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# Targeted EU Sanctions and Fundamental Rights

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Aleksi Pursiainen

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## 1. Introduction: Targeted Sanctions

Restrictive measures, commonly referred to as sanctions, have become perhaps the most important, and certainly the most frequently used, foreign and security policy tool of the European Union. Consisting of the partial or complete suspension of economic, financial or other relations with a third country or a non-state actor<sup>1</sup>, sanctions aim to coerce a change in the policy or activities of their targets. At any given time this decade, the EU has had in place around 30 “sanctions regimes”, as a set of sanctions towards a given country (or other target) is known. Out of these, sanctions against the Governments of Russia, Iran and Syria as well as those targeted at international terrorism have commanded the most public attention.

Ever since the world was shocked by reports of catastrophic humanitarian consequences of the international embargo on Iraq in the 1990s, the key trend in international sanctions has been a move away from the complete economic isolation of a given country (an embargo), towards more targeted sanctions, referred to by proponents as “smart sanctions”. The EU has been perhaps the most vocal advocate for and the most eager practitioner of targeted sanctions, and as a matter of policy does not employ complete embargoes against any state.<sup>2</sup>

The toolkit of targeted sanctions consists of asset freezes and travel bans imposed on natural or legal persons<sup>3</sup> and of tailored restrictions placed on

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\*Aleksi Pursiainen is a PhD Candidate in International Law at the University of Helsinki and CEO of the sanctions and export compliance consultancy Solid Plan Consulting Ltd. The author would like to thank the Ministry for Foreign Affairs of Finland for generously funding this research project, the Lauterpacht Centre for International Law, University of Cambridge, for their hospitality and companionship during the project, and Senior Lecturer, Dr Jarna Petman at the University of Helsinki for her support overall. The views expressed in this report are those of the author, and do not necessarily represent the position of any of these fine institutions.

specific sectors of the economy, including arms embargoes, financial restrictions and prohibitions on the import or export of specific types of commodities. The EU aims to design a set of sanctions in manner that directs the negative effects to those considered responsible for the adverse policy and those supporting or benefitting from such a policy as well as the sources for funds and material needed in implementing the policy.<sup>4</sup> Ideally, targeting sanctions correctly will maximize their efficiency in influencing the targets while minimizing unintended negative consequences on those not targeted, including the general population of the targeted State.

However, the advent of smart sanctions has not been without its challenges. The most difficult one to overcome has proven to be the balancing of targeted sanctions and the underlying policy interest with the fundamental rights of targeted persons. Early on, the case law of the EU Courts confirmed that freezing the assets of a private actor in pursuit of an important foreign policy objective is not in itself a disproportionate invasion of that person's fundamental rights, including the right to property.<sup>5</sup> However, the Courts have been equally consistent in pronouncing that the importance of the foreign policy interest does not place the targets outside the protection of EU fundamental rights in general, and in particular the right of a target to effectively challenge these measures in front of the Courts.

Indeed, this balancing act has proven a gargantuan task. The number of individual challenges on restrictive measures in EU Courts runs in the hundreds, and in a considerable number of these cases the targets have succeeded in getting the measures against them annulled. Often the response of the EU has been to reimpose sanctions on the same person, but in a manner supposedly addressing the deficiencies of the earlier measures as exposed by the Court. This melancholy dance of successful challenges in Court and incremental improvements by the Council has now been going on for nearly two decades.

Yet, there is cause for real optimism. Recent case law from the EU appeals court, the Court of Justice, suggests that the incremental improvements made by the Council to its sanctions processes have finally been able to adequately address many of the deficiencies identified by the Courts. However, while the Council's record has significantly improved, its success rate is far from perfect. Given the severe hardship and restrictions on fundamental rights that asset freezes impose on their targets, it is imperative that the Council ensures that its practice in imposing restrictive measures on any person is compatible with the fundamental rights recognized in its Founding Treaties.

Based on a comprehensive analysis of EU case law and relevant literature,

the following report will describe in the clearest possible terms the requirements EU Courts place on targeted sanctions for them to be consistent with EU fundamental rights. Building on this analysis, the report also offer some practical solutions which would help ensure future practice of the Council complies with these requirements.

## **2. Fundamental Rights and Targeted Sanctions: EU Case Law**

### **2.1. Fundamental Rights Across EU Sanctions Regimes**

The Court of Justice of the European Union<sup>6</sup> has profoundly influenced the development of procedural rights of persons targeted by EU sanctions. Ever since the early 2010s the Courts have been required to take an increasingly visible role, as more and more persons targeted by sanctions have sought annulment of these measures from the Court. The Council initially appeared unable to adapt its processes with the case law and the standards developed by the Courts; as the number of judgements kept soaring, the Council found itself losing most the cases.<sup>7</sup>

A parallel development saw the Courts' focus shift from counter-terrorism sanctions to sanctions imposed against third States: while almost all the initial court cases concerned counter-terrorism, the clear majority now relates to third country sanctions. An important side effect of this development is that the Courts are today mostly faced with cases relating the EU's autonomous sanctions, i.e. sanctions whose targets the EU has chosen itself, rather than sanctions where the Council is merely implementing list of targets identified by the UN Security Council.

In fact, there are three distinct types of targeted sanctions imposed by the EU. Firstly, the EU implements UN sanctions, such as those against al Qaida, through EU law. Here, EU institutions do not have any real discretion on the choice of the targets; the UN lists are implemented as they are. Secondly, the EU implements a counter-terrorism sanction regime where the targets are proposed to the EU Council by individual Member States.<sup>8</sup> The targets are persons who are subject to terrorism related investigations or proceedings in a Member State or a third country. While the decision whether to add the person to the EU's sanctions list is made by the Council, the primary responsibility for the measure, including the soundness of its factual basis, resides at the State level.<sup>9</sup> If the target successfully challenges the underlying national measure, the Council is required to remove the EU level measure.

Finally, there are autonomous third country sanctions of the EU, such as those imposed against the Assad regime in Syria and those imposed on Russia, where the EU Council independently decides who to target. In this context, the role of Member States and the European External Action Service is to make proposals and to feed into the Council's decision making process; however, responsibility for the substantial soundness of the designation and the adequacy of the process followed while deciding on it rest entirely with the Council, since there is not external decision (by the UN or a Member State) on which it could rely.

