The ECJ and the restrictive measures adopted within the CFSP area: taking fundamental rights seriously?

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I declare on my honour that this dissertation is my own work, completed without unauthorised external assistance, that it has been submitted to no another institution for assessment, and that it has never been published, either in whole or in part. All the information (ideas, sentences, graphs, maps, tables, etc.) taken from or referring to primary or secondary sources are properly referenced using the current university method.

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When I started gathering information about how the defence of the Master thesis takes place in Belgium, I've discovered that it's nothing like in Italy. Sure, you wear a fancy dress, but it's not really that big celebration that we usually have back home. No audience, no laurel crown, no ceremony on the same day. But there is one tradition I felt like I should keep, because it doesn't have to do with the formalities of what graduating means, but rather with the feelings it brings about. It has to do with saying thanks.

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It is always easier to fight for one's principles

than to live up to them.

(Alfred Adler)

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1. Introduction

1.1. The institutional context of the EU sanctions regime

Sanctions, or restrictive measures in official European Union's (EU) jargon, are one of the main tools at the EU's disposal to promote the objectives of the Common Foreign and Security Policy (CFSP), expressed in art. 21 TEU: peace, democracy and the respect for the rule of law, human rights and international law. Naturally, restrictive measures are not the only CFSP instrument on which the EU can rely to reach such goals: sanctions, in fact, ought to fit in a larger and more comprehensive policy framework together with political dialogue and diplomatic efforts[1], up to the threat or actual use of force. Nevertheless, as known, the EU itself currently lacks of sufficient and effective autonomous military forces; that's why sanctions appear nowadays to have gained importance within the CFSP both in a quantitative and in a qualitative sense.

As the 2015 report by the EU International Security Studies shows, the EU currently implements 37 different sanctions regimes[2], corresponding to an usage five times superior than what it used to be in 1991[3]. They now address a larger variety of foreign policy preoccupations, such as conflict management and post-conflict institutional consolidations, democracy and human rights promotion, countering international terrorism and nuclear non-proliferation; since 2014, the EU has resorted to sanctions as a means to condemn and contain the violation of territorial integrity, namely against Russia in the case of the Crimean conflict[4].

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[1] EEAS - EUROPEAN EXTERNAL ACTION SERVICE, *Sanctions policy*, n.d. [online].
[2] For a list of the current restrictive measures in force in the EU, see EEAS – EUROPEAN EXTERNAL ACTION SERVICE, *European Union restrictive measures (sanctions) in force*, updated on 26 April 2017 [online].
[3] EU ISS – EUROPEAN UNION INTERNATIONAL SECURITY STUDIES, *On target? EU sanctions as security policy tools,* ISSUE - Report n° 25, September 2015, I. DREYER, J. LUENGO-CABRERA (eds.) p. 9.
[4] *Ibid.*., p. 7.

A qualitative, so to say, evolution in the EU's sanctions policy can be identified in the growing implementation of the so-called 'targeted' or 'smart sanctions', that is, restrictive measures directly addressed to individuals or group of individuals (referring to both natural and legal persons) rather than to countries. The rationale behind the creation of such new category of targeted sanctions lies in the need to both effectively punish the condemned behaviours, and to preserve the well-being of the larger population. Comprehensive sanctions such as embargoes, in fact, come with severe negative consequences on civilian populations; targeted sanctions involving asset freezes or travel bans, instead, only damage the responsible decision-makers or commercial entities[5].

The sanctions that the EU implements may originate from two different legal systems. On the one side, we find the sanctions coming from the United Nations (UN) Security Council (UNSC), which all UN members have the obligation to implement *ex* art. 25 UN Charter. Despite not being a party to the UN Charter, it is the EU itself who implements such UN resolutions. This is because many of the sanctions enacted, insofar as they relate to economic relations with third countries, touch issues belonging to the Common Commercial Policy, of exclusive competence of the EU. Therefore, leaving the implementation of sanctions-related UNSC resolutions to each of the EU Member States (MS) independently would affect the unity and even breach the principle of primacy of EU law[6]. By implementing the UNSC sanctions, the Council of the European Union (thereinafter, the Council) might also go further in the scope, and if this is the case, we refer to 'mixed regime' sanctions. On the other side, the EU has also developed a system of so-called 'autonomous sanctions', adopted in a self-directing process within the competent EU institutions.

Despite this differentiation, the adoption procedure within the EU legal order stays the same: the legal basis in the Treaties is to be found in the combined reading of art. 29 TEU and art. 75 and 215 TFEU (former art. 60 and 301 EC respectively), which interact as follows. Being they an element of CFSP, restrictive measures ought to be the result of a CFSP decision *ex* art. 29 TEU, whose scope is in a sense to "authorise" the EU to act pursuant to art. 75 and 215 TFEU; such decision takes usually the form of a joint action or, much more frequently, of a

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[5] *Ibidem*.
[6] MARIANI, P., *The Implementation of UN Security Council resolutions Imposing Economic Sanctions in the EU/EC Legal System: Interpillar Issues and Judicial Review*, Bocconi Legal Studies Research Paper No. 1354568, 2009, p. 3.

common position. It is not only the Commission who can propose the adoption of such common position, as it is for standard EU legislation; rather, the right of initiative is shared with the Presidency of the Council and with any of the MS. The proposal is then discussed in the relevant Council Working Groups (usually the regional working groups, according to the third country concerned) and in the External Relations Counsellors Working Group (RELEX), as well as in the COREPER. The common position is then adopted by unanimity from the EU MS in the Foreign Affairs Council (FAC) configuration[7]. On the basis of such common position, binding for every EU institution, the Council urges the establishment of new or the amendment of previously existing restrictive measures, triggering the procedure described by art. 215 TFEU: the Commission is requested, together with the High Representative for Foreign Affairs and Security Policy (HR/VP), to issue a joint proposal to the Council itself, which will then adopt a decision by a qualified majority vote, once again, of the FAC.

1.2. Sanctions and fundamental rights: literature review

It is widely accepted that the sanction system as it was originally conceived created more than a few concerns about the scarce consideration that was given to fundamental rights. As Léonard and Kaunert notice, "*[p]aradoxically, whilst it was prompted by the willingness to avoid harming the human rights of the population of targeted countries (…), this move has actually led to serious violations of the human rights of the persons concerned*"[8]. Almqvist, for example, refers to a "*global securitization of terrorism*" to address the first causes of these concerns[9]. She points to the events of 9/11 as the trigger of the need for a new method and strategy to guarantee the security of countries against terrorism, which eventually translated into "*a set of (controversial) political ideas*" comprising a major involvement of the executive branches (both at the UN level, with the creation and strengthening of Counter Terrorism Committees and related bodies, and domestically at the State and EU level, with the leading role of the national governments within the Council) and a strong reliance on intelligence and

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[7] *Ibid.*, p. 8.

[8] LEONARD, S. and KAUNERT, C., ''Between a rock and a hard place?': The European Union's financial sanctions against suspected terrorists, multilateralism and human rights', *Cooperation and Conflict*, 47(4), 2012, p. 475.

[9] ALMQVIST, J., 'A human rights critique of European judicial review: counter-terrorism sanctions', *International and Comparative Law Quarterly*, 57(02), 2008, p. 305 et seq.

security information. In particular, the enhancement of the executive powers in the EU can be noticed in what Wessel presents as the "*most obvious lack of judicial control*": he points out how the Court of Justice of the EU (or European Court of Justice, ECJ), which already detains a rather limited role, as important as it can be, in the CFSP area, cannot review neither the decision-making procedure nor the legal basis chosen for the decisions the other institutions take. This results in a great empowerment of the Council, insofar as, should it ignore the competences of the other actors, notably the Commission and the European Parliament, there is no way to bring a judicial procedure against it. The Council is virtually free to act as the MS think best, reflecting once again the natural preference that States have towards an intergovernmental approach in the field of CFSP[10].

It therefore seemed that the absolute priority in foreign policy for what concerns both counterterrorism and other situation went to ensuring security at all costs, even when that meant leaving the respect of certain fundamental rights aside. A memorandum by Marty, rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe in 2007, well analyses the problematic: "*There is nothing about the addition of 'smart sanctions' to the panoply of instruments at the disposal of the international community that is questionable in itself. (...) However, this [new strategy] assumes that these targeted sanctions are imposed according to a procedure which guarantees the 'accused' at least some right to due process. The current procedure – as far as it can be called a procedure – fails to offer any safeguards for the people on the list. (...) [S]tates attached to the rule of law (...) should surely hesitate to put forward persons for inclusion in such lists which do not provide for any protection of fundamental freedoms.*"[11]

The particular nature of restrictive measures as tools of foreign policy and their status in the EU system has produced a wide literature, although the precise issue dealing with the importance of fundamental rights in this field doesn't seem to have been as prolific. Much more attention seems to have been given to the cases involving the implementation of UN sanctions, rather than EU autonomous measures, and this is understandably so, since the relationship between the UN and the EU in the field of restrictive measures is a complex and crucial one.

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[10] WESSEL, R.A., 'The legal dimension of European foreign policy', in AARSTAD, Å.K et al. (Eds.), *Handbook of European Foreign Policy*, Sage, 2015, p.7.

[11] MARTY, D., *UN Security Council Blacklists*, Parliamentary Assembly, Council of Europe as/jur doc. 14, 2007, pp. 2-4.

But in the narrative of this relationship, fundamental rights don't always find their own place. They rather seem to occupy a limited space and to be considered as accessory to the main discussion revolving around the 'monism *versus* pluralism' debate in international law. Gráinne de Búrca expresses this idea clearly in a prominent study about the consequences on the EU and international legal orders of the notorious *Kadi* case – at which we will get back during our analysis. In her opinion, the judgement served merely as a pretext to claim once and for all the autonomous nature of the EU (back then the European Community, EC) legal order *vis-à-vis* the international one[12]; the debate on fundamental rights is instead "*peripheral*", to quote Isiksel, who also warns the reader not to be completely "*swept up by the rhetoric of rights*" when considering the logic adopted by the ECJ[13].

In the discourse concerning the economic restrictive measures, be they deriving from the UN consolidated lists or the EU autonomous lists, authors very frequently refer to an existing conflict between norms, namely between national and international security norms and human rights, belonging to different regimes and systems and therefore necessarily meeting in a "*global legal arena*"[14]. This perceived conflict cannot but increase, as new threats shape current international relations, be they increasing terrorist menaces, the non-respect of human rights and rule of law, or attacks on territorial integrity, and measures to limit and especially prevent them as much as possible are more than necessary. Nevertheless, authors like Feinberg have argued that focusing on this "*language of conflict*" is wrong[15]. According to her, speaking about a conflict between security and fundamental human rights automatically leads to the conviction that the choice between the one and the other is exclusive, that security cannot be reached if not at the complete expenses of the rights of the individual. The annulment of fundamental rights, in other words, seems to be a "*necessary evil*"[16] when dealing with restrictive measures. Feinberg continues noticing how, lately, counterterrorist theories keep on underlying this conflict between norms, instead of passing on to a "*language of balance*", which would instead be more appropriate, since "*[h]uman rights should form the backdrop of counterterrorism*

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[12] DE BÚRCA, G., 'The European Court of Justice and the International Legal Order after *Kadi*', *Harvard International Law Journal*, 51(1), 2010 p. 44.
[13] ISIKSEL, N.T., 'Fundamental rights in the EU after *Kadi and Al Barakaa*t', *European Law Journal*, 16(5), 2010, p. 552.
[14] DE BÚRCA, G., *Op. cit.*, p. 4.
[15] FEINBERG, M., 'International counterterrorism – national security and human rights: conflict of norms or checks and balances?', *The International Journal of Human Rights*, 19(4), 2015, p. 388.
[16] *Ibidem*.

rather than constitute a conflicting and cumbersome interest" [17]. Feinberg focuses on counterterrorist measures; nevertheless, her reasoning can be expanded also to cover measures applied in other international crises, so to include also sanctions not addressed to terrorists. Together with scholars such as Moeckly, Feinberg defends the point of view according to which keeping a language of conflict between norms is only "*inadequate and misleading*"[18]; to this regard, she also makes reference to a concept relatively new in the debate on international security, that is "*human security*"[19], which not only brings back the balance between the pursuit of security and the protection of individual rights, but also puts the second "at the very heart" of the first[20]. As Axworthy defines it, "*[h]uman security today puts people first and recognises that their safety is integral to the promotion and maintenance of international peace and security. The security of States is essential, but not sufficient, to fully ensure the safety and well-being of the world's peoples.*"[21]

Although different authors therefore insist on promoting a language of balance, they recognise that a conflict indeed exists, but it's rather an institutional one[22]. This observation is derived from the recent disputes that have occurred in the judicial environment, with the prosecutions raised in different settings – EU, the Strasbourg European Court of Human Rights (ECtHR) and various national Courts – challenging exactly the lack of respect for human rights in the creation and execution of consolidated lists. These disputes have led both scholars and, more importantly, judges to face the problematics brought about by the so-perceived conflicting norms, and shifted the focus back on the necessity of balances. Feinberg herself welcomes this institutional conflict as a sign that an effective system of check and balances against the (too powerful) executives exists in the international community[23], and the ECJ has widely contributed to this. On the other side, nevertheless, there are authors who don't see this institutional conflict in a positive light; de Búrca *in primis*, who, as already pointed out, is

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[17] *Ibid.*, p. 399.
[18] MOECKLI D., 'Human Rights and Non-discrimination in the 'War on Terror'', *Oxford Monographs in International Law*, 7, 2008, cited in FEINBERG, M., *Op. cit.*, p. 390.
[19] For a detailed account on the characteristics of the concept of human security, see PARIS, R., 'Human security: paradigm shift or hot air?', *International Security*, 26(2), 2001, pp. 87-102.
[20] FEINBERG, M., *Op. cit.*, p. 390.
[21] AXWORTHY, L., 'Human security and global governance: putting people first', *Global Governance*, 7(1), 2016, p. 20.
[22] FEINBERG, M., *Op. cit.*, p. 391.
[23] *Ibid.*, p. 399.

convinced of the merely instrumental nature of the ECJ's case law concerning restrictive measures in the EU. Next to him, Hilpold takes a slightly more ambiguous position, doubting that it was a genuine interest in solving the conflict between security and human rights that sparked off the debate, but rather a "*power struggle*" between the institutions at the different levels involved (notably, the UN and the EU, but the ECtHR has been involved as well)[24].

1.3. Research question and methodology

It is anyways undeniable that a conflict between security and fundamental rights, whether substantial or institutional, exists, insofar as, even if progress has been made, the exercise of balance is still to be perfected. This thesis will focus on the complex balancing work that had to be done in addressing this conflict within the EU, a system that has always tried to appear as both the custodian of fundamental human rights internally and the watchdog of the same ones abroad. Its ambition notwithstanding, the EU has not been immune from the critics concerning the enactment of targeted sanctions. In particular, the research question of the present dissertation focuses on how the ECJ dealt with pleas concerning non-respect of fundamental rights in its case law. The goal is to see how the Court stroke a balance between security and human rights, and specifically to see whether fundamental rights do occupy an important place in its judgements, or whether they are an interest as any other, not vested of any special role. For this purpose, the ECJ case law will constitute the main source of the dissertation, while academic articles and reports will offer the theoretical framework and the premises of our analysis. As already hinted at, in the context of the CFSP restrictive measures, scholars focused more on the institutional and political aspects than the juridical one, and often did so with case studies on terrorism and on the *Kadi* saga. This dissertation certainly does not have the ambition to fill such gap, but it attempts to answer to the specific question of the ECJ's approach to fundamental rights in this field by taking a wider sample of judgements.

To this end, thirty-three cases have been selected, trying to keep a balance between the various grounds on which the sanction has been applied. Three big macro-areas have been identified in the selection of the judgements: sanctions in relation to the fight against terrorism (mostly addressed to persons associated to the Talibans and Al Qaeda), to the fight to nuclear

[24] HILPOLD, P., 'EU law and UN law in conflict: the *Kadi* case', *Max Planck Yearbook of United Nations Law*, 13, 2009, p. 159.

proliferation (which involves individuals and entities from the Republic of Iran), and to the state of democracy and human rights in third countries (Belarus, Libya, Myanmar, etc.), although the main criterion for selection of the cases has been their contribution to the development of the ECJ's jurisprudence, especially in terms of novelties that they have brought about.

At first, a research on the search form of the official website of the ECJ[25] has been conducted, using 'Common Foreign and Security Policy' as subject-matter of the research and 'fundamental rights' as keyword in the text. The number of cases corresponding to such criteria was too high to be reviewed within the framework of a Master thesis (in the beginning of August 2017, 278 judgements have been issued on the matter); hence, a further selection was needed. It seemed to me suitable to refer to the case law reported on the European Sanctions Blog[26] by legal practitioners Maya Lester QC and Michael O'Kane. The blog, apart from notifying regular updates on the issue of restrictive measures, offers a geographical classification of the EU sanctions in force, complete of Council regulations and decisions as well as the most relevant ECJ case law. I compared such lists with the bibliography of the academic sources I have relied upon to elaborate my theoretical framework (mainly Christina Eckes[27] and Iain Cameron[28]). This allowed me to obtain a list of around thirty judgements, complete with their main proceedings, appeal cases and AG opinions, which contributed the most to the evolution of the ECJ jurisprudence. The list did not stay unchanged over the time of the writing of this dissertation as, naturally, the further I proceeded in my preliminary analysis, the better I could discern too repetitive cases or come across more interesting ones.

For what concerns the dates of the case law selected, since the thesis aims to be an evaluation of the current stance of the ECJ analysis, most of the cases belong to the post-2008 period. It was nonetheless necessary to allow some exceptions for particularly representative cases; it was so, for example, in the case of *Bosphorus*, dating as far back as in 1996, and of the main proceedings of *Kadi*, delivered in 2003, whose appeal in 2008 represents a milestone for sanctions-related case law, as it will be detailed in the dissertation. I have also limited the analysis to cases closed before or in 2016, in order to deal with a case law that were as

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[25] www.curia.europa.eu.
[26] The European Sanctions Blog is available at: https://europeansanctions.com/.
[27] ECKES, C., *EU counter-terrorist policies and fundamental rights: the case of individual sanctions*, Oxford University Press, Oxford, 2009.
[28] CAMERON, I., 'EU sanctions law and policy issues concerning restrictive measures', *Supranational Criminal Law: Capita Selecta*, 5, 2013.

established as possible; the only exception in this instance being the appeal cases of the two judgements in *Hamas* and *LTTE*, already included in my selection of cases, and whose appeals were delivered by the ECJ on the 26th July 2017, bringing about a remarkable novelty that was worth discussing.

