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THE ISSUES OF CHALLENGING EU SANCTIONS DECISIONS: MECHANISMS AND CJEU CASE LAW ANALYSIS

ПИТАННЯ ОСКАРЖЕННЯ РІШЕНЬ ЩОДО НАКЛАДАННЯ САНКЦІЙ ЄС: МЕХАНІЗМИ ТА АНАЛІЗ СУДОВОЇ ПРАКТИКИ СУДУ ЄС

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Abstract. *This article examines the legal framework and judicial oversight of the European Union's (EU) restrictive measures, which are integral to the EU's Common Foreign and Security Policy (CFSP). The focus of this study is on the mechanisms available for challenging these measures and the pivotal role played by the Court of Justice of the European Union (CJEU) in ensuring their legality and procedural fairness. Through a comprehensive analysis of relevant case law, this article explores the procedural requirements for challenging sanctions, including the prerequisites for standing, the timelines for lodging complaints, etc. It highlights the CJEU's approach to balancing the EU's policy objectives with the protection of fundamental rights, emphasizing the court's scrutiny of the Council of the EU's decisions and the necessity for robust evidence supporting sanctions. Key findings include an examination of the evolving landscape of EU sanctions in response to geopolitical events, such as the conflicts involving Russia and Ukraine, and the legal challenges that have arisen from these measures. The article provides insights into the broader implications for international law and the ongoing need for judicial oversight to ensure the effectiveness and fairness of EU sanctions.*

Keywords: *restrictive measures, EU Law, Court of Justice of the European Union, Council of the European Union, Common Foreign and Security Policy, locus standi, human rights, case law.*

Анотація. *В статті досліджується законодавча база та судовий нагляд за обмежувальними заходами Європейського Союзу (ЄС), які є невід'ємною частиною Спільної зовнішньої та безпекової політики ЄС. Основна увага цього дослідження зосереджена на механізмах, доступних для оскарження санкцій, і на ключовій ролі, яку відіграє Суд Європейського Союзу у забезпеченні їх законності та процесуальної справедливості. Шляхом комплексного аналізу релевантного прецедентного права у статті аналізуються процедурні вимоги для оскарження санкцій, у тому числі передумови правоздатності, строки для подання скарг та інші. Зокрема, підкреслюється підхід Суду ЄС до балансування між політичними цілями ЄС та захистом фундаментальних прав, розглядається питання про перегляд на предмет правомірності Судом рішень Ради ЄС та на необхідності обґрунтованих доказів на підтримку санкцій. Основні висновки включають аналіз еволюції санкцій ЄС у відповідь на*

геополітичні події, такі як конфлікти за участю Росії та України, а також юридичні проблеми, які виникли внаслідок цих заходів.

Ключові слова: *обмежувальні заходи, право ЄС, Суд Європейського Союзу, Рада Європейського Союзу, Спільна зовнішня політика та політика безпеки, locus standi, права людини, прецедентне право.*

Introduction. The European Union's (EU) restrictive measures, commonly known as sanctions, constitute a vital tool within the European Union's Common Foreign and Security Policy (CFSP). These measures serve as a dynamic response to global challenges, aligning with the EU's core values, fundamental interests, and security objectives. By targeting governments, non-state entities, and individuals, EU sanctions aim not merely at punitive actions but rather at inducing policy shifts and promoting democratic principles, human rights, and adherence to international law. In recent years, the Court of Justice of the European Union (CJEU) has emerged as a critical arbiter, scrutinizing the legality, procedural fairness, and impact of these sanctions. This article delves into the intricate legal framework, significant case law, and the evolving landscape of EU restrictive measures, a delicate balance between security imperatives and judicial oversight.

