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EU's restrictive measures in Ukraine before the CJEU: taking stock

DI CLAUDIA MASSA*

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1. Introduction.

Since the early 2000s, restrictive measures (hereinafter "RMs"), which are a tool designed to bring about a change in the policy or activity of a country, entity or individual in contrast with the EU's objectives and values, have become a frequently used mean for the Council of the European Union (hereinafter "the Council") to quickly respond to international developments.

Amongst the RMs that have been adopted so far, some of them have the purpose to help some Countries prosecute (ex) members of their government or administration accused of misappropriation of public funds (in Ukraine, Egypt, Tunisia, Libya), international terrorism (that is against Osama bin Laden, Al-Qaida, Taliban), nuclear proliferation activities (in Iran), the violation of human rights or of the principles of the rule of law (in Belarus, Côte d'Ivoire, Myanmar, Zimbabwe), the repression of civilians (in Syria), or to ensure the respect of territorial integrity (in Russia, because of the situation in Crimea).

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With particular regard to the crisis in Ukraine, on 20 February 2014, the Council condemned in the strongest terms the use of violence in that State and called for an immediate end to violence and full respect for human rights and fundamental freedoms. The Council also called upon the Ukrainian Government to exercise maximum restraint and opposition leaders to distance themselves from those who resort to radical action, including violence. Then, on 3 March 2014, the Council agreed to adopt RMs enjoining the freeze and recovery of assets of persons identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations[1], with a view to consolidating and supporting the rule of law and the respect for human rights.

A significant share of the litigation before the Court of Justice of the European Union (hereinafter: "CJEU") is related to RMs[2]. In particular, those acts can be challenged before the General Court (hereinafter "GC") and, upon appeal, before the Court of Justice (hereinafter "CJ").

This article will first seek to survey the various classifications of RMs and the ways in which they are adopted and applied. Secondly, after having outlined the historical-legal framework in which RMs were adopted, following the crisis in Ukraine, it will focus on the analysis of the most recent case-law inherent to RMs adopted by the Council to freeze the assets of individuals of the Ukrainian political class responsible for the misappropriation of Ukrainian state funds (hereinafter "Ukrainian cases").

2. The notion of RMs

EU law does not provide for specific legislation on RMs. Indeed, in addition to certain provisions of the Treaty on the European Union (hereinafter "TEU") and of the Treaty on the Functioning of the European Union (hereinafter "TFEU"), which serve as legal basis for the adoption of such measures[3], there are only some basic principles outlined by the EU Political and Security Committee and adopted by the Council in the «guidelines on the implementation and evaluation of restrictive measures»[4]. These principles concern the use of RMs, their implementation and how to measure and control their impact. Moreover, EU Best Practices for the effective implementation of restrictive measures were also published[5] and, in limited cases, the Council adopted common positions setting the general framework for the adoption of RMs in a specific context[6].

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[1] Even though this criterion was set in the 2014 Council decision, no RMs enjoining the freeze or recovery of assets of persons identified as responsible for human rights violations has been adopted so far.

[2] The CJEU has competence over RMs according to Articles 275 (1) and 263(4) TFEU, even though they are laid down in Common Foreign and Security Policy Council decisions, which are normally excluded from the CJEU's competence according to Article 275(1) TFEU. *Cf.* G. STROZZI, R. MASTROIANNI, *Diritto dell'Unione europea, Parte istituzionale*, 7th ed., Giappichelli Editore, p. 337-338; C. ECKES, *EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions*, in *Common Market Law Review*, 51, 2014, p. 870.

[3] *Cf.* C. BEAUCILLON, *Les mesures restrictives de l'Union européenne*, 2014, p. 4-6.

[4] Available at: https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf. These guidelines were first adopted by the Council in 2003 and reviewed and updated in 2005, 2009, 2012 and 2017.

[5] Available at: https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf.

[6] *See*, for example, Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP).

Given the lack of a clear legal framework, it is firstly worth defining what is meant by "RMs", to then move on to the analysis of the various types of RMs[7] and their application.

RMs are an essential tool of the European Union's Common Foreign and Security Policy (hereinafter "CFSP") set out in Title V of the TEU, which allows the EU to respond swiftly to political challenges and developments that go against its objectives and values[8]. RMs are in fact laid down in CFSP Council decisions upon proposal of the High Representative of the Union for Foreign Affairs and Security Policy or of the High Representative with the Commission's support or of any Member State[9]. They can target governments of non-EU countries, entities (companies), groups or organisations (such as terrorist groups) and individuals supporting policies or involved in activities that are in contrast with EU objectives and values. In particular, RMs can target terrorism, nuclear proliferation activities, human rights violations, annexation of foreign territory and deliberate destabilisation of a sovereign country. They can consist, for instance, in restricting the entry of certain persons into the territory of the EU Member States, in freezing certain persons or entities' funds and assets, in imposing arms embargoes, in restricting the provision of services, of goods, of technologies, etc. Therefore, it is evident that RMs are not punitive in purpose, rather they are designed to bring about a change in the policy or activity put in place by the targeted country, entity or individual[10]. In fact, RMs do not have the nature of criminal sanctions[11] and they also differ from the administrative measures concerning the movement of capital and payments, which may be adopted jointly by the European Parliament and the Council under Article 75 TFEU, in the context of the framework of the area of freedom, security and justice[12].

As RMs abound, it is useful to categorize them on the basis of certain common features.

Having regard to the origin of the measure, it is possible to distinguish between "autonomous RMs", *i.e.* RMs adopted by the Council on its own initiative; "UN RMs", i.e. RMs adopted to implement Member States' commitments under international law, including United Nations Security Council's resolutions;[13] and "mixed RMs", *i.e.* RMs based on UN sanctions, but adding specific Union measures and aimed at strengthening those imposed by

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[7] For an extensive analysis of a classification of restrictive measures *ratione personae, ratione materiae* and *ratione causae iuris*, *Cf.* C. BEAUCILLON, *Les mesures restrictives de l'Union européenne*, *supra,* p. 23-27.

[8] *Cf.* C. MORVIDUCCI, *Le misure restrittive dell'Unione europea e il diritto internazionale: alcuni aspetti problematici*, in *Eurojus*, n. 2, 2019, pp. 77-96; P.J. CARDWELL, *The Legalisation of European Union Foreign Policy and the Use of Sanctions*, in *Cambridge Yearbook of European Legal Studies*, 17, 2015, pp. 287-310.

[9] *See* Article 30 TEU.

[10] *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy* (doc. 15579/03), available at https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf.

[11] It follows, for example, that, as regards the freezing of assets, the latter are not confiscated as proceeds of a crime, but frozen as a precautionary measure (see, to that effect, the judgments, GC, 7 December 2010, case T-49/07, *Fahas v Council*, EU:T:2010:499, point 67, and, 11 July 2007, case T-47/03, *Sison v Council*, unpublished, EU:T:2007:207, point 101).