These fundamental differences in the internal structure of the sanctions regimes initially led to a fragmentation of EU case law, where the applicable standards of due process depended heavily on which of the three types of sanctions was being challenged. Case law has since evolved, and after two landmark cases in 2013, *Kadi II*<sup>10</sup> and *Bamba*<sup>11</sup>, most commentators now agree that the applicable standards have been harmonized across the three different types of sanctions regimes.<sup>12</sup> Some differences are bound to remain, however, at least to the practical implementation of these standards, given the structural differences in the regimes.

From an extensive body of case law across these different types of sanctions regimes, we can determine that the EU Courts consistently require that an act of targeting sanctions on any person satisfies certain fundamental requirements that relate to

- (i) the general criteria according to which individual targets are chosen in a given sanctions regime ("designation criteria");
- (ii) the reasons or justification for targeting a specific person ("statement of reasons"); and
- (iii) the evidence supporting that statement of reasons ("supporting evidence").<sup>13</sup>

The Courts have established that they retain the power and the willingness to conduct a full legal review of any individual designation and to annul any listing that does not live up to these standards.

In the following sections, each of the three elements will be analyzed in order to describe in the clearest possible terms what is required for an in-

dividual designation to survive a challenge in Court; in other words, what is required from the Council to ensure that it is abiding by its obligation to protect the fundamental rights of those affected by its decisions. A further section will be devoted to examining situations where the Council may be held liable to compensate damages caused to persons who have been unlawfully targeted by sanctions. The concluding section will summarize these requirements and provide practical suggestions for their application in the Council's decision-making process.

## **2.2. Designation Criteria**

Restrictive measures are adopted under the Union's Common Foreign and Security Policy (CFSP).<sup>14</sup> As such, the purpose of the sanctions has to be linked to the promotion of the Union's CFSP objectives as laid down in the Treaty on European Union, including "safeguarding its values, fundamental interests, security, independence and integrity", "consolidating and supporting democracy, the rule of law, human rights and the principles of international law" and "preserving peace, preventing conflicts and strengthening international security".<sup>15</sup>

The EU's activities under CFSP are generally beyond the competence of the EU Courts review.<sup>16</sup> This includes, in principle, also any decision by the Council to impose restrictive measures against a third country. For instance, the Court could not be called upon to rule on whether the Council has appropriately categorized the policies or activities of a third State as constituting a threat the EU's foreign policy goals and interests as enumerated in the Treaties, nor whether the ban on trade in certain commodities would be an appropriate means of applying pressure on the Government of that State.<sup>17</sup>

Importantly, however, the EU Treaties specifically provide that the Courts have jurisdiction to review "the legality of decisions providing for restrictive measures against natural or legal persons".<sup>18</sup> As the Intergovernmental Conference which adopted the Treaty of Lisbon specifically declared, enabling an effective legal review requires that the Council's choice of which persons to target is "based on clear and distinct criteria" which are "tailored to the specifics of each restrictive measure".<sup>19</sup> To satisfy this commitment, whenever the Council decides to impose asset freezes on any persons, it has to specify in the relevant legal act the criteria by which the targets of these sanctions are selected. These "designation criteria" must be linked to the stated purpose of the restrictive measures in question; in other words, the Council must explain why targeting members of specific categories of

persons will help the Union achieve its foreign policy goal.

The Council has considerably wide discretion to make such determinations. Indeed, the Court has stated that only if “the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue” would it affect the legality of the measure<sup>20</sup> and that this broad discretion specifically applies to “[defining the] general criteria - - for the purpose of applying restrictive measures [on certain categories of persons]”<sup>21</sup>. The discretion, however, is not unlimited. The Courts retain the competence to review the designation criteria to determine that they, in themselves, do not violate the fundamental rights of those how have been targeted. The Courts have suggested this could be the case, for instance, where the criteria are so poorly defined that they would be inconsistent with the principle of legal certainty or so broad as to violate the principle of proportionality.<sup>22</sup>

In the context of restrictive measures adopted in reaction to alleged misappropriation of public funds by former Government officials<sup>23</sup>, the General Court has noted that while it may be appropriate to impose asset freezes on such officials, “it cannot be accepted that any act classifiable as misappropriation of public funds, committed in a third country, justifies European Union action - - using the powers of the Union under the CFSP”.<sup>24</sup> The General Court goes on to conclude that in order for such sanctions to be compatible with the EU legal order, the underlying acts of misappropriation must be such that, taken in their context, they are capable of undermining the rule of law and trust in public institutions in the targeted country.

There are no instances in the case law of the EU judiciary in which either of the Courts would have considered a designation criterion to be illegal in abstract. Nevertheless, the Council should be aware of the signals from the Courts that they do not consider the review of designation criteria beyond their powers. It seems safe to assume that the likelihood of a successful challenge on the legality of designation criteria increases in cases where sanctions have been imposed not in reaction to “traditional” and grave threats to key security interests of the Union, such as proliferation of nuclear weapons or violations of territorial integrity of neighboring states, but when they have been adopted as a response to less direct threats, such as the misappropriation of funds of third countries, where alternative means might be available for the same purpose (such as judicial co-operation).

Moreover, there are circumstances in which the Courts would likely be tempted to review designation criteria also in the more traditional CFSP context. Specifically, this could be the case were the Courts to suspect that the Council attempts to bypass due process requirements by laying down

ambitiously broad designation criteria. For instance, in the context of sanctions against Iran, the Council has since 2011 been able to impose sanctions on anyone identified as a “senior member of [Islamic Revolutionary Guard Corps]”<sup>25</sup>. Given the IRGC’s role in implementing the Iranian policies which caused the sanctions to be imposed, it seems perfectly reasonable (and certainly not “manifestly inappropriate”) to target those responsible for the IRGC’s actions, i.e. its senior leaders. However, in 2012, the EU amended this particular criterion to its current formulation, “being a member of the [IRGC]” – that is to say, the Council did away with the requirement of seniority.<sup>26</sup> According to open-source information, the ICRG has more than 100,000 members.<sup>27</sup> It seems plausible that, if requested, the Courts would feel pressure to assess whether targeting sanctions on a low-level member of such a vast organization would be a justified use of the Union’s CFSP powers.<sup>28</sup> The same would be true for any other similarly broad criterion.

