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# Reflections on the Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the European Union

Celia Challet\*

## Introduction

Over the last decades, Common Foreign and Security Policy sanctions have become a major aspect of the EU's foreign policy. They have also led to a massive amount of litigation before the CJEU. The case of EU sanctions adopted in the aftermath of the crisis in Ukraine is symptomatic of that.

As a response to what is considered by the EU as an illegal annexation of Crimea and a deliberate destabilisation of Ukraine by Russia, the former has adopted a series of economic sanctions against the latter. In particular, the EU has adopted restrictive measures towards persons and entities considered as supporting Russia's actions of destabilisation and threatening of Ukraine's integrity, sovereignty and independence. The EU has also targeted certain persons and entities with regard to the situation in Ukraine. The purpose was to consolidate and support democracy and the rule of law in Ukraine, and to maintain its territorial integrity. Special emphasis was put on imposing sanctions on persons that were subject to criminal proceedings in Ukraine in connection with misappropriations of public funds.

As from their adoption, these EU sanctions have been perceived as rather controversial. Since no measures were taken at the UN level due to the presence of Russia in the Security Council and a lack of consensus between the UN Member States, the EU adopted sanctions autonomously. Due to the features of these restrictive measures, their mere adoption and implementation has been called into question. For instance, the fact that the EU targeted individuals under criminal investigation in their country for the misappropriation of States funds, usually upon the request of the Ukrainian judiciary, bore a risk of restrictive measures being used to target political opponents.<sup>1</sup> The most critical authors consider that the legality of these sanctions is "disputable",<sup>2</sup> or even that they are unjustified.<sup>3</sup>

The first waves of sanctions against Russia were adopted after the referendum on Crimea's independence in 2014.<sup>4</sup> Most of them have been renewed ever since.<sup>5</sup> The EU targeted persons close to the Russian power, among which a major shareholder of a company involved in the construction of a bridge connecting Russia to Crimea,<sup>6</sup> and a

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<sup>1</sup> House of Lords, *The Legality of EU sanctions*, European Union Committee 11th Report of Session 2016–17 HL, Paper 102, 2 February 2017, paragraph 43.

<sup>2</sup> W. CZAPLINSKI, S. DEBSKI, R. TARNOGORSKI, K. WIERCZYNSKA, *The Case of Crimea's Annexation Under International Law*, SCHOLAR Publishing House, Warsaw, 2017, p.272.

<sup>3</sup> A. ALÍ, "The Challenges of a Sanctions Machine: Some Reflections on the Legal Issues of EU Restrictive Measures in the Field of Common Foreign Security Policy", in L. ANTONIOLLI, L. BONATTI, C. RUZZA (eds.), *Highs and Lows of European integration – Sixty Years after the Treaty of Rome*, Springer, Switzerland, 2019, p.53.

<sup>4</sup> See Council Decision 2014/145/CFSP and Council Regulation 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ. L/78.

<sup>5</sup> See, for instance, Council Decision (CFSP) 2020/907 of 29 June 2020 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ. L/207.

<sup>6</sup> General Court, 30 November 2016, *Rotenberg v. Council*, T-720/14, ECLI:EU:T:2016:689.

journalist and head of a Russian State news agency which, according to the EU, developed a government propaganda supporting the Russian operations in Ukraine.<sup>7</sup> They were mostly the subject of a freeze of assets. Following the downing of the Malaysia Airlines Flight 17 (MH17/MAS17), the EU targeted Russian undertakings operating in crucial areas, such as the defense sector (for instance, Almaz-Antey<sup>8</sup>), the oil and gas sector (e.g. Gazprom<sup>9</sup> and Rosneft<sup>10</sup>) and the banking and financial sector, with Russian-owned banks such as Sberbank of Russia,<sup>11</sup> VTB Bank,<sup>12</sup> and the Bank for Development and Foreign Economic Affairs<sup>13</sup> being targeted. Most of them were the subject of asset freezes and restriction of access to capital markets and defense, dual-use goods or sensitive technologies.<sup>14</sup>

As regards the situation within Ukraine, the EU targeted an important number of persons that were subject to criminal proceedings in Ukraine in connection with misappropriations of public funds. In order to support Ukraine and its judiciary in their investigation and proceedings, the EU provided for the freezing of the funds and assets of the persons concerned. The majority of these measures targeted Ukrainian leaders with strong connections to Russia: former President Viktor Yanukovich,<sup>15</sup> former Prime ministers Mykola Azarov<sup>16</sup> and Sergej Arbutov,<sup>17</sup> former Energy Minister Edward Stavytskyi,<sup>18</sup> former members of the Yanukovich administration such as Andriy Portnov<sup>19</sup> as well as Andrii Klyuyev.<sup>20</sup> Family members of some leaders were also the subject of restrictive measures (e.g. Oleksandr Yanukovich<sup>21</sup> and Oleksii Azarov<sup>22</sup>). Most of them were listed in the first EU acts providing for restrictive measures against Ukraine,<sup>23</sup> and some of these restrictive measures have been renewed ever since.<sup>24</sup> The EU also targeted

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<sup>7</sup> General Court, 15 June 2017, *Kiselev v. Council*, T-262/15, ECLI:EU:T:2017:392.

<sup>8</sup> General Court, 25 January 2017, *Almaz-Antey v. Council*, T-255/15, ECLI:EU:T:2017:25; General Court, 13 September 2018, *Almaz-Antey v. Council*, T-515/15, ECLI:EU:T:2018:545.

<sup>9</sup> See, in particular, General Court, 13 September 2018, *Gazprom Neft PAO v. Council*, T-735/14 and T-799/14, ECLI:EU:T:2018:548.

<sup>10</sup> Court of Justice, Grand Chamber, 28 March 2017, *PJSC Rosneft Oil Company v. Her Majesty's Treasury*, C-72/15, ECLI:EU:C:2017:236; General Court, 13 September 2018, *PAO Rosneft Oil Company and others v. Council*, T-715/14, ECLI:EU:T:2018:544.

<sup>11</sup> General Court, 13 September 2018, *Sberbank of Russia OAO v. Council*, T-732/14, ECLI:EU:T:2018:541.

<sup>12</sup> General Court, 13 September 2018, *VTB Bank PAO v. Council*, T-734/14, ECLI:EU:T:2018:542; Court of Justice, 25 June 2020, *VTB Bank PAO v. Council*, C-729/18 P, ECLI:EU:C:2020:499.

<sup>13</sup> General Court, 13 September 2018, *Vnesheconombank v. Council*, T-737/14, ECLI:EU:T:2018:543; Court of Justice, 25 June 2020, *Vnesheconombank v. Council*, C-731/18 P, ECLI:EU:C:2020:500

<sup>14</sup> Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ. L/299.

<sup>15</sup> See, in particular, General Court, 15 September 2016, *Viktor Yanukovich v. Council*, T-346/14, ECLI:EU:T:2016:497 and Court of Justice, 19 October 2017, *Viktor Yanukovich v. Council*, C-598/16 P, ECLI:EU:C:2017:786.

