listed when there are "reasonable grounds for suspicion", provided that those grounds are supported by sufficient information or evidence.[62] This is the test that was used in the *Youssef*[63] case by the UK.[64] Yet, in a Union founded on the rule of law, the need to effectively fight terrorism must be balanced with respect for fundamental rights, consistently with the well-established jurisprudence of the Court of Justice.

A second development is the approval of new Rules of Procedure governing proceedings before the Courts of the EU, which entered into force in 2016[65]. Articles 105 and 190bis of, respectively, the General Court and the Court of Justice's Rules of Procedure, introduce the so-called "closed material procedure".[66] The latter makes it possible to derogate to the adversarial principles which characterise the proceedings before the Courts in order to preserve the confidentiality of certain information.[67] Article

60 The test that is applied in the case of listing decisions of businessmen associated with third country regimes is different and was clarified in the *Anbouba* (Judgment of 21 April 2015, *supra* note 39). In para 53, the Court of Justice held that "the Council discharges the burden of proof borne by it when it presents to the Courts of the European Union a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the person subject to a measure freezing his funds and the regime being combated".

61 Judgment of 13 December 2016, *Al-Gabra*, T-248/13, EU:T:2016:721.

62 *Id.,* para 117.

63 *Youssef* (appellant) v *Secretary of State for Foreign and Commonwealth Affairs* (respondent) [2016] UKSC 3.

64 House of Lords, EU Committee, *The legality of EU sanctions*, 2017 11.

65 See the chapter by Allan Rosas in this volume.

66 This expression is used for the first time by AG Sharpston in her opinion of 14 July 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09, EU:C:2011:853, para 193. See further on the new security rules of EU Courts the Chapter by Allan Rosas in this volume.

67 Recital n. 9 of the General Court's Rules of Procedure, OJ 2015, L 105/1.

105 of the General Court Rules of Procedure and Article 190 bis of the Court of Justice Rules of Procedure do not specifically apply to the proceedings concerning restrictive measures; however, the Council has invoked EU security or the need to protect its international relations in proceedings concerning the legality of restrictive measures in order to not disclose to the other party the evidence at the basis of some restrictive measures. The new rules imply that the main party (the Council) may provide the information and material[68] supporting the inclusion in the list of natural and legal persons to the Courts without disclosing it to the other party (a natural/legal person included in the list and wishing to challenge it) – in consideration of the need to protect overriding interests related to Member States and EU's security and international relations – and the Courts may use this information in making their decisions.[69] That the Courts need not to disclose certain information to the person who challenges the listing decision was also admitted by the Court of Justice in *Kadi I*[70] and *Kadi II* rulings;[71] the Courts of the EU were given the task of using techniques which accommodate on the one hand, security concerns, and, on the other, the need to guarantee respect of procedural rights. However, under the rules of procedures in force at the time of this judgment, it was not possible for the Court to take material undisclosed to the other party into consideration when assessing the legality of these measures. As a result, in the absence of non-confidential evidence to support restrictive measures, the Council could not prove that these measures were based on solid factual evidence, and its decisions instituting sanctions were annulled.[72]

Under Article 105 of the General Court Rules of Procedure, when the main party in proceedings before the Court intends to base his claims on certain information or material but submits that its communication would

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68 Such evidence may come from the Member States or from other sources.

69 See Article 105 of the General Court's Rules of Procedure and Article 190 bis of the Rules of Procedure of the Court of Justice, OJ 2016 L 217/71. The two provisions entered into force on December 2016. For a comment on Article 190 bis, see S. Poli, "Comment to article 190 bis of the Rules of Procedure of the Court of Justice", in C. Amalfitano, M. Condinanzi, P. Iannuccelli (eds), *Le regole del processo dinanzi al giudice dell'Unione europea* (Giuffré: Milano 2017), 901.

70 Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation*, C-402/05 P and 415/05P, EU:C:2008:461, para 342.