The thesis will therefore represent an original work of judicial analysis about how the ECJ has approached the pleas raised by the applicants according to which specific fundamental right has been allegedly breached: most notably, the rights of the defence, i.e. the right to be heard and the right to an effective judicial protection; the obligation to state reasons; the right to property; and the right to private and family life. The analysis has been conducted in fact through a transversal reading of all the case law selected: in a first moment, I had identified the different pleas raised by the applicants and chosen the cases that seemed to me to be the most representative in each context, in order to better appreciate the evolution and the current standpoint of the ECJ on the matter.

It seemed coherent to keep such division according to the pleas raised as the basis of the whole work as well, which will therefore be organised as follows. First, a chapter will be dedicated to the more procedural aspects of the case law and to the pleas challenging essential procedural requirement such as the choice of the legal basis and the competences of the EU institutions in adopting the instruments giving effect to the sanctions, as well as the scope of such sanctions. The debate over the criminal or administrative nature of such sanctions will also be introduced in chapter 2, together with the question, strictly linked to criminal procedures, of the presumption of innocence. Chapter 3 will deal with the alleged violations of all those rights relating to access to justice and to a fair trial: the rights of the defence, the right to effective judicial protection and review, the right to access the documents, and the obligation to state reasons. Chapter 4 will analyse how the claims relating to violations of the right to property are faced by the ECJ, analysed in the light of the principle of proportionality, together with the claims relating to the right to private and family life and to the right to reputation, as well as the question of the liability of the EU institutions. In the conclusion, we will sum up our findings in order to give an overall consideration about how the ECJ has carried out the balancing work in the case law selected.

2. Procedural and formal elements

2.1. The scope *ratione personae* and *ratione materiae* of restrictive measures

Before starting the enquiry on fundamental rights *per se*, it is important to briefly discuss the scope of the restrictive measures implemented by the Council both *ratione personae* (to whom these measures can be addressed), and *ratione materiae* (which kinds of funds are covered and which derogations are allowed in respect to the freeze established).

2.1.1. Ratione personae

As we have mentioned earlier, the rationale behind the creation of targeted sanctions in the '90s within the UNSC was to avoid the drawbacks brought about by the comprehensive sanctions regimes, in particular in terms of humanitarian impact and of efficiency and precision of the sanctions themselves[29]. This is why, since 1994, all UNSC sanctions have been targeted towards leaders and rulers of a country, as well as their associates and supporters, rather than the entire population, or towards a single economic sector, rather than the entire economy[30]. It is therefore undisputed that natural persons are the main addressees of these new smart sanctions, but they're not the only ones: as confirmed by the General Court (GC) in *Al-Aqsa*[31], restrictive measures can be addressed not only to natural persons but also to legal persons[32], such as enterprises or financial institutions.

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[29] SECURITY COUNCIL REPORT, *UN Sanctions*, Special research report no. 3, 2013, p. 3.
[30] TSC – TARGETED SANCTIONS CONSORTIUM, *The effectiveness of United Nations targeted sanctions*, TSC Publications, 2013, pp. 9.
[31] Judgement of the General Court of 9 September 2010, *Al-Aqsa v Council*, T-348/07, EU:T:2010:373 ('GC, *Al-Aqsa'*).
[32] GC, *Al-Aqsa*, paragraph 57-58.

What is interesting to notice is that, in a series of cases, the Court has established that it is not strictly necessary for the targeted person or entity to have carried out the material act condemned; a close link with such activity as well as the potentiality of carrying out such activity in the future are sufficient. So it is confirmed in *Ezz*[33], for example, where both the GC and the ECJ accept the enlistment of the first applicant insofar as "*complicit*"[34] in the conduct of activities ("*usurping of public assets*") which correspond "*in essence*" to the act targeted by the Council decision ("*misappropriation of State funds*")[35], as well as the enlistment of the second, third and fourth applicant, who had not yet been declared guilty of misappropriation of State funds, but who were under investigation in Egypt for such activity[36].

In *Kala Naft*[37], at first, the GC had ruled that it was necessary, for the application of restrictive measures against an individual, group or entity, that the person had actually carried on the activity condemned in the past, for "*the mere risk that the entity concerned may provide support for nuclear proliferation in the future is not sufficient*"[38]. Subsequently, though, the ECJ has reversed its ruling[39], establishing that the wording of the Council decision on which the freeze of assets was disposed was quite general ("*being engaged in, directly associated with, or providing support for…*") and that no express reference was made to actual conducts, therefore the adoption of sanctions is possible even when only a risk exists, if supported by sufficient proofs such as the statute of the entity[40] (in this case, Kala Naft has a central role in the activities conducted by the National Iranian Oil Company, which had already been found responsible for the support in nuclear proliferation plans in Iran[41]). This stance is supported by the Advocate General (AG) as well, who also refers to the preventive nature of freeze-funding sanctions: "*[i]n order to prevent such a risk materialising, it is necessary to neutralise the*

[33] Judgement of the General Court of 27 February 2014, *Ezz and Others v Council*, T-256/11, EU:T:2014:93 ('GC, *Ezz*'); and Judgement of the Court of 5 March 2015, *Ezz and Others v Council*, C-220/14 P, EU:C:2015:147 ('ECJ, *Ezz*').
[34] GC, *Ezz*, paragraph 136.
[35] GC, *Ezz*, paragraph 139-140.
[36] GC, *Ezz*, paragraph 134.
[37] Judgement of the General Court of 25 April 2012, *Manufacturing Support & Procurement Kala Naft Co. v Council*, T-509/10, EU:T:2012:201 ('GC, Kala Naft').
[38] GC, *Kala Naft*, paragraph 115.
[39] Judgement of the Court of 28 November 2013, *Council v Manufacturing Support & Procurement Kala Naft Co.*, C-348/12 P, EU:C:2013:776 ('ECJ, Kala Naft').
[40] ECJ, *Kala Naft*, paragraph 84-90.
[41] Judgment of the General Court of 16 July 2014, *National Iranian Oil Company v Council*, T-578/12, EU:T:2014:678 ('GC, *NIOC*').

activities, conducts and relationships of persons and entities which the States have reasonable grounds for believing may, if restrictive measures are not applied, contribute to the development of the Iranian nuclear programme. From that point of view, for a person or entity to be recognised as supporting nuclear proliferation, it is sufficient if, by reason of its activity, conduct and/or links, that person or entity may be likely to contribute to the Iranian nuclear programme." [42]

It might be argued that such a possibility to apply sanctions on the sole basis of a future likeliness of the person or entity in question of engaging with condemned activities goes against the principle of guilt (*nulla poena sine culpa*), insofar as the EU institutions are allowed to impose sanctions without a material act having been executed. Nevertheless, the *nulla poena sine culpa* is a principle typical of criminal law and, as we will see in the following sections, the criminal nature of restrictive measures is everything but certain: the EU Courts have in fact adopted the view that freezes of assets do not correspond to criminal sanctions, hence the principle of guilt does not apply in such cases.

2.1.2. Ratione materiae

Although the exact material scope of the restrictive measures is specified in the respective Council resolutions and there is not a, so to say, universal rule for what is covered by them, normally freezes are directed to two kinds of assets: funds and economic resources. The first ones relate to "*financial assets and economic benefits of every kind*", while economic resources are generally defined as "*assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services*"[43]. Throughout the dissertation, for the sake of brevity and clarity, we will use only the term 'funds', it being understood that it can refer to both funds *strictu sensu* and economic resources.

Normally, regulations also include the general prohibition for funds or economic resources to be "*made available, directly or indirectly, to or for the benefit*" of the designated person or entity[44].

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[42] Opinion of AG Bot delivered on 11 July 2013, *Council v Manufacturing Support & Procurement Kala Naft Co.* C-348/12 P, EU:C:2013:470 ('AG Op., *Kala Naft*'), paragraph 184-185.
[43] See, for example, article 1 of Council regulation No 881/2002 of 27 May 2002.
[44] See, for example, article 7(3) of Council regulation No 423/2007.

The question rose in *Afrasiabi*[45] whether this prohibition included also resources that were not immediately ready for use, such as, as in the present case, a furnace installed without the software necessary for its functioning. The Court ruled that "*the relevant criterion (...) is whether there is a possibility that the asset in question may be used to obtain funds, goods or services*" [46] – in this case, funds, goods or services that may be used to support nuclear proliferation in Iran. Additionally, the Court specifies that there are also two cumulative requirements of knowledge and intent relating to the prohibition of making funds or economic resources available to a designated person: these requirements are met "*where the person participating in an activity covered by [the prohibition] deliberately seeks the object or the effect, direct or indirect, of circumvention connected therewith. They are also met where the person in question is aware that his participation in such an activity can have that object or effect and accepts that possibility*"[47].

Derogations to such prohibition are nevertheless usually made for humanitarian reasons, particularly in order to cover "*basic expenses*"[48]. A few preliminary references made by national authorities to the ECJ help define in a more precise way what is covered by these exceptions. A case where such derogation is not permitted, for example, concerns the final registration of a transfer of ownership of an immovable property, even if in performance of a contract concluded prior to the enlistment of the buyer in the blacklists for the freeze of his/her funds, and even if the price had already been paid by the buyer – in such case, the seller must repay the buyer, on the condition that the funds repaid be subject to the freezing[49]. Derogations are instead permitted for social security or social assistance benefits provided by the State to the spouse of a designated person (as in *M and Others*)[50], as well as for funds intended for the payment of legal services of which the designated person had benefitted (as in *Peftiev*)[51]. In particular, the Court highlights that "*the competent national authority does not enjoy an absolute discretion [in deciding whether to grant a derogation or not], but must exercise its powers in a manner which upholds the rights provided for in the second sentence of the second paragraph of Art.*

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[45] Judgement of the Court of 21 December 2011, *Afrasiabi and others*, C-72/11, EU:C:2011:874 ('GC, *Afrasiabi*').
[46]GC, *Afrasiabi*, paragraph 46.
[47] GC, *Afrasiabi*, paragraph 67.
[48] See, for example, article 2a(1)(i) of Council regulation No 881/2002 of 27 May 2002 as modified by regulation No 561/2003.
[49] Judgement of the Court of 11 October 2007, *Möllendorf and Möllendorf-Niehuus*, C-117/06, EU:C:2007:596.
[50] Judgement of the Court of 29 April 2010, *M and Others*, C-340/08, EU:C:2010:232 ('GC, *M and Others*').
[51] Judgement of the Court of 12 June 2014, *Peftiev and Others*, C-314/13, EU:C:2014:1645 ('ECJ, *Peftiev*').

47 of the Charter [of Fundamental Rights of the EU]"[52]. Derogations are therefore very much intended as a protection of certain fundamental rights of the designated person, such as the right to access to justice provided for by art. 47 of the Charter of Fundamental Rights of the EU (thereinafter, the Charter). But access to justice seems to be the only fundamental right taken into consideration by the ECJ in such context. The AG in *M and Others*, in fact, makes also reference to the right to respect of the family life of the designated person[53]; this consideration notwithstanding, the Court does not make any explicit reference to the right to private and family life but merely assesses that social benefits are hardly of such an entity that they can be converted into funds that could be used to support terrorist activities[54].

2.2. The question of the legal basis and of the existence of "*sufficient links*" between a person and a third country

2.2.1. The role of art. 352 TFEU (ex art. 308 EC)

An element of very frequent discussion in the ambit of sanctions-related case law is the legal basis on which restrictive measures are applied. As we have seen, the internal procedure that allows the Council to adopt sanctions is the same regardless of the origin of the sanction, be it autonomous or derived from a UNSC resolution; therefore, there is no such distinction to take into consideration in this section.

In *Bank Melli*[55], the applicant, Bank Melli Iran, contests the legal basis that the Council had indicated in order to adopt the regulation in question, namely art. 75 TFEU (ex art. 60 EC) and 215 TFEU (ex art. 301 EC), according to which the Council, on the basis of a Community common position, can interrupt economic and financial relations with third countries, acting by qualified majority voting. According to the applicant, these two articles were not enough to justify the adoption of the contested Council regulation. Instead, art. 352 TFEU (ex art. 308 EC) should have been included, too, insofar as the freezing of funds was directed to a legal

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[52] ECJ, *Peftiev*, paragraph 29.
[53] Opinion of AG Mengozzi delivered on 14 January 2010, *M and Others* C-340/08, EU:C:2010:13, ('AG Op., *M and Others*'), paragraph 90.
[54] GC, *M and Others*, paragraph 61.
[55] Judgment of the CFI of 14 October 2009, *Bank Melli Iran v Council*, T-390/08, EU:T:2009:401 ('CFI, *Bank Melli*'); and Judgement of the Court of 16 November 2011 *Bank Melli Iran v Council*, C-548/09, EU:C:2011:735 ('ECJ, *Bank Melli*').

person and not to the Republic of Iran; in this case, the voting procedure ought to have been unanimity, and not qualified majority. To substantiate its claims, Bank Melli quotes[56] the *Kadi II* judgement given by the ECJ the year before. In *Kadi*, in fact, the Court had clarified that art. 60 and 301 EC concern indeed the adoption of measures *vis-à-vis* third countries, concept that includes the rulers of such countries as well as individuals and entities associated with or controlled, directly or indirectly, by them[57]. On the other hand, art. 308 had been "*designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act*"[58], therefore justifying the fact that sanctions were now addressed to single individuals and not to countries. The ECJ does not share Bank Melli's opinion: art. 60 and 301 EC alone were considered to be sufficient for the validity of the Council regulation insofar as Bank Melli is an "*Iranian commercial bank owned by the Iranian State*"[59], which has "*provided financial support [to the Iranian government] for nuclear proliferation*"[60]. The fact that this finding had not been challenged by the applicant was enough for the ECJ and the AG Mengozzi[61] to consider Bank Melli as an entity directly connected with the Iranian regime, and since the *ratio legis* of the Council regulation was to combat the Iranian policy of nuclear proliferation, the recourse to art. 60 and 301 EC alone were sufficient to include Bank Melli in the list for freezing funds[62].

We can thus make a first consideration on the scope of the targeted sanctions regime: the fact that the addressee of a restrictive measure is a natural or legal person does not automatically mean that we need a recourse to art. 308 to justify the Council's action. As explicitly mentioned by the ECJ in *Kadi* and reiterated in *Bank Melli*, the leader of a country as well as individuals and entities associated with them can be subject to a sanctions regime based on a Council decision taken by qualified majority voting rather than unanimity, as long as they are "*actually and sufficiently linked*" to the state in question[63]. Neither the AG nor the ECJ gave a precise definition of what an actual and sufficient link is, since the link between the Republic of Iran

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[56] ECJ, *Bank Melli*, paragraph 60.
[57] ECJ, *Kadi II*, par. 166.
[58] ECJ, *Kadi II*, par. 211.
[59] CFI, *Bank Melli*, paragraph 1.
[60] CFI, *Bank Melli*, paragraph 30.
[61] Opinion of AG Mengozzi delivered on 28 June 2011, *Bank Melli Iran v Council*, C-548/09, EU:C:2011:426 ('AG Op., *Bank Melli'*).
[62] AG Op., *Bank Melli*, paragraph 77; and ECJ, *Bank Melli*, paragraph 69.
[63] AG Op., *Bank Melli*, paragraph 75.

and Bank Melli was considered to be rather obvious, being the latter directly owned by the Iranian State.

2.2.2. Identifying those responsible for the condemned behaviour

A more explanatory case on this point is instead *Tay Za*[64], which deals with restrictive measures applied on the sole basis of art. 60 and art. 301 EC to Mr Tay Za, on the grounds that he is the son of an important Burmese businessman whom the Council has considered as benefitting from the military regime in Myanmar. By challenging the legal basis on which the contested regulation was adopted, Mr Tay Za claims that the Community didn't have the authorisation to include his name in the list for the freeze of funds, since he is not himself a member of the Government of Myanmar or a person associated with it. As in *Bank Melli,* the GC proceeds to establish whether Mr Tay Za, who is clearly not a member of the government, could be considered as a person associated with it, and the question of the sufficient link first mentioned in *Bank Melli* comes up.

The GC points out that the Council itself explained what this sufficient link was, by stating that Mr Tay Za was considered as associated with the regime of Myanmar "*because of the existence of an indirect link between him and the regime. (...) [T]hat link is established as a result of his father's function as managing director of [two Burmese companies], from which the applicant is assumed to benefit*"[65]. The Council has therefore found a direct link between the father of the applicant and the regime because of his function as a businessman whose enterprises were prospering thanks to the favour of the regime, and an indirect link between the applicant and the regime because of his familiar ties with a person directly associated with the regime. The GC agrees with the Council's argument that a presumption exists, that family members of leading business figures benefit from the functions exercised by the latter. This presumption is nevertheless rebuttable, in the eyes of the Court, if the applicant demonstrates that a close link with the family member in question does not exist[66]. Moreover, the Court adds, including family members of leading business figures is necessary for the effectiveness of the restrictive measure's sake: it is likely that a businessman included in the sanctions lists will try

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[64] Judgement of the General Court of 19 May 2010, *Tay Za v Council*, T-181/08, EU:T:2010:209 ('GC, *Tay Za*').
[65] GC, *Tay Za*, paragraph 65.
[66] GC, *Tay Za*, paragraph 67-68.

to circumvent the restrictions upon him by transferring his assets to the accounts of family members, hence the need to freeze the funds of their family members as well[67].

This position is reversed by the ECJ in the appeal[68]: at paragraph 65-66 of the appeal judgement, the ECJ in fact states that "*[b]y considering that it may be presumed that the family members of leading business figures also benefit from the economic policies of the government, the GC extended the category of natural persons who may be subject to targeted restrictive measures. The application of such measures to natural persons on the sole ground of their family connection (...), irrespective of the personal conduct of such natural persons, is at variance with the Court's case-law on Articles 60 EC and 301 EC*". The ECJ recalls *Kadi* once again, highlighting how the fact that restrictive measures against a third country could not be directed at persons associated with the country "*in some other way*" was intended to mean that the Council, first, and the Court, if that is the case, should keep a restricted focus on persons or entities who are actually associated with the country in a direct way, relying on "*precise, concrete evidence*" relating to the individuals concerned, and not merely on their familiar ties[69].

