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# EDITORIAL COMMENTS

## *A new tool in the Union's human rights toolbox*

The EU has a shiny new tool in its "human rights and foreign policy toolbox":[1] a global human rights sanctions regime which allows the EU to target persons and entities responsible for serious violations and abuses of human rights wherever they occur.[2] Although the legislation does not formally bear the name, it is already being called a European Magnitsky Act.[3] Those pressing for its adoption argued that a human rights sanctions instrument would fill a gap, supplementing existing geographical and thematic sanctions regimes by providing a legal basis for targeted individual sanctions without the need for a country-based regime, [4] and that it would "strengthen our collective action on human rights and ensure perpetrators of human rights violations and abuses have nowhere to hide."[5] Its adoption, as a component of the new Action Plan on Human Rights and Democracy 2020–2024, has been accompanied by rhetoric on strengthening the EU's global leadership[6] and operationalizing its strategic autonomy.[7]

1. European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime, P8_TA(2019)0215, para 3.

2. Council Decision 2020/1999/CFSP of 7 Dec. 2020 concerning restrictive measures against serious human rights violations and abuses, O.J. 2020, L 410 I/13; Council Regulation 2020/1998/EU of 7 Dec. 2020 concerning restrictive measures against serious human rights violations and abuses, O.J. 2020, L 410 I/1.

3. The original US Magnitsky Act of 2012 (The Sergei Magnitsky Rule of Law Accountability Act, Public Law No. 112-208) was directed at Russia and concerned human rights and Rule of Law violations by those connected to the death of Sergei Magnitsky in prison in Moscow in 2009. This law was then extended globally in 2016, by the Global Magnitsky Human Rights Accountability Act. Like the EU regime, the US scheme includes visa bans and financial sanctions; unlike the EU regime it targets corruption as well as human rights violations. Similar laws have been adopted by Estonia, Latvia and Lithuania, and discussed by others.

4. Remarks by the Dutch Minister of Foreign Affairs Stef Blok, 20 Nov. 2018, <www.government.nl/documents/speeches/2018/11/20/blok-on-eu-global-human-rights-sanction-regime>.

5. Keynote Address by the EU Special Representative for Human Rights, Eamon Gilmore at the launch of the EU Action Plan on Human Rights and Democracy 2020–2024, 23 Nov. 2020.

6. Council Conclusions on the EU Action Plan on Human Rights and Democracy 2020–2024, Council doc. 12848/20, 18 Nov. 2020, para 6.

7. Foreign Affairs Council, Council doc. 13737/20, 7 Dec. 2020. More generally, the focus on strategic autonomy favours the strengthening of the EU's ability to take unilateral measures

It is early days yet to assess whether this promise will be fulfilled, although measures have already been taken against fifteen individuals and four legal entities from six countries.[8] But the process of adoption and the shape that the instrument has taken prompt some reflections on the EU's role as "a global human rights actor"[9] and its claim to a values-based foreign policy in the post-Lisbon era.[10]

An EU thematic sanctions regime to respond to human rights violations has been under discussion for some time. Several countries, including Canada, the United Kingdom, and some EU Member States followed the United States in adopting a Magnitsky Act[11] and there was pressure for the EU to do so too. The Dutch Government proposed action in 2018 and the European Parliament passed a resolution calling for a human rights sanctions regime in March 2019.[12] The incoming High Representative for the CFSP, Josep Borrell, was questioned about it in a meeting early in his mandate with the European Parliament's Foreign Affairs Committee,[13] and discussions were initiated shortly after in the Council.[14] The proposal was mentioned in the Commission's Action Plan on Human Rights and Democracy for 2020–2024, which proposed "expanding the human rights toolbox",[15] and in Commission President Von der Leyen's State of the Union address to the European

in response to third country action; see e.g. Regulation 2021/167/EU of 10 Feb. 2021 amending Regulation (EU) 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, O.J. 2021, L 49/1, and the revival in 2018 of the EU's Blocking Statute, Council Regulation 2271/96/EC protecting against the effects of the extra-territorial application of legislation adopted by a third country, O.J. 1996, L 309/1. A mechanism allowing the EU to "deter and counteract coercive action by non-EU countries" is under consultation, see Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries, O.J. 2021, C 49/1; Council doc. 5878/21, 3 Feb. 2021, Annex II.