[12] With regard to the relationship between the measures adopted under Article 75 TFEU and the restrictive measures (adopted under Article 215 TFEU) *see* the judgment, CJ, 19 July 2012, case C-130/10, *Parliament v Council*, EU:C:2012:472, points 51 to 66).

[13] UN Sanctions are adopted by the Security Council as resolutions under Chapter VII of the Charter of the United Nations. *Cf.* F. FILPO, *Evidence standards in the judicial review of restrictive measures*, 2019, https://doi.org/10.1007/s12027-019-00583-9, p. 15.

the Security Council[14]. Finally, there is a special "double-level" system scheme whereby the Council acts on the basis of a decision adopted by a national authority with regard to a person, group or entity (hereinafter "double-level RMs")[15].

Having regard to the personal scope of the measure, RMs can be divided into "general RMs" and "targeted RMs". "General RMs" are applicable *erga omnes* and consist, for example, in embargoes on the export or import of weapons or other products, prior authorization schemes for the export of dual-use items, prohibition to provide certain services and restrictions on transfers of financial resources between the Union and the third State concerned. Instead, "targeted RMs" apply only to designated persons, groups or entities: for example, the freeze of assets and financial resources located in the territory of the Union or held by nationals of the Union, as well as restrictions on the admission of natural persons in the territory of the Member States. The great importance of this type of RMs has been widely acknowledged since they have less collateral effects than general RMs[16].

Following the 2014 crisis in Ukraine and the annexation of Crimea by Russia, the Council adopted various type of RMs (see paragraph 4), but the ones that gave rise to litigation before the GC were mostly "autonomous targeted RMs".

3. Adoption and implementation of RMs

There are several provisions of the TEU and TFEU that are prominent in relation to the adoption and implementation of the RMs. In particular, Article 21, 23 and 29 TEU relates to their adoption whereas Article 215 and 291 TFUE concern their implementation.

Following the entry into force of the Treaty of Lisbon, RMs are adopted on the basis of Article 29 TEU by a unanimous decision of the Council, which shall «define the approach of the Union to a particular matter of a geographical or thematic nature»[17].

With reference to the legal basis for the adoption of RMs, since they belong to the CFSP, any Council decisions must always be based on one of the objectives of the Union's external action set out in Article 21 TEU, which include «democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law»[18]. In fact, Article 23 TEU provides for an obligation for the Union to

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[14] *See* Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, Brussels, 7 June 2004.

[15] This kind of restrictive measures is frequently used in the framework of the fight against terrorism. *See*, for example, the measures which are the subject of the judgments GC, 16 October 2014, case T-208/11 and T-508/11, *LTTE v Council*, EU:T:2014:885 (confirmed by the judgment, CJ, 26 July 2017, case C-599/14 P, *Council/LTTE*, EU:C:2017:583), 14 December 2014, case T-400/10, *Hamas v Council*, EU:T:2014:1095 (annulled by the judgment, 26 July 2017, case C-79/15 P, *Council v Hamas*, EU:C:2017:584) and, 13 December 2016, case T-248/13, *Al-Ghabra v Commission*, EU:T:2016:721.

[16] C. ECKES, *EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions*, *supra*, p. 872.

[17] Before the decision is adopted by the Council by unanimity, the proposed measures are examined and discussed by the relevant Council preparatory bodies: the Council working party responsible for the geographical region to which the targeted country belongs (for example, the Eastern Europe and Central Asia Working Party (COEST) for Ukraine or Belarus; the Mashreq/Maghreb Working Party for Syria, or other preparatory body), the Working Party of Foreign Relations Counsellors Working Party (RELEX), if required, the Political and Security Committee (PSC), the Committee of Permanent Representatives (COREPER II).

[18] *Cf.* L. LONARDO, *Common foreign and security policy and the EU's external action objectives: an analysis of article 21 of the Treaty on the European Union*, in *European Constitutional Law Review*, 14(3), 2018, pp. 584-

pursue these objectives by stating that «the Union's action on the international scene […] shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down» in the chapter concerning the general provisions on the EU external action (*i.e.*, in particular, Article 21 TEU).

As far as the implementation of RMs is concerned, it can be carried out either directly at Union level or by its Member States[19], depending on the type of RM adopted.

Direct implementation is provided for in Article 215 TFEU and it concerns Council decisions that include an asset freeze or other types of economic or financial RMs. These decisions have to be implemented through a Council regulation that lays down the precise scope of the RMs and the details for their implementation, adopted by a qualified majority upon joint proposal by the High Representative of the Union for Foreign Affairs and Security Policy and the Commission[20]. This direct implementation is used, in particular, when the Council decision provides for RMs necessary for the «interruption or reduction, in part or completely, of economic and financial relations with one or more third countries» (Article 215 (1) TFEU), and for RMs against «natural or legal persons and groups or non-State entities» (Article 215 (2) TFEU)[21]. Even if the Council decision adopted under Article 29 TEU and the Council regulation adopted under Article 215 TFEU are separate acts, the first being a condition for the adoption of the second, they are normally adopted by the Council on the same day, in order to preserve the "surprise effect" of the RMs and thus guarantee their effectiveness.

Member States are then required to take the measures of national law necessary for the implementation of the Council regulations providing for RMs, in accordance with Article 291 (1) TFEU and with those regulations. This obligation concerns, in particular, the implementation of asset freeze RMs as well as prior authorization systems and derogations from targeted RMs of freeze of funds provided for at the Union level.

In areas where the European Union does not have competence (such as, for example, restrictions on entry into the territory), indirect implementation takes place, since it is up to the Member States to implement Council decisions adopted on the basis of Article 29 TEU.

In the so-called "Ukrainian cases" that will be analysed below, the Council adopted RMs to promote and consolidate compliance with the rule of law and to enforce human rights in Ukraine. Moreover, the Council directly implemented these RMs by means of regulations according to Article 215 TFUE[22].

4. Setting the scene: the RMs adopted in response to the crisis in Ukraine.

608; T. GAZZINI, E. HERLIN-KARNELL, *Restrictive measures adopted by the EU from the standpoint of international and EU law*, in *European Law Review*, 36(6), 2011, pp. 798-817.

[19] The EU has adopted *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy* (doc. 15579/03), available at https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf.

[20] The European Parliament shall be informed. As a legal act of general application, the regulation is binding on any person or entity (economic operators, public authorities, etc.) within the EU.

[21] On the distinction between the legal basis of Article 215(1) and Article 215(2), *cf.* C. ECKES, *EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions*, *supra*, p. 880-883.

[22] The legal bases of Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 66, 6.3.2014, p. 1–10, on the basis of which other implementing regulations have been adopted, is Article 215 TFUE.

