kleptotrace

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Report on the limitations of the current EU restrictive measures (sanctions) regimes

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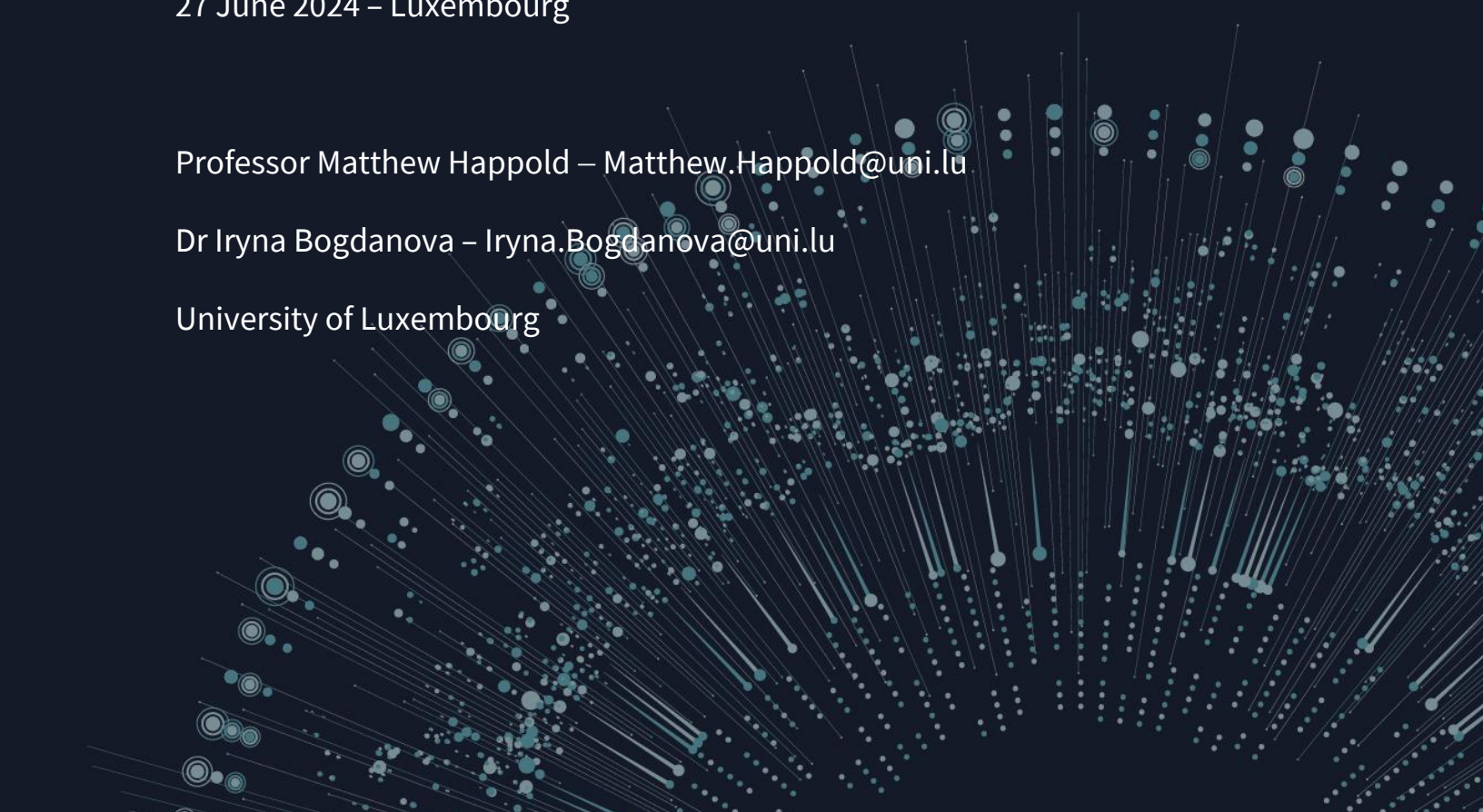

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Executive summary

❖ The European Union has been habitually imposing EU restrictive measures (sanctions) as a foreign policy tool. There are three distinct types of restrictive measures implemented by the EU: (i) collective economic sanctions authorized by the UN Security Council, (ii) restrictive measures taken in excess of the UN-authorized collective sanctions, (iii) autonomous EU restrictive measures taken in the absence of action by the UN Security Council. From the international law perspective, the legality of the latter two is debatable.

❖ The legal and institutional frameworks underpinning the adoption, renewal, implementation and enforcement of the EU restrictive measures are complex and reflect the nature of the European Union as a supra-national body, as well as the political nature of the decision-making in relation to EU restrictive measures.

❖ The EU practice of employing restrictive measures demonstrates that the EU has implemented such measures on numerous occasions and for various reasons as diverse as human rights abuses, chemical weapons use, cyberattacks and misappropriation of public funds. The latter example is of particular relevance for the ongoing discussions of a new EU sanctions regime targeting serious acts of corruption.

❖ EU restrictive measures do not operate in a legal vacuum. The legal limitations constraining the use of EU restrictive measures fall into two categories: (i) limitations imposed by international law and (ii) limitations imposed by the EU law.

❖ From the international law perspective, EU restrictive measures might be inconsistent with WTO obligations and obligations under the Bilateral Investment Treaties (BITs) signed either between the EU and sanctioned states or between the EU Member States and sanctioned states. While the WTO Agreements explicitly stipulate national security exceptions, the majority of the existing BITs lack national security clauses, making it challenging for respondent states to justify their policies as related to national security.

❖ Human rights considerations profoundly influenced the design and formulation of EU restrictive measures. In particular, this Report highlights the following contributions of human rights to the EU law and practice of employing restrictive measures: (i) human rights considerations prompted the shift from comprehensive economic sanctions to targeted sanctions; (ii) exceptions became a compulsory element of all EU sanctions regimes as a result of human rights concerns, (iii) the de-listing procedures and Council's regular reviews of the EU restrictive measures are motivated by the need to comply with the human rights of the targeted persons, and finally (iv) in the context of the judicial review of restrictive measures, human rights play a significant role.

❖ Certain types of EU restrictive measures might encroach upon the immunities guaranteed under international law, although the scope of such immunities is not well-defined and exceptions available under EU sanctions regimes seek to address these concerns. The EU avoids designing its restrictive measures in ways that might be considered extraterritorial, despite its recent practices of trying to extend their reach.

❖ Within the EU institutional framework, the institution that reviews the conformity of EU restrictive measures with the principles and norms of the EU law is the Court of Justice of the European Union, comprised of the General Court and the Court of Justice. The most common grounds for questioning EU restrictive measures before the EU courts are: infringement of the obligation to state reasons for inclusion of an individual or a legal entity on the sanctions list; errors of assessment in considering that there was a sufficient factual basis to justify the inclusion of a person on a sanctions list; infringement of the rights of the defence and of the right to effective judicial protection; infringement of applicant's fundamental rights, including the right to property and the freedom to conduct a business. Analysis of the pertinent case law unequivocally demonstrates that the EU courts are more willing to acknowledge the violation of due process rights than other rights, such as the right to property or the right to freedom of expression.

1 Introduction

European Union restrictive measures (sanctions) are imposed in the framework of the Common Foreign and Security Policy (CFSP). These measures should promote the CFSP principles and objectives, which among other things include the preservation of peace, the prevention of conflicts and support of democracy, the rule of law, and human rights, as well as the promotion of good global governance.[1] For three decades, the EU has employed its restrictive measures as a foreign policy tool aimed at promoting these objectives.[2]

In 2022, the President of the European Commission, Ursula von der Leyen, announced that fighting corruption both at home and abroad should be an EU priority.[3] With this idea in mind, the President of the European Commission proposed to include corruption in the list of wrongdoings that provide the basis for the adoption of the EU restrictive measures.[4] This aspiration was developed futher in the proposal of the High Representative of the Union for Foreign Affairs and Security Policy, supported by the European Commission, to establish a new EU sanctions regime targeting serious acts of corruption worldwide.[5] It should be noted that states such as the United States, Canada, and the United Kingdom already sanction acts of significant corruption under their human rights sanctions regimes (Magnitsky-style sanctions).[6] Against this background, this Report analyses the limitations of the current EU restrictive measures that apply to the existing (sanctions) regimes and will apply to the EU restrictive measures targeting serious corruption once they are adopted.

The objective of the Report is to analyse and present in a concise manner the legal constraints on the employment and use of EU restrictive measures (sanctions) imposed by both international law and EU law.

The report is structured in the following way. To set the stage for the subsequent discussion, the first part outlines the legal and institutional frameworks underpinning the adoption and implementation of EU restrictive measures. Following this, the second part is dedicated to the description of the EU policy of employing restrictive measures as a foreign policy tool. In the third part, legal limitations on the use of EU restrictive measures are examined and discussed. The concluding remarks recapitulate the main findings of the Report.

[1] Article 21, Treaty on European Union (TEU).
[2] Part 2 of this Report.
[3] European Commission (2022), 2022 State of the Union Address by President von der Leyen.
[4] Ursula von der Leyen declared that "we will also propose to include corruption in our human rights sanction regime, our new tool to protect our values abroad."
[5] European Commission (2023), 'Anti-corruption: Stronger rules to fight corruption in the EU and worldwide'.
[6] European Parliamentary Research Service (2021), 'Mapping Magnitsky laws: The US, Canadian, UK and EU approach'.

2 Legal and institutional frameworks underpinning adoption and implementation of EU restrictive measures

2.1 Types of EU restrictive measures depending on the actors authorizing them

The European Union's practice of using economic sanctions – known as restrictive measures in EU parlence[7] – has three distinctive strands. The first strand of practice relates to the implementation of collective economic sanctions, i.e., economic sanctions authorized by the United Nations Security Council (UNSC) and binding for all the EU Member States as UN Member States.[8] Since the end of the Cold War, the number of UN-authorized sanctions has drastically increased ('sanctions decade'),[9] and they have pursued objectives as diverse as countering terrorism, preventing conflicts, promoting peace, protecting the civilian population, supporting democracy, improving resource governance, and preventing the proliferation of nuclear weapons.[10] Since the coming into force of Treaty on European Union (Maastricht Treaty) in 1993, the EU has implemented UNSC economic sanctions by issuing relevant regulations binding on the EU Member States.[11] The legality of the UN sanctions is presumed,[12] with their legality and legitimacy being questioned only in the early 2000s in the

[7] For the purposes of this study, the term EU restrictive measures is strictly defined as the measures taken in the context of the Common Foreign and Security Policy and does not include such measures as suspension of preferences under the EU Generalised System of Preferences.

[8] According to Article 39 of the UN Charter, the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Article 41 of the UN Charter allows the Security Council to call upon the Members of the United Nations to apply such measures as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." Articles 25, 48 and 103 of the UN Charter make any such decision binding upon the Members of the United Nations.

[9] Lee Jones (2015), Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work.

[10] Thomas J Biersteker, Marcos Tourinho and Sue E Eckert (2016), 'Thinking about United Nations Targeted Sanctions', p. 12.

[11] Before 1980, the EU Member States were implementing the UNSC Resolutions individually ('Rhodesia doctrine') and after 1980, the implementation was channelled via the framework of European Political Cooperation that resulted in the adoption of Regulations under Article 113 of the Treaty of Rome ('Malvines doctrine'). For example, a UNSC-authorized embargo on trade with Iraq and Kuwait was implemented by Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait. For more, Clara Portela (2010), European Union Sanctions and Foreign Policy: When and Why Do They Work?.

[12] Some UN Member States even argue that only economic sanctions authorized by the UNSC can be legal under international law. Traditionally, this view has been endorsed by the People's Republic of China and the Russian Federation. The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law (2016). On the eve of the Russian invasion of Ukraine, the Russian Federation and the People's Republic of China issued a Joint Statement in which they once again expressed their opposition to "power politics, bullying, unilateral sanctions […]". Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development, 2022.

context of UNSC sanctions targeting alleged terrorists and their networks, and owing to their detrimental effects on the due process rights of the targets,[13] issues to which we will return in Part 4.

The second category of EU restrictive measures are restrictions taken in excess of the collective sanctions agreed upon and authorized by the UNSC.[14] These additional or 'UNSC plus measures' can take various forms: for example, the EU can implement broader sectoral sanctions or target individuals or entities not included in the UNSC blacklists.[15] This EU practice has been particularly significant in the context of economic sanctions against Iran. In particular, the EU enacted more comprehensive restrictions than those authorised by the UNSC, a move which instigated a heated scholarly debate whether such measures could be justified as lawful countermeasures.[16] Yet, it should be noted that in some instances excessive restrictive measures might be a result of attempts to implement of vaguely formulated UNSC Resolutions.

The third type of EU restrictive measures belongs to the category of autonomous or unilateral measures taken without any prior UNSC authorization. Various terms are used to denote such measures: autonomous sanctions, unilateral sanctions, non-UN sanctions, unilateral coercive measures. As of today, this terminological conundrum has not been resolved either in state practice[17] or in the scholarly debates.[18] Besides this, the legality of unilateral economic sanctions – a politically salient topic – is frequently debated at the UN[19] and in academic commentaries,[20] without much success in bridging the gap between the two opposing views on the issue.

The relationship between autonomous EU restrictive measures (sanctions) and various international law rules is discussed in Part 4.1. From the perspective of the EU law, the abovementioned types of EU restrictive

[13] Iryna Bogdanova (2022), Unilateral Sanctions in International Law and the Enforcement of Human Rights, pp. 33-36.

[14] EU Sanctions Guidelines explicitly acknowledge the right to impose additional restrictions: "[…] it is understood that the EU may decide to apply measures that are more restrictive [than the measures imposed by the UN Security Council under Chapter VII of the UN Charter]." Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (2018).

[15] Mirko Sossai (2017), 'UN sanctions and regional organizations: an analytical framework'.

[16] N. Jansen Calamita argued that "[t]he limited scope of the Security Council's sanctions resolutions does not mean that additional reactive measures against Iran by states acting individually or in concert are foreclosed", and contended that such restrictive measures can be justified as countermeasures or alternatively as third-party or general interest countermeasures. N. Jansen Calamita (2009), 'Sanctions, Countermeasures, and the Iranian Nuclear Issue'; for the opposite view, see Pierre-Emmanuel Dupont (2012), 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran'.