8. Council Decision 2021/372/CFSP, O.J. 2021, L 71 I/6; Council Implementing Regulation 2021/371/EU, O.J. 2021, L 71 I/1; Council Decision 2021/481/CFSP, O.J. 2021, L 99 I/25; Council Implementing Regulation 2021/478/EU, O.J. 2021, L 99 I/1.

9. European Parliament resolution of 14 March 2019, cited *supra* note 1, para 3.

10. See e.g. "The European Union's Global Strategy: Three Years On, Looking Forward," 13 June 2019, <eeas.europa.eu/topics/eu-global-strategy/64045/european-unions-global-strategy-three-years-moving-forward_en>.

11. See *supra* note 3.

12. See *supra* notes 1 and 4.

13. HRVP Josep Borrell, The long and complex road towards an EU Global Human Rights Sanctions Regime, 31 Oct. 2020, referring to a meeting with AFET in early December 2019; <eeas.europa.eu/headquarters/headquarters-homepage/87884/long-and-complex-road-towards-eu-global-human-rights-sanctions-regime_en>.

14. Foreign Affairs Council, 9 Dec. 2019.

15. The Action Plan included a proposal to "Develop a new horizontal EU global human rights sanctions regime to tackle serious human rights violations and abuses worldwide." EU Action Plan on Human Rights and Democracy 2020–2024, JOIN (2020)5, 25 March 2020, p. 5.

Parliament in September 2020.[16] The next month the High Representative and Commission presented proposals for the Council CFSP decision and Council Regulation required by Article 215 TFEU,[17] and the measures were adopted on 7 December 2020, just in time for International Human Rights Day.[18]

### *The use of thematic sanctions*

Despite being hailed as innovative, the new instrument is based on long-standing powers to adopt restrictive measures (sanctions) and accordingly follows the standard format, combining a Council Decision adopted under CFSP powers (Art. 29 TEU) and a Regulation adopted under Article 215 TFEU. Indeed, since their earliest use in the 1980s, restrictive measures have been used as a political instrument to respond to threats to human rights and democracy in third countries,[19] and a majority of current country-based sanctions are concerned with human rights.[20] The new instrument offers an alternative to country-based sanctions and continues a trend towards thematic sanctions started by the counter-terrorism regime,[21] and – facilitated by the revision to Article 215 TFEU in 2009[22] – followed by

16. "This House has called many times for a European Magnitsky Act – and I can announce that we will now come forward with a proposal. We need to complete our toolbox." State of the Union Address by President von der Leyen at the European Parliament Plenary, Brussels 16 Sept. 2020.

17. Proposal of the High Representative of the Union for Foreign Affairs and Security Policy to the Council for a Council Decision concerning restrictive measures against serious human rights violations and abuses, HR (2020) 113, Council doc. 12102/20, 19 Oct. 2020; Joint Proposal for a Council Regulation concerning restrictive measures against serious human rights violations and abuses, JOIN (2020) 20, 19 Oct. 2020.

18. See *supra* note 2. Foreign Affairs Council, 7 Dec. 2020, Council doc. 13737/20. See also Declaration by the High Representative on behalf of the European Union on the EU Global Human Rights Sanctions Regime, Council press release, 8 Dec. 2020.

19. Before the introduction of a specific legal basis for restrictive measures by the Treaty of Maastricht, trade sanctions were used for the first time in 1982 against the USSR as a response to the introduction of martial law in Poland: Regulation 596/82/EEC, O.J. 1982, L 72/15.

20. On country-based sanctions see Beaucillon, "Opening up the horizon: The ECJ's new take on country sanctions", 55 CML Rev. (2018), 387.