A further possible challenge could relate to the extensive use of so called risk-based designation criteria. Under such a criterion, targeting a specific person would not be based on their prior or ongoing actions or status, but merely on the serious risk of future reprehensible activities. The Court of Justice in *Kala Naft* seemed to accept that a designation based on risk only can be compatible with fundamental rights.<sup>29</sup> In the specific context of *Kala Naft*, the notion does not appear troubling: *Kala Naft* was a company dealing in equipment that could be used in nuclear proliferation and a known procurement company for a company targeted by sanctions. It therefore seemed reasonable to accept that it posed a real threat to the Union’s security interests, even in the absence of a specific accusation of a wrongful act.

However, if risk-based designation criteria were to be accepted widely in the context of third country sanctions, the fundamental rights concerns would surely become evident. Clearly, such criteria could lead to situations where a person is required to disprove speculative claims relating to things that have not happened. Furthermore, such criteria would also make it difficult for targets and potential targets to understand what actions will lead to sanctions being imposed or lifted, which in turn would weaken the ability of sanctions to coerce change in their targets behavior.<sup>30</sup>

### 2.3. Statements of Reasons

Under established case law, the Council is required to provide a justification for targeting sanctions on any person. In practice, the Council does this by including a “statement of reasons” in the annex of the appropriate legal act and explaining there why the Council has considered it necessary to freeze his funds in pursuit of the Union’s CFSP objectives.

In hindsight, it may seem peculiar that this basic requirement has even been in dispute. However, in the OMPI case, for instance, the Council argued before the Court that an organization placed on the EU terrorist sanctions list should be able to infer from that fact the reasons for it having been targeted – i.e., that it is a terrorist organization because it is on a list of terrorist organizations. The Court of First Instance dismissed the argument, stating that the Council must provide a justification which “indicate[s] the actual and specific reasons” for the targeting the entity and that “a general, stereotypical formulation, modelled on [the designation criteria]” would not satisfy this requirement.<sup>31</sup>

Since then, several persons targeted by EU sanctions have challenged their designation on the basis that the statement of reasons provided by the Council has not met the requisite standard. This has allowed the Courts to refine their position, and finally in *Kadi II* lay down the current standard: “[T]he obligation to state reasons - - entails in all circumstances - - that that statement of reasons identifies the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures”.<sup>32</sup> The test employed by the court to determine whether the standard has been met is to assess whether the statement is adequate for, firstly, the targeted person to understand the reasons to the extent that he is in a position to either challenge the factual correctness of the accusation or its relevance (in relation to the designation criteria) and, secondly, for the Courts to review the legality of the measure if invited to do so.<sup>33</sup> This also ties the statement of reasons to the sanctions’ presumed coercive effect: only if a targeted persons knows why it is being targeted will it understand what it needs to do the get the sanctions lifted.

The 2016 *Bank Saderat Iran* case provides a typical example of the Court applying the requirement that the statement must provide enough information for the designated person to be able to “refute the factual correctness” of the statement. In this case, the Court of Justice ruled that stating that an Iranian bank “has provided financial services for entities procuring on behalf of Iran’s nuclear and ballistic missile programmes, including entities [that are subject to UN sanctions]” did not satisfy the test, since the bank was

unable to determine which services it was alleged to have provided and to whom.<sup>34</sup> Without these details, the bank would not be able to provide exculpatory evidence to the Council or to the Court (nor to refrain from providing these types of services in the future).

On the other hand, the more concretely the Council manages to link the designated person to a specific activity at a specified time, the more likely the statement will be considered individual, specific and concrete.<sup>35</sup> Similarly, a reference to the status of a given person, such as being “a cabinet minister” of a repressive Government will usually pass this test. In all these situations, designated person, having been informed of the relevant details, will be in a position to effectively refute factual correctness the allegation.

As to the ability of the designated person to “refute the relevance” of the accusation, the Court seems to allow the Council more discretion and assess this question in the wider context of why and in which circumstances the restrictive measures were adopted. For instance, in *Bamba*, the Court of Justice stated that “the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in circumstances known to that person which enable him to understand the scope of the measure concerning him”.<sup>36</sup> On this basis, the Court refused to accept that a newspaper editor could claim that she was unaware of the security situation in her country or the widespread allegations that her newspaper’s provocative editorial line was partly to blame for ongoing violence. With this information, taken together with the Council’s statement of reasons<sup>37</sup>, *Bamba* was held to be “in a position effectively to dispute the merits of the contested acts [as] it was possible for her, if appropriate, to dispute the truth of the claims made in the contested acts - - or - - the relevance of all or any of those facts or their classification”<sup>38</sup>. Furthermore, in *Anbouba*, the Court allowed the Council to rely on the presumption that the designated person, a leading Syrian businessman, could not have achieved and maintained this status without supporting or at least benefiting from the Syrian Government (which was the relevant designation criterion in this case).<sup>39</sup> The statement of reasons was clear enough for the target to understand that the Council was relying on such a presumption, and therefore enabled the target to provide evidence or information indicating that presumption to be incorrect, i.e. that his success in business was not a relevant factor in determining whether he supported the Assad regime.

Interestingly, the statement of reasons provided does not have to meet the “the individual, specific and concrete” test in its entirety. If the Council has decided to provide several different reasons why it considers a specific person must be targeted, the Courts will only require that “at the very least, one of the reasons mentioned is sufficiently detailed and specific” even if “the

same cannot be said of other such reasons".<sup>40</sup> The Court regularly employs this approach, reviewing a set of justifications provided by the Council in each statement of reasons in search of at least one adequately concrete claim. If at least one of these adequately concrete claims is supported by adequate evidence, the Court will side with the Council (see next section).