<sup>16</sup> See, in particular, General Court, 28 January 2016, *Mykola Azarov v. Council*, T-331/14, ECLI:EU:T:2016:49, and General Court, 7 July 2017, *Mykola Azarov v. Council*, T-215/15, ECLI:EU:T:2017:479.

<sup>17</sup> See, in particular, General Court, 28 January 2016, *Arbutov v. Council*, T-434/14, ECLI:EU:T:2016:46, and General Court, 7 July 2017, *Arbutov v. Council*, T-221/15, ECLI:EU:T:2017:478.

<sup>18</sup> See, in particular, General Court, 30 January 2019, *Stavytskyi v. Council*, T-290/17, ECLI:EU:T:2019:37.

<sup>19</sup> See, in particular, General Court, 26 October 2015, *Portnov v. Council*, T-290/14, ECLI:EU:T:2015:806.

<sup>20</sup> See, in particular, General Court, 15 September 2016, *Klyuyev v. Council*, T-340/15, ECLI:EU:T:2016:496; General Court, 11 July 2019, *Klyuyev v. Council*, T-305/18, ECLI:EU:T:2019:506

<sup>21</sup> See, in particular, General Court, 15 September 2016, *Oleksandr Yanukovich v. Council*, T-348/14, ECLI:EU:T:2016:508, and Court of Justice, 19 October 2017, *Oleksandr Yanukovich v. Council*, C-599/16 P, ECLI:EU:C:2017:785.

<sup>22</sup> See, in particular, General Court, 28 January 2016, *Oleksii Azarov v. Council*, T-332/14, ECLI:EU:T:2016:48.

<sup>23</sup> 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 [6.03.2014], OJ. L/66; Council Regulation (EU) 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [6.03.2014], OJ. L/66.

<sup>24</sup> See, for instance, Council Decision (CFSP) 2020/399 of 13 March 2020 amending Decision 2014/145/CFSP, OJ. L/78.

Ukrainian undertakings considered as being controlled by Russian firms close to the Russian central power. This was the case of Prominvestbank,<sup>25</sup> a Ukrainian bank in which the majority of the capital was held by a Russian bank.

An important number of targeted persons have challenged the validity of the restrictive measures before the CJEU, mostly in the framework of actions for annulment. This has led to a substantial caseload: so far, the CJEU has issued almost 40 judgments on sanctions against Ukrainian persons and 12 on sanctions against Russians persons. A dozen cases are still pending.<sup>26</sup> This litigation raised important legal issues linked to the CFSP, among which the extremely wide margin of appreciation of the Council regarding the adoption of restrictive measures, and the extent of judicial review to be exercised by the Court over them.

This contribution offers some reflections on the impact of these judgments on the law and framework of restrictive measures. First, attention will be given to the evolutions in the Court's apprehension of the sanctions against Russian and Ukrainian persons, as well as the developments in the substantive law of restrictive measures **(1)**. This is followed by some reflections on whether or not the Court has used the opportunity of this case law to make the CFSP framework evolve. Indeed, one can notice, in spite of its failure to address some critical issues linked to the CFSP, a certain activism of the Court when adjudicating these measures **(2)**. Lastly, this contribution will briefly assess some perspectives of evolution in the field of judicial review of restrictive measures **(3)**.

## **1. Impact of the CJEU rulings on the law of restrictive measures**

### **1.1. Outcome of the cases**

In the majority of the studied cases, the sanctions imposed by the EU were annulled by the CJEU. Certainly, this assertion could be qualified by the outcome of the cases on sanctions against Russians: with the notable exception of Rotenberg,<sup>27</sup> almost all the restrictive measures targeting Russian natural and legal persons were upheld by the Court. As regards sanctions against the Ukrainian intelligentsia, however, the outcome was clear-cut: the wide majority of them were annulled by the CJEU. Cases such as *Oleksii Azarov*,<sup>28</sup> *Klyuyev*,<sup>29</sup> *Yanukovych*,<sup>30</sup> *Pshonka*<sup>31</sup> and *Klymenko*<sup>32</sup> led to an annulment of the sanctions in first instance. In other cases,<sup>33</sup> the sanctions were upheld by the General Court but ultimately annulled by the Court of Justice.

One of the main reasons for the annulment of the restrictive measures was related to the motivation of the Council decisions pursuant to Article 296 TFEU. The CJEU has often sanctioned the fact that the Council, in order to impose sanctions on Ukrainian persons being the subject to criminal proceedings for misappropriation of public funds, relied on a letter of a Ukrainian prosecutor-general that was not precise enough on the

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<sup>25</sup> General Court, 13 September 2018, *PSC Prominvestbank v. Council*, T-739/14, ECLI:EU:T:2018:547.

<sup>26</sup> See, *inter alia*, cases *Rosneft and others v. Council* (C-732/18 P), *Oleksandr Yanukovych v. Council* (T-292/20), *Viktor Yanukovych v. Council* (T-291/20), *Viktor Pshonka v. Council* (cases T-291/19 and T-269/20), *Artem Pshonka v. Council* (cases T-292/19 and T-268/20), *Sergej Arbuzov v. Council* (cases T-289/19 and T-267/20), *Mykola Azarov v. Council* (T-286/19), and *Klymenko v. Council* (T-258/20).

<sup>27</sup> *Rotenberg*, *supra* note 6.

<sup>28</sup> *Oleksii Azarov*, T-332/14, *supra* note 22.

<sup>29</sup> *Klyuyev*, cases T-340/15 and T-305/18, *supra* note 20.

<sup>30</sup> General Court, 11 July 2019, *Viktor Yanukovych v. Council*, T-244/16 and T-285/17, ECLI:EU:T:2019:502.

<sup>31</sup> General Court, 11 July 2019, *Viktor Pshonka v. Council*, T-285/18, ECLI:EU:T:2019:512.

<sup>32</sup> General Court, 25 June 2020, *Klymenko v. Council*, T-295/19, ECLI:EU:T:2020:287.

<sup>33</sup> See, for instance, the *Mykola Azarov* cases (T-215/15, T-190/16 and T-247/17).

establishment of the facts and on the individual responsibility of the applicants towards them.<sup>34</sup> In a more global way, “regardless of the stage reached in the proceedings to which the [applicants were] allegedly subject, the Council could not adopt restrictive measures against [them] because it was not aware of the facts of misappropriation of public funds specifically alleged against [them] by the Ukrainian authorities”.<sup>35</sup> It is only by being aware of these facts that the Council could have established that they could qualify as misappropriation of public funds, and call into question the rule of law in Ukraine. In other words, since the EU restrictive measures meant to support the rule of law in Ukraine, the Council had to make sure that the targeted persons had threatened such rule of law.