21. Council Common Position 2001/931/CFSP of 27 Dec. 2001 on the application of specific measures to combat terrorism, O.J. 2001, L 344/93; Council Regulation 2580/2001/EC of 27 Dec. 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, O.J. 2001, L 344/70.

22. The Lisbon Treaty amended Art. 215 TFEU to provide expressly for sanctions against individuals and non-State actors; previously, individuals closely connected to the targeted regime could be listed in country-based sanctions (Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission*, EU:C:2008:461, para 166;

sanctions regimes directed at chemical weapons[23] and cyber-attacks.[24] Like them, the restrictive measures available under the new regime combine entry and transit restrictions (visa bans) with freezing of assets of targeted persons and entities.

Thematic sanctions regimes such as these offer a convenient prepared framework which can be activated relatively easily in specific cases. They determine the targeted conduct, the types of sanctions involved and the conditions under which sanctions may be imposed, as well as exemptions and listing procedures. All that is then required is the adoption from time to time of implementing CFSP Decisions and Regulations, individuating the targets of the sanctions in the Annexes to the main instruments.[25] Thematic instruments therefore offer speed and efficiency, in that there is no need to draw up a complete legal framework for each case. Moreover, country-based sanctions inevitably put in question the whole relationship of the EU (and its Member States) to that country. Thematic sanctions, by removing the explicit country link, make it easier to separate the sanction from the EU's overall relations with the country concerned and to overcome objections from individual Member States (important given the need for unanimity in adopting the CFSP Decision[26]); they may perhaps make it harder for a Member State to threaten a veto for reasons not directly related to the proposed listing.

In fact, however, when we look at the listings made so far under the new human rights regime, the individuals named and the actions for which they are listed are in each case connected to State policy and action: Russian officials linked to the detention of Navalny and suppression of related protests,[27] Russian officials in Chechnya involved in repression of LGBTI persons, Chinese officials linked to persecution of the Uyghur, the North Korean Ministers for State Security and Social Security,[28] among others. Although the new instrument may be more efficient and may give greater visibility to the

C-376/10 P, *Pye Phyo Tay Za* v. *Council*, EU:C:2012:138, paras. 53–71); alternatively where there was no such link, as in *Kadi* itself, what is now Art. 352 TFEU was required as an additional legal basis.

23. Council Decision 2018/1544/CFSP of 15 Oct. 2018 concerning restrictive measures against the proliferation and use of chemical weapons, O.J. 2018, L 259/25; Council Regulation 2018/1542/EU of 15 Oct. 2018 concerning restrictive measures against the proliferation and use of chemical weapons, O.J. 2018, L 259/12.

24. Council Decision 2019/797/CFSP of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, O.J. 2019, L 129 I/13; and Council Regulation 2019/796/EU of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, O.J. 2019, L 129 I/1.

25. See e.g. *supra* note 8.

26. Proposals to move to qualified majority voting for CFSP sanctions decisions have not so far been accepted: see further *infra*.

27. Decision 2021/372/CFSP.

28. Decision 2021/481/CFSP.

human rights rationale of the measures, these are not new powers. Indeed, we may ask whether it is desirable for the State-based nature of the human rights abuses targeted by the EU (at least so far) to be obscured in this way. No doubt it is more comfortable for overall EU relations with, say, Russia and China, but it does not increase the transparency or visibility of the EU response to State-sponsored human rights abuses.

### *Institutional (im)balance*

The legal basis and decision-making procedure for thematic sanctions, including the new human rights instrument, is the same as for country-based sanctions, i.e. the cumbersome double process of a CFSP Decision adopted by unanimity and a Council Regulation adopted by qualified majority. The process is dominated by the Council; the Parliament is to be informed but does not act as co-legislator. The character of thematic sanctions in particular suggests a potential distinction between the initial acts establishing the sanction regime and subsequent listing measures, but attempts to distinguish the two in terms of decision-making have not so far been successful. As the short time between proposal and adoption of the new human rights regime indicates, most of the negotiation took place before the proposals were formally adopted; nonetheless some key amendments were made, essentially rejecting proposed changes to established procedures.