There is obvious merit to this approach. If a measure is justified by some valid reason stated by the Council, the fact that the Council has additionally referred to an irrelevant one would not seem to diminish the overall justification of its action. However, the weakness in this approach is that it seems to encourage the Council to make numerous and perhaps even speculative claims against a targeted person in the hope that this increases the likelihood of at least one justification surviving scrutiny by the Court. Lengthy, speculative and unspecified allegations against a person will serve to damage their reputation and link them to misdeeds and atrocities with which they may not have any actual association. Furthermore, the presumed ability of sanctions to coerce change in the behavior of their targets will be in jeopardy if the target is faced only with a flood of unspecified accusations rather than individual, specific and concrete reasoning. Therefore, the Council would be well advised to use this wide discretion with considerable self-restraint.

## **2.4. Supporting Evidence**

The preceding section examined the requirement that for each person it targets, the Council must provide individual, specific and concrete reasons that justify imposing the measures. In addition to this, established case law also requires the Council to be able to provide sufficient evidence to support the factual correctness of the statement it makes. The Court will uphold a designation only if it finds at least one reason provided by the Council that is (1) individual, specific and concrete, (2) sufficient in itself to justify the designation and (3) substantiated by adequate evidence.<sup>41</sup>

The Court has not specified clearly what standard of proof it will employ in assessing whether a statement of reasons has been adequately substantiated. The Court has only stated that the evidence provided by the Council must be such that it enables the Court to review whether "the decision - - is taken on a sufficiently solid factual basis".<sup>42</sup> Furthermore, the Court has explained that when assessing the evidence it will "determine whether the facts alleged are made out in the light of that information or evidence and assess the probative value of that information or evidence in the circum-

stances of the particular case and in the light of any observations submitted in relation to them by, among others, the person concerned".<sup>43</sup>

However, it seems certain that "sufficiently solid factual basis" is something much less demanding than a "beyond reasonable doubt" standard employed in criminal law. Firstly, the General Court continues to emphasize that that restrictive measures are not imposed on persons as punishment for any violation of (criminal) law, nor do they even "imply any accusation of a criminal nature", and therefore the targets are not entitled to the full protections related to the presumption of innocence.<sup>44</sup> The Court of Justice has acknowledged as much by confirming that restrictive measures are of a "preventative nature"<sup>45</sup> and that the measures may be based on "suspicion of involvement" in activities subject to sanctions, assuming the suspicions are adequately well justified<sup>46</sup>. In any event, a "beyond reasonable doubt" standard would be unrealistically strict, given the security and foreign policy context in which sanctions are imposed and the difficulties in obtaining information from third countries engaged in activities such as proliferation of weapons of mass destruction or internal repression.

On the other hand, the Court has made it clear that will not accept a total absence of supporting evidence in case the alleged facts are challenged by the person concerned.<sup>47</sup> If the targeted person denies the factual accuracy of a reason provided by the Council, the Council has to provide additional information or evidence in support, or the Court will rule that the reason does "not constitute sufficient basis to justify the adoption" of measures against that person<sup>48</sup> and, in the absence of any other sufficiently justified reason, annul the measures.

It seems, then, that it is possible to confidently deduce from the case law of the Court only that the standard of proof applicable to sanctions cases is something less than "beyond reasonable doubt" and something more than no evidence whatsoever. This is unsatisfactory. Even accepting the non-criminal nature of restrictive measures, and the consequent applicability of a lower standard of proof, it does not seem consistent with the principle of legal certainty that the Court would hold the Council to an undefined standard of proof. One feasible solution would be to explicitly develop and consistently apply a standard of "reasonable grounds", such as the one employed to notable success by the Ombudsperson of the UN Al Qaeda Sanctions Committee, requiring that "there is sufficient information to provide a reasonable and credible basis for the listing".<sup>49</sup> This would also correspond to the standard recommended by the Financial Action Task Force (FATF) as the threshold at which its Member States should impose sanctions on specific persons to combat financing of terrorism.<sup>50</sup>

For the Council, the thorniest issue relating to evidence in sanctions cases is the use and disclosure of confidential information. When deciding to impose sanctions in contexts such as counter-terrorism or non-proliferation, often the best and sometimes the only information available to support that decision comes from intelligence or other confidential sources. Disclosing this information to the target of sanctions could have dire consequences for the security of the Union, not to mention the security of individual informants and agents. Moreover, such information is often received from third countries, who for their own security concerns usually only provide such information on the condition that it not be disclosed to anyone. The temptation for the Council to use this information as basis for imposing sanctions, even with the knowledge it can never be disclosed, is understandable.

The Courts, however, have made it clear that the ability of the Council to rely on such information is limited and subject to strict scrutiny by the Courts. In *Kadi II*, the Court ruled that any information considered confidential by the Council would have to be provided to the Court for its assessment. Having reviewed the information, the Court would then determine whether, on balance, the security concerns were serious enough to justify infringing the rights of persons targeted by sanctions by withholding some or all that information from them. If the Court ruled that the evidence should be shared, the Council could still refuse to do so; however, the Court would then disregard that information when ruling on the case. Where the Court would determine that the security concerns did indeed outweigh the rights of the target, the Court would be willing to accept that instead of the evidence itself, a non-confidential summary of it would be provided to the target.<sup>51</sup>

At the time the Court ruled on *Kadi II*, the Rules of Procedure of the General Court allowed the Court to base its judgement solely on information and evidence to which both parties had access. To accommodate the use of confidential information in cases related to restrictive measures, those rules have since been amended on the basis of a proposal of the General Court approved by the Council. As acknowledged by the Council, these changes are “to a large extent based on the case-law of the Court of Justice” in *Kadi II*.<sup>52</sup> According to the amended Rules of Procedure, after following the process outlined above, the Court may now take into account information the target of sanctions has not had access to, if this “is essential in order for it to rule in the case - - and confining itself to what is strictly necessary”. In such a case, the Court must further “take account of the fact that [the target] has not been able to make his views on it known”.<sup>53</sup>

It is too soon to assess whether the amendment, adopted in April 2015, will have an impact on the practice of the Council. However, there is some cause for early skepticism. Some commentators have seen the proposal as going

too far in accommodating the use of confidential information, to the extent that it in some individual cases may entail a disproportionate infringement on due process rights, in particular the principle of equal arms.<sup>54</sup> However, it seems that the graver threat to the practical success of the approach lies not in that it is too restrictive, but that it is not restrictive enough.