Purpose of the article. The primary objective of this article is to provide a comprehensive analysis of EU restrictive measures, focusing on legal aspects, case studies, and procedural requirements. By examining recent CJEU judgments, we aim to shed light on the evolving landscape of EU sanctions and their impact on affected individuals, entities, and international relations. Additionally, we explore the balance between fundamental rights and the EU's policy objectives in sanction implementation and aim to understand how the CJEU navigates these complex issues comprehensively. Furthermore, this article seeks to contribute to the scholarly discourse on international law, EU sanctions regulations, and human rights by offering insights for policymakers, legal practitioners, and academics.

Literature review. Authors such as Arnall (2006), Chachko (2019), Challet (2020), Ross (2023), Lonardo (2023), and others have significantly contributed to our understanding of CJEU as a key player in EU jurisprudence. Arnall (2006) in his book provides an in-depth analysis of the Court of Justice of the European Union's role in the EU's institutional structure, its contribution to the EU's constitutionalization and substantive law development, and its impact on national laws, particularly in terms of remedies and fundamental rights protection. Chachko (2019) in her studies examines the practical implications of the CJEU's intervention in foreign affairs, particularly due process review. Lonardo (2023) examines challenges to EU sanctions against Russia, highlighting the CJEU's role in balancing judicial protection and CFSP. Pursiainen (2018) focuses on fundamental rights in the context of targeted EU sanctions. Roos (2023) analyzes CJEU standards of proof in cases involving targeted human rights sanctions. Finally, Challet (2020) reflects on the CJEU's review of EU sanctions post-Ukraine crisis. These works collectively inform our understanding of the CJEU's approach to restrictive measures and its broader implications for international law.

Main Results of the Research. EU restrictive measures, also known as sanctions, are an essential tool of the EU's Common Foreign and Security Policy (CFSP). They allow the EU to respond to global challenges and developments that go against its objectives and values. These measures are not punitive but are intended to bring about a change in the policy or conduct of those targeted, intending to promote the objectives of the EU's CFSP. These objectives include safeguarding the EU's values, fundamental interests, and security, supporting democracy, the rule of law, human rights, and international law, preserving peace, preventing conflicts, and strengthening international security (Council of the EU, 2024).

EU restrictive measures can consist of asset freezes, travel bans, arms embargoes, embargoes on equipment that might be used for internal repression, other export restrictions (targeting specific sectors), or import restrictions. The EU can also implement a ban on the provision of financial services and/or investment bans against a targeted country. In addition, as exemplified by the restrictive measures against Belarus or Russia, the EU can also implement flight bans, restrictions on access to its airspace and ports, or a ban on land road transport. The EU has over 40 different sanctions regimes in place. Some are mandated by the United Nations Security Council, while others are adopted autonomously by the EU (EUR-lex, 2023).

The primary legal instruments for EU restrictive measures are the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU). Article 29 TEU allows the Council of the European Union to adopt restrictive measures (sanctions) against governments of countries that are not part of the European Union (EU), non-state entities (for example, companies), and individuals (such as terrorists) to bring about a change in their policy or activity. Under Article 215 TFEU, the Council may adopt the necessary measures to implement decisions adopted under Article 29 TEU to ensure they are applied uniformly in all EU Member States (EUR-lex, 2023).

The EU adopts and reviews sanctions through a well-defined process. The decisions and regulations on sanctions are adopted by the Council of the EU by unanimity. The EU sanctions apply within the jurisdiction of the EU.

The process for adopting a Council decision involves a proposal made by the High Representative of the Union for Foreign Affairs and Security Policy (HR). The proposed measures are then examined and discussed by the relevant Council preparatory bodies. If the Council Decision includes an asset freeze and/or other types of economic and/or financial sanctions, those measures need to be implemented in a Council regulation.

The Council regulation, based on the CFSP Council decision, is presented as a joint proposal by the HR and the European Commission. The regulation lays down the precise scope of the measures and details for their implementation. The Council decision enters into force upon publication in the official journal of the European Union (Council of the EU, 2024).