Since March 2014, Ukraine was hit by a crisis erupted after the announcement of the freezing of the signing of the association agreement with the EU by the pro-Russian President Yanukovych. With the fall of Yanukovych and the takeover of power by the nationalist and pro-European opposition, the Russian Federation proceeded to the illegal annexation of Crimea following a referendum called by the Crimean Parliament to break away from Kiev.

In response to those events, the EU took three different actions. On the one hand, it adopted diplomatic measures that cannot be defined as RMs in a technical sense and therefore they won't be analysed in the present article[23]. On the other hand, it progressively imposed two types of RMs: some aimed at exerting pressure on Russia because of the illegal annexation of Crimea; others aimed at helping the new Ukrainian government prosecute members of the former Ukrainian government or people associated with them (such as their family members) as accused of «misappropriation of public funds», with the purpose of consolidating the rule of law in Ukraine.

Even though the present article will focus on the litigation before the CJEU related only to this last group of RMs, in order to set a clear historical-legal framework, it is appropriate to list, by way of example, also some of the RMs adopted to exert pressure on Russia[24]. For instance, the EU adopted several RMs restricting economic relations with Crimea and Sevastopol, such as: an import ban on goods from those two areas, restrictions on trade and investment related to certain economic sectors and infrastructure projects, a prohibition to supply tourism services in Crimea or Sevastopol and an export ban for certain goods and technologies. Furthermore, the EU imposed RMs consisting in economic sanctions targeting exchanges with Russia in specific economic sectors. They limit access to EU primary and secondary capital markets for certain Russian banks and companies, impose an export and import ban on trade in arms, establish an export ban for dual-use goods for military use or military end users in Russia, curtail Russian access to certain sensitive technologies and services that can be used for oil production and exploration. EU leaders also introduced RMs concerning economic cooperation. In particular, the European Investment Bank was requested to suspend the signature of new financing operations in the Russian Federation, the EU member states agreed to coordinate their positions within the European Bank for Reconstruction and Development (EBRD) Board of Directors with a view to also suspend the financing of new operations, and the implementation of EU bilateral and regional cooperation programmes with Russia was re-assessed and certain programmes suspended.

[23] For example, the EU-Russia summit was cancelled and EU Member States decided not to hold regular bilateral summits. Also bilateral talks with Russia on visa matters as well as on the new agreement between the EU and Russia were suspended. Moreover, instead of the G8 summit in Sochi, a G7 meeting was held in Brussels on 4-5 June 2014. Since then, meetings have continued within the G7 process. Furthermore, EU countries also supported the suspension of negotiations over Russia's joining the Organisation for Economic Co-operation and Development (OECD) and the International Energy Agency (IEA).

[24] It is worth noting that very recent case-law of the CJEU also concerns this kind of RMs adopted within the framework of the Union's policy of non-recognition of the illegal annexation of Crimea and Sevastopol. For instance, the Court ruled upon RMs targeting persons and entities who has been considered as helping to establish independent sources of electricity in those States (*see*, 11 September 2019, case T-721/17, *Topor-Gilka v Council*, EU:T:2019:579). Moreover, the CJEU also stated on cases concerning RMs targeting Russian entities, adopted with the objective to increase the costs of the actions of the Russian Federation designed to undermine Ukraine's territorial integrity, sovereignty and independence and to promote a peaceful settlement of the crisis (*see*, 13 September 2018, case T-715/14, *NK Rosneft and Others v Council*, EU:T:2018:544; 16 July 2015, case T-69/15, *NK Rosneft and Others v Council*, EU:T:2015:565).

With reference to the RMs that interest us here, *i.e.* those aimed at helping the new Ukrainian government prosecute members of the former Ukrainian government accused of «misappropriation of public funds», it is first of all important to stress that they are «targeted RMs». In fact, the EU imposed RMs consisting in the asset freeze against ten persons identified as responsible for the misappropriation of Ukrainian state funds or for the abuse of office causing a loss to Ukrainian public funds. These RMs were initially introduced in March 2014 and extended on a yearly basis since then. The last extension was done on 5 March 2020 until 6 March 2021[25].

Some of the people to whom this type of RMs were addressed challenged the decisions of the Council and the related implementing regulations before the GC. The present article will now focus on the most recent case-law arising from these actions for annulment under Article 263 TFEU.

5. Preliminary insights on the case-law concerning targeted RMs in the Ukrainian cases

There are a few preliminary issues to clarify before moving on to the analysis of the case-law related to RMs consisting in the freeze of the assets of people who were under investigation at the national level for misappropriation of public funds, adopted by the EU with the aim of consolidating the rule of law in Ukraine.

Firstly, it is important to make clear how a RM of freeze of funds would serve the purpose of strengthening of the rule of law. In fact, it is true that the rule of law is part of the goals of the Union's external action under Article 21 TEU that – as explained above – have to be pursued within the CFSP according to Article 23 TEU, but it is not easy to envisage how this specific kind of RMs would help to reach this aim. In order to solve this doubt, it is useful to cite the position adopted by the GC. The latter justified the Union's competence to establish this kind of RMs by stating that the fight against corruption constitutes, in the context of the Union's external action, a principle included in the scope of the concept of "rule of law"[26]. Therefore, the GC stated that the freeze of funds ensures that the authorities can more easily secure restitution of the profits of misappropriation, thus allowing the EU – albeit indirectly – to consolidate the rule of law in third States[27].

Secondly, it is worth noting that a Council Decision of 2015[28] explicitly specified that, in addition to the people who are subject to definitive judicial proceedings, even those who are subject to mere preliminary investigations by the Ukrainian authorities may also be affected by

[25] Council Decision (CFSP) 2020/373 of 5 March 2020 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, ST/6062/2020/INIT, OJ L 71, 6.3.2020, p. 10–13.

[26] GC, 15 September 2016, case T-346/14, *Yanukovych v Council*, EU:T:2016:497, para. 98; 21 February 2018, case T-731/15, *Klyuyev v Council*, EU:T:2018:90, para. 76-77.

[27] GC, 15 September 2016, case T-340/14, *Klyuyev v Council*, EU:T:2016:496, prara. 118. *Cf.* S. POLI, *L'evoluzione del controllo giurisdizionale sugli atti PESC intesi a consolidare la rule of law: il caso delle misure restrittive sullo sviamento di fondi pubblici*, in *Il Diritto dell'Unione europea*, vol. 2, 2019, p. 302.

[28] Council Decision 2015/143/CFSP of 29 January 2015 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 24, 30.1.2015, p. 16–16, Article 1.

a RM[29]. The rationale behind this provision is to ensure the useful effect of the RMs, *i.e.* to avoid that the misappropriated funds are quickly transferred elsewhere. For this reason, the Council sometimes adopted RMs just after the opening of preliminary investigations or at the time of the opening of the seizure of assets procedure.