Firstly, the process requires that, in all cases, the confidential evidence and information is provided, in full, to the General Court, even if it is eventually withheld from the other party to the proceedings. It seems unlikely that third states will always be willing to accept even this relatively small exception to the general rule that no disclosure of confidential intelligence is allowed outside the receiving agency.

Secondly, it seems difficult to accept that a Member State in possession of the confidential information would provide that directly to the Court, without providing access to it to the full Council, i.e. all other Member States. After all, particularly in the case of autonomous third country sanctions, where the Council is the sole decision-making body, it seems that all its members must at least in principle have access to all information on which the decision is based, even if they are not required by law to make use of that access.<sup>55</sup> This means that even if the other party to the judicial proceedings is eventually denied access to some confidential information, that information has already been shared among 28 States and a number of officials of the Court. At least for highly sensitive information the leaking of which would put lives at jeopardy, such an approach seems prohibitively risky. Of course, the solution may well be workable for some confidential yet less sensitive evidence and information, so in the absence of any relevant case law, is too early to dismiss the innovation entirely.

## **2.5. Damages**

From early on, persons wrongfully targeted by sanctions have also sought compensation from the European Union for damages allegedly caused by the freezing of their assets. Initially, the Courts were reluctant to accept such demands. Under its Treaties, the Union is required to compensate non-contractual damages caused by its institutions “in accordance with the general principles common to the laws of the Member States”.<sup>56</sup> Under established case law, these principles have been interpreted as requiring that anyone claiming damages has to be able to demonstrate the actual damage caused, the causal link of that damage to the actions of the EU institutions, and, finally, that the damage was caused by a sufficiently serious breach of EU law.<sup>57</sup> In early sanctions case law, the Courts found at least one of these

requirements was left unsatisfied by persons seeking damages.<sup>58</sup>

In 2014, all this changed when the General Court for the first time ordered damages to be paid to a person wrongfully targeted in the Safa Nicu case.<sup>59</sup> The Court noted that the Council was unable to provide any substantiating evidence for its statement of reasons (in which it had claimed Safa Nicu to have provided goods to a nuclear facility in Iran)<sup>60</sup>, and that because of this, the Council's actions were clearly unlawful<sup>61</sup>. The Court then went on to assess whether the three criteria were satisfied, and found that they indeed were.

The Court first noted that "an infringement of EU law is sufficiently serious if it has persisted despite - - settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement".<sup>62</sup> According to the Court, case law predating the decision to target Safa Nicu clearly laid down the requirement to substantiate such decisions with adequate evidence.<sup>63</sup> The Court concluded that in such circumstances any "administrative authority, exercising ordinary care and diligence" would have understood that it was required to ensure it had adequate evidence and that therefore the Council had committed a sufficiently serious breach of EU law.<sup>64</sup>

The Court went on to state that being publicly accused by the European Union in its Official Gazette of participation in nuclear proliferation can be enough to cause reputational damage to the person accused.<sup>65</sup> It further noted that third parties had perceivably changed their behavior towards Safa Nicu because of this public accusation,<sup>66</sup> indicating that its reputation had indeed been affected. The General Court awarded Safa Nicu EUR 50,000 as compensation for this immaterial damage, without specifying how it reached that specific amount.<sup>67</sup> (Safa Nicu had claimed for EUR 2,000,000.<sup>68</sup>) Claims for material damages in the amount of several million euros were rejected by the Court, on the grounds Safa Nicu had provided inadequate proof of either having incurred actual losses or that the losses had been caused by sanctions.<sup>69</sup>

If upheld on appeal, the Safa Nicu case sets an ominous precedent for the Council.<sup>70</sup> It clearly establishes that the fundamental rights related requirements arising from the Court's case law are now established clearly enough that a violation of them will carry the risk of liability for damages. While Safa Nicu was unable to prove it had suffered material damage, and the amount awarded was therefore relatively insignificant, other persons targeted by sanctions are likely to take heed and come to Court prepared with more supporting evidence.

### **3. Conclusion: The Way Forward**

Restrictive measures are a powerful foreign and security policy tool. The European Union has time and again relied on sanctions as part of its efforts to address situations in third countries which threaten its fundamental interests, and is very likely to continue doing so. However, the sustainability of its reliance on targeted sanctions will be in doubt if their legitimacy is repeatedly brought into question by Court decisions annulling the measures as incompatible with fundamental rights. Indeed, a decade of apparent inability or unwillingness by the Council to make the necessary reforms led one prominent scholar in 2014 to assert that the Council and the Commission were “knowingly and deliberately continu[ing] to adopt measures that are not in compliance with basic procedural rights” thereby undermining the credibility of the EU as a “Union of law”.<sup>71</sup>

In 2017, the accusation seems harsh, but not unfounded. The record of the Council in defending its decisions has improved considerably as it has adapted its procedures to the demands of the Courts.<sup>72</sup> Efforts to tackle the thorny issue of confidential information seem genuine and have led to an amendment of the Court’s Rules of Procedure, which now at least in principle allow the Court to rely on evidence that is not disclosed to the other party, if this is deemed essential. Still, the Council continues to lose cases<sup>73</sup>, and there is no evidence suggesting any comprehensive review of the hundreds of designations the Council has made through the years, even if it seems hard to avoid the impression that many of these would suffer from the same weaknesses that lead to the annulment of so many similar measures whenever they were challenged. The underlying risks have become even more concrete ever since the General Court accepted that the Council is in some cases liable to compensate persons for damages arising from unlawfully freezing their assets.

While a historical review and update of past measures may not be feasible, the Council can certainly be expected to ensure any new sanctions it imposes are in compliance with fundamental rights, as reflected in the requirements that can now be relatively clearly identified from case law. As described above, these requirements relate to (i) the general criteria according to which individual targets are chosen in a given sanctions regime (“designation criteria”); (ii) the reasons or justification for targeting a specific person (“statement of reasons”); and (iii) the evidence supporting that statement of reasons (“supporting evidence”). Most of the past problems have fallen within the two last categories, but there are warning signs also regarding the first.

