RESTRICTIVE MEASURES OF THE EUROPEAN UNION AND THE PROPORTIONALITY OF RESTRICTIONS ON THE FREEDOM TO CONDUCT A BUSINESS AND THE RIGHT TO PROPERTY: THE BOSPHORUS DOCTRINE AND EUROPEAN CONSTITUTIONAL PLURALISM*

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ABSTRACT

The primary objective of this article is to analyse and identify the essential elements of the proportionality assessment method applied by the Court of Justice of the European Union in cases concerning the restrictive measures (sanctions) adopted by the Council, which limit the freedom of entrepreneurship and the property rights guaranteed by Articles 16 and 17 of the Charter of Fundamental Rights. Since these measures amount to interferences with the right to peaceful enjoyment of property protected by Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, this article specifically aims to identify both the similarities and the contentious differences in the proportionality assessment methods used by the CJEU and the ECtHR, especially in the context of the Bosphorus doctrine and the presumption that the protection standard provided by EU law is equivalent to the standards of the Convention. Given their unprecedent character, the article particularly analyses cases of the CJEU concerning sanctions imposed following the war in Ukraine by comparing them with relevant case-law of the ECtHR under Article 1 of Protocol No. 1 to the Convention. Finally, the article provides original conclusions regarding the elements of the lawfulness and proportionality tests applied by the CJEU that should be improved in order to make its practice more consistent and clearer for national constitutional courts, which will increasingly be required to apply both the accepted Convention standards and EU law in cases concern-

* The views expressed in this paper are those of the authors and do not represent nor do they bind the Constitutional Court.

ing restrictive measures. In this regard, the article also offers conclusions on the principles that constitutional courts should follow in such cases.

Keywords: *Bosphorus doctrine, constitutional courts, freedom to conduct a business, right to property, restrictive measures*

1. INTRODUCTION

1.1. EUROPEAN HUMAN RIGHTS SYSTEM, THE BOSPHORUS DOCTRINE, AND RESTRICTIVE MEASURES

A number of studies have examined the EU's restrictive measures imposed under Article 29 TEU[1] and Article 215 TFEU.[2] The principal research subjects covered have been the institutional framework of the EU sanctions regime and its development;[3] the CJEU's[4] jurisdiction to review (under Articles 263 and 275(2) TFEU) and interpret (under Article 267 TFEU) the Council's legal acts of general applicability (decision, regulations and implementing regulations), as well as individual restrictive measures;[5] or the practice of sanctions and their (in)effectiveness in relation to the cause triggering their imposition.[6]

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1 The consolidated version of the Treaty on European Union (the Lisbon Treaty), OJ C 202, 7 June 2016.

2 The consolidated version of the Treaty on the Functioning of the European Union (the Lisbon Treaty), OJ C 202, 7 June 2016.

3 See, for example, Gazzini, T.; Herlin-Karnell, E.; *Restrictive measures adopted by the European Union from the standpoint of international and EU law,* European Law Review, Vol. 36, Issue 6, 2011, pp. 798 - 817.; Chachko, E., *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, Yale Journal of International Law, Vol. 44, Issue 1, 2019, pp. 33 – 41.; Eckes, C., *The law and practice of EU sanctions*: In Research Handbook on the EU's Common Foreign and Security Policy, Edward Elgar Publishing, 2018, pp. 206 - 229.; Lonardo, L., *Restrictive Measures: Constitutional Issues, Classification, Judicial Review*: In EU Common Foreign and Security Policy After Lisbon: Between Law and Geopolitics, Cham: Springer International Publishing, 2022, pp. 73-89.; Hofmann, R.; Moritz, M.; *Recent Trends in EU Sanctions Law*: In International Sanctions and Human Rights, Cham: Springer Nature Switzerland, 2024, pp. 53 - 77.; and the sources cited therein.

4 The Court of Justice of the European Union; in this article the abbreviation „the CJEU" refers to both the General Court and the Court.

5 See, for example, Poli, S., *The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*, Common Market Law Review, Vol. 56, Issue 6, 2017, pp. 1799 – 1834.; Van Elsuwege, P., *Judicial review and the common foreign and security policy: Limits to the gap-filling role of the Court of Justice*, Common Market Law Review, Vol. 58, Issue 6, pp. 1731 – 1760.; Giegerich, T., *The Rule of Law, Fundamental Rights, the EU's Common Foreign and Security Policy and the ECHR: Quartet of Constant Dissonance*?, ZEuS Zeitschrift für Europarechtliche Studien, Vol. 27, Issue 4, 2024, pp. 590 - 633.; and the sources cited therein.

6 See, for example, Kreutz, J., *Hard measures by a soft power? Sanctions policy of the European Union*, Bonn: Bonn International Center for Conversion (BICC), Paper No. 45., 2005, pp. 1 – 45.; Giumelli F.; Geelhoed, W.; Vries, M. d.; Molesini, A.; *United in Diversity? A Study on the Implementation of Sanctions in the European Union*, Politics & Governance, Vol. 10, Issue 1, 2022, pp. 36 - 46.; Finelli, F., *Countering circumvention of restrictive measures: The EU response*, Common Market Law Review, Vol.

However, one sanctions case marked a turning point for all the courts of the EU in understanding the architecture of the European human rights system and the relationship between the ECHR[7] and the EU legal order - the *Bosphorus Airways* case[8], where the applicant company lodged an individual application with the ECtHR[9], complaining that its right to property (Article 1 Protocol no. 1 ECHR) had been violated by the Irish authorities' decision based on Article 8 of Council Regulation (EEC) No 990/93[10] to impound the aircraft owned by the sanctioned Yugoslav national airline but operated by the applicant company under a lease agreement.

The ECtHR established the so-called Bosphorus presumption of equivalent protection in relation to EU law. In brief, the ECHR applies to all national measures enforcing EU law, as EU membership has not absolved Member States from their obligations under Article 1 ECHR. Where a Member State cannot depart from a legal act of the EU, such as the Council regulation imposing a restrictive measure, and provided that protective mechanisms provided for by EU law (direct actions or the preliminary reference procedure) have been deployed, the presumption of equivalent protection applies. It establishes a general rule under which the ECtHR will not examine the proportionality of the impugned interference with property rights, as EU law affords protection of human rights and fundamental freedoms to standards equivalent to those of the ECHR. The ECtHR's assessment will be limited to ascertaining whether the impugned interference had a sufficient legal basis in EU law and a legitimate aim in implementing EU law. However, the presumption is rebuttable if the protective mechanisms have not been deployed, for example: if a national court failed to refer questions concerning the interpretation of EU law for a preliminary ruling;[11] or if a particular case reveals manifest deficiencies in the protection of human rights afforded by EU law. The latter, once an inconceivable situation, was realised in 2021 in *Bivolaru and Moldovan*, where the ECtHR found a violation of Article 3 ECHR in the context of the execution of a European arrest warrant.[12] Furthermore, the ECtHR has actually diluted the

60, Issue 3, 2023, pp. 733 – 762.; Khort, I., *The Sanctions Principles-Based Regulation: A Blueprint for a New Approach for the EU Sanctions Policy (Part I)*; European Company and Financial Law Review, Vol. 21, Issue 2, 2024, pp. 192 - 233.; and the sources cited therein.

7 European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International agreements, no. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010.

8 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (2010) The European Court of Human Rights [GC].

9 The European Court of Human Rights.

10 Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), OJ 1993 L 102, p. 14.

11 *Avotiņš v Latvia* (2016) The European Court of Human Rights [GC] §121 – 122.