AG Mengozzi offers a particularly effective metaphor for a situation such as the one in *Tay Za*. As described in paragraphs 40 of his Opinion[70], situations like the one at stake can be visualised through the imge of three concentric circles. "*The first circle comprises the rulers themselves, that is to say the members of the government or other persons who have real decision-making power and therefore hold preeminent political responsibility for the situation which the EU aims to combat. (...) The second circle comprises persons associated directly or indirectly with the rulers belonging to the first circle; these may be members of the rulers' families but also persons who benefit from the economic policies. The third circle then comprises the family members of persons who benefit from the economic policies, in connection with whom the Council does not take account of any direct or indirect responsibility in the decision-making process, or even in the enjoyment of benefits by the members of the second circle. (...) [T]his third circle seems to me to be too remote from the decision-making centre for it to be subject of restrictive measures adopted solely on the basis of Article 60 and 301*

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[67] GC, *Tay Za*, paragraph 72.
[68] Judgement of the Court of 13 March 2012, *Tay Za v Council*, C-376/10, EU:C:2012:138 ('ECJ, *Tay Za*').
[69] ECJ, *Tay Za*, paragraphs 68-70.
[70] Opinion of AG Mengozzi delivered on 29 November 2011, *Tay Za v Council* C-376/10 P, EU:C:2011:786 ('AG Op., *Tay Za*').

EC." Even more, the AG believes that even business leaders should be treated differently than rulers, if they are passive actors and do not perform any official public function[71]. After all, the very rationale underlying the system of targeted sanctions is to achieve "*behavioural modifications*"[72]: in order to end a certain activity – be it terrorism, nuclear proliferation, or violations of human rights, as in the Myanmar case – it is necessary to target those individuals or entities that have an actual decision-making power over such activity; a mere passive or indefinite involvement might not be sufficient.

Another remarkable point in the AG Opinion concerns the answer that AG Mengozzi gives to the claim made by the GC, that the existence of a presumption of involvement of family members of persons associated with the regime was justified by the need to ensure effectiveness to the sanctions. To this claim, Mengozzi replies, "*I do not believe that everything may be sacrificed on the altar of the effectiveness of the restrictive measures. By this I mean, that the very thing that gives the EU its added value, that distinguishes it from the authoritarian regimes it fights against, is the implementation and defence of a union governed by the rule of law. (…) Absolute effectiveness (…) must fall by the wayside, the very fallibility of the restrictive measures testifying to the fact that, in the legal system of the EU, it is the rights of individuals that are paramount*."[73] This is an explicit and straightforward declaration of the existence of a hierarchic order to be kept in mind when elaborating restrictive measures, and even more when judging proceedings initiated against them: fundamental rights should come first, effectiveness of the measures and security second. As foreseeable, though, the ECJ did not follow the AG Opinion literally, and although it did recognise the link found by the GC in the main proceedings to be based on a too broad interpretation of articles 60 and 301 EC, it did not include such an upfront statement in its reasoning, leaving the door open not only to a possible balancing between fundamental rights protection and effectiveness of security measures, but also to further negative consequences on the protection of individual rights itself.

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[71] AG Op., *Tay Za*, paragraph 43.
[72] CAMERON, I., 'UN targeted sanctions, legal safeguards and the European Convention on Human Rights', *Nordic Journal of International Law*, 72, 2003, p. 171.
[73] AG Op., *Tay Za*, paragraph 44.

2.3. The scope *ratione personae* of fundamental rights in sanctions-related cases

A question was raised in a few cases about whether legal persons enjoyed fundamental rights as well, or whether only natural persons could benefit from their protection. A first case in point is *Kala Naft*. Here, the Council, supported by the Commission, submits with particular insistence an observation concerning the impossibility of having Kala Naft bringing proceedings for the alleged violation of its fundamental rights, saying that, since Kala Naft is a company set up by the state-owned National Iranian Oil Company, it had to be considered as a governmental organisation and therefore as an offshoot of the Iranian State itself, and as such it could not forward claims concerning fundamental rights. This argument is at first dealt with by the GC in the main proceedings[74] as a matter of merits of the case rather than of admissibility, and therefore dismissing the Council's argument. The Council insists in the appeal[75] that it is indeed a question of admissibility, insofar as Kala Naft, being a government organisation for the purposes of art. 34 of the European Convention of Human Rights (ECHR)[76], does not have *locus standi* to bring proceeding on alleged infringements of fundamental rights. The question is quickly dismissed by the ECJ as well, which merely gives reason to the GC's ruling.

It is instead the AG who carries on a fuller review of the Council's claims and offers a good cause for reflection[77]. In fact, both the GC in the main proceedings and the ECJ in the appeal consider the question raised by the Council exclusively in terms of distinction between admissibility and merits of Kala Naft's ability to enjoy fundamental rights. AG Bot agrees with the GC's finding that the question should be dealt with in terms of merits and not of admissibility, underlying that Kala Naft has *locus standi* to bring proceedings to the ECJ because it is contesting a measure "*of direct and individual concern to it within the meaning of the fourth paragraph of Article 263 TFEU*"[78]. He also reminds that the GC itself has already established that art. 34 ECHR, to which the Council makes reference, is a procedural provision not applicable within the EU judicial system, since the latter is governed by its own set of different procedural provisions, among which the quoted art. 263 TFEU: although a duty of

[74] GC, *Kala Naft*, paragraphs 43-46.
[75] ECJ, *Kala Naft*, paragraphs 47-49.
[76] Article 34 ECHR on individual applications reads: "The Court may receive applications from any person, *non-governmental organisation* or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right" (emphasis added).
[77] AG Op., *Kala Naft*.
[78] AG Op., *Kala Naft*, paragraph 59.

consistent interpretation generally exists between EU law provisions and the ECHR, the AG rules out a correspondence of Art. 34 ECHR within EU law exactly because of the own peculiarity of the rules of proceedings relating to the ECJ.

Beside this procedural and very formalistic discussion, the AG goes deeper to the essence of the Council's claim and to the consequences that would derive, were such claim to be accepted by the ECJ. Bot, in fact, notes how "*the Council's argument [that governmental organisations should not enjoy fundamental rights] has the effect, purely and simply, of depriving persons and entities dependant in one way or another on a third State of their right to an effective [judicial] remedy*"[79]. The AG claims to be surprised by the Council's and the Commission's attitude, which is in complete contrast with the obligation to respect fundamental rights enshrined in the Treaties. Not only, he also reproaches the GC of having once accepted, in *Tay Za*[80], this same idea that fundamental rights do not apply to person and entities named in the lists of sanctions aimed at third countries. By doing so, in fact the Court has created an artificial distinction, as Bot defines it, between persons and entities subject to targeted sanctions "*on account of their own activities*" and person and entities subject to targeted sanctions "*because they belong to a general category of persons and entities*"[81]. Nevertheless, such a critic is not followed up by the ECJ: the Court does not clarify, as the AG had hoped, that such distinction argued by the Council and once accepted by the GC is artificial and detrimental to the protection of fundamental rights; it just refers to the procedural side of the discussion and overlooks the more substantive question on the scope.

The fact that the ECJ turned a blind eye on the AG's suggestion could represent a first warning sign about the superficial importance that the ECJ might be assigning to fundamental rights in its sanctions-related case law. If, on one side, the Court delivers more or less exhaustive judgements in favour of fundamental rights, especially the ones related to the rights of the defence and to a fair trial, as we will see later on, on the other, quickly ruling on a basic question about defining who is entitled to fundamental rights might cast a long shadow on its apparently good intentions. Implicitly accepting the idea that such fundamental rights are due according to categorisations (individual or entities subject to targeted sanctions because of their own actions enjoy fundamental rights, while individual or entities belonging to categories somehow linked

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[79] AG Op., *Kala Naft*, paragraph 64.
[80] GC, *Tay Za*, paragraphs 121-123.
[81] AG Op., Kala Naft, paragraph 73.

to the third country addressee of the sanctions do not) obviously clashes with the universal nature that fundamental rights are supposed to have. Fundamental rights should belong to everyone, as AG Bot recalls, and cannot be assigned "*according to whether [the persons or entities] have more or less close links with a third country*"[82]. By ignoring this crucial characteristic of fundamental rights, the ECJ would seriously jeopardise the effective protection of these same rights.

It appears, nonetheless, that the Court recognised its imprudence and tried to adjust its message a few years later. In the series of judgements concerning Bank Mellat[83] and Bank Saderat[84], it is directly the GC in the main proceedings who states that fundamental rights belong to "*everyone*"[85], finally abandoning that distinction between individuals and entities directly involved, and individual and entities who are associated with third States. Bank Mellat and Bank Saderat are referred to in terms of legal entities, and not as governmental organisations not necessarily because they are not recognised as such, but because the Court acknowledges that their links with the Iranian State would not change the outcome of its reasoning: "*EU law contains no rule preventing legal persons which are emanations of non-Member countries from taking advantage of fundamental rights protection and guarantees. Those rights may therefore be relied upon by those persons before the Courts of the EU in so far as those rights are compatible with their status as legal persons*."[86]

2.4. Criminal *vs* administrative nature of the sanctions

2.4.1. The general notion of criminal sanctions in EU law

Another element of paramount importance in the debate surrounding fundamental rights in sanctions-related case law concerns the legal classification of the sanctions themselves, and to the consequences attached to such classification. In particular, reference shall be made to the

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[82] AG Op., Kala Naft, paragraph 67.

[83] Judgement of the General Court of 29 January 2013, *Bank Mellat v Council*, T-496/10, EU:T:2013:39 ('GC, *Bank Mellat*'); and Judgement of the Court of 18 February 2016, *Council v Bank Mellat*, C-176/13 P, EU:C:2016:96 ('ECJ, *Bank Mellat*').

[84] Judgement of the General Court of 5 February 2013, *Bank Saderat Iran v Council*, T-494/10, EU:T:2013:59 ('GC, *Bank Saderat*); and Judgement of the Court of 21 April 2016, *Council v Bank Saderat Iran*, C-200/13 P, EU:C:2016:284 ('ECJ, *Bank Saderat*').

[85] GC, *Bank Mellat*, paragraph 35-41; and GC, *Bank Saderat*, paragraph 33-39.

[86] GC, *Bank Mellat*, paragraph 41; and GC, *Bank Saderat*, paragraph 39.

possibility and the limits of the recourse to art. 6 ECHR. Despite the fact that this article covers the right to fair trial in criminal proceedings, some of its aspects have been recognised as general principles of EU law and therefore applicable to all types of proceedings, not only criminal ones: such principles include namely the right to effective judicial protection and judicial review, corresponding to paragraph 1 of art. 6 ECHR and enshrined in art. 47 of the Charter as well, and the obligation to state reasons, mentioned in the third paragraph of art. 6 ECHR. This standpoint has been confirmed in sanctions-related case law as well, most notably in the *Kadi*[87] case and in *OMPI*[88], to which more space will be dedicated in the next chapter. Here we want to focus on the one aspect that has not been recognised as applicable in proceedings different from criminal proceedings in EU law, that is, the principle of presumption of innocence, expressed in art. 6(2) ECHR.

Several actions have in fact been brought before the Court of First Instance (CFI) and the GC claiming a breach of the principle of presumption of innocence due to the inclusion of the applicants in the blacklists and the subsequent freeze of their funds. The question of whether presumption of innocence exists in relation to the application of restrictive measures has important implications in establishing the legal classification of the measures themselves: if restrictive measures such as the freeze of funds were classified as criminal sanctions, then the principle of presumption of innocence would have to apply; if instead it were recognised that restrictive measures are not criminal in their nature, the presumption of innocence would not be relevant.

As it is known, the ECJ has aligned its conclusions with the interpretation that the ECtHR has given to art. 6 ECHR since the *Schindler* judgement[89], a case falling in the scope of competition law but that is nevertheless useful for the purposes of understanding what the EU Courts consider as a "criminal charge". *Schindler* in fact supports[90] the decision of the ECtHR

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[87] ECJ, *Kadi II*, paragraph 335-337.
[88] Judgment of the CFI of 12 December 2006, *Organisation des Modjahedines du Peuple d'Iran v Council*, T-228/02, EU:T:2006:384 ('CFI, *OMPI*'), paragraph 109.
[89] Judgement of the General Court delivered on 13 July 2011, *Schindler Holding v Commission*, Case T-138/07, EU:T:2011:362 ('GC, *Schindler*').
[90] GC, *Schindler*, paragraph 52.

in the *Jussila* case[91], which in turn recognises that the criteria established in *Engel*[92] to determine the criminal nature of an economic sanction – i.e., legal classification of the offence in the legal system of the State concerned, nature and seriousness of the offence, and severity and purpose of the sanction[93] – were applicable only to the "*hard core*" of criminal law, while instead those "*criminal-head guarantees will not necessarily apply with their full stringency*" in "*criminal cases which do not carry any significant degree of stigma*"[94].

2.4.2. CFSP restrictive measures as criminal sanctions?

The first two *Engel* criteria, domestic classification and nature of the offence, constitute a problem for the categorisation of EU restrictive measures as criminal offences. It is in fact sufficient to think of the case of sanctions aimed at combating terrorism: while in fact both the legal classification and the nature of terrorism correspond to criminal offences under the law of the Member States, the measures applied at the EU level are normally classified as administrative and not criminal[95]. This classification, though, seems to me to be in contrast with the wording of art. 83 TFEU, which provides for a partial approximation in the field of substantive criminal law. The second indent of art. 83(1) TFEU, in fact, lists a series of so-called 'eurocrimes' for which the Council, together with the European Parliament in accordance with the ordinary legislative procedure, can establish minimum rules concerning the definition of criminal offences and sanctions; among these eurocrimes, there is the explicit mention of terrorism. This would mean that terrorism is indeed classified as a crime both under each of the MS's legal orders and the EU legal system itself. It is true that art. 83 TFEU would fit in the former third pillar of Police and Justice Cooperation, as named in the Amsterdam Treaty, while the sanctions regime belongs to the CFSP area and thus finds its ultimate legal basis in art. 29 TEU; nevertheless, for the sake of uniformity within EU law, one could argue that terrorist acts might be classified as criminal acts also under EU law. In any event, the case of terrorism

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[91] Judgement on the merits delivered by the Grand Chamber, *Jussila v. Finland* [GC], application no. 73053/01, ECtHR, 2006 ('ECtHR, *Jussila*').
[92] Judgement of the Plenary delivered on 8 June 1976, *Engel and others vs the Netherlands*, application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, ECtHR, 1976 ('ECtHR, *Engel*').
[93] ECtHR, *Engel*, paragraph 82.
[94] ECtHR, *Jussila*, paragraph 43.
[95] VAN DEN BROEK, M., HAZELHORST, M., DE ZANGER, W., 'Asset Freezing: Smart Sanction or Criminal Charge?', *Merkourios - Criminal Justice and Human Rights*, 27(72), 2010, p. 26.

appears to be an exception that could be justified by creating a distinction in nature between "European" terrorism and international terrorism[96], according to which the former is treated under national and European criminal law while the latter remains purely a matter of EU external relations. This distinction could also be justified by the lack of parallels with the other grounds for applying restrictive measures such as nuclear proliferation or violations of human rights in third countries, which do not constitute eurocrimes as of art. 83(1) TFEU.

Considering therefore the first two *Engel* criteria as controversial in the case of CFSP sanctions, the third criterion about the purpose and the severity of the restrictive measures appears to be the decisive one in the eyes of the ECJ: without any doubt, sanctions such as a freeze of funds are quite severe, and this could lead to think that their effect is also punitive and not merely preventive. Nevertheless, the ECJ always underlines their temporary character, considering that sanctions can be lifted whenever there is no longer reason for the persons to be included in the blacklists[97], hence excluding a punitive intent.

2.4.3. The ECJ case law on the allegedly criminal nature of CFSP sanctions

One of the first and most important cases in which the question about the criminal nature of sanctions has arisen is *Sison I*[98]. Here the applicant did not specifically call into question his right to be presumed innocent, but rather challenged the possibility of the Council to adopt restrictive measures insofar as the EU institutions didn't have competences in criminal matters, thus implicitly claiming that freezes of funds correspond to criminal sanctions. The CFI, nevertheless, labels this claim as based on a "*mistaken premise*": the freeze of funds against Mr Sison was not taken as a consequence of a criminal proceeding but rather as a preventive measure, therefore such sanction cannot have a criminal nature[99]. The explanation may hide a rather circular reasoning: the Court states that a freeze of funds is not a criminal sanction because it doesn't follow a criminal proceeding, but we could say that the proceeding is not

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[96] This distinction between "European" and "international" terrorism must be understood as referring to terrorist acts committed on the European territory (so to fit in the category of "eurocrimes") and terrorist acts committed elsewhere. It is a distinction that has not been retrieved by any piece of literature and is only meant as part of a personal spontaneous reflection. It is also not meant as a way to initiate a discussion on what can be categorised as a terrorist act in the EU legal order, as this topic finds neither space nor reason in this dissertation.
[97] VAN DEN BROEK, M., HAZELHORST, M., DE ZANGER, W., *Op. cit.*, p. 27.
[98] Judgment of the CFI of 11 July 2007. *Jose Maria Sison v Council*, T-47/03, EU:T:2007:207 ('CFI, *Sison I*').
[99] CFI, *Sison I*, paragraph 101.

criminal in nature because the Council does not have the power to initiate such criminal proceedings in the first place. The Court in *Sison I* seems to be rejecting a claim of lack of competences of the Council by briefly arguing that the problem doesn't exist exactly because the Council does not have those competences.

We have to wait only two years to obtain a more extensive clarification by the EU Court. This comes in the *El Morabit* case[100], where the applicant had been included in the EU blacklists following to a condemnation in the Netherlands for participation to a group with terrorist ends, condemnation that was, at the time of the facts, under appeal before the domestic appeal court. El Morabit claims that his inclusion in the blacklist would have been legitimate only following to a definitive condemnation, and by not respecting this requirement, the Council had violated the applicant's right to be presumed innocent[101]. The CFI this time offers a more extensive explanation on why it believes that the freeze of funds to which Mr El Morabit had been subject did not correspond to a criminal sanction, and thus why the principle of presumption of innocence did not apply to his case. Restrictive measures such as the freeze of funds, in fact, do not compromise the presumption of innocence of the individuals targeted because they are merely preventive, insofar as they are measures provided by law, adopted by a competent authority and limited in time: a freeze of funds, in fact, is always provided for by a common position that also indicates the Council as the competent authority to implement them and requires that the lists be reviewed, always by the Council, periodically, hence their temporary as well as reversible nature[102].

