EU Restrictive Measures and Third Countries' Evidence

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EU restrictive measures, often referred to as 'sanctions', have become an increasingly used instrument of EU autonomous foreign policy. For some restrictive measures, however, the EU cannot act alone. In order to adopt them, the Council must rely on information transmitted by third states' authorities and decisions taken by them at domestic level. This has been the case, in particular, of EU restrictive measures adopted in connection with misappropriations of state funds. The Council's use of such evidence has been somewhat controversial and has led to numerous legal debates before the Court of Justice of the European Union (CJEU). To what extent was the Council free to rely on the evidence provided by these third states' authorities? How to ensure that the fundamental rights of the targeted persons and entities were complied with in the process? Faced with these questions in its particularly abundant case law, the CJEU has progressively raised the threshold of validity for these sanctions. It has done so up to a point at which, in the authors' opinion, the sanctions can no longer reach such threshold in practice. This article addresses the evolutions and implications of the CJEU case law on a legal aspect that is of crucial importance for the EU's sanctions practice.

Keywords: Restrictive measures – Third States evidence – Misappropriations of State funds – Terrorism – Judicial review – Fundamental Rights – Ukraine – Tunisia – Egypt

1 INTRODUCTION

The EU's exponential recourse to restrictive measures has turned them into a major source of litigation before the Court of Justice of the European Union (CJEU).[1] Since the entry into force of the Lisbon Treaty, which codified in Article 275(2) of the Treaty on the Functioning of the EU (TFEU) the possibility for natural or legal persons targeted by restrictive measures to challenge them before the CJEU,[2] more than 500 rulings and/or orders have been issued by the EU judges in that area. Over the last decade, the caseload related to restrictive measures

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1 Since the entry into force of the Treaty of Lisbon, which codified in Art. 275 TFEU the possibility for natural or legal persons targeted by restrictive measures to challenge them before the CJEU, more than 500 rulings and/or orders have been issued by EU judges in this area.

2 Pursuant to Art. 275, para. 2, TFEU, the Court 'shall have jurisdiction to […] rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons'.

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has led the General Court and the Court of Justice to rule on fundamental aspects of these specific legal instruments. Despite the fact that restrictive measures remain a policy subject to specific rules and procedures,[3] and over which the CJEU's jurisdiction is meant to be the exception rather than the norm, they have been gradually subject to more judicial scrutiny. The CJEU has progressively emphasized the requirement for restrictive measures to comply with fundamental rights,[4] extended its jurisdiction over these measures[5] and, more globally, expanded the possibilities for applicants to make use of the legal remedies provided for in the treaties.[6] In other words, a first and substantial body of judgments has been issued on institutional and transversal aspects of EU restrictive measures.

The past years have, however, also witnessed litigation over increasingly specific and technical aspects of EU restrictive measures. Ranging from the notion of 'frozen asset' for the purpose of the initiation of protective measures by creditors[7] to the notion of 'financial assistance' in connection with export restrictions,[8] the legal issues put forward before EU judges have revealed the ongoing trend of specialization of the law of restrictive measures.

In particular, a specific issue has arisen that relates to the Council's possibility to rely on decisions, evidence and information originating in third states in order to adopt and renew restrictive measures. The Council must justify every listing of person or entity in the restrictive measures, and substantiate it by relevant evidence.[9]

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3 In that regard, *see* Art. 24 TEU.

4 *See* in particular, C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council*, EU:C:2008:461; C-548/10 P, *Commission v. Kadi*, EU:C:2013:518; E. Cannizzao, *Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case*, 28 Y.B. Eur. L. 593 (2010); T. Tridimas, *Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order*, 34 Eur. L. Rev. 103 (2009). On the more general topic of the compliance of restrictive measures with fundamental rights, *see* inter alia, G. De Baere, *European Integration and the Rule of Law in Foreign Policy*, in *Philosophical Foundations of European Union Law* 354 (J. Dickson & P. Eleftheriadis eds, OUP 2012); C. Timmermans, *EU Common Foreign and Security Policy and Protection of Fundamental Rights*, in *The EU as a Global Actor – Bridging Theory into Practice, Liber Amicorum in Honour of Ricardo Gosalbo Bono* 295–305 (J. Czuczai & F. Naert eds, 13 SEUR, BRILL 2017); L. Pantaleo, *Sanctions Cases in the European Courts*, in *Economic Sanctions and International Law* 71–196 (M. Happold & Paul Eden eds, Hart Publishing 2016).

5 *See* in particular, C-455/14 P, *H v. Council*, EU:C:2016:569; C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, EU:C:2017:236.

6 *See* in particular, T-384/11, *Safa Nicu Sepahan v. Council*, EU:T:2014:986 and C-134/19 P, *Bank Refah Kargaran v. Council*, EU:C:2020:793, regarding the possibility for persons or entities targeted by restrictive measures to initiate an action for damages under Art. 340 TFEU. *See also* C-872/19 P *République bolivarienne du Venezuela v. Council*, EU:C:2021:507. in which the Court asserted that a third state targeted by EU restrictive measures may challenge them in the framework of an action for annulement under Art. 263 TFEU.

7 *See* C-340/20, *Bank Sepah v. Overseas Financial Limited and Oaktree Finance Limited*, EU:C:2021:903.

8 *Rosneft*, *supra* n. 5, paras 158–167.

9 *See* European Council, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy* (doc. ST 5664/18), 5–10 (2018). The latter solely refer to EU autonomous restrictive measures, i.e., those adopted without any prior adoption of restrictive measures at the United Nations (UN) level.

For several sets of restrictive measures, however, the EU cannot act alone: the Council must rely on information transmitted by third states' authorities and decisions taken by them at domestic level. This is particularly true when EU restrictive measures are autonomous, i.e., going beyond or outside any United Nations (UN) framework imposing sanctions. Such is the case, first of all, of EU autonomous counter-terrorism restrictive measures,[10] for which the Council abundantly relies on United States (US) or the United Kingdom (UK)'s intelligence and judicial decisions. But more importantly for the purpose of the present article, this has been the case of EU restrictive measures linked to misappropriations of state funds in Egypt,[11] Tunisia[12] and Ukraine.[13] In order to adopt these sanctions, which aimed to support these states in their democratic transition, the Council has relied on the respective states' decisions and information.

However, the Council's practice of relying on such evidence quickly led to legal concerns. It was not clear that the third states from which the decisions and evidence originated applied the same standard of protection of fundamental rights for the targeted persons and entities, especially the rights of the defence. This was all the more so that some of the third states in question were still ongoing a transition in terms of democracy, rule of law and judicial independence. To what extent could the Council lawfully rely on the evidence provided by these third states' authorities? How to ensure that the targets' fundamental rights were complied within the process? Faced with these legal issues in numerous cases against restrictive measures linked to misappropriation of state funds, the CJEU has progressively enhanced its scrutiny over the Council's use of third states evidence.