[17] Canada designates such restrictions as 'special economic measures' (Special Economic Measures Act S.C. 1992, c. 17); Australia uses the term 'autonomous sanctions' (Autonomous Sanctions Act 2011); Ukraine calls these restrictive measures 'sanctions' (Law of Ukraine № 1644-VII).

[18] Tom Ruys (2017), 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework'; Bogdanova (n 13).

[19] Traditionally, the UN General Assembly (UNGA) is the main international forum actively used by the UN Member States to oppose the use of unilateral economic sanctions (unilateral coercive measures is the term used in these debates and in UN documents). This opposition is reflected in numerous UNGA Resolutions adopted under the UN auspices. In 2014, with the strong support of the states opposing unilateral economic sanctions, including China and Russia, the mandate of the Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights was established. Human Rights Council, Resolution 27/21.

[20] Alexandra Hofer (2017), 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?'; Bogdanova (n 13).

measures (sanctions) are enacted based on the same legal framework prescribed by the EU Treaties, as described in the next Section.

2.2 Legal framework underpinning imposition and implementation of EU restrictive measures

European Union restrictive measures (sanctions) are imposed in the framework of the Common Foreign and Security Policy (CFSP), thus, promoting the CFSP principles and objectives, which among other things, include the preservation of peace, the prevention of conflicts and support of democracy, the rule of law, and human rights.[21]

The Treaty on European Union (Maastricht Treaty) added the CFSP as the second pillar of the European Union and, as a result, included EU restrictive measures (sanctions) in the foreign policy toolbox of the newly created Union.[22] Specifically, Article 301 was incorporated into the Treaty of Rome. It reads as follows:

Article 301

> Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community ***to interrupt or to reduce, in part or completely, economic relations with one or more third countries,*** the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission. [***emphasis added***]

Article 301 of the Treaty of Rome made it a legal requirement that the EU Member States implement EU restrictive measures against third states, although foreign policy coordination that encompassed coordinated imposition of economic sanctions emerged much earlier.[23] In addition, Article 60(1) of the Treaty of Rome granted the right to the Council to "take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned."

[21] Article 21, TEU.
[22] Treaty on European Union.
[23] Article 224 of the Treaty establishing the European Community (Treaty of Rome) requires cooperation between the Member States when they implement economic restrictions "in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security." Later this cooperation was channelled through the intergovernmental framework of European Political Cooperation, with the examples of economic sanctions against the Soviet Union (1981) and Argentina (1982) being the first instances of economic restrictive measures taken collectively by the EU Members States and outside of the UNSC. For more, Clara Portela (2010), European Union Sanctions and Foreign Policy: When and Why Do They Work?; Francesco Giumelli (2020), 'Implementation of sanctions: European Union'.

In 2003-2004, two programmatic documents were adopted to provide further guidance on the principles underlining the use of EU restrictive measures, their implementation and evaluation: the Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions)[24] and the Basic Principles of the Use of Restrictive Measures (Sanctions)[25].

The Basic Principles emphasized the right of the EU to impose autonomous sanctions "in support of efforts to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance."[26] The Basic Principles also confirm the EU's preference for targeted sanctions[27], and, as a logical extension of this, encourage the imposition of sanctions against non-state actors[28]. Later, this right to target non-state actors was embedded in Article 215 of the Treaty on the Functioning of the European Union (TFEU), which states that:

> **Article 215**
>
> **(ex Article 301 EC)**
>
> 1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, ***provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries***, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
>
> 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt ***restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities***.
>
> 3. The acts referred to in this Article shall include necessary provisions on legal safeguards. [***emphasis added***]

The EU legal framework underpinning the imposition and implementation of EU restrictive measures is thus comprised of the relevant treaty provisions (mentioned above) and substantiated by the three additional documents – the Basic Principles (2004)[29], the Guidelines (first adopted in 2003, then updated several times,

[24] Council of the European Union (2003), Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy.
[25] Council of the European Union (2004), Basic Principles on the Use of Restrictive Measures (Sanctions).
[26] Ibid, para. 3.
[27] Ibid, para. 6.
[28] Ibid, para. 7.
[29] Basic Principles on the Use of Restrictive Measures (Sanctions) (n 25).

with the last update in 2018)[30] and the EU Best Practices for the effective implementation of restrictive measures (updated in 2022)[31].

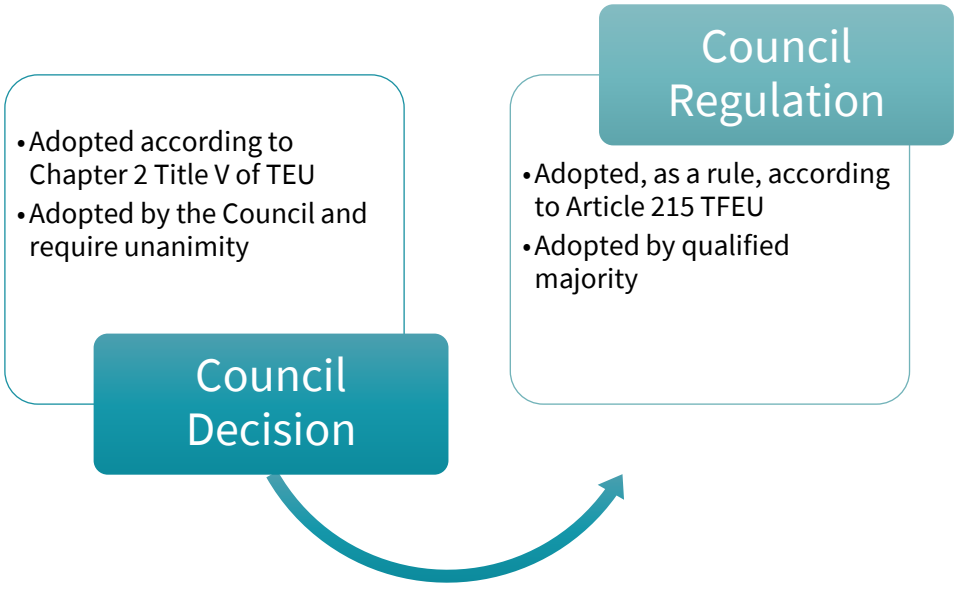
The right to impose economic restrictions either against third countries or non-state entities, natural or legal persons, however, does not operate in a legal vacuum. It is part and parcel of the EU institutional and legal framework. We now turn to the description of the EU institutional framework enabling the enactment of EU restrictive measures.

2.3 Institutional framework enabling the imposition of EU restrictive measures

The imposition of EU restrictive measures is a two-step process: first, a Council Decision is adopted in the CFSP framework (by unanimity) and second, a Council Regulation is adopted to formulate the exact scope of EU restrictive measures (by qualified majority).[32] Figure 1 visualizes this decision-making process.

Figure 1. Process of EU restrictive measures (sanctions) enactment

*In practice, frequently, both documents are adopted on the same day



[30] Council of the European Union (2018), Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy.
[31] Council of the European Union (2022), EU Best Practices for the effective implementation of restrictive measures.
[32] As commentators observe: "The terminology of Article 29 TEU and a systematic interpretation of both provisions point toward a system by which the CFSP-decision is limited to establishing the overall policy whereas the details of the restrictions are determined by the non-CFSP act based on Article 215 TFEU." Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (2019), The EU Treaties and the Charter of Fundamental Rights: A Commentary, p. 1635.

In such a way, the political decision to impose EU restrictive measures takes legal shape through two instruments: Decisions and Regulations. The Council's Decisions are binding only on EU Member States, whereas Regulations are directly applicable in the EU Member States and binding upon their domestic constituencies (legal entities, individuals).[33]

EU restrictive measures are adopted for a limited period (for 6 or 12 months) and are subject of periodic renewals, which should be agreed by unanimity in the form of Council Decision. This decision-making mechanism – which has been labelled as a "rather convoluted process"[34] – is illustrative of the institutional and legal settings in which these measures are adopted.

As it becomes clear, the Council of the European Union plays a significant role in the enactment of the EU restrictive measures. This said, some further clarifications regarding other actors involved are warranted. The European Commission, in particular the Directorate-General for Financial Stability, Financial Services and Capital Markets Union and the European External Action Service assist the Council in the preparation of the legal texts.[35] The European Commission also issues guidances and opinions on particular aspects of the implementation of EU restrictive measures.[36] Although the European Parliament is informed about the decision to impose restrictive measures, it "remains otherwise excluded from the sanctions decision-making process".[37] It is, however, actively involved in the discussions on new sanctions regimes and updates of the existing regimes.[38]

It has been reported that the influence of the European Commission in the process of restrictive measures formulation and implementation has recently considerably increased.[39] Clara Portela contends that this growing influence is reflected in three developments: (i) formulation of restrictive measures has become less member state-driven, (ii) implementation of restrictive measures has undergone some steps towards centralisation with an active role of the Commission therein and (iii) the Commission and its President have assumed a leading role in communicating new decisions on restrictive measures.[40]

[33] Article 288, Treaty on the Functioning of the European Union (TFEU).
[34] Giumelli (n 23).
[35] Clara Portela and Kim B. Olsen (2023), Implementation and monitoring of the EU sanctions' regimes, including recommendations to reinforce the EU's capacities to implement and monitor sanctions, p. 8-9.
[36] For example, in September 2023, the European Commission published a Guidance for EU operators: Implementing enhanced due diligence to shield against Russia sanctions circumvention. The Commission also issues opinions, for instance, Commission Opinion of 08.06.2021 on Article 2(2) of Council Regulation (EU) No 269/2014.
[37] Portela and Olsen (n 35).
[38] Ibid, p. 12.
[39] Clara Portela (2023), 'Sanctions and the Geopolitical Commission: The War over Ukraine and the Transformation of EU Governance'.
[40] Ibid.

3 EU practice of employing restrictive measures as a foreign policy tool

In the three decades after the Maastricht Treaty came into force, establishing the CFSP and adding restrictive measures to the EU foreign policy toolkit, the EU has implemented such measures on numerous occasions and for various reasons. Specifically, they have been mandated to pursue objectives as diverse as democracy and human rights promotion, conflict management, non-proliferation, post-conflict restoration, and countering terrorism.[41]

In practice, EU restrictive measures encompass a broad range of measures that can be categorized based on various criteria: (i) degree of targeting (e.g., comprehensive sanctions, sectoral sanctions, targeted sanctions against named legal entities and individuals); (ii) economic (financial restrictions) vs non-economic restrictions (travel bans); (iii) country-specific vs horizontal regimes; (iv) based on the reasons for their imposition (e.g., democracy promotion, conflict management, post-conflict stabilisation, non-proliferation, terrorism, promotion of European Union's interests, as well as promotion of international

norms)[42]; (v) based on the objectives they aim to achieve (e.g., change of behaviour, deterrence of the objectionable actions, etc.)[43].

The most comprehensive study of EU restrictive measures shows that the average duration of a sanctions episode is 4.5 years (55 months to be more precise).[44] Besides this, the study demonstrates that the most common types of EU restrictive measures are asset freezes and travel bans, which constitute 75 and 62% of the overall sanctions episodes, followed by arms embargoes (46%), trade (18%) and financial restrictions (16%).[45] In two-thirds of sanctions cases (67%), a combination of two or three different types of restrictions are imposed.[46]

As of May 2024, the EU has thirty-five active sanctions regimes, each of which allows the imposition of EU restrictive measures.[47] The most recent of them announced by the Council on May 27, 2024, establishes a new

[41] This categorization is proposed by Francesco Giumelli (n 23).
[42] These seven categories have been identified in Francesco Giumelli, Fabian Hoffmann and Anna Książczaková (2021), 'The when, what, where and why of European Union sanctions'.
[43] One recent study identifies the following possible objectives: "[…] the desire to demonstrate the sender's willingness and capacity to act, to anticipate or deflect criticism, to maintain certain patterns of behaviour in international affairs, to deter further engagement in the objectionable actions by the target and third parties, to support international institutions, to promote subversion in the target or to assuage domestic audiences." Tobias Stoll and others (2020), Extraterritorial sanctions on trade and investments and European responses, p. 15.
[44] The database and the subsequent analysis cover the EU restrictive measures imposed between 1993 and 2019, with the 48 sanctions cases identified and divided into a total of 85 sanctions episodes. Giumelli, Hoffmann and Książczaková (n 42), p. 10.
[45] Ibid, pp. 10-11.
[46] Ibid, p. 11.
[47] European Commission, EU sanctions tracker, https://data.europa.eu/apps/eusanctionstracker/

country-specific sanctions framework "in view of the situation in Russia and the internal repression therein".[48] As a result, one entity and 19 natural persons were sanctioned under the new regime.[49]

EU sanctions regimes can be of two types:

- geographical or country-specific regimes;
- thematic or horizontal sanctions.

The great majority of the EU sanctions regimes are country-specific restrictive measures: as of May 2024, 29 sanctions regimes out of 35 belong to this category.[50]

Country-specific regimes encompass a broader range of measures than thematic/horizontal regimes, for example, restrictive measures targeting certain sectors of the country's economy or prohibitions on new investments into a particular country or a sector of that country's economy.