The requirements can be summarized as follows:

*Designation criteria.* The decision to impose sanctions on a specific person must be based on the application of clear and distinct criteria which are laid down in the relevant legal act and tailored to the specifics of the restrictive measures, particularly to their objective. The criteria must be defined with adequate precision so that their application can be foreseen with reasonable certainty. Additionally, they should not be so broad as to be applicable to such a wide range of persons that they lose their targeted nature or an acceptable connection to the foreign and security policy objective being pursued. Criteria that allow the imposition of sanction based merely on the risk of future behavior should be used with restraint, as they may be subject to successful challenges in the future.

*Statements of reasons.* The decision to impose sanctions on a specific person must be accompanied in the relevant legal instrument by a statement of reasons, which provides the individual, specific and concrete reasons why that person has been targeted. The statement must include enough information for the person to be able to understand what would be needed to refute the factual correctness or the relevance of the statement. When the statement is based on the activities of the person, the statement is always stronger the more detailed it is in terms of providing information on other persons involved in the activity, the nature of activity and its time and date. Equally, statements based on the status of persons are often strong if that status clearly links them to the designation criteria and ultimately to the activity or policy in reaction to which the sanctions are being imposed. The statement of reasons is not expected to comprehensively describe the context of the targeting decision, as the target is expected to take into account generally known contextual information when assessing the accuracy and relevance of the statement. In case the Council provides multiple reasons for targeting a person, the decision will survive a challenge if at least one of these reasons satisfies the test. For policy reasons, however, the Council should avoid speculatively providing extensive lists of reasons, even if this would appear tempting in order to maximize chances of success.

*Supporting evidence.* The decision to impose sanctions on a specific person must be based on evidence that indicates the decision has been taken on sufficiently solid factual basis. The statements made by the Council do not have to be proven beyond reasonable doubt, but in the absence of any supporting evidence or information, the statement will not be accepted as justification for imposing sanctions.

The sensitivity or confidentiality of underlying information does not justify a refusal to provide it to the Courts. Under recently amended rules, the Courts may within strict limits accept to take into account information that will not be provided to the person challenging the measure. However, the decision to do so and the influence afforded to such information is entirely in the discretion of the Court. So far, there are no examples in the Courts' case law on using this new tool. It seems that the best available option for the Council remains to find justifications that can be supported by publicly available information or by evidence which can be declassified to the necessary extent.

Sanctions are often initially adopted in unforeseeable and dramatic situations which require swift and determined action by the Union for it to defend its interests and to indicate its support to its friends and allies. In such circumstances, the pressure on the Council, the European External Action Service and the Member States to propose, approve and adopt sanctions, including lists of persons targeted, can be intense. This understandably restricts the ability of the Council to collect and assess evidence and to draft extensive, detailed statements of reasons. The Court has accepted this, and as seen the previous sections, is willing to allow considerable flexibility. A decision to target a specific person will survive a challenge in Court as long as one of the reasons is individual, specific and concrete enough for that person to adequately understand it and, if needed, to deny the accusation, and that this statement is substantiated by at least some, albeit so far undefined degree of, evidence or supporting information. This is not an unreasonable requirement, and in any case the Council has little choice but strive to satisfy it regardless of political pressures.

To address the challenge of following these requirements in difficult circumstances, the Council could consider adopting a more structured, standardized process in which to make decisions on targeting specific persons.<sup>74</sup> The Council could require, as a matter of course, that all proposals for new designations, whether they are made by the EEAS or a Member State, are made to the Council in standard format, perhaps in a template developed by the appropriate expert working group of the Council. Such a template could require the proposing entity to indicate how, in its assessment, the proposal satisfies the fundamental requirements as outlined by the Court. This would at least direct the decision-making process to the right direction by focusing the attention of the Member State to these requirements, in addition to the political imperatives, even when working under a tight deadline. Arguably, this might somewhat increase the burden on the proposing entity; even so, it would surely make the overall process more effective, since other Member States would be able to benefit from the structure and initial analysis provided to them.

The Council has made considerable progress in reconciling targeted restrictive measures with fundamental rights. Some challenges remain, and further work is needed. Still, by consistently and coherently applying the standards developed in the case law of the Court and described above, the Council should be able to ensure the clear majority of its decisions comply with fundamental rights and will survive a challenge in court. Ultimately, there is no other way to guarantee the long-term sustainability and legitimacy of the Union's favorite foreign policy instrument.

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<sup>1</sup> Similarly in Cardwell, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions', (2015) 17 Cambridge Yearbook of European Legal Studies, p.294, referring to "measures which aim to restrict the economic and other relationships between states, or between states and the international community (including regional organisations)" which "are used as a means to promote a change in behaviour, as a punishment or a means to isolate a state, or a combination thereof". However, there is no single universally accepted definition; for a discussion on this, see Gazzini and Herlin-Jarnell, 'Restrictive measures adopted by the EU from the standpoint of international and EU law', (2011) 36 European Law Review 6, p.799-800. EU Treaties use terms such as "the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries" and "restrictive measures against natural or legal persons and groups or non-State entities" (see Article 215 of the Treaty on the Functioning of the European Union).

<sup>2</sup> On the evolution of targeted sanctions and the role of the European Union in it, see Portela, 'Are European Union sanctions "targeted"?', (2016) 29 Cambridge Review of International Affairs 3, p. 912.

<sup>3</sup> Below, references to "a person" are to be understood as covering both natural and legal persons, meaning any individual, company, organization or other entity targeted by sanctions

<sup>4</sup> Council of the European Union, 'Basic Principles on the Use of Restrictive Measures (Sanctions)', 10198/1/04 REV 1, 7.7.2014, Annex I, para 6.

<sup>5</sup> Case C-84/95, *Bosphorus v Minister for Transport, Energy and Communications and Others*, ECLI:EU:C:1996:312.