The present article unveils the main takeaways and implications of a set of CJEU case law that has led to few analyses so far,[14] in spite of its importance for the

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[10] *Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism*, OJ L 344, at 70–75 (28 Dec. 2001).

[11] *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*, OJ L 76, at 63–67 (22 Mar. 2011); *Council Regulation (EU) No 270/2011 of 21 March 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt*, OJ L 76, at 4–12 (22 Mar. 2011).

[12] *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*, OJ L 28, at 62–64 (2 Feb. 2011); *Council Regulation (EU) No 101/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia*, OJ L 31, at 1–12 (5 Feb. 2011).

[13] *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*, OJ L 66, at 26–30 (6 Mar. 2014); *Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine*, OJ L 66, at 1–10 (6 Mar. 2014).

[14] *See* V. Valančius, *Le contrôle juridictionnel de la légalité des mesures restrictives: les apports du « contentieux ukrainien »*, (4) Revue de droit de l'Union européenne 207–226 (2021); C. Challet, *Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the European Union*, 4 Res. Paper L. 10–11 (College of Europe Research Series 2020); C. Challet, *The Impact of the Adjudication of Sanctions Against Russia Before the Court of Justice of the EU*, in *Principled Pragmatism in Practice: The EU's Policy Towards Russia After Crimea* 134–136 (F. Bossuyt & P. van Elsuwege eds, SEUR n°19, BRILL 2021); S. Poli, *The Right to Effective Judicial Protection With Respect to Acts Imposing*

Council's sanctions practice. The article first highlights the legal issues involved by the use of third states' decisions and evidence for the adoption of restrictive measures linked to misappropriations of states funds (2). It then explores how the CJEU has progressively increased its judicial scrutiny over these restrictive measures, up until a point where, as it is argued, they can no longer meet the new standards of validity (3). Based on this state of play, the article draws conclusions and recommendations for the EU's current and future practice of restrictive measures linked to misappropriation of state funds (4).

2 LEGAL ISSUES RAISED BY THE COUNCIL'S USE OF THIRD STATES' INFORMATION AND EVIDENCE

All EU restrictive measures imply the use and processing of evidence and information, be it from Member States or from third states, for the purpose of their adoption. Such evidence and information are indispensable for the restrictive measures to comply with the obligation to state reasons, and with the Council's obligation to comply with the listing criteria.

The processing of evidence occurs at two stages, the first and main one being the adoption of the restrictive measures. At that stage, the processing of evidence remains along the same lines, with two distinct scenarios. If the EU restrictive measures are fully UN-based (i.e., adopted to comply with the Member States' obligation to implement sanctions adopted through UN Security Council Resolutions), the Council does not process much evidence or information. The motivation and evidence justifying the listing of persons and/or entities are those already contained in the UN Security Council Resolutions.

If, however, the EU restrictive measures are autonomous the gathering and processing of evidence and information fully rests on the EU. In this scenario, the European External Action Service (EEAS) or Member States compile a comprehensive file with the existing evidence for each set of restrictive measures The evidence usually consists of intelligence from national secret services, of publicly available information (originating, for instance, in registers of companies, newspapers or official reports) or of national administrative or judicial decisions. The proposal for listing together with the evidence is circulated between the Member States via COREU (CORespondance EUropéenne), which is a Common Foreign and Security Policy (CFSP) communication network gathering the twenty-seven EU Member States, the Council, the EEAS and the Commission.[15] The file is then discussed within a relevant Council working party: a

Restrictive Measures and Its Transformative Force for the Common Foreign and Security Policy, 59(4) Com. Mkt. L. Rev. 1072–1077 (2022).

[15] Council Guidelines doc. ST 5664/18, *supra* n. 10, at 46.

geographical working party if the restrictive measures target a specific country (e.g., the Eastern Europe and Central Asia Working Party), or the Working Party on the application of specific measures to combat terrorism (COMET) in the case of counter-terrorism restrictive measures. It is, overall, at the stage of these working parties that the processing and analysis of evidence (be it from Member States or from third countries) mainly occurs. The political aspects and broader parameters of the listing proposals are also discussed within these working parties.[16]

It is in this framework that information and evidence originating from third states come into play. Certain sets of autonomous EU restrictive measures require evidence and information that are not within Member States' reach, thereby raising specific legal issues. Such has been the case, firstly, of counter-terrorism restrictive measures. In order to adopt them, the Council has substantially relied on evidence and information transmitted by authorities of states such as the US or the UK. It has also relied on administrative and/or judicial decisions taken by the authorities and jurisdictions of the US, the UK or, for instance, India,[17] against the persons and entities concerned. But even more importantly, this has been the case of the restrictive measures adopted by the EU in connection with misappropriation of state funds. From 2011 onwards, the EU has adopted and renewed restrictive measures in order to support Egypt,[18] Tunisia[19] and Ukraine[20] in their democratic transition. It has frozen the assets of members of these countries' former intelligentsia who were being prosecuted there for the misappropriation of state funds. Such was the case of the former Presidents of Egypt, Tunisia and Ukraine and members of their family and government. The objective of the restrictive measures was to help the authorities of the countries concerned to recover the misappropriated funds, should they be qualified as such at the end of the judicial proceedings. When listing the targets, the Council fully (and freely) relied on information and evidence of misappropriation of public funds transmitted by these states' judicial and/or administrative authorities, as well as proof that judicial proceedings were ongoing. This state of play, which led some authors to speak of 'a highly atypical form of [restrictive measures]',[21] was bound to lead to interrogations as to the reliability of this evidence and information. This was all the more so since the proposals for the restrictive measures could be based on requests by the third country concerned (e.g., in the case of former Ukrainian leaders, by the

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16 *Ibid.*, at 47.
17 As exemplified in, inter alia, T-208/11 and T-508/11 *LTTE v. Council*, ECLI:EU:T:2014:885.
18 *See Council Decision 2011/172/CFSP*, *supra* n. 12 and *Council Regulation (EU) No 270/2011*, *supra* n. 12.
19 *See Council Decision 2011/72/CFSP*, *supra* n. 13 and *Council Regulation (EU) No 101/2011*, *supra* n. 13.
20 *See Council Decision 2014/119/CFSP*, *supra* n. 14 and *Council Regulation (EU) No 208/2014*, *supra* n. 14.
21 Poli, *supra* n. 15, at 1073.