Four thematic/horizontal sanctions regimes are regimes targeting terrorist groups,[51] chemical weapons use,[52] cyberattacks[53] and human rights abuses[54]. Other states also have similar horizontal sanctions regimes. For example, the United States, the United Kingdom and Australia have used economic sanctions to target actors responsible for significant cyberattacks and other forms of malicious behaviour in cyberspace.[55] EU global human rights sanctions regime replicates Magnitsky-style sanctions introduced by the United States, Canada, and the United Kingdom.[56] However, in distinction to the other countries' Magnitsky sanctions, EU human rights sanctions do not prescribe sanctions for acts of significant corruption.[57] As of the time of writing, a sanctions regime targeting significant corruption is under consideration, with the European Parliament acting as a vocal supporter of such a move.[58]

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[48] Council Decision (CFSP) 2024/1484 of 27 May 2024 concerning restrictive measures in view of the situation in Russia; Council Regulation (EU) 2024/1485 of 27 May 2024 concerning restrictive measures in view of the situation in Russia.
[49] Council Implementing Regulation (EU) 2024/1488 of 27 May 2024 implementing Regulation (EU) 2024/1485 concerning restrictive measures in view of the situation in Russia.
[50] Ibid.
[51] This EU sanctions regime emerged as a continuation of the UNSC sanctions countering terrorism.
[52] Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, with subsequent amendments; Council Regulation (EU) 2018/1542 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, with subsequent amendments.
[53] Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, with subsequent amendments; Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, with subsequent amendments.
[54] Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, with subsequent amendments; Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, with subsequent amendments.
[55] Iryna Bogdanova and María Vásquez Callo-Müller (2021), 'Unilateral Cyber Sanctions: Between Questioned Legality and Normative Value'; Iryna Bogdanova and María Vásquez Callo-Müller (2021), 'Unilateral Economic Sanctions to Deter and Punish Cyber-Attacks: Are They Here to Stay?'.
[56] European Parliamentary Research Service (n 6).
[57] Ibid.
[58] European Parliamentary Research Service (2023), Towards an EU global sanctions regime for corruption; Alexandra Brzozowski (2023), 'EU to extend sanctions framework to target corrupt foreigners'.

In response to the events in Tunisia and Egypt known as the Arab Spring and the Ukrainian Revolution of Dignity (Maidan Revolution), the EU put in place a special EU sanctions regime – EU misappropriation sanctions.[59] As events unfolded, notoriously corrupted regimes were forced to step down. To prevent the flight of stolen public assets and to stabilize the situations in the affected countries, the EU agreed to enact misappropriation sanctions targeting regime leaders and their associates.[60] Strictly speaking EU misappropriation sanctions were enacted as three separate country-specific regimes. The initial designations under these regimes and subsequent prolongation of the asset freezes relied upon evidence provided by the states whose public funds were misappropriated: Tunisia, Egypt and Ukraine.[61]

This peculiarity reinforced by the non-cooperative behaviour of the government agencies and courts in the affected states made EU misappropriation sanctions particularly vulnerable to legal challenges before

the Court of Justice of the European Union (CJEU).[62] Non-cooperative behaviour of these states could be partially explained by the susceptibility of their judiciaries and anti-corruption agencies to political interference.[63]

In recent years and more prominently since the Russian full-scale invasion of Ukraine, the EU employed restrictive measures to counteract disinformation and propaganda.[64] For example, Russian propagandist Dmitrii Kiselev was already sanctioned in 2014 for being a "[c]entral figure of the government propaganda supporting the deployment of Russian forces in Ukraine."[65] In March 2022, the EU decided to suspend the broadcasting activities of Sputnik and RT (Russia Today)[66] inside the EU and directed at the EU.[67] Within a week,

[59] Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia (extended until 31 January 2025); Council Decision 2011/172/CFSP of 21 March 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt (this sanctions framework was repealed in 2021 by Council Decision (CFSP) 2021/449); Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (extended until 6 March 2025).

[60] Clara Portela (2019), Sanctioning kleptocrats: An assessment of EU misappropriation sanctions.

[61] Ibid.

[62] Initially, EU restrictive measures were imposed against 48 individuals from Tunisia, as of the time of writing, only 32 remain to be listed; all 19 sanctioned persons from Egypt were de-listed and the sanctions framework was repealed in 2021; 22 Ukrainian nationals were sanctioned at the outset, with only 3 being sanctioned in May 2024.

[63] Ibid.

[64] The General Court confirmed that EU restrictive measures could be adopted to counteract propaganda and disinformation: "Since the propaganda and disinformation campaigns are capable of undermining the foundations of democratic societies and are an integral part of the arsenal of modern warfare, the restrictive measures at issue also form part of the pursuit by the European Union of the objectives assigned to it in Article 3(1) and (5) TEU." RT France v Council (Case T-125/22), para. 56.

[65] Council Implementing D 2014/151/CFSP of 21 March 2014 implementing Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

[66] RT – Russia Today English, RT – Russia Today UK, RT – Russia Today Germany, RT – Russia Today France and RT – Russia Today Spanish.

[67] Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

RT France brought a case before the CJEU alleging breach of the rights of the defence, freedom of expression and information, the freedom to conduct a business, and the principle of non-discrimination on grounds of nationality, as well as contesting the Council's competence to adopt EU restrictive measures entailing a suspension of the broadcasting activities.[68] The General Court dismissed all the claims.[69] Subsequently, the EU ban has been extended to other Russian entities, such as Rossiya RTR/RTR Planeta, Rossiya 24/Russia 24, TV Centre International[70], and later to NTV/NTV Mir, Rossiya 1, REN TV, Pervyi Kanal[71] and other entities.[72] More recently, the broadcasting activities of four media outlets that "spread and support the Russian propaganda" – Voice of Europe, RIA Novosti, Izvestia and Rossiyskaya Gazeta – were suspended.[73]

The unprecedented scale of destruction inflicted by the Russian Federation on Ukraine and the current discussions of Ukraine's recovery take place against the background of an unprecedented freezing of the Russian Central Bank assets, the value of which exceeds US$ 300 billion.[74] The EU, along with the other G7 Members, considered various options resulting in initiatives taken by individual states at the domestic level.[75] In its turn, on February 12, 2024, the Council of the EU announced its decision to "account extraordinary cash balances accumulating due to EU restrictive measures separately and […] keep corresponding revenues separate."[76] Following this, in May 2024, it was agreed to use unexpected and extraordinary revenues generated by the immobilized Russian assets ("windfall net profits") "for further military support to Ukraine, as well as its defence industry capacities and reconstruction."[77]

Autonomous EU restrictive measures have an impact beyond the EU Membership: this impact is channelled through formal and informal alignment of non-EU Members with such measures. The formal alignment takes the form of an official decision of states that are not EU Member States to implement EU restrictive measures and make them binding for their domestic constituencies. In other words, a number of non-EU Member States align themselves with EU restrictive measures, although such alignment remains voluntary. These states can be divided into several categories[78]:

[68] RT France v Council (n 64).
[69] Ibid.
[70] Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
[71] Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
[72] Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
[73] Council of the European Union (2024), 'Russia's war of aggression against Ukraine: Council bans broadcasting activities in the European Union of four more Russia-associated media outlets'.
[74] Iryna Bogdanova (2023), 'Use of the immobilized Russian Central Bank assets to rebuild Ukraine: between political will and legal hurdles'.
[75] Ibid.
[76] Council of the European Union (2024), 'Immobilised Russian assets: Council decides to set aside extraordinary revenues'.
[77] Council of the European Union (2024), 'Extraordinary revenues generated by immobilised Russian assets: Council greenlights the use of net windfall profits to support Ukraine's self-defence and reconstruction'.
[78] Clara Portela (2018), Targeted Sanctions against Individuals on Grounds of Grave Human Rights Violations – Impact, Trends and Prospects at EU Level.

- members of the European Economic Area (Iceland, Norway, and Liechtenstein);
- European Neighbourhood Policy countries (Armenia, Azerbaijan, Georgia, the Republic of Moldova and Ukraine);
- signatories to the Stability and Association Agreement (Albania, Bosnia and Herzegovina and Kosovo);
- candidate countries and aspirants (Albania, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia, Turkey, Bosnia and Herzegovina and Kosovo).

Switzerland often follows suit and enacts EU restrictive measures: Article 1(1) of the Swiss Embargo Act (Embargogesetz, EmbG) reads as follows "[t]he Confederation may enact compulsory measures in order to implement sanctions that have been ordered by the United Nations Organisation, by the Organisation for Security and Cooperation in Europe or by Switzerland's most significant trading partners and which serve to secure compliance with international law, and in particular the respect of human rights."[79]

In response to Russia's aggression against Ukraine, Switzerland joined the EU in its sanctioning efforts, including by immobilizing Russian Central Bank assets worth of 7.2 billion Swiss francs.[80]

Informal alignment occurs when legal entities and individuals outside of the EU abide by EU restrictive measures. A recent case filed by the sanctioned Russian oligarch Roman Abramovich and Israel's non-governmental rescue and recovery organisation ZAKA against Mizrahi Tefahot Bank Ltd is a vivid illustration of this tendency.[81] As a result of economic sanctions imposed by the EU and the United Kingdom against Roman Abramovich, his bank account at the Israeli-based Mizrahi Tefahot Bank had been frozen.[82] Subsequently, the bank refused to transfer a donation from Roman Abramovich's bank account to ZAKA, triggering the court case currently pending before the Israel's Supreme Court.[83] This happened despite the fact that Israel has not imposed any economic sanctions against Mr Abramovich.

[79] Bundesgesetz über die Durchsetzung von internationalen Sanktionen (Embargogesetz, EmbG) vom 22. März 2002.
[80] The Federal Council (2022), 'Switzerland adopts EU sanctions against Russia'; Yann Fauconnet (2022), 'Neutralitätsrechtliche Einordnung der schweizerischen Sanktionen gegen Russland im Ukraine-Krieg'; State Secretariat for Economic Affairs SECO (2024), 'Ukraine: Decrease in the value of Russian assets frozen in Switzerland'.
[81] Tel Aviv District Court, Case No. 59756-12-23, Roman Abramovich and ZAKA against Mizrahi Tefahot Bank Ltd.
[82] Dean Shmuel Elmas (2024), 'Judge tells Mizrahi Bank to transfer Abramovich donation to ZAKA'.
[83] Nitsan Shafir (2024), 'Supreme Court blocks Abramovich donation to ZAKA'.

4 Legal limitations on the use of EU restrictive measures

4.1 Limitations on the use of EU restrictive measures imposed by international law

As mentioned before, sanctions authorized by the UNSC are presumed to be legal, while the legality of the measures either imposed in excess of the UNSC sanctions or in their absence is the subject of perennial debate between different groups of states as well as in the academic community. At the current stage of its development, international law does not contain explicit rules on *per se* legality or illegality of economic sanctions imposed outside of the UNSC framework (i.e., unilateral sanctions).[84] This being said, there are various international law rules that might be potentially breached by states enacting unilateral sanctions. We now turn to the analysis of the relationship between EU restrictive measures imposed in excess of the UNSC sanctions or even in their absence, i.e., based on autonomous political decisions of the EU under the CFSP framework, and international law.

At the outset, it should be emphasized that the Treaty on European Union stipulates that the European Union is committed to "the strict observance and the development of international law".[85] Furthermore, the Guidelines on implementation and evaluation of EU restrictive measures provide that: "[t]he introduction and implementation of restrictive measures must always be in accordance with international law."[86]

The discussions in Sections 4.1.1 and 4.1.2 take the EU restrictive measures against the Russian Federation as an illustrative example of the possible incompatibility between EU restrictive measures and obligations under Bilateral Investment Treaties or WTO Agreements.

4.1.1 EU restrictive measures and Bilateral Investment Treaties (BITs)

Pursuing the goal of protecting its investors abroad and attracting foreign investments, the EU as well as individual EU Member States have entered into a myriad of Bilateral Investment Treaties (BITs) with other states. Among these states are states targeted by EU restrictive measures, including legal entities incorporated in those states and nationals of those states. For example, the EU restrictive measures against the Russian Federation might raise questions concerning their compatibility with the BITs entered into between individual EU Member States and the Russian Federation or with its predecessor, the Union of Soviet Socialist Republics (the USSR) (see Table 1 below).

[84] Omer Yousif Elagab in 1988 concluded that "there are no rules of international law which categorically pronounce either on the prima-facie legality or prima-facie illegality of economic coercion". Omer Yousif Elagab (1988), *The Legality of Non-Forcible Counter-Measures in International Law*; more recently Antonios Tzanakopoulos ("[…] if there is a fundamental right of States to be free from economic coercion? There is not […]") and Alexandra Hofer ("[…] the majority opinion in doctrine is that there is no autonomous norm prohibiting economic coercion") draw similar conclusion. Antonios Tzanakopoulos (2015), 'The Right to Be Free from Economic Coercion'; Hofer (n 20).

[85] Article 3(5), TEU.

[86] Guidelines on implementation and evaluation of EU restrictive measures (n 30).

Table 1. BITs signed between EU Member States and the Russian Federation

No.	Short title of agreement	Status	Date of signature	Date of entry into force
1	Bulgaria - Russian Federation BIT (1993)	In force	08/06/1993	19/12/2005
2	Lithuania - Russian Federation BIT (1999)	In force	29/06/1999	24/05/2004
3	Italy - Russian Federation BIT (1996)	In force	09/04/1996	07/07/1997
4	Greece - Russian Federation BIT (1993)	In force	30/06/1993	23/02/1997
5	Denmark - Russian Federation BIT (1993)	In force	04/11/1993	26/08/1996
6	Russian Federation - Slovakia BIT (1993)	In force	30/11/1993	02/08/1996
7	Romania - Russian Federation BIT (1993)	In force	29/09/1993	20/07/1996
8	Russian Federation - Sweden BIT (1995)	In force	19/04/1995	07/07/1996
9	Czech Republic - Russian Federation BIT (1994)	In force	05/04/1994	06/06/1996
10	Hungary - Russian Federation BIT (1995)	In force	06/03/1995	29/05/1996
11	Russian Federation - Spain BIT (1990)	In force	26/10/1990	28/11/1991
12	Austria - Russian Federation BIT (1990)	In force	08/02/1990	01/09/1991
13	Belgium/Luxembourg-Russian Federation BIT (1989)	In force	09/02/1989	18/08/1991
14	Finland - Russian Federation BIT (1989)	In force	08/02/1989	15/08/1991
15	Germany - Russian Federation BIT (1989)	In force	13/06/1989	05/08/1991
16	Netherlands - Russian Federation BIT (1989)	In force	05/10/1989	20/07/1991
17	France - Russian Federation BIT (1989)	In force	04/07/1989	18/07/1991

These BITs have standards of protection commonly included in investment treaties, both substantive and procedural. Substantive standards include, among others, national treatment (NT),[87] most favoured nation (MFN) treatment,[88] fair and equitable treatment (FET),[89] full protection and security (FPS),[90] and protection against illegal expropriation[91]. Procedural standards include the possibility of bringing claims against the host state outside of domestic courts using investor-state dispute settlement (ISDS), mainly through investor-state arbitration. The most common ISDS options prescribed by the BITs in force between the EU Member States and

[87] For example, Article 3(1) Romania - Russian Federation BIT (1993); Article 3(2) Lithuania - Russian Federation BIT (1999).
[88] For example, Article 2 Belgium - Luxembourg - USSR BIT (1989); Article 3(1) Romania - Russian Federation BIT (1993); Article 3(2) Lithuania - Russian Federation BIT (1999).
[89] For example, Article 4(1) Belgium - Luxembourg - USSR BIT (1989); Article 2(3) Romania - Russian Federation BIT (1993); Article 3(1) Lithuania - Russian Federation BIT (1999).
[90] For example, Article 4(2) Belgium - Luxembourg - USSR BIT (1989); full and unconditional legal protection is guaranteed under Article 2(2) Romania - Russian Federation BIT (1993); Article 2(2) Lithuania - Russian Federation BIT (1999).
[91] For example, Article 5 Belgium - Luxembourg - USSR BIT (1989); Article 5 Romania - Russian Federation BIT (1993); Article 6 Lithuania - Russian Federation BIT (1999).

the Russian Federation are: ad hoc arbitration tribunal established under the UNCITRAL arbitration rules, arbitration using the International Centre for Settlement of Investment Disputes (ICSID) or under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce.[92]

There are several plausible claims that might be brought to arbitration by Russian investors in cases when there is an established investment in a territory of the EU Member State, with which the Russian Federation has a BIT in force.[93]

Among the relevant standards of investment protection that could be invoked by Russian investors are the following.

