

THESIS

*“The protection of human rights in
the EU sanction mechanism: A new
hope with the Magnitsky act.”*

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ABSTRACT

The European mechanism designed to impose restrictive measures is becoming one of the most important means used by the Union to act or react on the international stage to express its opposition. Moreover, the European Union carries in its DNA its commitment to the protection of human rights. Because of this very positive commitment to human rights, there must be no loopholes. Indeed, the credibility of the Union's external action depends on this irreproachability. Therefore, this paper looks for shortcomings in the system that would jeopardize the protection of human rights. While bearing the needs of the European Union and its Member States for external action, the mechanism of restrictive measures sees its effectiveness reduced due to strong pressures which reduce its potential. This analysis demonstrates that the too important leeway given to the Member States both in decision-making but also especially in implementation represents a loophole in the system, especially because of several internal and external influence at the national level. How does the system control this implementation and balance risks for human rights? While some implementation risks are monitored by the Court of Justice of the European Union, there are still many shortcomings that the Court cannot resolve on its own. This is where the EU Global Human Rights Sanctions Regime (Magnitsky Act) comes into play. This initiative may solve several remaining problems in the existing system of restrictive measures and represent a step forward for human rights, paving the way for future policies.

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“The protection of human rights in the EU sanction mechanism: A new hope with the Magnitsky act.”

INTRODUCTION

“The protection and promotion of human rights is a silver thread running through all EU action both at home and abroad”¹

European Union has strong values that have driven its creation and constantly contribute to its construction. Of all these constituent values, the main one is undoubtedly human rights.²

Besides the economic integration and maybe contiguously, the European Union has found its Member States together thank to its common vision of the future. This ambition to create a safer and equal world for all is a great force to always move forward together. This might sound very cliché or displaced analytically talking but assessing the profound motives of this Union to be such a Union shows its real purpose.

The Union has progressively built its own approach toward Human right becoming thus the main actor and contributor for human rights protection worldwide. The first step has been to create a sustainable protection inside the EU³. The latter integrating new states regularly, its protection domain has consequently extended⁴. Once inside the EU, Member States shall constantly uphold EU values within their home system. However, it has to be continuously controlled to avoid breach of fundamental values as it is currently the case with Hungary and Poland. These two worrying cases have the potential to dismantle the EU's proud internal fortress of human rights, democracy and the rule of law. These cases have had the possibility to develop until this point due to institutional and vote mechanisms shortcomings. Thus, even in a well-established system, loopholes can broadly jeopardize the structure. The Court of

¹ Joint Communication of the Commission and the High Representative of the EU for Foreign Affairs and Security Policy, ‘Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach’, COM(2011) 886.

² See Article 2 TEU (Treaty on European Union) establishing on which values the EU is founded. Among them “democracy, equality, the rule of law and respect for human rights” hold the first position.

³ To this end, the EU has adopted a Charter of Fundamental Rights giving it "the same legal value as the Treaties"; see Article 6 TEU.

⁴ In that sense, Article 49 TEU set as an essential condition the respect of the values of Article 2 in order to apply for membership of the European Union.

Justice of the European Union (CJEU) seems to be the "last soldier standing"⁵ on this issue as the Parliament is out of the running.

The obligation to consider human rights protection when taking decision is apply to all organs EU institutions and its Member States. In practice though, the Parliament and the Court are the two main pillars when it comes to uphold human rights and fundamental freedoms. Thus, the participation of the parliament in any decision process is essential when peoples' rights might be jeopardized. This, in order to preserve a democratic debate on tensed topics and avoid any arbitrary decisions. The Court's role completes the parliament job, controlling implementation.

Hence, coming to the external side of the EU action, it has been developed broadly throughout numerous policies. Among which, the protection of human rights has been included. Two forms of policy may be distinguished: supranational policy and intergovernmental policy. For instance, the trade competence, known as the Common Commercial Policy (CCP) falls within the exclusive competence of the EU. Another example which is essentially intergovernmental, is the Common Foreign and Security Policy (CFSP). However, both policies are designed to uphold foreign policy values⁶.

While the former may use the incentive method to promote human rights through clauses inserted in development and cooperation trade and other agreements, the latter is more likely to use the restrictive one, the tough: sanctions. However, this is not an absolute rule insofar as, on the one hand, the CFSP also uses incentive and political dialogue methods and, on the other hand, economic sanctions can be taken, thus involving the CCP. Moreover, the two policies are not unlinked to each other despite their differences. Indeed "[e]xternal trade policy interacts with general foreign policy, and to the extent that the Member States continue to have powers in that area, there is a frontier zone where the principle of exclusivity does not fully come into play"⁷.

The distinction is nonetheless essential for human rights protection in the sense that it will enable the Court to have jurisdiction over a subject or not. Indeed, about CFSP the Court does

⁵ D. Kochenov, P. Bard, *"The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States in the EU"*, University of Groningen, Research Series, n°5, 2019.

⁶ See Article 21 TEU which lays down EU external objectives.

⁷ See Common commercial policy Chapter in Eeckhout P., *« EU external relations law »*, Oxford University Press, 2nd ed, 2011, p 439.

not have competence⁸ whilst the competence is complete for CCP. However, an exception has been foreseen when it comes to “legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council”⁹. This exception does not apply to every sanction though. Hence, two categories of sanction can be distinguished: Those controllable by the Court and those not. In addition, and this is a major point: Court has competence when it comes to disputes between competence borders.¹⁰

The desire to protect human rights is at the root of the vast majority of sanctions against third countries. Nevertheless, the sanction decisional procedure is eminently political and thus have geopolitical implications. This explains why Member States decided to keep a leeway for action excluding the exclusive Union competence for it. This point highlights a possible conflict, namely the one between human rights protection and Member States’ geopolitical interests. This may clearly interfere with the EU's human rights ambitions.

Basically, it is questionable what control mechanism exists for sanctions outside the scope of Article 275(2) TFEU¹¹. A body could have been very appropriate for this: The European Parliament. However, the latter is excluded from the decision-making process¹² and no power of veto or post-implementation evaluation is given. This definitely constitute an institutional issue and its role needs to be enhanced in the sanction process. It is understandable that Member States would be willing to maintain a sovereignty level when it comes to their foreign affairs. However, the European approach in this area should be fully controlled since its reputation and values are engaged when it acts outside its borders or when a Member State acts on its behalf¹³.

The only appropriate change could be made by a treaty amendment synonymous with a new approach. This new approach would incorporate genuine parliamentary involvement in the sanctions decision-making process in order to ensure control whether at the beginning or after implementation. Although another change could provide a solution to this issue by creating a special procedure involving Parliament: The new Magnitsky Act. It is being negotiated at this

⁸ See Article 24(1) TEU and Article 275(1) TFEU.

⁹ Article 275(2) TFEU (Treaty on the Functioning of the European Union). See also, Article 263(4) TFEU.

¹⁰ See Article 47 TEU.

¹¹ Official Journal of the European Union, Consolidated version of the Treaty on the Functioning of the European Union, 2016/C 202/1, 7 June 2016.

¹² Article 215(1) TFEU expressly excludes the parliament from any decisional power laying down that the Council merely “inform the European Parliament” at the end of the decision-making process.

¹³ By implementing CFSP acts for instance.

very moment and would show unity toward Human right issues, around the world. It is not intended to change the whole process of decision-making on sanctions, but it is supposed to bypass certain geopolitical obstacles by specifically targeting individuals without sending a message of hostility towards a country.

Furthermore, if this system is established on the long run, it is very likely to broadly open the control of the Court. Indeed, sanctions taken under the Magnitsky act, by targeting individuals, will fall under the scope of the article 275(2) TFEU.

More generally, due to positive EU involvement for human right, no loophole should be allowed to show through. In order to be credible in front of the whole world it is essential to be blameless. Who could trust an organization blaming others for human rights violations when that same organization does not respect that value? This is why looking for existing control able to assess restrictive measures compliance with human rights is so important.

Hence, in order to reinforce EU position toward Human right, the Court as exploited its niche competence for individual sanctions. Doing so, the Court has to deal with Member States implementation of restrictive measures and their use of so-called secondary measures. Several issues as the respect of UNSC¹⁴ sanction to European standards have modelled the protection given by the Court and progressively designed its stance toward restrictive measures¹⁵. This position helps to analyse the protection level given by the Court when it comes to restrictive measures. It now needs to be seen whether the Court can use its own jurisdiction for novel situations and, if so, how far? Some cases such as the Rosneft case provide answers, but the scope is rather limited.

First thing, in order to better understand ‘why the Member State implementation of restrictive measures can represent a loophole in the overall human rights protection system designed by the Union’, a chapter will be devoted to this issue. Indeed, the first issue dealt in this thesis is the one that lies at the very heart of the sanction mechanism, and that can potentially give rise to a conflict of interest in its application. The first part will analyse which conflict of interest

¹⁴ United Nations Security Council.

¹⁵ See for instance the Kadi cases about implementation by Member States of UN security council sanctions. (Case T-315/01 Kadi v. Council and Commission [2005] ECR II-3649; Joined Cases C-402 and 415/05P Kadi and Al Barakaat v. Council and Commission [2008] ECR I-6351.; Joined Cases C-584/10, C-593/19 and C-595/10, Commission and other v Yassin Abdullah Kadi, ECLI:EU:C:2013:518 (“Kadi II”).

could arise due to Member States' geopolitical¹⁶ interests. Thus, the first part distinguishes two problematic aspects of the state implementation to provide a corresponding answer in the following parts. These two problematic aspects will compose the first chapter.

The first being the institutional issue, related to the mechanism itself and on which no remedies can be brought besides an overhaul of the system. The second issue is the one related to secondary measures against individuals which can be dealt with by the Court and thus include its ability to regulate the risk of Human right violation. This second part could represent another door toward change but it is very unlikely if not impossible that the Court extend its own competence to be able of an overall control of the sanction mechanism.

Consequently, the second chapter will bring to the forefront the Court competence and stance toward member states implementation of restrictive measures. This thesis will analyse the Court's position regarding its own competence. It is essentially a question of ascertaining whether or not the Court actually extends its jurisdiction and, if so, how far? As the court's position is constantly evolving, new elements are often introduced and lead to new expectations about Court's jurisdiction. Therefore, the aim of this chapter is to provide an answer and a possible vision for the future of human rights protection through the Court.

Last but not least the third chapter of this study will deal with the new Magnitsky act. Also known as the EU Global Human Rights Sanctions Regime, this act has been proposed by the Dutch government¹⁷ and might bring answers to the current system. The third part will discuss this new hope and what solutions could it come with. Indeed, this act still being under negotiations¹⁸, the modalities of its implementation and its potential are unknown. Does this address every issue mentioned above, which one still remain unaddressed? Furthermore, and this will be the real point of this part: is this new system a real change for human right protection in the world or is it just a shimmering new tool that glitters with supposed protection without making any change?

¹⁶ The term 'geopolitical' is understood here as all national interests for a state when it comes about international relations in any way. The topic dealing with external action aspects, this word allows for some flexibility and can include both economic and political aspects.

¹⁷ A. Rettman, "*Dutch flesh out proposal for EU human rights sanctions*", EU Observer, 19 November 2018. Available at: <<https://euobserver.com/foreign/143424>> [Accessed on 17 July 2020].

¹⁸ A. Rettman, "*Ball rolling on EU human rights sanctions*", EU Observer, 1 March 2019. Available at: <<https://euobserver.com/foreign/144308>> [Accessed on 17 July 2020].

**FIRST CHAPTER - Geopolitics, Member States and
restrictive measures: A Protection threatened.**

Section 1: Restrictive measures mechanism: designed and directed by Member States.

1/ Member States at the heart of decision-making process.

In the first place, before discussing the decision-making process, it could be relevant to define sanctions, what their history is and what stance does the European Union adopt toward it.

Shortly, according to Francesco Giumelli, sanctions as a means of international policy, are created for three purposes: coercing, constraining and/or signalling targeted actors¹⁹. Initially, sanctions were focused on States and were extremely damaging to populations. They contributed significantly to increasing human rights violations in the country, which is a paradox when the sanction is created because of past violations. Furthermore, by examining the cost/effect ratio of sanctions, scholars²⁰ rapidly showed that the ‘pain-gain’ effect is not real as such. Indeed, sanctions are often synonymous with humiliation as explained by Bertrand Badie who “distinguish[es] four types of humiliation: belittlement, denial of equality, stigmatization and relegation.”²¹ The ‘rally around the flag’ effect in Iran for instance illustrate perfectly this point.²²

That is why sanctions must be seen as a science that tries to heal, but above all without adding to the suffering.

The focus should now be moved on European approach to sanctions. The appropriate term used by European Union is ‘restrictive measures’ even if it is not properly defined in European law.²³

¹⁹ Francesco Giumelli, *Coercing, Constraining and Signalling. Explaining UN and EU Sanctions after the Cold War* (Colchester: ECPR Press, 2011).

²⁰ Pierre Grosser, ‘*Des histoires sans leçons ? : De l’efficacité et de la pertinence des sanctions contemporaines*’, *Revue internationale et stratégique*, volume 97.1, 2015, p.89 <<https://doi.org/10.3917/ris.097.0089>>.

²¹ Bertrand Badie, Bastien Nivet, and Marc Verzeroli, ‘*Les sanctions, une forme particulière d’humiliation ?*’, *Revue internationale et stratégique*, volume 97.1, 2015, p.69 <<https://doi.org/10.3917/ris.097.0069>>.

²² This effect undermines sanctions power and much more because instead of producing the desired coercive effect against a government, the sanctions are perceived as unjust and the population comes to form a union behind the government. See Bastien Nivet, ‘*Les sanctions internationales de l’Union européenne : soft power, hard power ou puissance symbolique ?*’, *Revue internationale et stratégique*, volume 97.1, 2015, p.129 <<https://doi.org/10.3917/ris.097.0129>>.

²³ The annual report of the court (2018) gives nevertheless a definition: “‘Restrictive measures’ are an EU foreign policy instrument which may take the form of an arms embargo, the freezing of funds, a prohibition on entering and travelling through the territory of the European Union, a ban on imports and exports, and so forth. They seek to uphold the values and security of the Union, to support democracy, the rule of law, human rights and the principles of international law, to prevent conflict and to preserve peace. They may target the governments of non-

Article 215 TFEU and article 29 TEU both constitute the legal basis for it. Nothing is precisely explained except “the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries”²⁴. European restrictive measures are in line with the definition given in article 41 Chapter VII of the United nation charter²⁵ which talks about action against threats to peace. The qualification of European sanction under international law has given rise to a lot of questions then addressed by specialised literature. Among these were the comparison with countermeasures, Erga omnes obligation and right to react on the grounds of prejudice and general interest of the community. The International law commission (ILC) has answered it and in this regard, considering that the majority of cases quoted by the ILC are about European Union, EU is, in a way, creating International law with its practice²⁶.

Before being imposed, sanctions²⁷, at the European scale must be decided in accordance with a well-established procedure. This process for adopting restrictive measures operates within a hybrid legal framework. The principle of action is decided at intergovernmental level and then is formulated and implemented by the Council within an integrated framework. This basically means that the Member States control all stages.

During the negotiations of the Lisbon treaty, a choice had to be made between legal and political aspects. From a legal point of view, States are the addressees of United Nations Security Council resolutions imposing economic sanctions on a third State, but they were prevented from adopting implementing measures which fell within the Community's exclusive competence in trade matters. From a political point of view, States wished to retain control over such highly political decisions.²⁸ The choice resulted in a hybrid mechanism giving power mainly to states.

EU countries, companies, groups and organisations (such as terrorist groups), and natural persons with the aim of bringing about a change of policy or behavior”.

²⁴ Article 215 TFEU.

²⁵ « The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations »

²⁶ Charlotte Beaucillon, *Comment choisir ses mesures restrictives ? guide pratique des sanctions de l'UE*, European Union Institute for Security Studies, 2012, 35p.

²⁷ The term sanction will be used as synonym for restrictive measures.

²⁸ Isabelle Bosse-Platière, ‘LES MESURES RESTRICTIVES ADOPTÉES PAR L’UNION EUROPÉENNE La projection à l’externe d’un acteur singulier’, *Annuaire français de relations internationales*, Volume XVII, 2016, 23p.

From a practical point of view, the process for imposing sanction is as follows: The High Representative of the Union for Foreign Affairs and Security Policy (High representative) or a Member State makes a proposal which is examined and discussed by the relevant group (Group RELEX²⁹ for sanctions). The proposal is then a decision which needs to be adopted by unanimity before the council. A Council Regulation will then be necessary if the sanction decided upon is of an economic or financial nature or an asset freeze. The high representative and the European Commission then submit a joint proposal for Council regulation. The proposal is examined again by specialised group before being adopted by the Council and by qualified majority. The European Parliament is not involved, and it is only after the adoption that the Parliament is notified without any possibility of challenge. The first CFSP decision is taken under art 29 TEU and the second decision (regulation) is done under article 215 TFEU.

