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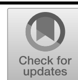

Evidence standards in the judicial review of restrictive measures

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Abstract This article discusses, from a practical point of view, the evidence standards applied by the EU Courts in restrictive measures' litigation, that is, the rules and practices aimed at establishing who must prove what (allocation of the 'burden of proof') and whether any relevant fact has been proven or not ('standard of proof'). While, in principle, the same rules apply across all fields of litigation, the EU Courts take into account the peculiarities of the restrictive measures' sector and try to strike a fair balance between the EU institutions' discretion and the respect for due process and fundamental rights.

Keywords Restrictive measures · Evidence · Burden of proof · Standard of proof · Evidence standards · Unfettered evaluation of evidence · Presumptions

1 Introduction

This article discusses, from a practical point of view, the evidence standards applied by the EU Courts[1] in litigation concerning restrictive measures. For the purpose of

[1]The expression 'EU Courts' refers both to the General Court of the European Union (hereinafter the 'General Court'), judge of first instance in the field of restrictive measures under Art. 275(2) TFEU, and to the Court of Justice of the European Union (hereinafter the 'Court of Justice'), which deals with those cases in appeal on points of law, under Art. 256 TFEU (in addition to its jurisdiction for preliminary rulings under Art. 267 TFEU, which is not relevant for the purpose of this article).

The views expressed are personal.

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this article, evidence standards mainly refer to what is generally discussed in literature under the concepts of 'burden of proof' and 'standard of proof',[2] that is, the rules and practices aimed at establishing who must prove what and whether any relevant fact has been proven or not.

In short, the notion of 'burden of proof' addresses the question of who bears the negative consequences of a fact not having been proved.[3] In the context of restrictive measures' litigation, this issue is mainly discussed with reference to the obligation of the EU authority[4] to establish that the measures are well founded and to the instances where this obligation shifts to other parties or where the litigants are dispensed with it. These issues are addressed in Sect. 2. Conversely, the 'standard of proof' determines the requirements which must be satisfied for facts to be regarded as proven.[5] In substance, it relates to the level of persuasiveness which is necessary to prove a fact. In the context of restrictive measures' litigation, this issue mainly concerns the principle of the 'unfettered evaluation of evidence' and its application in the context of the peculiarities of this domain, with particular reference to the difficulties in evidence gathering and to the types of evidence most often employed. These issues are addressed in Sects. 3 and 4.

This article does not discuss the 'standard of review' of the legality of the acts adopted by the EU authority, that is, the nature and the intensity of the judicial review the EU Courts undertake when faced with an appeal concerning restrictive measures, as this issue is discussed elsewhere in this publication.[6] Yet, some considerations are put forward in Sect. 3.4 as to the impact of the different standards of review on the assessment of evidence.

At the outset, it should be noted that, while, in principle, evidence standards are subject to the same rules and practices across all fields of litigation before the EU Courts, in the field of restrictive measures the latter have to take into account the peculiarities of the sector and try to strike a fair balance between the EU's institutions broad margin of discretion in the field of Common Foreign and Security Policy (CFSP) and the respect for due process and the fundamental rights of individuals.

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[2] See, for instance, Castillo de la Torre, Gippini Fournier [1], Kalintiri [6].

[3] As the Advocate General Kokott observed, the burden of proof determines which party must put forward the facts and, where necessary, adduce the related evidence and the allocation of that burden determines which party bears the risk of facts remaining unresolved or allegations unproven (Opinion in Case C-97/08 P, *Akzo Nobel e.a./Commission*, C-97/08 P, EU:C:2009:536, para. 74 (fn. 64)).

[4] The 'EU authority' which is competent for the adoption of restrictive measures is mainly the Council, which adopts a decision under Article 29 TEU. The decision is then implemented either by Member States' authorities or by way of a Council regulation under Article 215 TFEU. In some instances, the Council can delegate the adoption of implementing acts to the Commission (see, for instance, the Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations [2002] OJ L 139/9). Hereinafter we will refer in general to the 'EU authority' and, in specific instances, to the Council.

[5] Advocate General Opinion in Case C-97/08 P, *Akzo Nobel e.a./Commission*, EU:C:2009:536, para. 74 (fn. 64). While the expression 'standard of proof' originates in common law systems, the underlying concept, in essence, is not extraneous to continental law legal systems.

[6] Triart [8].

2 Burden of proof

The allocation of the burden of proof is not regulated by the EU Treaties and is only seldom referred to by EU secondary law.[7] In the field of restrictive measures, it is only subject to the general principles developed by the EU Courts' case-law.

As a general principle, the burden of proof lays with the EU authority. The EU Courts have constantly held that it is the task of the competent EU authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence that those reasons are not well founded, and that the information or evidence produced should support the reasons relied on against the person concerned.[8] This is also the case when the restrictive measures are adopted on the basis of evidence obtained by a Member State,[9] even when the relevant evidence comes from confidential sources and cannot, consequently, be disclosed.[10] Yet, this principle is not absolute.

First of all, it is mitigated by a kind of 'resilience test'. According to settled case-law, there is no requirement that the EU authority produce before the EU Courts all the information and evidence underlying the reasons alleged, provided that the information or evidence produced support the reasons relied on against the person concerned.[11] In such a case, judicial control will be based on the sole material which has been disclosed in the court, namely the statement of reasons, the observations and exculpatory evidence produced by the person concerned and the response of the competent EU authority to those observations.[12]

Also, it is settled case-law that uncontested facts do not require to be proven. The Council is bound to produce evidence or information in support of its position

[7] See, in this regard, Art. 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1, according to which the burden of proving an infringement of Art. 101(1) or of Art. 102 TFEU shall rest on the party or the authority alleging the infringement, while the undertaking or association of undertakings claiming the benefit of Art. 101(3) TFEU shall bear the burden of proving that the conditions of that paragraph are fulfilled.

[8] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission e.a./Kadi* EU:C:2013:518 (hereinafter '*Kadi II*'), paras. 121–122.

[9] Joined Cases T-35/10 et T-7/11 *Bank Melli Iran* v *Council*, EU:T:2013:397, para. 125; Case T-8/11, *Bank Kargoshaei e.a.* v *Council*, EU:T:2013:470, para 116. According to the General Court, this circumstance in no way detracts from the fact that the contested measures are measures taken by the Council, which must, therefore, ensure that their adoption is justified, if necessary by requesting the Member State concerned to submit to it the evidence and information required for that purpose.