Thirdly, the same Council Decision of 2015 defined the meaning of the phrase responsible «for the misappropriation of public funds», by affirming that it includes persons subject to investigation «for the misappropriation of Ukrainian public funds or assets, or being an accomplice thereto; or for the abuse of office as a public office-holder in order to procure an unjustified advantage for him or herself or for a third party, and thereby causing a loss to Ukrainian public funds or assets, or being an accomplice thereto»[30].

Based on these criteria, the Council adopted RMs against, among others, Viktor Fedorovych Yanukovych (former President of Ukraine) and one of his sons, Oleksandr Viktorovych Yanukovych, together with Mykola Yanovych Azarov (former Prime Minister of Ukraine), Sergej Arbuzov (former Prime Minister of Ukraine), Oleksandr Klymenko (former Minister of Revenue and Duties of Ukraine), Viktor Pshonka (former Prosecutor General of Ukraine), Artem Pshonka, his son, and Andriy Klyuyev (former Head of Administration of the President of Ukraine). They were included, for the first time in 2014, on the list of persons subject to the freezing of funds, on the ground that they were subject to criminal proceedings in Ukraine to investigate crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine[31]. The decision concerning the freezing of funds against those persons was repeatedly extended, for one-year periods, on the new ground that they were subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.

In these cases[32] – held between 2014 and 2020 – the GC and the CJ exercised an intense judicial review over the RMs and annulled all of them.

In particular, since the very first cases, the GC has always carefully assessed these RMs and it annulled those of 2014 after a accurate verification not only of the reasoning of the RMs but also of whether the listing criterion stated in each decision was compatible with the objectives of the CFSP and, more specifically, whether that criterion was proportionate in the light of those objectives.

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[29] Actually, even if a provision as explicit as the one contained in Article 1 of Decision 2015/143/CFSP was not contained in Decision 2014/119/CFSP, the latter already provided for RMs concerning people subject to preliminary proceedings. The GC confirmed their validity, in the wake of what was already established in the judgments relating to RMs adopted following the political events which took place in Egypt in January 2011 (*see*, for example, 27 February 2014, case T- 256/11, *Ezz and Others v Council*, EU:T:2014:93).

[30] Council Decision (CFSP) 2015/143 of 29 January 2015 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 24, 30.1.2015, p. 16–16, Article 1.

[31] Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 66, 6.3.2014, p. 26–30; Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 66, 6.3.2014, p. 1–10.

[32] For instance, CJ, 19 December 2018, case C-530/17P, *Azarov v Council*, EU:C:2018:1031; 11 July 2019, case C-416/18 P, *Azarov v Council*, EU:C:2019:602; GC, 11 July 2019, case T-284/18, *Arbuzov v Council*, EU:T:2019:511; CJ, 26 September 2019, case C-11/18P, *Klymenko v Council*, EU:C:2019:786; GC, 11 July 2019, T-244/16, *Yanukovych v Council*, EU:T:2019:502.

Then, with the *Azarov* judgment of December 2018[33] the CJ imposed on the Council a further (and controversial) verification of compliance with fundamental rights.

In particular, in the 2018 *Azarov* judgment the CJ applied a principle that is referred to as the "LTTE principle", since it was established for the first time in the *Council v LTTE* judgment[34] concerning anti-terrorism RMs. According to this principle, the Council must, *before acting on the basis of a decision of an authority of a third State* (such as judicial decisions, statements, letters, etc.), check whether that decision was adopted in accordance with the rights of the defence and the right to effective judicial protection[35].

In applying the "LTTE principle" in the 2018 *Azarov* judgment, the CJ basically transferred a principle that is applicable in the context of "double-level" RMs, whereby the Council acts on the basis of a decision adopted by a national authority with regard to a person, group or entity (such as those adopted to fight against terrorism), to the different context of "autonomous" RMs, which are instead adopted *motu proprio* by the Council (such as the Ukrainian RMs), regardless of the existence of a prior national competent authority's decision. In the case of an "autonomous" RMs, in fact, if a decision adopted by a national authority exists, it only serves as a proof (*i.e.* a «sufficiently solid factual basis» [36]) to include a person or entity on a list of persons or entities whose assets are to be frozen.

This transfer of the principle from one context to another is to a certain extent controversial: the "LTTE principle" is clearly suitable when it comes to "double-level" RMs, whereas it appears difficult to figure out how to apply it in the context of "autonomous" RMs.

In this regard, the GC tried to explain, in its April 2018 *Azarov* judgment[37], that the *Council v. LTTE* judgment is built upon Article 1(4) of the Council Common Position on the application of specific measures to combat terrorism[38], which establishes a specific criterion for the designation of persons subject to RMs, by providing a mechanism allowing the Council to include a person in a list of freeze of funds on the basis of a decision adopted by a national authority, even of a third State. On the contrary, Article 1(1) of Decision 2014/119, to which the Ukrainian RMs are anchored, does not include the existence of a prior decision by the Ukrainian authorities among the criteria conditioning the adoption of RMs. In fact, the aforementioned Article 1(1) only provides for the freeze of funds of «persons *having been identified as responsible* for the misappropriation of Ukrainian State funds and persons

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[33] CJ, 19 December 2018, C-530/17 P, *Azarov v Council*, *supra*.

[34] CJ, 26 July 2017, case C-599/14 P*, Council v LTTE*, ECLI:EU:C:2017:583, para. 24.

[35] Emphasis added. CJ, 26 July 2017, case C-599/14 P*, Council v LTTE*, *supra*, para. 24; CJ, 19 December 2018, C-530/17 P, *Azarov v Council*, *supra*, para. 26; 22 October 2019, case C-58/19 P, *Council v Azarov*, EU:C:2019:890, para. 28; 11 July 2019, case C-416/18 P, *Azarov v Council*, *supra*, para. 27; 26 September 2019, case C-11/18 P, *Klymenko v Council*, *supra*, para. 21. It should be noted that in the following judgments of July and September 2019 – all of which were not appealed by the Council – the GC applied the CJ's *Azarov* case-law, even in the course of the procedure (for example, in the *Yanukovych* cases the oral procedure was reopened).

[36] This aspect will be further analysed in the paragraph 5.1.

[37] GC, 26 April 2018, case T-190/16, *Azarov v Council*, EU:T:2018:232, para. 183 and ff.

[38] Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344, 28.12.2001, p. 93–96, Article 1(4): «The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list».

responsible for human rights violations in Ukraine, and natural or legal persons, entities or bodies associated with them»[39]. Interpreting this provision, the GC concluded that the legal proceedings initiated by the national authorities only constitute the factual basis on which RMs are instituted but not a criterion for the listing[40].

However, the CJ arguably overcame the distinction provided by the GC by stating, in its 2019 *Azarov* judgment [41], that it is irrelevant that the existence of a prior decision of a national authority does not constitute the listing criterion referred to in Article 1(1) of Decision 2014/119, but the factual basis on which RMs are based. Consequently, the CJ deemed it appropriate to point out that the Council is required to verify whether the national decision was adopted in compliance with the rights of the defence and the right to effective judicial protection (see paragraph 5.1). Thus, it can be affirmed that the reasoning of the 2018 *Azarov* judgment is at the basis of the 2019 *Azarov* judgment and of all the other judgments issued after 2018 related to the Ukrainian RMs here at stake[42].