Looking closer at this process, the CFSP decision represents the will of Member States to act collectively by a unilateral means: the European Union. Each stage is in fact governed by the Member States from the initial proposal, passing by the vote of each act, to the implementation of these measures. For instance, when it comes to register the name of an individual on a sanction list annexed to a restrictive measure, both the name and information concerning the person are provided by the State³⁰. This is not an issue as such in the first place because even if information on the individual is of national interest, this is assessed under secrecy by specialised group such as RELEX. But it becomes a problem when the measure is contested before the judge and its motivation is still kept secret. The control of the legality of the act becomes hard for the European judge. Moreover, it is detrimental to the fundamental rights of the plaintiff who cannot defend himself and therefore suffers breach of the right to a fair trial.³¹

Hence, while the willingness to act in a united way is valid, the leeway left to Member States is considerable. It is therefore necessary to underline the possible conflict of interest between the essential concern of the Member States and the EU's commitment to the protection of human rights when it comes to imposing sanction on a country³² or on individuals. For example,

²⁹ Foreign Relations Counsellors Working Party. Other groups can discuss the proposal as well: Political and Security Committee (PSC); (COREPER II); Council working party responsible for the geographical region.

³⁰ In practice, the information comes mainly from the United Kingdom and France even if third states can provide also information.

³¹ See Case T-228/02 *OMPI v. Council* [2006] ECR II-4665. This point and its evolution will be detailed further when talking about the Court approach.

³² The EU, in accordance to its values often argue the gross violation of human rights to sanction a country or an entity.

sanctions against Russia leave aside the gas sector being too important for countries as Germany, but this aspect will be discussed in more detail below. On the one hand, there is an institutional point concerning the way in which sanctions are decided. This can impact human right protection around the globe, the EU intervening in some countries and not in others. But this point has definitely to take into consideration requirements of geopolitics and one could say 'real life'. However, this pretext cannot be used to justify an inaction and if the European Union wants to assert its position at the international stage as a real player, it will have to assume its values.

On the other hand, since implementation is also the responsibility of the Member States, another question arises with regard to secondary sanctions³³. This point is developed in the following section but before it, defining some categories of sanction could be relevant.

The EU is currently imposing more than 30 regimes of sanctions all over the world for several motives³⁴. Depending on the situation, restrictive measures can be of changing nature and be classed in different categories.³⁵ There are three types of differentiated regimes: those involving a simple transposition of measures agreed within the UN framework (transposition measures), those adopted in a complementary manner to flesh out measures taken by the Security Council (supplementary measures, against Iran for example) and those approved on own initiative (autonomous measures)³⁶.

Firstly, the measure may be formulated against a State in an undifferentiated way in the form of a general embargo (see for instance United states against Iran) which greatly impact the population. Secondly, the measure may aim at putting pressure on those at the head of the State, through the adoption of coercive measures, particularly economic coercion (freezing of financial assets) against them.³⁷ Thirdly, measures may target individuals, not being key persons at state level but rather because they are themselves the root of the violation. The private

³³ Secondary sanctions are so called because these are sanctions applied by Member States when an entity does not comply with the first sanction imposed by the European Union.

³⁴ For instance, Iran, Russia, Zimbabwe, China, Indonesia, Myanmar, Venezuela, Syria, Libya. See <<https://sanctionsmap.eu/#/main>> [Accessed on 17 July 2020].

³⁵ See the consolidated list of EU sanctions on the EEAS website. Accessible at: <https://eeas.europa.eu/topics/sanctions-policy/8442/consolidated-list-of-sanctions_en> [Accessed on 17 July 2020].

³⁶ For instance, restrictive measures taken against Belarus, Russia and Syria.

³⁷ Burriez, 'L'individualisation des sanctions adoptées par l'Union européenne sous forme de mesures restrictives', 2015, p. 2.

violence and the ‘non-state entities’ issues have led to this new kind of sanction that is often known as counter-terrorism sanctions³⁸

This latter distinction leads to two others. On the one hand, the geographical or State-targeted (blind) versus individual-targeted sanctions (smart). On the other hand, the distinction could be made according to the objective of the sanction: Security (e.g fight against terrorism) or the defence of values (e.g human rights, international law). However, the last distinction may sometimes be irrelevant since some regimes have both objectives. Sanctions to combat terrorism are imposed for both EU security and the protection of human rights.

Finally, the boundaries between one category and another are shifting and while it may be a simple academic matter, the distinction can sometimes have essential legal purposes.

2/ Constrained implementation of restrictive measures

The Union's capacity for action is necessarily limited and sanctions can only be adopted in close complementarity with its Member States. Moreover, the Union is often dependent on its Member States, both at the stage of the adoption of restrictive measures and at that of their implementation, which is not without consequences, including for their judicial control. Despite the regulation statute of the restrictive measure regime taken by the Council, and its direct effect, Member States have to implement it to enact secondary measures.

The implementation of a sanction, the practical part of the process, which gives effect to the decision, largely depends on the sanction regime itself. Indeed, the measure taken can be of various kinds: Asset freezing, restriction on visas or trade restrictions. In any case, the Commission is the one supposed to ensure the “proper implementation by member States of the EU legislation on restrictive”³⁹, being the watch-dog for EU law.

The question on this part could be why the room for manoeuvre offered to Member States in this matter could be problematic? When the sanction is enacted, the Member State has to fulfil

³⁸ The sanctions regime to prevent and combat terrorism and related activities is laid down in Article 75 TFEU. Incidentally, this regime, taken in the framework of the ordinary legislative procedure, leaves room for Parliament, unlike the procedure in Article 215 TFEU.

³⁹ Marco Gestri, ‘*Sanctions Imposed by the European Union: Legal and Institutional Aspects*’, *Coercive Diplomacy, Sanctions and International Law*, 2016, p. 94.

two points during the implementation: On the one hand, it must adopt necessary rules, “laying down national provisions on effective, proportionate and dissuasive penalties for sanctions’ violations”⁴⁰. Then, it must adopt so-called secondary measures, if the national transcribed version is infringed. On the other hand, while implementing, it must respect essential rules concerning fundamental rights in order not to infringe them.

A proper balance must therefore take place between effective implementation leading to good results and fundamental rights respect. Basically, the European guidelines foresee the fundamental right aspect by stating that the implementation of restrictive measures “must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy. The measures imposed must always be proportionate to their objective.”⁴¹

Then one might ask what good implementation means, and the official answer is rather hazy, if one looks at the guidelines: “Member States should take appropriate measures to ensure compliance with restrictive measures”⁴². Therefore, it could be better to look at the Commission's practice to see what is considered good implementation. Indeed, the Commission may initiate infringement proceedings ⁴³ if it considers that the State has not implemented correctly⁴⁴. But the question remains what is good implementation? First of all, the State must establish national provisions, i.e. create material means of implementation at the national level. Depending on the nature of the measure, implementation is different and involves different bodies. Indeed, while the national transcription of the Council's measure is the first essential step, it is in fact the banks, companies and other national entities that will adapt their practices to make the measure valid. This will be done through the communication of internal documents⁴⁵ for each entity able to take part in the implementation. The process is generally rather slow and cumbersome. Indeed, “in the actual practice, a number of problems also derive from the number of national authorities generally involved in the application, monitoring and enforcement of sanctions.”⁴⁶

⁴⁰ Ibidem.

⁴¹ See point 9, Council of the European Union, ‘Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy’, 5664/18, 4 May 2018.

⁴² See point 53 guidelines.

⁴³ See the procedure under Article 258 TFEU.

⁴⁴ This possibility has never been triggered so far for this specific area.

⁴⁵ See for instance ACPR Banque de France, ‘Lignes directrices conjointes de la direction générale du Trésor et de l’ACPR sur le gel des avoirs’, n°29, September-October 2016, p.9-11.

⁴⁶ Marco Gestri, “*Sanctions Imposed by the European Union: Legal and Institutional Aspects*”, Coercive Diplomacy, Sanctions and International Law, 2016, p.95.

Furthermore, the great diversity of national systems within the Union gives rise to an equally great diversity of national methods of implementation. Hence, the control of implementation efficiency is harsh for the Commission. Being able to acknowledge the good implementation of a sanction regime is almost impossible if a united procedure is not created.

Looking at the Commission practice does not help in fact since no infringement procedure has been launched against a State for mis implementation of a restrictive measure. To believe that all States comply 100% with European measures is a utopia, just as believing that implementation is the same throughout Europe is a utopia. However, without being too dramatic, this does not imply either that Member States are not willing to comply. But there is a risk that the action of States will be influenced, which at some point may prove problematic. Then, as this task is offered to States, it is possible that their interest may dictate two antagonistic behaviours: Not implementing sanctions properly, thus rendering them ineffective or using overly strong secondary measures without adequate safeguards, thus violating people's rights. The latter can be assessed by the Court, but the former represents a loophole in the system. For this reason, guidelines and best practice documents address this issue, encouraging the provision of as much information as possible by States. But these documents remain non-binding. Furthermore, "as every Member State will see its interests at stake by a certain measure one day – risking not properly enforcing it –, they are not keen to install a tradition of quick reporting"⁴⁷

Fortunately, the regulation establishing the measure usually provides for standard clauses to limit Member States' leeway. For example, one clause in the Regulation provides for sanctions in the event of infringement of the restrictive measures: "Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive"^{48,49}. Thus, the transposition by the State of the EU regulation is guided, and therefore the secondary sanctions are framed. However, if these

⁴⁷ Leander Leenders, "EU Sanctions: A Relevant Foreign Policy Tool?", EU Diplomacy Papers, n° 3, Bruges, Collège d'Europe, 2014, p.28

⁴⁸ See article 8(1) of the Council Regulation (EU) No. 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol.

⁴⁹ The Court has already defined what effective, proportionate and dissuasive penalties means in: Case 68/88, *Commission v. Greece*, 21 September 1989, ECLI:EU:C:1989:339.

clauses give the Court more scope for interpretation, the Court still has to assess each case to determine whether implementation has been effective, proportionate and dissuasive.

About the granting of exemption for sanctions, which is also part of the implementation, it is given to the broad appreciation of the Member State. Here again, only guidelines address this point⁵⁰ and no established mechanism is foreseen to regulate it. This point is probably one of the most illustrative of the freedom given to States to implement measures without control.

To conclude on the implementation part, it must be said that the lack of common implementation system (which is, of course, due primarily to the variety of internal systems) leaves room for inconsistent application. However, it is important to bear in mind that for some States the limit is institutional, due to the complexity of the internal system. Indeed, “failures to properly enforce EU sanctions are [...] not necessarily intentional and may be due to insufficient administrative capacity in certain Member States”⁵¹.

Referring to an American analysis of the European system, Marco Gestri proposes, as a solution to tackle this recurrent issue, the creation of a centralized EU sanction authority. This proposal is compared to the Office of Foreign Assets Control (OFAC) of the US Department of the Treasury which controls every American sanction and implements it. Hence, it would “render the EU system more efficient and also, from a practical point of view, less onerous for major economic operators, who currently have to comply with 28 legislations and to deal with 28 different national authorities”⁵². While this solution seems good, it is for the time being more unlikely than likely to materialise. However, the change may come sooner than expected and it only takes a proposal to start discussing it, as is the case with the Magnitsky Act currently under discussion.

In order to better understand why this kind of change would be necessary, two points need to be analysed. On the one hand, the external and internal influence on States. Indeed, it is one thing to talk about the risk of too much leeway for states in implementation, but it is important to understand to what extent this represents a risk and why Member States would not be able to

⁵⁰ Guidelines only mention that “The competent authorities should grant exemptions on a case by case basis” and basically that it should not undermine the aim of the restrictive measure. However, it is up to the State to establish whether or not the exemptions should be granted or not.

⁵¹ Leander Leenders, “*EU Sanctions: A Relevant Foreign Policy Tool?*”, EU Diplomacy Papers, n° 3, Bruges, Collège d’Europe, 2014, p.28

⁵² Marco Gestri, ‘*Sanctions Imposed by the European Union: Legal and Institutional Aspects*’, Coercive Diplomacy, Sanctions and International Law’, 2016, p. 92.

apply sanctions properly in the event of a lack of control. On the other hand, once this first point explained, one major point will be to detail the Court's current approach to assess restrictive measures implementation.

Section 2: Geopolitical influence on Member States implementation of restrictive measures

In this section, an attempt will be made to distinguish between internal and external pressure when it comes to states implementing and deciding on sanctions.

1/ Economic and strategic interests influencing MS implementation: Internal influence

It has been shown that there is scope for Member States to limit, reduce or simply undermine the effect of restrictive measures. The mere intergovernmental nature of the CFSP suggests this possibility and, indeed, one could say to some extent the intergovernmental nature of the EU. However, the Union was created by the States and it is the States that have decided to delegate their power in certain areas in favour of a more integrated Union. This was done mainly to strengthen Europe, to make it capable of fighting for common values and to shape the future. The best interest of States is at the root of this process, the idea being that by uniting, States are better off than if they were alone. This idea is not, however, supported by all States, as illustrated by the withdrawal of the United Kingdom, but the other members are still supposed to trust it.

Nevertheless, it seems to be a day-to-day governance that influences countries behaviours. States, even if being conscious of the European vision, act first and foremost according to their national problems. Thus, they are subject to both external and internal pressures, which can change the way they apply or decide on sanctions. This is the whole restrictive measure system that suffer from such behaviours. They are numerous and of various intensity and this work does not pretend to mention each of them but will try to illustrate these words through some examples showing the existing risk for regimes and human right protection while States look first for national interests.

These interests can be diverse in nature, ranging from purely economic to electoral purposes and diplomatic relations or influence. To illustrate this, it is very instructive to look at what happened inside Germany when the events in the Crimea were triggered by Russia and therefore when restrictive measures had to be imposed.

Internal pressure: The German case

Before analysing the German position and its impact in the context of sanctions against Russia, it is necessary to remind that this situation is certainly not the only one and this point is not made to target bad German behaviour but to show how geopolitical interests can influence the effectiveness of sanctions and thus, the defence of EU values.

In the European Union, Germany is the country with the most economic ties to Russia. When the time came to vote on sanctions against the Russian federation for its actions against international law, companies were consulted to negotiate and determine how far the sanctions could go. For Berlin, Russia is a more important economic partner than most European countries (With an import/export amount equivalent to Swiss, Belgium or Austria). This economic position was objected to by industry groups in Germany when the sanction idea was first launched. The public debate soon opened and some groups, such as the Federal Association of German Industry (BDI)⁵³ supported the government's position saying that the damage to the German economy would be "more than compensated" if international law is respected, while two other groups⁵⁴ criticised it claiming that "300,000 German jobs depend on Russian trade, German companies have invested around 20 billion euros in Russia"⁵⁵. Regardless of the position of the companies, sanctions are also damaging to the economy of the sanctioning country and that is why before the 30th of July 2014, the German government met with its major companies for a 'partner discussion'. This approach, not regarding the outcome, is already more economic than political and thus already undermines the political strength of restrictive measures.

⁵³ Bundesverband der deutschen Industrie.

⁵⁴ The Eastern Committee of the German Economy (**Ost-Ausschuss** der deutschen Wirtschaft) & the German Chamber of Industry and Commerce (Deutscher Industrie- und Handelskammertag – **DIHK**)

⁵⁵ See translation of article Andreas Metz "Ost-Ausschuss warnt vor Wirtschaftskonflikt". Available at <https://www.oaev.de/ost-ausschuss-warnt-vor-wirtschaftskonflikt> [Accessed on 17 July 2020].

Indeed, if one considers the effects of sanctions, whether the economic or the political, both are weak. Of course, the result is not only due to the German reluctance to sanction strongly but it is definitively part of it. For example, the oil sector remains largely spared since only certain specific activities are sanctioned. The latter sector being strategic for Russia, it is also essential for many European countries, and Germany in the first place. As a result, the sanctions imposed on Russia are rather limited and concern almost exclusively arms and dual-use goods.

More, in fact, “none of the sectors in which German companies are particularly invested in Russia are sanctioned”.⁵⁶ This is a paradox if we refer to the statements made by certain German lobbies. Coming back to the influence of companies and groups on this issue, how could they be behind all this? Benjamin Bürbaumer provides an answer in his detailed study and explains that “prior to the decision on the first economic sanctions on 30 July 2014, the Ministry of Foreign Affairs invites a number of representatives of the business community - DIHK, BDI, Ost-Ausschuss, Volkswagen, Siemens, Thyssen-Krupp and others - to repeated consultations before and after the negotiations in Brussels.”⁵⁷

Thus, this author points out the influential and political power of companies to put pressure on the government when it comes to voting on sanctions and know how far it should go. Once again, Germany is not the black sheep and this issue has been met by other countries since sanction is an economic arm and companies are economic actors. Nevertheless, this shows how and why a country can undermine the impact of sanctions. This case clearly highlights the internal pressure exerted on the government which, in addition, has the constant electoral pressure on its back.

More generally, it is the economic impact on the sanctioning country that is afraid and limits government action. It is precisely this point that will ‘encourage’ the mis-implementation of restrictive measures. In addition, another source of pressure on the decision to impose a strong sanction is the risk of companies seeing their market taken over by foreign companies. This phenomenon has already been observed: when the EU suspends its relations with a country as a result of restrictive measures, other actors tend to take its place. The risk increases as sanctions

⁵⁶ Translated from french : Bürbaumer, “La puissance des entreprises allemandes, la faiblesse des sanctions économiques contre la Russie”, 2015, p.9

⁵⁷ Ibidem.

are prolonged over time.⁵⁸ For example, China has become a dominant player in Zimbabwe's mining industries and has more than offset the effects of EU and US sanctions in Myanmar by becoming the largest foreign investor and trading partner in 2012, accounting for 29% of Myanmar's trade. The same phenomenon has occurred in favour of Russia, in the context of EU sanctions against Belarus.⁵⁹

In fact, this point is made to criticise the general concept of sanctions but is also considered on a case-by-case basis and may therefore be part of the reluctance of Member States to decide on strong sanctions.