This standpoint is also confirmed in subsequent cases, such as *Ezz* and *Alsharghawi*[103], which were delivered after the *Schindler* judgement mentioned earlier. After reiterating the temporary character of the sanctions, the GC adds that the immediate objective of a freeze of assets is neither to punish or prevent the repetition of a certain conduct[104], nor to render a decision of culpability of the person[105], but merely to "*preserve the assets*"[106] of the persons,

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[100] Judgment of the CFI of 2 September 2009, *El Morabit v Council*, joined cases T-37/07 and T-323/07, EU:T:2009:296 ('CFI, *El Morabit*').
[101] CFI, *El Morabit*, paragraph 28.
[102] CFI, *El Morabit*, paragraph 40-42.
[103] Judgment of the General Court of 20 September 2016, *Alsharghawi v Council*, T-485/15, EU:T:2016:520 ('GC, *Alshargawi*').
[104] GC, *Ezz*, paragraph 78.
[105] GC, *Alshargawi*, paragraph 69.
[106] GC, *Ezz*, paragraph 78.

entities or bodies indicated by the respective Council decisions. This is particularly evident in the *Ezz* case, where the second, third and fourth applicants contest their enlistment on the grounds that they had not yet been convicted by the Egyptian competent courts for misappropriation of State funds[107]. Nevertheless, the GC believes that the fact that the Egyptian judicial authorities had asked the EU for judicial cooperation, insofar as the applicants were currently under investigation for misappropriation of State funds, was a sufficient ground for the Council to apply restrictive measures[108].

The Court therefore operates a distinction between criminal sanctions, conclusive of a criminal proceeding, and administrative sanctions, which do not correspond in themselves to a guilty verdict, and which therefore cannot be prevented by the principle of presumption of innocence. The same arguments could also be used to justify the non-adherence to the principle of *nulla poena sine culpa* as mentioned above in Chapter 1.1: not being in the field of criminal law, the principle of guilt does not apply and consequently does not need to be respected. Considering that *Alsharghawi* was delivered only last year (2016), at least for the moment, it seems unlikely that the Court will reverse this point of view.

2.4.4. The implications of the non-criminal nature on fundamental rights

The question whether or not restrictive measures such as assets-freezing actually are of a criminal nature is one of the most divisive, since accepting their administrative character would eliminate the possibility to invoke the presumption of innocence and the principle of guilt, and therefore might open the way to abuses of power or anyways have important repercussions on the reputation of the individuals or entities that could have been enlisted by error. This risk is even more likely if we take into consideration the recent tendency of the EU Courts to accept a sort of waiver on the burden of proof lying on the Council in certain circumstances.

Several cases have in fact confirmed that it is for the Council to show the evidences that brought to the enlistment and subsequent freeze of funds of the persons or entities concerned, as it will be described in the next chapter when dealing with the obligation to state reasons. Nevertheless, the recent developments, in particular, of the situation in Syria have led the Courts

[107] GC, *Ezz*, paragraph 131.
[108] GC, *Ezz*, paragraph 134.

to recognise the possibility for the Council to discharge the burden of proof lying on it "*if it presents to the Courts of the EU a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the person subject to a measure freezing his funds and the regime being combated*"[109]. Although it is recognised that an explicit presumption that – in this series of cases – the heads of the leading businesses of Syria provide support for the Syrian regime does not exist[110], the Court still recognises that the use of such presumption is permitted if this is consistent with the objective of the legislation at issue, if it is proportionate to its aim, and if it is rebuttable[111]. In particular, it is interesting to notice how in the brief proportionality test that is applied by the Court in such instances, security and the conduct of international relations of the EU and of its Member States is seen as an overriding consideration which permits the discharge of the Council's burden of proof[112], leaving the individual with the task to prove that they are not a businessman, or alternatively that they had publicly condemned the regime or publicly distanced themselves from it[113]. Even more, the Council is allowed to make us of this presumption "*on the basis of common experience derived from the normal course of events*"[114]: this means that the Council is in a way allowed to make generalisations about a whole category of persons or entities (businessmen, in this case), therefore ignoring the individual and personal situation of each of them. This orientation of the Court seems to validate the fear we expressed earlier when discussing the failure, on behalf of the Court, to follow up with AG Mengozzi's wish, expressed in *Tay Za*[115], to give more prominence to the actual and active involvement of each individual and to hold fundamental rights as paramount interest of the EU legal order.

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[109] Judgement of the Court of 21 April 2015, *Anbouba v Council*, C-605/13 P, EU:C:2015:248 ('ECJ, *Anbouba*'), paragraph 52.
[110] ECJ, *Anbouba*, paragraph 43.
[111] Judgement of the General Court of 12 February 2015, *Akhras v Council*, T-579/11, EU:T:2015:97 ('GC, *Akhras*')., paragraph 113-114.
[112] GC, *Akhras*, paragraph 115.
[113] GC, *Akhras*, paragraph 117.
[114] GC, *Akhras*, paragraph 112.
[115] AG Op., *Tay Za*, paragraph 43-44.

3. The rights linked to the access to justice

3.1. The notion of access to justice in EU law

The biggest reproach that is addressed to both the Council and the EU Courts is probably the seemingly lack of attention for all those rights that concern access to justice and effective judicial protection; from the right to be heard to the right to judicial review, the breach of these norms is often the major violation lamented by the applicants in sanctions-related case law.

Access to justice, in EU law, is both a means and an end: through the actual possibility of referring a case to a court or tribunal, its purpose is to "*enable individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in [judicial]*[116] *proceedings*"[117]. While the ECHR and other international instruments don't make mention to access to justice as a legal concept in itself but nonetheless protect its components separately[118], the phrase is explicitly mentioned in conclusion of art. 47 of the Charter of the EU. This allows us to identify all the specific rights that, in the EU legal order, pertain to the more general notion of access to justice: the right to an effective remedy before a court or tribunal; the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law; the right to be advised, defended and represented; and the right to legal aid in case of lack of sufficient resources[119]. The last two are rarely brought up in cases relating to restrictive

[116] The source originally talked about "*criminal proceedings*", but it continued saying that access to justice "*is an important element of the rule of law and cuts across civil, criminal and administrative law*", annulling any difference between criminal and administrative proceedings, such as the ones relating to restrictive measures.
[117] EU AGENCY FOR FUNDAMENTAL RIGHTS, *Handbook on European law relating to access to justice*, EU Publications, 2016, p. 16.
[118] For example, art. 6 ECHR (right to fair trial) and art. 13 ECHR (right to judicial remedy).
[119] EU AGENCY FOR FUNDAMENTAL RIGHTS, *Access to justice in Europe: an overview of challenges and opportunities*, EU Publications, 2010, p. 15.

measures, and have never been mentioned in the case law selected; therefore, the analysis will only focus on the right to effective remedy and to a fair hearing.

In particular, the right to a fair hearing is often considered by the ECJ as being one part of the more general rights of the defence. As ruled, for example, in *OMPI*, in fact, "*the safeguarding of the rights of the defence comprises, in principle, two main parts. First, the party concerned must be informed of the evidence adduced against it to justify the proposed administrative sanction ('notification of the evidence adduced'). Second, he must be afforded the opportunity effectively to make known his view on that evidence ('hearing')*"[120]. Different from the mere notification that a freeze of funds has been disposed of is the obligation, incumbent on the Council, to state reasons, which is also indicated as a necessary requirement in order to enable the applicant to have full knowledge of his/her situation. The next paragraphs will therefore deal respectively with the right to effective judicial protection, the obligation to state reasons, and finally the applicability of and the consideration generally given to the rights of the defence.

3.2. The right to effective judicial protection

The terms 'judicial protection' and 'judicial review' are used by the Court interchangeably, for both of them represent one of the most fundamental principles in all political organisations based on the rule of law, that is, the control enacted by a court or tribunal on the acts coming from legislative and executive bodies. The EU is no exception; the ECJ has in fact several times affirmed that "*the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States*"[121] and, in addition to being codified at art. 263 TFEU (ex art. 230 EC), it is also protected as a fundamental right at art. 6 and 13 of the ECHR and art. 47 of the Charter. These articles, in particular art. 263 TFEU, make it so that the right to judicial protection is actually always provided for and enjoyable, including in sanctions-related cases: as first ruled in *OMPI* and reminded in *Tay Za*, "*the safeguard relating to the right to effective judicial protection is ensured by the right the parties concerned have to bring an action for annulment before this Court against a decision to freeze their funds*". This means that it is not necessary for a specific

[120] CFI, *OMPI*, paragraph 93.
[121] ECJ, *Kadi II*, paragraph 335.

provision to be included in the notification of the decision to freeze funds (although usually the Council does so), since the possibility to bring proceedings before the ECJ is always granted by the Treaties[122].

3.2.1. The right to effective judicial protection before 2008

The right to an effective judicial review has undergone a significant evolution in the field of sanctions-related case law of the ECJ. In fact, the respect for and the importance given to such right, as well as to the rights of the defence, as we'll see later on, used to be different according to the origins of the sanction, that is, according to whether the contested Council regulation was merely reporting what already established in a UNSC resolution or whether it was autonomously setting up a new list for the freeze of funds. The most notorious *Kadi* saga describes perfectly this development.

In *Kadi I*[123], the CFI does not contest the existence of a right to judicial review *per se*. Paragraph 4 of art. 230 EC – corresponding to the current art. 263 – did in fact allow both natural and legal persons to bring proceedings against an act of the EU institutions which is of direct and individual concern to them[124]: it is clear to see that an act such as a Council regulation identifying an individual, group or entity by name does fall within the category of acts giving rise to direct and individual concerns. Nevertheless, the CFI wondered "*whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on the judicial review which it falls to the CFI to carry out with regard to [the] regulation [at stake]*"[125]. Indeed, in the CFI's eyes, the EU institutions did not have any room of manoeuvre in applying sanctions as required by the UNSC, and reviewing a Council regulation implementing a UNSC resolution in the light of the fundamental rights protected by the EU would equal to reviewing the UNSC resolution itself[126], which would naturally be inappropriate for the CFI to do. The judicial review of the CFI instead should be limited "*on the one hand, to ascertaining whether the rules on formal and procedural requirements (…) were observed and, on the other hand to ascertaining whether the Community measures at issue were appropriate and proportionate in*

[122] GC, *Tay Za*, paragraph 142-143.
[123] Judgment of the CFI of 21 September 2005, *Kadi v Council*, T-315/01, EU:T:2005:332 ('CFI, *Kadi I*').
[124] CFI, *Kadi I*, paragraph 211.
[125] CFI, *Kadi I*, paragraph 212.
[126] CFI, *Kadi I*, paragraph 215-216.

relation to the resolutions of the Security Council which they put into effect"[127], with no real control on the substance of the decision if not, indirectly, in the light of the peremptory norms pertaining to the *jus cogens*[128]. This standpoint comes from the monist approach that the CFI initially adopted: the EU legal order belongs *within* the international legal order and is consequently hierarchically inferior to it; therefore, since the rules of international law – the UNSC resolutions being on the top – are binding on the EU MS, they are also binding for the EU institutions, including the Court[129].

The review and re-examination of individual complaints, in the eyes of the CFI, is a task for the UN Sanctions Committee, organ set up to supervise the enforcement of UN sanctions, and not for the European courts. This position is confirmed also in *Hassan*[130]. Here, the applicant had complained that the procedure in front of the UN Sanctions Committee could not guarantee a sufficient protection of his fundamental rights, and even infringed fundamental rights itself, considering that, first of all, there is no possibility for the individual to petition the Committee by himself. In fact, when a designated person wants to have his case reviewed by the Committee, he has to rely on the State of his nationality or residence to lodge such application. Furthermore, should the State in question refuse to intercede for him, or should the Sanctions Committee reject his petition to have his name removed from the lists, there is no possibility to bring proceedings in front of an independent or impartial tribunal[131]. The CFI, though, points out that by providing for re-examination procedures as described in the Committee's guidelines, the UN Sanctions Committee had tried to take into consideration the fundamental rights of the individuals, and in particular the right to be heard, as much as possible[132]. It is true that such procedures do not offer any possibility for the individual to directly address the Committee, but rather make him dependent on the diplomatic protection afforded by his State of nationality or residence; nevertheless, this limitation is still appropriate as it is necessary balanced with the objectives of the restrictive measure (in this case, the fight against terrorism) and it fits the requirements of the public international order[133]. Moreover, the

[127] CFI, *Kadi I*, paragraph 217-218.
[128] CFI, *Kadi I*, paragraph 226.
[129] CFI *Kadi I*, paragraph 217.
[130] Judgement of the CFI of 12 July 2006, *Hassan v Council and Commission*, T-49/04, EU:T:2006:201, ('CFI, *Hassan*').
[131] CFI, *Hassan*, paragraph 83.
[132] CFI, *Hassan*, paragraph 110.
[133] CFI, *Hassan*, paragraph 111.

Court answers to Mr Hassan's preoccupations by saying that both the member States of the UN and the UN Sanctions Committee itself are obliged to act in good faith and in line with the general principle of *pacta sunt servanda*[134]: this, in the eyes of the Court, seems to be an appropriate guarantee for the safeguard of the rights of the individual. Even more, should a State decline to cooperate with the petitioning individual and refuse to submit his application for re-examination before the UN Sanctions Committee, there is the possibility for the individual to open proceedings against such wrongful refusal before the competent national court[135]. An obvious question comes to mind, whether the CFI really does believe, perhaps naively, that the obligation to act in good faith is sufficient to consider the rights of the defence and the right to an effective judicial review protected at the international level, or whether it is offering a mere sop to the appellant to hide the fact that security must come at the expenses of fundamental rights.

3.2.2. The right to effective judicial protection since 2008

In any case, the appeal in *Kadi II*[136] reversed the CFI's standpoint, and consequently, the *Hassan* judgement was updated as well[137]. Contrarily to the monist stance of the CFI, the ECJ takes a strongly dualist approach, as it is clear when it refers to the "*autonomous legal order of the Community*"[138] and when it acknowledges that "*the review of lawfulness (...) to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such*"[139]. The ECJ is in fact of the opinion that "*the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights*"[140], and will therefore apply the EU standards of legal review on the Council regulation[141], instead of referring merely to the norms of *jus*

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[134] CFI, *Hassan*, paragraph 112.
[135] CFI, *Hassan*, paragraph 120.
[136] Judgment of the Court of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461 ('ECJ, *Kadi II*').
[137] Judgement of the Court of 3 December 2009, *Hassan and Ayadi v Council and Commission*, joined cases C-399/06 P and C-403/06 P, EU:C:2009:748 ('ECJ, *Hassan*').
[138] ECJ, *Kadi II*, paragraph 317.
[139] ECJ, *Kadi II*, paragraph 286.
[140] ECJ, *Kadi II*, paragraph 285.
[141] ECJ, *Kadi II*, paragraph 326.

cogens as the CFI had done to review the UNSC resolution. In other words, the EU courts must grant judicial review in the light of those fundamental rights recognised by the EU of the Council regulation, considering that the latter and the UNSC resolution are two completely different legal instruments.

Such guarantee notwithstanding, the review applicable by the ECJ cannot be too wide. In particular, since "*the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions*" falling within the CFSP area, "*the review carried out by the Court of the lawfulness of decision to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power*"[142]. The Court is therefore allowed to control the facts and circumstances as well as the evidences relied upon by the Council for its decision to freeze funds only in their material accuracy, but not in their relevance, matter that is left to the Council's discretion. At the same time it has to ensure that the rights of the defence of the applicants are respected, in particular by checking that the statement of reasons complies with its requirements and/or that the exceptions relied on by the Council to limit these rights are well founded[143].

These are also the reasons why the GC took the time to point out that an apparently extensive review such as the one conducted in *LTTE*[144] does not exceed the scope of the limited review that the Court is allowed to carry on, insofar as it is still limited to check that the correct procedures have been complied with and that the facts are accurate[145]. Interestingly, in this case the GC makes an express reference to the need to safeguard fundamental rights[146], showing how, at least for what concerns procedures and formalities, the ECJ does take into good consideration the rights of the individuals.

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[142] CFI, *OMPI*, paragraph 159.
[143] CFI, *Bank Melli*, paragraph 37.
[144] Judgement of the General Court of 16 October 2014, *LTTE v Council*, joined cases T-208/11 and T-508/11, EU:T:2014:885 ('GC, *LTTE*').
[145] GC, *LTTE*, paragraph 220.
[146] GC, *LTTE*, paragraph 224.

3.3. The obligation to state reasons

Whenever it is called into question, the respect of the right to effective judicial protection implies – and often becomes intertwined with – the fulfilment on behalf of the Council of the obligation to state reasons and the possibility for the designated persons to express their views. The rights of the defence, and in particular the right be heard, in fact, are obviously only useful when the designated persons can defend themselves having full knowledge of their situation. For the appellants to be afforded the possibility to prepare their defence so to enjoy the fullest and most effective judicial review possible, it is necessary that they know the reasons why they have been enlisted and had their funds frozen, and the elements used in order to justify the restrictive measures against them of which the Council is in possession. The same is valid for the right to effective judicial review itself: tribunal and courts can assess the validity of a legal act – thus ensuring an effective judicial review – only when they are aware of the facts that brought to the adoption of such act. The obligation to state reasons is therefore intended as a further safeguard of both the rights of the defence and the right to effective judicial review.

Such obligation, incumbent on the Council, is enshrined in art. 296 TFEU, second indent (former art. 253 EC): *"Legal acts shall state the reasons on which they are based and shall refer to any proposal, initiatives, recommendations, requests or opinions required by the Treaties*". Art. 41 of the Charter also makes a reference to such obligation under the title 'right to good administration', although rarely there is mention of it in the ECJ case law relative to restrictive measures.

As a matter of fact, the circumstance that the obligation to state reasons serves as a link between the rights of the defence and the right to effective judicial review has been often pointed out by the EU Courts themselves: "*[a]s held in settled case-law, the Community institutions' obligation under [Article 296 TFEU] to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the lawfulness of the decision, and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded*"[147]. This is also a reason why there is not always a clear separation, in the Court's judgements, of these various rights: they have obviously different legal definitions and different legal bases, nevertheless, their borders may get rather blurred and, most importantly, being the

[147] CFI, *OMPI*, paragraph 89.

one so dependent on the other, they frequently overlap. Despite this fact, though, it is important to highlight that "*[t]he issue of the grounds for the contested decision is different (...) from that of the evidence of the conduct of which the appellant is accused (...). Accordingly, the question whether the reasons stated in the contested measures are supported by evidence is relevant in the context of [pleas] claiming an error of assessment (...)*"[148]. This means that whenever a complaint is raised merely about the lack of reasons, the applicant will not be able to argue at the same time about the lawfulness of the freeze of his or her funds, or about the accuracy of the facts presented by the Council: the obligation to state reasons simply concerns whether or not, and in which conditions, the Council has informed the designated person about the grounds of its decision to include or to maintain their name on the list of individuals, groups or entities whose funds have been frozen.