[10] *Bank Melli Iran*, para. 126; *Bank Kargoshaei e.a.*, para. 117. According to the General Court, the Council cannot rely on a claim that the evidence concerned comes from confidential sources and cannot, consequently, be disclosed. While that circumstance might, possibly, justify restrictions in relation to the communication of that evidence to the applicant or its lawyers, the fact remains that, taking into consideration the essential role of judicial review in the context of the adoption of restrictive measures, the EU Courts must be able to review the lawfulness and merits of such measures without it being possible to raise objections that the evidence and information used by the Council is secret or confidential. Moreover, the Council is not entitled to base an act adopting restrictive measures on information or evidence in the file communicated by a Member State, if that Member State is not willing to authorise its communication to the EU Courts whose task is to review the lawfulness of that decision.

[11] *Kadi II*, para. 122.

[12] *Kadi II*, para. 123; Case C-280/12 P *Council* v *Fulmen and Mahmoudian*, EU:C:2013:775, para. 68.

only where the applicant challenges the actions of which he is accused[13] and not with regards to facts that are not in dispute.[14] Conversely, in the event of challenge, it is for the Council to present that evidence for review by the EU Courts and, where it fails to submit relevant evidence and information, the impossibility to determine whether the applicant's arguments are well-founded should not prejudice the applicant.[15]

Once the Council has discharged its duty to provide evidence, the burden of proof shift to the other party. According to settled case-law, if the competent EU authority provides relevant information or evidence, the EU Courts must then determine whether the facts alleged are made out in the light of that information or evidence and assess the probative value of that information or evidence in the circumstances of the particular case and in the light of any observations submitted in relation to them by, among others, the person concerned.[16]

The burden of proof also shifts to the opposing party in the case of well-known facts and presumptions, which are widely used in this domain, as it is discussed in Sect. 3.2. Furthermore, a reversal of the burden of proof is produced, *de facto*, when the Council brings *prima facie* or non-conclusive evidence of the relevant facts. In such a situation, further evidence can be drawn from lack of reaction or acquiescence from the counterpart.

Indisputably, as it follows from the previous considerations, the burden of proof lays on the parties and principally on the EU authority. This is the core of the adversarial principle. Yet, despite the articulation of the burden of proof as above described, the EU Courts do not remain inactive, but can and often do intervene in order to gather or complete evidence. According to settled case-law, it is for the EU Courts, in order to carry out their examination, to request the competent EU authority, when

[13] A mere 'opposition' of the applicant is not sufficient in this respect (see Cases T-9/13 *National Iranian Gas Company/Council*, EU:T:2015:236, paras. 165–166, and T-10/13 *Bank of Industry and Mine/Council*, EU:T:2015:235, paras. 187–188).

[14] As an example, in a case related to restrictive measures against Iran with the aim of preventing nuclear proliferation, the applicant did not dispute that he carried out transactions involving the designated Iranian banks during the periods referred to in the grounds of the contested measures, while claiming that there was no link between the transactions referred to in these grounds and the transactions that it actually carried out. Accordingly, the General Court, supported by the Court of Justice in appeal, concluded that the Council was not bound to produce proof of facts that were not in dispute (Cases T-434/11 *Europäisch-Iranische Handelsbank/Council*, EU:T:2013:405, paras. 113–118, and C-585/13 P *Europäisch-Iranische Handelsbank/Council*, EU:C:2015:145).

[15] As an example, in a further case related to the restrictive measures against Iran with the aim of preventing nuclear proliferation, the applicant was accused, amongst other, of handling payments and letters of credit to entities engaged in nuclear proliferation, which the applicant did not dispute. Nonetheless, it claimed that the services provided through those letters were ordinary banking services unrelated to transactions linked to nuclear proliferation. Asked by the General Court to provide detailed information on the letters of credit in question, the Council could not produce any evidence and simply claimed that the applicant had also failed to produce such evidence. The General Court considered that, since the Council relied on those letters of credit and the applicant contested them, it was for the Council to provide to the General Court the related details. Consequently, the fact that it was impossible to determine whether the applicant's arguments (that the services it provided to those entities did not justify the adoption of restrictive measures against it) are well founded should not prejudice the applicant. On the contrary, since such impossibility was due to the Council's failure to meet its obligation to submit relevant evidence and information, the General Court upheld the applicant's position (Case T-494/10 *Bank Saderat Iran/Council*, EU:T:2013:59, paras. 111–116, upheld in appeal in Case C-200/13 P *Council/Bank Saderat Iran*, EU:C:2016:284).

[16] *Kadi II*, para. 124.

necessary, to produce information or evidence, confidential or not, relevant to such an examination.[17] The General Court, in particular, as the 'trier of fact',[18] regularly intervenes with measures of organisation of procedure, in particular by inviting the parties to make written or oral submissions on certain aspects of the proceedings or by asking the parties to produce any material relating to the case.[19]

In addition, a special regime has recently been introduced for information or material pertaining to the security of the EU or that of one or more of its Member States or to the conduct of their international relations. Following previous case law permitting the Council to derogate to the generally applicable procedural rules,[20] the new Art. 105 of the Rules of Procedure of General Court[21] has established a procedure by which, where the General Court considers that information or material which, owing to its confidential nature, has not been communicated to the other main party is essential in order for it to rule in the case, it may, by way of derogation from Art. 64 of the aforesaid Rules of Procedure and confining itself to what is strictly necessary, base its judgement on such information or material, taking into account the fact that a main party has not been able to make his views on it known. This provision has not been applied so far.

3 Standard of proof

3.1 The principle of unfettered evaluation of evidence

It follows from settled case-law that the EU Courts have to ensure that the decision to list or to maintain the listing of a given person is taken on a 'sufficiently solid factual basis'. That entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.[22]

In order to verify whether the factual basis of the measures is substantiated, it is of fundamental importance setting up the right standard of proof, that is, the minimum threshold that the EU authority needs to surpass in terms of quality and quantity of

[17] See, for instance, *Kadi II*, para. 120, Case C-280/12 P *Council* v *Fulmen and Mahmoudian*, EU:C:2013:775, para. 65.

[18] That is, '*juge des faits*' in French, working language of the EU Courts.

[19] The General Court can take measures of organisation of procedure and measures of inquiry of its own motion under Chap. 6 of its Rules of Procedure.

[20] See notably *Kadi II*, para. 125. According to Art. 64 of the Rules of Procedure of the General Court, under the adversarial principle, all information and material must be fully communicated between the parties.

[21] This provision has been implemented by the Decision (EU) 2016/2387 of the General Court of 14 September 2016 concerning the security rules applicable to information or material produced in accordance with Article 105(1) or (2) of the Rules of Procedure. In addition, Art. 190a of the Rules of Procedure of the Court of Justice insures that the same system is maintained in the case of appeal.