The same lack of compliance with the obligation to state reasons was sanctioned regarding the measures imposed on Russian persons or entities which, by their conduct, were responsible for actions or policies undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. An example of that is the *Rotenberg* case. This person had connexions with the Russian power through his personal relationship with President Putin. He was also the major shareholder of a company that built a bridge connecting Crimea to Russia. Therefore, he was targeted by sanctions on the ground that he benefitted from one of the Russian decision-makers responsible for the annexation of Crimea.<sup>36</sup> According to the Court, the Council failed to prove in a satisfying manner that the applicant did control the said company.<sup>37</sup> In addition, in order to impose sanctions on that person it was necessary that the Russian decision-makers in question had “at the very least [...] started to prepare the annexation of Crimea and the destabilisation of Ukraine”<sup>38</sup> before signing a contract with the Russian company. Otherwise, the persons targeted by the sanctions could not have been aware of the involvement of those decision-makers in the preparation<sup>39</sup> (and therefore would not have been eligible to the sanctions).

Overall, there has been a double trend of the Court when assessing the validity of EU sanctions against Russians and Ukrainians. Firstly, most of the sanctions that were annulled by the Court were those targeting Ukrainian persons. In 28 out of 32 cases on sanctions against Ukrainians, the restrictive measures were annulled by the CJEU. By contrast, only 1 case on sanctions against Russia led to the annulment of the sanctions. One might inevitably wonder which factors led to these different outcomes. Secondly, most of the sanctions that were annulled due to an insufficient motivation of the Council were those targeting natural persons. One can reasonably deduce that the Court has been more severe in its appreciation of sanctions targeting natural persons than when assessing those imposed on legal ones. This might be due to its awareness that consequences of such restrictive measures can be more damaging for individuals than for undertakings.

## 1.2. Developments in the substantive law of restrictive measures

The CJEU case law on sanctions against Russians and Ukrainians is entrenched in a set of case law on restrictive measures that has developed over the last decades. Since the entry into force of the Lisbon Treaty, much progress has been made in terms of

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<sup>34</sup> See, for instance, *Arbuzov*, T-434/14, *supra* note 17, paragraph 39; *Oleksandr Yanukovych*, T-348/14, *supra* note 21.

<sup>35</sup> *Arbuzov*, T-434/14, *supra* note 17, paragraph 43.

<sup>36</sup> *Rotenberg*, *supra* note 6.

<sup>37</sup> *Ibid*, paragraph 84.

<sup>38</sup> *Ibid*, paragraph 91.

<sup>39</sup> *Ibid*.

judicial protection of targeted persons.<sup>40</sup> Thus, a certain number of jurisprudential developments had already taken place when the CJEU started adjudicating sanctions against Ukrainians and Russians.<sup>41</sup>

This is particularly true regarding the obligation to state reasons. An example of that is the General Court recalling in *Oleksandr Yanukovych* that “*the statement of reasons for an asset-freezing 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*”,<sup>42</sup> thereby referring to its *Ben Ali*<sup>43</sup> case law.

There have been, nevertheless, visible developments. As stressed by C. Beaucillon, the CJEU case law on sanctions targeting countries, such as those against Russians and Ukrainians, “*is probably now set to exceed that concerning counterterrorism in terms of case load and innovation*”.<sup>44</sup> It is connected to a new situation, since the EU is trying both to help Ukraine reestablish the rule of law in its own territory and to pressure Russia to stop destabilising it. In that way, the CJEU case law on sanctions against Russia and Ukrainian leaders can be seen, to some extent, as a ‘laboratory of law’.

Firstly, the ECJ ruled on the admissibility of actions for annulment brought by targeted entities against ban exports which were applicable to undertakings subject to EU law. Russian undertakings can be considered as directly affected by such export bans in the meaning of Article 263§4 TFEU, and therefore entitled to challenge them before the Court, regardless of the fact that those measures were only applicable to undertakings subject to EU law and that the Russian undertakings were not prohibited from carrying out the operations concerned outside the Union.<sup>45</sup> The determining factor is that these export bans provided for restrictions to market access upon the applicants.<sup>46</sup>

Secondly, the Court addressed the extent to which the EU could sanction the misappropriation of public funds. The restrictive measures were justified in the view of supporting democracy, the rule of law and the institutional foundations of Ukraine. These were threatened by the fact that “*a significant part of the former Ukrainian leadership [was] suspected of having committed serious crimes in the management of public resources*”.<sup>47</sup> Facilitating their prosecution was considered as contributing to the support of the rule of law in Ukraine.<sup>48</sup> However, this does not mean that any act classifiable as a misappropriation of public fund and committed in a third country can justify EU action.<sup>49</sup> The Court gave a definition of the misappropriations of public funds that can lead to the adoption of restrictive measures: those

*“which, having regard to the amount or the type of funds or assets misappropriated or to the context in which the offence took place, are, at the very least, such as to undermine the legal and institutional foundations of Ukraine, and*

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<sup>40</sup> S. POLI, “Effective Judicial Protection and Its limits in the case law concerning individual restrictive measures in the European Union”, in E. NEFRAMI, M. GATTI (eds.), *Constitutional Issues of EU External Relations Law*, Luxembourg Legal Studies, Volume 16, Nomos, Baden-Baden, 2018, p.296.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Oleksandr Yanukovych*, T-348/14, *supra* note 21, paragraph 80.

<sup>43</sup> General Court, 14 April 2016, *Ben Ali v. Council*, T-200/14, EU:T:2016:216, paragraph 96.

<sup>44</sup> C. BEAUCILLON, “Opening up the horizon: the CJEU’s new take on country sanctions”, *Common Market Law Review* n°55, 2018, p. 387.

<sup>45</sup> *Prominvestbank*, *supra* note 25, paragraph 49; *Vnesheconombank*, T-737/14, *supra* note 13, paragraph 49.

<sup>46</sup> *Ibid*; *Gazprom*, *supra* note 9, paragraph 75.

<sup>47</sup> *Klyuyev*, T-340/15, *supra* note 20, paragraph 117.

<sup>48</sup> *Ibid*, paragraph 118.

<sup>49</sup> *Oleksandr Yanukovych*, T-348/14, *supra* note 21, paragraph 100.