12 See in detail *Bivolaru and Moldovan v France* (2021) The European Court of Human Rights.

equivalent protection presumption by finding it inapplicable whenever the national authorities have even the narrowest margin of manoeuvre not to apply EU law in order to meet commitments under the ECHR, regardless of the nature of the legal act in question—whether it be a Council decision or a generally applicable regulation.[13] Also, when national courts apply EU law, they must interpret it in accordance with the ECHR. As the EU has not acceded to the ECHR, this obligation confers on national courts—especially constitutional courts—a two-fold responsibility: to apply both EU law and the ECHR directly, and then to verify which one provides the most adequate level of human rights protection in compliance with international obligations.[14]

Following the *Bosphorus* judgment, the EU's restrictive measures have not been subjected to the ECtHR's scrutiny. In fact, the seminal judgment rendered by the CJEU in *Kadi*[15], based on the fundamental rights protection as a general principle of EU law that extends the CJEU's competence to a full review of the lawfulness of a Council regulation implementing the UN Security Council resolution, later inspired the ECtHR to apply the same standards in *Nada*[16] and *Al-Dulimi*[17]with respect to the Swiss authorities' refusal to provide effective and full judicial review of the UN sanctions impeding the applicants' free movement or freezing their assets.

1.2 RESEARCH PROBLEM AND METHODOLOGY

The last case where the ECtHR dealt with sanctions imposed by the Council was the Bosphorus case which, like *Nada* and *Al-Dulimi*, does not analyse an

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13 *M.S.S. v Belgium and Greece* (2011) The European Court of Human Rights (2011) [GC] §339-340; *Pirozzi v Belgium* (2018) The European Court of Human Rights §62; *O'Sullivan McCarthy Mussel Development Ltd v Ireland* (2018) The European Court of Human Rights, § 112.

14 *Jeunesse v the Netherlands* (2014) The European Court of Human Rights [GC] § 110.; As to other comments on the Bosphorus doctrine, see more in Rizcallah, C., *The Systemic Equivalence Test and the Presumption of Equivalent Protection in European Human Rights Law—A Critical Appraisal*, German Law Journal, Vol. 24, Issue 6, 2023, pp. 1062 - 1077.; Imamović, Š., *Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine*; Utrecht Journal of International and European Law, Vol. 39, Issue 1, 2024, pp. 17 – 29.; see also Schimmelfennig, F., *Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union*: In The Constitutionalization of the European Union, Routledge, 2013, pp. 100 – 117.

15 C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] Court of Justice of the European Union EU:C:2008:461; See more in Leanerts, K., *The Kadi Saga and the Rule of Law within the EU*, SMU Law Review, Vol. 67, Issue 4, pp. 707 – 715; and van Rossem, J. W., *Patrolling the Borders of the EU Legal Order: Constitutional Repercussions of the Kadi Judgment*, Croatian Yearbook of European Law & Policy, Vol. 5, 2009, pp. 93 – 120.

16 *Nada v Switzerland* (2012) The European Court of Human Rights [GC].

17 *Al-Dulimi and Montana Management Inc. v Switzerland* (2016) The European Court of Human Rights [GC].

autonomous sanctions regime of the EU. The EU has become increasingly autonomous and independent from the UN in imposing restrictive measures within the European values-based CFSP policy. A longitudinal study by *Giumelli et al.*, completed in 2021 (before the illegal invasion of Ukraine) shows that almost 50% of all restrictive measures imposed by the Council have targeted European countries; 44% were adopted with the aim of promoting democracy and 33% as crisis-management measures in relation to the Russia–Ukraine conflict. In terms of structure, 75% of all restrictive measures were asset freezes targeting economic interests of designated subjects.[18] This strategic change is a consequence of the 15 packages of sanctions adopted against Russia: the first ones introduced following the annexation of Crimea in 2014, were extensively upgraded by a new set of measures sanctioning the illegal invasion of Ukraine in 2022. Consequently, by targeting the Russian Government, individuals supporting the policies that undermine the territorial integrity and sovereignty of Ukraine, leading businesspersons, their family members or legal persons affiliated with the Government, or entire economic sectors or specific economic operators substantially contributing to the Russian Government, with asset freezes, import-export bans, and transaction bans, the EU intentionally inflicts the costs on Russian economy and exerts pressure on the Russian Government to cease its operations in Ukraine.[19] The EU has therefore introduced, due to the size of the targeted economy and the magnitude of restrictive measures applied, an "unprecedented" economic sanctions regime to date, as *Giumelli* observed.[20]

Such a complex system also required implementation in national legal systems to achieve effectiveness. For example, in Croatia, it is enforced through the Restrictive Measures Act, which, in turn, refers to the subsidiary application of national property and procedural laws, leaving the individual restrictive measures open to national judicial review.[21] The law in question and the courts' decisions will be scrutinised as well by the Croatian Constitutional Court which is ought to interpret the national constitution in conformity with both the ECHR and EU law.

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18 Giumelli, F.; Hoffmann, F.; Książczaková, A.; *The when, what, where and why of European Union Sanctions*, European Security, Vol. 30, Issue 1, 2021, pp. 2 - 5., 12 – 15.

19 For the overview of the restrictive measures policy in respect of Russia see Meissner, K.; Graziani, C.; *The transformation and design of EU restrictive measures against Russia*, Journal of European Integration, Vol. 45, Issue 3, 2023, pp. 377 – 394.; Alì, A., *Assessing the legality of the EU sanctions imposed on the Russian Federation from 2022*; In The Routledge handbook of the political economy of sanctions, Routledge, 2024, pp. 330 – 338.; Silingardi, S., *The EU 11th and 12th Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, Global Trade and Customs Journal, Vol. 19, Issue 7/8, 2024, pp. 1 – 9.

20 Giumelli, F., *A comprehensive approach to sanctions effectiveness: Lessons learned from sanctions on Russia*, European Journal on Criminal Policy and Research, Vol. 30, Issue 2, 2024, p. 212.

21 Official Gazette No. 133/2023.

The CJEU applies Articles 16 and 17 of the Charter[22], which guarantee the freedom to conduct a business and the right to property, in the case-law concerning economic restrictive measures. However, whether it truly protects those rights by a standard equivalent to that of Article 1 Protocol no. 1 ECHR we cannot unequivocally ascertain, as, after the Bosphorus judgment, the ECtHR has not dealt with economic restrictive measures imposed by the EU, let alone in the context of a sanctions regime as extensive as the one targeting Russian economy. It is worth noting that in *D. and Others* the ECtHR has communicated to the Finnish Government a complaint raised under Article 1 Protocol no. 1 ECHR regarding the applicants' inability to collect their pensions from Russia due to "the EU sanctions against the Russian Banks". Therefore, after the *Bivolaru* judgment which established the existence of manifest deficiencies in the protection of fundamental rights in the enforcement of a Council framework decision, doubts about the ECtHR's future approach to these restrictive measures are well founded.

A legitimate question thus arises concerning the general justifiability and proportionality of economic restrictive measures as the measures interfering with property rights protected under Article 1 Protocol no. 1. Recently, some studies have addressed the issue of proportionality of economic restrictive measures under Articles 16 and 17 of the Charter. A year ago, *Terlinden* formulated a hypothesis that "the application of the proportionality principle diminishes in significance, even in the face of fundamental rights protected by the Charter". This conclusion was reached by comparing the case-law that cites proportionality as a general principle of EU law (Article 5(4) TEU) with ordinary standards of suitability and necessity, instead of focusing on the specific guarantees of Articles 16 and 17 of the Charter in a particular context.[23] These criticisms are similar to those of *Eckes*, in respect of the *Kadi* case-law line developed under Article 47 of the Charter, where she noted that the "abstract" objective such as fight against terrorism has voided the proportionality principle of its meaning.[24] *Hofer* analysed the proportionality test in *Rosneft*[25] and she also observed that the objectives pursued by the restrictive measures against Russia have outweighed the concerns for the applicant's individual

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22 Charter of Fundamental Rights of the European Union, OJ C 326/391, 26 October 2012, p. 39.