3.3.1. The principle of equality of arms

The obligation to state reasons is also aimed at ensuring that another fundamental principle strictly connected with the rights of the defence is safeguarded, that is, the principle of equality of arms. This concept reflects the need to treat both parties in a trial in a way that guarantees their "*procedurally equal position*", meaning that everyone needs to be afforded the opportunity to present their case and defend themselves under equal conditions, while any difference that could come from the weaker position of one of those parties needs to be levelled. Seen under this light, the principle of equality of arms becomes, as Negri defines it, a "*minimum threshold requirement for any judicial proceedings to be considered fair and consistent with human rights standards*"[149]. The ECtHR itself has ruled that the principle of equality of arms is "*only one feature of the wider concept of fair trial*"[150], therefore integrating the concept within the scope of art. 6 ECHR and making it applicable to both civil and criminal cases[151].

The principle of equality of arms is fully pertinent before the ECJ, as well. In particular, Negri notes how a series of cases has made explicit that, in order to acknowledge whether there

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[148] GC, *Fulmen*, paragraph 56-57.

[149] NEGRI, S., 'The principle of "equality of arms" and the evolving law of international criminal procedure', *International Criminal Law Review*, 5, 2005, pp. 513-514.

[150] Judgement on the merits delivered by the Grand Chamber, *Neumeister v. Austria* [GC], application no. 1936/63, ECtHR, 1968, paragraph 22, quoted in Negri, S. (2005), *Op. cit.*, p. 515.

[151] NEGRI, S., *Op. cit.*, p. 516.

has been a "*breach of procedure (…) which adversely affects the interests of the appellant"* (hence a violation of the equality of arms) as per art. 58 Statute of the ECJ, the Court needs to take into consideration *"the general principles of Community law and the procedural rules applicable to the burden of proof and the taking of evidence*"[152]. It is clear that one way to safeguard the principle of equality of arms is by strictly connecting it with the obligation to state reasons, whose purpose is exactly to have the burden of proof rest on the strongest party, i.e. the Council, by obliging it to present its evidences.

The Court itself confirms that the principle of equality of arms is indeed relevant even in the field of CFSP sanctions and is directly affected by the respect or lack thereof of the obligation to state reasons: the statement of reasons, in fact, must be issued at the same time with the notification to the concerned person of the adoption of a restrictive measure in their regard, and a failure in doing so cannot find remedy during the trial itself. In other words, asking to the designated individuals or entities to open judicial proceedings first, and let them learn about the reasons why they were included in the blacklists during such proceedings is not sufficient: the persons have to know the reasons before bringing any proceeding, so that they can properly prepare their defence and their replies[153].

3.3.2. The requirements of the obligation to state reasons: comprehensibility…

As it will be better developed in the next section, observance of the rights of the defence in sanctions-related case law is rather limited, meaning that, among other considerations, the right to be heard is mostly intended as an *a posteriori* remedy, since the need to benefit from a surprise effect runs against the possibility of a prior hearing of the to-be-designated persons. This leads the Court to state that "*compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the party concerned (…) to make effective use of the legal remedies available to it to challenge the lawfulness of [a Council's] decision*"[154]. For this reason, the Court has also set out a series of requirements to make sure that the statement of reasons will be as effective as possible.

[152] NEGRI, S., *Op. cit.*, p. 538-539.
[153] CFI, *OMPI*, paragraph 139.
[154] CFI, *OMPI*, paragraph 140.

First of all, the statement "*must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the person concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof*"[155]. This does not necessarily mean that the Council has to specify all the matters of fact and law, but at the same time, it also cannot simply refer to a "*general, stereotypical formulation*", such as the reiteration of the grounds on which the regulation or the common position at stake have been originally adopted. For example, 'links with companies taking part in Iran's nuclear programme' is not an acceptable reason justifying the adoption of a restrictive measure against an individual or an entity, as there is no specification of which kind of links and relationships exist between the designed person and the companies behind the Iranian nuclear programme[156]. "*The grounds for such a measure must (...) indicate the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned"*[157], or, alternatively, *"the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified*"[158].

The main criterion to establish whether the statement of reasons is sufficient, in the Court's eyes, is indeed whether the addressee of the measure can actually understand the reasons why its funds have been frozen, but this might actually constitute a levity in the ECJ's assessment of the impact of the obligation to state reasons on the applicants' fundamental rights. The argument is relevant for cases such as *Melli Bank plc*[159], involving a public limited company wholly owned by Bank Melli Iran, a bank controlled by the Iranian government. The parent company Bank Melli Iran had been enlisted as entity "*providing or attempting to provide financial support (...) for Iran's nuclear and missile programmes*"[160]; Melli Bank plc, instead, had been enlisted in quality of subsidiary of Bank Melli Iran[161]. Both in the main proceedings

[155] CFI, *OMPI*, paragraph 141.
[156] GC, *Kala Naft*, paragraph 79.
[157] CFI, *OMPI*, paragraph 143.
[158] CFI, *OMPI*, paragraph 144.
[159] Judgement of the CFI of 9 July 2009, *Melli Bank plc v Council*, joined cases T-246/08 and T-332/08, EU:T:2009:266 ('CFI, *Melli Bank plc*').
[160] CFI, *Bank Melli*, paragraph 12.
[161] CFI, *Melli Bank plc*, paragraph 10.

and in the appeal case[162], the Court rules in favour of the Council, agreeing with its view that "*in so far as the freezing of an entity's funds apply equally to subsidiaries owned or controlled by that entity, there is no need to provide specific reasons for freezing the funds of each of the subsidiaries*"[163]. The CFI recognises that the statement of reasons given by the Council is "*exceptionally concise*", but that did not impede the understanding of the reasons by the applicant. Even the AG Mengozzi, who, as we have seen in previous cases, is generally a convinced upholder of fundamental rights, agrees on the fact that "*the obligation to state reasons must be assessed by reference to whether the person concerned understood the reasons for its inclusion and was in a position to assess (...) the merits of those reasons*"[164].

The comprehensibility of the reasons is also not ruled out in cases of inaccuracy. For example, Mr Mahmoudian, one of the two applicants in *Fulmen*[165], claims that the identifying information reported in the statement of reasons were not correct, and that should have invalidated the statement of reasons itself. Nevertheless, the Court considers that "*the fact that [Mr Mahmoudian] has brought an action before the Court confirms that he has understood that he was the subject of the contested measures*"[166].

3.3.3. …and the grounds of the Council decision

Another important condition that the ECJ requests has to do with the sources on which the Council bases its reasons, at least for what concerns restrictive measures against individuals, groups or entities involved in the fight against terrorism. It is in fact normally required that the decision of the Council on such matters be based on "*precise information or material in the relevant file which indicates that a decision has been taken by a competent authority*"[167], be it an authority from an EU Member State or from a third country. The need for the Council to rely on a national decision based on "*serious and credible evidence or clues*", as declared by the

[162] Judgement of the Court of 13 March 2012, *Melli Bank plc v Council*, C-380/09 P, EU:C:2012:137 ('ECJ, *Melli Bank plc*').
[163] CFI, *Melli Bank plc*, paragraph 142.
[164] Opinion of AG Mengozzi delivered on 28 June 2011, *Melli Bank plc v Council*, C-380/09 P, EU:C:2011:424 ('AG Op., *Melli Bank plc*'), paragraph 63.
[165] Judgement of the General Court of 21 March 2012, *Fulmen and Fereydoun Mahmoudian v Council*, joined cases T-439/10 and T-440/10, EU:T:2012:142 ('GC, *Fulmen*').
[166] GC, *Fulmen*, paragraph 60.
[167] ECJ, *Al-Aqsa*, paragraph 64.

Court itself, "*aims to protect the persons concerned by ensuring that they are included on the list at issue only on a sufficiently solid factual basis*"[168]. The rationale in this case is clear: it is imperative for the involved EU institutions to take into account the fundamental rights of the individuals, groups or entities that the Council intends to designate, especially considering that the EU does not have investigative powers itself and thus has to rely on information provided for by national authorities[169]; the least it could do is to check that those information are trustworthy.

Such a negligence on behalf of the Council has been found in two notorious cases: *Hamas*[170] and *LTTE*. Both cases deal with two groups that have been defined by the Council and the MS as terrorist organisations and enlisted on the basis of information allegedly coming from, respectively, the US and India. In both cases, according to the GC, the Council had not been able to substantiate its reasons with the "*precise information*" required; even more, it resulted that the material that had the most weight on the Council decision came from the press. On the one side, in fact, the Council had failed to produce recent US files that could justify the decision to maintain Hamas in the terrorist lists and rather claimed that "*it is sufficient to consult the press in order to establish that the applicant regularly acknowledges responsibility for terrorist acts*"[171]. On the other side, similarly, the Council stated that its decision was "*based on well-publicised events*"[172], namely a series of terrorist acts allegedly carried on by the LTTE in the context of the conflict in Sri Lanka. It was clear for the GC that information retrieved from the press or from the internet did not imply such an accurate examination on behalf of the Council; hence in both cases the Council was found guilty of breaching its obligation to state reasons.

What is more, the Court notes how such control of the Council "*is all the more important in the case of decisions adopted by authorities of a third State*", insofar as the greatest majority of third States – and certainly India and the US – are not parties to the ECHR[173]. The Court reiterates therefore that a full compliance with the obligation to state reasons is of utmost

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[168] ECJ, *Al-Aqsa,* paragraph 68.
[169] ECJ, *Al-Aqsa,* paragraph 69.
[170] Judgement of the General Court of 17 December 2014, *Hamas v Council,* T-400/10, EU:T:2014:1095 ('GC, *Hamas*').
[171] GC, *Hamas*, paragraph 108.
[172] GC, *LTTE*, paragraph 184.
[173] GC, *LTTE*, paragraph 138.

importance in order to safeguard the rights of the individuals, groups or entities concerned. In particular, the Council is supposed to "*carefully verify that the relevant legislation of that State ensures protection of the rights of defence and a right to effective judicial protection equivalent to that guaranteed at EU level*"[174]. The Court acknowledges that, if the Council did not fulfil such duty, there would be "*a difference in treatment between the persons covered by EU fund-freezing measures, according to whether the national decision underlying those measures emanated from authorities of third States or authorities of Member States*"[175]. This is apparently a very bold and firm stance for the Court, completely based on a perspective oriented towards the protection of fundamental rights.

The very recent appeal judgements of *Hamas*[176] and *LTTE*[177], nevertheless, show us a slightly different approach of the ECJ to the way in which the Council had carried on its periodical review. On the one side, the ECJ upheld the GC's ruling that the single fact that the national decision on which the freeze of funds was disposed is still in force is not in itself a valid ground to maintain the restrictive measure. Instead, in order to establish whether the individuals, groups or entities still constitute a threat to international peace and security, the Council ought to keep into account the passage of time and the current circumstances, and it "*is obliged to base the retention of that person or entity on the list on an up-to-date assessment of the situation, and to take into account more recent facts which demonstrate that that risk still exists*"[178].

On the other side, though, the ECJ ruled in favour of the Council and contrarily to what the GC had stated, stating that the sanctions' review mechanism "*does not require any new material on which the Council may rely in order to justify the retention of the person or entity concerned on the list at issue to have been the subject of a national decision taken by a competent authority after the decision on which the initial listing was based*"[179]. In other words, a national decision is a compulsory requirement for the Council to establish the initial enlistment of a person or entity on the sanctions lists, but it not necessary in order for the Council to decide on the maintenance of that person or entity on the lists. Asking the Council

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[174] GC, *LTTE*, paragraph 139.
[175] GC, *LTTE*, paragraph 140.
[176] Judgement of the Court of 26 July 2017, *Council v Hamas*, C-79/15 P, EU:C:2017:584 ('ECJ, *Hamas*').
[177] Judgement of the Court of 26 July 2017, *Council v LTTE*, C-599/14 P, EU:C:2017:583 ('ECJ *LTTE*').
[178] ECJ, *Hamas*, paragraph 32; and ECJ, *LTTE*, paragraph 54.
[179] ECJ, *Hamas*, paragraph 40; and ECJ, *LTTE*, paragraph 62.

to review the initial listing only on the basis of a national decision would be equivalent to asking the national authorities in the first place to issue a national decision for the Council to rely on at least every six months; yet, this requirement has no legal basis in EU law[180]. Thus, the Council can indeed rely on other sources, too, without incurring in a violation of the obligation to state reasons, insofar as the designated persons always have the possibility to bring proceedings before the national and EU courts and contest all the material relied on by the Council[181].

With this reasoning, the judgement of the GC in *Hamas* was set aside by the ECJ and the GC will be called to rule on it once again; the one in *LTTE*, contrarily, is still in force, because its operative part appeared to be well founded on other legal grounds[182]. This means that the considerations made above about the importance of a control on behalf of the Council of the relevant legislation of third States in order to guarantee the protection of certain fundamental rights, in particular the rights of the defence, is still valid at the present day.

3.3.4. The limits and exceptions to the obligation to state reasons

The specific and detailed reasons useful to consider the statement of reasons satisfying, nevertheless, need not to be published in the Official Journal of the EU together with the operative part of the decision. Rather, they should be "*formalised and brought to the knowledge of the parties concerned by any other appropriate means*", most commonly a personalised letter. The fact that it is accepted that only the operative part of the decision, preceded by a general statement of reasons, be published on the Official Journal is due to the attention that the Court gives not only to the overriding considerations relative to the security of the Union and the Member States, but also to the "*legitimate interests of the persons and entities in question, in that [a full publication of specific and detailed reasons] would be capable of causing serious damage to their reputation*"[183].

But if this exception to the public disclosure of reasons is meant to be in favour of the designated individual, group or entity, other limits are posed by the Court, which at first sight

[180] ECJ, *Hamas*, paragraph 41-42; and ECJ, *LTTE*, paragraph 63-64.
[181] ECJ, *Hamas*, paragraph 47-48; and ECJ, *LTTE*, paragraph 69-70.
[182] ECJ, *LTTE*, paragraph 75.
[183] CFI, *OMPI*, paragraph 147.

run against the persons' fundamental rights. In fact, "*the overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds, just as they may preclude the evidence adduced against those parties from being communicated to them during the administrative procedure*"[184]. The Court arguments that such restrictions are compatible both with the common constitutional traditions of the MS and with the ECtHR case law[185]. It even makes a parallel with free movement provisions, in particular with the so-called Citizens Directive, to validate the existence of overriding reasons that justify a limited disclosure on behalf of the Council of the grounds relied on for its decisions: as of art. 30(2) of directive 2004/38/EC, in fact, citizens shall be informed of the reasons why their or a member of their family's freedom of movement and residence has been restricted *"unless this is contrary to the interest of State security*"[186]. It is therefore admissible that such an exception exist also in by far more sensitive cases as the ones relating to CFSP sanctions.

The Council is thus not obliged to adduce evidences when doing so would risk compromising the security of the MS and/or the conduct of their international relations; normally, documents capable of causing such threats are the ones classified as "CONFIDENTIEL UE". In such circumstance, there is obviously the risk that the Council adopt a too extensive interpretation of what could be classified as confidential, in order to retain as much secrecy as possible. Nevertheless, in a couple of cases, the Court has set certain borders to avoid a too broad discretion for the Council. In *Sison I*, for example, the Council had argued that it could not offer detailed reasons to the applicant exactly because his enlistment was based on confidential information; it even refused to communicate who the MS at the origins of the Council decision was, insofar as such MS was opposed to the disclosure of its identity[187]. During the preliminary phases of the proceedings before the Court, though, the Council had admitted basing its decision on a series of judgements given by the competent Dutch authorities, dealing with the possibility of granting the refugee status to Mr Sison. As sensitive as those judgements could be considered, though, the Court underlines how they cannot be classified as

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[184] CFI, *OMPI*, paragraph 148.
[185] GC, *Sison I*, paragraphs 181-182.
[186] CFI, *OMPI*, paragraph 149.
[187] GC, *Sison I*, paragraph 200.

confidential documents, because they were “*official acts adopted at the end of public judicial proceedings to which the applicant had been a party*”[188].

In any case, some doubts remain about to which extent the ECJ can actually guarantee that the Council will not abuse of its power. In the appeal of *Fulmen*, in fact, the Court ruled that “*[i]f [the Council] finds itself unable to comply with the request by the Courts of the EU [to produce information or evidence, confidential or not, relevant to such an examination], it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them*”[189]. What may be interesting to notice, here, is that the Court seems to acknowledge that it does not actually have the power to have certain documents disclosed, neither to the persons concerned nor to the Court itself. A protection for the persons concerned is offered in the sense that “*[i]f that material is insufficient to allow a finding that a reason is well founded, the Courts of the EU shall disregard that reason as a possible basis for the contested decision to list or maintain a listing*”, meaning that, if the disclosed documents are not sufficient to justify the Council decision, the Court may annul it even regardless of the confidential documents that have not been presented to it. Although, a few passages later, the Court itself reminds once again how “*it is necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection […] and those flowing from the security of the EU or its Member States or the conduct of their international relations*”[190]; this ambiguity might be interpreted as a hint that there may be cases in which the ECJ will agree with the Council even if the disclosed documents appear not to be enough, placing once again security and the conduct of international relations on a higher pedestal than the individuals’ fundamental rights.

3.3.5. Access to documents

Strictly linked with the obligation to state reasons is the right of the designated individual, groups or entities to access the documents on which the Council has based its decision, as declared in the statement of the reasons. In order to assess whether the reasons stated are well founded, in fact, it would be desirable for the applicant to be acquainted with the content of the

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[188] GC, *Sison I*, paragraphs 211-212.
[189] Judgement of the Court of 28 November 2013, *Counvil v Fulmen and Fereydoun Mahmoudian*, C-280/12 P, EU:C:2013:775 (‘ECJ, *Fulmen*’), paragraph 68.
[190] ECJ, *Fulmen*, paragraph 73.

file at the Council's disposal. Moreover, the right of access to documents is enshrined in paragraph 2 of art. 15 TFEU and strengthened in art. 42 Charter. Furthermore, regulation (EC) no. 1049/2001 on public access to European Parliament, Council and Commission documents ('Access Regulation') widens the scope of these articles by allowing the institutions to grant access to the relevant documents even to non-EU citizens or to legal and natural persons not residing or not having their registered office on the territory of the EU[191]. The principle, throughout EU law, is therefore to grant the "*widest possible access*" to the interested persons, but exceptions are nevertheless possible, when established by law[192], although to be applied in a narrow sense[193]. It is easy to imagine how, in sanctions-related case law, such exceptions are likely to be very frequently called upon.