4.1.1.1 Possible violations

4.1.1.1.1 Indirect expropriation

Expropriation provisions prescribed by the BITs signed by the Russian Federation contain the prohibition that "investments […] shall not be subject to expropriation, nationalisation or other measures equivalent to expropriation or nationalisation."[94] This formulation covers both direct and indirect forms of expropriation.

Indirect expropriation has been defined as "a situation in which an investor's legal title is not extinguished but the actions of a state are, in legally significant respects, analogous to direct expropriation".[95]

In the context of EU restrictive measures taking the form of extended asset and/or economic resources freezes, the argument could be made that these actions are in effect equivalent to an indirect expropriation.[96]

4.1.1.1.2 Transfer of funds

All the BITs included in Table 1 prescribe treaty provisions that guarantee investors the prompt transfer of funds. For example, Article 8 of the BIT with Lithuania (1999) provides the following:

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[92] For example, Article 8 Romania - Russian Federation BIT (1993); Article 10 Lithuania - Russian Federation BIT (1999); Article 10 Belgium - Luxembourg - USSR BIT (1989).

[93] Several scholarly contributions explored the interrelations between economic sanctions and international investment law. For example, Sabrina Robert-Cuendet distinguishes between economic sanctions impairing foreign investments in the pre-establishment phase and economic sanctions hindering foreign investments in the post-establishment phase. Sabrina Robert-Cuendet (2021), 'Unilateral and extraterritorial sanctions and international investment law'. Pierre-Emmanuel Dupont considers the following standards of investment protection as the relevant ones: expropriation, FET, full protection and security, prohibition of arbitrary and discriminatory measures. Pierre-Emmanuel Dupont (2015), 'The Arbitration of Disputes Related to Foreign Investments Affected by Unilateral Sanctions'.

[94] For example, Article 6(1) Lithuania - Russian Federation BIT (1999); similar formulations can be found in Article 5 Romania - Russian Federation BIT (1993); and Article 5 Belgium - Luxembourg - USSR BIT (1989).

[95] Jonathan Bonnitcha (2014), *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*, pp.229–272.

[96] Anne van Aaken argued that "there is little doubt that a longer-term asset freezing, without due process, is an expropriation even if the legal title is not taken". Anne van Aaken (2016), 'International investment law and decentralized targeted sanctions: an uneasy relationship'; Jessica Beess und Chrostin observed that in the context of economic sanctions "[r]elevant protections in this context to which a qualified investor may be entitled under a BIT are the protection from expropriation without compensation […]." Jessica Beess und Chrostin (2016), 'Unilateral and Multilateral Sanctions in Investment Treaty Arbitration'.

Article 8. Transfers of Payments

1. Each Contracting Party shall guarantee to investors of the other Contracting Party, after the completion of all tax obligations, ***free transfer abroad of payments in connection with the investments****, in particular:*

a) The initial capital and additional amounts for the maintenance or increase of the investment;

b) ***Returns****;*

c) Funds in repayment of loans, directly related to the investment;

d) The proceeds from the total or partial liquidation or sale of the investments;

e) Compensation referred to in the Article 6 of this Agreement [Expropriation and Compensation];

f) ***The earnings and other remuneration of the investor*** *of the other Contracting Party and key personnel authorised to work in connection with investments in the territory of the first Contracting Party.*

2. Transfers shall be made without undue delay in a freely convertible currency at the exchange rate applying on the date of transfer in accordance with currency regulations in force of the Contracting Party in whose territory the investment was made. [**emphasis added**]

Asset freezes and restrictions on making economic resources available, especially when they apply not only to sanctioned individuals but also to entities owned or controlled by them,[97] create formidable obstacles to the transfer of funds and are intended to do so. In addition, faced with significant financial penalties and reputational risks, banks, as well as other financial institutions, introduce string sanctions compliance programs and are hesitant to provide services to sanctioned individuals or entities where the owner/major shareholder is sanctioned.[98]

4.1.1.1.3 Fair and equitable treatment

Russia's BIT with the Belgium-Luxembourg Economic Union (1989) provides:

> *1. Each Contracting Party undertakes to provide in its territory for investments by investors of the other contracting party* ***fair and equitable treatment excluding any unjustified or discriminatory measure*** *which could adversely affect their enjoyment, maintenance, management or disposal.* [**emphasis added**]

Ambiguous treaty formulations of the FET standard enshrined in the majority of the BITs have led to a situation in which investment tribunals have interpreted it broadly: as a failure to comply with the duty of vigilance and protection, denial of due process or procedural fairness, failure to respect the investor's legitimate expectations, coercion and harassment by public authorities, failure to provide a stable and predictable legal framework, unjust enrichment, evidence of bad faith, lack of transparency and arbitrary and discriminatory treatment.[99]

In the past two years, and with increasing frequency in the past few months, sanctioned Russian entities and individuals are expressing a willingness to initiate investor-state arbitration.[100]

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[97] EU Best Practices (n 31, para. 34) clarifies the scope of freezing as follows: "The freezing covers all funds and economic resources belonging to or owned by designated persons and entities, and also to those held or controlled by such persons and entities."

[98] Clara Portela (2020), 'Implementation and enforcement'.

[99] Ioana Tudor (2008), 'Actual Situations in Which the FET Standard Has Been Applied'.

[100] Jack Ballantyne (2024), 'Sanctioned Russian billionaire threatens claim against Luxembourg'.

Faced with the need to justify EU restrictive measures, the EU Member States may rely upon the treaty-based exceptions and public international law defences.

4.1.1.2 Possible justifications

4.1.1.2.1 Treaty-based exceptions

Only two investment treaties concluded between the EU Member States and the Russian Federation prescribe national security exceptions: the BIT with Hungary (1995) and the BIT with Sweden (1995). The BIT with Hungary stipulates a general national security exception. Specifically, Article 2(3) provides that the agreement shall not preclude the application of either Contracting Party of "*measures, necessary* ***for the maintenance of defence, national security and public order****, protection of the environment, morality and public health*". [**emphasis added**]

In contrast, in the BIT with Sweden, the national security exception is specific to the obligation to provide national treatment. Article 3(3) stipulates that each Contracting Party may have limited exceptions to national treatment in its legislation. Any new exception will not apply to investments made in its territory by investors of the other Contracting Party before the entry into force of such an exception, "*except when the exception is necessitated for* ***the purpose of the maintenance of defence****,* ***national security and public order,*** *protection of the environment, morality and public health*". [**emphasis added**]

The great majority of the BITs signed between the EU Member States and the Russian Federation do not contain national security or public order exceptions, thus leaving the respondent states with the need to rely upon the defences available under general public international law.

4.1.1.2.2 Public international law defences

In the case of the EU restrictive measures targeting the Russian Federation for its aggression against Ukraine, two international law defences can be relied upon to justify the economic restrictions imposed: lawful countermeasures and non-forcible self-defence.

4.1.1.2.2.1 EU restrictive measures as permissible countermeasures

Countermeasures – self-help measures in international law – can be defined as "unilateral measures adopted by a State in response to the breach of its rights by the wrongful act of another State that affect the rights of the target State and are aimed at inducing it to provide cessation or reparations to the injured State."[101] Countermeasures are subject to procedural and substantive preconditions, compliance with which renders

[101] Federica I Paddeu, 'Countermeasures,' *Max Planck Encyclopedia of Public International Law.*

them legal.[102] Substantive preconditions are codified in Articles 49–51 of the ARSIWA,[103] while the procedural ones are listed in Article 52.[104]

It is a tenable legal position to argue that the EU restrictive measures targeting the Russian Federation qualify as lawful countermeasures. To start with, the Russian Federation by starting and continuing military aggression against Ukraine commits an internationally wrongful act. In response to this, the EU introduced temporary, reversible and proportional restrictive measures, which pursue the objective of inducing Russia's compliance with its international obligations by withdrawing its troops from Ukraine and paying reparations.

The right to take permissible countermeasures is, in general, reserved for a state that is considered an 'injured state' as defined in the ARSIWA.[105] The right of the other states to take countermeasures is debatable.[106] In this regard, however, the EU Member States might argue that they should be designated as 'specially affected' states[107] and thus are 'injured states' entitled to take lawful countermeasures.

For example, the EU Member States had to receive millions of refugees fleeing the war in Ukraine, a move that dramatically increased pressure on the governmental agencies and social security systems as

well as the educational systems of all EU Member States.[108] Beyond the financial expenses related to providing assistance to Ukrainian refugees, the EU, as well as other states, has provided macro-financial aid to fund the most critical functions of the Ukrainian state, such as paying pensions and providing financial assistance to the internally displaced persons (as of December 2023, estimated 3.7 million persons).[109] These are a few examples

[102] Countermeasures belong to the circumstances precluding wrongfullness only if they are imposed in accordance with the rules prescribed by the ARSIWA; otherwise, they are illegal.

[103] Among the most important restrictions are: countermeasures can be taken only against a state that is responsible for an internationally wrongful act (Article 49), the objective of the countermeasures is to induce compliance with international obligations (Article 49), countermeasures shall be, as far as possible, temporary in nature (Article 49), there is a defined group of international obligations that cannot be affected by countermeasures (Article 50), and countermeasures must be proportional (Article 51).

[104] Procedural preconditions include: a duty to call upon the responsible state to fulfil its obligations, a duty to notify the responsible state of a decision to take countermeasures, a duty to suspend countermeasures either if the wrongful act has ceased or if there is a pending dispute before the tribunal.

[105] ILC Commentary stipulates: "In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty, or it must be considered an injured State.".

[106] Martin Dawidowicz (2017), Third-Party Countermeasures in International Law; Martin Dawidowicz (2016), 'Third-party countermeasures: A progressive development of international law'.

[107] ILC Commentary clarifies that "[f]or a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed."

[108] As of November 2023, over 4.2 million people from Ukraine benefit from the special status of temporary protection offered by the European Union. Council of the European Union (2024), 'Refugees from Ukraine in the EU'.

[109] "Regarding bilateral financial assistance, since the Russian invasion, the EU, Member States and the European Financial Institutions, stepped up their support in a Team Europe approach, mobilising EUR 59 billion for Ukraine's overall economic, social and financial resilience in the form of emergency macro-financial assistance, budget support, emergency assistance, crisis response and humanitarian aid." European Commission (2023), Ukraine 2023 Report: Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2023 Communication on EU Enlargement policy.

of how Russia's aggression has negatively impacted sanctioning states, making it tenable to argue that these states are 'specially affected' in the meaning of Article 42 of the ARSIWA.

4.1.1.2.2.2 EU restrictive measures as non-forcible collective self-defence

The right of individual or collective self-defence is included in the UN Charter[110] and is part of customary international law[111]. In consequence, Article 21 of the ARSIWA precludes a state's international responsibility for measures taken in self-defence: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

In *Military and Paramilitary Activities in and against Nicaragua*, the ICJ defined the specific conditions that apply in the instances of collective self-defence. These conditions are as follows: the existence of an armed attack,[112] that the injured state must declare itself as a victim of such armed attack,[113] and that the state victim of an armed attack must request assistance for the right to collective self-defence to be permitted.[114] Additionally, the court pronounced that the conditions of necessity and proportionality must be met for the exercise of the right to collective self-defence.[115]

The abovementioned preconditions have been fulfilled in the case of Russian aggression against Ukraine and hence the right to collective self-defence should be permitted. It remains disputed whether the right of individual or collective self-defence also encompasses non-forcible measures such as EU restrictive measures, but plausible legal arguments to support this view have been presented in the academic contributions,[116] albeit it is not an argument that has been made by the EU or its Member States.

4.1.2 EU restrictive measures and WTO law

EU restrictive measures may take the form of trade restrictions, i.e., restrictions that have a direct bearing on the flow of goods and services in international trade. For example, on March 15, 2022, the European Union, as a part of its fourth package of sanctions against the Russian Federation, denied Russian products and services MFN treatment.[117] Other trade restrictions include import and export bans on various categories of goods: for example, an import ban on certain steel products and an export ban on luxury goods.[118]

[110] Article 51, UN Charter.
[111] The ICJ declared that "the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law." Military and Parliamentary Activities in and against Nicaragua (Nicaragua v USA), Judgment, ICJ Rep 1986, para. 193.
[112] Ibid, para. 195.
[113] Ibid.
[114] Ibid, para. 199.
[115] Ibid, para. 194.
[116] Russell Buchan (2022), 'Non-forcible measures and the law of self-defence'.
[117] European Commission (2022), 'Ukraine: EU agrees fourth package of restrictive measures against Russia'.
[118] Ibid.