23 Terlinden, M., *The Quest for Proportionality in the Changing Landscape of the Unilateral Sanctions of the European Union*, Netherlands International Law Review, Vol. 71, 2024, pp. 311 – 318.; As regards the application of proportionality as a general of principle of EU law in cases concerning sanctions, see Tridimas, T., *Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments*, Cambridge Yearbook of European Legal Studies, Vol. 12, 2009-2010, pp. 455-490.

24 Eckes, C., *EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions*, Common Market Law Review, Vol. 51, Issue 3, 2014, p. 896.

25 C-72/15, *Rosneft* (2017) Court of Justice of the European Union EU:C:2017:236.

situation.[26] However, these remarks have been challenged by empirical researchers, such as *Giumelli*, who argues that economic restrictive measures can only be proportionate if they actually inflict costs for the targeted behaviour.[27]

Nevertheless, no consistent studies have been published on economic restrictive measures as restrictions on the rights protected by Articles 16 and 17 of the Charter, especially from the perspective of Article 52(3) of the Charter, which compels the CJEU to interpret those provisions in accordance with the standards established by the ECtHR under Article 1 Protocol no. 1 ECHR. Therefore, the principal objective of this article is to analyse the CJEU's assessment methodology under Articles 16 and 17 of the Charter, applied exclusively to economic restrictive measures, through a comparative method that contrasts the CJEU's tests and criteria with those of the ECtHR. The article aims to give original answers to the following questions: 1. What aspects of the analysed courts' methodology should be aligned with the ECtHR's case-law?; 2. Does the proportionality test actually need to assert both the suitability and necessity criteria in the context of economic restrictive measures?; 3. How should the CJEU's case-law regarding economic restrictive measures be applied or interpreted by national constitutional courts that apply the ECHR directly?

As the current state of secondary legal sources cannot answer these questions, this research returns to the primary legal sources—namely, the judgments of the CJEU and the ECtHR. The case-law analysed predominantly concerns the Russia–Ukraine sanctions, as these unprecedented economic restrictive measures have, and will continue to, require closer judicial scrutiny. The sampled case-law is also limited exclusively to those judgments where the CJEU has applied Articles 16 and 17 of the Charter directly, while cases where the CJEU has only dealt with pleas of illegality or Article 47 of the Charter are excluded from the analysis. This is because the article does not intend to recapitulate well-established academic findings regarding the CJEU's jurisdiction to rule on actions for annulment. However, the study will cover the CJEU's approach to procedural guarantees inherent to Article 1 of Protocol No. 1 ECHR and the lawfulness test. Therefore, due to the deficient

[26] Hofer, A., *The EU's 'massive and targeted' sanctions in response to Russian aggression, a contradiction in terms*, Cambridge Yearbook of European Legal Studies, Vol. 25, 2023, pp. 30 – 31.; for a similar Rosneft case analysis see also Lonardo, L., *Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy*, Cambridge Yearbook of European Legal Studies, Vol. 25, 2023, p. 56; and compare with Lonardo, L.;Szép, V.; *The use of sanctions to achieve EU strategic autonomy: restrictive measures, the blocking statute and the anti-coercion instrumen*t, European Foreign Affairs Review, Vol. 28, Issue 4, 2023, p. 375, where the objectives of restrictive measures have been prioritised over the proportionality *strictu sensu*.

[27] Giumelli, F*., New analytical categories for assessing EU sanctions*, The International Spectator, Vol. 45, Issue 3, 2010, pp. 131 – 144.

methodology of the CJEU, this article also scrutinises the CJEU's reasonings regarding pleas of illegality and Article 47 of the Charter, as far as they are relevant for the analysis under Articles 16 and 17 of the Charter. In light of these criteria, it should be noted that the well-commented *RT France*[28] case, in so far as it concerns the application of Article 16 of the Charter, will not be scrutinised in-depth in this study. This is because, following the ECtHR's findings in *NIT S.R.L.*[29], we fundamentally disagree with the CJEU's assessments concerning the loss of future income (profits) complaint. Furthermore, the special context of the Article 10 ECHR complaint renders this case non-representative within the sampled case-law, as the revocation of the broadcasting licence did not pursue the legitimate aims of economic restrictive measures, such as inflicting costs on the Russian Government and economy. These are all relevant questions for a separate study.

2. COMPARATIVE CASE-LAW ANALYSIS

2.1. GENERAL METHODOLOGY

Articles 16 and 17 of the Charter, which guarantee the freedom to conduct a business and the right to property, apply as a rule of law and general principles of EU law intended to confer rights on individuals.[30] Pursuant to Article 52(3) of the Charter, the CJEU's assessment methodology "imitates" the case-law of the ECtHR with respect to the classification of interferences with property rights under the three distinctive rules of Article 1 of Protocol no. 1 ECHR[31], as well as with regard to their justification. Therefore, economic restrictive measures are classified as measures amounting to the control of the use of property rather than deprivation of property,[32] even if they result in *de facto* deprivation of property (e.g., confiscation measures with punitive character).[33] As the rights guaranteed by

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28 T-125/22, *RT France v Council* (2022) Court of Justice of the European Union EU:T:2022:483; The measure was not economic in nature, but rather targeted war propaganda, see Baade, B., *EU sanctions against propaganda for war–reflections on the General Court's Judgment in Case T-125/22 (RT France)*, Heidelberg Journal of International Law, 2023, Vol. 83, Issue 2, pp. 257 - 282.

29 *NIT S.R.L. v Moldova* (2022) The European Court of Human Rights [GC] §254.

30 C-235/17, Commission v Hungary (*Usufruct over agricultural land*) (2019) Court of Justice of the European Union EU:C:2019:432, par. 68; C-351/2022, *Neves* (2024) Court of Justice of the European Union EU:C:2024:723, par. 79.; T-305/22, *Rashnikov v Council* (2023) Court of Justice of the European Union EU:T:2023:530, par. 117.

31 C-83/20, *BPC Lux 2 and Others* (2022) Court of Justice of the European Union EU:C:2022:346, par. 38.

32 T-742/22, *Mazepin v Council* (2024) Court of Justice of the European Union EU:T:2024:433, par. 199.

33 *Neves*, par. 82.; The conclusion has been drawn from the ECtHR's cases *Agosi v the United Kingdom* (1986), § 51; *Gogitidze and Others v Georgia* (2015) The European Court of Human Rights, § 94; *Karapetyan v Georgia* (2020) The European Court of Human Rights, § 32.