One of the most notorious cases in point is *Sison II*[194], proceedings that have been launched beside *Sison I*, and that specifically relate to the access to documents. Mr Sison, in fact, complained that the Council did not conduct a thorough assessment of the consequences of disclosing the documents relative to his case, and rather gave him a very short explanation, which, in the applicant's eyes, is contrary to the principle that the limitations of the right to access to documents have to be interpreted strictly[195]. The CFI considers instead – and the ECJ ultimately agrees – that the Council was right in limiting the access to the documents that the applicant had requested, insofar as those documents were classified as "CONFIDENTIEL UE", hence falling under the scope of those exceptions foreseen by regulation 1049/2001 at art. 9. The same goes for the disclosure of the identity of the State, which is also an element falling within the scope of art. 4 of the Access Regulation. Moreover, "*the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or*

[191] Art. 2(2) of regulation (EC) No 1049/2001 of the European Parliament and Of The Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
[192] Regulation No. 1049/2001 itself lists a series of exceptions at art. 4 and specific conditions for the treatment of sensitive documents (such as the ones classified as "CONFIDENTIEL") at art. 9.
[193] EU PARLIAMENT DG FOR INTERNAL POLICIES, *Openness, transparency and the right of access to documents in the EU*, In-Depth Analysis for the PETI committee, 2016, pag. 4.
[194] Judgement of the CFI of 26 April 2005, *Sison v Council*, joined cases T-110/03, T-150/03 and T-405/03, EU:T:2005:143 ('CFI, *Sison II*'); and Judgement of the Court of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75 ('ECJ, *Sison II*').
[195] CFI, *Sison II*, paragraph 67.

entities suspected of terrorism is kept secret so that the information remains relevant and enables effective action to be taken”[196].

In any case, the Court has often pointed out that the access to documents is not an automatic right. As ruled first in *Bank Melli Iran*, “*the principle of respect for the rights of the defence does not mean that the institution is obliged spontaneously to grant access to the documents in its file. It is only on the request of the party concerned that the Council is required to provide access to all non-confidential official documents concerning the measure at issue*”[197].

3.4. The rights of the defence

3.4.1. The rights of the defence before 2008

Being strictly linked to the right to effective judicial review, the rights of the defence have also undergone an important evolution in terms of fundamental rights within the ECJ case law related to restrictive measures.

What is first of all observed by the Court in all these cases is that the right to a fair hearing is a “*fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question*”[198], and which is in theory applicable to sanctions cases insofar as a decision of freeze of funds is not a simple legislative measure, but “*it is of direct and individual concern to the applicant, to whom it refers by name*”[199]. Nevertheless, at first the Court had identified different situations in which the right to be heard was either fully applicable or not at all.

In *Kadi I*, the CFI ruled that such right is not applicable in cases such as the ones involving restrictive measures coming from the UNSC, where the Community institutions don’t have any power in examining or reviewing the substance of the UNSC resolution. The right to be heard, in the Court’s opinion, depends on the existence or not of a discretion by the authorities who have issued the measure contested[200]; since the Council did not enjoy such discretion, it was

[196] CFI, *Sison II*, paragraph 77.
[197] CFI, *Bank Melli*, paragraph 97.
[198] CFI, *OMPI*, paragraph 91.
[199] CFI, *OMPI*, paragraph 98.
[200] CFI, *Kadi I*, paragraph 257

also not obliged to hear the applicant about his enlistment[201]. Such a view is confirmed a couple of years later in *Minin*, where the Court refers to the possibility that the designated persons have to request a review of their case through "*analogous mechanisms (...) by the competent sanctions committee*" at the UN level[202]. In the case of autonomous sanctions such as the ones at stake in *OMPI*, instead, the Court established that the right to be heard is fully applicable, in principle, "*[s]ince the identification of the persons, groups and entities (...) and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community's own powers, entailing a discretionary appreciation by the Community*"[203]. The same standpoint is valid in *Sison I*, where, as for *OMPI*, the name of the applicant does not appear in the UNSC resolution, but is identified directly by the Council regulation. It is clear, therefore, that, at that time, the right to a fair hearing was ruled as being enjoyable exclusively by individuals or entities subject to EU-autonomous sanctions.

This consideration created naturally a distinction that hampered the fundamental rights of a considerable category of designated persons. As described earlier, in fact, the CFI used to adopt a strictly monist approach to interpret the relationship between the EU and the international legal order. Therefore, it should not be surprising that a ruling of the CFI on the right to be heard follows the same logic applied for the right to effective judicial review. The Court, being limited in its jurisdiction[204], found that a distinction had to be made between the applicant's right to be heard by the Council and his right to be heard by the UN Sanctions Committee[205]: the right to be heard for UNSC-derived sanctions has to be respected before the latter; while, as we have seen, the right to be heard by the Council does not really exist, because the Council lacks discretion and is therefore merely a passive actor, abiding to its obligations towards the UN. Only when the Council does have such a discretion, as in *OMPI*, the right to be heard is fully applicable.

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[201] CFI, *Kadi I*, paragraph 259.
[202] Judgement of the CFI of 31 January 2007, *Minin v Commission*, T-362/04, EU:T:2007:25 ('CFI, *Minin*').
[203] CFI, *OMPI*, paragraph 107.
[204] CFI, *Kadi I*, paragraph 218.
[205] CFI, *Kadi I*, paragraph 254.

3.4.2. The rights of the defence since 2008

As we know, the *Kadi* judgement was reversed in the appeal by the ECJ: the distinction between restrictive measures originating from UNSC resolutions and restrictive measures originating within the EU autonomous system is not valid anymore, and the position of the individuals and entities subject to the two different regimes is finally levelled. Despite the introduction of this novelty, which overall proved very positive for fundamental rights protection's sake, the ECJ did not depart from the CFI's ruling all-round, but instead upheld some substantive elements of the latter's ruling in the appeal, as well. In fact, while the ECJ recognises that the right to be heard does apply in sanctions-related cases regardless of the sanction's origins, it also acknowledges that such right cannot be enjoyed before the first enlistment of the designated person in the blacklists for the freezing of their funds[206]. Recalling the main proceedings of *Yusuf and Al Barakaat*, in fact, the ECJ recognises[207] that "*to have heard the applicants before they were included in that list would have been liable to jeopardise the effectiveness of the sanctions and would have been incompatible with the public interest objective pursued*"[208]: restrictive measures would be senseless and ineffective if they did not benefit from a surprise effect, and to allow a to-be-designated person to be heard before its actual designation would run counter to the very own objective of the sanctions systems[209].

The Court maintains still nowadays the position that a right to be heard prior to the person's enlistment and freeze of funds does not exist. As it recalls in *Ezz*, "*no provision or principle requires that the EU measures defining the set of rules to be followed by individual asset-freezing measures must include provisions or establish procedures (…)*"[210] according to which "*the persons whose assets are frozen must be heard and their views taken into account*"[211]. It is therefore necessary to find "*techniques which accommodate, on the one hand, legitimate security concerns (…) and, on the other, the need to accord the individual a sufficient measure of procedural justice*"[212].

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[206] ECJ, *Kadi II*, paragraph 338.
[207] ECJ, *Kadi II*, paragraph 339.
[208] Judgment of the CFI of 21 September 2005, *Yusuf and Al Barakaat International Foundation v Council and Commission*, T-306/01, EU:T:2005:331 ('CFI, *Yusuf*'), paragraph 308.
[209] ECJ, *Kadi II*, paragraph 340.
[210] GC, *Ezz*, paragraph 177.
[211] GC, *Ezz*, paragraph 172.
[212] ECJ, *Kadi II*, paragraph 344.

3.4.3. The notification

One of such techniques relates to the fact that the ECJ now requires that the notification of the enlistment and of the evidence adduced against the person happen "*in so far as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds*"[213]. There are certain conditions that the notification has to follow to be declared valid. First of all, the CFI does not accept the Council's claim that certain measures directed towards a "*body of addressees determined in a general and abstract manner*" – such as, for example, those measures freezing the funds of state entities linked with the Iranian State – can be notified only through their publication in the Official Journal. The Court in fact notices that, even if it's true that the same restrictive measures apply generally to an entire group of persons or entities, the Council regulation still refers by name, directly and individually, to each of those persons and entities; consequently, a direct and individual notification is also required[214]. Nevertheless, should the Council not fulfil its obligation to give out individual notifications, this fact does not necessarily constitute a breach of the rights of the defence: if the designed persons or entities have been able to have knowledge, in good time, of the reasons for their enlistment, the Council's error is not such as to justify the annulment of its decision[215].

Second requirement relative to the obligation of notification concerns the fact that the Council does not enjoy any arbitrariness or freedom in choosing the means of communication and notification of its decisions: notification has to be given "*either directly, if the address is known, or through the publication of a notice, providing such person or entity with an opportunity to present observations*"[216]. The only exception to the requirement of direct notification, as first ruled in *Gbagbo*[217] and then confirmed in *Akhras*, is whenever the Council is not in possession of the personal address of the designated person, which makes it "*impossible for the Council to effect service*"[218]. This is because "*restrictive measures are to be implemented in areas frequently involving a high degree of sensitivity*": addresses of third persons, including the designated person's lawyer[219], are therefore not relevant, and even less so is the business

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[213] CFI, *OMPI*, paragraph 129.
[214] CFI, *Bank Melli*, paragraph 86.
[215] CFI, *Bank Melli*, paragraph 90.
[216] GC, *Akhras*, paragraphs 82-83.
[217] Judgment of the Court of 23 April 2013, *Gbagbo and Others v Council*, C-478/11, EU:C:2013:258, paragraphs 60-61.
[218] GC, *Akhras*, paragraph 83.
[219] GC, *Akhras* paragraph 88.

address of the designated person, insofar as the letter of notification might be received by someone else and not by the designated person himself[220].

3.4.4. The right to be heard

Another of such techniques to safeguard the right to be heard as much as possible is to ensure that the individuals or entities subject to a restrictive measure be in the position to make their views known before the national court of the country where the procedures that led to the adoption of the contested regulations originally took place. Since, in fact, the adoption of a restrictive measure within the EU system takes place first at the national level – where the competent authorities investigates and/or prosecutes the person – and then at the community level – where the Council decides by unanimity whether to include that person in the disputed list, based on the national authorities' files – the right of that person to be heard must also be respected on those two levels[221]. What the designated person can challenge at the EU level relates to "*the legal conditions of application of the Community measure in question*", that is, the existence of specific information or material in the file on which the restrictive measure is based which justify the decision to freeze funds or its subsequent confirmation[222]. The appropriateness and the accuracy of the national decision, together with the legality and correctness of the way in which national investigations were conducted, can instead only be challenged at the national level itself[223]. Allowing the designated persons to be heard at the EU level on these matters would be "*inappropriate in the light of the principle of sincere cooperation*", in so far as such principle "*entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority (…) both in respect of the issue of whether there are 'serious and credible evidence or clues' on which its decision is based, and in respect of recognition of potential restrictions on access to that evidence or those clues (…)*"[224].

Nevertheless, the Court specifies in *Sison I* that a control has to be ensured at the Community level when such evidence or clues have not been effectively assessed by the

[220] GC, *Akhras*, paragraph 85.
[221] CFI, *OMPI*, paragraph 117-118.
[222] CFI, *OMPI*, paragraph 120.
[223] CFI, *OMPI*, paragraph 121.
[224] CFI, *OMPI*, paragraph 122-124.

competent national authorities but merely communicated to the Council: in these circumstances, the Council is dealing with "*fresh incriminating evidence which must, as a rule, be the subject of notification and of a hearing at Community level, by reason of its not having already been so at national level*"[225]. A new layer of protection is therefore afforded to the individuals, who, should they be guaranteed no substantive protection at the national level, can still obtain it at the EU level. This seems to have been even reinforced, *inter alia*, in *Bank Mellat*, where the Court states that, "*when adopting an initial act establishing [restrictive] measures, the Council must assess the relevance and the validity of the information and evidence submitted to it (…) by a Member State or by the High Representative of the Union for Foreign Affairs and Security Policy. When adopting subsequent acts affecting the same entity, the Council is required (…) to review the need to maintain those measures in the light of observations submitted by that entity*."[226] It seems now that it is possible to hold the Council accountable for the accuracy of the facts in any circumstance, since the regulation establishing the freeze of funds is indeed an autonomous legal act of the Council, although based on information coming from the MS; therefore it is logic to require that the Council be responsible for it through and through.

3.4.5. Distinction between the Council's initial decisions and subsequent decisions

Another way in which the ECJ tries to expand the scope of the rights of the defence for the designated individuals is by drawing a distinction between the initial decision of the Council to adopt restrictive measures towards an individual or an entity, and the subsequent decision to renovate the freeze of the individual's or entity's funds. In the latter case, in fact, the surprise effect to which mention was made above is not needed anymore, thus the Council must now concede the possibility of a hearing of the designated person and, if the circumstances so require, must notify any new evidences[227].

It seems, nevertheless, that the Court has somehow qualified this possibility. In fact, the obligation of notification and of respect of the right to be heard before a subsequent decision to maintain the name of the designated person in the blacklists exists only when there is a

[225] CFI, *Sison*, paragraph 172.
[226] GC, *Bank Mellat*, paragraph 100.
[227] CFI, *Sison I*, paragraph 178.

substantial change in the reasons. When a Council regulation is characterised by a mere change of wording, instead, such obligation is not anymore binding on the Council. A clear example is offered in *Ipatau*, a case involving the vice-president of the Central Electoral Commission (CEC) of Belarus, for whom a freeze of funds was disposed in 2011 as one of the "*[persons] responsible for violations of international electoral standards*"[228]. The review made in 2012 showed a slightly different criterion for the enlistment of people, talking about "*[persons] responsible for serious violations of human rights or repression of the civil society and democratic opposition, or whose activities otherwise seriously undermine democracy or the rule of law in Belarus*"[229]. The Court has anyways recognised that "*the reason concerning the applicant had not substantially changed in 2012*", since he was subject to restrictive measures still because of his role as vice-president of the CEC and of his involvement in the violation of electoral standards. Hence, the Council was obliged neither to communicate once again the elements that it had against Mr Ipatau, nor to grant him a hearing before confirming his enlistment[230].

The Court has further clarified such a position in *Alsharghawi*. The facts are similar to *Ipatau*, *mutatis mutandis*, in the context of the sanctions against Libya and the Ghaddafi's regime: the appellant's name had been maintained on the lists of designated persons, allegedly without receiving a notification and without being heard by the Council. Regardless of the merits of the case – which found that the new notification did happen via letter to which the applicant had even answered with his observations – what matters to us is the Court's finding that "*the right to be heard prior to the adoptions of acts maintaining restrictive measures against persons already subject to them supposes that the Council has received new elements against those persons*"[231]: what is relevant is simply the existence of new material.

This clarification of the Court's stance probably reflects a need for pragmatism and speed within the Council, for it is clear to see that, if the situation is not in any way altered, there is no need for the Council to dedicate efforts in notifying a lack of change. Anyways, we should not underestimate the possibility of abuses: if the Court is now only attentive to the wording of

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[228] Judgment of the General Court of 23 September 2014, *Ipatau v Council*, T-646/11, EU:T:2014:800 ('GC, *Ipatau*'), paragraph 78.
[229] GC, *Ipatau*, paragraph 79.
[230] GC, *Ipatau*, paragraph 81.
[231] GC, *Alsharghawi*, paragraph 60.

the Council reviews, it might be possible that the Council find a way to keep a similar wording for changed situations in order to dodge its obligations, thus breaching someone's right to notice and to a fair hearing. These are only speculations, though, as no such case has yet presented itself.

4. The unavoidable negative consequences of the restrictive measures

4.1. Premise

Until now, we have dealt with the pleas relating to those that we could define the most ‘formalistic’ aspects of the restrictive measures. The complaints concerning the legality of the sanctions *per se*, their criminal nature or the infringement of all those rights linked with access to justice always relate to the way in which the sanctions regime has been construed and implemented, but not, in a sense, to the final outcome that the measures themselves aimed at. In this chapter, we will deal with all those pleas that instead focus on the consequences that the restrictive measures have brought about in respect to the designated persons. First of all, we will analyse the impact of the sanctions regime on the right to property that individuals, groups and entities enjoy. The infringement of the right to property, in fact, is the other big elephant in the room, next to the violation of the rights of the defence, which is very frequently called into question by those who are subject to restrictive measures, and in particular to freezes of funds, be they natural or legal persons. In the greatest majority of cases, the right to property is analysed together or in light of the principle of proportionality, hence a section will be dedicated to the latter, keeping in mind the difficulty, once again, in keeping a sharp separation between two overlapping elements such as the respect of the right to property and of the principle of proportionality. Finally, we will consider the remedies that could be found by holding the EU accountable for the damages caused, connecting the issue of the liability of the EU institutions with the right to reputation, interpreted as one component of the right to private and family rights.

4.2. The right to property

4.2.1. The scope of the right to property

Traditionally, the right to property was treated as a matter of competence of the single States, mostly because of its strict links with national political ideology and of its proximity to economic and social national policies. Since the late 1940s, nevertheless, the right to property became the subject of different international instruments as well[232]. In the EU legal system, the right to property was first recognised by the ECJ as one of the general principles of law derived from the common constitutional traditions of the MS[233], and only subsequently was it codified in the EU Charter, at art. 17. As expressly said in the explanations relating to the Charter, art. 17 is based on art. 1 of the First Protocol of the ECHR, therefore all the clarifications concerning the right to property have to be inferred from the ECtHR case law.