In addition to the internal economic pressure, there can be another internal pressure which that of the security or strategy is. While the first point would rather concern global sanctions against specific sectors of a country, the next point concerns individual measures.

Strategic interest influencing sanctions

Another internal reason for the lack of clarity and consistency in sanctions is again due to the individual interest of States. This time, the interests in question are security-related. For instance, while a restrictive measure is voted on, a list is annexed to it with several names⁶⁰ that are supposed to be responsible of bad behavior or to be the person the pressure should be put on to initiate change in the regime. This list is checked by specialized groups before coming to vote before the Council. Names may be added after the first version in order to always be up to date about who the Union must put pressure on to keep its sanction regime relevant. The point is, these names are proposed by Member States themselves and if they normally must provide all reasons justifying the proposal, they may argue the national security needs or secrecy.

The national defense argument justifies quick action and special approach, but, if one considers the protection of fundamental rights, this constitute a great shortcoming. More, it seems that European sanction became a proper mean to fight terrorism and security threats. This is interesting and rather good news, but the question then arises: How can we ensure that this route is not used by states to satisfy their own strategic needs? It can be said that the strategic needs

⁵⁸ Eric-André Martin, “*La politique de sanctions de l’Union européenne. Ambition multilatérale contre logique de puissance*”, Études de l’Ifri, IFRI, October 2019, 50p.

⁵⁹ F. Giumelli et P. Ivan, “*The Effectiveness of EU Sanctions: An Analysis of Iran, Belarus, Syria and Myanmar*”, European Policy Center Issue Paper, n° 76, November 2013.

⁶⁰ See the European Union consolidated financial sanctions list at <https://webgate.ec.europa.eu/europeaid/fsd/fsf/public/files/pdf/FullSanctionsList/content?token=n002nsvq> [Accessed on 17 July 2020].

of the Member States are the strategic needs of the Union and this is why this question remain of low importance. Nevertheless, it would be definitively useful to arm the Union with stronger monitoring bodies. It is relevant to ask whether the RELEX group is powerful enough to take on this task.

This comment is actually linkable with the diversification of thematic sanctions. The first, being about counterterrorism action⁶¹, is now followed by other regimes aiming Union's self-defense. For instance, the newly adopted regime of restrictive measures "against cyber-attacks threatening the Union or its Member States"⁶² and the one against the proliferation and use of chemical weapons⁶³ provide a united force to react when the Union is threatened. The *Skripal* case launched the chemical weapon regime which clearly appears to be targeted individually rather than geographically. As Louis-Marie Chauvel quotes, these new thematic regimes may target "behavior which may be the act of citizens or residents of the Union, and for which the link with international security sometimes seems distorted"⁶⁴. This future use of thematic regimes of sanction will probably question the scope of Article 215 TFEU and could renew the problem of the border between CFSP and AFSJ in terms of sanctions.

2/ External pressure on European Union and Member States

The first idea that comes to mind when talking about pressures that can change the behavior of Member States is that coming from outside their borders. It is indeed a great source of influence able to change decisions. As the EU is now ready to present itself as a real player on the international stage, it has to contend with the efforts of third states to impose their power as the EU tries to defend its values around the world. Thus, numerous sources as China, Russia, United States or Turkey will affect and sometimes limit its action. Their actions or positions are likely to influence the willingness of Member States to act or rather not to act, which may therefore undermine the restrictive measures. For an overall understanding of the different sources of external pressure on European external action, it is necessary to observe three

⁶¹ See 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, Official Journal L 344.

⁶² See Council Regulation (EU) No 2019/796, of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States; and Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.

⁶³ Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons; And Council Regulation (EU) 2018/1542 of 15 October 2018.

⁶⁴ Louis-Marie Chauvel, 'La diversification des régimes thématiques de mesures restrictives', *Chronique Action extérieure de l'UE*, 2019, 3p.

situations. The Turkish case and the migration issue, the US extraterritoriality pressure and the case of Third States implementing sanctions as UK will soon be.

The Turkish case

This example is rooted in the 2015 migration crisis that shook the European system. In order to solve this problem, an arrangement was reached⁶⁵ which gave Turkey a great deal of power to put pressure on the EU Member States. Indeed, the threat of large flows of migrants going through Europe is a major pressure on States. They fear that the opinion of their people will be manipulated by political parties, as has happened in Hungary, and that democracy and human rights will be greatly undermined as a result. This pressure gives rise to fears of internal destruction of the European Union system. Consequently, the EU does not punish Turkey for its violations, and this is what Parliament calls “double standards”⁶⁶. Besides its allegedly bad relations with Turkey, the European Parliament use to call on the Council to take sanctions⁶⁷ and “in the face of the government’s repressive measures under the state of emergency in breach of basic rights and freedoms and of democratic values, called for a ‘temporary freeze’ of the accession negotiations with Turkey”⁶⁸. Furthermore, recently the Turkish threat has recently been unleashed, with Turkey using its power of pressure to force the EU to comply with its will.⁶⁹ However, EU seems to be stronger than expected about this tensed topic and has refused to give in.

Thanks to this illustration, it is possible to see how external pressure can really be effective in making states fear for the balance of their national political systems. This reaction is rather problematic when one considers the major risk of human rights violations that migrants, and

⁶⁵ See ‘EU-Turkey statement, 18 March 2016’. Available at <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> [Accessed on 17 July 2020].

⁶⁶ See European Parliament Resolution of 17 January 2013 on the human rights situation in Bahrain (2013/2513(RSP)).

⁶⁷ See European Parliament, Resolution on the evaluation of EU sanctions as part of the EU’s actions and policies in the area of human rights, 2008. And Elin Hellquist, ‘Ostracism and the EU’s contradictory approach to sanctions at home and abroad’, *Contemporary politics*, December 2018, pp. 393-418. Available at <<https://doi.org/10.1080/13569775.2018.1553083>>. [Accessed on 17 July 2020].

⁶⁸ Ibidem.

⁶⁹ European Parliament Press released, ‘Greek-Turkish border: MEPs reject Turkey’s pressure, demand common asylum rules’, March 2020. Available at <<https://www.europarl.europa.eu/news/en/press-room/20200305IPR74187/greek-turkish-border-meps-reject-turkey-s-pressure-demand-common-asylum-rules>> [Accessed on 17 July 2020].

among them refugees, are facing. Moreover, if this influence prevents Member States from taking restrictive measures to protect human rights, this is another major problem.

The Turkish case has a very high political base, which means that it often finds itself in the media arena. However, external pressures are all the stronger when the economy comes into play. So, this leads quite logically to another major external influence: the extraterritoriality policy of the United States, which is probably the most important source.

The US extraterritoriality

The FCPA (Foreign Corrupt Practices Act), the CAATSA (Countering America's Adversaries Through Sanctions Act), or the Cloud Act, are American legislations using extraterritoriality. This essentially means that their jurisdiction extends beyond their borders. For a number of reasons, such as international sanctions, the fight against corruption or the fight against terrorism, the country will decide either to terminate its relations with any entity not complying with the measure or to impose a sanction against it. It is a real geopolitical tool for the United States and is certainly capable of undermining the EU's external action by forcing Member States to respect the American will. The most illustrative case is that of Iran. The EU has its own approach to the Iranian regime and therefore decides how far it can go. However, American extraterritoriality prevents European companies from trading with Iran, thus obliging them to respect an embargo. The sanction or restriction being pronounced against national companies and thus affecting national economy greatly influence Member States will to maintain a common policy toward an area under sanction. Indeed "if they continue their business with Iran, they expose themselves to the risk of being punished under US law."⁷⁰

This greatly undermines the EU's position on external action on the world stage, turning it into a child unable to say no to his parents. This approach increases the pressure on Iran, which is already under UN sanctions and autonomous European sanctions⁷¹. The latter are, however, imposed for the purpose of protecting human rights and therefore logically do not go beyond

⁷⁰ Dr Katja Göcke, 'The US "secondary sanctions" against Iran - risks for EU companies', Graf von Westphalen, December 2018.

⁷¹ EU imposes asset freeze, restrictions on admissions, restrictions on equipment used for internal repression, and on telecommunication equipment (see <https://sanctionsmap.eu/#/main>.) [Accessed on 17 July 2020].

their objectives by imposing too much pressure. Indeed, restrictions that are too strong and too broad, such as the current US sanctions, affect people first foremost.

Aware of the negative impact on human rights and the weakening of its power, however, the EU has reacted to build a European front against US extraterritoriality. For instance, it has reactivated and renovated a regulation from 1996⁷² designed to protect companies against extraterritoriality. Nevertheless, the real impact of this regulation has been rather ineffective due to its inability to protect European companies from restrictions in the US market. As a result, extraterritoriality remains one of the most important realities affecting EU and Member State decisions. As this is a real problem for the EU, it must continue to address it by all possible means, with diplomatic channels often being the most relevant but not the only way to maintain good relations with allies.⁷³

Talking about allies, one has to say that EU is not alone implementing its sanctions and not alone undergoing pressure from outside.

The case of third States implementing sanctions and UK

EU Sanctions Guidelines clearly establish that «the effectiveness of restrictive measures is directly related to the adoption of similar measures by third countries»⁷⁴. Hence, restrictive measures are often adopted by third states as candidate countries, potential candidates and members of the European economic area.⁷⁵

These countries are important for the implementation of European measures and are also subject to external pressures. This can be detrimental to overall European external action plans when it comes to protecting human rights through restrictive measures. For example, the fact that Serbia is under Russian influence today prevents it from implementing restrictive measures against the federation as candidates for EU membership must do. But on this peculiar situation, EU has a

⁷² See, Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom; And its recent update: Commission implementing regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

⁷³ Galbert, *“The Challenge to Building a Balanced Transatlantic Sanctions Policy between the US and the EU”*, Center for Strategic and International Studies and Center for a New American Century, 2016.

⁷⁴ See point 56, ‘Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy’, 5664/18, 4 May 2018.

⁷⁵ Marco Gestri, *‘Sanctions Imposed by the European Union: Legal and Institutional Aspects’*, Coercive Diplomacy, Sanctions and International Law, 2016.

lever to make it implement, namely the membership procedure⁷⁶. The situation in the United Kingdom must now be examined: future first country to withdraw from the EU, one of the main assets for EU sanctions, certainly future partner for EU sanctions? But what will this relationship be made of? Will the UK implement the next new measures? If not, the EU is unlikely to have the same tools of pressure as it has for Serbia. Furthermore, how will the measures be controlled once they have been implemented by the UK? Finally, will the UK live up to its many commitments to human rights and therefore cooperate with the EU when its actions follow this objective? In any case, the EU is losing one of its most influential members and will have to face these issues at some point in time.

It must be said that many sources of influence can lead to the poor application of restrictive measures by States. However, the choice can always be made to implement restrictive measures correctly. Among the sources of influence, domestic sources are certainly the worst, as they often divide countries among themselves, not having the same interests. Moreover, within a country, there are often divisions between those in favour and those against the measure, as Galbert explains in his article: “security-related agencies are usually interested in maximizing the political effect of sanctions, while economic and trade-related agencies want to minimize the economic effects on their national companies”⁷⁷. Nevertheless, while being the most limiting aspect for the effectiveness of restrictive measures, this issue could be resolved by the creation of a strong body strengthening implementation and balancing it across the EU. With regard to the rest, namely external influence and the willingness of Member States to decide on strong sanctions, it seems that only further integration of the European Union could resolve these aspects. It must be made clear that the EU's interests are overriding and that the EU's scale is the best for conducting an external relations policy.

Now that it has been understood how Member States can be influenced in their implementation and the problem has been defined, it is necessary to investigate what are the current solutions to counterbalance this risk. The room for manoeuvre given to the Member States can give rise to two problems: too little implementation of the measures, making them ineffective and

⁷⁶ See in that sense European Parliament Resolution of 11 March 2015 on the 2014 Progress Report on Serbia (2014/2949(RSP)), prompting Serbia to take measures and mentioning the possibility to suspend the candidate process.

⁷⁷ Galbert, “*The Challenge to Building a Balanced Transatlantic Sanctions Policy between the US and the EU*”, Center for Strategic and International Studies and Center for a New American Century, 2016.

undermining the protection sought. Or on the contrary, too strong implementation that jeopardizes the fundamental rights of the individuals targeted. The first, as has already been said, still needs an additional draft to resolve it, but the second currently falls within the jurisdiction of the Court and it is absolutely necessary to analyse it in order to understand where the limits of the European system of restrictive measures lie in terms of its links with human rights.

SECOND CHAPTER - CJEU's oversight of restrictive measures

The main European jurisdiction has always been a “driving force for European integration”⁷⁸. As explained by Yulia Belous, “The main mission of the CJEU has been to ensure the uniform interpretation and application of European law throughout the Communities and later the Union.”⁷⁹ Thus, the Court of Justice of the European Union has its role in the construction of the Common Foreign and Security Policy (CFSP) and more specifically, in its component: The Common Security and Defense Policy. However, if in the Lisbon treaty, the competence of the Court is excluded for CFSP acts⁸⁰, an exception has been foreseen when it comes to “legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council”⁸¹. But before analysing the derogative Court competence toward restrictive measures, it is necessary to explain why such an exception exists.

As every jurisdiction do while taking a decision, the European Court of Justice and in the first place its Tribunal have, for a given policy, to consider its aim and should try to provide protection without making ineffective the given policy. Basically, when it comes to restrictive measures, a balance must be found between the sought effectiveness of the measure (for instance if the policy objective is to combat terrorism) and the fundamental rights protection. Here, the judge often has to conciliate individual rights and freedoms to so-called higher interests. These interests relate to the conduct of diplomatic relations when the measures adopted are aimed at States threatening the security of the Union and its members and to the protection of public policy when the restrictive measures form part of a policy to combat terrorism.

Nevertheless, while the diplomatic component to a dispute may imply a certain degree of caution on the part of the judge, it cannot lead to a complete withdrawal of the dispute. The guarantee of the constitutional requirements of fundamental rights is thus an obstacle to the waiver by the Court of its control. The Court itself has founded this principle in the famous Kadi case⁸². Briefly this case establishes that pressing considerations relating to security or the

⁷⁸ Kirill Entin and Yulia Belous, ‘The Role of the Court of Justice of the European Union in the Development of the Common Foreign and Security Policy after the Treaty of Lisbon’, *SSRN Electronic Journal*, 2019 <<https://doi.org/10.2139/ssrn.3458948>>.

⁷⁹ Ibidem.

⁸⁰ Article 275(1) TFEU

⁸¹ Article 275(2) TFEU. The Court can review “the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council”.

⁸² Joined Cases C-402 and 415/05P Kadi and Al Barakaat v. Council and Commission 2008, ECLI:EU:C:2008:461

conduct of international relations have given way to those relating to the protection of individuals, even if the sanction is pronounced by the security council of the United nations. Clearly, the control and the protection given by the Court for individuals could not be bypassed even for security or diplomatic interests.

This point is highlighted in the Lisbon treaty which expressively mention the Court competence for “any natural or legal person”⁸³ who “institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”⁸⁴

The judge thus favors reasoning based on the effects of the measures on individual situations. Restrictive measures cannot be subject, despite their variety, to fluctuating and, where appropriate, lighter judicial review according to the precise objectives they pursue. The case-law therefore refuses to distinguish control according to the restrictive measures in question.⁸⁵

In order to obtain an efficient analysis, this part will search how the Court finds the balance between fundamental rights protection and higher Union or Member States’ interests. On the first hand it should be observed the scope of competence of the Court when it comes to restrictive measures. Thus, this will frame the power of the Court to interpret.

On the second hand, the interpretation of the Court will be under lights to know to what extent the Court balance fundamental rights with higher interests.

Section 1: The Court competence for restrictive measures

As has been pointed out, the Court has only derogatory jurisdiction in respect of restrictive measures. Nevertheless, if its jurisdiction is limited in relation to the decision establishing the sanctions regime by reason of its CFSP nature, some of the means of implementation, as TFEU regulations fall under other policies which are not of an intergovernmental nature. For instance, certain implementation measures belong to the

⁸³ Article 263(4) TFEU

⁸⁴ Ibidem

⁸⁵ See, Joined Cases T-329/12 and T-74/13, *Mazen Al-Tabbaa v. Council of the European Union*, 9 July 2014, ECLI:EU:T:2014:622

common commercial policy because of their economic nature and thus it is up to the court to determine the competence borders.

The Court competence is evolving. It may be from its own decision, which means at one point it decides to interpret broadly a treaty disposition, but it may also be due to the practice of sanctions itself, directly fitting with its existing competence.

1/ The Court interpreting its competence: The Rosneft Case

Article 275 TFEU is divided into two paragraphs, the first excludes the jurisdiction of the court for CFSP acts and all acts taken on this basis and the second sets out the conditions under which an exception to this exclusion exists. This second paragraph talks about Article 40 TEU which comes to limit the implementation of CFSP stating that it shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences. Basically, this first part gives jurisdiction to the Court to monitor competence repartition⁸⁶ between EU and Member States even when a CFSP act is concerned.