Articles 16 and 17 of the Charter are not absolute in nature, they may be subject to restrictions justified by objectives of general interest pursued by the EU.[34] The question of whether a restrictive measure is compatible with EU law or justified will be answered through a four-pronged test, encompassing four conditions that must be met in accordance with Article 52(1) of the Charter: 1. The interference with property rights must be 'provided for by law' – the Council must have a legal basis for its actions; 2. It must respect the essence of property rights; 3. It must refer to an objective of general interest, recognised as such by the EU; 4. It must be proportionate.[35]

2.2. LAWFULNESS

As to the lawfulness of economic restrictive measures, the legal basis for their imposition is found in the Council's decisions, regulations, and implementing regulations adopted pursuant to Article 29 TEU and Article 215 TFEU. As established in *Pumpyanskaya*, *Moshkovich*, and *Rashnikov*, a sufficient statement of reasons and the assessment, which observes the distribution of the burden of proof and the probative value of the evidence for the initial listing of the applicant, coupled with subsequent periodic reviews of measures of general applicability, ensure respect for the lawfulness requirement and impose an obligation on the Council to constantly reassess the existence and appropriateness of the designation and listing criteria.[36]

In proceedings initiated under Article 263 TFEU, the CJEU can either intentionally separate the lawfulness requirement from the four-pronged test, or even confuse the complaints as to the unlawfulness of the interference with the proportionality test or procedural guarantees under Article 47 of the Charter.

For example, in *Pumpyanskaya*, the complaint that the proscribed designation criteria of "associated person" was vague and imprecise, thus conferring on the Council completely unfettered discretion, was addressed in a separate statement of reasons on the application of the principle of legal certainty. Furthermore, in spite of the finding under Article 17 of the Charter that the contested measure had no

[34] Cases C-10/15 and C-8/15, *Ledra Advertising and Others v Commission and ECB* (2016) Court of Justice of the European Union EU:C:2016:701, par. 69; *Neves*, par. 85.

[35] T-283/22, *Moshkovich v Council* (2023) Court of Justice of the European Union EU:T:2023:849, par. 163; T-262/15, *Kiselev v Council* (2017) Court of Justice of the European Union EU:T:2017:392, par. 69 and 84; *Mazepin*, par. 202; *Neves*, par. 86.; *Rashnikov*, par. 121.

[36] T-272/22, *Pumpyanskaya* (2023) Court of Justice of the European Union EU:T:2023:491, par. 95 ; *Moshovich*, par. 165; *Rashnikov*, par. 123 and 125; see also T-307/12 and T-408/13, *Mayaleh v Council* (2014) Court of Justice of the European Union EU:T:2014:926, par. 176.

punitive character, which was assessed as relevant with respect to the proportionality of the measure concerned in the four-pronged test, in its analysis under the legal certainty plea, the CJEU applied the standards of lawfulness under Article 7 ECHR, namely the foreseeability of criminal penalties, which was a criterion inapplicable to the administrative measure in question.[37]

The CJEU attempted to justify the application of such an unnecessarily stringent standard by stating that the restrictive measures have "a considerable impact on the rights and freedoms of the persons concerned".[38] Not only does this depart from the ECtHR's case-law, but this approach would require the CJEU to actually examine the impact and effects of the restrictive measures on the applicant's personal situation. However, it does not do so, as will be explained further in respect of the individual burden criterion under the proportionality test.

In *Igor Rotenberg*, the CJEU answered the applicant's complaints regarding the arbitrary interpretation of the proscribed designation criteria "benefitting from Russian decision-makers or from the Government of the Russian Federation" responsible for the annexation of Crimea by concluding that the "interpretation of the concept" did not go beyond what was necessary in light of the objective pursued.[39] In other words, the qualitative requirements of the lawfulness criterion, such as precision of the wording and foreseeability to be given to the legal basis by non-arbitrary judicial interpretation, were mistaken for proportionality assessment. This became even more confusing when the CJEU responded to the complaint regarding the lack of foreseeability of the contested measure in its analysis of the illegality plea under Article 267 TFEU and Article 47 of the Charter, by concluding that the applicant could have been aware of the involvement of the decision-makers from whom he had benefited in the annexation of Crimea, and that he could have expected to be targeted by the restrictive measures.[40]

As regards individual measures open to national judicial review, national courts must interpret the legal basis for the imposition of a national implementing or enforcement measure in light of secondary EU law. In *Neves*, where the individual affected contested the applicability of Article 2(2)(a) of Decision 2014/512[41] con-

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37 Par. 98, 113 – 115; Compare, in particular, with *Garofalo and Others v Italy* (2025) The European Court of Human Rights.

38 See also T-577/22, *Nioc and Others v Council* (2015) Court of Justice of the European Union EU:T:2015:596, par. 135 – 136.

39 Par. 113 – 114.

40 Par. 60 – 67.

41 Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229, 31 July 2014, p. 13.

cerning the brokering services provided in relation to military equipment that was never imported into the territory of a Member State, the CJEU did not deal with this question under the lawfulness test. It limited this part of the preliminary ruling to the conventional answer on the interpretation of Article 2(2)(a) of Decision 2014/512.[42] On the other hand, it appears that the scope of application of Article 2(2)(a) of Decision 2014/512 could have been discussed in light of the qualitative requirements for the lawfulness of the interference with property rights, therefore providing an answer to the question of whether the applicable Article 2(2)(a) of Decision 2014/512 was sufficiently accessible, precise, and foreseeable in its application to afford the affected individual a practical opportunity to comply with restrictive measures.[43]

To be precise, this idea does not call for a review of the validity of the EU's legal act limiting the rights guaranteed by Article 17 of the Charter. It rather recognises that judicial interpretation is inherent to the lawfulness requirement under Article 1 of Protocol No. 1 ECHR, which, in fact, invites the courts to clarify legal norms couched in vague or more general terms, but also subjects judicial interpretation to the principles of legal certainty, non-arbitrariness, and foreseeability.[44] Therefore, it should be questioned whether the CJEU could have seized an opportunity to clarify the margin of appreciation that it enjoys when interpreting CFSP legal acts under the lawfulness test, as well as the margin of appreciation afforded to national legislators or national courts when they exercise their, albeit limited, discretion in interpreting the Council's decisions or regulations when they adopt, or are called to review, the national enforcement measures.

In spite of the fact that these decisions and regulations are binding in their entirety and directly applicable in all Member States (Article 288(2) and (4) TFEU), the practice has shown that the proscribed legal nature of these legal acts does not, as such, alleviate the risks of their incorrect implementation or interpretation at the national level, especially in the context of restrictive measures, which is an issue well recognised by both the Council, its working groups, the Commission, and academia.[45]

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42 See in detail par. 62 - 71.

43 Compare with *Sud Fondi S.r.l. and Others v Italy* (2009) The European Court of Human Rights §109; *Centro Europa 7 S.r.1. and Di Stefano v Italy* (2012) The European Court of Human Rights [GC] §143.

44 See *Yukos v Russia* (2011) The European Court of Human Rights §595 - 599; and compare with *Khodorkovskiy and Lebedev v Russia* (2013) The European Court of Human Rights §876 – 885.