*in particular the principles of legality, the prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, undermining respect for the rule of law in that country”.*<sup>50</sup>

The CJEU has also explained that, in some circumstances, the absence of criminal proceedings or of a pre-trial investigation in Ukraine did not necessarily mean that the Council could not adopt restrictive measures,<sup>51</sup> recalling its discretion in that matter. Finally, the Court has acknowledged the wide margin of appreciation of the Council regarding the amount of funds and assets that can be frozen: in case of an impossibility to assess the amount of public funds that became a targeted person’s property, the Council is entitled to impose a full freeze.<sup>52</sup>

Thirdly, the Court has ruled on the extent to which the Council could target Russian persons and, in particular, on the notion of active or material support to Russian actions destabilising Ukraine. In *Kiselev* the CJEU defined the concept of active support by “forms of support which, by their quantitative or qualitative significance, contribute to the continuance of the actions and policies of the Russian Government destabilising Ukraine”.<sup>53</sup> It concluded that large-scale media can provide such an active support.<sup>54</sup> The Court also established the distinction between material support and direct participation in the actions of destabilisation. Such direct participation is not necessary<sup>55</sup> as long as the undertaking concerned supplied Russia with heavy weapons which were, in turn, supplied to Ukrainian separatists.<sup>56</sup> This is because the objective of those measures is “not to penalize certain entities because of their links with the situation in Ukraine, but to impose economic sanctions on the Russian Federation, in order to increase the costs of its actions”<sup>57</sup> of destabilisation. Consequently, the Court upheld restrictive measures on Russian undertakings that did not participate, even indirectly, to the Ukrainian crisis: the mere fact that they operated on crucial sectors of the Russian economy was considered as a sufficient basis to impose the sanctions.<sup>58</sup>

Lastly, interesting developments were laid down on the balance between the fundamental rights of the persons targeted and the objectives of the restrictive measures. In *Kiselev*, the Court considered that the freedom of expression protected by Article 11 of the Charter of Fundamental Rights (the Charter) could be limited for the purpose of putting an end to Russia’s destabilisation of Ukraine.<sup>59</sup> The Court also recalled that the challenged restrictive measures were compatible with the right to property<sup>60</sup> and, in the case of undertakings, with the freedom to conduct business.<sup>61</sup> Those sanctions are “protective measures”<sup>62</sup> and are not supposed to deprive the targeted persons of these rights.<sup>63</sup> Moreover, they are “by nature temporary and reversible and do not therefore infringe the ‘essential content’ of the right to property”,<sup>64</sup> nor do they pursue an immediate purpose of preventing the entities concerned from pursuing economic activities within

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<sup>50</sup> *Ibid*, paragraph 102.

<sup>51</sup> *Ibid*, paragraph 128.

<sup>52</sup> *Mykola Azarov*, T-215/15, *supra* note 16, paragraph 100.

<sup>53</sup> *Kiselev*, *supra* note 7, paragraph 114.

<sup>54</sup> *Ibid*, paragraph 76.

<sup>55</sup> *Almaz-Antey*, *supra* note 8, paragraph 112.

<sup>56</sup> *Ibid*, paragraph 128.

<sup>57</sup> See, for instance, *Gazprom*, *supra* note 9, paragraph 135.

<sup>58</sup> *Ibid*, paragraphs 143 and 144; *Rosneft*, *supra* note 10, paragraph 147; *Rosneft and others*, *supra* note 10, paragraphs 156 and 157.

<sup>59</sup> *Kiselev*, *supra* note 7, paragraphs 76 and 116 to 119.

<sup>60</sup> Charter of Fundamental Rights of the European Union, Article 17.

<sup>61</sup> *Ibid*, Article 16.

<sup>62</sup> *Rotenberg*, *supra* note 6, paragraph 167.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Mykola Azarov*, T-215/15, *supra* note 16, paragraph 85.



the EU.<sup>65</sup> Finally, although the restrictive measures cannot be seen as breaching the right to reputation of the persons concerned, especially since, in the case of Ukrainians being accused of misappropriation of public funds, their imposition does not involve any view on their culpability,<sup>66</sup> the right to reputation may justify an applicant's continuing interest in bringing proceedings.<sup>67</sup> This is all the more so when the person concerned is a politician.<sup>68</sup> Therefore, even if by the time a claim arrives to the Court the legal basis for the restrictive measure has been amended and no longer contains the name of the applicant, the latter can still have a continuing interest in bringing the proceedings.

## **2. Impact of the CJEU rulings on the CFSP framework**

Has the Court seized the opportunity of the caseload on sanctions against Russians and Ukrainians to make the CFSP framework evolve? It is submitted that the CJEU has been, so far, unable or unwilling to impulse strong evolutions as a response to the criticisms of the CFSP legal framework. This does not mean, however, that it has not shown some activism in that area.

### **2.1. Limited evolutions in the CFSP framework**

*The Court's failure to address the main issues linked to judicial review of restrictive measures*

In a certain number of aspects, the case law of the CJEU on sanctions against Russians and Ukrainians has not addressed the main issues of the CFSP framework. This is true, firstly, regarding the particularly wide margin of appreciation of the Council when adopting restrictive measures. While in most of the cases in which sanctions were annulled the Court put the emphasis on the non-compliance of the Council with the obligation to state reasons and to rely on a sufficiently solid factual basis, the fact is that the latter remains in principle free to adopt these restrictive measures. In most of its judgments the Court has recalled the broad discretion of the Council in areas that involve political, economic and social choices. This institution has to make complex assessments and must examine if the objectives of the adopted measures are consistent with the objectives of external action set out in Article 21 TEU.<sup>69</sup>

This has been confirmed regarding sanctions targeting Russians: they are adopted for the purposes of the protection of essential EU security interests and the maintenance of international peace and security,<sup>70</sup> which allows for negative consequences to be borne by individual operators<sup>71</sup> such as Russian undertakings.

The confirmation of the wide margin of appreciation of the Council is also notable when it comes to the adjudication of sanctions targeting former Ukrainian leaders. The Court has proved to be flexible regarding the extent to which the Council could target persons being suspected of misappropriation of public funds in Ukraine. Its earliest case law repeatedly asserted that the Council was not obliged to verify if the investigations to which applicants were subjected were well founded, nor the facts on which they relied on in order to carry out the investigations. This was justified by the fact that "*in adopting the contested acts, the Council does not seek itself to punish the misappropriation of*

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<sup>65</sup> *Ibid*, paragraph 91.

<sup>66</sup> *Klyuyev*, T-340/15, *supra* note 20, paragraph 135.

<sup>67</sup> *Ibid*, paragraph 31; *Portnov*, *supra* note 19, paragraph 30.

<sup>68</sup> *Klyuyev*, T-340/15, *supra* note 20, paragraph 31.

<sup>69</sup> See, for instance, *Rosneft*, *supra* note 10, paragraphs 113 to 116.

<sup>70</sup> *Ibid*, paragraph 112.

<sup>71</sup> *Ibid*, paragraph 150.

*public funds being investigated by the Ukrainian authorities, but to protect the possibility of the authorities identifying such misappropriation and recovering the funds”.*<sup>72</sup>

This wide margin of appreciation of the Council is further reinforced by the limited jurisdiction of the Court over restrictive measures in the meaning of Articles 24 TEU and 275 TFEU. It still does not review the substance or appropriateness of the restrictive measures, and mainly continues to confine itself to compliance of the Council with the procedural rules and the obligation to state reasons.

Another aspect of the CFSP framework that might not have been sufficiently addressed by the Court relates to the protection of the fundamental rights of the targeted persons. The Court has often had the opportunity to strike a balance between the objectives of the CFSP and the fundamental rights of the persons concerned. In most cases, this was done at the expense of the latter, in particular regarding the right to property and to pursue an economic activity within the EU, the right to reputation and the freedom of expression.<sup>73</sup> Such a situation is obviously linked to the important margin of appreciation enjoyed by the Council in that field.