All existing restrictive measures are continually scrutinized to ensure their ongoing effectiveness in achieving their intended goals. The restrictive measures put in place following UN Security Council resolutions do not have a predetermined expiration date. These measures are modified or revoked promptly following a UN decision. While UN provisions are indefinite in duration, EU autonomous provisions undergo a review at least annually. Though Council decisions that impose EU autonomous restrictive measures are in effect for 12 months, however, the corresponding Council regulations do not have a set end date. Before the extension of such a Council decision, a review of the restrictive measures is conducted by the Council. Based on the evolution of the situation, the Council may choose to modify, prolong, or halt these measures (Council of the EU, 2024).

A natural or legal person has *locus standi* to annul regulatory acts that are of direct concern to it, or provisions of direct and individual concern to it, or measures addressed to it (Article 263 TFEU). Thus individuals, entities, and organizations targeted by EU restrictive measures have the right to challenge them before the CJEU. Legal persons include third countries, as the Court established in Venezuela (Fernández, 2021). This finding in the Venezuela judgment enables Russia, Belarus, and even—hypothetically—Ukraine to challenge the restrictive measures. The challenge would not be admissible against all the provisions in the sanctions, but only against those fulfilling the conditions of Article 263 fourth paragraph TFEU (Lonardo, 2023).

The CJEU, established under Article 19 of the TEU, plays a pivotal role in the EU's CFSP, particularly in the realm of sanctions policy (European Parliament, 2022). As the judicial arm of the EU, the CJEU is tasked with interpreting EU law to ensure its equal application across all EU member states. This includes assessing the legality of Council decisions related to sanctions and restrictive measures (Lonardo, 2023).

The process of challenging restrictive measures involves several steps. First, a *direct action* under Article 263 4th paragraph and Article 275 2nd paragraph TFEU or second, an *indirect action* through the preliminary ruling procedure according to Article 267 TFEU can be initiated (Vomáčka, 2023). The direct action under Article 263 TFEU allows individuals, organizations, or member states to challenge the legality of an act of the European Union's institutions, bodies, offices, or agencies. This action can be brought on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers (Craig & De Búrca, 2020). On the other hand, the indirect action through the preliminary ruling procedure under Article 267 TFEU enables national courts to refer questions of EU law to the CJEU during proceedings. The CJEU then provides interpretations of EU law or reviews the legality of acts by EU institutions. This mechanism ensures the uniform application and interpretation of EU law across all member states (Arnulf, 2006). However, it's important to note that

the process of challenging restrictive measures is complex and requires a deep understanding of EU law and procedures. It's also subject to strict time limits and procedural requirements.

First of all, to bring a case before the CJEU, the applicant must demonstrate standing. This means they must be directly and individually concerned by the contested act. A case shall be brought by a written application and must specify the subject matter of the dispute, the arguments, and a summary of the pleas in law on which the application is based (Article 21, Statute of the CJEU).

Secondly, due to Article 256 TFEU jurisdiction to hear and determine at first instance actions or proceedings lodged by individuals or companies against acts by EU institutions that are addressed to them or that affect them directly and individually (direct actions) obtains by the General Court (GC). It is important to note that the decisions given by the GC may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute of the CJEU.

The timeframe for lodging a challenge against EU sanctions before the CJEU is two months. This period begins from the date of the measure's publication, its notification to the complainant, or, if neither of these occurred, from the day the complainant became aware of it, depending on the situation (Article 263 TFEU). However as stated in Article 59 Rules of Procedure of the General Court (RPGC) in cases where the time limit allowed for initiating proceedings against a measure adopted by an institution runs from the publication of that measure in the Official Journal of the European Union, that time limit shall be calculated from the end of the 14th day after such publication. Due to the complexity of the issues involved, the need for a thorough examination of the facts and legal arguments, and the procedural requirements of the court, it is important to note that legal proceedings in the CJEU can take several years.