[22] *Kadi II*, para. 119.

evidence, in order for the relevant facts to be established. While references to the notion of standard of proof, developed in the common law systems, can be found in the EU Courts case-law, it is to be noted that this notion is not well developed in EU law. The EU Courts often refer to the concept of 'probative value' of evidence, that is, the capability of the evidence put forward to substantiate the allegation it is meant to support.[23] According to a generally-applied formula, the EU Courts must determine whether the facts alleged are made out in the light of the information or evidence provided by the competent EU authority and assess the probative value of that information or evidence in the circumstances of the particular case and in the light of any observations submitted in relation to them by, among others, the person concerned.[24]

The case-law does not provide further guidance as to the 'probative value' of the evidence. The EU Courts simply specify that, as regards the evidence which may be relied on, the prevailing principle of EU law is the 'unfettered evaluation of evidence',[25] and it is only the reliability of the evidence before the Court which is decisive when it comes to the assessment of its value. For instance, in order to assess the probative value of a document, regard should be had to the credibility of the account it contains, and in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable.[26]

This principle is commonly applied in EU litigation, although it is not further detailed and is often expressed by formulas with different degrees of objectivity.[27] Whatever its exact meaning, the evaluation of the probative value of evidence leaves a fair margin of assessment to the EU Courts. Furthermore, the listings of individuals are often based on indirect evidence, such as presumptions,[28] or on a bundle of indicia, whose assessment requires not only a piece by piece analysis but also an overall assessment. In such a case, while single pieces of evidence may not satisfy that standard, yet the whole body of evidence may still meet the required standard of proof.[29] This allows for a margin of flexibility for the EU Courts.

Moreover, the EU Courts' assessment of the probative value of evidence may be less strict under specific circumstances that are peculiar to the realm of restrictive

[23] The question of the probative value of evidence must be distinguished from the different question of the admissibility of evidence. The latter issue, of procedural nature, relates to the possibility to make use of that evidence in the context of the relevant litigation and it is not dealt with in this article.

[24] *Kadi II*, para. 124.

[25] See, for instance, Case T-493/10 Persia International Bank/Council, EU:T:2013:398, para. 95.

[26] Joined Cases T-533/15 et T-264/16 *Kim e.a.* v *Council and Commission*, EU:T:2018:138, para. 258 (with reference to Case T-343/06 *Shell Petroleum and Others* v *Commission*, EU:T:2012:478, para. 161 and the case-law cited).

[27] These formulas vary from references to the 'personal conviction' of the judge ('*intime conviction*' in French), to more 'objective' standards (see Castillo de la Torre, Gippini Fournier [1], 38).

[28] See Sect. 3.2 below.

[29] Case C-605/13 P *Anbouba/Council*, EU:C:2015:248, paras. 50–55. In the specific case, the EU Courts have not engaged in a piece by piece analysis, as the General Court had reviewed whether Mr Anbouba's inclusion on the lists of persons subject to restrictive measures was well founded on the basis of a set of indicia relating to his situation, functions and relations in the context of the Syrian regime that were not rebutted by the applicant (*ibidem*, para. 54).

measures. These circumstances relate, in particular, to the context in which these measures are adopted, to the urgency under which the EU authority intervenes and to the difficulties for the latter to find evidence. Inevitably, restrictive measures are often adopted in the context of complex geopolitical situations, such as civil wars and/or with respect to authoritarian regimes. In such situations, the EU authority's task of providing relevant evidence is particularly challenging. For instance, this is the case concerning restrictive measures adopted against Syria, in the context of which the EU Courts have so far adopted a flexible approach towards the Council's duty to provide a sufficiently solid factual basis underpinning the measures. The Court of Justice, in particular, recognises that account may be taken of the peculiar context of those measures, of the fact that there was an urgent need to adopt such measures intended to put pressure on the Syrian regime in order for it to stop the violent repression against the population and of the difficulty in obtaining more specific evidence in a State at civil war and having an authoritarian regime.[30]

3.2 The relevance of indirect evidence: presumptions

In the field of restrictive measures, the use of indirect evidence such as presumptions is particularly frequent in view of the difficulties encountered by the EU authority to find direct evidence in sensitive situations. An interesting example is given by the presumptions employed by the Council to demonstrate the existence of personal links of the listed persons with third countries' regimes targeted by restrictive measures. This is often the case with the measures against Syria, where different degrees of proximity between the listed persons and the targeted government have been scrutinised by the EU Courts, with different outcomes.

In particular, when a link with the regime was claimed with respect of *third countries' leaders*, the EU Courts have not hesitated to recognise its legitimacy. For instance, the General Court made it clear that, as a 'rule of experience' a minister (namely the minister for economy and commerce) is part of the country's leaders and responsible for the acts of the country, taking into account the authoritarian nature of the Syrian regime.[31] A similar solution has been adopted as it comes to *family members of these leaders*. As the General Court has established, the mere fact that the applicant was a family member of a country's leader (namely the sister of Mr Bashar Al Assad) was sufficient for the Council to consider that she was connected with the Syrian leaders, particularly as the existence in that country of a tradition of the exercise of power by a family is a well-known fact which the Council was entitled to take into account.[32] Conversely, the approach of the judges has been more nuanced with reference to *businessmen linked with those leaders*. The General Court had first qualified the existence of such a link as a presumption *stricto sensu*.[33] However, the

[30] Case C-605/13 P *Anbouba/Council*, EU:C:2015:248, para. 104.

[31] Case T-203/12 *Alchaar* v *Council*, EU:T:2014:602, para. 138.

[32] Case T-202/12, *Al Assad/Council*, EU:T:2014:113, para. 96.

[33] Case T-563/11, *Anbouba/Council*, EU:T:2013:429, para. 38. The General Court considered that, given the authoritarian nature of the Syrian regime and the State's tight control over the Syrian economy, the Council could rightly regard as constituting a matter of common experience the fact that the activities of

Court of Justice turned the concept of presumption in that of a 'set of indicia' and established that the General Court was entitled to hold that the applicant position in Syrian economic life and his relations with a member of the family of the Syrian President constituted a 'set of indicia sufficiently specific, precise and consistent' to establish that he provided economic support for the Syrian regime.[34] On the contrary, in a different context, the Court of Justice found that the status of *family members of businessmen linked with the leaders of the country* was not sufficient to demonstrate, in itself, that there was 'a sufficient link between the persons concerned and the third country targeted by the restrictive measures', as it could not be presumed that the family members of leading business figures also benefit from the economic policies of the government and were thus responsible of the latter's actions.[35]

The difficulties in establishing the above presumptions have recently determined the Council to 'circumvent' the problem by way of including the personal status of the persons involved (which was previously part of the listing grounds) in the general listing criteria.[36] More in details, in the context of restrictive measures against Syria, the Council has amended the criterion, originally targeting persons and entities responsible for the violent repression against the civilian population in Syria, in order to target directly 'leading businesspersons operating in Syria', unless there was sufficient information that those persons were not, or were no longer, associated with the regime or did not exercise influence over it or did not pose a real risk of circumvention. The Council therefore 'moved up' the presumption, introducing the status of 'leading businessman operating in Syria' as an autonomous general listing criterion and leaving to the party concerned the burden of demonstrating that he or she was no longer associated or connected with the regime. Confronted with the issue, the General Court recognised that the status of 'leading businessman operating in Syria'

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one of the leading businessmen in Syria, who is active in numerous sectors, could not have prospered if he had not enjoyed the favour of that regime and provided it with a degree of support in return.