Then, this article mentions the Court's competence for "reviewing the legality of decisions providing for restrictive measures against natural or legal persons"⁸⁷. This central element represents the starting point of the derogative jurisdiction for restrictive measures.

Finally, the 'restrictive measures' concept is specified by a sentence: those "adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union."⁸⁸ If this seems very logical because the treaty shall be legally solid and thus mention all useful references, it actually refers to one specific article, the number 29 TEU: "The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions."⁸⁹ This article is detailed by Article 215 TFEU which divide between individual sanction and state-targeted ones. This represents another point on which the Court might express itself. However, this point will be developed soon.

⁸⁶ See Treaty on the Functioning of the European Union, the competence repartition is referred to in Articles 3 to 6.

⁸⁷ Article 275(2) TFEU.

⁸⁸ Ibidem.

⁸⁹ Article 29 TEU.

The purpose of the detailed analysis of Article 275 is to provide an overview of the extent to which the Court can interpret its jurisdiction. Indeed, the court has in fact numerous means not to remain stuck to this exclusion.

Moreover, according to Article 19(3) TEU, the Court has competence to rule on actions and give preliminary rulings “at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions”⁹⁰. This article is reinforced by Article 263 which lays down the general competence of the Court to review legality of EU acts. Consequently, due to the Court’s general competence for EU law, this exclusion shall be interpreted narrowly⁹².

It is interesting to observe now how the Court positions itself on all these aspects because, as can be seen, this exclusion is not at all synonymous with the incapacity of the Court. While the Court could use interpretative tools to broaden its jurisdiction, this is in fact not what is done in practice. The very fact that the Court is attempting to broaden its jurisdiction over sanctions is still being discussed by academics. Nevertheless, if the Court's action can, at any given time, be considered to be broadened, it is because of the Rosneft case⁹³.

The Rosneft company is a Russian oil company bothered by the 2014 UK law⁹⁴ which make a transcription of the EU regulation⁹⁵ establishing the sanction regime against Russia. Thus, it tried to prevent it from coming into force and argued that “uncertain legal terms [...] violates Article 7 of the European Convention of Human Right”⁹⁶. In this first instance, the UK judged “that there was no risk to Rosneft of serious irreparable harm and took into account that a delay in implementation would undermine the effectiveness of the sanctions”⁹⁷.

⁹⁰ See Article 19(3)(b) TEU.

⁹¹ For preliminary rulings, see also and above all Article 267 TFEU: “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.”

⁹² See the Rosneft case, discussed below at paragraphs 74-75.

⁹³ Case C-72/15, *The Queen (PJSC Rosneft Oil Company) v. Her Majesty’s Treasury*, Judgment of the Court of Justice (Grand Chamber), 28 March 2017, EU:C:2017:236.

⁹⁴ The Export Control (Russia, Crimea and Sevastopol Sanctions) (Amendment) Order 2014, No. 2932.

⁹⁵ COUNCIL REGULATION (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

⁹⁶ *OJSC Rosneft Oil Company, R (on the application of) v HM Treasury & Ors* [2014] EWHC 4002 (Admin) (27 November 2014).

⁹⁷ Maya Lester, “*Rosneft tries to stop UK law criminalising Russia sanctions*”, EU sanctions law, practice and guidance, 9th of December 2014. Available at <https://www.europeansanctions.com/2014/12/rosneft-tries-to-stop-uk-law-criminalising-russia-sanctions/> [Accessed on 18 July 2020].

The next step in this procedure was the Court of Justice of the European Union. While validating the position of the British judge, the European Court of Justice (ECJ) took the opportunity to clarify certain points relating to its jurisdiction. Three questions are asked in this case law and two of them are about the Court competence. The first one considers preliminary rulings and the second one is about the validity of several provisions either into the implementing regulation and in the CFSP decision.

Beforehand, an admissibility point has been brought, the Council stating that there is no need to challenge the validity of the CFSP act at any point because the questions can be resolved in the light of the implementing regulation alone.

About the admissibility

First of all, about the admissibility question, it has allowed the Court to recall its competence by stating that where the validity of a provision of EU law is concerned, the Court is obliged to give a ruling⁹⁸. Moreover, the Court uses this admissibility fore point to tackle the unassailable nature of Council decisions adopted in the framework of the CFSP mentioning the need for fundamental rights protection⁹⁹. Indeed, the European jurisdiction links the CFSP decision and the TFEU legally based regulation by saying that “if were Regulation No 833/2014 to be declared invalid, that would, as a matter of principle, have no effect on the obligation of Member States to ensure that their national policies conform to the restrictive measures established pursuant to Decision 2014/512”¹⁰⁰. Thus, the Court rightly mentions that if it has jurisdiction to examine the validity of Decision 2014/512, it should proceed to such an examination “to determine the scope of the obligations resulting from that decision, irrespective of whether Regulation No 833/2014 is valid.”¹⁰¹.

About preliminary rulings on CFSP

This point is actually divided in two. The first is not a complex one in the extent it only confirms what is logically expected: Does the ECJ competence given in article 40 TUE

⁹⁸ *Rosneft case*, para 49.

⁹⁹ *Rosneft case*, para 54.

¹⁰⁰ *Rosneft case*, para 56.

¹⁰¹ *Ibid.*

extending or simply applying to preliminary rulings? As Peter Van Elswege¹⁰² states, it is rather uncontroversial and straightforward. Consequently, the Court, in its 62nd paragraph lays down that “the Treaties do not make provision for any particular means by which such judicial monitoring is to be carried out.” Thus, the Court can monitor compliance with Article 40 TEU by any means, included preliminary rulings “at the request of national courts or tribunals, on, inter alia, the validity of acts adopted by the institutions of the European Union.”¹⁰³.

Here, the Court asserts its jurisdiction to review the CFSP act in its compliance with Article 40 TEU. This assertion cannot be regarded as an extension of powers because it is a simple reading of the Treaty, but it nevertheless represents for the Court an entry into the unassailable world of the CFSP and thus enables it to control its institutional borders. In this matter the Court has the potential power to delimit CFSP scope and prevent its excesses. This represents a good point for fundamental rights protection that the Court is able to limit a non-checkable area of action. However, the jurisdiction does not stop here.

The second point about preliminary rulings is the capacity of the Court to give preliminary rulings “on the validity of decisions adopted in relation to the CFSP, such as Decision 2014/512, where they prescribe restrictive measures against natural or legal persons”¹⁰⁴. The Court, in its development first considers its competence to control Union acts (See Articles 275 TFEU and 24(1) TEU). Then, it recalls its two classic means to ensure the legality review¹⁰⁵ among which the capacity to rule on proceedings and the preliminary rulings procedure. It rightly says that nothing in the two treaties EU establishes that action for annulment “constitutes the sole means for reviewing the legality of decisions providing for restrictive measures against natural or legal persons”¹⁰⁶. Finally, on this point the Court concludes on its competence in matter of preliminary rulings on the validity of CFSP acts when they prescribe restrictive measures against natural or legal persons.

Here, “*Rosneft* extends the principles deriving from *Foto-Frost*¹⁰⁷ to CFSP for the first time, thus signaling a willingness of the EU judiciary to ensure the monopoly of the review of legality

¹⁰² In his article: “*Judicial review of the EU’s Common and Foreign Policy: Lessons from the Rosneft Case*”, *Verfassungsblog*, 6 April 2017.

¹⁰³ *Rosneft case*, para 62.

¹⁰⁴ *Rosneft case*, para 64.

¹⁰⁵ *Rosneft case*, para 66.

¹⁰⁶ *Rosneft case*, para 70.

¹⁰⁷ Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 22 October 1987, EU:C:1987:452.

even in this field”¹⁰⁸. Even if, in short, it is only a matter of applying established case law to a new case, this is again a great point for fundamental rights. Indeed, as stated in paragraph 71, the implementation of the CFSP is a matter for States and it is essential for effective judicial protection that the ECJ can ensure access to judicial review. Especially when “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”¹⁰⁹, because the national jurisdiction is unable to check the legality of the CFSP act itself.

About the competence on CFSP decision

Recognizing its jurisdiction to give preliminary rulings on CFSP acts, the Court essentially established that it is in fact not the type of procedure in which the Court reviews legality that is important, but rather the type of decision whose legality can be reviewed.¹¹⁰ While the Court could have stopped there, it decided to go further and to use its newly worded capacity, which cannot, however, be regarded as a new competence, since it existed in the Treaty.

To answer the second question on the validity of several measures of the CFSP decision, the Court had to choose tools to do so and they were rather logical, if not totally expected. The first is Article 40 TEU which is used to monitor the compliance of the given act with the treaty competence repartition. In this case it is applied to evaluate if the precision in the wording of the decision CFSP 2014/512 is not too important that it is predetermining the content of the regulation No 833/2014 and thus must be considered as a ‘legislative act’ as it is not allowed for CFSP acts¹¹¹. The Court, using its power of review, rejects this argument by saying that the Council followed the procedure of Article 24 TEU and therefore does not challenge the validity of the decision CFSP by way of Article 40 TEU. This sentence, once analysed, could be regarded as very protective for the CFSP and, in a way, put an end to the effect of Article 40 of the TEU on it¹¹². As long as the CFSP act is decided in accordance with the procedure laid

¹⁰⁸ Sara Poli, “*The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*”, *Common Market Law Review*, p. 1799–1834, 2017.

¹⁰⁹ *Rosneft case*, para 71.

¹¹⁰ *Rosneft case*, para 70.

¹¹¹ *Rosneft case*, paragraphs 90-91.

¹¹² In its relationship with the procedure of article 215 TFEU.

down in Article 24, it cannot be regarded as a legislative act and its validity cannot therefore be challenged by the Court.

The second obvious tool is the derogative Court competence for the legality of restrictive measures against natural or legal persons¹¹³. First of all, the Court confirms that “any regulation adopted on the basis of the TFEU Article 215 is within the jurisdiction of the CJEU”¹¹⁴. In addition, the European Court has declared itself competent for the provisions relating to its power of derogation, i.e. restrictive measures against natural or legal persons. However, no invalidity was pronounced with regard to the provisions of the CFSP Decision.

To conclude on this part, “the Court specifies that a reference for a preliminary ruling must relate either to the monitoring of the legality of the decision itself in the light of Article 40 TEU [...] or a review of the legality of restrictive measures against natural or legal persons.”¹¹⁵ Then, rightfully notified by Stian Johansen in his article: Why the litigant did not instead seek to go straight to the EU’s General Court with an action for annulment claim. Indeed, the Court saying that actions for annulment through direct actions are not the only means to challenge sanctions, it might constitute the basis “for future forum shopping when legal entities are subjected to the Union’s comprehensive sanctions regime under the auspices of CFSP in the future.”¹¹⁶

Finally, it is not clear whether the Court has actually extended its CFSP jurisdiction in this case, but it has clarified what should be and, on the one hand it has taken a position on the exclusion from its jurisdiction (Article 275 TFEU) using Article 47 of the Charter of Fundamental Rights of the European Union to interpret it in a strict and rather narrow way. But on the other hand, it has also given a narrow interpretation to its competence about restrictive measures against natural and legal persons.¹¹⁷

¹¹³ According to article 275(2) TFEU.

¹¹⁴ *Rosneft case*, paragraphs 105-106.

¹¹⁵ See, Press release N° 34/17, “*The restrictive measures adopted by the Council in response to the crisis in Ukraine against certain Russian undertakings, including Rosneft, are valid*”, Luxembourg, 28 March 2017. Available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170034en.pdf> [Accessed on 15 July 2020].

¹¹⁶ Stian Johansen, “*Judicial control of EU foreign policy: the ECJ judgment in Rosneft*”, EU Law analysis, 29 March 2017. Available at <http://eulawanalysis.blogspot.com/2017/03/judicial-control-of-eu-foreign-policy.html> [Accessed on 18 July 2020].

¹¹⁷ See in that sense, Sara Poli, “*The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*”, Common Market Law Review 54, 2017, p.1824.

Nevertheless, interpretation is not the only means available to the Court to broaden its jurisdiction or field of action, indeed, the practice of restrictive measures can provide guidance in opening cases to the Court's jurisdiction.

2/ The Court competence broaden by the practice.

Article 29 TEU which mentions the mere capacity for the Council to adopt restrictive measures function with article 215 TFEU. Article 215 TFEU, in its two first paragraphs distinguish between “interruption or reduction [of] economic and financial relations with one or more third countries”¹¹⁸ and “restrictive measures [...] against natural or legal persons and groups or non-State entities”¹¹⁹. A distinction is thus made between State-targeted measures and individual measures. Consequently, a sanction regime for which the legal basis is the second paragraph of the article 215 would fall under the Court competence because it aims to target individuals. This distinction has been introduced in the Kadi case between targeted sanctions, which target individuals in order to reach the state, and individual sanctions, which target individuals in order to coerce them. With the smart sanctions approach, targeted sanctions have become individualized sanction. This trend has focused sanctions even more on individuals. Nonetheless, this did not lead to a total uniformity of the mechanism since they introduced a distinction between sanctions against the State and sanctions against individuals.

While it appears that in practice there are still individual sanctions as opposed to individualized sanctions, it should be stressed that the boundaries between these two categories are now tending to become closer, which makes it particularly difficult to differentiate between them. This alignment between the two categories of sanctions is also apparent in terms of the rules governing the legality of sanctions, which also tend to overlap. Indeed, sometimes sanctions regimes against States target individuals who may have only a weak link to a sitting government while individual sanctions may target individuals who are not free from any ties to a government or state regime.

¹¹⁸ Article 215(1) TFEU.

¹¹⁹ Article 215(2) TFEU.

For instance, the case of the *Tribunal Georgias and Others v. Council*¹²⁰ has highlighted this issue. In that case, the Court distinguished the hypothesis of a listing on the basis of membership of the Government from that of a listing on the basis of responsibility for committing human rights violations. Indeed, see the formula: “the Council deems it necessary to introduce restrictive measures against the Government of Zimbabwe and those who bear a wide responsibility for such violations.”¹²¹ Thus, the legal basis will be the same for both sanctions against individuals and the State.

Moreover, the practice of the Council has also progressively started to target people who are not related anymore to the State. The Egyptian situation illustrate these words.

In order to “support the peaceful and orderly transition to a civilian and democratic government in Egypt based on the rule of law, with full respect for human rights and fundamental freedoms”¹²², the Union target former members of the government.¹²³ Actually, this becomes sanctions of an individual nature. This means that individual sanctions may pursue objectives other than counter-terrorism alone and thus be used to achieve other objectives such as the rule of law, democracy and possibly more political objectives.

The Court assessing this evolution

What is the legal impact of this development? The decision of measures such as the freezing of financial depends on two successive legal bases: Article 29 TEU as regards the decision to impose sanctions and Article 215 TFEU as regards the means of coercion. Article 215 TFEU incorporates a distinction which seems interesting for this analysis, in that it sets the third State on the one hand, and non-state legal or natural persons on the other hand.

Classically, case law differentiates between two elements that may be subject to control. Firstly, there are the general rules which define the modalities of restrictive measures, which are subject to limited control, and secondly, the inclusion of a specific person on the list, which is subject

¹²⁰ Case T-168/12, *Georgias and Others v. Council and Commission*, Judgment of the General Court (Eighth Chamber), 18 September 2014, ECLI:EU: T:2014:781

¹²¹ Council Common position of 18 February 2002 concerning restrictive measures against Zimbabwe, (2002/145/CFSP).

¹²² 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, paragraph 1.

¹²³ This point has been sued before the tribunal (Case T-256/11, *Ahmed Abdelaziz Ezz e.a. v. Council*, 27 February 2014, ECLI:EU: T:2014:93) because the applicant contested his link with the government sphere.

to full control by the court.¹²⁴ Nevertheless, the converging nature of the means has reflected on the legal rules. The difference in the legal basis that could prevail in the early days of the Union's international sanctions is now disappearing. Despite their different purposes, the rules applicable to sanctions adopted by the European Union are in fact uniform.

The distinction between individual sanctions and individualised sanctions no longer seems to have any real meaning for the Court today as far as the applicable legal framework is concerned. Deprived of these legal stakes, the classification *ratione personae* seems to lose its substance. To this must be added the difficulty observed above in distinguishing between the two categories of sanctions. This is probably why the Court confirmed that “any regulation adopted on the basis of the TFEU Article 215 is within the jurisdiction of the CJEU”¹²⁵. Basically, the Court's jurisdiction for restrictive measures has been broadened by the practice of the early 2000s with the advent of smart sanctions. The distinction between sanctions State-targeted and individualized sanctions has remained for a few years to differentiate the means used, but the Court now seems to apply the same regime to both. At the end of the day, it is the number of cases for which the Court may have jurisdiction that has increased and not especially its jurisdiction as such.