45 See, for example, the Council's document *Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures*, Brussels, 4 May 2018 (OR. en) 8519/18, available at https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf; *the Com-*

The shortcoming of the lawfulness test in *Neves* is even more regretful as the interpretation of the scope of application of Article 2(2)(a) of Decision 2014/512 could have ascertained the legitimate aims to be pursued by a broader interpretation of the provision in question, namely ensuring the effectiveness of the restrictive measure by preventing circumvention should the weapons and equipment be routed without passing through EU territory, and ultimately ensuring that the interpretation of EU law is consistent, giving the same definition to the term 'brokering services' in various measures relating to the CFSP.[46] Therefore, these legitimate aims could have well been invoked and included in the assessment under Article 17 of the Charter, especially in the proportionality test. For example, the ECtHR's case-law on (in)compatibility of national measures with EU law under Article 1 Protocol no. 1 ECHR would approach these legitimate aims under the proportionality test, rather than the lawfulness test, as the correct interpretation of EU law and legal obligation stemming from the EU membership primarily rests with the CJEU and national courts.[47]

2.3. LEGITIMATE AIM AND THE MARGIN OF APPRECIATION

The legitimate aim pursued by the contested restrictive measure will be determined in light of the legitimate aim set out by a Council decision imposing the economic restrictive measure. However, the existence of a legitimate aim must be reasserted whenever an applicant complains about having been maintained on the list of designated subjects despite the Council's periodic review, as in *Rashnikov*, where it was corroborated by the CJEU's finding that the triggering cause for the imposition of the impugned measure, as well as the applicant's personal situation, had remained unchanged.[48]

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mission Opinion of 8.6.2021 on Article 2(2) of Council Regulation (EU) No 269/2014, C(2021) 4223 final, available at: [https://finance.ec.europa.eu/document/download/1cd09e4a-0187-45bc-b234-1de949933f34_en?-filename=210608-ukraine-opinion_en.pdf]; or, for critical considerations on the coordination between the Member States implementing the restrictive measures, see Giumelli F. *et al.*, *United in Diversity? A Study on the Implementation of Sanctions in the European Union*, Politics & Governance, Vol. 10, Issue 1, 2022, pp. 36 - 46.; or Lonardo, L.; Szép, V., *The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument*, European Foreign Affairs Review, Vol. 28, Issue 4, pp. 372 - 373.

46 Par. 68. - 70.

47 See, in detail, *S. A. Dangeville v France* (2002) The European Court of Human Rights §55 - 58; *Aon Conseil et Courtage S.A. i Christian de Clarens S.A. v France* (2007) The European Court of Human Rights §40 - 44; *Ioviţoni and Others v Romania* (2012) The European Court of Human Rights §20 - 24, 33 - 34, 45 - 50; *O'Sullivan McCarthy Mussel Development Ltd. v Ireland* (2018) The European Court of Human Rights, full text.

48 Par. 62

The legitimate aim is mostly addressed by invoking the general values of the CFSP's policies under Article 21 TEU. For example, in *Moshkovich*, a quite general legitimate aim of exerting pressure on the Russian Government to bring an end to its actions destabilising Ukraine, and reaffirming the values that inspire the CFSP policies pursuant to Article 21 TEU, sufficed to justify the contested interference. Furthermore, this case demonstrated that the CJEU would also address complaints regarding the incompatibility of the objectives pursued by the restrictive measures and CFSP policies with other general objectives of the Treaties invoked by the applicant.[49]

Economic restrictive measures, in particular, have a legitimate aim in inflicting costs for the actions triggering the sanctions regime. For example, in *Rosneft* and subsequently *Sberbank*, the CJEU found that a regulation which has introduced restrictions on investment services and financial transactions with the applicants, intended to attain the objective of increasing the costs to be borne by the Russian Federation for its actions undermining Ukraine's territorial integrity.

However, the approach in which a legitimate aim would be determined in light of the applicant's individual situation is rarely applied. For example, in *Ezubov*, the legitimate aim pursued was construed as a specific subset of a more general aim. In this case, the applicant complained of having been enlisted as a person associated with another designated subject. The CJEU determined that the "associated persons" criterion is justified by the significant danger that a person subject to restrictive measures may, in order to circumvent those measures, exploit their link with persons associated with them.[50]

The analysis in *Arkady Rotenberg* was also slightly different, given the specific context of imposing the restrictive measures set forth in Decision 2014/145 on an individual personally involved in the actions of the Russian Government following the annexation of Crimea. The CJEU deemed it appropriate to justify the contested decisions of the Council by resolutions adopted at the UN General Assembly and Article 2 of the UN Charter.[51] The Council pursues the idea of an EU autonomous sanctions regime that enforces the values of the EU enshrined in the Treaties, whereas, within the context of common European security, the Union of different nations represented in the Council acts unanimously. Therefore, the legitimisation of the EU's aims by the UN's documents seems unnecessary, particularly if we reconsider the fact that the designated subject is a citizen of a Per-

[49] Par. 168 and 175.

[50] Par. 220.

[51] T-720/14, *Arkady Rotenberg v Council* (2016) Court of Justice of the European Union EU:T:2016:689, par. 176 – 177.

manent Member of the UN Security Council, capable of blocking and hindering the enforcement of UN policies in the given context. At one point, the policies of the EU and the UN could substantially diverge.

Finally, in *Ezubov* and *Mazepin*, the CJEU set out an interpretive rule under Articles 16 and 17 of the Charter which, although rarely invoked, could define its own margin of appreciation in respect of the restrictive measures. According to this rule, property rights, as fundamental rights, "must be viewed in relation to their function in society".[52] This rule resembles the ECtHR's interpretation of the ECHR as "a living instrument". However, the CJEU's case-law has not yet shown what effects should be given to the interpretation of that rule in respect of restrictive measures.

2.4. PROPORTIONALITY

The principle of proportionality, as a general principle of EU law enshrined in Article 5(4) TEU, applies to restrictive measures. However, the standard of protection is still difficult to grasp. For example, in *Rosneft* and *VTB Bank,* the introduction of pleas under Articles 16 and 17 of the Charter, mandated that the contested measure should not be *disproportionate or intolerable* in a way that impairs *the very essence* of the rights guaranteed.[53] In *Igor Rotenberg*, *Mazepin* and *RT France*, the proportionality standard applied required that measures adopted by the Council do not exceed the limits of what is *appropriate and necessary* to attain the objectives pursued.[54]

a) The scope of interference and respect for the essence of fundamental rights

As the restrictive measures of general applicability amount to the control of the use of property, the CJEU first examines whether they "respect the essence of property rights." Due to their temporary and reversible nature, or precautionary character as observed in *Rashnikov*[55], the CJEU established in *Mazepin* and *RT France* that these measures do not impair the essence of property rights.[56] The same standard

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52 T-741/22, *Ezubov v. Council* (2024) Court of Justice of the European Union EU:T:2024:605*,* par. 211; *Mazepin*, par. 200; see also T-202/12, *Al Assad v Council* (2014) Court of Justice of the European Union EU:T:2014:113, par. 113.

53 *Rosneft*, par. 148.; C-729/18 P, *VTB Bank PAO v Council* (2020) Court of Justice of the European Union EU:C:2020:499, par. 80.

54 T-738/22, *Igor Rotenberg v Council* (2023) Court of Justice of the European Union EU:T:2024:398, par. 105 and 106; *Mazepin*, par. 209; *RT France*, par. 168; see also T-723/20, *Prigozhin v Council* (2022) Court of Justice of the European Union EU:T:2022:317, par. 133.

55 Par. 118.

56 *Mazepin*, par. 205; *RT France*, par. 153; see also T-551/18, *Oblitas Ruzza* v *Council* (2021) Court of Justice of the European Union EU:T:2021:453, par. 96.

regarding whether "the essence of the right" was respected was also applied in *Neves* with respect to an individual confiscation (punitive) measure.[57] This proportionality element is quite confusing and shortsighted with regard to the actual content, scope, and effects of the restrictive measures. It appears to "imitate" the ECtHR's condition of whether a right guaranteed by Article 1 of Protocol No. 1 ECHR "has been infringed in a manner resulting in the impairment of the essence of ... rights." This condition was purposefully developed for the line of case-law dealing with partial reductions, as opposed to full deprivation, of pensions and social benefits[58], and was subsequently transposed into the EU austerity measures case-law, where the ECtHR had dealt with general legislative reductions of social rights[59]; wherefrom this standard "snuck in" to the CJEU's case-law.