Among the other procedural requirements is the obligation to be represented. It means that the party must be represented by an agent or a lawyer due to the provisions of Article 19 of the Statute of the CJEU. The lawyer representing a party must be authorized to practice before a court of a Member State or of another State which is a party to the EEA Agreement. In case the party represented by the lawyer is a legal person governed by private law, the lawyer must have the authority to act given by that person (Article 51 RPGC). The language of the case is determined by the applicant, except for the cases listed in Article 45 RPGC. It must be one of the EU's official languages (Article 44 RPGC). The applicant must provide evidence to support their claims. This can include documents, witness statements, expert opinions, etc. It's important to note that these are general requirements and the specifics may vary depending on the individual case and the nature of the sanctions being challenged.

Concerning the Russian war against Ukraine (2021) and an earlier Crimea occupation crisis (2014), the EU implemented the most extensive sanctions ever, focusing on the economies of Russia and Belarus, and affecting numerous individuals and entities from Ukraine and Russia as well. This led to numerous amount of litigation before the CJEU. This litigation raised important legal issues linked to the CFSP, among which the extremely wide margin of appreciation of the Council regarding the adoption of restrictive measures, and the extent of judicial review to be exercised by the Court over them (Challet, 2020).

The first package of sanctions imposed by the EU in 2014 was annulled by the CJEU. While most cases challenging the sanctions are still pending, we can draw lessons from previous case law on EU restrictive measures. Notably, the Court has upheld almost all restrictive measures targeting Russian natural and legal persons of the very first wave of restrictive measures after the 2014 crisis, except *Rotenberg*. However, when it comes to sanctions against the Ukrainians, the outcome has been clear-cut: the majority of these sanctions were annulled by the Court of Justice. For instance, cases involving *Oleksii Azarov*, *Klyuyev*, *Yanukovych*, *Pshonka*, and *Klymenko* resulted in the annulment of sanctions in the first instance. In other cases, the General Court upheld the sanctions, but they were ultimately annulled by the Court of Justice (Challet, 2020).

Common in all those cases is that the individuals' success relies on the invocation of procedural flaws, particularly the Council's insufficient investigation of the information on which the inclusion or maintenance of individuals' names to the sanctions list is based, i.e., the Council's supporting evidence (Verheyen, 2019).

One of the good examples of the latter is *Portnov v. Council* case. On the 26th of October 2015, the Judgement of the GC annuls Council Decision and Regulation, both dated 5th of March 2014, in so far as they concern *Portnov*. Notably, this was done after an actual Council Decision and Regulation were amended by several Council's Implementing Decisions and Regulations, in regards to submitted written request by *Portnov* to the Council asking to reconsider the inclusion of his name on the list and to state the grounds on which it was included. Even after those amendments the name of *Portnov* no longer appeared on the list, he did not, however, change his position and retained interest in bringing proceedings (*Portnov v. Council*, Case T-290/14).

As we can see in the *Portnov* case, despite the Council's broad discretion in this context, it faced censure for failing to comply with Article 47 of the EU Charter of Fundamental Rights (EUCFR). The effective judicial protection enshrined in that provision was compromised due to the absence of a robust factual basis when the Council imposed or extended sanctions. This solid factual basis pertains to the credibility of evidence justifying the inclusion and retention of an individual's name on the sanctions list. Consequently, the Council is obligated to verify or investigate the specific reasons or factual allegations supporting an individual's listing. The same compliance issue with EUCFR appeared in the judgments in other cases, like *M. Azarov*, *O. Azarov*, *Stavytskyi*, *Klyuyev*, and *Arbuzov*.

In situations where the validity of an EU act is questioned under Article 267 TFEU, the Court faces the delicate task of balancing fundamental rights (FRs) and the general principles of EU law against the objectives of the CFSP pursued by the Council. This requires a careful consideration of competing interests to ensure a fair and legally sound outcome. Initially, the validity of sanctions is assessed concerning the same procedural FRs as in annulment procedures. These include the obligation to state reasons, the right to defense, and the right to effective judicial protection.