4.1.2.1 Possible violations of the GATT 1994

The EU, EU Member States and the Russian Federation are WTO Members; thus, they are obliged to comply with WTO rules. In this regard, EU Sanctions Guidelines emphasize that: "[t]he restrictive measures should also respect the international obligations of the Union and its Member States, in particular the WTO Agreements."[119]

Economic sanctions imposed against Russia may violate some of these obligations. For example, the EU decision to withdraw MFN treatment breaches Article I:1 of the General Agreement on Tariffs and Trade (GATT 1994).[120] Moreover, if a WTO Member imposes additional tariffs, in excess of its bound tariffs, which is what happened when the EU revoked the MFN treatment granted to Russia and applied higher tariffs, Article II of the GATT 1994, in particular, the obligations under Article II:1(a)[121] and (b)[122], might be breached. The WTO panel in *US – Tariff Measures (China)* agreed with the previous panels that "Article II:1(b) prohibits a specific kind of practice 'that will always be inconsistent with paragraph (a)'."[123] Thus, if a WTO Member applies customs duties in excess of those provided for in its schedule, this Member violates Article II:1(b) and grants 'less favourable' treatment in violation of Article II:1(a). Revocation of the MFN treatment and imposition of higher tariffs probably violates both subparagraphs of Article II of the GATT 1994.

Various types of import and export restrictions might also be incompatible with WTO law. A prohibition on the importation of goods that applies only to one WTO Member, while exempting other Members, faces a significant risk of being inconsistent with the MFN obligation. This is because import restrictions discriminate against goods that originated in a particular country by granting market access to goods from other countries, which is incompatible with the obligation under Article I:1 of the GATT 1994.[124]

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[119] Guidelines on implementation and evaluation of EU restrictive measures (n 30), para. 11.

[120] Article I:1 GATT 1994 reads as follows: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

[121] Article II:1(a) of the GATT 1994 reads as follows: "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."

[122] Article II:1(b) of the GATT 1994 reads as follows: "The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

[123] Panel Report, United States – Tariff Measures on Certain Goods from China, para. 7.90.

[124] For a more detailed analysis, see Bogdanova (n 13), pp. 133-157.

Furthermore, import and export restrictions may be incompatible with Article XI:1 of the GATT 1994.[125] In several disputes, the WTO adjudicators have discussed import prohibitions and their compatibility with Article XI of the GATT 1994.[126] This obligation has been interpreted broadly: "[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'."[127] Furthermore, in *China – Raw Materials*, it was pointed out that "Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported".[128] The panel in *Brazil – Retreaded Tyres* emphasised that: "There is no ambiguity as to what 'prohibitions' on importation means: Members shall not forbid the importation of any product of any other Member into their markets."[129] Thus, when EU restrictive measures restrict importation and/or exportation of goods, they inevitably limit imports and exports incompatibly with Article XI:1 of the GATT 1994.

4.1.2.2 Possible violations of the GATS

When it comes to trade in services, restrictions on the importation of services might violate Articles II:1 (Most-Favoured-Nation Treatment) and XVI:1 (Market Access) of the General Agreement on Trade in Services (GATS), although the latter provision would be breached only if a WTO Member has undertaken commitments in a particular services sector and mode of supply and then restricted the importation of such services. In the case of an import ban on services supplied by Russian entities, a breach of the GATS commitments is almost inevitable, since such restrictions are exclusively based on the origin of the services or service supplier(s), and thus, inconsistent with the MFN obligation under Article II:1 of the GATS. The latter functions as an umbrella clause that guarantees that commitments undertaken by any WTO Member are extended to the whole membership.[130]

In addition, Article XVII:1 (National Treatment) of the GATS might be infringed if a WTO Member has undertaken national treatment commitments in a particular services sector and mode of supply (as might be the case with the EU and EU Member States) and then imposed economic sanctions resulting in a 'less favourable' treatment accorded to foreign services and service suppliers in comparison to its own services and service suppliers.[131]

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[125] Article XI:1 of the GATT 1994 reads as follows: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

[126] Panel Report, Canada – Certain Measures Concerning Periodicals; Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products.

[127] Panel Report, India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, para. 5.129.

[128] Appellate Body Reports, China – Measures Related to the Exportation of Various Raw Materials, paras. 319-320.

[129] Panel Report, Brazil – Measures Affecting Imports of Retreaded Tyres, para. 7.11.

[130] Article II:1 of the GATS reads as follows: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."

[131] Article XVII:1 of the GATS reads as follows: "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

Restrictions on the exportation of services may be GATS-incompatible – violating Article XVI:1 of the GATS – only if a WTO Member has undertaken market access commitments in a specific services sector and under mode 3, which, according to WTO adjudicators, also covers the right to export services to recipients abroad.[132] The latter claim could be potentially advanced by a foreign entity that established a commercial presence on the territory of the EU with the goal of providing services in the EU market and exporting them to other destinations, including Russia. However, EU restrictive measures are constraining such an entity from providing services to foreign service recipients when they are subject to restrictive measures targeting Russia.

4.1.2.3 EU restrictive measures against Russia and WTO national security exceptions

In the course of 2022, economic sanctions imposed against Russia – labelled as 'unilateral trade restrictive measures against Russia' – were discussed at Russia's request during the regular meetings of the WTO Council for Trade in Goods (CTG).[133] The Minutes of the CTG Meeting from April 2022 reveal that in Russia's view economic sanctions, potentially incompatible with the other states' WTO obligations, are as follows: additional tariffs imposed on goods originating from Russia (the result of the revocation of the MFN treatment) as well as import and export restrictions on various types of goods.[134] Other restrictive measures such as financial and transport sanctions have also been mentioned, but without any further details as to how they breach the WTO obligations of the states enacting them.[135] In May 2022, at the request of Russia, economic sanctions were discussed at the WTO Council for Trade in Services.[136] The representative of Russia listed some economic sanctions and argued that they "were inconsistent with a number of WTO rules, including the MFN principle and the specific commitments of those Members."[137]

WTO Members that have imposed economic sanctions on Russia emphasise that their actions, even if they are WTO-incompatible, are justifiable on national security grounds. Announcing the revocation of the MFN treatment granted to goods and services originating from Russia, the European Commission stated that: "These actions against Russia protect the essential security interests of the EU and its partners in

light of Russia's unprovoked, premeditated and unjustified aggression against Ukraine, assisted by Belarus. They are fully justified under WTO law."[138]

Article XXI of the GATT 1994 and similar exception in the GATS contemplate a number of security exceptions. The national security exception that allows WTO Members to take any unilateral trade-restrictive measure (e.g., autonomous EU restrictive measures) is embedded in Article XXI(b)(iii) of the GATT 1994, which reads:

[132] Panel Report, China – Certain Measures Affecting Electronic Payment Services, para. 7.617.
[133] WTO, Council for Trade in Goods, 'Minutes of the Meeting of the Council for Trade in Goods 21 and 22 April 2022'; WTO, Council for Trade in Goods, 'Minutes of the Meeting of the Council for Trade in Goods 7 and 8 July 2022'.
[134] WTO, Council for Trade in Goods, 'Minutes of the Meeting of the Council for Trade in Goods 21 and 22 April 2022'.
[135] Ibid.
[136] WTO, Council for Trade in Services, 'Report of the Meeting Held on 16 May 2022'.
[137] Ibid.
[138] European Commission (n 117).

> Nothing in this Agreement shall be construed:
>
> [...] (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests
>
> [...] (iii) taken in time of war or other emergency in international relations.

In *Russia – Traffic in Transit*, the panel introduced a framework to analyse the invocation of the national security justification. The panel distinguished between objective and subjective elements of the national security clause: the prerequisite "taken in time of war or other emergency in international relations" was interpreted as an objective element[139] that operates as a 'limitative qualifying clause'[140]. This objective element not only requires the objectively established existence of war or other emergency in international relations but also chronological concurrence between trade-restrictive measures and such events.[141] According to the panel report, the WTO Member's determination of the subjective elements of the national security exception – a determination of 'essential security interests' and the necessity of such measures ('necessary for the protection') – should be reviewed against the background of the principle of good faith.[142] For this reason, a WTO Member should articulate its essential security interests "sufficiently enough to demonstrate their veracity".[143] Furthermore, the element 'necessary for the protection' requires a minimum degree of plausibility between the trade-restrictive measures imposed and their ability to contribute to the protection of the declared security interests.[144] Subsequent WTO panels have either explicitly relied upon this framework[145] or reached similar conclusions after interpreting Article XXI(b)(iii) of the GATT 1994.[146]

In light of the above, the national security exception might justify EU restrictive measures if the actions that provoked the imposition of these trade-restrictive measures constitute a situation of 'war' or 'emergency in international relations', giving rise to a certain type of national security threats that can be essential for the EU or its Member States. This is the case with the Russian invasion of Ukraine.

EU restrictive measures against Russia were imposed in response to its invasion of Ukraine, and the subsequent tightening of these restrictive measures was inspired by the brutal conduct of the invading Russian army.[147]

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[139] Panel Report, Russia – Measures Concerning Traffic in Transit, para. 7.101.
[140] Ibid, para. 7.65.
[141] Ibid, para. 7.70.
[142] Ibid, para. 7.132. and para. 7.138.
[143] Ibid, para. 7.134.
[144] Ibid, para. 7.138.
[145] Panel Report, Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights, para. 7.241.
[146] Panel Report, US – Origin Marking Requirement (Hong Kong, China), para. 7.89; Panel Report, United States – Certain Measures on Steel and Aluminium Products.
[147] The Independent International Commission of Inquiry on Ukraine in its first report to the UN General Assembly came to the following conclusion: "the Commission has found that war crimes, violations of human rights and international humanitarian law have been committed in Ukraine since 24 February 2022. Russian armed forces are responsible for the vast majority of the violations identified." Independent International Commission of Inquiry on Ukraine (2022), Report.

4.1.3 EU restrictive measures and international human rights

Recent scholarly debates increasingly discuss the interrelations between unilateral economic sanctions and the human rights obligations of the states imposing such measures.[148] In this ongoing discussion, economic sanctions are instrumentalised either as an instrument to promote and enforce human rights or as policies that violate the human rights of those targeted by them.[149]

Protection of human rights features prominently among the reasons for the imposition of both country-specific (see, e.g., the Myanmar (Burma) sanctions) and horizontal (e.g., Magnitsky-style sanctions) EU restrictive measures. In parallel to this, human rights considerations limit the EU's ability to use restrictive measures in a number of ways: (i) by limiting the scope of the measures imposed; (ii) by exceptions that have become a compulsory element of all EU sanctions regimes; (iii) by the de-listing procedures and Council's regular reviews of EU restrictive measures; and finally (iv) by their judicial review. The latter aspect is analysed in detail in Section 4.2, while the former elements are examined here.

The shift towards more targeted EU restrictive measures illustrates how human rights considerations limit such measures' scope. Following countless reports on the negative effects of comprehensive economic sanctions on the civilian population of sanctioned states, there was a move to targeted collective and unilateral sanctions. The preference for targeted measures is also reflected in the EU Guidelines on Implementation and Evaluation of Restrictive Measures, which state that:[150]

> The measures taken should target those identified as responsible for the policies or actions that have prompted the EU decision to impose restrictive measures and those benefiting from and supporting such policies and actions. Such targeted measures are more effective than indiscriminate measures and minimise adverse consequences for those not responsible for such policies and actions.

Another example are the exceptions that are now a compulsory element of all EU sanctions regimes. The existing EU restrictive measures explicitly allow certain exemptions, mostly driven by human rights considerations. As a rule, individuals whose assets and economic resources have been frozen are permitted to use some of their assets to cover their basic needs (living costs, medical treatment, legal advice, etc.).

For example, Article 5(3) of the Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States allows the following derogations:

> […] the competent authorities of the Member States may authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, under such conditions as they deem appropriate, after having determined that the funds or economic resources concerned are:

[148] Jean-Marc Thouvenin (2015), 'International Economic Sanctions and Fundamental Rights: Friend or Foe?'; Matthew Happold (2016), 'Targeted Sanctions and Human Rights'; Iryna Bogdanova (2023), 'Human Rights and Unilateral Economic Sanctions: A New Perspective on a Twisted Relationship'.
[149] Bogdanova (n 148).
[150] EU Guidelines on Implementation and Evaluation of Restrictive Measures (n 30), para. 13.

(a) necessary to satisfy the basic needs of the natural persons listed in the Annex and dependent family members of such natural persons, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;

(b) intended exclusively for the payment of reasonable professional fees or the reimbursement of incurred expenses associated with the provision of legal services; […]

In this regard, EU Best Practices for the effective implementation of restrictive measures emphasise that: "[w]hile acting consistently with the letter and spirit of the Regulations, the competent authority shall take into account fundamental rights of designated persons and entities when granting derogations."[151]

Furthermore, humanitarian exceptions made mandatory for the UN collective sanctions have also been incorporated into EU sanctions regimes.[152]

The de-listing procedure is also envisioned under the existing EU restrictive measures frameworks. EU Best Practices for the effective implementation of restrictive measures acknowledges that: "[a] transparent and effective de-listing procedure is essential to the credibility and legitimacy of restrictive measures."[153] The EU global human rights sanctions regime prescribes the rule, which is also embedded in other regimes, that: "Where observations are submitted, or where substantial new evidence is presented, the Council shall review the decisions referred to in paragraph 1 [decision to include a natural or legal person into a particular sanctions list] and inform the natural or legal person, entity or body concerned accordingly."[154] EU Guidelines on Implementation and Evaluation of Restrictive Measures prescribe general rules on how such requests for de-listings should be processed.[155] Lists of sanctioned individuals and legal entities "shall be reviewed at regular intervals and at least every 12 months"[156], even if no request for de-listing was submitted.