6. Key-point of the case-law

The key-points of the recent case-law concerning targeted RMs in the "Ukrainian cases" relate to three main obligations of the Council: the duty to verify the compliance with the rights of the defence and the right to effective judicial protection, the duty to state reasons in its decisions and the duty to regularly provide new reasons for retaining people or entities on the list.

6.1. Duty to verify the compliance with the rights of the defence and the right to effective judicial protection

As far as the duty to verify the compliance with the rights of the defence and the right to effective judicial protection are concerned, as mentioned above, the CJ affirmed that the Council must, before acting on the basis of a decision of an authority of a third State (such as judicial decisions, statements, letters, etc.), check whether that decision was adopted in accordance with these rights[43].

When it comes to "double-level" RMs, such a duty to verify the compliance with those fundamental rights is particularly relevant because, unlike EU's Member States, many third States are not bound by the requirements stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "ECHR"), signed in Rome on 4 November 1950, and none of them is subject to the provisions of the Charter of Fundamental Rights of the European Union. As a result of this scenario, the subsequent judicial review of the GC is supposed to be much more meaningful in cases concerning "double-level" RMs

[39] Emphasis added.

[40] GC, 26 April 2018, case T-190/16, *Azarov v Council*, *supra*, para. 185.

[41] CJ, 11 July 2019, case C-416/18 P, *Azarov v Council*, *supra*.

[42] *Cf.* S. POLI, *L'evoluzione del controllo giurisdizionale sugli atti PESC intesi a consolidare la rule of law: il caso delle misure restrittive sullo sviamento di fondi pubblici, supra,* pp. 306 and ff.; S. POLI, *Le misure restrittive dell'unione europea per sviamento di fondi pubblici alla luce della sentenza Azarov*, in *European Papers*, vol. 1, n. 1, 016, pp. 715-726.

[43] CJ, 19 December 2018, C-530/17 P, *Azarov v Council*, *supra*, para. 26; 22 October 2019, case C-58/19 P, *Council v Azarov*, *supra*, para. 28; 11 July 2019, case C-416/18 P, *Azarov v Council*, *supra*, para. 27; 26 September 2019, case C-11/18 P, *Klymenko v Council*, *supra*, para. 21.

adopted following a decision of an authority of a third State than in cases where the RM is based on a decision taken by an EU Member State's competent authority[44].

With regard to "autonomous" RMs, instead, the requirement for the Council to verify that the decisions of a third States on which it bases the entry of a person or entity on a list of persons or entities whose assets are to be frozen have been taken in accordance with those rights is designed to ensure that they are included on that list only «on a *sufficiently solid factual basis*»[45] and, thus, to protect the persons or entities concerned[46].

In particular, the Council cannot conclude that a listing decision is taken on a sufficiently solid factual basis before having itself verified that the rights of the defence and the right to effective judicial protection were respected at the time of the adoption of the decision by the third State at stake on which it intends to base the adoption of RMs[47].

Even though Ukraine is among those third States that have acceded to the ECHR, the CJ stated that, although a circumstance of that nature entails review by the European Court of Human Rights of the fundamental rights guaranteed by that convention (which, in accordance with Article 6(3) TEU, forms part of EU law as general principles), «*it cannot render superfluous the verification, by the Council*[48], that the decision of a third State on which it bases its [RMs] has been taken in compliance with fundamental rights and, in particular, the rights of the defence and the right to effective judicial protection»[49].

It clearly appears that the CJ requires the Council to carry out a *substantial*, and not only formal, check of the respect by the Ukrainian authorities of the aforementioned rights. Therefore, the Council should not only simply verify whether the provisions of law relating to such proceedings in third States comply with those fundamental rights, but it should also assess whether in each individual case the investigations or judicial proceedings against the person to be listed were carried out in compliance with those rights.

However, it is not easy to set the boundaries of this substantial assessment. In this regard, the less recent case-law only affirmed, on the one hand, that it is not for the Council (nor for the GC) to verify whether the national investigations are well founded[50], and, on the other hand, that it is the responsibility of the Council to carry out additional verifications or ask the national authorities for additional evidence[51]. On 25 June 2020, instead, the GC finally held the 2020

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[44] F. FILPO, *Evidence standards in the judicial review of restrictive measures*, *supra,* p. 16. V. CJ, 26 July 2017, case C-599/14 P*, Council v LTTE*, *supra*, para. 24; GC, 16 October 2014, case T-208/11 and T-508/11*, LTTE v Council*, *supra*, paras. 138 and 139.

[45] Emphasis added.

[46] CJ, 26 July 2017, case C-599/14 P*, Council v LTTE*, *supra*, para. 26; 19 December 2018, C-530/17 P, *Azarov v Council*, *supra*, para. 28; 22 October 2019, case C-58/19 P, *Council v Azarov*, *supra*, para. 30; 11 July 2019, case C-416/18 P, *Azarov v Council*, *supra*, para. 29; 26 September 2019, case C-11/18 P, *Klymenko v Council*, *supra*, para. 23.

[47] CJ, 19 December 2018, C-530/17 P, *Azarov v Council*, *supra*, para. 34; 22 October 2019, case C-58/19 P, *Council v Azarov*, *supra*, para. 36; 11 July 2019, case C-416/18 P, *Azarov v Council*, *supra*, para. 35; 26 September 2019, case C-11/18 P, *Klymenko v Council*, *supra*, para. 33.

[48] Emphasis added.

[49] CJ, 19 December 2018, C-530/17 P, *Azarov v Council*, *supra*, para. 36; 22 October 2019, case C-58/19 P, *Council v Azarov*, *supra*, para. 38; 11 July 2019, case C-416/18 P, *Azarov v Council*, *supra*, para. 37; 26 September 2019, case C-11/18 P, *Klymenko v Council*, *supra*, para. 35.

[50] CJ, 5 March 2015, case C-220/14 P, *Ezz and others v Council*, EU:C:2015:147, para. 77.

[51] GC, 7 July 2017, case T-215/15, *Azarov v Council*, EU:T:2017:479, para. 148. *Cf.* F. FILPO, *Evidence standards in the judicial review of restrictive measures*, *supra,* p. 18.

Klymenko judgment[52] that gives further details on this topic and helps to clarify which are the boundaries of the assessment that the Council has to carry out, specifically when adopting a decision of extension of a RM[53].