First of all, it is important to mention that, according to the ECtHR case law, both natural and legal persons enjoy the right to property. There is nevertheless a difference between the interpretation given by the ECtHR and the ECJ: the former, in fact, excludes from the scope public law entities exercising governmental powers[234], while initially it was unclear where the ECJ stood on that point. For example, AG Mengozzi highlights how, in *Bank Melli*, the GC had not considered the matter whether Bank Melli, a legal person strictly connected with the Iranian State, could enjoy the fundamental right to protection of its property. None of the parties had raised the question, although they had their views known during the hearing of the trial. The Court had therefore avoided to raise the question itself, but "*[t]he GC's silence should not necessarily be interpreted as a failure on its part to consider the issue, as it may equally be regarded as an implicit recognition of the appellant's status as the holder of a right to property*"[235].

Some years later, the ECJ had the occasion to rule explicitly on this matter in the *National Iran Oil Company* (*NIOC*) case, where the Council had requested the Court to declare the application inadmissible insofar as neither MS nor third States, nor entities that are emanations of those States, could enjoy any kind of fundamental rights, including, in particular, the right to property[236]. In the *NIOC* judgement, the Court recalled its rulings in *Bank Mellat* and *Bank Saderat*, which we have already discussed in Chapter 1.3, and consequently concludes that there

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[232] FERNÁNDEZ-BERMEJO, D.U., 'The multilevel protection of the right of property in Europe', *China-EU Law Journal*, 4, 2015, p. 76.
[233] Judgment of the Court of 14 May 1974, *Nold KG v Commission*, C-4/73, EU:C:1974:51, paragraphs 13-14; and Judgment of the Court of 13 December 1979, *Hauer v Land Rheinland-Pfalz*, C-44/79, EU:C:1979:290, paragraph 17.
[234] FERNÁNDEZ-BERMEJO, D.U., *Op. cit.*, p. 78.
[235] AG Op., *Bank Melli Iran*, paragraph 120.
[236] GC, *NIOC*, paragraph 29.

are no provisions in EU law that exclude third States – and therefore offshoots of third States – from bringing proceedings against measures of direct and individual concern to them, such as economic sanctions are[237]. The ECJ therefore widens the scope *ratione personae* of the right to property, admitting that it belongs to governmental organisation, too.

On the other side, the scope *ratione materiae* identified by the ECtHR is instead fully recognised by the ECJ: the notion of 'property' is not limited to physical goods, but extends also to pecuniary assets (for example, stocks and shares of enterprises or profits coming from commercial activities), as long as they are already existing and not future, the only exception being, in certain situations, debts or claims[238]. For instance, the GC specified, in *Ezz*, that "*'possession' can be either 'existing possessions' or 'assets', including claims, in respect of which the appellant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right*"[239]. This means that any payment made by third parties as a consequence of contracts, agreements or obligations predating the enlistment, and therefore the freeze, of an account should still be considered as part of the property of the owner of that account. It is only payments that were not provided by law at the date of the freeze that are not permitted in the restrictive measures' regime[240].

4.2.2. The permitted interferences to the right to property

Another element – the most important for us – on which the ECtHR and the ECJ converge concerns the non-absolute nature of the right to property. Art. 1 Protocol 1 ECHR admits in fact the existence of exceptions in the name of public interest and "*subject to the conditions provided for by law and by the general principles of international relations*". There are in sum three principles that govern precisely the circumstances in which a State is allowed to interfere with a person's right to property: the principle of lawfulness (any interference on behalf of public authorities must be lawful); the principle of a legitimate aim (the interference must pursue a legitimate aim); and the principle of a fair balance (the protection of the individual's right to

[237] GC, *NIOC*, paragraph 36.
[238] FERNÁNDEZ-BERMEJO, D.U., *Op. cit.*, p. 78-79.
[239] GC, *Ezz*, paragraph 212.
[240] GC, *Ezz*, paragraph 213.

property has to be balanced with the interests of the general public, and the interference must not be excessive or disproportionate)[241].

The principle of lawfulness is perhaps the most basic constituent of the exceptions to the right to respect of one's property; in fact, it is the only principle explicitly recognised even outside the European context. Art. 17(2) of the Universal Declaration of Human Rights (UDHR), indeed, only states that "*[n]o one shall be arbitrarily deprived of his property*". It is also on this aspect that the CFI puts particular emphasis when assessing the breach of the applicant's right to property in *Kadi I*, where, it will be remembered, the analysis carried on by the Court is merely in the light of the *jus cogens*. The CFI recognises that the right to property belongs to the category of mandatory rules of general international law; nevertheless, since the UDHR only condemns the arbitrary deprivation of such right, it concludes that there is no violation of the right to property. In fact, a freeze of funds resulting from restrictive measures is not arbitrary: it is provided by law (in this case, a UNSC resolution); it pursues a legitimate interest (namely the fight against terrorism), which makes it so that the principle of a legitimate aim is also implicitly respected; it is a precautionary measure, different from confiscation, therefore it does not affect the substance of the right to property[242]; it is subject to periodic reviews by the UNSC; and the designated person has always the possibility to challenge the measure before the Sanctions Committee[243]. Nor can the applicant lament that the freeze is excessively strict, considering that derogations are foreseen in order to cover basic and/or extraordinary expenses[244]. Therefore, the freeze of funds cannot be regarded, in the CFI's opinion, as "*an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned*"[245].

4.2.3. The ECJ's assessment of the right to property in relation to CFSP sanctions

Although, as we know, the ECJ in the appeal cases of *Kadi II* completely changed its approach to the review of the restrictive measures provided by the Council regulations, its analysis relative to the right to property is not substantially different from the one carried on by

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[241] ECHR ONLINE, *The right to property (article 1 of Protocol 1 to the ECHR)*, n.d. [online].
[242] See also CFI, *Hassan*, paragraph 105.
[243] CFI, *Kadi I*, paragraphs 241-252.
[244] CFI, *Hassan*, paragraph 96.
[245] CFI, *Kadi I*, paragraph 251.

the CFI. The review in *Kadi II* is conducted with the premise that the right to property belongs to the general principles of EU law and that it must be examined with regard of art. 1 of Protocol 1 of the ECHR. The reasoning of the ECJ is similar to the one of the CFI: a freeze of funds certainly constitutes a "*considerable*" restriction of Mr Kadi's exercise of his right to property[246]; still, the protection of the right to property cannot be absolute. Interferences are permitted, "*provided that those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed*"[247]. The ECJ, apart from reminding, as the CFI had done, that restrictive measures respect the principle of lawfulness and the principle of a legitimate aim, also points out how the principle of a fair balance between the interests of the individual and the interests of the wider society had been taken into consideration. It is perhaps questionable whether the consideration given is fully satisfactory, though. Talking about the way in which such balancing exercise is done, in fact, the ECJ itself states that "*[i]n doing so, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question*"[248]. There is not much balancing analysis done, after all: the Council benefits from a wide margin of appreciation, and that is sufficient for the society's interests' plate to weight more than the individual's one does.

In any event, what is interesting to note is that the focus seems to have been widened from the mere lawfulness of the measure providing for a restriction of the right to property, to the utility and implicitly the proportionality of the restriction itself. This aspect will be better discussed in the next section. Lawfulness is still a central point in the analysis of the ECJ, though. In fact, although such interference may be justified by the importance of the objective pursued by the Council decision, the Court found that Mr Kadi's right to property had been nevertheless violated. In fact, art. 1 of Protocol 1 to the ECHR also implies certain procedural requirements to be fulfilled for a restriction of the right to property to be permitted; among these requirements, there is that of granting to the designated person the possibility to bring the case

[246] ECJ, *Kadi II*, paragraph 358.
[247] ECJ, *Kadi II*, paragraph 355.
[248] ECJ, *Kadi II*, paragraph 360.

before the competent authorities and contest their decision[249]. As we discussed in the previous chapter, the Court had found that Mr Kadi was not afforded such possibility; therefore, the Council had violated not only his right to the access to justice and his right to be heard, but also his right to respect of property[250].

The right to property seems hence to be treated similarly to the right to reputation, a more detailed description of which will be given in the following sections: it is clear that individuals' or entities' properties will be significantly affected when subject to restrictive measures, as it is clear that their reputation will be damaged when they are singled out and labelled as supporters of terrorism, nuclear proliferation, undemocratic regimes, and so on and so forth. Nevertheless, these are negative consequences that have to be suffered and in a sense tolerated in the name of objectives that are of higher importance for the whole international community, and that may therefore trump a person's fundamental rights. Breaches to the right to property, as well as to the reputation of the designated persons, will thus be justified, as long as there is no infringement of other procedural requisites.

4.2.4. The principle of proportionality

This last consideration does not mean that the right to property in sanctions-related case law does not stand as a right on its own and that a violation thereof can be acknowledged in no other case but when other rights have been violated as well. It's true that the right to property is by definition always restricted by an economic sanction and that such restrictions may in principle be justified by the importance of the objectives pursued by the restrictive measures; still, a condition exists for such a restriction to be acceptable, namely, it must respect the principle of proportionality.

According to settled ECJ case law, a measure is proportional when it is reasonably connected with its goal[251], i.e., it should be appropriate and necessary to reach the aim for which

[249] ECJ, *Kadi II*, paragraph 368.
[250] ECJ, *Kadi II*, paragraphs 369-371.
[251] DREWNIAK, E., '*Bosphorus* case: the balancing of property rights in the European Community and the public interest in ending the war in Bosnia', *Fordham International Law Journal*, 20(3), article 11, 1996, p. 1022.

it was designed, and it should be the least restrictive and burdensome as possible, compared to the alternative measures that could have been applied[252].

For what concerns the appropriateness of the measure and its necessity, the Court has several times pointed out how freezes of funds constitute a suitable means to the legitimate aim of obtaining and maintaining international peace and stability, whether we talk about contrasting terrorism[253], halting nuclear proliferation[254], or consolidating and supporting democracy, the rule of law, human rights and the principles of international law[255]. It is clear to see how freezing funds is indeed an appropriate measure capable of ensuring that funds will not be used to perpetrate and support such activities[256].

Furthermore, the appropriateness of restrictive measures is also not hindered by the financial consequences that it may bear on third parties, as severe as they could be. This is clearly expressed in the most notorious judgement about the alleged infringement of the right to property due to an economic sanction, that is, the *Bosphorus* case[257]. What is at stake in *Bosphorus* is an embargo, not a freeze of funds, but this judgement illustrates perfectly the scarce consideration that the ECJ gives to the right to property in its sanctions-related case law, hence it deserves to be taken into account. Bosphorus, a Turkish airline, was indirectly affected by the economic sanction that had been imposed by the UNSC and consequently by the EU Council on Yugoslavia; in fact, one of its aircrafts, which Bosphorus had leased from the Yugoslavian National Airline, had been confiscated according to Council regulation 990/933, providing for the impounding of Yugoslavian aircrafts following the violation of the integrity and security of Bosnia Herzegovina[258]. Bosphorus naturally contested the confiscation before the competent national court, claiming that it infringed the principle of proportionality, insofar as Bosphorus Airways, or Turkey, for what mattered, had nothing to do with the war in Bosnia Herzegovina[259]. Nevertheless, the EU Court, asked to give a preliminary ruling on the matter, ruled that "*[a]s compared with an objective of general interest so fundamental for the*

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[252] CFI, *Bank Melli Iran*, paragraph 66.
[253] ECJ, *Kadi II*, paragraph 363.
[254] CFI, *Bank Melli Iran*, paragraph 67.
[255] GC, *Ipatau*, paragraph 121.
[256] CFI, *Bank Melli Iran*, paragraph 68.
[257] Judgment of the Court of 30 July 1996, *Bosphorus v Minister for Transport, Energy and Communications and Others*, C-84/95, EU:C:1996:312 ('CFI, *Bosphorus*').
[258] CFI, *Bosphorus*, paragraph 4.
[259] CFI, *Bosphorus*, paragraph 19-20.

international community (...), the impounding of the aircraft in question (...) cannot be regarded as inappropriate or disproportionate”[260]. The same opinion was shared by AG Jacobs, who stated that “*even if it were relevant to take account of the losses allegedly incurred by Bosphorus Airways, I do not think that the principle of proportionality would be infringed, in view of the importance of the public interest involved*”[261]. Although this judgement is now twenty years old and it doesn’t involve specifically a freeze of funds, there is nothing in the more recent case law to prove that the Court moved away from this standpoint.

Lastly, for what concerns the proportionality *strictu sensu* of the sanctions and the possible existence of less burdensome measures, in the same way as it happens in free movement cases, it is up to the person contesting the freeze to put forward and demonstrate that alternative less restrictive measures exist that would still be apt to achieve the goals of international peace and stability[262]. If it fails to do so, there is nothing for them to do but accepting that “*given the primary importance of maintaining international peace and security, the disadvantages caused are not inordinate in relation to the ends sought*”, in particular considering the relatively limited scope of the freeze, which does not cover basic and extraordinary expenses[263].

4.2.5. The balancing of the right to property with international security

It would therefore seem to be virtually impossible for a person, either natural or legal, to see their right to property fully protected by the ECJ in respect to CFSP restrictive measures, even when the proportionality test is applied. After all, whose right to property would ever be more important than maintaining international peace and security? In connection to this, Drewniak makes an interesting observation: he warns about the too abstract conception that the EU institutions – including therefore the ECJ – give to the aim of their restrictive measures. Naturally, the more abstract is the goal, the hardest it will be to argue that a certain measure is disproportionate to the goal itself; for example, in the case of Bosphorus, “*[t]he ending of a war is an aim so abstract that the question of what types of measures would not be reasonably*

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[260] CFI, *Bosphorus*, paragraph 26.
[261] Opinion of AG Jacobs delivered on 30 April 1996, *Bosphorus v Minister for Transport, Energy and Communications and Others*, C-84/95, EU:C:1996:179 (‘AG Op., *Bosphorus*’).
[262] CFI, *Bank Melli Iran*, paragraph 69.
[263] CFI, *Bank Melli Iran*, paragraph 71.

likely to further it is so amorphous as to be virtually meaningless"[264]. He continues arguing that a more concrete interpretation of the purpose of the regulation in question would have been that of impeding the Yugoslavian entities to get access to the leased aircraft, circumventing the embargo. If the ECJ and the AG had interpreted the regulation in such sense, it would have been evident that the other basic requirement of the principle of proportionality had not been respected, that is, the reasonable relationship between the impounding of the leased aircraft and the goal concretely constructed[265]. Instead, the Court had chosen to uphold an abstract reading of the purpose of the regulation. Moreover, "*[w]ar and international politics are indefinite by nature*"[266], from whatever perspective we assume – terrorism, nuclear proliferation, human rights violations, etc. Is it really legitimate to claim that sanctions and freezes of funds are actually temporary measures, when their temporariness depends on indefinite and unforeseeable events?

What is more, in the above-quoted passage of *Bank Melli Iran*, we find once again a hint about the existence of a hierarchy between fundamental rights and international peace and security, the latter being now raised to "*primary importance*". The applicant had tried to challenge this idea arguing, in the appeal proceedings, that "*the protection of the fundamental rights guaranteed by the ECHR may not be weighed against the fight against terrorism and protection from terrorism*" and, by extension, against the need to preserve international peace and security. He contended that "*[t]he justification given for the restrictive measures taken, namely, the maintenance of international peace and security, is not valid reasoning for the protection of human rights which the Court of Justice ensures in the Community legal order*"[267]. In support of its claim, Bank Melli relies on the ECtHR case law, in particular *Saadi v. Italy* and *A. v. United Kingdom*[268], where the ECtHR held exactly that no balancing was possible between fundamental rights and the campaign against terrorism, for the former had to have priority. Nonetheless, the ECJ dismisses the applicant's claim by reiterating what the CFI had already ruled, i.e. that the right to property is not an absolute fundamental right and therefore it could be put up to balance with other interests. Even more, AG Mengozzi highlights how the

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[264] Drewniak, E. (1996), *Op. cit.*, p. 1079.
[265] *Ivi*, p. 1081.
[266] *Ivi*, p. 1084.
[267] ECJ, *Banj Melli Iran*, paragraph 111.
[268] Judgement on the merits delivered by the Grand Chamber, *Saadi v. Italy* [GC], application no. 37201/06, ECtHR, 2008; and Judgement on the merits delivered by the Grand Chamber, *A and others v. UK* [GC], application no. 3455/05, ECtHR, 2009.

case law quoted by Bank Melli only relates to art. 3 of the ECHR, the prohibition of torture and inhuman or degrading treatment, included in that series of articles listed in art. 15(2) ECHR for which no derogation is ever possible. Mengozzi therefore concludes that "*the impossibility of weighing a fundamental right against the campaign against terrorism is strictly limited to the prevention of torture and inhuman or degrading treatment*"[269]. Any other fundamental right protected by the ECHR can instead be subject to the balancing exercise of the Courts.

4.3. Liability of the EU institutions and the right to reputation

4.3.1. Liability for material damages

Some kind of remedy to the broad discretion left by the Court to the EU institutions, and in particular the Council, might be found in the possibility for any natural or legal person to bring an action for liability of the EU institutions to seek redress of a damage suffered *ex* art. 340 TFEU (former art. 288 EC)[270]. Initially, it was held that the Community could incur in non-contractual liability only if the damage derived from an unlawful conduct or an unlawful act of the Community institutions. It is only since the year 2000 that the ECJ accepted non-contractual liability for lawful acts, as well. This novelty was brought about, by happy coincidence, in the context of a sanctions-related case, *Dorsch Consult*[271]; here the applicant, a German company which offered engineering consultancy in Iraq, were to receive a compensation for the services offered to an Iraqi Ministry; nevertheless, in response to a Council regulation imposing an embargo on trade with Iraq, the Iraqi government itself adopted a law freezing all Iraqi property and assets held by, *inter alia*, undertakings established in those States who enacted the embargo. That meant that Dorsch Consult could not receive the payment it was entitled to by the Iraqi Ministry, hence its demand that the EU be held liable and pay the damages caused, in Dorsch Consult's opinion, by the Council regulation. It is not necessary to get into the merits of this case; the fact that is actually important noticing is that the ECJ accepted the possibility of non-contractual liability of the EU for lawful acts, as long as certain conditions were satisfied: the

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[269] AG Op., *Bank Melli Iran*, paragraph 127.

[270] EUR-LEX SUMMARIES OF EU LEGISLATION, *Action for liability*, n.d. [online].

[271] Judgement of the CFI of 28 April 1998, *Dorsch Consult v Council and Commission*, T-184/95, EU:T:1998:74 ('CFI, *Dorsch Consult*'); and Judgement of the Court of 15 June 2000, *Dorsch Consult v Council and Commission*, C-237/98 P, EU:C:2000:321 ('ECJ, *Dorsch Consult*').

real existence of the damage allegedly suffered; the causal link between such damage and the Community act; and the unusual and special nature of that damage[272].