Prosecutor General of Ukraine). In a scenario where the states concerned could and were asking the EU to sanction their own citizens, the EU was receiving evidence from states acting as both judges and parties. This inevitably entailed risks from the perspective of due process and of the targeted persons' rights of the defence.

The issues raised by the use of evidence and information originating from third states also inevitably arose at the second main stage of processing of evidence, namely during the review (and renewal) of the restrictive measures. The Council conducts a yearly review for restrictive measures linked to the misappropriation of funds, and a six-month review for those related to counter-terrorism. It must base the retention of the persons or entities on the sanctions list on an up-to-date assessment of the situation. In the case of misappropriation of state funds, it must verify whether there is still a need to keep the persons concerned on the list (i.e., if they are still being prosecuted in their home state). This inevitably implies further use of third states' evidence and information.

The question of the standard of validity of the evidence used for the adoption and renewal of these restrictive measures, particularly when such evidence originates from third states, was therefore crucial. The CJEU's assessment had the potential to significantly limit the Council's margin of appreciation in the field of EU restrictive measures. As it will be examined in section 23, the CJEU has used that potential. Its case law has laid down fundamental developments in that regard, reaching a point where, as it will be argued, these restrictive measures have in practice been deprived of any possibility to fulfil the new standards of validity laid down by the Luxembourg court.

3 JUDICIAL SCRUTINY OVER THE USE OF THIRD STATES EVIDENCE LINKED TO MISAPPROPRIATIONS OF STATE FUNDS

The interrogations linked to the Council's use of third states evidence for these restrictive measures have not last long before being raised before the General Court and, in appeal cases, the Court of Justice. This was not the first time, however, that EU judges ruled on the use of third states' evidence regarding restrictive measures. Some developments had already been laid down by the CJEU case law on counter-terrorism restrictive measures. A brief word on the main takeaways of these judgments is necessary to understand the implications of the case law on restrictive measures linked to misappropriations of state funds (3.1). Such implications are all the more striking that unlike the case law on counter-terrorism sanctions, the one on restrictive measures linked to misappropriations of state funds has in practice signed off the death warrant for EU restrictive measures linked to misappropriations of state funds (3.2).

3.1 Setting the background: The case law on the use of third states' evidence for the adoption of counter-terrorism restrictive measures

The analysed case law should be placed in the context of the pre-existing case law on the use of third states' evidence and information for the purpose of autonomous restrictive measures. The extent of the Council's discretion in that regard had already been debated in cases against counter-terrorism measures. As mentioned above, in order to adopt these sanctions the Council has substantially relied on third states' decisions and evidence. Unlike sanctions related to misappropriations of state funds, however, counter-terrorism restrictive measures had from the outset been subject to more constraints regarding the evidence used. Common Position 2001/931/CFSP,[22] which is one of the main legal bases for EU counter-terrorism restrictive measures, provides in its Article 1(4) that the list of targets 'shall be drawn up on the basis of [information or material] which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned'. In other words, a target cannot be added on the EU's counter-terrorism sanctions list unless there is a decision by a national authority recognizing it as involved or suspected to be involved in terrorist activities.

The Council's practice of relying on decisions taken by third states' authorities had raised concerns as to the legal safeguards surrounding the domestic procedures within these countries.[23] As stressed by Advocate General Kokott in *Liberation Tigers of Tamil Eelam (LTTE)*, while the Council could in principle presume that decisions of competent authorities of Member States complied with EU fundamental rights[24]:

> the situation is different where the Council decides to rely on a decision of a competent authority of a third State. Those authorities do not act within same constraints as the Member States in terms of fundamental rights protection, even if their legal protection of fundamental rights might be at least equivalent to that guaranteed under EU law.[25]

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[22] *Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism*, OJ L 344, at 93–96 (28 Dec. 2001).

[23] For comments on the legal issues raised by relying on the decision of a national authority in the first place, *see* e.g., E. Guild, *The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the 'Terrorist List'*, 46(1) J. Com. Mkt. Stud. 173–193 (2008); A. Antonino, *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 *Highs and Lows and European Integration – Sixty Years After the Treaty of Rome* 49–62, 54 and 55 (L. Antoniolli, L. Bonatti & C. Ruzza eds, Springer 2019); C. Eckes, *Decision-Making in the Dark? Autonomous EU Sanctions and National Classification*, in *EU Sanctions: Law and Policy Issues Regarding Restrictive Measures* 177–197 (I. Cameron ed., Cambridge 2013). For comments on the safeguards surrounding third states authorities' decisions, *see* e.g., C. Eckes, *EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions*, 51(3) Com. Mkt. L. Rev. 897–904 (2014).

[24] C-599/14 P *Council v. LTTE*, Opinion of AG Sharpston, ECLI:EU:C:2016:723, para. 62.

[25] *Ibid.*, para. 65.

The numerous actions for annulment raised against counter-terrorism restrictive measures led the CJEU to clarify the legal safeguards that ought to surround their adoption. The present section does not intend to provide an exhaustive analysis of this rich case law but merely to mention its relevant takeaways for the purpose of the article.

As a matter of principle, the CJEU preserved the Council's possibility to rely on decisions adopted by third states authorities under Common Position 2001/93. The EU judges made it clear that a third state authority could be considered as a 'competent authority' under that Common Position.[26] A different conclusion would disregard the wording and the objective of the Common Position, namely cooperation among states to combat terrorism.[27] Similarly, the applicants' argument that the principle of sincere cooperation would exclude third states authorities as 'competent authorities' reached an unsuccessful outcome in *People's Mojahedin Organization of Iran* (*PMOI*).[28] The principle remained that a third state's authority is a competent authority within the meaning of Common Position 2001/931, and that the Council can rely on that authority's assessments.[29]

However, this stance of principle did not prevent the CJEU from exercising scrutiny over the appropriate standard for the use of third states evidence and information. It was stressed from the start that a verification that there is a decision of a national authority fulfilling the definition of Article 1(4) of Common Position 2001/931 was an essential precondition for the adoption, by the Council, of its own decision to freeze funds.[30] The *LTTE* judgment of 2014 then clarified that before acting on the basis of a decision of a third state's authority, the Council must verify that the relevant legislation of that state ensures a protection of the rights of defence and of the right to effective judicial protection that is equivalent to that guaranteed at EU level.[31] In addition, there cannot be evidence showing that the third state fails to apply that legislation in practice.[32] The EU judges' reasoning seems to have been motivated by considerations of fundamental rights protection. If there is no equivalence between the level of protection ensured by a third state's legislation and that ensured at EU level, a finding that a third state's authority was a competent authority under Common Position 2001/931 would entail a difference in treatment for the persons sanctioned. Unlike Member States, numerous third states are not bound by the requirements stemming from the Convention for the

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26 T-208/11 and T-508/11, *supra* n. 17, para. 129.
27 *Ibid*.
28 T-256/07 *People's Mojahedin Organization of Iran v. Council*, ECLI:EU:T:2008:461, para. 131.
29 T-208/11 and T-508/11, *supra* n. 17, paras 134–135.
30 T-341/07 *Sison v. Council*, ECLI:EU:T:2011:687, para. 93.
31 T-208/11 and T-508/11, *supra* n. 17, para. 139.
32 *Ibid*.