[34]Case C-605/13 P, *Anbouba/Council*, EU:C:2015:248, paras. 51–52 (see also *Clausen* [3], p. 410). The reluctance of the Court of Justice to base its assessment on presumptions is also evident in Case C-330/15 P *Tomana e.a.* v *Council et Commission*, EU:C:2016:601, where it established that the fact of holding senior posts in the ruling party during the relevant period was sufficient to consider the applicants as being fully associated with the Government of Zimbabwe, unless they have taken specific action demonstrating their rejection of the government's practices, while specifying that such a conclusion was not the result of a presumption been applied, but of an appraisal of the evidence (constituted by a set of indicia sufficiently specific, precise and consistent) carried out in the context in which the measures were adopted (*ibidem*, paras. 81–84).

[35]Case C-376/10 P *Tay* Za v *Council*, EU:C:2012:138, paras. 63–65.

[36]Since the entry into force of the Lisbon Treaty, restrictive measures are adopted on a twofold level. On the one hand, the general listing criteria are adopted by way of a Council decision under Article 29 TEU. This decision defines "the approach of the Union to a particular matter of a geographical or thematic nature" and it is based on one of the EU CFSP objectives under 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". On the other hand, the Council decision under Article 29 TEU is implemented either by Member States authorities or by way of a Council regulation under Article 215 TFEU. For the purpose of this article, the expression 'general listing criteria' refers to the criteria on which the EU authority bases the restrictive measures in conformity with the relevant CFSP objectives, while the expression 'individual listing grounds' refers to the specific reasons upon which a person, group or entity is subject to the restrictive measures in conformity with the general listing criteria.

constituted an 'objective, autonomous and sufficient criterion' for the application of restrictive measures, without there being any need for the Council to demonstrate the support given by these persons to the existing regime, the benefit they derive from that regime's policies and their association with that regime. The link to the Syrian regime in the case of 'leading businesspersons operating in Syria' was thus presumed.[37] The consequences of this new approach are important as, in view of the broad discretion enjoyed by the Council as regards the general and abstract definition of the listing criteria, once the personal status in question is part of an autonomous listing criterion, the judicial review shifts to the 'limited review' standard,[38] namely under the proportionality test, provided that the general listing criteria are challenged by way of a plea of illegality,[39] and the burden of proof shifts on the applicant.[40]

3.3 The relevance of new evidence provided for the first time before the court

A further sensitive issue related to the assessment of the probative value of evidence concerns the probative value of evidence provided by the parties, in particular by the EU authority, during the course of the judicial proceedings.

Some controversial questions in this respect arise, on the one hand, with respect to evidence that was not previously communicated by the EU authority to the applicant and it is produced for the first time before the court and, on the other hand, with respect to elements that were not at the disposal of the EU authority at the time of adoption of the measures.

These questions have been addressed by the EU Courts in other domains, notably in the field of competition law, where they seem to have concluded that judicial review takes into account all the elements submitted by the applicant, whether those elements

[37] Case T-5/17 *Sharif/Council*, EU:T:2019:216, paras. 55–56.

[38] Case T-5/17 *Sharif/Council*, EU:T:2019:216, para. 97, with reference to Case C-348/12 P *Council/Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776, para. 120.

[39] In fact, in the same case a plea of illegality was raised against the general inscription criterion and the General Court specified that the EU institutions may make use of presumptions which reflect the fact that it is open to the authority on which the burden of proof lies to draw certain conclusions on the basis of common experience derived from the normal course of events. It went further to recall that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded (Case T-5/17 *Sharif/Council*, EU:T:2019:216, paras. 91–92). The General Court referred, by analogy, to case-law related to competition law (Case C-97/08 P *Akzo Nobel and Others/Commission*, EU:C:2009:536, paras. 60–63, Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands and Others*, EU:C:2009:110, paras. 87–89, Case C-521/09 P *Elf Aquitaine/Commission*, EU:C:2011:620, para. 62 and the case-law cited), as well as to case-law of the European Court of Human Rights concerning Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, requiring that presumptions are confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (ECtHR, 7 October 1988, *Salabiaku/France*, CE:ECHR:1988:1007JUD001051983).

[40] In the case at issue, the General Court concluded that the burden of proof on the applicant was not excessive, as he could rely, *inter alia*, on facts and information that only he could have and that the Council had afforded the applicant the opportunity to produce evidence that, notwithstanding the existence of serious indicia that he should be included in the category of persons covered by the relevant listing criterion, he was not in fact linked to the Syrian regime (Case T-5/17 *Sharif/Council*, EU:T:2019:216, paras. 103–110).

pre-date or post-date the contested decision, whether they were submitted previously in the context of the administrative procedure or, for the first time, in the context of the judicial proceedings, in so far as those elements are relevant to the review of the legality of the contested act.[41] Yet, this possibility seems to be excluded for the defendant EU authority as, according to the Court of Justice, a fact relied on by the Commission for the first time in its defence before the General Court cannot be taken into account in order to support the contested decision,[42] as the Commission cannot replace the findings on the constituent elements of the infringement on evidence other than that relied upon in the decision. In any event, this is without prejudice for the defendant EU authority to submit additional evidence with the sole purpose to rebut the new evidence adduced by the applicant.

In the domain of restrictive measures, it is settled case-law that the legality of the contested decision may be assessed only on the basis of the elements of fact and law on which it was adopted and not on the basis of information which was brought to the Council's knowledge after the adoption of that decision, even if the latter takes the view that the information could legitimately be the basis for the adoption of that decision. The Council cannot substitute the grounds on which that decision is based.[43] According to that case-law, the review extends both to the assessment of the *facts and circumstances* relied on as justifying it, and to the *evidence and information* on which that assessment is based.[44]

In particular, as it comes to the evidence, the General Court had fist excluded that the Council could rely, before it, on evidence which was not communicated to the applicant, at its request, before the action was brought.[45] It was however unclear whether, according to such case-law, a violation of this principle would only trigger the violation of the rights of the defence,[46] possibly together with the right to effective judicial protection,[47] or also the 'principle that the legality of a measure may

[41] Case C-603/13 P *Galp Energía España e.a.* v *Commission*, EU:C:2016:38, para. 72.