In particular, from the 2020 *Klymenko* case it emerges that a crucial role may be played by all the documents and letters that the national authority and the Council or the person already subject to a RM and the Council exchange in the phase preceding the adoption of the decision of the extension of a RM by the Council. In fact, the GC affirms that the arguments contained in the applicant's letters concerning the respect of fundamental rights in the national proceedings have to be examined by the Council together with the national decision upon which the RM is based, in order to assess whether the rights of the defence and the right to effective judicial protection have been respected[54]. Moreover, according to the GC, if the national decision cannot be appealed, the Council should also check if that decision is somehow compatible with national rules ensuring the rights of the defence and the right to effective judicial protection, such as those enabling the suspect to contest decisions, actions and omissions of the prosecutor or the investigating judge[55]. Furthermore, it falls within the duty of the Council to verify the reason why a person was not represented in court by designated attorneys but by court-appointed ones[56]. In addition, the Council must also verify the information on which the investigating judge relied on to affirm that the applicant's name was included in the list of people sought by the Interpol[57]. Finally, the Council must also examine if the procedural rules such as those relating to the default procedure were respected[58]. In any case, when a person has been subject to RMs for many years, and this because of the same preliminary investigations of the national authority, the Council is required to further investigate on the possible violation of the fundamental rights[59].

It is submitted that it is not an easy task for the Council to carry out all those verifications, not only for the material difficulty of performing such a control but also – at least in cases concerning RMs adopted for the first time against a person – for the speed with which it should be carried out, in view of ensuring the "surprise effect" that makes a RM such as the freeze of assets effective.

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[52] GC, 25 June 2020, case T-295/19, *Klymenko v Council*, EU:T:2020:287.

[53] The *Klymenko* case, in fact, only concerns a Council decision of extension of an existing RM and not a new RM. Therefore, everything the GC affirmed in this ruling only refers to this particular circumstance and cannot be extended to cases involving the adoption of new RMs. As a consequence, there is still a gap in relation to the boundaries of the assessment that the Council has to carry out when adopting a new RM.

[54] GC, 25 June 2020, case T-295/19, *Klymenko v Council*, *supra*, para. 80. Those letters, in fact, can reveal important aspects such as (as in the *Klymenko* case) the presence in the national hearing of a designated or *ex officio* defence, the respect of the conditions for authorizing the default procedure, etc.

[55] *Ibid*., para. 82.

[56] *Ibid*., para. 83.

[57] *Ibid*., para. 86.

[58] *Ibid*., para. 89.

[59] *Ibid*., para. 99. It should be noted that, following the 2020 *Klymenko* judgment, the GC issued two other rulings on 23 September 2020 in which it annulled the Council decisions extending the RMs against Viktor Pavlovych Pshonka and his son, Artem Viktorovych Pshonka, on the ground that a decision of the investigating judicial authority having an incidental and procedural nature may serve as a sufficiently solid factual basis for a RM but it is not ontologically capable of proving that the Ukrainian judicial authorities have respected the fundamental rights. (*see*, GC, 23 September 2020, case T-291/19, *Viktor Pavlovych Pshonka v. Council*, EU:T:2020:448 and 23 September 2020, case T-292/19, *Artem Viktorovych Pshonka v. Council*, EU:T:2020:449).

Furthermore, doubts also arise as to the power of the Council to carry out a further review of compliance than the factual verification that it normally carries out. In fact, while in cases of RMs adopted on the basis of a decision of an EU Member State's authority the principle of sincere cooperation set out in Article 4(3) TEU applies and, therefore, the national authority must collaborate with the Council and help it in performing its task of checking whether the fundamental rights have been respected, in cases that involve third countries authorities this principle does not apply since it is an internal EU principle. Surely, it is possible to foresee a necessary close cooperation between the Union's Institutions and the third States' governments in order to help them recover state resources, but this cooperation does not necessarily have any legal basis.

Anyway, since targeted RMs limit fundamental rights, it is unquestionable that it is absolutely necessary for the Council to be sure that third State's judges on whose activity RMs are based act legally, independently and freely from political interference.

6.2. Duty to state reasons

The aforementioned duty to verify the compliance with the rights of the defence and the right to effective judicial protection is strictly linked to the duty to state reasons. In particular, the CJ held that «the Council must refer, if only briefly, in the statement of reasons relating to a decision to include a person or entity on a list of persons or entities whose assets are to be frozen and to subsequent decisions, to the *reasons* why it considers the decision of the third State on which it intends to rely to have been adopted in accordance with the rights of the defence and the right to effective judicial protection»[60]. Thus, it seems to be for the Council, in order to fulfil its obligation to state reasons, to clearly show that it has actually checked that the decision of the third State were taken in accordance with the fundamental rights[61]. Such an obligation cannot result, as it was the case in the Ukrainian cases at issue, in the simple information by the Council that a person "listed" in the decision of RMs was under investigation or judicial procedure in a third State. Not even the mere information on the type of procedure to which the person is subject or the indication of the national provision of law under which the procedure is in place can fulfil the obligation to state reasons. The CJ asks for something more: once the Council, before acting on the basis of a decision of an authority of a third State, checks whether that decision was adopted in accordance with the rights of the defence and the right to effective judicial protection, it consequently has to explain the reasons why it considers that decision to be in accordance with those rights.

[60] CJ, 26 July 2017, case C-599/14 P, *Council v LTTE*, *supra*, paras. 31, 33; 19 December 2018, case C-530/17 P, *Azarov v Council*, *supra*, para. 29; 22 October 2019, case C-58/19 P, *Council v Azarov*, *supra*, para. 31; 11 July 2019, case C-416/18 P, *Azarov v Council*, *supra*, para. 30; 26 September 2019, case C-11/18 P, *Klymenko v Council*, *supra*, para. 24.

[61] CJ, 26 July 2017, case C-599/14 P, *Council v LTTE*, *supra*, para. 37; 19 December 2018, case C-530/17 P, *Azarov v Council*, *supra*, para. 30; 22 October 2019, case C-58/19 P, *Council v Azarov*, *supra*, para. 32; 11 July 2019, case C-416/18 P, *Azarov v Council*, *supra*, para. 31; 26 September 2019, case C-11/18 P, *Klymenko v Council*, *supra*, para. 25.

Moreover, in order to comply with the duty at issue, the statement of reasons must, in any event, «*set out the facts and the legal considerations*»[62] that have decisive importance in the context of that act[63].

Therefore, it is possible to affirm that the duty to state reasons is made up of two aspects: the Council not only has to specify the reason why it inserts a person or entity on the list of persons or entities whose assets are frozen, but it must also justify why it believes that the national decision on which it bases its decision has been taken in compliance with fundamental rights.

The purposes of the obligation to state the reasons on which an act adversely affecting an individual is based – which is a corollary of the principle of the respect for the rights of defence – are two[64]: first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the GC[65]; second, to enable the Court to review the legality of that act[66]. For these reasons, in *Council v LTTE*, the CJ rejected the Council's argument according to which the Council itself must be allowed to make its observations on the legal system of the third State concerned not in the statements of reasons relating to decisions to freeze funds but in its pleadings before the GC[67]. In this way, the right to defence is fully respected.