Protection of Human Rights and Fundamental Freedoms, and none of them is subject to the provisions of the Charter of Fundamental Rights of the EU.

Based on these elements, the EU judges have on several occasions annulled a listing due to a lack of verifications by the Council. Two cases, in particular, ought to be briefly mentioned. The first one is again *LTTE*, in which the General Court annulled the sanctions because, in the grounds for listing, the Council had limited itself to mentioning the national legislation providing for due process, without assessing it.[33] Interestingly, in its appeal of the judgment, the Council argued that it should be allowed to demonstrate in the defence, rather than in the statement of reasons of the contested acts, that the Indian decision was surrounded by sufficient legal safeguards.[34] According to the Council, the third state concerned might regard such an assessment in the statement of reasons as amounting to interference in its internal affairs.[35] The Court rejected this argument by reemphasizing the Council's obligation to comply with fundamental rights and the duty to state reasons.[36] While such reasoning is not particularly surprising, the Court's firm stance on that matter is of particular relevance for the present article. As it will be further explored, the question of the interference within a third state's internal affairs, and of maintaining a close cooperation with its authorities, was at the heart of the case law on restrictive measures linked to misappropriations of state funds.

The second case worth mentioning is the *Hamas*[37] one. In order to list Hamas, the Council had relied on US decisions qualifying it as a terrorist organization. However, the applicable US legislation did not require a notification nor a statement of reasons for the authorities' decisions.[38] Since the Council did not provide any indication as to whether the decisions had been published and contained a statement of reasons, the General Court ruled that it had not carried out the required verifications.[39]

The Council's use of third state' evidence for its counter-terrorism restrictive measures has been therefore subject to a certain level of judicial scrutiny. This has allowed to ensure that the targeted persons' fundamental rights were sufficiently preserved in the state concerned, and that the evidence used by the Council was sufficiently reliable. The CJEU has installed a certain balance between the effectiveness of counter-terrorism sanctions on the one hand, and their compliance with fundamental rights and ultimately the rule of law on the other hand. Such exercise has overall had a successful outcome. The Council modified its Working Methods

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33 *Ibid.*, para. 141.
34 C-599/14 P *Council v. LTTE*, ECLI:EU:C:2017:583, para. 20.
35 *Ibid.*
36 *Ibid.*, paras 22–36.
37 T-289/15 *Hamas v. Council*, ECLI:EU:T:2019:138.
38 *Ibid.*, para. 53.
39 *Ibid.*, paras 56–66.

on counter-terrorism sanctions in 2016 in order to include the verifications requirements,[40] and in most of the latest cases the sanctions have been considered as fulfilling these standards of validity.[41] Admittedly, Brexit might create challenges for the Council's use of information and decisions originating in the UK, given that the latter remains one of the main providers of intelligence at the EU and UN level. On the one hand, foreign policy, external security and defence cooperation remain uncovered in the EU-UK Trade and Cooperation Agreement.[42] Apart from the exchange of classified information, which is subject to an EU-UK Security of Information Agreement,[43] there does not therefore seem to be a legal framework for coordinate joint responses on foreign policy challenges, for instance through the imposition of restrictive measures. On the other hand, the UK Sanctions Act,[44] which was adopted in order to provide for the imposition, update and lifting of restrictive measures after Brexit, cannot benefit from the mutual recognition of equivalent standards of protection which applies to EU Member States' sanctions regimes. Depending on the CJEU's assessment of the UK's legal safeguards on the adoption of sanctions and on its review mechanism, therefore, the standards of protection of the rights of the defence and effective judicial protection might not necessarily be considered as fulfilled.

The fact nevertheless remains that the CJEU has overall developed a rather balanced approach, of which the case law on restrictive measures linked to misappropriations of state funds has, to some extent, been the legacy. That case law has followed, however, a very different path: while the CJEU has initially been reluctant to restrain the Council's margin of appreciation, it has then changed its approach and exercised an unprecedented level of scrutiny over the sanctions.

3.2 The case of restrictive measures linked to the misappropriation of state funds: Increasing the CJEU's judicial scrutiny

The EU restrictive measures related to misappropriation of state funds provide a particularly (if not the most) striking illustration of the CJEU's increasing scrutiny over the Council's sanctions practice. The CJEU was faced with the following

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40 Council of the European Union, *Establishment of a Council Working Party on Restrictive Measures to Combat Terrorism (COMET WP)* (doc. 14612/1/16 REV 1), 6–7.

41 For example, C-46/19 P *Council v. PKK*, EU:C:2021:316, paras 53–57.

42 *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the on part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*, OJ, L 444 (2020).

43 *Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information*, OJ L 149, at 2540–2548 (30 Apr. 2021).

44 Sanctions and Anti-Money Laundering Act 2018 (c. 13).

question: given that these restrictive measures were meant to assist certain third states in their democratic transition, to what extent could the Council 'trust' their authorities in order to adopt such sanctions? In that regard, the case of the restrictive measures linked to the misappropriation of state funds is undoubtedly the most striking example of the Court's progressive awareness of the reality of the EU's sanctions practice, and of the concerns it can raise.

As explained in section 2, due to the purpose of these sanctions and to the fact that the Council relied heavily on the information transmitted by the third states' authorities, concerns were raised as regards the legality of such sanctions. The fact that the EU targeted individuals under criminal investigation and/or prosecution for the misappropriation of state funds, usually upon the request of the national judiciary, bore a risk of EU sanctions being used to target political opponents.[45] There was a suspicion, shared by a wide number of applicants, that the restrictive measures could facilitate a form of 'political trials', rather than to assist the new governments in re-establishing and consolidating the rule of law.[46] Some have even argued, particularly as regards Ukraine, that the EU has adopted sanctions 'with eyes closed to violations committed by one side, while those committed by the other [were] stressed'.[47]

These legal issues have been emphasized in the 'plethoric litigation'[48] that arose against the restrictive measures targeting Ukrainians (sixty-five cases at the time of writing) and, to a lesser extent, Tunisians (nineteen cases) and Egyptians (seventeen cases). This abundant caseload has provided the CJEU with an opportunity to take a stance on the extent to which the Council can rely on such information for the purpose of imposing the restrictive measures. For clarity purposes, this section will analyse what are argued to be two main periods within the case law on these sanctions. The initial judgments reaffirmed the Council's freedom to rely on evidence transmitted by third states' authorities, while revealing the CJEU's increasing awareness of the issues tied to that evidence (3.2[a]). The second period within the case law, introduced by the *Azarov* judgment, witnessed a significant change of approach by the EU judges and an unprecedented level of judicial scrutiny exercised over the Council's practice (3.2[b]).