4.1.4 EU restrictive measures and customary law of immunity

4.1.4.1 EU restrictive measures targeting central banks and state immunity

The EU practice of using restrictive measures demonstrates that these measures may target state-owned enterprises and central banks. For example, the EU has adopted restrictive measures against the central banks

[151] EU Best Practices for the effective implementation of restrictive measures (n 31), para. 76.
[152] For example, the EU implemented a humanitarian exception to its human rights sanctions regime: Article 4 of Regulation (EU) 2020/1998 has been amended by Regulation (EU) 2024/1034. This exemption is based on United Nations Security Council Resolution 2664 (2022), which was adopted on 9 December 2022.
[153] EU Best Practices for the effective implementation of restrictive measures (n 31), para. 18.
[154] Article 14(3), Council Regulation (EU) 2020/1998 of 7 December 2020 (n 54).
[155] EU Guidelines on Implementation and Evaluation of Restrictive Measures (n 30), paras. 18-20.
[156] Article 14(4), Council Regulation (EU) 2020/1998 of 7 December 2020 (n 54).

of Iran[157] and Syria[158], and most recently against the central bank of Russia.[159] Based on the distinction between *acta jure gestionis and acta jure imperii*, state-owned entities when they act as economic operators and do not fulfil any distinctive governmental functions do not benefit from the state immunity entitlements.[160] Meanwhile, there is almost universal agreement that central banks are entitled to the state immunity guarantees.[161] We now turn to the analysis of how these immunities relate to EU restrictive measures targeting central banks and their assets.

State immunity originated in customary international law and efforts to codify rules on state immunity have not come to fruition yet. The customary rules are, however binding on the EU. As the CJEU has stated: "when it [Union] adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the Union."[162]

The principle of state immunity embodies jurisdictional immunity (immunity from adjudication) and enforcement immunity (immunity from execution).[163] While the former aspect of state immunity is not applicable to out-of-court proceedings, the application of the latter to the executive decisions taken not in the context of court proceedings is debated. Jean-Marc Thouvenin and Victor Grandaubert, for example, advance the view that immunity from execution is equal to immunity from any type of constraint: "non-judicial measures can hinder the foreign State's management of its property and should in principle be covered by immunity from execution under customary international law."[164] In contrast, Tom Ruys and Ingrid (Brunk) Wuerth contend that immunity from execution is applicable only in the context of court proceedings.[165]

This theoretical debate has a direct impact on the legality of economic sanctions targeting central banks and their assets. If the view of state immunity as only applying to in the context of court proceedings is accepted as customary international law, then EU restrictive measures targeting central banks, including the freezing of their assets, do not breach customary international law of state immunity as it applies to central banks. This is so because EU restrictive measures have not been adopted in the course of judicial proceedings.

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[157] The EU restrictive measures against the Central Bank of Iran were justified by its "involvement in activities to circumvent sanctions imposed against Iran." Council Decision 2012/35/CFSP of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran.

[158] The Central Bank of Syria was included in the list of sanctioned enterprises for "providing financial support to the regime." Council Regulation (EU) No 168/ 2012 of 27 February 2012 amending Regulation (EU) No 36/ 2012 concerning restrictive measures in view of the situation in Syria.

[159] In the early days of the Russian invasion, the EU prohibited all transactions with the Central Bank of Russia related to the management of its reserves and assets. Council of the European Union (2022), 'Russia's military aggression against Ukraine: Council imposes sanctions on 26 persons and one entity'.

[160] "Inasmuch as the property, including the bank accounts, of these entities is not 'specifically in use or intended for use by the State for other than government non-commercial purposes' (in the sense of Article 19[c] of the 2004 UN Convention on State Immunity [UNCSI]), it does not enjoy immunity from execution under customary international law." Tom Ruys (2019), 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions', p. 671.

[161] Peter-Tobias Stoll, 'State Immunity,' *Max Planck Encyclopedia of Public International Law;* Ingrid Wuerth (2019), 'Immunity from Execution of Central Bank Assets'.

[162] Bolivarian Republic of Venezuela v Council (Case T-65/18 RENV), para. 87.

[163] Stoll (n 161).

[164] Jean-Marc Thouvenin and Victor Grandaubert (2019), 'The Material Scope of State Immunity from Execution'.

[165] Ruys (n 160); Ingrid Brunk (Wuerth) (2023), 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds'.

4.1.4.2 EU restrictive measures targeting government officials and immunities of high-ranking state officials

Heads of states and other senior government officials have been targeted by EU restrictive measures, such as asset freezes and travel bans. Some of these high-ranking officials are entitled to international immunities. For example, it is uncontestable that the head of state is entitled to both immunity in the public capacity – 'as the State' – and personal immunity.[166] When it comes to the immunity of other high-ranking state officials, the problem of determining who is entitled to be called 'high-ranking government official' for the purposes of immunity entitlements remains unsettled.[167] In this regard, Hazel Fox and Philippa Webb observe: "The tendency in practice has, however, been to expand the categories of high-ranking officials benefiting from immunity ratione personae."[168] To buttress this point, they quote the ICJ findings in *Armed Activities on the Territory of the Congo* (judgement on jurisdiction) wherein after noting that "Heads of State, Heads of Government and Ministers for Foreign Affairs" are deemed to represent the state, the court noted: "with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials."[169]

In light of the above, it is safe to conclude that the Head of State, Head of Government and Minister for Foreign Affairs are entitled to immunity *ratione personae*, while the immunity entitlements of other high-ranking government officials hinge upon their role in representing the state.

In connection with the EU restrictive measures targeting Heads of State, Heads of Government, Ministers for Foreign Affairs and other senior government officials and implying asset freezes and travel bans, the question of whether these restrictions might encroach on immunity guarantees should be addressed. For example, the ICJ concluded in *Arrest Warrant of 11 April 2000* that an arrest warrant hindered the ability of the Minister for Foreign Affairs to perform his functions abroad and thus violated immunities guaranteed under international law.[170] This finding, if interpreted broadly, may imply that travel bans that prohibit the Ministers for Foreign Affairs, Heads of State, Heads of Government, as well as potentially other senior governmental officials, from entering a territory of other states in their official capacity as a

representative of their state might be incompatible with the immunity guarantees.

In this regard, it should be noted that the legal documents establishing EU restrictive measures allow for a number of exceptions that apply to travel bans. One of the most common types of exception is exemption allowing certain categories of sanctioned individuals to enter the territory of the EU in strictly-defined instances. For example, EU Magnitsky-style sanctions allow the following exceptions to travel bans:[171]

[166] Hazel Fox and Philippa Webb (2015), The Law of State Immunity, p. 544.
[167] Arthur Watts, 'Heads of Governments and Other Senior Officials,' *Max Planck Encyclopedia of Public International Law*.
[168] Fox and Webb (n 166), p. 565.
[169] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, paras. 46-47.
[170] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, p 3.
[171] Article 2(3), Council Decision (CFSP) 2020/1999 of 7 December 2020 (n 54).

> Paragraph 1 [travel ban] shall be without prejudice to the cases where a Member State is bound by an obligation under international law, namely:
>
> (a) as a host country of an international intergovernmental organisation;
>
> (b) as a host country of an international conference convened by, or under the auspices of, the United Nations;
>
> (c) under a multilateral agreement conferring privileges and immunities; or
>
> (d) pursuant to the 1929 Treaty of Conciliation (Lateran Pact) concluded by the Holy See (Vatican City State) and Italy.

As regards asset freezes, the debate on whether immunity applies only in the context of court proceedings, is also of relevance to decide if immunities offer any protection to senior state officials from being targeted and from their assets being frozen as a result of EU restrictive measures.[172]

4.1.5 EU restrictive measures and jurisdiction in international law

The term "jurisdiction" denotes three competences exercised by a state: prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction. The majority of states favour the permissive principle of ascertaining jurisdiction, which entails that states are required to justify their assertions of jurisdiction by reference to an established base of jurisdiction.[173]

Jurisdiction can be ascertained based on the following principles:

- The territoriality principle embodies subjective territorial jurisdiction and objective territorial jurisdiction; the former covering conduct that commenced in a state's territory and the latter covers conduct that concluded in a state's territory.[174] The effects doctrine is a variation of objective territorial jurisdiction, which is accepted by some states and contested by other.[175]

- The nationality principle endows a state with jurisdiction over its nationals, and it entitles a state to exercise jurisdiction over its nationals abroad.[176]
- The protective principle acknowledged that "acts that severely jeopardise a state's government functions are considered a sufficient basis for jurisdiction."[177] It has traditionally been applied to crimes such as treason and counterfeiting the national currency.

[172] Ruys (n 160).
[173] Cedric Ryngaert (2015), Jurisdiction in International Law, p. 29; Susan Emmenegger emphasizes that "states are required to justify their jurisdictional assertion under generally accepted rules or principles of international law (permissive principles approach)." Susan Emmenegger (2016), 'Extraterritorial Economic Sanctions and Their Foundation in International Law', p. 644.
[174] Ian Brownlie (2008), Principles of Public International Law, p. 301.
[175] Ryngaert (173), p. 84.
[176] Bruno Simma and Andreas Müller (2012), 'Exercise and Limits of Jurisdiction', p. 142.
[177] Ibid, p. 144.

- The universality principle (universal jurisdiction) authorises any state (or, at least, any state which has custody of the offender) to assert jurisdiction over certain categories of crimes under international law.[178]

As a rule, the EU restrictive measures apply within the territory of the EU, including its airspace, and they are binding upon nationals of the EU Member States, legal entities incorporated under the laws of the EU Member States and legal entities if they do business within the EU.[179] In other words, EU restrictive measures apply according to the established territorial and nationality bases of jurisdiction.

The US practice of enacting unilateral economic sanctions with sweeping extraterritorial effects, especially in the case of sanctions targeting Iran, is well-known. The EU has publicly opposed such practices and even updated its Blocking Statute to wind down the effect of the US unilateralism.[180] Thus, traditionally, the EU has been hesitant to frame its restrictive measures in a way that might have extraterritorial effects. However, in the course of the last years and in the context of the debate on the effectiveness of EU restrictive measures, the EU has been slowly changing its approach.

In its efforts to tighten EU restrictive measures targeting Russia, a ban on the re-exportation of sensitive goods and technology to Russia and for use in Russia – 'no Russia clause' – was introduced as part of the EU's 12th package of sanctions.[181] According to this ban, EU exporters are obligated to insert a 'no re-export to Russia' clause into their export, sale, supply, transfer or similar contracts when they relate to trade in sensitive goods such as goods related to aviation, jet fuel, firearms, and common high priority items.[182] These new clauses had to be incorporated into the new or existing agreements as of 20 March 2024.[183]

These prohibitions on re-export might raise concerns regarding their extraterritorial application. The prohibition on re-export entails that the government regulates the conduct of foreign-based entities, entities that potentially have no connection to that particular state, by requiring them to refrain from engaging in certain business transactions. In other words, the EU prescribes and enforces rules with respect to subjects over which it has no jurisdiction.

Yet in this particular instance, the potential extraterritorial reach of 'no Russia clauses' are less problematic because they are applied to legal entities of the EU. The EU can argue that it is only regulating the conduct of

[178] Ibid.
[179] This Regulation shall apply: (a) within the territory of the Union, including its airspace; (b) on board any aircraft or vessel under the jurisdiction of a Member State; (c) to any natural person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union. Article 19, Council Regulation (EU) 2020/1998 of 7 December 2020 (n 54).
[180] Stoll and others (n 43).
[181] Council Regulation (EU) 2023/2878 of 18 December 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
[182] Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014 (Last updated 14 May 2024).
[183] Ibid.

its entities by demanding the inclusion of 'no Russia clause' into their contracts. Certainly, were a foreign counterparty to act contrary to such clause in a contract with an EU exporter, it would not seem to be in breach of EU law, although it would be in breach of contract.

The EU's growing urge to sanction entities in third countries, mostly in China, for supporting Russian aggression against Ukraine resulted in the imposition of export restrictions on four companies registered in China along with companies registered in Kazakhstan, India, Serbia, Thailand, Sri Lanka, and Turkey as a part of its 13th package of sanctions against Russia.[184] The 14th package of sanctions announced on June 24, 2024, extended export restrictions to additional entities from third countries – China, Kazakhstan, Kyrgyzstan, Turkey, and the United Arab Emirates.[185] But these EU restrictive measures regulate the conduct of domestically incorporated companies – prohibiting them from supplying certain goods to the sanctioned companies in third states – so they are not, as such, extraterritorial.

4.2 Limitations on EU restrictive measures imposed by the EU law (acquis communautaire)

The European Union is founded on the common values shared by its Member States, including such values as the rule of law and respect for human rights.[186] In addition, fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the constitutional traditions of the EU Member States constitute general principles of EU law.[187] Hence, the starting point of this analysis is the presumption that EU restrictive measures must comply with the general principles and norms of EU law (the *acquis communautaire*).

4.2.1 The role of the Court of Justice of the European Union in reviewing EU restrictive measures: court's jurisdiction and standard of review

Within the EU institutional framework, the institution that reviews the conformity of EU restrictive measures with EU law is the Court of Justice of the European Union (CJEU), comprised of the General Court and the Court of Justice (ECJ).[188] The legal basis for such reviews is provided in Article 24 TEU, and Articles 275 and 263 of the TFEU, which allow any natural or legal person to institute proceedings before the CJEU if certain preconditions are fulfilled.[189] In particular, Article 263(4) of the TFEU gives a right to any natural or legal person to institute proceedings (i) "against an act addressed to that person or which is of direct and individual concern to them" and (ii) "against a regulatory act which is of direct concern to them and does not entail implementing

[184] European Commission (2024), 'EU adopts 13th package of sanctions against Russia after two years of its war of aggression against Ukraine'.
[185] Council of the European Union (2024), 'Russia's war of aggression against Ukraine: comprehensive EU's 14th package of sanctions cracks down on circumvention and adopts energy measures'. /
[186] Article 2, TEU.
[187] Article 6(3), TEU.
[188] Pursuant to the Treaties, only the Court of Justice of the European Union can provide legally binding interpretations of Union law.
[189] Articles 275 and 263, TFEU.

measures". The settled case law requires the fulfilment of the two cumulative criteria: "the contested measure should, first, directly affect the legal situation of the individual and, secondly, should leave no discretion to the addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone".[190]

The question of the CJEU jurisdiction in CFSP matters has gained much attention among academics and practitioners. This discussion falls outside of the scope of this Report, yet several observations on the most recent case law relevant to the review of EU restrictive measures are warranted. In its 2017 decision in *PJSC Rosneft Oil Company v Her Majesty's Treasury*, the ECJ held that when individuals or legal entities targeted by the EU restrictive measures challenge the legality of the decision to impose such measures before Member States' national courts, these national courts have to issue a reference for a preliminary ruling of the CJEU, and that the latter has jurisdiction to give such a preliminary ruling.[191]

The recent case initiated by Venezuela against the Council put the following question before the Court: could a third state targeted by EU restrictive measures challenge these measures before the CJEU?[192] In other words, could such a third state initiate a dispute before the EU courts, if, as a result of the EU restrictive measures, the ability of individuals and legal entities under its jurisdiction to engage in transactions with their EU-based counterparts is constrained?