71 Judgment of 12 July 2013, *Kadi II*, *supra* note 39, para 125.

72 See, for example, Judgment of 21 April 2016, *Council* v *Fulmen*, C- 280/12 P, EU:C:2013:775, paras 100-103.

harm the security of the Union or that of one or more of its Member States or the conduct of their international relations, it may apply for confidential treatment of this information. The General Court will examine such information and may decide that it is not confidential (and, as such, can be communicated to the other party)[73] or that such material cannot be disclosed to the concerned party for the overriding reasons mentioned above. In the latter case, the General Court "shall [...] weigh the requirements linked to the right to effective judicial protection, particularly observance of the adversarial principle, against the requirements flowing from the security of the Union or of one or more of its Member States or the conduct of their international relations".[74] The Court may also issue a reasoned order imposing on the party that applied for the confidential treatment to provide "a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof and enabling the other main party, to the greatest extent possible, to make its views known". However, what is important is that the Court may consider that the information and material at its disposal is essential in order for it to rule in the case, and, as a result, the EU judges may, by way of derogation from Article 64 and confining themselves to what is strictly necessary, base their judicial decision on such information or material.[75] The new procedural rules, which also apply in proceedings before the Court of Justice,[76] will enable the Council to gain an advantage in the proceedings concerning restrictive measures. In addition, the confidentiality of the information transferred from the Council or the EU Member States to the EU Courts is now guaranteed by new internal rules adopted by the latter in order to ensure a high level of protection for this material.[77]

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73 The sensitive material and information can be withdrawn by the party that produced it and applied for confidential treatment, under Article 105, paragraph 7. In this case, this material will not be taken into account in the determination of the case. However, the material cannot be withdrawn at any time.

74 Article 105, paragraph 5, of the General Court Rules of Procedure.

75 Article 105, paragraph 8, of the General Court Rules of Procedure.

76 See Article 190 bis of the Court of Justice Rules of Procedure.

77 Decision 2016/2386/EU of the Court of Justice of 20 September 2016 concerning the security rules applicable to information or material produced before the General Court in accordance with Article 105 of its Rules of Procedure, OJ 2016 L 355/5, and Decision 2016/2387/EU of the General Court of 14 September 2016 concerning the security rules applicable to information or material produced in ac-

At the moment, the impact on litigation concerning restrictive measures of the new legal framework is uncertain. Allan Rosas wishes that it will encourage the Council and EU Member States to submit information to the Court[78] so as to give evidence that the listing decision was well founded; however, consideration should be given to the fact that the UK abstained on the adoption of the General Court's Rules of Procedure; in addition, doubts were expressed on whether some Member States would consider the safeguards provided by the new security rules adopted by the Courts as strong enough to protect this information; in other words, would Member States be willing to provide certain confidential information and material to the Court?[79] In the case of a positive answer, it is to be hoped that the latter will be strict in assessing whether or not reliance on the information and material referred to in Article 105 of the Rules of Procedures is relevant for the adjudication of a given case. The application for confidential treatment of this material should be accepted only in exceptional cases, and, wherever possible, the Council should use non-confidential evidence to defend its measures. Indeed, there is nothing similar to the "special advocate procedure" in the EU in order to protect the rights of the targets of restrictive measures, and, therefore, doubts may be raised as to the compatibility of the new rules with the right to a fair hearing.[80] The EU Courts have the difficult task of guaranteeing the full respect of this right.

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cordance with Article 105, paragraph 1 or 2 of the Rules of Procedure, OJ 2016 L 355/18.

78 See A. Rosas, "EU Restrictive Measures against Third States: Value Imperialism, Future Gesture Politics of Judicial Extravaganza", *Diritto dell'Unione europea*, no. 4 (2016), 630, at 650; see also the chapter by Allan Rosas in this volume.

79 House of Lords, *supra* note 64, 19.

80 *Id.*, p. 20.