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45 *See* e.g., House of Lords, *The Legality of EU Sanctions*, European Union Committee 11th Report of Session 2016-17 HL, Paper 102, para. 43 (2 Feb. 2017).

46 *See* e.g., T-348/14 *Oleksandr Yanukovych v. Council*, EU:T:2016:508, para. 120, as regards the restrictive measures imposed for the misappropriation of state funds in Ukraine: *'the true objective pursued by the Council by means of the restrictive measures in question was that of seeking favor with the so-called interim regime in Ukraine with the aim of producing an EU-friendly Ukraine government, that being a political objective of the European Union, and not the objective of consolidating and supporting the rule of law in Ukraine'*.

47 *The Case of Crimea's Annexation Under International Law* 276 (W. Czapliński, S. Dębski, R. Tarnogórski & K. Wierczyńska eds, SCHOLAR Publishing House 2017).

48 Valančius, *supra* n. 14, at 207.

3.2[a] *The Pre-Azarov Period: From Wide Discretion Left to the Council to First Hints of Change*

The first CJEU judgments on restrictive measures linked to misappropriations of state funds, which were issued from 2016, repeatedly stressed the Council's wide margin of appreciation when acting upon the request of the third state's judiciary. The initial stance was the following: the sole purpose of these restrictive measures was to assist the third states' authorities in recovering misappropriated state funds.[49] As long as the Council showed proof of ongoing judicial proceedings in the state concerned, it was exempted from additional verifications.[50] In any event, although it was recalled that the Council could not endorse in all circumstances the findings of the third states' judicial authorities,[51] it was not required to systematically carry out its own investigations or to operate verifications.[52] What the Council ought to prove was (1) that the evidence received showed that the applicant was subject to criminal proceedings in connection with a misappropriation of state funds and (2) that those proceedings were such that the applicant's actions could be characterized as being identified as responsible for the misappropriation of state funds.[53] The Council had to investigate further only if it could not establish these two elements.

At the time, the approach of EU judges, particularly within the General Court, was one of wide trust for the third state's authorities that had launched the proceedings. The restrictive measures were understood as part of a more general policy of support for the third states' authorities concerned, in order to promote political stability and democracy.[54] When answering claims of alleged dysfunctions of Ukraine's judicial and political system and of infringements of their rights of the defence during the judicial proceedings in Ukraine, the CJEU initially stressed that such concerns should not affect the validity of the sanctions. It was the Council's eminently political decision to cooperate with the new Ukrainian government in order to re-establish and consolidate the rule of law and fundamental freedoms,[55] which the judges were not entitled to review. In addition, Ukraine was a member of the Council of Europe and its new regime was recognized as lawful by the EU and the international community.[56] As a result, if the Council's decision to cooperate with the new authorities were subject to the condition that the Ukrainian State should, immediately after the change of regime,

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49 T-288/15 *Ezz ea v. Council*, ECLI:EU:T:2018:619, para. 64.
50 T-200/14 *Ben Ali v. Council*, ECLI:EU:T:2016:216, paras 168–173.
51 T-516/13 *CW v. Council*, ECLI:EU:T:2016:377, para. 141.
52 T-200/14, *supra* n. 50, para. 175.
53 T-245/15 *Klymenko v. Council*, ECLI:EU:T:2017:792, para. 122.
54 For example, T-545/13 *Al-Matri v. Council*, ECLI:EU:T:2016:376, para. 60.
55 T-215/15 *Azarov v. Council*, ECLI:EU:T:2017:479, para. 173.
56 For example, T-340/14, *Klyuyev v. Council*, ECLI:EU:T:2016:496, para. 93; T-221/15 *Arbuzov v. Council*, ECLI:EU:T:2017:478, para. 146.

guarantee a level of fundamental rights protection that is equivalent to the EU's, the Council's broad discretion would be undermined.[57] The *Azarov* judgment of 2017 mentioned the rule of law improvements introduced by the Ukrainian government[58] and stressed that even if deficiencies were to be found within the Ukrainian judicial system, they were not sufficient to consider that the EU should not support the new regime.[59] Therefore, the Council '[could not] be criticised for not having verified [the] information which came from the highest judicial authorities in the country and which confirmed the existence of those investigations was correct and substantiated'.[60] The same rationale was applied in the case law regarding Egypt, where the EU judges did not even reply to the applicant's claims questioning the reliability of the Egyptian evidence and the Egyptian judiciary's compliance with their fundamental rights.[61]

In other words, the General Court officialized a sort of 'presumption' of compliance by the third states concerned with international standards of fundamental rights. If anything, it was for the applicants to demonstrate the need for further verifications by the Council.[62] There was, thus, a clear unbalance between the targeted persons and the Council. It was for the targets to prove that there was an issue with the evidence on the basis of which they had been added to the sanctions list, with no guarantee that the Council would proceed to the clarifications which it was not, in principle, required to do in the first place.

It is also worth noting that in that initial stage of the case law, the General Court excluded any transposability of the *LTTE* case on due process safeguards to restrictive measures linked to misappropriations of state funds.[63] Two reasons were provided in support of that position. Firstly, and contrary to counter-terrorism restrictive measures, the existence of a prior decision by the third state authorities (India) is not a legal condition required by the listing criteria.[64] Secondly, there was 'a major difference between [counter-terrorism restrictive measures] and those which … formed part of the cooperation between the EU and the new authorities of a third State'[65] it wished to support. While the first reason could seem legitimate from a legal point of view, this was hardly the case for the second one, which further confirmed the political considerations at the heart of the cases.

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57 T-215/15, *supra* n. 55, para. 173.
58 T-221/15, *supra* n. 56, para. 149.
59 *Ibid.*, para. 148.
60 T-340/14, *supra* n. 56, para. 157.
61 T-256/11 *Ezz ea v. Council*, ECLI:EU:T:2014:93; C-220/14 P *Ezz ea v. Council*, ECLI:EU:C:2015:147.
62 Case T-245/15, *supra* n. 53, para. 126; T-288/15, *supra* n. 49, para. 66.
63 *Ibid.*, para. 223; T-190/16 *Azarov v. Council*, ECLI:EU:T:2018:232, para. 183.
64 *Ibid.*, para. 225.
65 *Ibid.*, para. 227.