The General Court in its judgment delivered in September 2019 decided that Venezuela had no legal standing to initiate the dispute under Article 263 TFEU.[193] At the same time, the Court of Justice held that the General Court erred in law and referred the case back to the General Court for the judgment on the

merits.[194] In September 2023, the Grand Chamber of the General Court dismissed the action on the merits.[195]

It was UN-authorised sanctions targeting individuals and imposed without due process that caused a significant backlash against collective sanctions and risked undermining their legality and legitimacy.[196] The cases brought by sanctioned individuals were instrumental in defining the standard of review now utilised by the CJEU. In

[190] Bolivarian Republic of Venezuela v Council (Case C-872/19 P), para. 61.
[191] PJSC Rosneft Oil Company v Her Majesty's Treasury (Case C-72/15). At the same time, as Peter Van Elsuwege observes: "[o]nly measures of general application, such as the basic principle to effect a partial interruption of the EU's economic and financial relations with Russia, are excluded from judicial review." Peter van Elsuwege (2017), 'Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case'.
[192] Bolivarian Republic of Venezuela v Council (Case T-65/18).
[193] The court concluded: "[…] the fact that the contested provisions prohibit operators established in the European Union from having economic and financial relations with any natural or legal person, entity or body in Venezuela cannot lead to the conclusion that those provisions directly concern the Bolivarian Republic of Venezuela within the meaning of the fourth paragraph of Article 263 TFEU." Ibid.
[194] The court first held that "Venezuela, as a State with international legal personality, must be regarded as a 'legal person' within the meaning of the fourth paragraph of Article 263 TFEU"; second, that "the General Court erred in law in considering that the restrictive measures at issue did not directly affect the legal situation of the Bolivarian Republic of Venezuela". Bolivarian Republic of Venezuela v Council (n 190).
[195] Bolivarian Republic of Venezuela v Council (n 162).
[196] Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union (Joined Cases C-402/05 P and C-415/05 P) (Kadi I); European Commission v Yassin Abdullah Kadi (in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P) (Kadi II).

Kadi II, the ECJ declared the applicable standard of review for such cases as follows: "the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order."[197] At the same time, the EU courts acknowledge the broad discretion given to the Council when it comes to EU restrictive measures: "[it] must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments."[198]

4.2.2 Grounds for questioning the legality of EU restrictive measures and the CJEU case law

According to the Court, given the broad discretion given to the Council "in areas which involve political, economic and social choices […], and in which it is called upon to undertake complex assessments", the legality of the adopted measures can be affected only if "the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."[199] Despite such a seemingly permissive view on the potential illegality of EU restrictive measures, it has become habitual for individuals and legal entities to bring an action for annulment before the EU courts.[200] State-owned entities such as the National Iranian Oil Company[201], the Central Bank of Iran[202], as well as sanctioned Russian oligarchs and former Ukrainian government officials sanctioned for misappropriation of public funds have all challenged their designations.

The most common grounds for challenging EU restrictive measures before the EU courts are: infringement of the obligation to state reasons for inclusion of an individual or a legal entity on the sanctions list; errors of assessment in considering that there was a sufficient factual basis to justify the inclusion of a person on a sanctions list; infringement of the rights of the defence and of the right to effective judicial protection;

and infringement of applicant's fundamental rights, including the right to property and the freedom to conduct a business.[203]

Below we analyze these most common grounds for challenging EU restrictive measures and the case law of the CJEU, which reflects its views on the relationship between EU restrictive measures and norms and principles of the EU law.

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[197] Kadi II (n 198), para. 97.

[198] National Iranian Oil Company v Council, European Commission intervening (Case C-440/14 P), para. 77, citing the judgements in Sison v Council (Case C-266/05 P) para. 33, and Council v Manufacturing Support & Procurement Kala Naft (Case C-348/12 P) para. 120.

[199] Ibid.

[200] Clara Portela points out that this category of cases has become one of the most frequent before the CJEU, with the decisions of the court shaping the design and formulation of EU restrictive measures. Portela (n 78).

[201] National Iranian Oil Company v Council (Case T-578/12); National Iranian Oil Company v Council (n 198).

[202] Central Bank of Iran v Council (Case T-262/12).

[203] Arkady Romanovich Rotenberg v Council (Case T-720/14); Arnoud Willems and Alessandra Moroni name the four pleas as the most frequently argued by the individuals/entities targeted by the EU unilateral sanctions: "1. The EU institutions fail to state reasons and breach their right of defence by failing to support factual and legal allegations with adequate evidence; 2. The EU institutions make manifest errors of assessment in determining whether listing criteria are satisfied; 3. The EU institutions disproportionately restrict fundamental rights, including rights to property and reputation and the freedom to conduct a business; and 4. The EU institutions breach their right to an effective remedy."

Before doing this, one more clarification is warranted. On several occasions, sanctioned persons have questioned the competence of the Council to adopt the acts adding those persons to a sanctions list.[204] The court's view on the Council's competence in this regard should be recalled:[205]

> In view of the broad scope of the aims and objectives of the common foreign and security policy, as expressed in Article 3(5) TEU and Article 21 TEU, and specific provisions relating to that policy, in particular Articles 23 and 24 TEU […], **the Council has a broad discretion in determining the persons and entities that are to be subject to the restrictive measures that the European Union adopts in the field of the common foreign and security policy.** [***emphasis added***]

4.2.2.1 Elements that the Council should prove before the CJEU

The Council enjoys a broad discretion in defining the legal criteria based on which individuals and legal entities can be designated, implying a limited judicial review of such criteria.[206] At the same time, on a number of occasions the CJEU has signalled its willingness to review the legality of a designation criterion as such, especially if these criteria are inappropriate in light of the objectives pursued by the CFSP.[207]

There are two main elements that the Council must demonstrate before the CJEU to prove that restrictive measures should not be annulled: that there is a sufficiently solid factual basis to designate the individual or entity, and that the obligation to state reasons for such a designation was fulfilled.

4.2.2.1.1 The existence of a sufficiently solid factual basis to sanction an individual or entity

Time and again targeted individuals and legal entities argue before the CJEU that the Council made "an error of assessment" in designating them under a special sanctions regime.[208] To put it differently, applicants claim that the Council did not adduce specific and precise evidence constituting a solid factual basis enabling it to show that the listing criteria of a specific sanctions regime had been satisfied with respect to the particular individual or entity.[209]

According to the Court's case law, Article 47 of the Charter of Fundamental Rights, which guarantees the effectiveness of the judicial review, requires that the Court ensures that the decision to impose restrictive

[204] For example, in RT France v Council, the applicant "expresse[d] doubt […] as to the Council's competence to adopt the contested acts [Council Decision (CFSP) 2022/351 of 1 March 2022 and Council Regulation (EU) 2022/350 of 1 March 2022]".
[205] RT France v Council (n 64), para. 52.
[206] Dmitry Arkadievich Mazepin v Council (Case T-282/22), para. 86.
[207] Aleksi Pursiainen (2017), 'Targeted EU Sanctions and Fundamental Rights'.
[208] For example, Nikita Mazepin argued that the Council made "a manifest error of assessment" by including his name in a relevant sanctions list. Nikita Dmitrievich Mazepin v Council (Case T-743/22). His father, Dmitry Arkadievich Mazepin, argued the same. Dmitry Arkadievich Mazepin v Council (n 206).
[209] Arnoud Willems and Alessandra Moroni (2020), 'Defeating Economic Sanctions in the EU: A Strategic Analysis of Litigation Options'.

measures against individuals or entities "is taken on a sufficiently solid factual basis."[210] The assessment of the relevant evidence and information – whether it is sufficiently solid – is carried out "not in isolation but in their context."[211] The evidence provided by the Council should be "sufficiently specific, precise and consistent" to establish that "there is a sufficient link" between sanctioned individual or entity and the sanctioned regime or "the situations being combated".[212]

Analysis of the recent case law reveals that there are two categories of disputes in which applicants have a higher chance of their designation being annulled based on the absence of a 'sufficient link'. The first category encompasses instances when restrictive measures apply not only to political elites and businessmen affiliated with a sanctioned regime but also to their family members and other persons 'associated with them'. In two recent cases, *Prigozhina v Council* and *Nikita Dmitrievich Mazepin v Council*, the General Court pronounced:[213]

> […] as is apparent from case-law, the application of restrictive measures to natural persons irrespective of their personal conduct and on the sole ground of their family connection with persons associated with the leaders of the third country concerned must be regarded as at variance with the case-law of the Court of Justice. That requirement ensures that **there is a sufficient link between the persons concerned and the third country targeted by the restrictive measures adopted by the European Union**. [***emphasis added***]

It should be noted, however, that a more detailed analysis of the case law demonstrates its inconclusiveness and ambiguity on the legality of restrictive measures targeting family members.[214]

The second category covers disputes where sanctioned persons dispute their affiliation with the sanctioned regime and the policies pursued by it. For example, in the recent judgements in *Aven v Council*[215] and *Fridman v Council*[216], the General Court found that the Council did not provide sufficient evidence to prove that these Russian oligarchs were "supporting or implementing actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine" or that they are "associated with" other persons on the sanctions lists.

4.2.2.1.2 The obligation to state reasons

The obligation to state the reasons for an act adversely affecting a person is required under the second paragraph of Article 296 TFEU ("[l]egal acts shall state the reasons on which they are based") and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union ("the obligation of the administration to give reasons for its decisions").[217] In *Kiselev v Council*, the General Court emphasized that: "[t]he obligation to state reasons therefore constitutes an essential principle of European Union law which may be derogated from only

[210] Nikita Dmitrievich Mazepin v Council (n 208), para. 66; Dmitry Arkadievich Mazepin v Council (n 206), para. 45.
[211] Nikita Dmitrievich Mazepin v Council (n 208), para. 68; Dmitry Arkadievich Mazepin v Council (n 206), para. 46.
[212] Ibid.
[213] Nikita Dmitrievich Mazepin v Council (n 208), para. 92, citing judgment Prigozhina v Council (Case T-212/22), para. 95.
[214] Anton Moiseienko (2024), 'The Sins of the Fathers: Targeted Sanctions Against Family Members of Primary Targets'.
[215] Petr Aven v Council (Case T-301/22).
[216] Mikhail Fridman v Council (Case T-304/22).
[217] Dmitrii Konstantinovich Kiselev v Council (Case T-262/15), para. 39.

for compelling reasons."[218] In *RT France v Council*, the General Court characterized the obligation to state the reasons on which an act adversely affecting a person is based as "a corollary of the principle of respect for the rights of the defence".[219]

Applicants interpret this obligation as requiring "that the applicant be able to ascertain the grounds on which the Council proposed to base its decision to include the applicant's name on the lists at issue before it adopted that decision."[220] Applicants often argue infringement of the obligation to state reasons as a part of a broader argument alleging infringement of the right to effective judicial protection.[221] This approach is supported by the existing case law, according to which the right to effective judicial protection "requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him or her is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons."[222]

The case law defines the ambit of such an obligation. First and foremost, the requirements that should be satisfied in order to fulfil the obligation "depend on the circumstances of each case".[223] Second, the reasons given for the decision are sufficient if (i) "that decision was adopted in circumstances known to the party concerned which enable him or her to understand the scope of the measure concerning him or her"[224];

(ii) "the degree of precision of the statement of the reasons for a measure must be weighed against practical realities and the time and technical facilities available for taking the measure".[225] In the context of EU restrictive measures against named individuals and entities, the obligation to state reasons requires "the actual and specific reasons why the Council considered, in the exercise of its discretion, that such a measure had to be adopted in respect of the person concerned".[226] Third, the statement of reasons should not be too generic or ambiguous. In *Oleksandr Yanukovych v Council*, the General Court stressed that "the statement of reasons […] cannot consist merely of a general, stereotypical formulation. Such a measure must indicate the actual and specific reasons why the Council considers that the relevant legislation is applicable to the person concerned".[227]

4.2.2.2 EU restrictive measures and the fundamental rights of their targets

The cornerstone principle guiding the review of EU restrictive measures by the EU courts is that "the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the EU legal order."[228] The court had many

[218] Ibid.
[219] RT France v Council (n 64), para. 102.
[220] RT France v Council (n 64), para. 65.
[221] Nikita Dmitrievich Mazepin v Council (n 208), para. 60; Dmitry Arkadievich Mazepin v Council (n 206), para. 18; Igor Rotenberg v Council (Case T-738/22), para. 18.
[222] Dmitry Arkadievich Mazepin v Council (n 206), para. 24
[223] RT France v Council (n 64), para. 103, citing a similar conclusion in Rosneft v Council (Case C-732/18 P), para. 77.
[224] RT France v Council (n 64), para. 104, citing a similar conclusion in Rosneft v Council (n 223), para. 78.
[225] RT France v Council (n 64), para. 104, citing a similar conclusion in Sberbank of Russia v Council (Case T-732/14), para. 93.
[226] RT France v Council (n 64), para. 105, citing a similar conclusion in Sberbank of Russia v Council (n 225), para. 93.
[227] Oleksandr Yanukovych v Council (Case T-348/14), para. 80.
[228] Mykola Yanovych Azarov v Council (Case C 530/17 P), para. 20.

opportunities to pronounce on the balance between EU restrictive measures and the fundamental rights of their targets. As the analysis of the pertinent case law unequivocally demonstrates: the EU courts are more willing to acknowledge violation of due process rights than other rights, such as the right to property or the right to freedom of expression.[229]

4.2.2.2.1 Rights of the defence

Respect for the rights of the defence is guaranteed by Article 41 (right to good administration) and Article 48 (presumption of innocence and right of defence) of the Charter of Fundamental Rights of the European Union. Applicants often argue before the CJEU that Article 41(2)(a) of the Charter of Fundamental Rights requires that the Council should hear applicants before adopting the acts that put them on a sanctions list (i.e., right to be heard).[230]

The right to be heard is not an absolute one, and it may be curtailed if the preconditions of Article 52(1) of the Charter of Fundamental Rights are met. In its case law, the CJEU recognises the limitations of the right to be heard if they are necessary to preserve the effectiveness of EU restrictive measures.