<sup>6</sup> The Court of Justice of the European Union consists of the Court of Justice, the General Court, and the Civil Service Tribunal, the third of which is not of relevance in the present context.

<sup>7</sup> By the end of 2014, in appeals made from the General Court to the Court of Justice, the Court of Justice had ruled in favor of the targeted person in 10 judgements out of 17 (for in cases C-402/05, C-399/06, C-403/06, C-27/09, C-376/10, C-584/10, C-183/12, C-239/12, C-280/12 and C-200/13; against in cases C-266/05, C-548/09, C-380/09, C-539/10, C-417/11, C-478/11 and C-348/12). Since then, the situation has dramatically changed; see note 72 below. Of course, most cases never reach the Court of Justice (there are nearly 200 directly relevant judgements by the General Court and its predecessor the Court of First Instance, and many cases ongoing).

<sup>8</sup> Article 1(4) of Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, OJ 2001 L 344/92, provides that the list of designated persons “shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority”, i.e. a State authority (typically, but not always, an authority of an EU Member State).

<sup>9</sup> See, for instance, Joined Cases T-208 and T-508/11, Liberation Tigers of Tamil Eelam (LTTE) v Council, ECLI:EU:T:2014:885, para 206.

<sup>10</sup> Joined Cases C-584/10, C-593/10 and C-595/10, Commission and other v Yassin Abdullah Kadi, ECLI:EU:C:2013:518 (“Kadi II”)

<sup>11</sup> Case C-417/11, Council of the European Union v. Nadiany Bamba, ECLI:EU:C:2012:718 (“Bamba”).

<sup>12</sup> Wimmer, ‘Individual Sanctions and fundamental rights standards: Bamba’, (2013) 50 Common Market Law Review 4, p.1126; Eckes, ‘EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions’, (2014) 51 Common Market Law Review 3, p.892; Cuyvers, “Give me one good reason”: The unified standard of review for sanctions after Kadi II’, (2014) 51 Common Market Law Review 6, one good reason, p.1768.

<sup>13</sup> For instance, Case C-535/14 P, Vadzim Ipatau v Council, ECLI:EU:C:2015:407, para 39.

<sup>14</sup> Specifically, Article 29 of the Treaty on European Union. Additionally, the Article 75 of the Treaty on the Functioning of the European Union envisages a system that would enable freezing funds in the framework of “the area of freedom, security and justice”; however, that system has not been implemented.

<sup>15</sup> Treaty on European Union, Article 21.

<sup>16</sup> Treaty on the European Union, Article 24(2), and Treaty on the Functioning of the European Union, Article 275(1).

<sup>17</sup> Case C-348/12, Council v Manufacturing Support & Procurement Kala Naft Co., Tehran,

ECLI:EU:C:2013:776, (“Kala Naft”), para 99, and Case C-72/15, Rosneft, ECLI:EU:C:2017:236, (“Rosneft”), para 96-99; see also Eckes (2014), p.880-883.

<sup>18</sup> Treaty on the European Union, Article 24(2), and Treaty on the Functioning of the European Union, Article 275(2). On the scope of the Court’s competence to review such measures, see Rosneft, para 58-93.

<sup>19</sup> Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, Declaration 25.

<sup>20</sup> Kala Naft, para 120.

<sup>21</sup> Case C-630/13, Issam Anbouba v Council, ECLI:EU:C:2015:247, para 42.

<sup>22</sup> See, to that effect, Case T-578/12, National Iranian Oil Company v Council, ECLI:EU:T:2014:678, paragraph 111, (upheld after appeal in Case C-440/14, National Iranian Oil Company v Council, EU:C:2016:128).

<sup>23</sup> Currently in place on Egypt, Tunisia and Ukraine.

<sup>24</sup> Case T-348/14, Yanukovych v Council, ECLI:EU:T:2016:508, para 100.

<sup>25</sup> Council Decision concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, Article 15(1)(b), OJ 2010 L 195/39.

<sup>26</sup> Council Decision 2012/35/CFSP amending Decision 2010/413/CFSP concerning restrictive measures against Iran, OJ 2012 L 19/170, Article 1(6).

<sup>27</sup> For instance Council on Foreign Relations website, <http://www.cfr.org/iran/irans-revolutionary-guards/p14324>, downloaded on February 23rd, 2017.

<sup>28</sup> For criticisms of broad designation criteria, see Eckes (2014), p.888-891 and 903, and Portela (2016), p.8-9.

<sup>29</sup> Kala Naft, para 84. Particularly in the context of counter-terrorism sanctions, the point is often made that sanctions are by nature preventative rather than punitive; see p. 11 of this report and case law cited in note 44 below.

<sup>30</sup> For criticism of risk based designation, see also Eckes (2014), p. 899 and 903.

<sup>31</sup> Case T-228/02, Organisation des Modjahedines du peuple d’Iran v Council, ECLI:EU:T:2006:384, para 83 and 143.

<sup>32</sup> Kadi II, para 116 (emphasis added).

<sup>33</sup> For instance, Case C-176/13, Council v Bank Mellat, ECLI:EU:C:2016:96, para 74, (“Bank Mellat”).

<sup>34</sup> Case C-200/13, Council v Bank Saderat Iran, ECLI:EU:C:2016:284X, para 74.

<sup>35</sup> Kadi II, para 143-149; see also Cuyvers (2014), p.1769-1770.

<sup>36</sup> Bamba, para 54.

<sup>37</sup> The statement of reasons was: “Director of the Cyclone group which publishes the newspaper “Le Temps”: Obstruction of the peace and reconciliation processes through public incitement to hatred and violence and through participation in disinformation campaigns in connection with the 2010 presidential election.” See Bamba, para 20.

<sup>38</sup> Bamba, para 59.

<sup>39</sup> Case C-605/13, Issam Anbouba v Council, ECLI:EU:C:2015:248, para 54.

<sup>40</sup> Kala Naft para 72; Kadi II, para 130.

<sup>41</sup> Kadi II, para 119; see also Cuyvers (2014), p.1776.

<sup>42</sup> Case C-280/12, Council v Fulmen and Fereydoun Mahmoudian, ECLI:EU:C:2013:775, para 64.