[42] Case T-24/05 *Alliance One International e.a.* v *Commission*, EU:T:2010:453, para. 77.

[43] Case T-63/12 *Oil Turbo Compressor* v *Council*, EU:T:2012:579, para. 29 (with reference to previous case-law in the field of competition law, namely Case T-190/10 *Egan and Hackett* v *Parliament*, EU:T:2012:165, paras. 102–103 and the case-law cited).

[44] Case T-63/12 *Oil Turbo Compressor* v *Council*, EU:T:2012:579, para. 18 (with reference to Case T-390/08 *Bank Melli Iran* v *Council*, EU:T:2009:401, paras. 37 and 107). More recently, see Cases T-731/15 *Klyuyev* v *Council*, EU:T:2018:90, para. 125, and T-240/16 *Klyuyev* v *Council*, EU:T:2018:433, para. 137.

[45] Joined Cases T-35/10 and T-7/11 *Bank Melli Iran* v *Council*, EU:T:2013:397, paras. 99–102, and Cases T-58/12 *Nabipour e.a./Council*, EU:T:2013:640, para. 79, and T-182/13 *Moallem Insurance/Council*, EU:T:2014:624, para. 35.

[46] In such a case, a breach would justify annulment of the acts concerned only where it is established that the restrictive measures concerned could not have been lawfully adopted or maintained if the document that was not communicated had to be excluded as inculpatory evidence (see for instance, Cases T-7/11 *Bank Melli Iran* v *Council*, EU:T:2013:397, para. 100, T-493/10 *Persia International Bank* v *Council*, EU:T:2013:398, para. 85, and T-161/13 *First Islamic Investment Bank/Council*, EU:T:2015:667, paras. 83–87).

[47] See Case T-182/13 *Moallem Insurance/Council*, EU:T:2014:624, para. 35.

be assessed only on the basis of the elements of fact and of law on which it was adopted'.[48]

The General Court has later recognised the possibility to submit 'new' evidence in court, namely information provided by the Council in the course of the judicial proceedings, spontaneously or following a measure of organisation of procedure, in order to substantiate the legality of the measure,[49] provided that the Council had those evidence at its disposal at the latest when it adopted the restrictive measures[50] and without prejudice of the possible infringement of the rights of defence.[51] This is also without prejudice of the possibility to take into consideration a piece of evidence that has been submitted as exculpatory evidence by the person subject to the restrictive measures for the purpose of *confirming* an assessment of the lawfulness of the contested acts that is based on the elements of fact and of law underpinning the adoption of those acts.[52]

3.4 The impact of the standard of review on the assessment of evidence

Rules and practices on evidence are essential for the EU Courts to exercise judicial review. Therefore, the question arises as to if, and to what extent, the scope and the intensity of judicial review may have an impact on the setting up of evidence standards.

The standards of judicial review applied by the EU Courts in the field of restrictive measures are discussed elsewhere in this publication.[53] Suffice here to remind that,

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[48] See Case T-58/12 *Nabipour e.a./Council*, EU:T:2013:640, para. 79.

[49] For instance, in the framework of the restrictive measures taken against Iran with the aim of preventing nuclear proliferation, the General Court took into consideration evidence attached to the defence, proving that the applicant was controlled by a person providing support to the Iranian Government (Case T-161/13 *First Islamic Investment Bank/Council*, EU:T:2015:667, paras. 49–58). In some other instances in the same context, the General court took into account evidence produced by the applicant itself in order to *confirm* the legality of the measures (see, for instance, Cases T-9/13 *National Iranian Gas Company/Council*, EU:T:2015:236, paras. 163–166, and T-10/13 *Bank of Industry and Mine/Council*, EU:T:2015:235, paras. 185–188).

[50] See, for instance, Cases T-290/14 *Portnov* v *Council*, EU:T:2015:806, para. 47, and T-255/15 *Almaz-Antey Air and Space Defence/Council*, EU:T:2017:25, para. 151. However, in the specific framework of the anti-terrorist measures implementing a UN Security Council Resolution, the General Court has accepted that the EU authority can bring evidence which was not at the disposal of the competent authority at the moment of the decision. In this occasion, the General Court made a distinction between, on the one hand, the procedural requirement of a sufficiently specific statement of reasons and its disclosure to the person concerned in the course of the administrative procedure and, on the other hand, the determination, to be made by the EU Courts that, the statement of reasons thus disclosed has a sufficiently solid factual basis, after having requested the competent EU authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination (Case T-248/13 *Al-Ghabra/Commission*, EU:T:2016:721, para. 140, with reference to *Kadi II*, paras. 117–120). The General Court considered that the new material produced with the defence was specifically intended to serve that purpose and could be taken it into account for the purposes of the review of lawfulness of the measures at issue.

[51] Provided that it is established that the restrictive measures concerned could not have been lawfully adopted or maintained if the undisclosed document had to be excluded as inculpatory evidence (see footnote 46 above).

[52] Joined Cases T-533/15 et T-264/16 *Kim e.a.* v *Council and Commission*, EU:T:2018:138 para. 115. On this issue, see also Case C-123/18P, HTTS v Council, EU:C:2019:694, paras. 45–47 and 83.

[53] See footnote 6 above.

according to settled case-law, the intensity of the judicial review varies according to whether the applicant challenges the general listing criteria or the individual listing grounds.[54]

According to Art. 275(2) TFEU, the EU Courts must ensure, in principle, the full review of the lawfulness of all EU acts in the light of the fundamental rights forming an integral part of the EU legal order.[55] However, as regards the definition of the general listing criteria, the EU Courts exercise a limited review, due to the broad discretion entrusted to the Council.[56] According to settled case-law, the review carried out by the EU Courts must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the assessment of the considerations of appropriateness on which such measures are based,[57] in the context of the proportionality principle which is invoked in the context of a plea of illegality under Art. 277 TFEU.[58]

Conversely, the implementation of the general listing criteria to a specific situation, namely the individual listing grounds, are subject to a 'full' review, by the EU Courts, aimed at ensuring that the decision to list or to maintain the listing of a given person is taken on a 'sufficiently solid factual basis'.[59]

Having established that different standards of review apply according to this peculiar articulation between general listing criteria and individual listing grounds, the question arises as to the interaction between these different standards of review and the setting up of evidence standards. In other worlds, does the different standards of review influence the intensity of evidence assessment?