From this extension of the Court's jurisdiction or simply from the number of cases it can hear, a big winner emerges: Fundamental rights. In short, fundamental rights requirements will be applied more broadly and the protection offered by the European Union in this area will be strengthened. But what protection does the Court grant? What does the Court protect? Mainly the Court tries to ensure respect for the rights of the defense, the right to a fair trial, but also in matters of restrictive measures, the right to property. Actually, in order to fit with this analysis approach, instead of analyzing each protected right, it is better to focus on potentially problematic points regarding Member States implementation of restrictive measures and their potential ‘higher interests’. So, without claiming to be exhaustive, it would be relevant to observe two major aspects of this protection: Proportionality and Legal certainty.

¹²⁴ See, Case T-390/08, *Bank Melli Iran v Council of the European Union*, 14 October 2009, ECLI:EU:T:2009:401

¹²⁵ *Rosneft case*, paragraphs 105-106.

Section 2: Fundamental rights balanced by Higher Interests of States?

The Court uses its above-mentioned competence to protect fundamental rights as rights to property, the freedom to conduct a business or due process of law.

The European Union jurisdiction actually controls 3 major elements which will enable it to ensure respect of fundamental rights. These elements are regrouped by Aleksi Pursiainen¹²⁶ and are, according to him: the ‘designation criteria’, the ‘Statement of reasons’ and the ‘supporting evidence’. The first controlled criteria being “the general criteria according to which individual targets are chosen in a given sanctions regime”¹²⁷ followed by the second which is “the reasons or justification for targeting a specific person”¹²⁸ that must be legally validated by “the evidence supporting that statement of reasons”¹²⁹.

Basically, this approach echoes three key elements that the Court observes when it comes to control the legality of restrictive measures and their compliance with fundamental rights. These elements can be summarized as: The legal certainty, the proportionality and the evidence supporting the inscription of the name on the list.

On the one hand, as both approaches are relevant, this section will combine them by focusing on case law and leading cases that establish, deepen or simply confirm these principles of protection. On the other hand, it is necessary to include and underline in this analysis the way in which the Court strikes a balance with the higher interests of the States or the Union.

1/ The Court and the legal certainty

The principle of legal certainty is not inherent to restrictive measures and is very developed in EU case-law. It is a concept found in most Western legal systems and, being essential for the respect of the rule of law, it is applied by the ECJ in all areas where necessary. Nevertheless, according to the literature, it seems to be “the most uncertain, ambiguous and

¹²⁶ See his article, Aleksi Pursiainen, “*Targeted EU sanctions and Fundamental rights*”, 2017, pp. 6.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

unpredictable of all the European norms”¹³⁰. Besides its very ‘evolutive’ nature as jurisprudence evolves, it is always synonym with a clear, certain, stable, precise, known and predictable law. Thus, it is also the most central concept for fundamental rights protection in EU.

The challenge now is to see how the ECJ uses this key principle for the litigation of restrictive measures. More importantly, how does the Court safeguard fundamental rights through it.

Recently in *Rosneft* the Court recalls that, “the general principle of legal certainty [...] requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly”¹³¹.

This principle is central in particular when it comes to criminal offences and so, sanctions. Consequently, as seen in precedent parts, Member States must effectively implement restrictive measures. Indeed, as the guidelines for implementation of restrictive measures lays down, “Member States should take appropriate measures to ensure compliance with restrictive measures”¹³². Moreover, regulations also urge States to adopt national measures even though they are of direct effect. For example, the regulation taken in 2014 against Russia and Crimea states that “Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented.”¹³³ National measures taken in this respect may lead to so-called secondary sanctions, which may be of an administrative or criminal nature. This may therefore pose a risk to the fundamental rights of the persons concerned. Hence, the Court will monitor compliance with legal certainty and a number of underlying principles relating to it: through the national act, the Regulation and the CFSP Decision which is the basis for the above two. It should be recalled that after several cases which condemned the Council for its measures, its poor wording lacking protective provisions and thus affecting the way in which Member States implemented it, the Council now foresees that “the penalties provided for must be effective, proportionate and dissuasive.”¹³⁴ Proportionality is an essential element of legal certainty and, as will be

¹³⁰ Jérémie Van Meerbeeck, “*The principle of legal certainty in the case-law of the European Court of justice: from certainty to trust*”, *European Law Review*, 41(2), 2016, p. 275-288.

¹³¹ *Rosneft case*, para 161, see also Case C-344/04, *Iata and ELFAA v. Council*, 10 January 2006, EU:C:2006:10, para 68.

¹³² See paragraph 53 guidelines.

¹³³ Council regulation (EU) concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, No 692/2014, 23 June 2014, Article 8.

¹³⁴ *Ibid.*

shown in the next section, it is an essential tool that belongs to the Court to regulate the discretionary power of restrictive measures.

The concept and the rights attached to legal certainty are guaranteed to everyone and their violation may be invoked before a court by any individual subject to a sanction, and therefore under the jurisdiction of one of the Member States.¹³⁵

Moreover, it is clear that the Court intends to protect this aspect in a systematic manner. This involvement has been taken since the *Kadi* case where the European judges have had to deal with the transcription of UN sanction in EU law. The Court affirmed that “all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.”¹³⁶ In addition, after asserting the great importance of measures aiming to protect peace and security, the jurisdiction states that it cannot be read as authorizing “any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms”¹³⁷. Thus, the Court by enhancing its competence and the strength of the European Union’s legal system, it also chooses its side regarding fundamental rights. Nevertheless, this early position in favor of the superior interest of fundamental rights is questioned latter and the Court seems to reduce this primacy in order to balance with national (often security) interests.

This is where the concept of proportionality, which is part of legal certainty, comes into play.

2/ The Court and the proportionality

Basically, the European guidelines emphasise the fundamental rights aspect by stating that the implementation of restrictive measures “must respect human rights and fundamental

¹³⁵ See, for instance, *Rosneft* case paragraph 34 in which the Court recalled that “the measures adopted in that field can have a serious impact on natural and legal persons and that the principle of access to a court to review the legality of acts of the executive is a fundamental right”.

¹³⁶ Joined Cases C-402 and 415/05P *Kadi and Al Barakaat v. Council and Commission* 2008, ECLI:EU:C:2008:461, paragraph 285.

¹³⁷ *Ibid*, paragraph 303.

freedoms, in particular due process and the right to an effective remedy. The measures imposed must always be proportionate to their objective.”¹³⁸

In addition, as now provided for in the regulations on the implementation of restrictive measures, these ones shall be effective, proportionate and dissuasive¹³⁹. On this basis, the Court will try to protect rights of people targeted. The concept of proportionality is used to establish whether the measure taken is not too strong, intrusive or harmful in relation to the objective pursued. In essence, the Court examines the general interest objective pursued by the measure and assesses whether, "in relation to the aim pursued"¹⁴⁰, the measure constitutes a "disproportionate and intolerable interference, undermining the very essence of the rights guaranteed"¹⁴¹. Thus, the Court may possibly order the annulment of any measure violating the rights of individuals too broadly or, on the contrary, limit the scope of certain rights by considering that other interests or objectives are stronger.

As before the European Court of Human Rights (ECtHR), the assessment of the proportionality of a measure will in fact depend on the right affected¹⁴². Certain rights are likely to be balanced with opposite considerations while other simply cannot. Even if all rights are considered as equals, some, approached as core rights are ‘too important’ to undergo any limitation. Before the ECtHR it concerns initially articles 2,3,4 and 5(1) of the Convention (ECHR), in other words those concerning “the physical integrity and dignity of the human person”¹⁴³. The ECJ does not have to deal with such violent violations. However, other rights are also considered to be very important, so that they are hardly subject to a balance with divergent interests. This is the case of due process rights, which are almost non-derogable because of their essential place in the protection of the rights of individuals.

For example, it was recently reiterated that “the freedom to conduct a business and the right to property, are not absolute, and their exercise may be subject to restrictions justified by

¹³⁸ See paragraph 9, Council of the European Union, ‘Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy’, 5664/18, 4 May 2018.

¹³⁹ The Court has defined this point years ago in its case law: See, Case 68/88, *Commission v. Greece*, 21 September 1989, ECLI:EU:C:1989:339.

¹⁴⁰ *Rosneft case*, para 148.

¹⁴¹ *Ibid.*

¹⁴² See in that respect, Hennebel, “*Classement et hiérarchisation des droits de l’Homme*”, AIJC, vol. 26, 2010, p. 423-435.

¹⁴³ Mustapha Afroukh, “*Une hiérarchie entre droits fondamentaux ? Le point de vue du droit européen*”, RDLF, N°43, 2019.

objectives of public interest pursued by the European Union”¹⁴⁴. On the contrary, the Court seems much more rigid when the due process of law is affected. In that sense, the Court mentions: “it should be recalled that the discretion conferred on the Council by the contested criterion is counterbalanced by a duty to state reasons and enhanced procedural rights”¹⁴⁵. In the consequence of what, this imply for the Court to “consider, carefully and impartially, all relevant elements of the case, the right of the person concerned to make his or her views known and the right to have the reasons for the decision sufficiently substantiated.”¹⁴⁶

In practice, however, after recalling these obligations, the Court, on appeal in the above-mentioned case, gave primacy to EU objectives by recalling that proportionality and legality “can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”¹⁴⁷. The same path has been followed in the Rosneft Case, and globally the Court seems to favor EU external action objectives before individual interest. Indeed, it has honestly acknowledged that an inherent effect of restrictive measures is to affect rights and freedoms (especially property and freedom to pursue a business) of “persons who are in no way responsible for the situation which led to the adoption of the sanctions”¹⁴⁸. The judges consider that the gradation of the measures, which are becoming progressively more severe, prevents them from being considered disproportionate. For example, the Ukrainian situation was subject to progressive sanctions that allowed time for companies to cut their links with the sanctioned activities.

The analysis of this point in fact reveals the great power of the ECJ to guide the EU's external position. It has the capacity to support the Council position as well as that of Member States following EU's external action goals. But it also could adopt a harsh vision of fundamental rights protection, and thus greatly curbs the EU external policy when it comes to tough tools. While it is a good thing that the Court allows the EU to assert its position on external action, the EU's DNA, which is based on rights and the rule of law, must be preserved. In this sense,

¹⁴⁴ *Rosneft case*, paragraph 148. The case-law is well established in that sense, see for instance the *Bosphorus Case*: C-84/95, EU:C:1996:312

¹⁴⁵ Traduced from French: Case T-578/12, *National Iranian Oil Company v Council*, 16 July 2014, ECLI:EU:T:2014:678, paragraph 122. « Il convient de rappeler que le pouvoir d'appréciation conféré au Conseil par le critère litigieux est contrebalancé par une obligation de motivation et des droits procéduraux renforcés ».

¹⁴⁶ *Ibid.* « d'examiner, avec soin et impartialité, tous les éléments pertinents du cas d'espèce, le droit de l'intéressé de faire connaître son point de vue ainsi que celui de voir motiver la décision de façon suffisante ».

¹⁴⁷ Case C-440/14, *National Iranian Oil Company v Council*, 1st March 2016, EU:C:2016:128, paragraph 77. See also in that effect, Case C-348/12 P *Council v Manufacturing Support & Procurement Kala Naft*, 28 November 2013, EU:C:2013:776.

¹⁴⁸ *Rosneft case*, paragraph 149.

the ECJ's position with regard to certain aspects of the operation of restrictive measures, namely implementation by Member States, seems too weak. The balance between the security necessity and risk for individual rights should be posed in this work.

3/ The Court's and States security concerns in implementation

As stated above, the principle of legal certainty imposes that “rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly”¹⁴⁹. This implies the right of people to know why they are undergoing restrictive measures and a fortiori why their name has been added to a list. Referring to The Charter of Fundamental rights of the European Union (The Charter), the ECJ finds the legal basis for these rights¹⁵⁰. Briefly, among them, the right of every person to be heard and the right of every person to have access to his or her file are foreseen at its Article 41(2) and the right to an effective remedy and to a fair trial at Article 47. However, the rights to be heard and to have access to the file are not absolute and may be subject to limitations on grounds of public interest, provided that such limitations are necessary and proportionate. The European institutions may be bound by confidentiality obligations. In particular, the institutions consider that, in order to protect sources, they cannot be obliged to provide the interested parties with information from confidential sources which is kept by the Member States holding it or even by third States with which the latter cooperate. The imperative considerations of security and foreign policy thus may justify a derogation from the adversarial principle and, more broadly, from the right to effective judicial protection.

The main issue in that case occurs when a State registers the name of an individual on a sanction list annexed to a restrictive measure. Both the name and information concerning the person are provided by the State. It becomes a problem when the measure is contested before the judge and its motivation is still kept secret. The OMPI Case¹⁵¹ illustrates this issue: In that case, the information submitted by France when the contested decision was adopted could not be released, despite the request made by the Tribunal, because it had been classified as confidential

¹⁴⁹ *Rosneft case*, para 161, see also Case C-344/04, *Iata and ELFAA v. Council*, 10 January 2006, EU:C:2006:10, paragraph 68.

¹⁵⁰ See for instance, Joint cases C-593/10 P, C-595/10 P & C-584/10 P, *Kadi II*, 18 July 2013, ECLI:EU:C:2013:518, paragraphs 98-99.

¹⁵¹ Case C-27/09 P, *French Republic v. People's Mojahedin Organization of Iran*, 21 December 2011, ECLI:EU:C:2011:853

by the French Government, which refused to declassify it. This was problematic from the point of view of fundamental rights, since the applicant could not defend himself, first, because of inadequate reasoning for the decision concerning him and, second, because of the infringement of the principle that the parties must be heard during the judicial procedure.

Facing this problem, instead of enhancing the transparency of the listing process, it has been decided to add a derogative procedure within the Rules of procedure of the general Court, the 23 April 2015¹⁵². In this non-binding document, the procedure provides for confidential information to be transmitted to the Court without being communicated to the applicant at any time. The Court is in measure then to appreciate the reasons of the inscription on the list and so the proportionality of the measure. Nevertheless, if this seems to be sufficiently protective of rights, the decision whether or not to release the confidential information on the person belongs to the State holding it.¹⁵³

This point represents an unresolved issue concerning the Court's position on the implementation of restrictive measures by Member States. As has been observed, the ECJ largely succeeds in balancing the needs of fundamental rights and supporting the credibility and effectiveness of the EU's external action. However, some aspects remain the sole responsibility of the Member States and the Court has no control over this. This is also the case for the power given to states to grant exemptions. Indeed, “the EU acts imposing sanctions do not provide detailed criteria as to the granting of exemptions.”¹⁵⁴ Except advices given in the guidelines and best practices, the Member States competent authorities have much freedom to grant exemption when they unilaterally consider it necessary.

The Court's strong involvement in the restrictive measures caselaw should be acknowledged. Moreover, its numerous efforts to preserve fundamental rights without undermining the strength of the EU's external action are to be welcomed. As the use of restrictive measures is constantly on the increase and the Union uses this tool to promote its

¹⁵² Rules of procedure of the general Court, Official Journal of the European Union, L 105, 23 April 2015.

¹⁵³ See for additional elements about this document: Isabelle Bosse-Platière, “Nouveau Règlement de procédure du Tribunal de l’Union : introduction d’une procédure dérogatoire au principe du contradictoire quand la sûreté de l’Union ou de ses Etats membres dans la conduite de leurs relations internationales est en jeu”, *RTD*, N3, 2015, pp. 630-633

¹⁵⁴ Marco Gestri, “Sanctions Imposed by the European Union: Legal and Institutional Aspect”, *Coercive Diplomacy, Sanctions and International Law*, (2016), p. 22

values externally, litigation about it is bound to increase accordingly. As practice also evolves to include adequate safeguards and to limit the emergence of new problems, this growth is likely to stabilise. Nevertheless, as mentioned above, some aspects of this contentious remains untouched by the Court and either can undermine the effectiveness of sanctions or affect to some extent the protection of fundamental rights. Namely the confidentiality for security reasons still remains out of Court's proper control. Same for the granting of exemptions. Furthermore, other issues are still present within the overall restrictive measures system. For instance, the parliament exclusion of the decisional process or the double standards influenced by others interests when it comes to sanctions human rights violations.

Having shown that the Member States are subject to geopolitical and economic influences that endanger protection in terms of human rights, it is necessary to examine how the Union regulates the use of the sanctions instrument in order to avoid its use in violation of human rights principles. Moreover, as the protection granted by the Court is not able to influence the reasons for the taking of sanctions, nor the appropriateness of a sanction, it is interesting to analyse what constitutes a new hope for the protection of human rights: The Magnitsky plan. This law could give back to the parliament a place in a process that has relegated it to the background and potentially will add to the Court's control as it will establish sanction exclusively against individuals.

The Magnitsky plan covers both aspects, reinforcing the protection offered by the sanctions by expressly targeting violations of the HR and targeting only individuals, which gives to ECJ supervisory jurisdiction.

**THIRD CHAPTER - The new “Magnitsky Act” as a light
of hope for change.**

This last part is dedicated to the analysis of the non-yet adopted so-called “EU Magnitsky Act”.

Also known as the EU Global Human Rights Sanctions Regime, this act has been proposed by the Dutch government¹⁵⁵ following the 70th anniversary of the Universal Declaration of Human Rights. This proposed new regime might bring answers to the current system, in matter of capacity of action against gross human rights violations. The current part will discuss this new hope and what solutions could it come with. Indeed, this act still being under negotiations¹⁵⁶, the modalities of its implementation and its potential are unknown. In this chapter, will be analysed what has been announced and can legitimately be expected. Does this address every issue mentioned above, which one remain still unaddressed? Furthermore, and this will be the real point of this part, is this new system a real change for human right protection in the world or is it just a shimmering new tool that glitters with supposed protection without making any change?