This tendency of the Court to give precedence to the objectives of the CFSP is all the more worrying that the current framework for the imposition and the challenging of restrictive measures is, in itself, not favourable to the protection of these rights. The majority of such sanctions are usually prolonged every six months or yearly until they are lifted. Thus, by the time the claim of a targeted person is assessed by the General Court, those sanctions have already ceased to be in force and have been renewed by the Council on a new legal basis.<sup>74</sup> Moreover, the fact that the sanctions regulations usually do not provide for penalties or lifting conditions can lead to issues of effective judicial protection.<sup>75</sup> To quote H. Over de Linden, “*using sanctions to ‘buy time’ is an extremely effective tool in the CFSP policy and [...] explains the Council’s ultimate goal in such cases, because individual conditions can be changed irreversibly by their imposition, regardless of the outcome of annulment actions*”<sup>76</sup>. The CJEU case law on sanctions against Russians and Ukrainians does not seem to have provided an answer to these concerns.

### *The Court’s clear desire for cautiousness due to political considerations*

The limited impact of the analysed case law on the CFSP legal framework is due, to a certain extent, to the Court’s awareness of the highly intergovernmental dimension of the CFSP. When reviewing the legality of restrictive measures, the Court is adjudicating in one of the most intergovernmental EU policies, with highly political and sensitive issues at stake. In the field of foreign policy more than in any other, the Court is aware that the power of its judgments rests on their acceptance by the Member States. An example of that is the *Rosneft* case, in which the Court ruled that CFSP sanctions can be taken into review in the framework of a reference for a preliminary ruling.<sup>77</sup> The Court gave an illustration of its “*equilibrist position*”:<sup>78</sup> its boldness as to the extent of its competence in

<sup>72</sup> *Mykola Azarov*, T-215/15, *supra* note 16, paragraph 145.

<sup>73</sup> See, for instance, *Kiselev*, *supra* note 7; *Rotenberg*, *supra* note 6.

<sup>74</sup> For an illustration of the difficulty for targeted persons to challenge the restrictive measures, see *Rosneft and others*, *supra* note 10, paragraph 105.

<sup>75</sup> H. OVER DE LINDEN, “The Court of Justice’s Difficulty with Reviewing Smart Sanctions as Illustrated by *Rosneft*”, *European Foreign Affairs Review* n°3, 2019, p.28.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Rosneft*, *supra* note 10.

<sup>78</sup> I. BOSSE PLATIERE Isabelle, “Le juge de l’union, artisan de la cohérence du système de contrôle juridictionnel au sein de l’Union européenne, y compris en matière de PESC, Note sous CJUE, Gde ch., 28 March 2017, C-72/15, *Rosneft*”, *RTDE*, 2017.

preliminary rulings is then counterbalanced by a dismissal of all the presumed grounds for invalidity of the act and a confirmation of the Council's wide discretion.<sup>79</sup>

The case law of the Court has also showed a certain will to ensure the effectiveness of restrictive measures, in a context in which their massive use “*has gone in parallel with the attempt of the [EU] to strengthen its dimension at the external level as a part of its coercitive diplomacy*”.<sup>80</sup> The Court seems to be aware of the complexity of the implementation of targeted sanctions: identifying individuals and entities requires detailed knowledge that is difficult to obtain.<sup>81</sup> At the same time, in order to ensure the effectiveness of measures such as asset freezes, the EU wishes them to apply immediately in order to prevent any asset flight outside the EU.<sup>82</sup> It seems fair to assume that the Court took those facts into account when adjudicating EU sanctions against Russians and Ukrainians.

This concern to ensure the effectiveness of restrictive measures is all the more obvious since some judgments have demonstrated the Court's determination to confirm the validity of the sanctions at all costs. An example of that is the Court's reasoning on compliance by the Council with the provisions of the Partnership and Cooperation Agreement (“PCA”) signed with Russia in 1999.<sup>83</sup> In cases such as *Rosneft*, the applicants argued that by imposing restrictive measures on them, the Council violated Articles 10(1), 12, 36 and 52 of the PCA, which provide for the liberalisation of economic relations between the EU and Russia. The Court rejected such a plea, relying on Article 99 (1) (d) of the PCA. This provision states that one of the Parties to the Agreement may take measures which it considers necessary for the protection of its essential security interests, for example in case of a threat to peace and international security.

The Court considered that the disputed measures had been adopted in order to protect essential EU interests, and to maintain peace and international security.<sup>84</sup> Moreover, and in any case, the Court recalled the broad discretion of the Council in that field.<sup>85</sup> This reasoning is debatable. In no way can it be deduced from Article 99 of the PCA that one Party to the Agreement can sanction the other in such a way, for obvious reasons: allowing such a possibility would go against the objectives of the PCA, which were to strengthen cooperation and economic ties between the EU and Russia.

## **2.2. A notable activism of the Court through its adjudications of the sanctions**

The fact that the CJEU case law on sanctions against Ukrainians and Russians has not revolutionized the CFSP framework does not mean that there is no desire for a change. On many aspects, this case law did have an impact on the CFSP legal framework. For the purpose of this contribution, attention will be paid to two main aspects: the Council's practice of adoption of restrictive measures, and the extension of the Court's jurisdiction over restrictive measures.

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<sup>79</sup> *Ibid.*

<sup>80</sup> A. ALÍ, *supra* note 3, p.49.

<sup>81</sup> F. GIUMELLI, “Winning without Killing: The Case for Targeted Sanctions”, in DUCHEINE Paul, OSINGA Frans (eds.), *Netherlands Annual Review of Military Studies*, Asser Press, The Hague, 2017, p.93.

<sup>82</sup> House of Lords, *supra* note 1, paragraph 47.

<sup>83</sup> Agreement of Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, JO L.327.

<sup>84</sup> *Rosneft*, *supra* note 10, paragraph 112.

<sup>85</sup> *Ibid*, paragraph 113.