First, there was the question of voting in Council in adopting the CFSP listing decisions. Both sanctions listing and human rights have been proposed as cases where the unanimity requirement can prevent swift response to urgent situations. In 2018 the Commission had suggested greater use of the possibility given by Article 31(2) TEU to move to qualified majority voting (QMV) for CFSP decision-making, and more particularly a consistent use of QMV when adopting decisions amending listings in EU sanctions regimes.[29] The High Representative's proposal for the Council decision left open the question of voting on listing decisions,[30] and a Commission declaration included in the minutes of the Council "called upon" the Council to adopt

29. The Commission argues that these decisions are implementing decisions and thus fall within Art. 31(2) TEU, third indent. Commission communication "A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy" COM(2018)647, 12 Sept. 2018, p.11. As the Commission indicates, implementing decisions based on Art. 31(2) TEU have sometimes been used to amend listings (e.g. Council Implementing Decision 2018/1086/CFSP concerning restrictive measures in view of the situation in Libya, O.J. 2018, L 194/150) but this is not a consistent practice.

30. Proposal of the High Representative, HR (2020) 113, Council doc. 12102/20, 19 Oct. 2020, Art. 5(1).

listing decisions by QMV under Article 31(2) TEU,[31] but the adopted text expressly requires a unanimous decision.[32] The opportunity offered by the Treaty to move to a decision-making framework better suited to swift action has thus not been taken up.

Second was the procedure for listing under the Article 215 TFEU Regulation. The joint proposal for the Council Regulation had provided that implementing acts amending the Annexes should be adopted by the Commission, and that the Commission should review those decisions in the light of observations received or new evidence.[33] The adopted text, however, reverts to established sanctions practice, reserving to the Council the amendment of the listings Annex and subsequent review.[34] Although normally the power to adopt implementing acts lies with the Commission, the Council may grant itself implementing powers "in duly justified specific cases."[35] In the Council's view, sanctions listings are such a case because consistency between the listings in the CFSP Decision and the Regulation requires that both should be decided by the same institution.[36] The Commission has contested this as a general principle, arguing that Commission implementation will ensure compliance with necessary procedural safeguards.[37] The recitals to the proposed Regulation merely referred to the need to ensure uniformity of implementation, a general justification for the exercise of implementing powers at EU level.[38] In *NIOC,* the ECJ found both that amendments to the listing Annex of a sanctions regulation, as "a specific application of the general listing criterion", could be adopted as an implementing act under Article 291(2) TFEU, and that the Council could, in that case, reserve to itself the implementing power.[39] Its reasons for the latter finding were based on the sensitivity of the listing decision given the substantial negative impact on the individuals affected, and on "requirements of consistency, coordination and speed," given that it is the

31. Council doc. 12329/20, 30 Nov 2020.

32. Council Decision 2020/1999/CFSP, Art. 5. This was publicly regretted by Belgium in a declaration in the Council minutes: "This requirement will hamper the impact of the sanctions regime as part of our human rights toolbox and as a CFSP policy instrument." Council doc. 12329/20 ADD 1, 4 Dec. 2020.

33. Joint Proposal for a Council Regulation concerning restrictive measures against serious human rights violations and abuses, JOIN (2020) 20, 19 Oct. 2020, Art. 17(1).

34. Council Regulation 2020/1998/EU, Art. 14(1).

35. Art. 291(2) TFEU.

36. Council Regulation 2020/1998/EU, Recital 3.

37. Commission declaration for insertion in the Council minutes, Council doc. 12329/20, 30 Nov. 2020.

38. JOIN (2020) 20, 19 Oct. 2020, Recital 3.

39. Case C-440/14 P, *National Iranian Oil Company* v. *Council* EU:C:2016:128, paras. 33–66.

Council that adopts the originating list in the CFSP decision. Both these factors – the second being more convincing than the first, given that the initial decision to list will always be taken by the Council – are likely to be used to justify the decision to continue the practice of reserving implementing powers to the Council in the new regime.