In *RT France v Council*, the General Court (Grand Chamber) emphasised that:[231]

> As regards respect for the right to be heard, it is apparent from the case-law that, in the case of the initial decision placing a person's or an entity's name on the list of persons and entities whose funds are frozen, the Council is not required to inform the person or
>
> entity concerned beforehand of the grounds on which it intends to rely in order to list that person or entity. So that its effectiveness may not be jeopardised, such a measure must be able to take advantage of a surprise effect and to apply immediately […].

This approach is usually justified when EU restrictive measures entail the freezing of assets. However, in *RT France v Council*, the General Court explicitly acknowledged that the same approach might be used not only in relation to freezing of assets but also to a temporary prohibition on broadcasting "to ensure its [measure's] effectiveness in the light of the objectives which it pursues and in particular to ensure that it is not deprived of impact and effectiveness".[232]

4.2.2.2.2 Right to effective judicial protection

Article 47 of the Charter of Fundamental Rights guarantees the right to effective judicial protection. It reads as follows:

[229] For a similar conclusion, see Willems and Moroni (n 209).
[230] RT France v Council (n 64), para. 65.
[231] RT France v Council (n 64), para. 80.
[232] Ibid, para. 84.

Article 47

Right to an effective remedy and to a fair trial

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

In the view of the CJEU, this right is an essential component of the rule of law: "[…] it must be recalled that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law."[233]

As has been mentioned above, applicants often argue infringement of the obligation to state reasons for their designation as a part of a broader argument alleging infringement of the right to effective judicial protection.

4.2.2.2.3 Right to freedom of expression and information

The right to freedom of expression and information is guaranteed by Article 11 of the Charter of Fundamental Rights, which reads as follows:

Article 11

Freedom of expression and information

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> 2. The freedom and pluralism of the media shall be respected.

In several recent disputes, the General Court had a chance to elaborate on the relationship between EU restrictive measures targeting propaganda and misinformation and the right to freedom of expression and information. The sanctioned Russian propagandist Dmitrii Kiselev, when attempting to annul his designation, based his legal claim on six pleas in law, including alleged infringement of the right to freedom of expression.[234] The Court held that: "the Council was allowed to adopt restrictive measures liable to limit the applicant's freedom of expression, provided that those limitations comply with the conditions set out above, all of which must be satisfied in order for that freedom to be legitimately restricted."[235] The conditions mentioned by the

[233] Bolivarian Republic of Venezuela v Council (n 190), para. 48, citing judgment in H v Council and Others (Case C-455/14 P), para. 41.
[234] Dmitrii Konstantinovich Kiselev v Council (n 217).
[235] Ibid, para. 70.

court are laid down in Article 52(1) of the Charter of Fundamental Rights, and they are the following: (i) the limitation must be 'provided for by law'; (ii) the limitation must be intended to achieve an objective of general interest, recognised as such by the European Union; and finally, (iii) the limitation must not be excessive.[236] The latter precondition is comprised of two elements: "(i) those limitations must be necessary and proportionate to the aim sought, and (ii) the essence of that freedom must not be impaired."[237]

In *RT France v Council*, the General Court recapitulated the principles of case law applicable to the right to freedom of expression and emphasised that the right is not an absolute one and in some instances can be subject to limitations.[238] Furthermore, the General Court recalled that certain types of expressions – those that promote or justify violence, hatred, xenophobia or another forms of intolerance – cannot claim protection.[239] The prerequisites that should be met for any limitation on the freedom of expression to be justified are the same four conditions laid down in Article 52(1) of the Charter of Fundamental Rights and applied by the General Court in *Kiselev v Council*.[240]

In both cases – *Kiselev v Council* and *RT France v Council* – the General Court decided that the limitations on the freedom of expression resulting from the EU restrictive measures have fulfilled the conditions laid down in Article 52(1) of the Charter of Fundamental Rights and thus were justified.

[236] Ibid, para. 69.
[237] Ibid, para. 84.
[238] RT France v Council (n 64), paras. 131-135.
[239] Ibid, para. 139.
[240] Ibid, paras. 144-145.

4.2.2.2.4 Right to property

Article 17 of the Charter of Fundamental Rights reads as follows:

> **Article 17**
>
> **Right to property**
>
> 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
>
> 2. Intellectual property shall be protected.

In *Rotenberg v Council*, the General Court acknowledged that EU restrictive measures are "not supposed to deprive the persons concerned of their property", however, they "undeniably entail a restriction of the exercise of the applicant's right to property".[241] The same view has been endorsed by the General Court in other recent disputes.[242]

As with the other rights that might be curtailed by EU restrictive measures, limitations on the right to property can be justified only if they comply with the conditions laid down in Article 52(1) of the Charter of Fundamental Rights. These limitations on the exercise of fundamental rights, including the right to property, must satisfy several conditions "in order to comply with EU law".[243] These conditions are universal: (i) the limitation must be provided for by law; (ii) the limitation must refer to an objective of general interest, and (iii) the limitation may not be excessive.[244] On another occasion, the court pronounced that EU restrictive measures "are by nature temporary and reversible and do not therefore infringe the 'essential content' of the right to property".[245]

In more recent judgements, the court combined all these requirements and explicitly stated that four conditions must be satisfied for any restriction on the right to property to be justified:[246]

> First, **it must be 'provided for by law'**, in the sense that the EU institution adopting measures liable to restrict a natural or legal person's fundamental rights must have a legal basis for its actions. Second, the limitation in question **must respect the essence of those rights**. Third, the limitation **must refer to an objective of general interest**, recognised as such by the European Union. Fourth, the limitation in question **must be proportionate**. [***emphasis added***]

4.2.2.2.5 Freedom to conduct a business

[241] Arkady Romanovich Rotenberg v Council (Case T-720/14), para. 167.
[242] Dmitry Arkadievich Mazepin v Council (n 206), para. 100.
[243] Arkady Romanovich Rotenberg v Council (n 241), para. 170.
[244] Ibid, paras. 171-173.
[245] Mykola Yanovych Azarov v Council (Case T-215/15), para. 85.
[246] Dmitry Arkadievich Mazepin v Council (n 206), para. 103.

Freedom to conduct a business is guaranteed by Article 16 of the Charter of Fundamental Rights, which reads as follows:

Article 16

Freedom to conduct a business

> The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Analysis of the CJEU case law demonstrates that the court has struck a balance between the negative impact of EU restrictive measures on the freedom to conduct a business, which is relatively straightforward, and the Council's entitlement to impose such measures. According to the case law, the freedom to conduct a business is not absolute and can be subject to restrictions if certain preconditions are met. The preconditions allowing limitations are similar to those that apply to the other rights and freedoms discussed in this section: (i) it is provided by law; (ii) it respects the essential content of the freedom; (iii) it refers to an objective of general interest, recognised as such by the European Union, and finally (iv) it should not be disproportionate.[247]

4.2.2.2.6 Right to reputation

This right is not guaranteed under the Charter of Fundamental Rights. Despite this, several former Ukrainian politicians sanctioned for misappropriation of public funds argued that EU restrictive measures infringed their right to reputation.[248]

In *Klymenko v Council*, the General Court observed:[249]

> […] according to settled case-law, like the right to property, the right to reputation is not an absolute right and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union.

Subsequently, the court decided that in this particular case, the importance of the aims pursued by the EU restrictive measures justified the negative consequences to the reputation of Mr Klymenko.[250] In subsequent cases, the General Court reached similar conclusions.[251]

4.2.2.2.7 Other arguments advanced by the applicants

Less frequently, applicants have also argued that EU restrictive measures violate other rights. For instance, RT France claimed that EU restrictive measures suspending its broadcasting on the territory of the EU violated the

[247] RT France v Council (n 64), para. 222.
[248] Andriy Klyuyev v Council (Case T-340/14); Oleksandr Viktorovych Klymenko v Council (Case T-245/15); Sergiy Klyuyev v Council (Case T-731/15); Andriy Klyuyev v Council (Case T-240/16).
[249] Oleksandr Viktorovych Klymenko v Council (n 248), para. 213.
[250] Ibid, paras. 213-216.
[251] Sergiy Klyuyev v Council (n 248), paras. 186-190; Andriy Klyuyev v Council (n 248), paras. 179-183.

principle of non-discrimination enshrined in Article 21 of the Charter of Fundamental Rights.[252] It was argued that "[a]ny prohibition on a media outlet on the sole ground of the nationality of its shareholders, whether public or private, is contrary to the principle of non-discrimination."[253] The General Court disagreed that RT France was sanctioned only based on its ownership structure and funding, highlighting that it was sanctioned based on two grounds: "one relating to the fact that it is controlled by the Government of the Russian Federation and the other to its propaganda acts in favour of the military aggression against Ukraine."[254] Importantly, the court clarified that protection against non-discrimination "concerns situations coming falling within the scope of EU law in which a national of one Member State is treated in a discriminatory manner by comparison with nationals of another Member State solely on the basis of his or her nationality."[255] Thus, in the court's view, EU restrictive measures against RT France did not "come within the scope" of Article 21 of the Charter of Fundamental Rights as it is interpreted as having the same scope as Article 18 TFEU.[256]

In several disputes, applicants have claimed that EU restrictive measures infringe the principle of equal treatment guaranteed under Article 20 of the Charter of Fundamental Rights, which reads: "[e]veryone is equal before the law." Specifically, the applicant in *Dmitry Arkadievich Mazepin v Council* argued that since the EU sanctioned him but did not sanction all other leading Russian businessmen, this constituted a breach of the principle of equal treatment.[257] In this regard, the General Court concluded that: "The Council has a broad discretion enabling it, when appropriate, not to impose restrictive measures on such a person or entity [person who satisfies listing criteria], where the Council considers that, in the light of the objectives of those measures, it would not be appropriate to do so."[258]

[252] RT France v Council (n 64), paras. 232-242.
[253] Ibid, para. 232.
[254] Ibid, para. 239.
[255] Ibid, para. 237.
[256] Ibid, para. 238.
[257] Dmitry Arkadievich Mazepin v Council (n 206), para. 124.
[258] Ibid, para. 128.

5 Concluding remarks

EU has a long tradition of using its restrictive measures to promote diverse CFSP objectives. Specifically, they have been employed to pursue objectives as diverse as democracy and human rights promotion, conflict management, non-proliferation, post-conflict restoration, and countering terrorism. More recently, restrictive measures were imposed to counteract disinformation and propaganda campaigns, in particular those waged by the Russian Federation.

A rediscovered urge to tackle acts of serious corruption globally sparked off the discussion of a new EU restrictive measures regime aimed at sanctioning acts of serious corruption and those engaged in such practices. This aspiration has brought its first results: in May 2023, the High Representative of the Union for Foreign Affairs and Security Policy presented a proposal for establishing such a sanctions regime, which was endorsed by the European Commission. These are the initial steps paving the way for the subsequent discussions and potentially an adoption of the Council Decision and Council Regulation setting up a new regime. This Report has thoroughly described the institutional and legal frameworks underpinning the adoption of EU restrictive measures and their subsequent renewal. These frameworks define the steps required for a new sanctions regime to be established after the process has been launched by the High Representative of the Union for Foreign Affairs and Security Policy.

Most likely a new EU sanctions regime targeting serious corruption will be comparable to the other EU horizontal sanctions regimes targeting terrorist groups, chemical weapons use, cyberattacks and human rights abuses. Asset freezing, also encompassing a prohibition on making economic resources available to the designated persons, and travel bans are the conventional types of EU restrictive measures being used in the EU horizontal sanctions regimes.

The EU and its restrictive measures promoting the Union's CFSP objectives do not operate in a legal vacuum. In a way, their use is curtailed by both international law rules and the EU legal order. As the analysis presented in this Report reveals human rights considerations have significantly shaped the design and formulation of EU restrictive measures in the past and continue to be relevant. From the international economic law perspective, economic restrictions are problematic: WTO Agreements and Bilateral Investment Treaties, especially the earlier ones, contain ambiguously formulated commitments that might be breached by various types of EU restrictive measures. To make things even more complicated, exceptions allowing certain types of restrictions, even if they are incompatible with WTO Agreements or Bilateral Investment Treaties, are not always available.

Other fields of international law – law of immunity and jurisdiction – are less implicated when the EU imposes its restrictive measures. The potential violations of immunity guarantees granted under international law, if they can be established, are played down by the temporary nature of EU restrictive measures and the existing exceptions. Considering the EU's cautious approach to the formulation of its restrictive measures, as a rule, these measures do not have an unjustifiable extraterritorial reach.

Turning to the EU legal order, judicial review of EU restrictive measures conducted by the CJEU plays an essential role in ensuring that these measures not only pursue the CFSP objectives but also do not disproportionally curtail the fundamental rights of their targets. It was this judicial review that significantly

undermined the legality of the EU restrictive measures imposed to address instances of alleged misappropriation of public funds. This experience could inform the EU policy-makers of the potential risks of relying upon evidence provided by third parties.

Overall, analysis of the CJEU case law is illustrative of the Court's tendency to attribute more weight to due process rights, in contrast to such rights as the right to property, the right to freedom of expression or the right to conduct a business.

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