In any event, this initial state of play did not last. From the end of 2017 onwards, the General Court started showing increasing scrutiny over the Council's practice. This was particularly so in the case of Ukraine. Three years after the start of judicial proceedings against the targeted persons in Ukraine, it was becoming increasingly difficult to overlook arguments of applicants pointing out to the lack of progress of the proceedings, to unexplained closures of proceedings by the Ukrainian authorities[66] or to 'intrinsic inconsistencies' in the evidence on which the Council relied.[67] The General Court maintained its official stance: Ukraine was making improvements in the field of rule of law[68] and therefore it could not be assumed that there were systemic issues in the judicial proceedings at hand. However, the judges increasingly acknowledged that the applicant's arguments were such as to cast doubt on the adequacy of the evidence used by the Council, and that it should have led it to carry out additional verifications.[69] The General Court also acknowledged for the first time that the Council should have sought clarification from the Ukrainian authorities as to the possible reasons for the lack of progress in the proceedings.[70]

This first period within the CJEU case law, which mostly consisted in judgments by the General Court, thus reflected the growing tensions surrounding the judicial review of the restrictive measures at stake. Caught between the imperative to maintain the Council's discretion in a highly political and sensitive area and the increasingly obvious concerns raised by the proceedings in Ukraine, the General Court opted for a moderate approach based on progressive changes. This laid the groundwork for a judgment that would trigger a stronger (and more accelerated) shift within the case law: the *Azarov* ruling by the Court of Justice.

3.2[b] *The Azarov Judgment and the Subsequent Case Law: The Unprecedent Judicial Scrutiny over the Council' Use of Third States Evidence*

The Court of Justice's *Azarov* judgment of 19 December 2018[71] has had major implications for the judicial review of restrictive measures linked to misappropriations of state funds. It asserted that the Council was obliged to carry out verifications when using third states evidence for the purpose of these sanctions. In that regard, it found direct inspiration in its case law on counter-terrorism restrictive

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66 Case T-246/15 *Ivanyuschenko v. Council*, ECLI:EU:T:2017:789, para. 117.
67 *Ibid.*, para. 132.
68 For example, T-731/15 *Klyuyev v. Council*, ECLI:EU:T:2018:90, para. 140; case T-190/16, *supra* n. 63, para. 193.
69 T-246/15, *supra* n. 66, paras 108–151.
70 T-258/17 *Arbuzov v. Council*, ECLI:EU:T:2020:445, para. 102.
71 C-530/17 *Azarov v. Council*, ECLI:EU:C:2018:1031.

measures: the Court officially rejected the alleged lack of transposability of the *LTTE* case law. It took a particularly firm stance on the matter:

> the differences in the wording, structure and objective … between, on the one hand, the model of [counter-terrorism restrictive measures] and, on the other hand, the model of restrictive measures [linked to misappropriations of State funds] cannot have the effect of limiting the application of the guarantees arising from that same case-law only to restrictive measures adopted in the fight against terrorism … and excluding those adopted in the context of cooperation with a third State decided on by the Council as a result of a political decision.[72]

The Court thus made it clear that the judicial review of the restrictive measures linked to misappropriation of state funds was to be aligned to the higher standards of validity regarding the use of third states' evidence and information. Consequently, the Council must verify that the rights of the defence and the right to effective judicial protection were respected at the time of the adoption of the decision by the third state in question.[73] Otherwise, the Council decision imposing the sanctions cannot be considered as having been adopted on a sufficiently solid factual basis.[74] More precisely, the Council ought to comply with a double obligation. First, it must ensure that the third states' authorities have complied with the rights of the defence and the right to effective judicial protection at the time of the adoption of their decision.[75] Second, the Council must refer, in its decision imposing the sanctions, to the reasons for which it considers that the third state's decision has been adopted in compliance with those rights.[76] In addition, the *Azarov* judgment put an end to the 'presumption' of Ukraine's compliance with fundamental rights due to its Council of Europe membership. Such circumstance 'cannot render superfluous verification, by the Council, that the decision of a third state on which it bases its restrictive measures has been taken in compliance with fundamental rights and in particular the rights of the defence and the right to effective judicial protection'.[77]

The importance of the *Azarov* judgment is thus self-explanatory. The Court of Justice made it clear to the Council and the General Court that a significantly higher burden of proof was required from the Council. This burden of proof was, at that stage, rather equivalent, or at least comparable, to what was required from the Council regarding counter-terrorism restrictive measures.

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72 *Ibid.*, para. 37.
73 *Ibid.*, paras 27–28 and 34.
74 *Ibid.*
75 *Ibid.*, para. 29.
76 *Ibid.*, para. 30.
77 *Ibid.*, para. 36.

However, the story did not stop there – quite the contrary. The *Azarov* ruling opened the door for an ever-increasing scrutiny by EU judges over the use of third states evidence for misappropriation of state funds sanctions. Once again, the Ukrainian cases paved the way for an exponential development of the Council's obligations of verification. For instance, the General Court stressed that the Council must ensure that the criminal proceedings on which it relies to maintain the restrictive measures do not conflict with the *ne bis in idem* principle.[78] The General Court also ruled that where a person has been subject to restrictive measures for several years on account of the same preliminary investigation conducted by the Ukrainian authorities, the Council must 'explore in greater detail the question of a possible infringement of the fundamental rights of that person by the Ukrainian authorities'.[79] It was also clarified that the Council had to carry out all these verifications irrespective of any evidence adduced by the applicants.[80] Even more importantly, the CJEU established that the Council's obligation of verification was a matter of public policy.[81]

At that stage, the obligations required from the Council were already sufficiently stringent so as to make it particularly difficult for that institution to fulfil the standards imposed by the case law. There is indeed a limit to what can be obtained from a third states' authorities or, to be more precise, to the possibility to prove that judicial proceedings complied with the defined standards when in reality the available information suggested that they did not. The Council's attempts to defend the legality of the renewal of the restrictive measures were all the more unsuccessful that the CJEU's full attention was, after *Azarov*, focused on the Council's compliance with its obligations of verifications. In most of the post-*Azarov* cases the CJEU restrained its assessment to this aspect, sometimes without even mentioning in the framework of which plea it was carrying out its judicial review.[82] The applicants themselves, learning from the CJEU's practice, systematically raised the issue of the lack of appropriate verifications by the Council.[83]

These evolutions triggered further attempts of adaptation by the Council. In order to comply with the CJEU case law, it inserted a specific section ('Section B') in the legal instruments providing for restrictive measures against Ukrainians, Egyptians and Tunisians. This Section, titled 'Rights of defence and right to effective judicial protection',[84] first refers to the protection of these rights under the domestic legal framework. It then develops the reasons why the Council considers that these rights