The third proposed – and likewise rejected – innovation concerned the visa ban. The joint proposal for Regulation 2020/1998/EU had included a clause on the implementation of entry and transit restrictions.[40] Hitherto, visa bans included in a CFSP sanctions Decision have been implemented directly by the Member States rather than included in the EU Regulation, and indeed this practice was ultimately preserved in the final text of the Regulation. Placing the visa ban in the Regulation, with concomitant direct applicability and Commission powers of enforcement, combined with Commission implementation would indeed have given the Commission a much more substantive role in managing this sanctions regime. Instead, the Council has decided to retain the existing balance, with the Council and Member States at its centre.

In the adoption of sanctions, the European Parliament has no deciding role. Following the entry into force of the Lisbon Treaty, the Parliament sought to argue that counter-terrorist sanctions involving financial restrictions (asset freezes) should be adopted on the basis of Article 75 TFEU rather than, or as well as, Article 215 TFEU.[41] The argument was unsuccessful, the Court holding that Article 215 TFEU provided an adequate legal basis and that Articles 75 and 215 were incompatible as joint legal bases.[42] The question of legal basis has not been raised again, but the increasing use of thematic sanctions raises a question of principle. It is understandable, indeed inevitable, that individual listing decisions should not be subject to a parliamentary legislative procedure, and in the case of country-based sanctions the decision to impose sanctions and the listings of targeted entities and persons are inseparable. However, in the case of thematic sanctions, the initial Council Decision and Regulation establishing the regime do not, in themselves, depend on identifying individuals to be listed; indeed, when Decision 2020/1999/CFSP and Regulation 2020/1998/EU were first adopted the listing annex was empty. There is no convincing reason why the European Parliament

40. JOIN (2020) 20, 19 Oct. 2020, Arts. 9–11.

41. Art. 75 TFEU provides "Where necessary . . . as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities."

42. Case C-130/10, *European Parliament* v. *Council*, EU:C:2012:472.

should not be able to participate in a legislative process to establish a thematic sanctions regime on (for example) cyber-attacks or human rights violations, while leaving the decisions on individual listing to the Council. Clearly the current Treaty basis for sanctions does not allow this; it would also, as the Court recognized, be difficult to combine a legislative procedure with a CFSP decision. A re-think of the decision-making process for thematic sanctions would thus require Treaty amendment – not currently a likely prospect. Nonetheless the imbalance in the existing system deserves recognition, and the increasing use of thematic sanctions renders it less defensible.

*Identifying targets and substantiating listings*

Just as the power to amend the listing annexes to both Decision and Regulation has remained with the Council, so too proposals to add persons or entities to the list in the CFSP Decision lies with the Member States and the High Representative.[43] Listing decisions are communicated by the Council to the persons or entities concerned, and they are provided with an opportunity to present observations; the listing decision should be reviewed after receiving observations or upon the receipt of substantial new evidence, or at least every twelve months.[44]

On what basis will listings be made? The Decision and Regulation refer to "serious human rights violations and abuses worldwide," falling into two categories. The first category is of violations and abuses of human rights regarded as sufficiently serious in themselves;[45] the second refers to violations or abuses which are "widespread, systematic or are otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU."[46] This phrasing is peculiar: the objectives set out in Article 21 TEU apply to all EU external action, including but certainly not

43. Decision 2020/1999/CFSP, Art. 5(1). There had been some discussion of extending the power to propose names to non-governmental bodies, or to a specially constituted independent committee; see e.g. "Proposal for a European Human Rights Entry Ban Commission", 14 Nov. 2018; <www.esiweb.org/pdf/Appeal%20-%20For%20a%20European%20Human%20Rights%20Entry%20Ban%20Commission%20-%2014%20Nov%202018.pdf>.

44. Decision 2020/1999/CFSP, Art. 5(2)-(3); Regulation 2020/1998/EU, Art. 14(2)-(4).

45. Decision 2020/1999/CFSP, Art. 1(1); Regulation 2020/1998/EU, Art. 2(1): genocide, crimes against humanity, torture and other cruel, inhuman or degrading treatment or punishment, slavery, extrajudicial, summary or arbitrary executions and killings, enforced disappearance of persons, and arbitrary arrests or detentions.