Therefore, this somewhat misplaced criterion can lead to conclusions that are at odds with the nature of restrictive measures (the impugned interference) or the circumstances of specific cases, such as for example in *Neves*, the case which dealt with a confiscation nature that should have been defined, according to the ECtHR, as "the loss of all ability to dispose of the property".[60] Moreover, it must be noted that the prolonged freezing of assets may, in effect, render the use of one's property completely devoid of its purpose over time and may represent a *de facto* deprivation. This is why the ECtHR looks into the duration of precautionary and preliminary measures.

Furthermore, some cases disclose methodological difficulties in defining the scope of the interference complained of. For example, in *Mazepin*, where the applicant appealed against an asset freeze and complained about being designated as a leading businessperson in an economic sector providing a substantial source of revenue for the Government of the Russian Federation, he also complained of the consequential loss of professional clientele and the import ban that one of the Member States had imposed on one of his companies. In the ECtHR's case-law, both of these complaints would refer to two separate measures interfering with property rights[61], but they would be also declared inadmissible *ratione personae* as they had

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57 *BPC Lux 2 and Others*, par. 53; *Neves*, par. 88.

58 See, amongst many, for example *Béláné Nagy v Hungary* (2016) The European Court of Human Rights [GC] §117 - 118, and the case-law cited therein; and compare, conversely, with *Stefanetti and Others v Italy* (2014) The European Court of Human Rights §59, or *Apostolakis v Greece* (2009) The European Court of Human Rights § 41.

59 E.g., *Da Silva Carvalho Rico v Portugal* (2015) The European Court of Human Rights §42.

60 *Vasilescu v Romania* (1998) The European Court of Human Rights §53.

61 In respect of legislative regulation leading to loss of market shares, cessation of contracts or business operations, see *Pannon Plakát Kft v Hungary* (2022) The European Court of Human Rights §41., 43. - 44., 53. and 55., and the case-law cited therein; whereas in respect of import bans, see *The Liquida-*

not been raised by the companies affected.[62] A similar mistake was repeated in *Moshkovich* where the applicant introduced complaints not only in respect of the business operations of his company but also on behalf of his family members for not having been able to access the frozen funds.[63] Instead of declaring them inadmissible, CJEU examined these complaints on the merits. In *Mazepin* it further unnecessarily attributed the consequences of the contested Council's measure to "Russia's decision to invade Ukraine", which was an unacceptable conclusion in the context of the obligation to determine the scope of the Council's interference with property rights in accordance with the ECHR.[64]

b) Suitability – the manifest appropriateness test

The legality of the Council's legal acts imposing restrictive measures may be questioned in terms of proportionality only if the measure is manifestly inappropriate or manifestly inordinate, having regard to the objective it seeks to pursue, the wide margin of appreciation afforded to the Council in adopting the restrictive measures, and the general effects the contested acts aim to produce.[65]

Regarding the concept of "manifest inappropriateness," which denotes the existence of a reasonable relationship between the restrictive measures of general applicability and the objectives pursued by the Council, it does lower, to some extent, the standards regarding whether such measures are *suitable to achieve the goal pursued*. It is now settled case-law that the measures must be *capable of contributing to the objective pursued*.

For example in *VTB Bank*, the restrictions on access to the EU capital market were deemed capable of contributing to the objective of increasing the costs to be borne by Russia for its actions to undermine Ukraine's territorial integrity, sovereignty, and independence, and thus were considered appropriate.[66] Regarding the special relationship between the general designation criteria, the legitimate aim pursued, and the Council's individual assessment of the designated subject, in *Mazepin* the

tion Estate of the Commercial Company Poljičan-Rašica d.o.o. v Croatia (2024) The European Court of Human Rights §17.

62 In respect of the admissibility of the complaints introduced by the shareholders of the companies affected by a legislative regulation, see *Albert and Others v Hungary* (2020) The European Court of Human Rights [GC] §122.

63 Par. 176 and 178.

64 *Mazepin*, par. 224 – 225.

65 *Mazepin*, par. 209; C-72/15, *Rosneft*, par. 146; C-225/17 P, *Islamic Republic of Iran Shipping Lines and Others v Council* (2019) Court of Justice of the European Union EU:C:2019:82, par. 103; *VTB Bank*, par. 61; C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft* (2013) Court of Justice of the European Union EU:C:2013:776, par. 120.

66 *VTB Bank*, par. 62 and 66.

CJEU found that the Council's decision to designate the applicant was appropriate as there was "a rational connection between the targeting of leading businesspersons operating in economic sectors providing substantial revenue to the government, in view of the importance of those sectors for the Russian economy, and the objective of the restrictive measures in the present case, which is to increase pressure on the Russian Federation as well as the costs of its actions to undermine Ukraine's territorial integrity, sovereignty and independence".[67]

As to the individual burden to be borne by the designated subject, the CJEU faces a difficult position in giving an individual assessment of the pecuniary effects produced by the imposition of the restrictive measures of general applicability, as it must accept their nature: they aim "to strike" a whole state, economic sector, or a group of economic operators without examining their culpability or factual involvement in the triggering cause[68]. At the same time, it must also refrain from examining the *de facto* effectiveness of the measures in achieving the goals pursued or producing the intended effects.[69] Therefore, some elements otherwise crucial to the assessment of the disproportionate effects of the interference with property rights must be left out: 1. The subjective element, such as the existence of good or bad faith on the part of the applicant, or determination of any responsibility for or involvement in the activities triggering sanctions[70]; 2. Any objective element of proportionality dependent on the applicant's behaviour, such as the scope of the measure, e.g. the size of the funds frozen[71]; 3. The existence of discriminatory effects of the measure complained of.[72]

For these reasons, in some aspects, the logic behind the assessment of restrictive measures of general applicability contradicts the proportionality assessment found elsewhere in case-law. Instead of focusing on the individual burden imposed on the applicant, it prioritises the effectiveness of the restrictive measure in the overall assessment.

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67 Par. 95.

68 As to natural persons, see T-270/22, *Pumpyansky v Council* (2023) Court of Justice of the European Union EU:T:2023:490, par. 89: as to legal persons, see *VTB Bank*, par. 64.

69 See to that effect *Pumpyanskaya*, par. 108.

70 *VTB Bank*, par. 81: "Restrictive measures, by definition, have consequences which affect rights to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions".; Compare, *a contrario*, with *Džinić v Croatia* (2016) The European Court of Human Rights.

71 See to that effect in particular T-245/15, *Klymenko v Council* (2017) Court of Justice of the European Union EU:T:2017:792, par. 210 – 211.

72 See T-68/14, *Post Bank Iran v Council* (2016) Court of Justice of the European Union EU:T:2016:263, par. 135.

For example, in *VTB Bank*, the fact that the applicant had to seek alternative sources of capital due to the restriction on access to EU capital markets was evaluated as supporting the appropriateness of the impugned measure.[73] In *Sberbank*, regarding explicit complaints of financial losses sustained due to restrictions on access to capital markets, the CJEU ruled that the harm caused to the applicant was the primary objective of the contested measure, which the applicant must tolerate, regardless of the lack of personal culpability. The objective of inflicting costs on the Russian Government for its actions in Ukraine outweighed the disproportionate effects on the applicant's pecuniary interests. In this context, the CJEU even went so far as to say that the resulting damages for the applicant could lead to a bailout by the Russian Government, which in itself proved the overall effectiveness of the contested measure.[74] In *Mazepin* and *Igor Rotenberg*, the CJEU avoided examining the complaints regarding financial losses incurred by the applicants, simply overriding them by finding that a periodic review of the Council's decision to designate the applicants, coupled with the possibility of authorising the use or release of frozen funds in exceptional circumstances (to meet basic needs or certain commitments), were sufficient safeguards of the proportionality priniciple.[75] The same reasoning was employed in *Rashnikov* to dismiss the complaints about the excessive burden placed on the applicant by maintaining him on the list, despite the fact that, in his view, the objectives of the contested measure had been attained and it no longer pursued any legitimate aim.[76]

In the context of potentially discriminatory effects of the contested measures[77], in *Rosneft*, where the applicant complained that the measure had targeted only some economic operators compared to others in the Russian oil sector, the CJEU determined that these effects were irrelevant. Inflicting additional costs on those operators who, unlike the others, depend exclusively on technology imported from the EU and therefore cannot offset the effects of the measure by imports from alternative markets was necessary for the effectiveness of the restrictive economic measure, which amounted to a partial interruption or reduction of the economic relations in the sector affected.[78]

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73 Par. 62.