In this respect, it must be distinguished between, on the one hand, the review of facts and evidence and, on the other hand, the review of the EU authority's assessments. It is evident from the formula consistently employed by the EU Courts that a limited judicial review does not apply to fact checking. It rather concern the assessments made by the EU authority, which are subject to a limited standard of review under the 'manifest error of assessment' test,[60] to the extent they imply the exercise of policy choices.

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[54] See footnote 36 above.

[55] *Kadi II*, para. 97, Case C-280/12 P *Council* v *Fulmen and Mahmoudian*, EU:C:2013:775, para. 58.

[56] Case C-605/13 P *Anbouba/Council*, EU:C:2015:248, para. 41 (with reference to Case C-348/12 P *Council* v *Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776, para. 120 and the case-law cited). By establishing the general listing criteria, the EU authority implements the CFSP objectives listed in Art. 21. These appreciations are considered as 'policy choices' that leave a broad margin of appreciation to the Council and are subject to a limited judicial review. Such a limited review is justified by the allocation of competences among EU institutions, based on the principle of the separation of powers (see, *inter alia*, Nehl [7], p. 178).

[57] Joined Cases T-246/08 et T-332/08 *Melli Bank* v *Council*, EU:T:2009:266, para. 45 (with reference to Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council*, para. 159).

[58] See, for instance, Cases T-578/12 *National Iranian Oil Company* v *Council*, EU:T:2014:678, para. 108, and T-346/14 *Yanukovych* v *Council*, EU:T:2016:497, paras. 99–101 (the judgement was confirmed by the Court of Justice in appeal in Case C-598/16 P, *Yanukovych* v *Council*, EU:C:2017:786).

[59] See Sect. 3.1 above.

[60] This notion has not been fully clarified in the case-law and is particularly controversial (see for instance, *Castillo de la Torre, Gippini Fournier* [1], p. 300 and the doctrine cited) An author refers to the test as a

The EU Courts' appreciation remains very intense with reference to the assessment of evidence. On the one hand, the (limited) review extends to reviewing whether the rules governing the procedure have been complied with. This includes the rules on the burden of proof, which are of procedural nature. On the other hand, the EU Courts, principally the General Court, maintain their review on whether the facts are materially accurate. The assessment of the 'existence of the facts' is indeed systematic and does not depend on the (full or limited) nature of judicial review.[61]

It is true that, in the context of restrictive measures, the policy considerations which justify the general listing criteria often refer to geopolitical situations.[62] Frequently, these situations, such as civil wars, repressive or dangerous regimes, etc., are, generally speaking, well-known facts. As a consequence, an in-depth assessment of factual circumstances is far less important when dealing with the definition of the general listing criteria.

That being said, in principle, the application of different standards of review, and in particular the 'limited review' standard, shall not affect the appreciation of evidence, in particular with reference to the standard of proof. Nevertheless, critics have been raised as to the lenient approach of the EU Courts when applying the proportionality test to the general listing criteria.[63] In particular, it has been submitted that, in spite of the principle of 'full review', the EU Courts review has been limited to the procedural aspects of EU measures imposing individual sanctions and that, although applicants were challenging those measures on the basis of the proportionality principle, when the EU Courts struck down individual sanctions, they only did so on due process grounds, without entering into substantive questions and thus leaving virtually absolute deference to the Council when it came to the sanctions policies.[64]

Yet, there are situations where the EU Courts have engaged in a deeper assessment, notably by way of a 'legal interpretation' of the general listing criteria in the light of the objectives of the EU Treaties (Art. 21 TEU). An interesting example comes from litigation concerning the restrictive measures taken in view of the situation in Ukraine.[65] In that case, the general listing criteria at stake focussed on the freezing

'vague, but flexible standard of judicial review', which 'is an expression of the fundamental requirement flowing from the division of powers basically to respect the margin of executive discretion and to subject its exercise to a limited judicial control only' (*Nehl* [7], p. 178). A limited standard of review based on the 'manifest error of assessment' test generally applies to appreciations of a complex or political nature and it is particularly discussed with reference to complex economic appreciations or policy considerations in the field of competition law, as well as to complex socio-economic, technical and scientific assessments in other areas of EU law. In the context of restrictive measures, policy considerations are of particular relevance, as the Council acts on the basis of (foreign) policy considerations and for the pursuit of (foreign) policy objectives.

[61] See, for instance, *Fartunova* [5], p. 472.

[62] Examples: restrictive measures adopted 'against the Islamic Republic of Iran with the aim of preventing nuclear proliferation', 'in view of the situation in Syria', 'in view of the situation in Ukraine', etc.

[63] See *Eckes* [4] p. 224.

[64] See, for a recent example, *Chachko* [2], p. 14.

[65] These measures were adopted, on the basis of Art. 29 TEU, by Decision 2014/119/CFSP of the Council of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2014] OJ L 66/26, and, on the basis of Art. 215(2) TFEU, by Regulation (EU) No 208/2014 of the Council of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2014] OJ L 66/1.

and recovery of assets of persons identified as responsible for the misappropriation of Ukrainian State funds, in view of the objective of consolidating and supporting the rule of law in Ukraine, in conformity with Art. 21(2)(b) TEU. The General Court held that, while it is conceivable that certain conduct pertaining to acts classifiable as misappropriation of public funds may be capable of undermining the rule of law under Art. 21(2)(b) TEU, it cannot be accepted that any act classifiable as misappropriation of public funds, committed in a third country, justifies EU action with the objective of consolidating and supporting the rule of law in that country, using the powers of the Union under the CFSP. In particular, the General Court held that, before it can be established that a misappropriation of public funds is capable of justifying EU action under the CFSP, based on the objective of consolidating and supporting the rule of law, it is, at the very least, necessary that the disputed acts should be such as to undermine the legal and institutional foundations of the country concerned. Consequently, that criterion must be interpreted as meaning that it does not concern, in abstract terms, any act classifiable as misappropriation of public funds, but rather as concerning acts classifiable as misappropriation of public funds or assets which, having regard to the amount or the type of funds or assets misappropriated or to the context in which the offence took place, are, at the very least, such as to undermine the legal and institutional foundations of Ukraine, and in particular the principles of legality, the prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, such as to undermine respect for the rule of law in that country.[66] As recognised by the General Court, such an interpretation guarantees the respect of the broad discretion enjoyed by the Council in relation to the definition of the general listing criteria, while ensuring that the full review of the lawfulness of EU acts in the light of fundamental rights is ensured.[67]

4 Peculiar elements of proof

In principle, EU law guarantees freedom of evidence, any type of evidence being in principle admissible without preclusions or hierarchies.[68] The probative value of evidence only relies on its credibility, assessed under the principle of the unfettered evaluation discussed above.[69] This being said, some elements of proof are peculiar or frequently used in the context of restrictive measures' litigation and will be briefly discussed hereinafter. This is the case of the designation by the UN Security Council, of some sort of national decisions in the framework of both anti-terrorist and autonomous measure, and of press and Internet-based information.