First of all, the origin of the Magnitsky act comes from the US same-named act of 2012. The latter has been enacted following human rights violation from the part of Russian federation against Sergei Magnitsky a Russian citizen working in UK. On 16 November 2009, after 358 days in prison in Russia, Sergei Magnitsky was found dead in his cell. Accused of tax evasion and fraud by the Russian government, the lawyer, a few months earlier, brought to light a system of large-scale tax evasion and corruption involving high-ranking Russian officials. Thanks to the efforts of his business associate William Browder, the US Congress passed the Magnitsky Act in 2012, and the Russian officials responsible for Mr. Magnitsky's death were sanctioned on an individual and targeted basis. In 2016, the US has taken the opportunity to turn the Magnitsky act to the Global Magnitsky Act¹⁵⁷ in order to extend it to other countries. Indeed, “Washington has subsequently broadened the list of sanctioned human rights abusers, adding individuals from Iraq, Myanmar and South Sudan”¹⁵⁸.

¹⁵⁵ A. Rettman, “*Dutch flesh out proposal for EU human rights sanctions*”, EU Observer, 19 November 2018. Available at: <https://euobserver.com/foreign/143424> [Accessed on 20 July 2020].

¹⁵⁶ A. Rettman, “*Ball rolling on EU human rights sanctions*”, EU Observer, 1 March 2019. Available at: <https://euobserver.com/foreign/144308> [Accessed on 20 July 2020].

¹⁵⁷ See, Global Magnitsky Human Rights Accountability Act, 18 May 2016. Available at <https://www.congress.gov/bill/114th-congress/senate-bill/284/text/es> [Accessed on 20 July 2020].

¹⁵⁸ Luke Harding, “Who was Sergei Magnitsky and how did UK sanctions come about?”, The Guardian, 6 July 2020. Available at <https://www.theguardian.com/politics/2020/jul/06/who-was-sergei-magnitsky-and-how-did-uk-sanctions-come-about> [Accessed on 20 July 2020].

All of this gave the impulse to other countries to adopt similar acts and thus Latvia, Lithuania Estonia, Kosovo, UK and Canada have decided to reinforce their human rights position especially against Russia.

This is where the Netherlands and its 'EU Magnitsky Act proposal' comes into play. Considering the European Union's scale more efficient, the Dutch government has proposed the law at EU parliament. Nevertheless, in order to give the Act the best chance of success, "Dutch diplomats have removed all references to Russia from their proposal for fear that Russia-friendly governments, such as those in Austria or Italy, could block the move to please Moscow"¹⁵⁹. In this work it will be indifferently named 'Magnitsky act' and 'EU Global Human Rights Sanctions Regime'.

A good hope to be voted?

Before discussing the content and potential of this proposal, it is probably quite relevant to consider whether it is likely to be promulgated at some point in time or whether it is likely to be one of the many failed acts on the road to better protection of human rights. On 9th December 2019, shortly after taking up his new post replacing Federica Mogherini, Joseph Borrell, the High Representative for Foreign Affairs and Security Policy has announced his involvement in favor of the European 'Magnitsky Act'. According to the High representative, the Foreign Affairs Council reached a strong consensus and "have agreed to launch the preparatory work for a global sanctions regime to address serious human rights violations, which will be the European Union equivalent of the so-called [Global] Magnitsky Act of the United States."¹⁶⁰

Although, as expected by the Dutch some countries as Cyprus, Italy, Greece or Hungary are reluctant because of their ties with Russia, the new High representative as succeed to launch the preparatory work¹⁶¹.

¹⁵⁹ A. Rettman, "Dutch flesh out proposal for EU human rights sanctions", EU Observer, 19 November 2018. Available at: <https://euobserver.com/foreign/143424> [Accessed on 20 July 2020].

¹⁶⁰ Joseph Borrel, High Representative for Foreign Affairs and Security Policy, Monday 9th of December 2019, EU foreign ministers meeting.

¹⁶¹ "Others still have collateral questions and some concerns but as chair of the council I think I could consider there is enough consensus in order to launch the technical process." (Joseph Borrel, High Representative for Foreign Affairs and Security Policy, Monday 9th of December 2019, EU foreign ministers meeting.)

This first step can be considered as a good hope for the adoption of the law. The work of the High Representative will consist, from now on and until the final vote, in convincing reluctant countries to stick to the Union's philosophy of greater human rights protection and to forget their personal ties as far as possible.

In a worst-case scenario, if the EU level Act cannot be passed, the proposal has already given the necessary impetus for the creation of acts at national level. For instance, countries as Denmark, Iceland, Norway, Sweden, Finland, Greenland, the Faroe Islands, and Åland (The Nordic Council), are considering passing a similar legislation “in the event that Magnitsky legislation is not implemented in the EU”¹⁶². Furthermore, following suit this ‘Magnitsky wave’, even the Council of Europe is prompting its Member States to “consider enacting legal instruments enabling their government to impose targeted sanctions on individuals reasonably believed to be personally responsible for serious human rights violations for which they enjoy impunity on political or corrupt grounds.”¹⁶³ The outcome of this process seems to be rather positive for the protection of human rights in almost all instances.

Moreover, the legislative organ of EU is rather in favour of the proposal since the very beginning. Indeed, in March, “the European Parliament had passed a resolution with 447 in favor and 70 against”¹⁶⁴¹⁶⁵. Nevertheless, still waiting for the Member States to agree on the final act in order to implement it since it will be part of the Common Foreign and Security Policy.

Section 1: The added value about human rights protection abroad

Now that it has been established that the act currently under discussion has a good chance of becoming one of the European Union's tools for the protection of human rights abroad, the content of the proposal needs to be examined. As seen in the previous sections, the

¹⁶² Ibid.

¹⁶³ Council of Europe, Parliamentary Assembly, “Sergei Magnitsky and beyond – fighting impunity by targeted sanctions”, Resolution 2252, 22 January 2019. Available at <<https://www.europarl.europa.eu/cmsdata/161079/6%20-%202006%20Resolution%20COE%20Sergei%20Magnitsky.pdf>> [Accessed on 20 July 2020].

¹⁶⁴ Alexandra Brzozowski, “EU ministers break ground on European ‘Magnitsky Act’”, EURACTIV, 10 December 2019. Available at <<https://www.euractiv.com/section/justice-home-affairs/news/eu-ministers-break-ground-on-european-magnitsky-act/>> [Accessed on 20 July 2020].

¹⁶⁵ See, European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime, 2019/2580(RSP). Available at <https://www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html?> [Accessed on 20 July 2020].

EU already imposes restrictive measures against third countries, for several reasons such as violation of international law, but also and above all for violations of human rights when it deems it appropriate. The question to ask now is - What is the difference with the existing sanction system?

First of all, in order to obtain a start of an answer, looking at what other same-named national acts are providing might be interesting. At the time of writing 7 countries have such a legislation. All use the means of visa bans to sanction human rights violators. Some as US, UK, or Canada also freeze assets. The main difference between national approaches is whether it applies only to Russian human rights abusers and only for financial crimes or to a broader category. For instance, the UK approach is done on finance, two amendments taken: “Magnitsky Amendment” to the Criminal Finances Act 2017 and “Magnitsky Amendment” to the Sanctions and Anti-Money Laundering Act 2018. The Latvian version is focusing only on Russian individuals and officials who were involved in the death of Sergei Magnitsky. However, for most of them, the model taken is rather the second version of the American Magnitsky Act, namely the Global Magnitsky Human Rights Accountability Act of 2016 which applies globally to human rights violators and perpetrators of grand corruption.¹⁶⁶

The EU approach, even if still wondering whether the act should be called from Sergei Magnitsky name or not, is not only focused on Russia. More, it is very likely to apply, as the US version does, on numerous human rights abuses worldwide. As the High Representative for Foreign Affairs and Security Policy stated, it is supposed to “give across the board a method of reacting with an approval by the Council in general terms, give [...] much more strength and much more capacity to react in front of serious human rights violations.”¹⁶⁷ These are good words that confirm the intention to tackle human rights violations abroad, and apparently not only about a specific category that would remain blind to “non-corresponding” abuses, but this does not explain the difference with the current approach on sanctions.

The real difference could in fact be that this new approach would “represent a shift from geographical to thematic sanctions”¹⁶⁸. But what does it mean? It actually means that the EU

¹⁶⁶ All info above-mentioned are extracted from: Hermitage Capital management, William Browder, Inquiry into targeted sanctions to address human rights abuses Submission 4, 14 January 2020.

¹⁶⁷ Joseph Borrell pre-cit.

¹⁶⁸ Martin Russell, “An EU human rights sanctions regime”, European Parliamentary Research Service, April 2019, PE 637.892.

would equip itself with a new tool making it more flexible and rapid in response to human rights violations abroad. Indeed, except for counterterrorism, most of restrictive measures' regime are geographically defined. Basically, the Council has to acknowledge a specific problem in a country often due to a government behavior, to vote a new sanction regime, which will be then implemented through name lists. The first point brought by this new approach is that it will open the possibilities offered to the Council and the EU to act in front of human rights violations. The thematic approach would rather focus on the violation than the place or the government violating its commitments. The symbolic is strong: The EU adopting such a regime in favor of Human rights would clearly affirms and 'warn' the world that when gross violation occurs, regardless of the country in which it occurs, the perpetrators will be sanctioned. This sounds a bit like transnational justice, but the way is clever, the sanction does not breach any sovereignty principle at any point.

This approach has the great advantage not to upset the government of which the citizens are targeted. Without sending the message: 'EU is sanctioning this country because it is doing things wrong', the diplomatic approach is preserved, and human rights are still protected. Recalling what has been said earlier in this work, there is an echo here with the problem of the 'geopolitical interests of the Member States'. The thematic path seems to provide an answer to this major problem portrayed earlier in this paper.

A system bypassing geopolitical interests.

This is one of the major issues explained in the first chapter: Geopolitical interests preventing EU from deciding measures protecting human rights against some countries and undermining Member States implementation of restrictive measures. This is what is named "double standards". The EU Magnitsky act would then affect new countries spared by the sanctions so far. For instance, "the EU has no sanctions against Saudi Arabia, and its Russia sanctions relate entirely to Ukraine as opposed to human rights."¹⁶⁹ Countries involved in the decision-making process or in the implementation of restrictive measures abroad that have close links with third States are often reluctant to sanction them.¹⁷⁰ Since the protection of human rights must take precedence over other interests, it is problematic to see interests, often economic ones, override it.

¹⁶⁹ Ibid.

¹⁷⁰ See First Chapter.

Thanks to this new approach, economic or diplomatic relations between Member States or EU with allies or economic partners are much less likely to be affected. The side of humiliation changes from the deleterious humiliation of the government violating human rights to the shame of the individual abusing human rights. Thus, instead of provoking a "rally around the flag" effect and an instrumentalization of the sanction's narrative, the new approach would seek to shame the perpetrators of human rights violations such as the "naming and shaming" used in the business world or the soft law of international law. Moreover, in the best of cases, such large-scale action could be supported and monitored by the host State as well, as long as the latter does not want to be associated with human rights abusers. Of course, this has yet to be confirmed in practice, but it could really be an additional effect of the new approach. A large obstacle is thus bypassed, and the protection is extended.

In addition, it should be noted that although the EU often justifies its sanctions regimes by its desire to put an end to a situation harmful to human rights, it has never launched restrictive measures solely because of human rights violations. This does not mean that this is a false justification, but rather that the protection of human rights alone is not sufficient to sanction a state. There are, however, certain points that are closely related to human rights, such as the use of weapons banned in Syria or the sabotage of the peace process by Transnistrian officials. But still, human rights are not the only sufficient grounds for a sanction.

By contrast, the Magnitsky approach will affirm its full commitment to human rights without using other pretexts to intervene. It could, however, be argued that it will not change anything, since the EU already has the possibility of launching a sanctions regime solely on human rights grounds. It is in fact true that the deep system will not change, it is always the States that decide whether or not to intervene, but the commitment made when voting for such an act represents a new impetus for this protection. Added to this is the major advantage of this approach, namely that states will be relieved, or at least partially relieved, of the burden of their political and economic ties.

Section 2: Improvements from an internal point of view

The external protection seems to be completed and strengthened by the EU Global Human Rights Sanctions Regime as it brings possible solutions to existing issues. The second

step in this analysis is therefore logically to consider whether it does the same for internal issues related to the sanctions system. In short, again without claiming to be exhaustive on all issues, it is necessary for the purposes of this work to list the points mentioned previously in order to investigate whether or not a response is being made to them. However, it should be recalled that while the new Magnitsky approach corrects, in its application, some of the problems contained in the classical sanctioning system, it does not correct them for the latter system. Indeed, here are two distinct systems that potentially have many similarities in their application, but they are not substitutes for each other. As the Parliament stated it is going to be much more a “complementary [system] to existing EU policies and existing country-specific and horizontal restrictive measures.”¹⁷¹ Indeed, “the new regime should not replace the human rights scope of current country-specific measures”¹⁷². Consequently the "corrective" effect could only be appreciated to the extent that potentially this second system will take over from the first which is rather very unlikely. The Magnitsky act must therefore be considered as having a "complementary" contribution.

Back to the matter at hand, the main issues mentioned are: Listing and delisting process, the exclusion of the parliament and the burden of unanimity in the decision-making process. With regard to implementation, besides the geopolitical influence suffered by States, the granting of the exemption is beyond the control of the Court or any other body. As an institutional criticism, the exclusion of Parliament from the entire decision-making process was mentioned. Furthermore, with regard to the decision-making process, unanimity seems to limit the flexibility of EU action.

1/ An acknowledgement of Parliament's place in the Magnitsky Act?

Convinced that the EU Magnitsky Act has the capacity to “strengthen the EU’s role as a global human rights actor, notably in its fight against impunity and its support to victims of abuse and to human rights defenders worldwide”¹⁷³, the European Parliament is strongly supporting this draft. Moreover, the Parliament usually completely excluded from the overall process of restrictive measures imposition, stresses its own importance and its scrutiny role

¹⁷¹ European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime, 2019/2580(RSP), Paragraph 10. Available at <https://www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html?> [Accessed on 20 July 2020].

¹⁷² Ibid.

¹⁷³ Ibid. Paragraph 3.

“over this future regime, notably regarding the scope and definition of the listing criteria, as well as the possibilities for judicial redress”¹⁷⁴. Failing to decide on restrictive measures in a practical way, the Parliament is trying to establish the rules to be respected in this area. In addition, as the EU Parliament encourages for the setting-up of an “EU-level advisory committee”, it somehow recalls the proposal did by Marco Gestri to create a centralized EU sanction authority. Nevertheless, the proposal to set up an advisory committee is weak compared to the proposal for a strong central system. The opportunity to vote on such a project should be seized to set up such a body, in which case Parliament could negotiate a place for itself to participate. Actually, it may well be the case to the extent that it has been proposed in a proposal¹⁷⁵.

Even if the regime will remain CFSP in nature and therefore still exclude the Parliament from the decision-making process, the assembly has now the possibility to influence it since it votes in favour of it. This is the moment to negotiate and add strong guarantees to the coming system. Nevertheless, this represents a meagre compensation and does not balance the exclusion of parliament when it comes to adopting and implementing sanctions. For instance, in this new approach to sanctions about to be voted on, Parliament could have been empowered to present problematic human rights situations abroad to the Council. Indeed, this would have made it possible to balance the double standards criticized by Parliament itself.

2/ Seriously considering the listing/delisting matters?

This is probably one of the most problematic points of the existing mechanism of restrictive measures, the real flaw in its implementation by the Member States. On the one hand, with regard to the listing process, a recurring issue was highlighted, namely, secrecy and security concerns that prevent States from providing useful information on the reasons for listing. Thus, the listing process could affect the rights of individuals, in particular the rights of the defense. On the other hand, concerning the delisting process also named exemption granting, the problem lies in the almost total absence of any control on this point. The State may, at its discretion, remove an individual's name from a list. The latter point is barely covered

¹⁷⁴ Ibid. Paragraph 7.

¹⁷⁵ Pieter Omtzigt, Martijn van Helvert and Sjoerd Sjoerdsma, “The power of focus: Proposal for a European Human rights entry ban commission”, European Stability initiative, 14 November 2018. Available at <<https://www.esiweb.org/pdf/Appeal%20-%20For%20a%20European%20Human%20Rights%20Entry%20Ban%20Commission%20-%2014%20Nov%202018.pdf>>, [accessed on 20 July 2020].

by the guiding principles while the former has been bypassed by the new rules of procedure of the general Court. More precision should be expected from the new approach on sanctions otherwise it might undermine first of all the effectiveness of the mechanism and its credibility. Indeed, “arbitrary and inconsistent listing practices would quickly endanger the credibility of a regime”.¹⁷⁶

However, the criticisms on these points seem to have been heard. From the early proposal, “the Dutch Minister of Foreign Affairs, when reporting on the conference held in The Hague, specifically mentioned the importance of due process for listing, review and de-listing.”¹⁷⁷ The negotiation process must go beyond the individual interests of Member States, in order to ensure a coherent process whereby listing and de-listing are carried out efficiently and according to binding rules. The creation of a specific mechanism controlling both the entry and exit of a name on a list should be considered for this purpose.