In evaluating the requirement to provide reasons, the Court followed its established case law and considered cases related to EU sanctions in response to the Ukrainian crisis. The requirement for a statement of reasons, as stipulated by Article 296 TFEU and Article 41(2) EUCFR, must be appropriate to the nature of the contested act and its context. The statement should disclose the reasoning behind the measure, allowing affected individuals to understand the basis for their inclusion. While it need not cover all relevant facts and legal points, the adequacy of the reasons depends on the known context and practical constraints. Balancing precision with practical realities is essential (*O. Yanukovych v. Council*, T-348/14).

However, in later CJEU judgments there is a clear controversy, as to what was ruled before. As stated in the recent GC judgment in the case *Pumpyanskiy v. Council* in the absence of investigative powers in third countries, Union authorities assess restrictive measures based on publicly available sources such as reports, press articles, and similar information. The GC determined that although Dmitry Pumpyanskiy was not directly involved in the acts of military aggression in Ukraine, his active participation in economic sectors served as a significant source of income for the Russian Federation government. These precautionary measures, while restricting certain fundamental rights, are evaluated in light of their social function. The GC has found that the impact on affected individuals is mitigated by the possibility of using frozen funds for basic needs and obtaining specific authorizations for releasing funds or other economic resources. Additionally, entry into the EU is not entirely excluded, especially in cases of urgent humanitarian grounds. Thus the GC dismissed the actions brought by Pumpyanskiy (*Pumpyanskiy v. Council*, T-270/22).

Secondly, the Court had to scrutinize again substantive FRs, such as the right to property (Article 17(1) EUCFR) and the freedom to conduct business (Article 7 ECR). The Court examined them together in light of the fundamental principle of proportionality. The position of the Court in regards to mentioned before was written in the Judgment of *Rosneft v. Council*. In the context of *Rosneft* challenging the proportionality, the Court emphasizes the EU legislature's broad discretion in politically, economically, and socially complex areas. The legality of such measures can be questioned only if they are manifestly inappropriate relative to the intended objective. Contrary to *Rosneft's* claim, the targeted approach - aimed at increasing costs for Russia's actions against Ukraine - is consistent with the objective. Additionally, fundamental rights (e.g., freedom to conduct business, right to property) are not absolute; restrictions are permissible if they align with public interest objectives and avoid disproportionate interference. Thus interference with *Rosneft's* freedom to

conduct a business and its right to property cannot be considered disproportionate (*Rosneft v. Council*, C-72/15).

Another recent case the GC ruled on was the case of *Islentyeva v. Council* on the matter of economic trade sanctions. The Court clarified the EU regulation on restrictive measures concerning the prohibition on the use of Russian-related aircraft in the EU territory as a consequence of Russia's actions destabilizing the situation in Ukraine. Specifically, the case involved a pilot with dual Russian and Luxembourg citizenship contesting an EU regulation. The regulation, particularly Article 1(2) of Decision (CFSP) 2022/335 (which inserted Article 4e into Council Decision 2014/512/CFSP), prohibited the use of Russian-related aircraft due to Russia's actions destabilizing Ukraine. The Directorate for Civil Aviation of Luxembourg denied recognition of the pilot's right to use her private pilot license for EU landings, takeoffs, or overflights. The authority argued that the regulation applied to Russian pilots exercising effective control over an aircraft. However, the GC clarified that the term 'control' in the EU Decision pertained only to economic or financial control, excluding Russian citizens with private pilot licenses. Interpreting the prohibition otherwise would be manifestly inappropriate given the objective of exerting pressure on Russia to uphold international law and Ukraine's territorial integrity. Ultimately, the applicant's action was dismissed as inadmissible (lack of *locus standi*), and the GC emphasized its limited jurisdiction in recognizing the pilot's right under Article 263 TFEU (*Islentyeva v Council*, T-233/22).