46. Including but not limited to: trafficking in human beings, sexual and gender-based violence, and violations or abuses of freedom of peaceful assembly and of association, of freedom of opinion and expression, or of freedom of religion or belief. Decision 2020/1999/CFSP, Art. 1(1)(d); Regulation 2020/1998/EU, Art. 2(1)(d).

limited to, the CFSP. While the reference to "the objectives of the common foreign and security policy set out in Article 21 TEU" may perhaps be acceptable in the CFSP decision, it is a solecism to have carried it over into the Regulation, perpetuating the pre-Lisbon, *Kadi*-era understanding of the relation between CFSP and other external powers.[47]

In defining the human rights abuses covered by the sanctions regime, reference is made to "customary international law and widely accepted instruments of international law", together with a (lengthy) indicative list of relevant instruments.[48] Natural or legal persons, entities or bodies, both State and non-State actors, may be listed if they are "responsible" for such acts; if they "provide financial, technical, or material support for, or are otherwise involved in" those acts, "including by planning, directing, ordering, assisting, preparing, facilitating, or encouraging"; or if they are "associated" with any of the former.[49] These references to violations and responsibility are of course the language of international criminal law. Many public statements about the new instrument have used the language of criminal law, notably referring to "perpetrators" and "criminals."[50] The listings annexes give details of specific conduct of listed individuals and types of violation are referred to,[51] but no reference is made to breaches of specific human rights instruments, and it hardly needs pointing out that no trial or any process of adjudication is foreseen.

How much does this matter? And what kind of proof will, or should, be required? The European Parliament, referring to the importance of due process rights for the legitimacy and credibility of the regime, stressed the need for transparent criteria "directly linked with the crime committed" and called for "the systematic inclusion of clear and specific benchmarks."[52] Decision 2020/1998/CFSP contains no criteria nor references to benchmarks, other than to say that in the case of non-State actors the Council shall take into account the objectives of the CFSP as set out in Article 21 TEU and the gravity

47. On the altered constitutional relationship see e.g. Case C-134/19 P, *Bank Refah Kargaran,* EU:C:2020:793, para 47.

48. Decision 2020/1999/CFSP, Art. 1(2); Regulation 2020/1998/EU, Art. 2(2).

49. Decision 2020/1999/CFSP, Arts. 2(1) and 3(1); Regulation 2020/1998/EU, Art. 3(3).

50. See e.g. "Too many human rights perpetrators believe they can get away with their crimes. So changing the calculus of those that commit these crimes is the main goal of the new sanctions regime." HRVP Borrell, cited *supra* note 13. See also the then Dutch Minister of Foreign Affairs Stef Blok, cited *supra* note 4; EU Special Representative for Human Rights, Eamon Gilmore, cited *supra* note 5.

51. See e.g. Decision 2021/372/CFSP, Annex, point 3: "In his capacity as Prosecutor General, he is responsible for serious human rights violations, including the arbitrary detentions of protesters, and for widespread and systematic repression of freedom of peaceful assembly and of association, and freedom of opinion and expression."

52. European Parliament Resolution of 14 March 2019 (cited *supra* note 1), para 11.

and/or impact of the abuses.[53] In the case of counter-terrorism sanctions, it has been possible to argue that their purpose is primarily preventive (blocking access to funds that might be used for terrorist purposes) rather than punitive, although it is also recognized that the consequences for the listed individual are severe.[54] The EU institutions have always argued that individual sanctions are not criminal, and the ECJ has accepted the argument that an asset freeze is not a penalty but a preventive measure, with the consequence that the presumption of innocence protected by Article 48(1) of the Charter of Fundamental Rights is not infringed,[55] and Article 49 of the Charter does not apply.[56] The preamble to Regulation 2020/1998 affirms respect for the Charter and in particular "the right to an effective remedy, the right to defence, and the right to the protection of personal data", but in the case of the human rights regime it will be harder to argue that the measures, while temporary and subject to regular review, are purely precautionary or preventive. After all, they clearly *do* "imply an accusation of a criminal nature",[57] though not in the context of criminal proceedings. It is not clear to what extent this may influence the requirement that listing decisions must have a solid factual basis.[58]