74 Par. 148 – 153.

75 *Moshkovich*, par. 167, *Mazepin*, par. 215; T-738/22, *Igor Rotenberg*, par. 112; see also *Arkady Rotenberg*, par. 185.

76 Par. 126, 138 – 139.

77 See, to that effect, general principles recapitulated in T-461/16, *Kaddour v Council* (2018) Court of Justice of the European Union EU:T:2018:316, par. 152.

78 Par. 131 – 132.

Furthermore, In *Rashnikov* the CJEU responded to the applicant's complaints regarding the alleged discriminatory effects of the contested measure by explicitly excluding the concept of indirect discrimination from its assessment. The CJEU stated that "the principle of equal treatment and non-discrimination must be reconciled with the principle of legality." Therefore, the CJEU only examined whether the provisions of the contested act were formulated neutrally, regardless of the nationality of designated subjects, and whether the decision to list the applicant was based on a reasoned and non-arbitrary assessment.[79]

Instead of conducting an individual assessment of *posteriori* disproportionate effects, in the appropriateness test, the CJEU examines whether the Council had *ex ante* ascertained objective criteria (justification) for the decision to target a specific economic operator or a group of specific economic operators. In this choice, the Council enjoys a broad discretion, which can only be overruled by the CJEU if it is possible to determine that the Council has misused its powers by implementing a restrictive measure for ends other than those for which the power was conferred on the Council, or with the aim of evading a procedure prescribed by the Treaties.[80] Therefore, in *VTB Bank* it was appropriate to single out the applicant, who was a major credit institutions established in Russia with over 50% public ownership or control.[81] In *Rosneft*, the intentional harm inflicted on the overall energy sector in Russia, with a view of reducing its power to threaten the countries that depend on it for energy supplies, was assessed to fall under the permissible appreciation of the intended effects of the restrictive measure, which did not disclose any appearances as to the misuse of powers on the part of the Council.[82]

In the end, in *Arkady Rotenberg*, the only case thus far where the CJEU established the applicant's individual responsibility for the cause triggering the imposition of restrictive measures under Decision 2014/145/CFSP, by finding him to be "among those responsible for policies and actions that undermined or threatened the territorial integrity, sovereignty, and independence of Ukraine," it was stated that the objectives pursued by the contested measure outweighed the disproportionate effects complained of. This raises the question of whether the CJEU should adopt

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79 Par. 145.; compare also with *Moshkovich*, par. 181 and 185, where the applicant complained of the Council's inconsistency in sectoral restrictive measures designation policy due to the decision not to include foreign shareholders generating higher revenues in the affected economic sector in comparison to domestic shareholders such as the applicant.

80 *Rosneft*, par. 135; T-235/22, *Russian Direct Investment Fund v Council* (2024) Court of Justice of the European Union EU:T:2024:311, par. 101; C-274/11 and C-295/11, *Spain and Italy v Council* (2013) Court of Justice of the European Union EU:C:2013:240, par. 33.

81 Par. 62, 67 – 68.

82 Par. 134 and 136.

a different proportionality standard for such cases compared to those where the applicant's personal involvement or culpability were irrelevant to its assessment.[83]

c) Necessity – less onerous alternatives

The proportionality test applicable to restrictive measures formally includes the obligation to verify the existence of alternative, less onerous measures capable of attaining the same objectives. However, the CJEU limits its assessment to the scope of powers exercised by the Council under Article 215 TFEU and the manner in which a specific restrictive measure was implemented within the broader sanctions regime, according to the reasons adduced by the Council.

For example, in *VTB Bank*, the CJEU was satisfied that the restriction on access to the EU capital market was not intended to result in a total interruption of economic and financial relations, considering that the Council had imposed the contested measure after already attempting to achieve the same objective through a series of progressive restrictive measures.[84] *In Russian Direct Investment Fund*, regarding the complaint that the asset freeze could have been more targeted and limited in scope to achieve the same objective, the CJEU was satisfied with the provisions under which contracts concluded before the legal acts came into force could be performed via exceptional prior authorisations for specific transactions.[85] Therefore, the comparison of the contested restrictive measures with other allegedly less onerous alternative measures proposed by the applicants was effectively excluded from the proportionality assessment.

Furthermore, in numerous cases, the CJEU refused to accept potentially less restrictive alternatives if they were seen to compromise the political goals it deemed legitimate. For instance, exerting pressure on Russian decision-makers responsible for the situation in Ukraine was considered a legitimate political goal. The CJEU was satisfied that less onerous alternatives, including de-listing, could be reassessed on an individual basis through the Council's periodic review.[86]

In other cases, complaints about less restrictive alternatives were dismissed if such alternatives would enable the circumvention of the restrictive measures. For example, in cases concerning asset freezes such as *Ezubov*, *Mazepin*, or *Arkady Roten-*

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83 *Arkady Rotenberg*, par. 180 – 181; In this regard, see also similar cases T-390/08, *Bank Melli Iran v Council* (2009) Court of Justice of the European Union EU:T:2009:401, par. 71, and T-202/12, *Al Assad*, par. 116.

84 Par. 79, 82.

85 Par. 96.

86 See *Arkady Rotenberg*, par. 182 and 185; and also *Al Assad*, par. 117 and 120.

berg, the CJEU found that prior authorisation or post hoc justification of specific transfers would allow the applicants to evade the restrictive measures regime.[87]

If there had been any doubts as to the underlying reasons for the self-evident avoidance of the necessity criterion, these appear to have been resolved in *OT*, where the CJEU unequivocally asserted that the values and objectives of the CFSP policy outweigh the relative importance of individual interests.[88]

d) Procedural guarantees inherent to the lawfulness and proportionality requirements

The test applied under Articles 16 and 17 of the Charter does not include procedural guarantees of the lawfulness and proportionality of interferences with property rights. As a result, complaints regarding violations of procedural guarantees are examined as separate pleas of illegality. This stems from the CJEU's methodology, which distinguishes the guarantees of the right to effective judicial protection under Article 47 of the Charter from its substantive provisions. This is quite different from the ECtHR's position that the procedural guarantees of the right to effective judicial protection are inherent to Article 1 Protocol no. 1 ECHR, as they have been in the context of EU law, for example, in the case *S. A. Dangeville*.

It is undisputed that complaints regarding violations of procedural guarantees may be examined as stand-alone complaints, such as those in *Russian Direct Investment Fund*, where the applicant alleged violations of the right to adversarial proceedings and non-disclosure of evidence in general. These complaints were not associated with the lawfulness and proportionality of the interference with property rights. However, where such complaints are directly connected to the assessment criteria under Articles 16 and 17 of the Charter, the latter approach creates evident deficiencies in the four-pronged test under the substantive provisions.