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78 T-290/17 *Stavytskyi v. Council*, ECLI:EU:T:2019:37, para. 129.
79 *Ibid.*, para. 81.
80 T-244/16 *Yanukovych v. Council*, ECLI:EU:T:2019:502, para. 87.
81 T-274/18 *Klymenko v. Council*, ECLI:EU:T:2019:509, paras 51–61.
82 For example, *ibid.*; T-284/18 *Arbuzov v. Council*, ECLI*:EU:T:2019:511*; T-285/18 *Pshonka v. Council*, ECLI:EU:T:2019:512.
83 For example, T-305/18 *Klyuyev v. Council*, ECLI:EU:T:2019:506; T-291/19 *Pshonka v. Council*, ECLI:EU:T:2020:448.
84 *See Council Decision 2014/119/CFSP*, *supra* n. 14, and of *Council Regulation (EU) No 208/2014*, *supra* n. 14.

have been respected for each of the listed persons. It is worth noting that the Council inserted this Section in its restrictive measures targeting Egyptians and Tunisians even before the CJEU transposed the *Azarov* case law to the restrictive measures linked to these two states.[85] This showed its awareness that the CJEU's approach on these sanctions was meant to stay. It did not suffice, however, to put an end to the annulments *en série* of the applicant's listings. Nor did it stop the CJEU from further raising the standard of validity of the sanctions. For instance, it is not sufficient for the Council to mention judicial decisions adopted in support of the principal criminal proceedings in order to show that it has verified the authorities' compliance with the rights of the defence of the applicant.[86] It is indispensable that such verification is carried out as regards the principal proceedings, especially if, after several years, they are still at a preliminary stage.[87] Each of the decisions relied on by the Council must also leave no doubt as to their compliance with due process: a decision taken by an investigating judge in camera, without the applicant's representants and without any possibility to appeal, can hardly be relied on by the Council.[88] Neither can investigating judges' decisions which have ceased to produce effects.[89] Finally, the General Court even stressed that the Council should have ascertained the extent to which the decision relied on was consistent with the articles of the Code of Criminal Procedure mentioned in Section B of the contested acts.[90]

4 WHAT IMPLICATIONS FOR THE COUNCIL'S CURRENT AND FUTURE SANCTIONS PRACTICE?

Overall, therefore, the CJEU judgments on the restrictive measures linked to misappropriations of state funds, particularly those relating to Ukraine, have

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85 The transposition of the *Azarov* case law for Egypt took place at the end of 2020 with C-72/19 P and C-145/19 P *Thabet, Mubarak ea v. Council*, ECLI:EU:C:2020:992, and for Tunisia with T-151/18 *Ben Ali v. Council*, ECLI:EU:T:2020:514. The insertion of s. B in these sets of restrictive measures, however, had already occurred in Jan. 2020 for Tunisia: *Council Decision (CFSP) 2020/117 of 27 January 2020 amending Decision 2011/72/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia*, OJ L 22, at 31–54 (28 Jan. 2020); *Council Implementing Regulation (EU) 2020/115 of 27 January 2020 implementing Regulation (EU) No 101/2011 concerning restrictive measures directed against certain persons, entities bodies in view of the situation in Tunisia*, OJ L 22, at 1–24 (28 Jan. 2020); and in Mar. 2020 for Egypt: *Council Decision (CFSP) 2020/418 of 19 March 2020 amending Decision 2011/172/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt*, OJ L 86, at 3–8 (20 Mar. 2020); *Council Implementing Regulation (EU) 2020/416 of 19 March 2020 implementing Regulation (EU) No 270/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt*, OJ L 86, at 11–17 (20 Mar. 2020).

86 For example, T-286/18 *Azarov v. Council*, ECLI:EU:T:2019:577, paras 72–73.

87 *Ibid.*, para. 73.

88 T-291/19, *supra* n. 83, paras 75–76.

89 *Ibid.*, para. 73.

90 T-303/19 *Yanukovych v. Council*, ECLI:EU:T:2021:334, para. 99.

developed an unprecedented level of judicial scrutiny over the Council's sanctions practice. The contrast with the case law on counter-terrorism restrictive measures, which seems to have ensured a sustainable standard of proof for the Council, is striking. The burden of proof required for misappropriations of state funds sanctions has been set at such a level that the Council has so far not been able to successfully adapt to it. The data surrounding the cases speaks for itself: out of fifty closed cases in which the CJEU ruled on restrictive measures against Ukrainians on the merits, forty-six have led to an annulment of the sanctions in first instance or in appeal. Since the *Azarov* judgment, the Council has lost every single case against restrictive measures linked to misappropriations of state funds (be they against Ukrainians, Tunisians or Egyptians). Accordingly, the Council has delisted a particularly high number of targeted individuals. While a substantial number of Tunisians are still subject to restrictive measures, seven were delisted in October 2022.[91] The list of targeted Ukrainians has fallen to two individuals, and even Viktor Yanukovych and his son were delisted in September 2022.[92] As regards Egypt, the restrictive measures were fully lifted in March 2021.[93]

This state of play is, once again, unprecedented in the field of EU restrictive measures. For the first time, the CJEU case law has, arguably, signed off the death warrant of a set of restrictive measures by depriving it of any possibility to meet the standards of validity in practice. Against that background, it could legitimately be asked whether the EU judges have not gone too far. After all, the CJEU is in practice requiring the Council to assess the duration of an investigation while the national authorities have confirmed that criminal proceedings are ongoing,[94] and even to interpret some provisions of the state's criminal law.[95] This thus brings the question as to whether there should be limits to what is ultimately an alternative to exercising further scrutiny on the listing criteria themselves, which the EU judges have always been reluctant to do.

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91 *Council Implementing Decision (CFSP) 2022/2086 of 27 Oct. 2022 implementing Decision 2011/72/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia*, OJ L 280, at 47-48; *Council Implementing Regulation (EU) 2022/2073 of 27 Oct. 2022 implementing Regulation (EU) No 101/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia*, OJ L 280, at 1-3.

92 *Council Decision (CFSP) 2022/1507 of 9 September 2022 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine*, OJ L 235, at 32–33 (12 Sep. 2022); *Council Implementing Regulation (EU) 2022/1501 of 9 September 2022 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine*, OJ L 235, at 1–3 (12 Sep. 2022).

93 *Council Decision (CFSP) 2021/449 of 12 March 2021 repealing Decision 2011/172/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt*, OJ L 87, at 46–46 (15 Mar. 2021).