Under the counter-terrorism sanctions regime, there is a requirement of a finding by a competent authority (judicial or equivalent);[59] and where persons are "identified as responsible" for misappropriation of State funds in the context of country-based sanctions, this requires at least the commencement of criminal proceedings or a pre-trial investigation in the country in question.[60] In both situations the Council, in relying on such decisions taken by the authorities of a third country, must verify whether that decision was adopted in accordance with the rights of the defence and the right to effective

53. Decision 2020/1999/CFSP, Art. 1(4). Alongside human rights, Art. 21 TEU refers to the rule of law, which the ECJ has, in the context of sanctions, linked to Art. 47 EUCFR and the right to an effective remedy: Case C-72/15, *Rosneft*, EU:C:2017:236, para 73.

54. Joined Cases C-584, 593 & 595/10 P, *Commission and Others* v. *Kadi*, EU:C:2013:518, para 132.

55. Case T-49/07, *Fahas* v. *Council*, EU:T:2010:499, para 67, "the restrictive measures in question adopted by the Council with a view to combating terrorism do not entail confiscation of the assets of the persons concerned as the proceeds of crime but a freezing of such assets as a precautionary measure. Such measures do not therefore constitute criminal sanctions and, what is more, do not imply any accusation of a criminal nature."

56. In the context of persons under prosecution for misappropriation of State funds, Case T-256/11, *Ahmed Abdelaziz Ezz and Others* v. *Council,* EU:T:2014:93 (affirmed on appeal in Case C-220/14 P, EU:C:2015:147), paras. 77–80.

57. See note 55 *supra*.

58. See e.g. Joined Cases C-584, 593 & 595/10 P, *Commission and Others* v. *Kadi*, para 119.

59. Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, O.J. 2001, L 344/93, Art. 1(4).

60. Case T-256/11, *Ahmed Abdelaziz Ezz*, para 67.

judicial protection.[61] It is hardly surprising, given the different context, that the human rights regime does not require any prior decision of a judicial or otherwise competent authority; but since it is does not explicitly require any specific evidence that listed persons or entities are "responsible", it is difficult to see how the "solid factual basis" for the decision can be tested. This is no doubt one reason why the listings so far have targeted persons and entities with clear State links, where official lines of responsibility can be more easily identified. The unspecified nature of the evidence required reflects an ambiguity as to the nature of this new regime.

*Foreign policy and international law*

The explicit references to international human rights instruments and international law in the new human rights regime prompt a reflection on the relationship between defence of human rights as part of the EU's foreign policy, and the international criminal process. A variety of EU actors have been at some pains to forestall arguments that the new instrument encroaches on the territory of the latter and to explain that it is not intended as an alternative to criminal prosecution or to replace the primary responsibility of States for human rights compliance. The European Parliament's resolution of 2019 declared that criminal prosecution of perpetrators "through domestic or international jurisdictions" should remain the primary objective of the EU and its Member States.[62] The preamble of Decision 2020/1999/CFSP affirms that "States have primary responsibility to respect, protect and fulfil human rights, including ensuring compliance with international human rights law",[63] and this point was reiterated by the High Representative in a declaration marking the adoption of the new instrument.[64] A statement in the Council minutes by Belgium emphasizes the responsibilities of States to ratify and implement international law instruments and to "put in place legislative and institutional arrangements to address the violations of international humanitarian and human rights law and to bring perpetrators to justice."[65] These protestations

61. On counter-terrorism sanctions, see Case C-599/14 P, *Council* v. *Liberation Tigers of Tamil Eelam (LTTE),* EU:C:2017:583, paras. 22–27; on misappropriation of State funds the Court has recently strengthened its position, compare Case C-598/16 P, *Yanukovych* v. *Council*, EU:C:2017:786, paras. 71–75 with Joined Cases C-72 & 145/19 P, *Suzanne Saleh Thabet and Others* v. *Council*, EU:C:2020:992, paras. 34–40 and 46.