With regard to the duty to state reasons, it is worth noting that there has been a change in the approach of the Council following the *Azarov* judgment of December 2018, in order to avoid the annulments of the GC for infringement of essential procedural requirements. In fact, in March 2019[68] and again in March 2020[69] it adopted new acts extending existing RMs stating their reasons in a more detailed way than before. In particular, the Council modified the annex of Decision 2014/119 and annex I of Regulation no. 208/2014 and added a new section in which it explains how it carried out the verifications requested by the CJ. This section is divided into two parts. The first one contains a simple general reference to the rights of the defence and to the right to effective judicial protection pursuant to the Ukrainian code of criminal procedure. In the second part, the Council makes specific reference, for each person, to the national judicial acts that, according to it, attest the protection of fundamental rights by the Ukrainian judicial authorities. However, this approach seems to be still insufficient to meet the aforementioned requirements established by the CJEU, since an explanation of the reasons why the Council

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[62] Emphasis added.

[63] CJ, 26 July 2017, case C-599/14 P, *Council v LTTE*, *supra*, para. 30.

[64] *Cf.* A. MAFFEO, *L'obbligo di motivazione degli atti delle istituzioni dell'Unione europea letto attraverso la giurisprudenza della Corte di giustizia*, in *Federalismi.it*, 2018.

[65] CJ, 4 June 2013, case C-300/11, *ZZ*, EU:C:2013:363, para. 53; 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v Kadi*, EU:C:2013:518, para. 100.

[66] CJ, 26 July 2017, case C-599/14 P, *Council v LTTE*, *supra*, para. 29; 18 February 2016, case C-176/13 P, *Council v Bank Mellat*, EU:C:2016:96, para. 74; 21 April 2013, caseC-200/13 P, *Council v Bank Saderat Iran*, EU:C:2016:284, para. 70.

[67] CJ, 26 July 2017, case C-599/14 P, *Council v LTTE*, *supra*, para. 35.

[68] *See*, among the others, Council Decision (CFSP) 2019/354 of 4 March 2019 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 64, 5.3.2019, p. 7–10.

[69] *See*, among the others, Council Decision (CFSP) 2020/373 of 5 March 2020 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 71, 6.3.2020, p. 10–13.

considers a certain national judicial decision to be in accordance with those fundamental rights is still missing. Moreover, this approach seems to be in contrast with the aforementioned CJEU case-law establishing that the simple information on the type of act or on type of procedure to which the person is subject are not sufficient to fulfil the obligation to state reasons.

In the *Klymenko* judgement of June 2020, the GC ruled for the first time upon the Council decisions of March 2019. However, it did not have the chance to evaluate the adequacy of the new reasons of the Council's decision, as it had to annul it on the grounds of an error of assessment in relation to the respect of the right of defence and of effective judicial protection by the Ukrainian authorities[70].

6.3. Duty to regularly provide new reasons for retaining people or entities on the list

RMs imposed by the Council shall be reviewed periodically, either at the request of the person, group or entity concerned or upon initiative of the Council itself. In case it decides to retain people or entity on the list, the Council has a duty to provide new reasons.

For instance, the Council is obliged to review its decision if, after the communication of the initial inclusion on the list, a person, group or entity concerned – possibly after having request access to the Council's file – submit observations. Following that review, the Council decides whether to maintain or revoke its decision.

Similarly, since targeted RMs must comply with the principle of proportionality, the Council must *ex officio* periodically verify the permanence of the justification for maintaining them, and it normally does that at intervals which are usually defined by the decision and regulation providing for the concerned scheme. For instance, the acts relating to Ukrainian RMs provide for an annual review of the RMs.

According to the established case-law of the CJ, when reviewing, the Council has to check whether, since the inclusion of a person or an entity on a list or since the last review, the *factual situation has changed*[71] in such a way that it is no longer possible to draw the same conclusion in relation to the involvement of that person or entity in the contested activities[72]. Thus, the Council is obliged to base the retention of a 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 a risk still exists[73].

The maintenance of RMs against a person, group or entity may be based either on the same legal and factual elements as those previously adopted or on new elements. In the latter case, the new elements must be notified to the person, group or entity concerned (the "surprise effect" no longer being necessary) and the latter must be given the opportunity to be heard[74].

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[70] GC, 25 June 2020, case T-295/19, *Klymenko v Council*, *supra*, para. 103.

[71] Emphasis added.

[72] CJ, 15 November 2012, joined cases C-539/10 P and C-550/10 P, *Al-Aqsa v Council and Netherlands v Al-Aqsa*, EU:C:2012:711, para. 82; 26 July 2017, case C-599/14 P, *Council v LTTE*, *supra*, para. 46.

[73] CJ, 26 July 2017, case C-599/14 P, *Council v LTTE*, *supra*, para. 54; *see*, by analogy, 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v Kadi*, *supra,* para. 156.

[74] Moreover, in this regard, there is an interesting procedural aspect to be pointed out. In case an action for annulment is already pending before the GC or the CJ, and where the measure the annulment of which is sought is replaced or amended by another measure with the same subject matter, according to Article 86 of the Rules of Procedure of the General Court, «the applicant may, before the oral part of the procedure is closed, or before the decision of the General Court to rule without an oral part of the procedure, modify the application to take account of that new factor». On this point, *cf*. the comment on Article 86 of the Rules of Procedure of the General Court

In relation to those "new elements", the CJ had the chance to give further indications with regard to "double-level" RMs. In fact, in *Council v. LTTE* the CJ interpreted Article 1(6) of the Common Position 2001/931 (which requires the Council to carry out at least once every six months a review to ensure that there continue to be grounds for keeping on the list a person or entity already listed on the basis of a national decision taken by a competent authority) as *not requiring* «*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»[75]. This means that the Council may rely even on other sources such as Internet or press to keep on maintaining a person or entity on a list. Thus, in the view of the CJ, the need to protect the concerned persons or entities' fundamental rights does not require the adoption of a new national decision in order to justify the retention on the list[76]. In general, given the difficulties of finding evidences in complex geopolitical environments, the Council makes regular use of different sources of evidence in order to substantiate its conclusions[77]. The CJ made it also clear that the person or entity concerned may, in the action challenging their retention on the list at issue, dispute all the material relied on by the Council to demonstrate that the risk of their involvement in the contested activities is ongoing, «irrespective of whether that material is derived from a national decision adopted by a competent authority or from other sources. In the event of challenge, it is for the Council to establish that the facts alleged are well founded and for the Courts of the European Union to determine whether they are made out»[78].

If the adoption of a new national decision in order to justify the retention on the list is not required in cases of "double-level" RMs, the less it may be required in cases of "autonomous" RMs that in principle are not based on national decisions. Therefore, in relation to "autonomous" RMs, it is plausible that it is in the Council's availability also the assessment of whether the factual situation has changed in order to establish whether to retain people or entity on the list.