[66]Case T-346/14 *Yanukovych* v *Council*, EU:T:2016:497, paras. 99–101 (the judgement was confirmed by the Court of Justice in appeal in Case C-598/16 P, *Yanukovych* v *Council*, EU:C:2017:786). An identical approach has been followed by the General Court in 'parallel' cases concerning the same restrictive measures (Case T-348/14 *Yanukovych/Council*, EU:T:2016:508, upheld by the Court in Case C-599/16 P *Yanukovych/Council*, EU:C:2017:785, Cases T-340/14 *Klyuyev/Council*, EU:T:2016:496, and T-341/14 *Klyuyev/Council*, EU:T:2016:47).

[67]*Ibidem*, para. 100 (with reference to Case T-578/12 *National Iranian Oil Company* v *Council*, EU:T:2014:678, para. 108 and the case-law cited).

[68]*Fartunova* [5], p. 355.

[69]Sect. 3.1.

4.1 Designation by the UN Security Council in the context of UN-based measures

Restrictive measures may be taken on the basis of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations ('UN-based measures'). In these instances, the determinations of the Security Council—and in particular its Sanctions Committee—constitute the main or exclusive factual basis of the EU listing.

Yet, judicial review of such acts and investigations is very limited. According to the General Court, while the EU judicature has jurisdiction to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council in the light of fundamental rights, including review of such measures as are designed to give effect to resolutions adopted by the Security Council,[70] it has no such jurisdiction to review the international agreement on which such EU measures are based, and in particular to review the Security Council resolutions *per se* or to review whether the investigations conducted by the UN bodies comply with fundamental rights.[71]

The General Court has established that, according to the principle of good administration enshrined in Art. 41 of the Charter of Fundamental Rights of the EU, the Council is under an obligation to examine carefully and impartially all the relevant aspects of the individual case, including the evidence on which the Sanctions Committee had relied in order to designate the applicant.[72] However, it doesn't follow that the Council is obliged to carry out, systematically or on its own initiative, its own investigations or checks for the purpose of obtaining additional information, when it already has information provided by the United Nations in taking restrictive measures against persons who have been subject to proceedings before that international organisation. In that regard, the EU authority must take its decision on the basis of the summary of reasons provided by the Sanctions Committee, while assessing, having regard, inter alia, to the content of any comments of the person concerned, whether it is necessary to seek the assistance of the UN Security Council in order to obtain the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination.[73]

4.2 National decisions in a two-tier system applicable to anti-terrorists measures

A particular source of evidence for listing persons, groups or entities in the context of anti-terrorist restrictive measures is constituted by decisions of national authorities.

[70] Case T-619/15 *Badica and Kardiam/Council*, EU:T:2017:532, para. 64, with reference to Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, para. 326.

[71] Case T-619/15 *Badica and Kardiam/Council*, EU:T:2017:532, paras. 65–68, with reference to Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paras. 286 and 287.

[72] Joined Cases T-107/15 et T-347/15 *Uganda Commercial Impex* v *Council*, EU:T:2017:628, para. 53.

[73] *Ibidem*, paras. 54–55 (with reference to *Kadi II*, para. 115).

Anti-terrorists measures are subject to a specific legal framework, based on Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJ L 344/93, as implemented by Regulation (EC) No 2580/2001 of the Council of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L 344/70.

Under Art. 1(4) of Common Position 2001/931, the list of persons, groups and entities involved in terrorist acts and subject to the restrictive measures at issue 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.[74] The same provision specifies that 'competent authority' shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area. The EU Courts have further clarified that the notion of 'competent authority' within the meaning of this provision is not limited to the authorities of Member States but is capable, in principle, of including the authorities of third States.[75]

Therefore, as restrictive measures under the specific anti-terrorist regime are normally based on a decision taken by a (EU Member State or third State) national decision,[76] the question arises as to what extent this decision constitute a sufficiently solid factual basis for the purpose of listing the persons, groups or entities concerned.

In that respect, in the *LTTE* case, the EU Courts have established that, while, except for exceptional circumstances, EU Member States 'competent authorities' decisions do not require any additional verification by the Council (in particular as to the respect of the fundamental rights of the parties concerned),[77] before acting on the basis of a decision of an authority of a third State, the Council must verify whether that decision was adopted in accordance with the rights of the defence and the right to effective judicial protection (the '*LTTE* principle').[78]

[74]The inscription may also extend to 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.

[75]Case C-599/14 P *Council/LTTE*, EU:C:2017:583, para. 22.

[76]However, the Court has specified that such a decision is not necessary in the event of a confirmatory measure, even though if, in view of the passage of time and in the light of changes in the circumstances of the case, the mere fact that the national decision that served as the basis for the original listing remains in force no longer supports the conclusion that there is an ongoing risk of the person or entity concerned being involved in terrorist activities, the Council is obliged to base the retention of that person or entity on the list on an up-to-date assessment of the situation, and to take into account more recent facts which demonstrate that the risk still exists (Case C-79/15 P *Council/Hamas*, EU:C:2017:584, para. 32, with reference, by analogy, to *Kadi II*, para. 156).

[77]Case T-643/16 *Gamaa Islamya Egypte/Council*, EU:T:2019:238, paras. 131–132. This is due to the fact that, within the framework of Common Position 2001/931, a specific form of cooperation has been set up between Member States authorities and the EU institutions, resulting in an obligation for the Council to rely as much as possible on the evaluation of the competent national authorities (*ibidem*, para. 130, with reference to Cases T-256/07 *People's Mojahedin Organization of Iran/Council*, EU:T:2008:461, para. 133, and T-284/08 *People's Mojahedin Organization of Iran/Council*, EU:T:2008:550, para. 53).

[78]Case C-599/14 P *Council/LTTE*, EU:C:2017:583, para. 24.