For example, in *Arkady Rotenberg*, the applicant complained that the criteria for inclusion on the list of designated subjects were unclear and that he could not understand them, as the Council's decision was insufficiently reasoned. This clear complaint about the foreseeability of the listing criteria—and thus, the lack of procedural guarantees concerning the lawfulness of the interference with property rights—was examined under Article 47 of the Charter and Article 296 TFEU.[89] Even though the test under Article 17 of the Charter had invoked the principle

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87 *Ezubov,* par. 222; *Arkady Rotenberg*, par. 182; *Mazepin*, par. 212.

88 T-193/22, *OT v Council* (2023) Court of Justice of the European Union EU:T:2023:716; par. 202: „…the disadvantages suffered by the applicant are not disproportionate in view of the importance of the objective pursued by the contested acts.".

89 *Arkady Rotenberg*, par. 45 and 49; see also T-307/12 and T-408/13, *Mayaleh*, par. 87.

of lawfulness of limitations on property rights[90], the analysis thereof could have been found only in the statement of reasons as to the pleas of illegality.[91] The same problem arose in the examination of pleas alleging manifest error of assessment by the Council. Also, pleas regarding the probative value of evidence used to assess the fulfilment of the designation criteria are separated from the lawfulness test under Articles 16 and 17 of the Charter. For example, in *Igor Arkady*, the question of whether the Council had interpreted the prescribed criteria arbitrarily by relying on less reliable sources of information, such as media articles, was answered separately under Article 47 of the Charter and Article 296 TFEU.[92] The cumulation of both flawed approaches to the general and broad designation criteria can also be observed in *Moshkovich*.[93]

Furthermore, the *OT* case demonstrates that this methodological flaw is intentional, and that the CJEU cannot ascertain which element of the test under Articles 16 and 17 of the Charter is applicable to conventional pleas of illegality. In the latter case, in the reasoning given under Article 17 of the Charter, the CJEU concluded that the applicant's complaint about the insufficiency of the evidence that he met the prescribed designation criteria "is a matter for the assessment of their merits and not of their proportionality." (?).[94]

Finally, the most recent *Ezubov* case reveals the actual consequences of this logical fallacy in the CJEU's methodology. While the CJEU decided to annul the contested decisions and the accompanying implementing regulations in respect of the applicant—because the Council failed to demonstrate that the applicant met the prescribed criterion of a "benefit" received from a leading businessperson associated with the Russian Government—the CJEU simultaneously established, under Article 17 of the Charter, that the interference with his property right was lawful.[95] How is it possible that, on one hand, the contested restrictive measure must be annulled in respect of an applicant when he or she does not meet the prescribed criteria to be sanctioned, but on the other hand, the restrictive measure and the interference with his property rights remain "lawful" under Article 17 of the Charter?

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90 See to that effect T-256/11, *Ezz and Others v Council* (2014) Court of Justice of the European Union EU:T:2014:93, par. 198.

91 *Arkady Rotenberg*, par. 171 and 175; see also T-372/14, *Sberbank of Russia OAO v Council* (2018) Court of Justice of the European Union EU:T:2018:541, par. 144 referring to par. 91 – 107 as to the pleas of illegaility; likewise in *Mazepin*, par. 204, and *Rashnikov*, par. 123.

92 Par. 51 – 55.

93 Par. 34 – 50, 58 – 67.

94 Par. 204.

95 See par. 175 – 204, and compare with par. 214.

3. CONCLUSIONS

1. What aspects of the CJEU's methodology should be aligned with the ECtHR's case-law?

a) The lawfulness test is the most deficient part of the four-pronged test applied under Articles 16 and 17 of the Charter

The CJEU should first include every interpretation of the concepts and terms set forth in Council decisions and regulations, or directives, especially any designation criteria or terms regulating the conditions for individual targeting, into the lawfulness test under Articles 16 and 17 ECHR.

Once it does so, the CJEU should attach the procedural guarantees of Article 47 of the Charter to the complaints regarding the non-fulfilment of the designation criteria to avoid illogical results such as the one in the *Ezubov* case.

There should be a clear distinction between the foreseeability of the interpretation of the designation criteria, as a primary concern under the lawfulness test, and the proportionality of the interference complained of. Whether the applicant could have foreseen that he or she could be designated is primarily the qualitative criterion of the lawfulness test and not a matter for the assessment of the individual situation in which they have been placed under the proportionality test.

In the end, the application of Article 7 ECHR to these measures, if they are not punitive in nature, should be removed to validate the CJEU's broader discretion in the interpretation of the designation criteria.

b) The legitimate aim and the margin of appreciation

It is self-evident that the primary concerns under the proportionality test are related to the effectiveness of economic restrictive measures and the circumvention of any evasion.

In this context, the CJEU should further elaborate on its findings in *Ezubov* and *Mazepin* that property rights "must be viewed in relation to their function in society."

This rule on the interpretation of EU law as "a living instrument" will give legitimacy, on the one hand, to a very broad interpretation of the objectives pursued by economic restrictive measures, while on the other, it would legitimise the lower standards applied in the proportionality test.

c) Proportionality

As regards proportionality, the CJEU should, first and foremost, remove from the assessment the question of whether economic restrictive measures interfere with "the essence" of property rights. The fact that the measures in question represent the control of the use of property does not mean that they, as such, cannot impair the very essence of one's possessions. They do, even if they are implemented formally as precautionary or preliminary measures.

If the CJEU refuses to assess the individual pecuniary burden borne by the applicant as a result of the imposition of economic restrictive measures, then the question of whether "the essence" of property rights has been respected is irrelevant. The criterion is also absolutely misplaced in respect of confiscation measures which serve a punitive purpose.

Secondly, the manifest appropriateness test under the suitability criterion should be better explained by the *Ezubov* and *Mazepin* rule on the CJEU's margin of appreciation, if further elaborated, whereas the test applied in *OT* in respect of the weight attached to the objectives pursued by economic restrictive measures should explain why the individual burden borne by the applicant is excluded from the overall proportionality test.

2. Does the proportionality test actually need to assert both the suitability and necessity criteria in the context of economic restrictive measures?

Finally, we disagree with other authors who argue that the proportionality test of economic restrictive measures should include any assessment of their necessity, as this proportionality rule contradicts the very logic of any economic sanctions' regime.

Consequently, the CJEU should further develop the suitability criterion to compensate for the lack of the necessity criterion and the assessment of the effects produced by economic restrictive measures in individual cases (the individual burden test).

3. How should the CJEU's case-law regarding economic restrictive measures be applied or interpreted by national constitutional courts that apply the ECHR directly?

As regards the lawfulness criterion, it appears that national constitutional courts should make use of the preliminary reference procedure under Article 267 TFEU as often as possible. Thus because it is hardly conceivable that the interpretation of the designation criteria, or broad and general terms adopted in other correlating legal acts of the EU, should be so evident that a national court could be confident

that the same interpretation would be shared by the CJEU, in accordance with the *CILFIT* criteria.

As regards the proportionality of national measures that enforce the restrictive measures adopted by the Council, the preliminary reference procedure will be obviously obligatory to fulfil the Bosphorus doctrine conditions, as there is no case-law of the ECtHR that could be relevant for the proportionality assessment of newly adopted sanctions packages.

In the end, constitutional courts should be particularly wary of those cases in which the applicants do not complain against the enforcement of restrictive measures directed against them, but that they have been consequently and *de facto* affected by measures which had no legitimate aim in targeting them personally or their proprietary interests. This raises the question of whether the proportionality test should apply to them by the same (lower) standards developed in the case-law of the CJEU in respect of individual and economic interests that have been intentionally targeted by the CFSP legal act of general applicability.

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