7. Conclusion

RMs are not organically and fully regulated by EU law. In fact, in primary law there are only a few provisions of the TEU and of the TFEU that serve as legal basis for the adoption of such measures, while other provisions in this field are set out in acts with a political nature that do not create legal obligations, such as the «Guidelines on the implementation and evaluation of restrictive measures» or the «EU Best Practices for the effective implementation of restrictive measures» or certain common position adopted by the Council. For this reason, it is necessary to refer, on the one hand, to the practice of the Council in order to categorize the RMs and, on the other hand, to the case-law of the CJEU in order to find clearer rules for their adoption.

Based on the practice of the Council, RMs can be classified in various ways, depending on their origin ("autonomous RMs" if adopted *motu proprio* by the Council; "UN RMs" and

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by A. MAFFEO, in C. AMALFITANO, M. CONDINANZI, P. IANNUCCELLI (edited by), *Le regole del processo dinanzi al Giudice dell'Unione europea*, 2017.

[75] Emphasis added. CJ, 26 July 2017, case C-599/14 P, *Council v LTTE*, *supra*, para. 62.

[76] CJ, 26 July 2017, case C-599/14 P, *Council v LTTE*, *supra*, para. 68.

[77] F. FILPO, *Evidence standards in the judicial review of restrictive measures*, *supra,* p. 19.

[78] CJ, 26 July 2017, case C-599/14 P*, Council v LTTE*, *supra*, para. 71. *See*, by analogy, 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v Kadi*, *supra*, paras. 121 and 124; 28 November 2013, case C-280/12 P, *Council v Fulmen and Mahmoudian*, EU:C:2013:775, paras 66 and 69.

"mixed RMs" if adopted upon decision of the United Nations; "double-level RMs" if adopted upon decision of a national authority), their personal scope ("general RMs" if *erga omnes*; "targeted RMs" if individual), how they are implemented (direct or indirect implementation).

Some of the RMs adopted after the crisis in Ukraine gave rise to litigation before the CJEU in recent years. Those RMs were all "autonomous" and "targeted" RMs, and the Council directly implemented all of them by means of regulations under to Article 215 TFUE. Those RMs were adopted to promote and consolidate compliance with the rule of law and to enforce human rights in Ukraine, and they consisted in the freeze of the assets of individuals of the Ukrainian political class responsible for the misappropriation of Ukrainian state funds.

The case-law arising from the actions brought before the CJEU for the annulment of the aforementioned RMs has clarified the rules concerning their adoption and has undergone an evolution over the years which has increased the complexity of the rules. However, it is not devoid of critical issues.

In particular, the CJEU has shed light on three main obligations of the Council: one of prior check on the compliance with the rights of the defence and the right to effective judicial protection, another to state reasons in its decisions, the last to regularly provide new reasons for retaining people or entities on the list.

A first critical issue arises in relation to the first of the aforementioned obligations. In fact, the CJ questionably extended the application of the "LTTE principle" to the context of the "autonomous RMs". The rationale underlying this principle is obviously that of ensuring control over the decisions of third States on which RMs are to be based, therefore it finds logical application in case of "double-level RMs" such as those against terrorism. Doubts arise in case of "autonomous RMs", which refer to national decisions only as proofs (*i.e.* as sufficiently solid factual basis), and for which national decisions are not a precondition for their adoption.

Furthermore, the CJ required the Council to carry out a substantial, and not only formal, check of the respect by the Ukrainian authorities of the fundamental rights. In this regard, the GC's *Klymenko* judgment of June 2020 provides an example of the substantive control required to the Council. With this judgment the GC imposed on the latter several duties, such as to look at the arguments contained in the applicant's letters, to verify whether a national decision that cannot be appealed is compatible with national rules related to fundamental rights, to verify the reason why a person was not represented in court by designated attorneys but by court-appointed ones, to verify the information on which the investigating judge relied on to affirm that the applicant's name was included in the list of people sought by the Interpol, to examine if the procedural rules such as those relating to the default procedure were respected, to investigate on the possible violation of the fundamental rights in case a person has been subject to RMs for many years, and this because of the same preliminary investigations of the national authority.

However, the critical issue here is that the *Klymenko* case at issue only concerns a Council decision of extension of an existing RM and not a new RM, therefore there is still the need for a clarification on the boundaries of the assessment that the Council has to carry out when adopting a new RM. In fact, in the latter case, an in-depth verification of the control of the fundamental rights may cause to the Council material difficulties and loss of time, which could hinder the "surprise effect" that is essential for the effectiveness of a RM such as the freeze of

assets. Moreover, it would also be difficult to carry out such a control because of the inapplicability of the principle of sincere cooperation to extra-EU relations.

With regard to the second key-point of the case-law at issue, *i.e.* the duty to state reasons, it seems possible to affirm that this duty is made up of two aspects. In fact, the CJ required the Council not only to specify the reason why it inserts a person or entity on the list of persons or entities whose assets are frozen, but also to justify why it believes that the national decision on which it bases its decision has been taken in compliance with fundamental rights.

The duty to state reasons also applies in cases whereby the Council reviews its RMs and decides to retain people or entities on the list. In these cases, the Council can base its decision either on the same legal and factual elements or on new elements. Those new elements have to be notified to the person or entity concerned and they can be disputed in the action challenging the retention on the list, in order to ensure the respect of the right of defence.

Despite the existence of the aforementioned critical issues, the CJEU's case-law sets more clear guidelines for the Council to structure its decisions. As a consequence, since March 2019, the Council changed its approach by giving further reasons when listing persons in the RMs. However, it seems that it did not meet the requirements yet, since an explanation of the reasons why the Council considers a certain national judicial decision to be in accordance with those rights is still missing.

Overall, thanks to the analysis of the recent case-law, it has been possible to discover which are the drawbacks of the not systematic regulation in the field of RMs. Actually, the latter has a twofold effect: on the one hand, the Council has a few legal references to comply with when adopting a RM and, on the other hand, the CJEU has weak legality parameters at its disposal. The consequence of this situation has been that the Council has significantly reformed its listing procedure over time to meet the requirements set out by the GC and the CJ, but these Courts are still struggling to find a coherent approach and to establish minimum requirements of legality.

Therefore, it seems that there still is a need for clearer rules and better control mechanisms in the field of RMs, not only to stop the large number of annulments but also to protect the Union's credibility as based on the Rule of law. In particular, soft law instruments such as the «Guidelines on the implementation and evaluation of restrictive measures» and the «EU Best Practices for the effective implementation of restrictive measures» seem to be insufficient to set the rules governing RMs. They surely affect policy development and practice precisely because they exercise an informal "soft" influence, but a Council decision establishing a RM must respond to specific requirements that should be set out in binding provisions upon the legal basis of Article 29 TEU. This way, both the Council and the CJEU would have a clear legal reference when adopting a RM or when deciding upon its legality.