As mentioned above, Parliament is a strong supporter of this project. In this regard, it has expressed itself in favour of greater precision and accuracy in the definition of each element in order to avoid as far as possible overly vague guidelines or other general statements. Thus, the parliament “emphasizes the need to clearly define the scope of violations as well as to set up appropriate legal avenues through which a listing can be challenged”¹⁷⁸. More than just supporting a better approach, the parliament clearly links the listing and de-listing process with the credibility and legitimacy of the regime itself. The parliament places the respect for fundamental rights even and especially for entities concerned by the measure at the heart of the process.¹⁷⁹ Consequently “decisions to list and delist individuals or entities should be based on clear, transparent and distinct criteria and directly linked with the crime committed in order to guarantee a thorough judicial review and redress rights”¹⁸⁰. To this latter sentence rather classical and similar to those in guidelines, the assembly, to the extent of the powers conferred

¹⁷⁶ Nienke van der Have, “*The Proposed EU Human Rights Sanctions Regime*”, Security and human rights, 2019, p.1-16

¹⁷⁷ Ibid. See the letter (In Dutch) at <<https://zoek.officielebekendmakingen.nl/kst-32735-229.html>> [Accessed on 20 July 2020].

¹⁷⁸ European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime, 2019/2580(RSP), Paragraph 4. Available at <https://www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html?> [Accessed on 20 July 2020].

¹⁷⁹ Ibid. See paragraph 11.

¹⁸⁰ Ibid.

upon it, calls for the establishment of a systemic procedure and methodology “for the lifting of sanctions and for de-listing”¹⁸¹.

This is fairly good news since, as seen above on several points, the real problem with the EU's mechanism of restrictive measures lies in the lack of a common supervisory body that could monitor and regulate the uniform implementation of the measures. Therefore, while this type of body will not exist as such, it is always positive to have a "scale model" that deals only with the issues of listing and de-listing.

3/ Qualified majority rather than unanimity?

Another point mentioned by the proposal is the possible qualified majority vote. This would represent a move from unanimity to qualified majority. With regard to the protection of human rights abroad, this is rather good news because the process of taking measures against entities that abuse human rights would be less constrained. This would avoid a situation where one Member State says no because of a misplaced interest when all the others are in favour of the regime. Thus, the chances of a regime to be adopted would increase and the EU would provide more protection.

The first thing that comes to mind when talking about the end of the unanimity regime is the exact unanimity vote needed to abandon it. This is a real question of sovereignty, since the States are the ones that apply the measures in a practical way and therefore the ones that bear the possible consequences of such sanctions. Once again, the switch from the usual unanimity to qualified majority would only affect the sanction regime related to the Magnitsky Act and not at all the current one discussed in this paper before. If the Member States decide to separate part of their sovereignty in this way, however small, this would represent a breakthrough, especially within the CFSP. Indeed, this Magnitsky plan would in any case fall within the CFSP. In any event, for some it would be a remarkable step forward and a proof of confidence in the European project by the States, while for others it would represent a loophole that would presage an unacceptable surrender of sovereignty. From this analysis, it is already easy to point out that a single proponent of the latter view can ensure that all this does not happen.

¹⁸¹ Ibid.

This question of qualified majority has been approached recently by the former president of the Commission, Mr Jean-Claude Juncker. Indeed, on 12 September 2018, the President of the Commission attempted to activate the so-called "lost treasure" clause of the Lisbon Treaty, which makes it possible to move from unanimity to qualified majority voting. This clause is in fact written in Article 31(3) TEU, also called 'passerelle clause'. It gives power to the European Council to change the way decisions are voted within the Council.¹⁸² In other words, it is legally possible in the treaty to change from unanimity to qualified majority. President Juncker has proposed this for certain areas of the CFSP, namely the response to attacks on human rights, when deciding on sanctions regimes and for decisions on CFSP civilian missions¹⁸³. The aim of this proposal was to give more power to EU foreign policy and thus to EU. "The geopolitical situation makes this Europe's hour: the time for European sovereignty has come."¹⁸⁴ In that sense, the former President Juncker clearly underlined what has been criticized in this work, namely the too many national interests that damages EU human rights protection worldwide. "It is not right that our Union silenced itself at the United Nations Human Rights Council when it came to condemning human rights abuses by China. And this because not all Member States could agree"¹⁸⁵.

Former President Juncker's position concerned a change affecting the CFSP in a fairly general way, which could create reluctance. The issue comes up again with the Magnitsky Act, which, for its part, targets only one point: the protection of human rights. This is perhaps the opportunity the EU is looking for to try out this qualified-majority mode of action in a much more limited way. The good point on it is that the parliament is already in favor of such a change¹⁸⁶ as is the new High Representative for Foreign Affairs and Security Policy, Josep Borrell. Regarding the current global sanitary crisis and its impact in EU, it may be the good

¹⁸² The Article only adds "in cases other than those referred to in paragraph 2" which mainly concern EU orientations, actions or positions. Nevertheless, even if this is still a pure hypothesis, the notion of EU action and position could be invoked in several ways to justify the return to unanimity. Simply, this notion needs to be defined, but as said above, this remains only a hypothesis since this article is not even activated yet.

¹⁸³ See in details the areas concerned: European Commission, "*Qualified majority voting: a tool to make Europe's Foreign and Security Policy more effective*", Factsheet, 12 september 2018.

¹⁸⁴ European Commission, State of the Union 2018: The Hour of European Sovereignty, 2018. Available at <https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf> [Accessed on 20 July 2020].

¹⁸⁵ Ibid.

¹⁸⁶ The Parliament "[w]elcomes the proposal made by the President of the Commission to move beyond unanimity in Council decision-making in CFSP areas and urges the Council to adopt this new sanction instrument in such a way that the imposition of human rights sanctions might be adopted by qualified majority in the Council". European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime, 2019/2580(RSP), Paragraph 6.

moment to seize the opportunity to act together in a more efficient way. However, this can also prove to be the worst moment to ask states to leave part of their sovereignty. Actually, a good indicator of the current tendency of States to act in favour of a stronger Union by partially forgetting their age-old sovereignty is the European summit being played at the time of the writing of this paper. “The goals of our recovery can be summarised in three words: first convergence, second resilience and third transformation”¹⁸⁷, stated the President of the European Council, Charles Michel, announcing the ‘recovery plan to respond to the COVID-19 crisis’ supported by France and Germany. If an agreement is reached that would reconcile Europe's divergences, then it is possible to envisage further integration. If not, it is very likely that Europe will have to wait a few more years before the projects discussed in this paper are realised.

The EU's Magnitsky Act is probably the most ambitious human rights plan ever undertaken by the EU as such. While the Union has always had a very strong commitment to human rights, making human rights its key value, this is the first time that such a plan is made solely for the sake of this protection and thus seems to be moving away from *realpolitik*. This act should not be considered only as what it is, i.e. a piece of legislation, it should be seen as a change of approach by the Union and its States. The plan is supported by several Member States, the European Parliament and high EU officials as the High representative. Moreover, the EU Global Human Rights Sanctions Regime appears to address most of the existing problems carried by the current CFSP sanctions mechanism. On the first hand, the issue of geopolitical interests, which has been widely criticized in this work, seems to be resolved by the non-geographical aspect of the sanctions envisaged. The question of unanimity, if resolved and transformed into a qualified majority, will also be part of the solution to the problem of geopolitical bias. Mostly this regime will constitute the proof that problems mentioned throughout this paper have solutions. This would therefore pave the way for a broader change applying to the whole mechanism of restrictive measures.

On the second hand, the role of Parliament is still minimal, and no place has been given to it in the decision-making process. However, the assembly has had the opportunity to discuss the plan and propose its vision, which is a meagre compensation since a power of initiative or

¹⁸⁷ President of the European Council, Charles Michel, 10 July 2020, Brussels.

proposal could have been given, as parliament is very much involved in the protection of human rights.

Finally, with regard to internal issues, the most relevant contribution is probably the listing/delisting procedure to be introduced. At least for the new human rights sanction regime, Member States will have to follow a structured path to insert or remove a name from a list. While this procedure may be seen as burdensome for its detractors, it is rather protective of rights as it will enhance the credibility and coherence of EU action in this field. Adequate oversight will exist, but it remains to be determined by which body it will be carried out and whether the creation of a general body related to the Magnitsky Act is conceivable. The latter solution would certainly be the best and is not to be excluded for the moment. Indeed, as already proposed¹⁸⁸: “[A] committee of experts rather than EU governments could be tasked with selecting the most pressing cases”¹⁸⁹. The negotiations are in progress as the perspectives do.¹⁹⁰

¹⁸⁸ Pieter Omtzigt, Martijn van Helvert and Sjoerd Sjoerdsma, “The power of focus: Proposal for a European Human rights entry ban commission”, European Stability initiative, 14 November 2018.

¹⁸⁹ Martin Russell, “An EU human rights sanctions regime”, European Parliamentary Research Service, April 2019, PE 637.892.

¹⁹⁰ See, Clara Portela, “A Blacklist is (almost) born, building a resilient EU human rights regime”, EUISS, March 2020, 8p. Available at <<https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief%205%20HRS.pdf>> [Accessed on 20 July 2020].

GENERAL CONCLUSION

The European mechanism designed to impose restrictive measures is becoming one of the most important means used by the Union to act or react on the international stage to express its opposition. It is also one of the most developed sanction systems in the world. Added to that, the European Union has a strong will to protect human rights which is part of its DNA. Without claiming to be exhaustive, the current work has endeavored to look for loopholes affecting human rights protection in the system of restrictive measures. Due to positive EU involvement for human right, no loophole should be allowed to show through. In order to be credible in front of the world it is essential to be blameless.

Before being imposed, sanctions, at the European scale must be decided in accordance with a well-established procedure. This process for adopting restrictive measures operates within a hybrid legal framework. The principle of action is decided at intergovernmental level and then is formulated and implemented by the Council within an integrated framework. This basically means that the Member States control all stages. All along the first part, this work has shown that many sources of influence can lead to the poor application of restrictive measures by States.

Among the sources of influence, domestic sources are certainly the worst, as they often divide countries among themselves, not having the same interests. Moreover, within a country, there are often divisions between those in favour and those against the measure: “security-related agencies are usually interested in maximizing the political effect of sanctions, while economic and trade-related agencies want to minimize the economic effects on their national companies”¹⁹¹. Nevertheless, while being the most limiting aspect for the effectiveness of restrictive measures, this issue could be resolved by the creation of a strong body strengthening implementation and balancing it across the EU. Indeed, regarding implementation, it must be said that the lack of common implementation system (which is, of course, due primarily to the variety of internal systems) leaves room for inconsistent application. However, it is important

¹⁹¹ Galbert, *“The Challenge to Building a Balanced Transatlantic Sanctions Policy between the US and the EU”*, Center for Strategic and International Studies and Center for a New American Century, 2016.

to bear in mind that for some States the limit is institutional, due to the complexity of the internal system

After having demonstrated that Member States can be influenced in their implementation and once related issues defined has been necessary to investigate what are the current solutions and controls to counterbalance this risk. The CJEU is definitely at the heart of this control. As seen, the Court is in charge of the balance between the EU external action interest, Member States so-called 'higher interest' and fundamental rights. Thanks to the analysis of some caselaw as the Rosneft case, it must be acknowledged that the Court upholds the EU's values. Indeed, its numerous efforts to preserve fundamental rights without undermining the strength of the EU's external action are to be welcomed. This central organ of the EU which was primarily almost completely excluded from the control of restrictive measures has progressively gain place in this matter. Even if it is still unclear that the Court has broaden itself its competence, it is clear that it has defined its scope of competence and its credibility in favour of fundamental rights. More, it is the practice that actually broaden the number of cases the Court is able to know about.

As the use of restrictive measures is constantly on the increase and the Union uses this tool to promote its values externally, litigation about it is bound to increase accordingly. As practice also evolves to include adequate safeguards and to limit the emergence of new problems, this growth is likely to stabilise.

Nevertheless, some aspects of these litigations remain untouched by the Court and either can undermine the effectiveness of sanctions or affect to some extent the protection of fundamental rights. Namely the confidentiality for security reasons still remains out of Court's proper control. Same for the granting of exemptions. Furthermore, other issues are still present within the overall restrictive measures system. For instance, the parliament exclusion of the decisional process or the double standards influenced by others interests when it comes to sanctions human rights violations.

A real change is awaited in the EU restrictive measures system and, as the protection granted by the Court is not able to influence the reasons for the taking of sanctions, nor the appropriateness of a sanction, it is interesting to analyse what constitutes a new hope for the protection of human rights: The EU Magnitsky Act. The EU Global Human Rights Sanctions

Regime appears to address most of the existing problems carried by the current CFSP sanctions mechanism. On the first hand, the issue of geopolitical interests, which has been widely criticized in this work, seems to be resolved by the non-geographical aspect of the sanctions envisaged. The question of unanimity, if resolved and transformed into a qualified majority, will also be part of the solution to the problem of geopolitical bias. Mostly this regime will constitute the proof that problems mentioned throughout this paper have solutions. This would therefore pave the way for a broader change applying to the whole mechanism of restrictive measures.

Regarding the current global sanitary crisis and its impact in EU, it may be the good moment to seize the opportunity to act together in a more efficient way. However, this can also prove to be the worst moment to ask states to leave part of their sovereignty. Actually, a good indicator of the current tendency of States to act in favour of a stronger Union by partially forgetting their age-old sovereignty is the European summit being played at the time of the writing of this paper. “The goals of our recovery can be summarised in three words: first convergence, second resilience and third transformation”¹⁹², stated the President of the European Council, Charles Michel, announcing the ‘recovery plan to respond to the COVID-19 crisis’ supported by France and Germany. If an agreement is reached that would reconcile Europe's divergences, then it is possible to envisage further integration. If not, it is very likely that Europe will have to wait a few more years before the projects discussed in this paper are realised. The outcome of the European summit is in this sense rather positive despite some opposition. This augurs a more united future for the Union, or at least the right to believe a little more in it

¹⁹² President of the European Council, Charles Michel, 10 July 2020, Brussels.

BIBLIOGRAPHY

I/ OFFICIAL DOCUMENTS

A/ PRIMARY SOURCES

- Consolidated version of the Treaty on the Functioning of the European Union, 2016/C 202/1, 7 June 2016.
- Consolidated version of the Treaty on European Union, 2016/C 202/1, 7 June 2016.
- Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012.

B/ SECONDARY SOURCES

1/ COUNCIL OF THE EUROPEAN UNION

- Council of the European Union, Council Regulation (EC) No. 2271/96, *Protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom*, 22 November 1996, 6p.
- Council of the European Union, Council Regulation (EC) No. 2580/2001, *on specific restrictive measures directed against certain persons and entities with a view to combating terrorism*, 27 December 2001.
- Council of the European Union, Council Common position (CFSP) No. 2002/145, concerning *restrictive measures against Zimbabwe*, 18 February 2002.
- Council of the European Union, *Monitoring and evaluation of restrictive measures (sanctions) in the framework of CFSP - Establishment of a 'Sanctions' formation of the Foreign Relations Counsellors Working party (RELEX/Sanctions)*, 5603/04, 22 January 2004, 3p.
- Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 10198/1/04 REV 1, 7 June 2004, 3p.
- Council of the European Union, *Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures*, 8666/1/08 REV 1, 24 April 2008, 28p.

- Council of the European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, 17464/09, 15 December 2009, 46p.
- Council of the European Union, Council Decision (CFSP) No. 2011/172, *concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt*, 21 March 2011.
- Council of the European Union, Council Regulation (EU) No. 692/2014, *concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol*, 23 June 2014.
- Council of the European Union, Council regulation (EU) No. 833/2014, *concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*, 31 July 2014.
- Council of the European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, 5664/18, 4 May 2018.
- Council of the European Union, Council Decision (CFSP) No. 2018/1544, *concerning restrictive measures against the proliferation and use of chemical weapons*, 15 October 2018.
- Council of the European Union, Council Regulation (EU) No. 2018/1542, 15 October 2018.
- Council of the European Union, Council Regulation (EU) No. 2019/796, *concerning restrictive measures against cyber-attacks threatening the Union or its Member States*, 17 May 2019.
- Council of the European Union, Council Decision (CFSP) No. 2019/797, *concerning restrictive measures against cyber-attacks threatening the Union or its Member States*, 17 May 2019.

2/ EUROPEAN PARLIAMENT

- European Parliament, Resolution on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights, (2008/2031(INI)), 4 September 2008.
- European Parliament, Resolution on the human rights situation in Bahrain (2013/2513(RSP)), 17 January 2013.
- European Parliament, Resolution on the 2014 Progress Report on Serbia (2014/2949(RSP)), 11 March 2015.

3/ EUROPEAN COMMISSION

- European Commission, Commission implementing regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom
- European Commission, “Qualified majority voting: a tool to make Europe’s Foreign and Security Policy more effective”, Factsheet, 12 September 2018.
- European Commission, State of the Union 2018: The Hour of European Sovereignty, 2018. Available at <https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf> [Accessed on 20 July 2020].