<sup>43</sup> Kadi II, para 124

<sup>44</sup> Case T-47/03, Jose Maria Sison v Council, ECLI:EU:T:2007:207, para 101; Case T-592/11, Issam Anbouba v Council, ECLI:EU:T:2013:427, para 40.

<sup>45</sup> Kadi II, para 130.

<sup>46</sup> Kadi II, para 149; see also Cuyvers (2014), p.1770.

<sup>47</sup> Kadi II, para 137

<sup>48</sup> Kadi II, para 159

<sup>49</sup> See sections ‘Approach and Standard’ at the website of the Office of the Ombudsperson of the Security Council’s 1267 Committee, at <https://www.un.org/sc/suborg/en/ombudsperson/approach-and-standard>, downloaded on 28 February 2017.

<sup>50</sup> International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The FATF Standards, February 2012, p. 41.

<sup>51</sup> Kadi II, para 120-129; for third country sanctions, the same was confirmed in Kala Naft, para 65-74.

<sup>52</sup> European Parliament, Parliamentary Questions, E-004981-16, Reply by Council, 14.11.2015.

<sup>53</sup> Rules of Procedure of the General Court, Official Journal of the European Union, 23.4.2015, Volume 58, L 105, p.1; see Article 105.

<sup>54</sup> de Boer, 'Secret evidence and due process rights under EU law: ZZ', (2014) 51 Common Market Law Review 4, p.1252-1258.

<sup>55</sup> Bank Mellat, para 91, and the Opinion of Advocate General in that case, ECLI:EU:C:2015:130, para 93-99.

<sup>56</sup> Treaty on the Functioning of the European Union, Article 340.

<sup>57</sup> Case T-69/00, FIAMM v Council, ECLI:EU:T:2005:449, para 85. See also Gutman, 'The evolution of the action for damages against the European Union and its place in the system of judicial protection', (2011) 48 Common Market Law Review 3, p.710-737.

<sup>58</sup> For instance, Case T-47/03, Jose Maria Sison v Council [2007] ECR II-73, where the Court considered the breach of EU law had been serious enough (para 240), but determined that the applicant had failed to show the causal link or the existence of actual damage (para 243); and Case T-341/07, Jose Maria Sison v Council, [2011] ECR II-7915, where in turn the Court held that the breach of EU law had not been serious enough (para 74).

<sup>59</sup> Case T-384/11, Safa Nicu Sepahan Co. v Council, ECLI:EU:T:2014:986, ("Safa Nicu").

<sup>60</sup> Safa Nicu, para 38.

<sup>61</sup> Safa Nicu, para 49.

<sup>62</sup> Safa Nicu, para 55.

<sup>63</sup> Safa Nicu, para 63-67.

<sup>64</sup> Safa Nicu, para 68-69.

<sup>65</sup> Safa Nicu, para 80 and 83.

<sup>66</sup> Safa Nicu, para 88.

<sup>67</sup> Safa Nicu, para 92.

<sup>68</sup> Safa Nicu, para 78.

<sup>69</sup> Safa Nicu, para 93-149.

<sup>70</sup> Safa Nicu has appealed claiming that the General Court's assessment of the amount of immaterial damages was arbitrarily low and that it should have also been compensated for material damages for the contracts and profits it alleges to have lost; the Council claims in its cross-appeal that there is no basis for damages at all. The Advocate General proposes that both the appeal and the cross-appeal are dismissed – in other words, that General Court's judgement is maintained as it was; see Case C-<sup>45</sup>/<sub>15</sub>, Opinion of the Advocate General, ECLI:EU:C:2016:658.

<sup>71</sup> Eckes (2014), p.903.

<sup>72</sup> Since the beginning of 2015, in appeals made from the General Court to the Court of Justice, only one out of thirteen has favored the targeted person (for C-<sup>176</sup>/<sub>13</sub>; against C-<sup>585</sup>/<sub>13</sub>, C-<sup>605</sup>/<sub>13</sub>, C-<sup>630</sup>/<sub>05</sub>, C-<sup>220</sup>/<sub>14</sub>, C-<sup>535</sup>/<sub>14</sub>, C-<sup>440</sup>/<sub>14</sub>, C-<sup>193</sup>/<sub>15</sub>, C-<sup>266</sup>/<sub>15</sub>, C-<sup>330</sup>/<sub>15</sub>, C-<sup>358</sup>/<sub>15</sub>, C-<sup>459</sup>/<sub>15</sub> and C-<sup>595</sup>/<sub>15</sub>; situation on 22 March 2017); compare this to note 7 above, indicating that before that, the targeted person has been successful in only one case out 13 at the appeals stage. Of course, most cases never reach the Court of Justice (there are nearly 200 directly relevant judgements by the General Court and its predecessor the Court of First Instance, and many cases ongoing).

<sup>73</sup> As noted, since the end of 2014, a targeted person has been successful in only one appeal case at the Court of Justice (see note 7 above). However, the Council has continued to lose cases at the General Court as well, most recently in Case T-<sup>213</sup>/<sub>15</sub>, *Haswani v Council*, ECLI:EU:T:2017:200, in March 2017, and Case T <sup>418</sup>/<sub>14</sub>, *Sina Bank v Council*, ECLI:EU:T:2016:619, in October 2016. Furthermore, there are ongoing cases in the Court of Justice where the Advocate General has proposed that the Court rule in favor of the targets; see Opinion of the Advocate General in Case C-<sup>599</sup>/<sub>14</sub>, *Council v Liberation Tigers of Tamil Eelam (LTTE)*, ECLI:EU:C:2016:723, and in Case C-<sup>79</sup>/<sub>15</sub>, *Council v Hamas*, ECLI:EU:C:2016:722, both in September 2016.

<sup>74</sup> For a more general proposal to improve the effectiveness of EU sanctions by introducing a "pre-assessment and contingency planning phase", see de Vries, Portela and Guijarro-Usobiaga, 'Improving the Effectiveness of Sanctions: A Checklist for the EU', Centre for European Policy Studies, Special Report No 95, November 2014.