The case law of the CJEU has significantly impacted the Council's approach to adopting restrictive measures. Notably, several sanctions have been overturned by the Court due to the Council's failure to adhere to procedural rules and provide adequate reasons for its decisions. While it cannot be definitively claimed that the CJEU has fundamentally altered the substance of the Council's policy, there is evidence that the latter has become more diligent in complying with procedural requirements. Recent years have witnessed an improvement in the quality of sanctions listings, characterized by clearer definitions and more substantial justifications for listing individuals and entities. An illustrative example is the *Stavytskyi* case: The applicant argued that the alleged misappropriation of public funds, which Ukrainian authorities had previously examined, did not warrant sanctions. The Ukrainian courts had found no wrongdoing. Consequently, the Council lacked sufficient evidence to maintain the applicant's name on the sanctions list, as it could not demonstrate compliance with the *ne bis in idem* principle. The CJEU upheld this argument, emphasizing the importance of procedural fairness in sanctions decisions (*Stavytskyi v. Council*, T-290/17).

It is important to underline that the CJEU has also significantly influenced the Council's discretion in adopting sanctions based on decisions by third-state authorities. Notably, this impact is evident in cases involving restrictive measures against Ukrainian individuals prosecuted for misappropriation of public funds. Initially, the CJEU upheld the Council's broad margin of appreciation in such matters, aiding anti-corruption efforts. However, as in the cases like *Portnov* the Court requires the Council to verify compliance with fundamental rights before relying on foreign prosecutors' decisions. These developments have already shaped the Council's approach to restrictive measures.

It should be noted that as mentioned in the *Portnov* case, there is a right to request to lift restrictive measures before applying to the CJEU, something like a pre-litigation process. Individuals and entities listed under EU sanctions have the option to submit a formal request to the Council. This request, accompanied by relevant supporting documentation, seeks reconsideration of their inclusion on the sanctions list. The submission process involves sending the request to the General Secretariat of the Council (Council of the EU, 2024).

Conclusions. The European Union's approach to restrictive measures, or sanctions, stands as a critical component of its CFSP, embodying a nuanced strategy that balances upholding fundamental rights and advancing international legal standards. We have explored the intricate legal landscape governing EU sanctions, examining significant case law and procedural mechanisms employed by the CJEU. Through an in-depth analysis of various judgments, it is evident that the CJEU plays a pivotal role in ensuring the legality and fairness of these measures, often walking a tightrope between the enforcement of EU policy objectives and the protection of individual rights.

The CJEU's scrutiny of the Council's decisions highlights the dynamic interplay between law and policy in the realm of international sanctions. The Court's insistence on procedural fairness and

adequate evidence underscores its commitment to due process and the rule of law, even in the politically sensitive context of foreign policy. This judicial oversight is essential in maintaining the credibility and effectiveness of the EU's restrictive measures, ensuring that they are not only legally sound but also just and equitable in their application.

Furthermore, the challenges to EU sanctions brought forth by various individuals and entities underscore the complex nature of modern international law, where the interests of states, non-state actors, and individuals intersect in multifaceted ways. The examination of recent case law, particularly in the context of the sanctions resulting from the Russian invasion of Ukraine, illustrates the ongoing evolution of the EU's legal framework in response to geopolitical developments. It also highlights the critical importance of maintaining a balance between security imperatives and fundamental rights, a principle that is central to the EU's legal and political ethos.

In conclusion, the analysis presented in this article not only sheds light on the current state of EU restrictive measures but also contributes to the broader discourse on international law and human rights. It underscores the need for continued vigilance and judicial oversight in the implementation of sanctions, ensuring that they serve their intended purpose without undermining the fundamental values that the EU seeks to promote. As global challenges continue to evolve, the EU's commitment to upholding the rule of law and protecting human rights within its sanctions regime will remain a cornerstone of its foreign policy strategy.

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