C/ EU COMMUNICATIONS

1/ OFFICIAL

- Joint Communication of the Commission and the High Representative of the EU for Foreign Affairs and Security Policy, ‘Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach’, COM(2011) 886.

2/ PRESS RELEASES

- Press released, European Council, “*EU-Turkey statement, 18 March 2016*”. Available at <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> [Accessed on 17 July 2020].
- Press released, European Parliament, ‘Greek-Turkish border: MEPs reject Turkey’s pressure, demand common asylum rules’, March 2020. Available at <<https://www.europarl.europa.eu/news/en/press-room/20200305IPR74187/greek-turkish-border-meps-reject-turkey-s-pressure-demand-common-asylum-rules>> [Accessed on 17 July 2020].
- Press release N° 34/17, “The restrictive measures adopted by the Council in response to the crisis in Ukraine against certain Russian undertakings, including Rosneft, are valid”, Luxembourg, 28 March 2017. Available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170034en.pdf> [Accessed on 15 July 2020].

II/ CASE LAW

A/ EUROPEAN COURT OF JUSTICE

- Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 22 October 1987, EU:C:1987:452.
- Case 68/88, *Commission v. Greece*, 21 September 1989, ECLI:EU:C:1989:339
- Case T-315/01, *Kadi v. Council and Commission*, 2005, ECR II-3649
- Case T-228/02, *OMPI v. Council*, 2006, ECR II-4665
- Case C-344/04, *Iata and ELFAA v. Council*, 10 January 2006, EU:C:2006:10
- Joined Cases C-402 and 415/05P, *Kadi and Al Barakaat v. Council and Commission*, 3 September 2008, ECLI:EU:C:2008:461
- Case T-390/08, *Bank Melli Iran v Council of the European Union*, 14 October 2009, ECLI:EU:T:2009:401
- Case C-27/09 P, *French Republic v. People's Mojahedin Organization of Iran*, 21 December 2011, ECLI:EU:C:2011:853
- Joined Cases C-584/10, C-593/19 and C-595/10, *Commission and other v. Yassin Abdullah Kadi*, 18 July 2013, ECLI:EU:C:2013:518
- Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft*, 28 November 2013, EU:C:2013:776
- Joined Cases T-329/12 and T-74/13, *Mazen Al-Tabbaa v. Council of the European Union*, 9 July 2014, ECLI:EU:T:2014:622
- Case T-578/12, *National Iranian Oil Company v Council*, 16 July 2014, ECLI:EU:T:2014:678
- Case T-168/12, *Georgias and Others v. Council and Commission*, Judgment of the General Court (Eighth Chamber), 18 September 2014, ECLI:EU:T:2014:781
- Case C-440/14, *National Iranian Oil Company v Council*, 1st March 2016, EU:C:2016:128
- Case C-72/15, *The Queen (PJSC Rosneft Oil Company) v. Her Majesty's Treasury*, Judgment of the Court of Justice (Grand Chamber), 28 March 2017, EU:C:2017:236.

B/ NATIONAL DECISIONS

- OJSC Rosneft Oil Company, R (on the application of) v HM Treasury & Ors [2014] EWHC 4002 (Admin) (27 November 2014).

III/ BOOKS AND ARTICLES

A/ BOOKS AND TEXTBOOKS

- Bart Van Vooren and Ramses A. Wessel, '*EU External Relations Law: Text, Cases and Materials*' (Cambridge, United Kingdom: Cambridge University Press, 2014), 579p.
- Eeckout P., '*EU external relations law*', Oxford University Press, 2nd ed, 2011, 512p.
- Ronzitti N., '*Coercive Diplomacy, Sanctions and International Law*', (Leiden: Brill Nijhoff, 2016).

B/ ARTICLES

- Aleksi Pursiainen, "*Targeted EU sanctions and Fundamental rights*", Solid Plan Consulting, 2017, 6p.
- Alexandra Brzozowski, "*EU ministers break ground on European 'Magnitsky Act'*", EURACTIV, 10 December 2019. Available at <<https://www.euractiv.com/section/justice-home-affairs/news/eu-ministers-break-ground-on-european-magnitsky-act/>> [Accessed on 20 July 2020].
- Allan Rosas, "*EU External Relations: Exclusive Competence Revisited*", Fordham International Law Journal, Volume 38, Issue 4, 2015, 26p.
- Andreas Metz "*Ost-Ausschuss warnt vor Wirtschaftskonflikt*". Available at <<https://www.oaev.de/ost-ausschuss-warnt-vor-wirtschaftskonflikt/>> [Accessed on 17 July 2020].
- Andrew Rettman, "*Ball rolling on EU human rights sanctions*", EU Observer, 1 March 2019. Available at: <<https://euobserver.com/foreign/144308>> [Accessed on 17 July 2020].
- Andrew Rettman, "*Dutch flesh out proposal for EU human rights sanctions*", EU Observer, 19 November 2018. Available at: <<https://euobserver.com/foreign/143424>> [Accessed on 17 July 2020].

- Anne Hamonic and Louis-Marie Chauvel, “*La Diversification Des Régimes Thématiques de Mesures Restrictives*”, *RTDeur. Revue Trimestrielle de Droit Européen*, n° 3, 2019, pp.746–748.
- Bastien Nivet, “*Les sanctions internationales de l’Union européenne : soft power , hard power ou puissance symbolique ?*”, *Revue internationale et stratégique*, volume 97.1 (2015), p.129 <<https://doi.org/10.3917/ris.097.0129>>.
- Bertrand Badie, Bastien Nivet, and Marc Verzeroli, “*Les sanctions, une forme particulière d’humiliation ?*”, *Revue internationale et stratégique*, volume 97.1 (2015), p.69 <<https://doi.org/10.3917/ris.097.0069>>.
- Bertrand Brunessen, “*La particularité du contrôle juridictionnel des mesures restrictives : Les « considérations impérieuses touchant à la sûreté ou à la conduite des relations internationales de l’Union et de ses États membres »*”, 2015, 16p.
- Benjamin Bürbaumer, “*La puissance des entreprises allemandes, la faiblesse des sanctions économiques contre la Russie*”, *Allemagne d’aujourd’hui*, volume 214.4 (2015), 6p. <<https://doi.org/10.3917/all.214.0006>>.
- Catherine Schneider, “*La PESC miracle ou mirage de la construction communautaire ?*”, *Revue de l’Union européenne*, 2018, 9p.
- Charlotte Beaucillon, “*Comment choisir ses mesures restrictives ? guide pratique des sanctions de l’UE*”, *European Union Institute for Security Studies*, 2012, 35p.
- Christophe Hillion, “*Cohérence et action extérieure de l’Union européenne*”, *EUROPEAN UNIVERSITY INSTITUTE, FLORENCE, EUI Working Paper LAW 2012/14*, 30p.
- Delphine Burriez, “*L’individualisation des sanctions adoptées par l’Union européenne sous forme de mesures restrictives*”, 2015, 13p.
- Clara Portela, “*A Blacklist is (almost) born, building a resilient EU human rights regime*”, *EUISS*, March 2020, 8p. Available at <<https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief%205%20HRS.pdf>> [Accessed on 20 July 2020].
- D. Kochenov, P. Bard, “*The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States in the EU*”, *University of Groningen, Research Series*, n°5, 2019.
- Dr Katja Göcke, “*The US ‘secondary sanctions’ against Iran - risks for EU companies*”, *Graf von Westphalen*, December 2018.
- Elin Hellquist, “*Ostracism and the EU’s contradictory approach to sanctions at home and abroad*”, *Contemporary politics*, December 2018, pp. 393-418. Available at <<https://doi.org/10.1080/13569775.2018.1553083>>. [Accessed on 17 July 2020].

- Eric-André Martin, “*La politique de sanctions de l’Union européenne. Ambition multilatérale contre logique de puissance*”, *Études de l’Ifri*, IFRI, October 2019, 50p.
- Fanny Coulomb and Sylvie Matelly, “*Bien-fondé et opportunité des sanctions économiques à l’heure de la mondialisation*”, *Revue internationale et stratégique*, volume 97.1 (2015), p.101 <<https://doi.org/10.3917/ris.097.0101>>.
- Francesco Giumelli, “*Coercing, Constraining and Signalling. Explaining UN and EU Sanctions after the Cold War*”, ECPR Press, 2011.
- Francesco Giumelli et P. Ivan, “*The Effectiveness of EU Sanctions: An Analysis of Iran, Belarus, Syria and Myanmar*”, European Policy Center Issue Paper, n° 76, November 2013.
- Galbert, “*The Challenge to Building a Balanced Transatlantic Sanctions Policy between the US and the EU*”, Center for Strategic and International Studies and Center for a New American Century, 2016.
- Hennebel, “*Classement et hiérarchisation des droits de l’Homme*”, *AJIC*, vol. 26, 2010, pp. 423-435.
- Hubert de Vauplane, “*Embargos, gels des avoirs : défense des droits de l’Homme ou instruments de politique étrangère ?*”, *Revue Banque*, n° 755-756, 2013, 6p.
- Isabelle Bosse-Platière, “*LES MESURES RESTRICTIVES ADOPTÉES PAR L’UNION EUROPÉENNE La projection à l’externe d’un acteur singulier*”, *Annuaire français de relations internationales*, Volume XVII, 2016, 23p.
- Isabelle Bosse-Platière, “*Nouveau Règlement de procédure du Tribunal de l’Union : introduction d’une procédure dérogatoire au principe du contradictoire quand la sûreté de l’Union ou de ses Etats membres dans la conduite de leurs relations internationales est en jeu*”, *RTD*, N3, 2015, pp. 630-633
- Jean Félix Delile, “*L’État de droit dans les relations extérieures de l’Union européenne*”, *Civitas Europa* 2016/2, n° 37, p. 47-63. ISSN 1290-9653.
- Jérémie Van Meerbeeck, “*The principle of legal certainty in the case-law of the European Court of justice: from certainty to trust*”, *European Law Review*, 41(2), 2016, pp. 275-288.
- Kristina Heva, “*The EU Restrictive Measures - What If the Court of Justice of European Union Finds Them Not Being Legal: Cases in Croatia and Republic of Macedonia*”, 2015, 23p.
- Laurent Coutron, “*Consécration de la compétence préjudicielle de la Cour de justice dans le contentieux des mesures restrictives*”, *Chronique Contentieux de l’Union européenne*, 2017, 6p.

- Laurent Coutron, “*L’application de la jurisprudence TWD aux mesures restrictives : un « tigre de papier » ?*”, *Chronique Contentieux de l’Union européenne*, 2017, 2p.
- Leander Leenders, “*EU Sanctions: A Relevant Foreign Policy Tool?*”, *EU Diplomacy Papers*, n° 3, Bruges, Collège d’Europe, 2014.
- Luke Harding, “Who was Sergei Magnitsky and how did UK sanctions come about?”, *The Guardian*, 6 July 2020. Available at <<https://www.theguardian.com/politics/2020/jul/06/who-was-sergei-magnitsky-and-how-did-uk-sanctions-come-about>> [Accessed on 20 July 2020].
- Malte Brosig, “*Le régime de sanctions internationales à l’égard de la Libye : la quête d’un changement de régime au sein d’une gouvernance internationale fragmentée*”, *Revue internationale et stratégique*, volume 97.1 (2015), p.139 <<https://doi.org/10.3917/ris.097.0139>>.
- Marco Gestri, “*Sanctions Imposed by the European Union: Legal and Institutional Aspects*”, *Coercive Diplomacy, Sanctions and International Law* (2016), pp. 70-102.
- Martin Russell, “An EU human rights sanctions regime”, *European Parliamentary Research Service*, April 2019, PE 637.892.
- Maya Lester, “*Rosneft tries to stop UK law criminalising Russia sanctions*”, *EU sanctions law, practice and guidance*, 9th of December 2014. Available at <<https://www.europeansanctions.com/2014/12/rosneft-tries-to-stop-uk-law-criminalising-russia-sanctions/>> [Accessed on 18 July 2020].
- Mustapha Afroukh, “*Une hiérarchie entre droits fondamentaux ? Le point de vue du droit européen*”, *RDLF*, N°43, 2019.
- Nicolas Roullier, “*Sanctions économiques : chaos juridique et droits de l’homme*”, *EurAsian Scientific Editions Ltd*, 2016, 15p.
- Nienke van der Have, “*The Proposed EU Human Rights Sanctions Regime*”, *Security and Human Rights*, 2020, 16p. <<https://doi.org/10.1163/18750230-02901009>>.
- Peter Van Elsuwege, “*Judicial review of the EU’s Common and Foreign Policy: Lessons from the Rosneft Case*”, *Verfassungsblog*, 6 April 2017.
- Pierre Grosser, “*Des histoires sans leçons ? : De l’efficacité et de la pertinence des sanctions contemporaines*”, *Revue internationale et stratégique*, volume 97.1 (2015), p.89 <<https://doi.org/10.3917/ris.097.0089>>.
- Pieter Omtzigt, Martijn van Helvert and Sjoerd Sjoerdsma, “The power of focus: Proposal for a European Human rights entry ban commission”, *European Stability initiative*, 14 November 2018. Available at <<https://www.esiweb.org/pdf/Appeal%20-%20For%20a%20European%20Human%20Rights%20Entry%20Ban%20Commission%20-%202014%20Nov%202018.pdf>>, [accessed on 20 July 2020].

- Pola Cebulak and Francisco Javier Mena Parras, “*Droits fondamentaux et sécurité : quelle cohérence pour l’approche de la Cour de justice en matière de gel des avoirs ?*”, 16p.
- Romain Tinière, “*Le pluralisme désordonné de la protection des droits fondamentaux en Europe : Le salut réside-t-il dans l’équivalence ?*”, *Revue des droits et libertés fondamentaux*, RDLF 2017, n°17, 2017, 6p. <<http://www.revuedlf.com/droit-ue/le-salut-dans-lequivalence/>>.
- Sara Poli, “*The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*”, *Common Market Law Review*, 2017, pp. 1799–1834.
- Stian Johansen, “*Judicial control of EU foreign policy: the ECJ judgment in Rosneft*”, *EU Law analysis*, 29 March 2017. Available at <http://eulawanalysis.blogspot.com/2017/03/judicial-control-of-eu-foreign-policy.html> [Accessed on 18 July 2020].
- Sylvain Duhamel, “*L’usage des mesures restrictives autonomes de l’Union européenne : deux poids deux mesures ou des mesures de poids ?*”, *College of Europe, Department of EU International Relations and Diplomacy Studies*, September 2009, 38p.
- Thierry Coville, “*Les sanctions contre l’Iran, le choix d’une punition collective contre la société iranienne ?*”, *Revue internationale et stratégique*, volume 97.1 (2015), p.149 <<https://doi.org/10.3917/ris.097.0149>>.
- Thomas Courbe, Emmanuelle Mignon, “*Le droit comme arme économique : l’Europe face aux sanctions et aux législations extraterritoriales*”, *Revue Défense Nationale* n° 825, Décembre 2019, 12p.
- Thomas J Biersteker, Clara Portela, “*EU sanctions in context: three type*”, *Institute for Security Studies*, 2015, 4p. <<http://dx.publications.europa.eu/10.2815/54101>>.
- Yulia Belous and Kirill Entin, “*The Role of the Court of Justice of the European Union in the Development of the Common Foreign and Security Policy after the Treaty of Lisbon*”, *SSRN Electronic Journal*, 2019 <<https://doi.org/10.2139/ssrn.3458948>>.

IV/ WEB SITES:

- Consolidated list of EU sanctions on the EEAS website. Accessible at: <https://eeas.europa.eu/topics/sanctions-policy/8442/consolidated-list-of-sanctions_en> [Accessed on 17 July 2020].
- European council of the European Union: Accessible at <https://www.consilium.europa.eu/en/>

- Sanction map provided by the Consilium website: Accessible at: <https://sanctionsmap.eu/#/main>

V/ OTHER SOURCES

- ACPR Banque de France, « *Lignes directrices conjointes de la direction générale du Trésor et de l'ACPR sur le gel des avoirs* », n°29, September-October 2016, pp.9-11.
- Council of Europe, Parliamentary Assembly, “Sergei Magnitsky and beyond – fighting impunity by targeted sanctions”, Resolution 2252, 22 January 2019. Available at <<https://www.europarl.europa.eu/cmsdata/161079/6%20-%202006%20Resolution%20COE%20Sergei%20Magnitsky.pdf>> [Accessed on 20 July 2020].
- CPIDH, *l'impact négatif des sanctions économiques et financières sur le plein exercice des droits de l'homme par les populations des états membres de l'oci ciblés*, 2014, 19p, OIC/IPHRC/REP/ECO SANC/2014 /CFM-41
- Global Magnitsky Human Rights Accountability Act, 18 May 2016. Available at <<https://www.congress.gov/bill/114th-congress/senate-bill/284/text/es>> [Accessed on 20 July 2020].
- Hermitage Capital management, William Browder, Inquiry into targeted sanctions to address human rights abuses Submission 4, 14 January 2020.
- Responsible Business Conduct Working Group (RBC Group) of the European Parliament, *Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU*, 12p.
- Rules of procedure of the general Court, Official Journal of the European Union, L 105, 23 April 2015.
- The Export Control (Russia, Crimea and Sevastopol Sanctions) (Amendment) Order 2014, No. 2932