62. Cited *supra* note 1 at para 12.

63. Decision 2020/1999/CFSP, Recital 2.

64. Declaration by the High Representative, cited *supra* note 18.

65. Declaration of Belgium to be included in the minutes of the Foreign Affairs Council of 7 Dec., Council doc. 12329/20 ADD 1, 4 Dec. 2020.

recall the unease felt by some commentators over the somewhat breezy assurance by the General Court in *Ezz* that the Council's listing of the claimant was in furtherance of its policy of supporting the new Egyptian authorities, "fully based on the CFSP" and possessed "no criminal law aspect,"[66] despite being a response to a request from the Egyptian authorities referencing the United Nations Convention against Corruption.[67]

One characteristic of the EU's foreign policy is to support multilateral legal instruments (on a wide range of topics, including protection of the environment, labour standards, weapons of mass destruction, money laundering, or the Statute of the International Criminal Court) by encouraging third States to ratify and implement them effectively. It has always declared that its purpose is to support existing international standards and compliance mechanisms rather than to create new ones. It is perhaps not quite enough to declare that the EU's Magnitsky Act operates differently from the international conventions it cites. The EU should be more explicit about exactly how its sanctions may further the objective of human rights compliance other than as a kind of alternative punitive measure lacking any independent legal determination of guilt. Especially so, given that the EU presents the new regime as an instrument of its global leadership and explicitly declares its purpose of encouraging other States to adopt similar restrictive measures.[68] Given the unproven (at best) effectiveness of sanctions in modifying behaviour,[69] it may be best to see the new instrument as ultimately concerned with making a political statement and registering disapproval, the EU's rhetoric being aimed at its domestic audience and

66. Case T-256/11 *Ahmed Abdelaziz Ezz,* paras. 44 and 77.

67. "No account seems to have been taken of the fact that mutual legal assistance is both by its nature and in terms of the UNCAC a judicial function and, however broad Article 29 TEU may be, it is questionable that it allows the Council to trespass on matters reserved to the judiciary." Crosby, "The *Ezz* case: Some critical observations: Case T-256/11 and on appeal Case C-220/14 P", 6 *New Journal of European Criminal Law* (2015), 316, at 317. Taking a more positive view, Garlick, "The *Ezz* case: What is all the fuss about?" 6 *New Journal of European Criminal Law* (2015), 307.

68. Decision 2020/1999/CFSP, Art. 9. A number of countries with close links to the EU (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Norway, Serbia and Ukraine) already "aligned themselves" to the High Representative's declaration on the new instrument (cited *supra* note 18).

69. Most of the literature on the effectiveness of sanctions has focused on country-based sanctions regimes. See e.g. Peksen, "When do imposed economic sanctions work? A critical review of the sanctions effectiveness literature", 30 *Defence and Peace Economics* (2019), 635; Giumelli, *The Success of Sanctions: Lessons Learned from the EU Experience* (Routledge, 2016); Giumelli, *How EU sanctions work: a new narrative*, EU Institute for Security Studies, Chaillot Paper 129, (2013); Portela, European Union sanctions and foreign policy: when and why do they work? (Routledge, 2010).

like-minded third States as well as perpetrators of human rights abuses.[70] It is understandable that the Council should have decided to follow so closely the template of other thematic sanctions regimes, but other procedures and measures would have been possible – including, for example, recourse to an independent committee – and might have avoided some of these ambiguities and increased the visibility of the new instrument.

70. "[T]he importance of the signalling dimension of sanctions should not be underestimated. The act of imposing sanctions is perceived as making a strong foreign policy statement and this can be of use both domestically, targeting an audience calling for action, and externally, projecting a certain image of the EU abroad and sending specific messages to other actors as well." Giumelli (2013) op. cit. *supra* note 69, p. 7.