### *Impact of the CJEU case law on the Council's practice of sanctions*

The analysed case law of the CJEU has most certainly reinforced a trend of influencing the practice of the Council when it adopts restrictive measures. A significant number of sanctions that have been overturned by the Court were annulled because of the Council's failure to comply with procedural rules or with the obligation to state reasons. Although it cannot be reasonably asserted that the Court brought the Council to significantly change the substance of its policy, the latter might be more diligent in complying with the rules of procedure and the obligation to state reasons: "*in recent years, it seems that the quality of sanctions listing has improved, with better definition and more substance underpinning the reasons for listing*".<sup>86</sup>

One example of the Court reminding the Council that it needs to comply with the rules concerned is the *Stavytskyi* case: the applicant argued that the alleged acts of misappropriation of public funds which were the subject of proceedings by the Ukrainian authorities had already been examined, a few years earlier, by Ukrainian courts, which had found nothing illegal.<sup>87</sup> Therefore, since the Council could not prove that the Ukrainian jurisdictions had complied with the *ne bis in idem* principle, it did not have sufficient evidence to maintain the applicant's name on the list of sanctions.<sup>88</sup> The Court confirmed this argument.<sup>89</sup>

More importantly and globally, the CJEU case law has had an impact on the Council's discretion when adopting sanctions based on the decision of a third State authority. This is particularly true regarding the restrictive measures adopted against Ukrainian persons that are being prosecuted in their country for the misappropriation of public funds. In its earliest case law, the Court had confirmed the wide margin of appreciation of the Council when adopting such sanctions. Those measures contributed to facilitating the prosecution of such crimes and, therefore, to fighting corruption and re-establishing the rule of law in Ukraine.<sup>90</sup> The Court dismissed applicant's claims based on an alleged dysfunctioning of Ukraine's political and judicial system, in which the prosecutions for misappropriation of public funds would be used to target former political opponents. The Court stressed that Ukraine was a member of the Council of Europe, and that its new regime was recognized as lawful by both the EU and the international community.<sup>91</sup> Therefore, the Council was free to rely on the decisions of Ukrainian prosecutors in order to impose the sanctions. In its most recent case law, however, the Court has significantly changed its approach. Before acting on the basis of a decision of a Ukrainian prosecutor, the Council must now verify whether such decision was adopted in compliance with the rights of the defence and the right to effective judicial protection.<sup>92</sup> Such obligation is twofold: firstly, the Council must ensure that at the time of the adoption of the decision, the authorities of the third State complied with these fundamental rights.<sup>93</sup> Secondly, the Council must explain the reasons why it considers that such decision was adopted in compliance with those rights.<sup>94</sup> Moreover, the Court has stressed that if a targeted person has been subject to restrictive measures for several years, due to the same preliminary investigations, the Council must "*explore in greater detail the question of a possible*

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<sup>86</sup> A. ALÍ, *supra* note 3, p. 61.

<sup>87</sup> *Stavytskyi*, *supra* note 18, paragraph 112.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, paragraph 129.

<sup>90</sup> *Mykola Azarov*, T-215/15, *supra* note 16, paragraph 155.

<sup>91</sup> See, for instance, *Arbuzov*, T-221/15, *supra* note 17, paragraph 146.

<sup>92</sup> See, for instance, Court of Justice, 19 December 2018, *Mykola Azarov v. Council*, C-530/17, ECLI:EU:C:2018:1031, paras 35-42; Court of Justice, 26 September 2019, *Klymenko v. Council*, C-11/18 P, ECLI:EU:C:2019:786, para 21.

<sup>93</sup> See, for instance, General Court, 11 July 2019, *Klymenko v. Council*, T-274/28, EU:T:2019:509, paragraph 47 ; *Klymenko*, T-295/19, *supra* note 32, paragraph 66.

<sup>94</sup> *Ibid.*

*infringement of the fundamental rights of [the person concerned] by the Ukrainian authorities*".<sup>95</sup> The Court has, thus, raised the standard of evidence that must be provided by the Council when adopting sanctions. These developments will inevitably impact the Council's practice of restrictive measures in the future.

### *The extension of the Court's jurisdiction over restrictive measures*

Due to the strong intergovernmental dimension of the CFSP, the treaties provide for a limited jurisdictional competence of the CJEU over CFSP acts. Pursuant to Article 24(1) TEU<sup>96</sup> and Article 275(1) TFEU, it cannot in principle adjudicate such acts. These provisions have been described by some authors as a "carve-out"<sup>97</sup> since they introduce a derogation to the principle of general jurisdiction of the Court over matters related to EU law, as laid down in Article 19(1) TEU. However, the second subparagraphs of Articles 24(1) TEU and 275 TFEU contain a sort of 'exception to the exception', a so-called 'clawback'<sup>98</sup> clause: the CJEU has jurisdiction to review the legality of restrictive measures targeting natural or legal persons.<sup>99</sup>

Until recently, the scope of this judicial review remained unclarified. The Court itself traditionally refused to proceed to such a clarification. In its Opinion 2/13, it merely stated that it had not yet had the opportunity to specify the scope of the limitations on its jurisdiction pursuant to Articles 24 TEU and 275 TFEU,<sup>100</sup> and that certain acts adopted in the context of the CFSP are beyond the Court's judicial control.<sup>101</sup> The Court did not define the scope of these limitations.

The *Rosneft* case law, however, significantly changed this approach. According to L. Coutron, "*the Rosneft judgment will certainly be remembered as one of the major judgments of 2017 and, probably, as one of the major judgments of the Court*".<sup>102</sup> The Court seized the opportunity of this case to clarify the scope of its jurisdiction over restrictive measures.

The context of the *Rosneft* case was as follows: CFSP acts imposing restrictive measures had been adopted by the EU, and the UK had enacted domestic implementing measures. Rosneft challenged these domestic acts by bringing, firstly, an action against them before the domestic courts and, secondly, an action for annulment of the EU decision and regulation before the General Court. Acting in compliance with the *Foto-Frost*<sup>103</sup> case law according to which only the CJEU can declare an act of EU law invalid,

<sup>95</sup> *Stavytskyi*, T-290/17, *supra* note 18, paragraph 132 ; *Klyuyev*, T-305/18, *supra* note 20, paragraph 81.

<sup>96</sup> Article 24(1) TEU, subparagraph 2, states that the "the Court of Justice of the European Union shall not have jurisdiction with respect to [CFSP] provisions".

<sup>97</sup> See, for instance, P. VAN ELSUWEGE, "Judicial Review of the EU's Common Foreign and Security Policy: lessons from the Rosneft case", *Verfassungsblog on matters constitutional*, 6 April 2017, retrieved 15 March 2019, <https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/>

<sup>98</sup> This expression has been used by numerous authors. For instance, see P. VAN ELSUWEGE, *supra* note 97.

<sup>99</sup> Article 275 TFEU, second subparagraph, states that "*the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on the European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth subparagraph of Article 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council*". Article 24(1) TEU, subparagraph 2 alludes to "*the exception of [the CJEU's] jurisdiction to monitor compliance with Article 40 [TEU] and to review the legality of certain decisions as provided for by Article 275 [TFEU]*".

<sup>100</sup> Court of Justice, 18 December 2014, *Opinion 2/13*, ECLI:EU:C:2014:2454, paragraph 251.

<sup>101</sup> *Ibid*, paragraph 252.

<sup>102</sup> L. COUTRON Laurent, *Justiciabilité des actes de la PESC : où la Cour s'arrêtera-t-elle ? Revue de droit public* n°6, November 2017, p. 1627.