3.4.2. Liability for non-material damages: the right to reputation

Another important acknowledgement by the ECJ relates to the possibility of claims for non-material damages to the so-called ‘personality rights’ of individuals or entities who were wrongfully made subject to freezes of funds, i.e. for damages to the reputation. Neither the ECHR nor the Charter make any direct reference to the right to reputation *per se*. Initially, the ECtHR had included it in the “*civil rights and obligations*” for which “*everyone is entitled to a fair and public hearing*” as of art. 6(1) ECHR. The right to reputation was therefore considered as an appendix of the right to a fair hearing[273]. It is only since 2004 that reputation is officially recognised as a right protected by art. 8 ECHR, and thus as a component of the right to respect of one’s private life[274].

One would expect that a fundamental right such as the right to respect for private and family life would be frequently raised as a plea in a case law dealing with so intrusive measures such as a freeze of funds, especially considering how extensively this notion has often been interpreted by the Council and the Courts. Nevertheless, this doesn’t seem to be the case; as a matter of fact, in the case law selected for the present thesis, a violation of the right to private life has been lamented by the applicant only in *Hassan*[275]. The CFI, carrying on its review only in the light of the *jus cogens*, states that “*only arbitrary interference with the exercise of those rights could be considered to be contrary to [the rules of the jus cogens]*”, referring to art. 12 of the UDHR[276]. Another brief mention to the right to respect for private and family life is also made by the AG in the *M and Others* case, where it is concluded that excluding the social benefits provided by the State to the spouses of designated persons from the scope of the freeze

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[272] ECJ, *Dorsch Consult*, paragraph 19.
[273] ECKES, C., *Op. cit.*, p. 167.
[274] Judgement on the merits of the Court (Second Section), *Chauvy and others vs. France*, application no. 64915/01, ECtHR, 2004, paragraph 70.
[275] Moreover, such plea is only present in the main proceedings, as the applicant himself did not include the head of claim related to the right to respect for private and family life in the appeal. See ECJ, *Hassan*, paragraph 76.
[276] CFI, *Hassan*, paragraphs 126-127.

of their funds is "*in keeping with the obligation to protect the appellants' right to respect for their family life*"[277]; the Court, though, does not explicitly acknowledges so.

Much more interesting is instead the debate about the existence of a specific right to reputation when faced with a restrictive measure. A notable case in point is *Safa Nicu*[278], who had been classified as a communications firm supplying equipment to the uranium enrichment facility of Fordow in Qom, Iran, without the Council having substantiated such allegation[279]. The Court recognised that such breach of the rule of law conferred on the applicant the right to receive compensation for the damage on its reputation[280] based on two grounds: first of all, because the restrictive measure to which Safa Nicu had been subject provoked "*opprobrium and suspicion*" not related to its commercial interests but to an alleged involvement with "*activities regarded as reprehensible by the international community*"; and secondly, because such damage to its reputation was "*all the more serious since it is caused (...) by an official statement of the position of an EU institution*" [281].

Nevertheless, it seems that for every two steps forward in the protection of fundamental rights, there is one step back: in *Central Bank of Iran*[282], in fact, the Court points out that the right to reputation is not absolute and a violation of it can be justified by "*objectives of public interest pursued by the EU*", and that "*[t]he importance of the aims pursued by the restrictive measures at issue is (...) such as to justify negative consequences, even of a substantial nature, for the persons or entities concerned*"[283]. In particular, the Court underlines how, since Central Bank of Iran was included in the sanctions lists admittedly in order to "*reinforce the diplomatic pressure currently being brought to bear on Iran*" – and therefore, disrespecting once again the actual behaviour of the Bank – the Council had not meant to allege that the Bank was itself involved in nuclear proliferation, hence the Bank was suffering of "*a lesser degree of mistrust*"[284] and not of an opprobrium as of *Safa Nicu*. The Central Bank of Iran had thus no

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[277] AG Op., *M and Others*, paragraph 90.
[278] Judgement of the General Court of 25 November 2014, *Safa Nicu Sepahan Co. v Council*, T-384/11, EU:T:2014:986 ('GC, *Safa Nicu*').
[279] GC, *Safa Nicu*, paragraph 38.
[280] GC, *Safa Nicu*, paragraph 85.
[281] GC, *Safa Nicu*, paragraph 82-83.
[282] Judgement of the General Court of 25 March 2015, *Central Bank of Iran v Council*, T-563/12, EU:T:2015:187 ('GC, *Central Bank of Iran*').
[283] GC, *Central Bank of Iran*, paragraph 115.
[284] GC, *Central Bank of Iran*, paragraph 119.

way to redress the damage. Perhaps, the difference that led the ECJ to rule that Central Bank of Iran could not enjoy a right to reputation while Safa Nicu could is that the enlistment itself of Safa Nicu was found unlawful. Were it the case, we might then conclude that the right to reputation does not work as an independent right to declare the unlawfulness of a Council regulation, but only as an ancillary right that the applicant can invoke once such unlawfulness has been already established. This view might be confirmed by taking into consideration *Akhras*, as well: here the applicant, Syrian businessman whose funds had been frozen because of his alleged benefit from or support for the repressive Syrian regime, raises pleas in relation to the harm to both his own reputation and of his industrial group. If, on one side, the applicant had failed to substantiate the claims relating to his own reputation, on the other side, the Court recalls a distinction made by the ECtHR according to which "*there is a difference between harm to a person's reputation and harm to a business reputation, as the latter lacks any moral dimension (…). Therefore, the applicant is wrong to rely on harm to the reputation of his business*"[285]. The lack of any further details might lead us to believe that natural persons cannot invoke any damage to their enterprise's reputation insofar as legal persons do not enjoy any right on their reputation. Nevertheless, the *Akhras* judgement comes one month before *Central Bank of Iran*; therefore, we can imagine that with the latter the Court wanted to adjust the tone of the *Akhras* judgement. We should thus conclude that legal persons do enjoy reputation rights, certainly in a lesser degree than natural persons do, and possibly damages to reputation come into play only as an aggravating factor in cases of already established unlawfulness of the restrictive measure.

[285] GC, *Akhras*, paragraph 152.

5. Conclusion

5.1. A language of conflict

At the end of our analysis, there are several conclusions that we can draw relatively to the weight that fundamental rights have for the ECJ in its judgements.

First of all, I don't believe that we can completely abandon the "language of conflict" as Feinberg had recommended, at least not yet. It is undeniable that the respect of individuals' fundamental rights must be at the basis of collective security. This is evident, in particular, if we take into consideration the rights connected with the access to justice: if a State is not able to afford basic judicial protection to its citizens and to those affected by its own legislative or executive measures, that will obviously constitute a violation of the rule of law. It is unthinkable and certainly undesirable that the EU itself, by combating the violations of the rule of law abroad, were allowed to violate the rule of law internally. Collective security and the protection of individuals' fundamental rights are not mutually exclusive, but if we talked about a "balance" between these two interests, it is natural that we would still be striving for some compromises; hence, we would accept that one interest might be limited for the other's sake.

Our analysis indeed shows that there are certain instances in which a full protection of fundamental rights would constitute a too big obstacle to the effective implementation of restrictive measures, hence an obstacle to the achievement of international peace and security[286]. The most intuitive example is that recognising a right to be alerted and heard prior to the eventual implementation of a restrictive measure would obviously spoil the surprise effect from which the sanctions need to benefit. Sometimes, closing an eye on certain fundamental rights' violations seems to be indeed a 'necessary evil' for the ECJ.

[286] It is evident here that we departed from the assumption that restrictive measures are an effective way to safeguard international peace and security; it does not fall within the scope of this dissertation to contest such assumption.

What matters more, in my perspective, is that the Court has in time developed an increasing awareness towards fundamental rights. If, on one side, the thesis of a power struggle between institutions could not be discussed here, as this was not a comparative work across different judicial instances, on the other side, it seemed like the ECJ had genuinely tried to protect fundamental rights as much as possible, without an agenda aimed at tipping the institutional balances within the EU, i.e., without aiming at obtaining more competences in the CFSP area.

From the literature that has been written on the subject and as the analysis conducted has confirmed, the *Kadi* saga constitutes the backbone of the ECJ case law on individual sanctions and fundamental rights. In particular, it is the appeal judgement of 2008 that really represents a watershed between the two attitudes of the Court.

Before *Kadi II*, the Court has shown a lesser degree of attachment to fundamental rights and by far more care for the Council's wide margin of discretion. Fundamental rights in general, and the right to be heard in particular, were easily trumped by the overriding considerations relating to international peace and security or the conduct of the international relations of the EU or of the single MS. The only fundamental rights that had value in the CFI's eyes were the ones belonging to the category of the *jus cogens*, i.e. the internationally recognised mandatory norms for which no derogation is possible. Having ruled that all the fundamental rights at stake in both *Kadi I* and the case law prior to 2008 were not belonging to the *jus cogens*, it was easy for the CFI to give them a secondary importance in comparison with the so vital objective of international security.

Starting from the appeal judgement of 2008, the ECJ has more and more underlined instead how fundamental rights needed to be taken more seriously into consideration. It certainly did not give them primary and absolute importance, but it showed to be more firm in its ruling concerning the need to respect all the formalities and procedural rules, so to obtain a limitation of the individuals' fundamental rights only when they are truly unavoidable.

5.2. The place of fundamental rights in the ECJ's analysis

Overall, the figure that gives the highest prominence to fundamental rights is the AG. The Opinion by Mengozzi in *Tay Za* and by Bot in *Kala Naft* are the best examples. As we have seen, the ECJ showed to be rather hesitant to adopt fully the views of the AGs: in both cases quoted above as well as in others, it did rule in favour of the same outcome suggested by the AG; nonetheless, most of times, it didn't fully embrace his rights-oriented point of view, but it rather found more formalistic ways to reach the same conclusion. Exemplar is how the question of whether governmental organisations as in *Kala Naft* could enjoy fundamental rights has been treated by the ECJ and the AG: respectively, the ECJ noted that no legal provision in EU law denies them such rights, while the AG looked at the discriminatory consequences of denying such rights altogether to a category of individuals or entities. At times, the ECJ has caught up with its levity in following judgements – to stick with the example of *Kala Naft*, delivered in 2013, the ECJ finally ruled in favour of fundamental rights for everyone in 2016 with *Bank Mellat* and *Bank Saderat*. But it seems to me that the ECJ still has not downright adopted a fundamental rights-oriented standpoint itself.

The most evident flaw, in terms of fundamental rights protection, in the way in which the ECJ has interpreted the sanctions regime relates to the debate around the administrative nature, as opposed to criminal, of the sanctions themselves. As we have widely developed in section 1.4., the ECJ leverages on the temporary nature of the measures and on their preventive rather than punishing scope in order to exclude their criminal nature. Even though, as we have mentioned later on in the dissertation, it is questionable whether the sanctions can actually be defined as temporary when they depend on events of unforeseeable length, the ECJ doesn't seem to be willing to depart from its current position. As a consequence, under these circumstances, we have to exclude the application of two crucial fundamental rights such as the principle of guilt following a material act and the presumption of innocence.

As we have seen throughout the entire thesis, for what concerns the rights that are recognised as pertinent in the sanctions-related case law, we can say that the ECJ has eventually upheld their importance and tried to take them as much into consideration as possible. Despite the fact that the concerns for international peace and security have generally gained the upper hand over fundamental rights, we shouldn't take for granted the fact that an evolution in the ECJ's attitude did take place. This is most noticeable in the ECJ's assessment of the right to effective judicial review and to the rights of the defence. Since 2008, the difference in the scope of the judicial review of UNSC-derived sanctions and EU autonomous sanctions has been annulled, and it is now recognised that the ECJ does have the competence to review both kinds of measures in light of EU-specific fundamental rights and not only *jus cogens*. What is excluded from the ECJ's competence is an evaluation of the relevance of the facts or the material relied upon by the Council for its decisions, but the Court has now the power to rule on the accuracy of such facts and material, as well as the compliance with all procedural rules.

The ECJ has indeed shown much attention to the procedural requirements underlying both initial decisions on the adoption of restrictive measures and subsequent decisions on the maintenance of a name in the lists, highlighting more and more how the two processes are distinct and have to be treated as such. This means that the rules applicable somehow differ for initial or subsequent decisions, and this is reflected on the different levels of protection of fundamental rights according to the circumstances (*Sison I*). In particular, the rights of the defence are better protected in the context of subsequent decisions, where a surprise effect is not needed any longer and thus there is no need to deny the right to be heard prior to the Council's decision.

Contrarily, a stricter adherence to the requisites of the obligation to state reasons is foreseen before an initial decision to freeze funds. Even more, the ECJ has often highlighted how the obligation to state reasons acts exactly as the counterpart of the rights of the defence: where the latter are weaker, as in the initial decisions to freeze funds, the reasons stated have to be as complete and exhaustive as possible, working as a balancing safeguard. Here, it is only the wide margin of discretion left to the Council in terms of confidential information that offers an exception to the full compliance with the duty to state reasons and with the objective of full equality of arms between the parties (*OMPI*).

For what concerns the obligation to state reasons, we can also notice a rather pragmatic approach of both the Court and the AG, in this case, who look more at the comprehensibility of the reasons rather than at their length or accuracy. They both accept, for example, that mistakes in the identifying information of a person do not invalidate a statement of reasons when the person is able to understand that that information refers to them (*Fulmen*); or also that subsidiaries of companies, which have been already subject to a restrictive measure, can easily assume that the reasons why their own funds have been frozen is because of their links with the parent company (*Melli Bank plc*). The same is true in cases where there is a simple change in the wording of the grounds stated by the Council in the subsequent decision, which does not automatically imply new reasons relative to the initial decision and hence does not require a new communication and a new hearing procedure (*Ipatau*).

It is interesting to notice that in the context of the obligation to state reasons, the ECJ seems to have somehow retreated from a position that, at first, granted a higher level of protection than it is nowadays. We refer here to the *Hamas* and *LTTE* judgements issued on the 26th July 2017, where the Court has taken a step back from the position of the GC who, in the main proceedings, had deemed a national decision necessary as the basis not only of initial decisions to freeze funds, but also of subsequent decisions. At the present day, the Council is free to rely also on other sources in assessing the need to maintain an individual, group or entity in the lists. Since the appeal judgements is so very recent, we have to wait to see whether this position will be consolidated, but in the light of the overall orientation of the ECJ it seems plausible that it might be. In fact, it is clear that asking for the Council to always rely on national decisions gives greater guarantees to the designated persons in terms of accuracy and relevance of their files; nevertheless, the ECJ anticipates that, since there is no EU provision that asks national authorities to issue the needed national decisions periodically, the consequences on international security might be important. In this case, therefore, it seems acceptable to close an eye on the need to guarantee such safeguards prior to the decision confirming the maintenance of the person's name in the lists, especially considering that, should the decision be based on erroneous considerations or in violation of other fundamental rights or procedural rules, the person can always obtain an *a posteriori* remedy by bringing proceedings to the competent courts.

In the same way as the sanctions regime as it is now 'necessarily' violates the principle of guilt and the presumption of innocence, as well as the right to be heard prior to the enlistment, the breach of the right to property is also seen as an unavoidable negative consequence of the freeze of funds. In this respect, the analysis of the ECJ will therefore rotate only around the proportionality of the sanctions justifying the restriction of the enjoyment of private property. As we have seen, the Court might interpret the objectives of international security and peace in a very abstract way, and by doing so, there is the risk that eventually no measure will ever be disproportionate. This was particularly evident in *Bosphorus*. In any case, what is clear from the ECJ's assessment in these situations is that international security and peace will always prevail on a person's right to property, provided that the measure is proportional.

A very wide margin of discretion is therefore always left to the Council. It is the only one who can decide on the relevance of the material collected, it can withdraw information classified as ‘confidential’, and it can discharge the burden of proof, expecting the designated person to prove the inaccuracy or the facts (*Akhras*).

Some kind of remedy is offered by the fact that the ECJ has recognised the liability of the EU institutions, hence including the Council, for both unlawful acts and lawful acts. In the case of material damages, the appellant will have to prove that an unusual and special damage actually exists and that there is a causal link between the damage and the Community act (*Dorsch Consult*). Non-material damages to an individual, a group or an entity’s reputation are also eligible for redress (*Safa Nicu*). Nevertheless, the right to reputation is also not absolute and it can be put up to balance with the objectives of public interest of the EU, no matter how serious the damage is (*Central Bank of Iran*).

5.3. Final remarks

In general, it doesn’t seem that there have been big differences between the way in which the ECJ assessed natural persons’ fundamental rights or legal persons’ fundamental rights. It is true that the ECJ, in the case law selected referring to legal persons, seemed to be more evasive or more quick in its balancing analysis; nevertheless, it is possible that the reason is that most of the selected case-law relating to legal persons involves the sanctions to combat nuclear proliferation in the Republic of Iran. It was easier for the Court to connect legal persons such as banks and national companies to the Iranian government, therefore to the heart of the decision-making power. It is possible that the reason why the Court has been more severe on these persons is because there was less controversy in the freeze of their funds. The largest majority of case law where the appellant was a natural person, in fact, concerns the other condemned activities that we have encountered in our analysis – terrorism, support for the Burmese government, interferences with the rule of law in Belarus, etc. In these cases, the Court has given generally more space to the balancing test, but we cannot conclude that it was more favourable, in terms of fundamental rights, for natural persons than it was for legal persons.

As things stand today, a radical change in favour of an absolute protection of fundamental rights doesn’t seem possible nor plausible, if not at the expenses of international security, which is an objective that the MS in the Council are certainly not willing to give up. This is why I had chosen to open this dissertation with Alfred Adler’s quote. The EU institutions and the ECJ in particular are always ready to uphold the importance of fundamental rights both within the EU and abroad, even more so since the entry into force in 2001 of the Charter of the Fundamental Rights of the EU. But when the Court is faced with the choice – protecting fundamental rights through and through or confirming the wide margin of discretion of the Council in the CFSP area – it seems, more often than not, to pander to the latter.

We might even argue that the ECJ resembles much the frog that tries to climb up the well: for every step forward towards the protection of fundamental rights, it falls down two steps by posing strict limitations to the rights, allowing for exceptions to the respect of certain procedural rules, and generally accepting that, after all, international security and peace might be worth a violation of an individual's, group's or entity's fundamental rights.

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