94 T-305/18, *supra* n. 83, para. 56.

95 T-291/19, *supra* n. 83, para. 53; T-268/20 *Pshonka v. Council*, ECLI:EU:T:2021:418, para. 57.

In any event, the analysed judgments have provided a further step to what can be considered as a process of 'normalization' of CFSP in general and of restrictive measures in particular. This case law, while specific to the case of restrictive measures linked to misappropriations of state funds, can be seen as a continuum, and a driving factor of, the progressive enhancement of rule of law in EU external relations by way of judicial intervention. In a context where the EU is facing increasing challenges to the rule of law and/or fundamental rights within several of its Member States but also in the framework of certain external policies (one need only to mention the controversies[96] and legal actions[97] surrounding Frontex' activities), these judgments provide a clear confirmation that the fundamental principles of rule of law must also be reckoned with in the designing and implementation of EU restrictive measures.

The significance of the CJEU developments, and the overall outcome of the cases, call for a broader reflection on the Council's future practice. How might the current state of play impact the current EU's policy of supporting democracy and the rule of law in third countries? One might indeed wonder whether in the future, the Council would (and should) not think twice before adopting restrictive measures to assist a state in the recovery of allegedly misappropriated state funds. Should such restrictive measures be challenged in Luxembourg, which would inevitably happen given the incentives provided by the outcome of the last cases, the probabilities for the Council to lose in court could be relatively high. Admittedly, this might not necessarily influence the Council's assessment of the cost and benefits of imposing such restrictive measures. Maintaining a person on a sanctions' list, even if he/she is delisted one or two years later following a CJEU decision, might still allow to achieve some of the objectives pursued. Moreover, the multiple (successful) actions for annulment initiated by similar applicants such as Viktor Yanukovych show that from the Council's perspective, complying with the CJEU judgments that annul restrictive measures might not be a key priority when, on the other hand, there is strong political will to maintain the listing. In the same vein, it might also be argued that any initiative to support a state's democratic transition is beneficial on the long term. However, this should not be at the expense of the fundamental rights of the targeted persons and of the basic principles

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[96] For recent examples, *see* European Parliament Press Release, *Frontex: MEPs Refuse to Discharge EU Border Agency over Its Management in 2020* (18 Oct. 2022); Frontex News Release, *Statement of Frontex Executive Management Following Publication of OLAF Report*, on the misconduct of several individuals employed by the Agency in relation to Frontex operational activities in Greece (14 Oct. 2022), https://frontex.europa.eu/media-centre/news/news-release/statement-of-frontex-executive-management-following-publication-of-olaf-report-amARYy.

[97] *See* for instance, T-282/21, *SS and ST v. Frontex*; T-600/21, *WS and Others v. Frontex*; T-136/22, *Hamoudi v. Frontex*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022TN0136.

of rule of law and due process. In addition, the political repercussions of such practice of restrictive measures should not be underestimated. Whether or not one agrees with the level of judicial scrutiny exercised by the CJEU over the sanctions targeting former Ukrainian leaders, the fact remains that the Council lost almost all the cases in court on the ground that it was supporting a regime whose transition towards the rule of law was not as successful as one might have thought.

The question thus remains the following: what are the alternatives to these controversial restrictive measures? If in the future the EU still desires to use restrictive measures as a means to support democratic transition and the fight against corruption, one option could be to resort to the Human Rights Sanctions Regime.[98] Its listing criteria seem, however, unsuited for the persons that the EU would be willing to target. The Human Rights Sanctions Regime is indeed intended to target serious and/or systemic violations of human rights, and it is highly doubtful that misappropriations of state funds would fall within that category. Another option could be to create a specific EU anti-corruption sanctions regime or to amend the Human Rights Sanctions Regime accordingly, a practice that is currently be explored and which would be welcome.[99] The listing criteria and standard of evidence required could then be more precise from the start, and could limit the hypotheses where the Council would list an individual without having sufficient evidence in support of the listing. A fundamental issue might however remain: the listing of third states individuals in the anti-corruption sanctions might once again imply the use evidence originating in states which might most likely still be in the process of democratic transition. The EU should thus implement stricter legal safeguards in order to avoid returning to square one. But more importantly, these issues underline a simple fact: restrictive measures cannot be the solution to all EU's foreign policy objectives.

5 CONCLUDING REMARKS

The CJEU case law on the restrictive measures linked to misappropriations of state funds has, to some extent, marked a turning point within the case law relating to these sanctions. Certainly, such intensity of judicial scrutiny has so far been specific to this type of restrictive measures. As it has been explained, a more sustainable approach (from the perspective of the Council's practice) has been developed by

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98 *Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses*, OJ L 410I, at 13–19 (7 Dec. 2020); *Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses*, OJ L 410I, at 1–12 (7 Dec. 2020).

99 European Commission, *the 2022 State of the Union Address by President von der Leyen*, SPEECH/22/5493 (14 Sep. 2022), https://ec.europa.eu/commission/presscorner/detail/ov/speech_22_5493.

the case law on counter-terrorism restrictive measures. For other sets of restrictive measures, be they autonomous or not, the intensity of judicial review exercised by the Court has not reached the proportions that have been witnessed in the litigation over restrictive measures linked to misappropriations of state funds. It could thus be argued that the outcome of the analysed case law remains the exception rather than the norm, and that it was induced by the specific legal issues raised by these restrictive measures.

However, it is precisely that state of play that allows to draw three main conclusions. Firstly, these judgments have reflected the CJEU's progressive awareness of the practical reality of certain restrictive measures, as well as the length to which it might go once it becomes evident that the Council's practice is unsustainable from a legal perspective. Secondly, the analysed case load has reflected a broader tendency within the evolution of the CJEU's case law on restrictive measures: it is the abundant litigation against these measures that allows EU judges to progressively enhance their judicial scrutiny, in an area for which, under the Treaties, judicial review remains in principle the exception. It is no surprise that the main evolutions within the case law on restrictive measures linked to misappropriations of state funds occurred through judgments on the sanctions targeting Ukrainians. While one can legitimately wonder whether concerns linked to the rule of law in Tunisia and Egypt were as politically sensitive as similar concerns for Ukraine, the fact that it was the Ukrainian case law that triggered the main developments is primarily due to its numerical importance. Thirdly, and more importantly, the analysed judgments have been a particularly clear illustration of the increasing specialization of the law and judicial review of EU restrictive measures. Due to their diversification and increasing complexity, restrictive measures now generate different legal issues that should increasingly call for different responses within the CJEU's judicial review. Time will tell whether the case law on restrictive measures linked to misappropriations of state funds will have a longer-term impact on the specialization of restrictive measures within the Council's practice and within the CJEU's judicial review. It is, in any event, only one illustration of the ever-increasing dynamic field of EU law that are restrictive measures.