<sup>103</sup> Court of Justice, 22 October 1987, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 314/85, ECLI:EU:C:1987:452.

the domestic court referred the matter to the Court for an assessment of the validity of the contested EU acts. One question asked to the CJEU was about the mere possibility for domestic judges to issue such a reference for a preliminary ruling on the basis of Article 267 TFEU, given the limited jurisdiction of the CJEU in the field of CFSP. Article 275 TFEU only provides for the possibility of the Court to adjudicate restrictive measures in the framework of an action for annulment in the meaning of Article 263 TFEU.

The Court answered this question by establishing its own competence to give such a preliminary ruling on the basis of Article 267 TFEU. It recalled that the preliminary ruling on the assessment of validity is a means of reviewing the legality of Union acts, just like an action for annulment.<sup>104</sup> In support of that decision, the Court relied on the notion of complete system of legal remedies.<sup>105</sup> It also insisted on the difference in wording between Articles 24 TEU and 275 TFEU regarding the ‘claw-back’ provisions: the reference in Article 24(1) TEU to the second paragraph of Article 275 TFEU concerns the type of decisions whose legality may be reviewed by the Court (*i.e.* restrictive measures), and not the type of procedure (*i.e.* actions for annulment) in which the Court may assess the validity of certain decisions.<sup>106</sup> This reasoning opens the possibility for the admissibility of references for preliminary ruling on the validity of these decisions. The Court also relied, *inter alia*, on Article 29 TEU and on the logic of consistency of legal remedies: Member States must ensure that their national policies comply with the relevant CFSP decisions. The Court concluded that the implementation of these decisions is in part the responsibility of the Member States.<sup>107</sup> As a result,

*“a reference for a preliminary ruling on the validity of a measure plays an essential part in ensuring effective judicial protection, particularly, where, as in the main proceedings, both the legality of the national implementing measures and the legality of the underlying decision adopted in the field of the CFSP itself are challenged within national legal proceedings”.*<sup>108</sup>

Therefore, in this judgment, the Court adopted a different position than that of Advocate general Kokott in the framework of Opinion 2/13. While regretting the absence of preliminary ruling jurisdiction of the Court in the field of CFSP,<sup>109</sup> she considered it as the logical consequence of the EU legislator’s choice to maintain the CFSP along intergovernmental lines.<sup>110</sup> Although in its Opinion 2/13 the Court seemed to have followed this opinion, this was no longer the case in *Rosneft*.

To conclude, the CJEU case law on sanctions against Russians and Ukrainians did have an impact on the CFSP legal framework in the sense that it has showed a particular concern of the Court for the respect of the rule of law and the guarantees of an effective judicial protection. In *Rosneft*, the Court recalled that the rule of law is one of the primary values on which the EU is founded, as is stated in Article 2 TEU and in Article 21 TEU concerning the EU’s external action.<sup>111</sup> Extending the legal possibilities of assessing the validity of CFSP decisions represented a *“considerable step forward in the judicial protection of litigants”*.<sup>112</sup> More globally, by laying down the basis for extended control over restrictive measures and increased protection of the applicant’s fundamental rights, the Court seems to be strengthening the credibility of the Union’s foreign policy on the

<sup>104</sup> *Rosneft*, *supra* note 10, paragraphs 169 and 170.

<sup>105</sup> *Ibid*, paragraph 67.

<sup>106</sup> *Ibid*, paragraph 70.

<sup>107</sup> *Ibid*, paragraph 56.

<sup>108</sup> *Ibidem*, paragraph 71.

<sup>109</sup> Opinion of Advocate General Kokott in *Opinion procedure 2/13*, delivered on 13 June 2014, ECLI:EU:C:2014:2475, paragraph 101.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Rosneft*, *supra* note 10, paragraph 72.

<sup>112</sup> L. COUTRON, *supra* note 102, p.1627.

international scene, which is not superfluous when it comes to sanctions against Russians and Ukrainians. The Court seems to be aware that “if the Union wants to use its power to impose sanctions effectively and therefore improve its foreign policy, it must necessarily refine and offer acceptable solutions to the most important issues”<sup>113</sup> of the CFSP. This is particularly true when it comes to autonomous sanctions, since they are adopted on the EU’s pure initiative.

### 3. Perspectives of evolution?

This section explores the potential consequences that may arise from the CJEU case law on sanctions against Ukrainian and Russian persons. For obvious reasons, it is unlikely that a reform of the CFSP through a revision of the Treaties will take place any time soon. In spite of its traditionally political cautiousness towards the CFSP, the CJEU therefore remains the institution that is best suited to trigger evolutions. This is all the more so since numerous proceedings and appeals on sanctions against Russia are still pending before the Court. In addition, the litigation on other waves of sanctions before the Court has not diminished. What trends can we expect within the CFSP legal order?

#### 3.1. Towards an increasing reparation of the damage suffered by the targeted persons?

This issue is of utmost interest, especially in view of the amount of sanctions imposed on Russian and Ukrainian persons that have been annulled by the Court, as well as the negative consequences of restrictive measures on the targeted persons. The issue of actions for damages was not addressed by the CJEU in *Rosneft*, leaving the door open to potential developments.

From the targeted persons’ side, obtaining the award of damages under the current EU and CFSP law framework remains highly difficult. The unlawfulness of an EU decision is not sufficient to allow for the award of damages: there must a sufficiently serious breach of EU law.<sup>114</sup> However, in *Safa Nicu Sepahan* the CJEU established the possibility for an undertaking to be awarded damages under Article 340 TFEU for the damage caused to its reputation, which was considered as a sufficiently serious breach of EU law.<sup>115</sup> Although the circumstances of the case were very specific,<sup>116</sup> this judgment was the first case in which the Court granted damages in the context of country sanctions, which could pave the way for future actions for damages.<sup>117</sup> Even though it was not related to sanctions against Russians and Ukrainians, nothing seems to prevent the applicants targeted by those measures to claim for damages, provided that the relevant conditions are fulfilled. Moreover, the low number of CFSP cases having led to an award of damages could be due to the behaviour of the applicants. When challenging the sanctions, their main interest might be to have their name cleared and to avoid complex and costly procedures. It can be reasonably assumed that a judgment relating to sanctions against Russian or Ukrainian persons, and awarding damages, could be sufficient to trigger a trend of claims for damages.

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<sup>113</sup> A. ALÍ, *supra* note 3, p. 54.

<sup>114</sup> See, for instance, General Court, 23 November 2011, *Jose Maria Sison v. Council*, T-341/07, ECLI: EU:T:2011:687, paragraph 33.

<sup>115</sup> General Court, 25 November 2014, *Safa Nicu Sepahan Co v. Council*, T-384/11, ECLI: EU:T:2014:986, paragraph 83.

<sup>116</sup> C. BEAUCILLON, *supra* note 44, p. 28.

<sup>117</sup> *Ibid.*

### 3.2. Towards a possibility of *forum shopping*?

This possibility is one of the most probable perspectives of evolution in the field of CFSP. The *Rosneft* judgment could lead to contentious strategies on the part of the applicants. They may now bring simultaneously an action for annulment before the General Court, and a complaint before a national court in which they seek a referral to the CJEU.<sup>118</sup> This could reinforce the protection of the applicants: it could increase their chances of having their case adjudicated faster by the Court.

Such a *forum shopping* could lead to applicants circumventing the time limits for bringing claims,<sup>119</sup> and especially the two-months' time limit imposed on actions for annulment in the meaning of Article 263 TFEU. This probability of *forum shopping* can obviously be tempered by the *TWD* doctrine, as a result of which cases cannot lead to a preliminary reference if the two-months limit to bring a direct action has expired.<sup>120</sup> This question was also debated before the Court in case *A and Others*.<sup>121</sup> However, and in any case, scholars remain confident that the *Rosneft* case significantly improved the targeted persons' access to justice.<sup>122</sup>

In any event, potentialities of *forum shopping* can be observed when it comes to restrictive measures adopted by the EU in order to implement UN Security Council Resolutions. Implementing measures enacted by the Member States can theoretically be challenged before both the European Court of Human Rights and the CJEU through a reference for a preliminary ruling. It might be preferable, from the perspective of an applicant subject to such measures, to have a national court refer to the CJEU. In the context of the European Convention on Human Rights, the rule on the previous exhaustion of domestic remedies inevitably implies a longer procedure. By contrast, the fact that national courts may now raise a question on the validity of restrictive measures can allow applicants to benefit from a faster procedure.<sup>123</sup>

### 3.3. Towards further clarification of the extent of the CJEU's jurisdiction over restrictive measure?

Although the *Rosneft* judgment was a major breakthrough regarding the extension of the CJEU's jurisdiction on CFSP acts, it also left some legal issues unsolved. Firstly, the Court remained silent regarding its competence to hear a preliminary ruling on the interpretation of CFSP decisions pursuant to Article 267(1)(a), in addition to its competence to rule over preliminary rulings on their validity. Advocate general Wathelet had, however, supported this solution, developing a particularly interesting argument:

*“if the European Union Courts can perform the broader task, that is to say, review the legality of decisions providing for measures against natural or legal persons [...], then they can certainly perform the narrower task, which is to interpret the terms of such decisions, in particular so that they can avoid annulling or declaring invalid an act relating to the CFSP which they could otherwise have preserved by giving it a*

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<sup>118</sup> G. BUTLER, “Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law”, *Columbia Journal of European Law* n°24, November 2018, p. 637.

<sup>119</sup> *Ibid.*

<sup>120</sup> Court of Justice, 9 March 1994, *TWD Textilwerke Deggendorf GmbH v. Germany*, C-188/92, [1994] ECR I-00833, paragraph 26.

<sup>121</sup> See Court of Justice, 14 March 2017, *A and Others v. Minister van Buitenlandse Zaken*, C-158/14, ECLI:EU:C:2017:202, paragraphs 59 to 75.

<sup>122</sup> See, for instance, S. POLI, *supra* note 40, p. 292.

<sup>123</sup> *Ibid.*, p. 193.



*different interpretation*".<sup>124</sup>

Given the political sensitivity surrounding the adoption of sanctions, it could be in the Court's interest to favour a consistent interpretation of CFSP decisions with regard to EU law, rather than annulling the challenged measures.

Lastly, one can only hope for a clearer distinction between reviewable and non-reviewable CFSP acts. It remains unclear from case law on sanctions against Ukrainian and Russian persons, and in particular the *Rosneft* judgment, which CFSP acts can now be reviewed by the Court. Since it has begun to rule on matters that may be strongly connected to political questions, "*it is likely [that] the Court will soon have to develop and invoke an explicit political question doctrine in respect of EU foreign affairs*".<sup>125</sup> This doctrine, initiated by the US Supreme Court in *Baker v. Carr*,<sup>126</sup> consists in the determination by a court that a specific issue should not be decided by a judge.<sup>127</sup> A court should not have jurisdiction over issues turning on policy choices or standards that defy judicial application.<sup>128</sup>

The implementation of such a doctrine may present advantages. It does not affect the protection of human rights: a court has jurisdiction any time the question at stake is connected to those rights.<sup>129</sup> At the same time, it does not entail risks in terms of separation of powers since it allows the legislator to maintain its broad discretion in the field concerned.<sup>130</sup> The CJEU could use this doctrine as a means of clarifying the distinction between reviewable and non-reviewable CFSP acts, without giving the EU institutions the impression that it is taking too much active of a role. Although the Court has, so far, showed no indication of a will to implement this doctrine, one can assume that it might reconsider this position in the future, especially if it keeps extending its jurisdiction over CFSP acts.

## Conclusion

The above reflections illustrate the difficult position of the EU judges when adjudicating claims that arise from restrictive measures. On the one hand, if the CJEU shows an activism that is considered as excessive in relation to the specificities of the CFSP, it might expose itself to some criticism, in particular from Member States. By annulling numerous restrictive measures imposed by the Council, it also risks to undermine the effectiveness of a European policy that is already difficult to implement at the international level. On the other hand, when the CJEU remains too cautious in the field of CFSP, its reasoning is inevitably be called into question.

In a global way, the CJEU case law on sanctions following the crisis in Ukraine did allow for significant developments in the law of restrictive measures. The Court had the opportunity to rule on a variety of legal issues, such as the admissibility of certain actions for annulment or the possibility to sanction actions of destabilisation of a third State by another. Substantial developments were laid down regarding the possibility for the Council to adopt sanctions for the misappropriation of public funds, and the extent to

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<sup>124</sup> Opinion of Advocate General Wathelet in case C-72/15, *Rosneft*, delivered on 31 May 2016, ECLI:EU:C:2016:381, paragraph 75.

<sup>125</sup> G. BUTLER, *supra* note 118, p. 650.

<sup>126</sup> Supreme Court of the United States of America, *Baker v. Carr*, [1962] 369 U.S. 186.

<sup>127</sup> L. LONARDO, "The Political Question Doctrine as Applied to Common Foreign and Security Policy", *European Foreign Affairs Review* n°22, Issue 4, 2017, p.571.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, p. 582.

<sup>130</sup> *Ibid.*

which it can rely on third States' decisions. The Court has also showed a certain will to reduce the differences between the CFSP and other EU policies: it extended its own jurisdiction over restrictive measures, and has shown a greater concern for the protection of the targeted persons' right to judicial protection.

However, the case law on sanctions against Ukrainians and Russians is also a reminder of the main legal issues surrounding the adoption and the judicial review of EU sanctions. In the majority of cases, and sometimes at the expense of a sound and clear legal reasoning, the Court has confirmed the wide margin of appreciation of the Council when adopting restrictive measures. In many aspects, the CJEU judgments show the importance of political considerations when it comes to judicial review of EU sanctions. These issues should not be overlooked: through its judicial review of the sanctions, the Court plays a significant role in strengthening or undermining the credibility of the EU's action on the international scene.



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