4.3 National (judicial) decisions in the context of autonomous measures

Autonomous restrictive measures lack a specific legal framework and are adopted under the sole responsibility of the EU authority.[79] It follows that the demonstration of the existence of a sufficiently solid factual basis and the relevant evidence lays under the responsibility of the EU authority. These measures may be based, inter alia, on acts of national authorities of third States, such as judicial decisions, statements, letters etc. Where taken by the Council as evidence for listing, these acts constitute the 'factual bases' for the listing and are not exempt from scrutiny by the EU Courts. The latter have made it clear that the need to demonstrate the existence of a 'sufficiently solid factual basis' entails a verification of all the relevant factual allegations in the summary of reasons underpinning that decision.[80]

In this context, the question has been raised as to the extent to which the General Court has to review the determinations made by third States' authorities and more in particular as to whether the '*LTTE* principle' also applies in the context of autonomous measures.[81] This question was decisive in the *Azarov* case, concerning restrictive measures taken in view of the situation in Ukraine[82] and targeting, in essence, persons related with the previous regime, which were responsible for the misappropriation of State funds, including persons subject to investigation by the Ukrainian authorities.[83] In adopting those restrictive measures, the Council relied on the fact that the appellant was subject to 'criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets', as was established from a letter, issued by the Ukrainian authorities, which referred to criminal investigations instituted against the appellant.[84]

The Court of Justice, setting aside the judgement of the General Court,[85] established that the Council was required to verify that the decision of a third State, on

[79] Although they are often adopted under proposals put forward by individual Member States and based on information the latter have collected, the EU authority remains exclusively responsible for these measures (see Sect. 2 above and in particular footnote 9).

[80] Settled case-law: see, for instance *Kadi II*, para. 119, C-348/12 P, *Council* v *Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776, para. 73, and T-290/14 *Portnov*, EU:T:2015:806, para. 38. In particular, the General Court had made it clear that national authorities' statements are not sufficient by themselves to substantiate the listing, as the Council cannot rely entirely on those statements, without any information regarding the acts or conduct specifically imputed to the applicant by those authorities (*Portnov*, para. 48).

[81] That is, the principle developed by the Court of Justice in the *LTTE* judgement, in relation to restrictive measures taken with a view to combating terrorism, on the basis of Common Position 2001/931, as implemented by Regulation (EC) No 2580/2001, according to which it falls to the Council, before acting on the basis of a decision of an authority of a third State, to verify that the relevant legislation of that State ensures protection of the rights of defence and of the right to effective judicial protection equivalent to that guaranteed at EU level (Case C-599/14 P *Council/LTTE*, EU:C:2017:583, para. 24; see Sect. 4.2 above).

[82] These measures were based on decision 2014/119/CFSP and Regulation (EU) No 208/2014 (see footnote 65 above), and their subsequent modifications.

[83] See Case C-530/17 P *Azarov/Council*, EU:C:2018:1031, paras. 2 and 5.

[84] *Ibidem*, para. 24.

[85] The General Court held that, as the existence of a preliminary decision of the competent national authorities was not amongst the listing criteria and that, differently from the case of the anti-terrorist measures, the contested measures were taken in the context of the cooperation with a third State authorities in the

which it intends to base the adoption of restrictive measures, was taken in accordance with the rights of the defence and the right to effective judicial protection.[86] The Court of Justice went even further, insofar as it established that the Council, in order to fulfil its obligation to state reasons, must refer, if only briefly, in the statement of reasons relating to a listing decision 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,[87] which the Council had not done in the case at issue.[88]

The feasibility of the solution adopted by the Court of Justice raises some concern, in particular as to the verifications the Council has to make. First, while in the framework of the EU anti-terrorism regime, the Council is bound to act upon a decision taken by a competent national authority, in adopting the (autonomous) measures at issue, the Council relied on the *fact* that the appellant was subject to 'criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets'[89] and not on a (unspecified) *decision* taken by the Ukrainian authorities.[90] One could wonder, for instance, whether the Council's burden of proof would be lesser if the existence of these procedures was demonstrated by (reliable) press information providing sufficient details of those proceedings. Secondly, it is settled case-law that, where the Council acts upon the existence of judicial proceedings at the national level, it is not for the Council (nor for the General Court) to verify whether the investigations are well founded.[91] Thirdly, the General Court had, in any case, established that it was the responsibility of the Council to carry out additional verifications or ask the national authorities for additional evidence, should it have doubts as to the adequacy of the evidence provided by those authorities on the basis of the elements at its disposal, included information and exculpatory evidence provided by the listed persons.[92] The General Court also conceded that the political choice of the Council to support the new regime would be manifestly wrong, should it appear that fundamental rights were systematically violated in that country.[93]

view of supporting a regime change, the approach taken in the *LTTE* Case could not be applied to the case at issue (Case T-190/16 *Azarov/Council*, EU:T:2018:232, paras. 183–192).

[86]Case C-530/17 P *Azarov/Council*, EU:C:2018:1031, para. 34. The same approach has been later applied to a case concerning the same person (see C-416/18 P *Azarov/Council*, EU:C:2019:602).

[87]*Ibidem*, paras. 29–30.

[88]*Ibidem*, para. 45. For that reason, the Court of Justice annulled the contested measures without referring the case back to the General Court.

[89]*Ibidem*, para. 24.

[90]*Ibidem*, para. 25. The only *acts* in questions were (probably) the national decisions by which the criminal proceedings were opened, which were not transmitted to the Council, and the letter by which the Ukrainian authorities informed the EU foreign services of the existence of such procedures. None of these acts seems to constitute *stricto sensu* a decision comparable to those adopted in the context of anti-terrorist measures.

[91]Case C-220/14 P *Ezz e.a.* v *Council*, EU:C:2015:147, para. 77.

[92]Case T-215/15 *Azarov/Council*, EU:T:2017:479, para. 148.

[93]*Ibidem*, para. 175. According to the General Court, it did not appear to be such a case. It is not clear what the Court of Justice expects the Council to do in practice, in addition to these verifications. The new measures adopted by the Council in 2019 following the *Azarov* case (Council Decision (CFSP) 2019/354 of 4 March 2019 amending Decision 2014/119/CFSP and Council Implementing Regulation (EU) 2019/352

4.4 Press and Internet-based information

It is worth recalling that, given the difficulties of finding evidence in complex geopolitical environments, the Council makes regular use of press and Internet-based information in order to substantiate its conclusions as to the implication of the listed persons in the facts taken into account in setting up the general listing criteria. The EU Courts have recognised the probative value of press information coming from reliable sources and Internet-based information (e.g. company website), often examined in an overall assessment and taken together with the absence of reaction from the applicant, thus producing, *de facto*, the reversal of the burden of proof.

For instance, *press information* was put forward by the Council and taken into account by the General Court in the framework of the restrictive measures against Syria, in one case, with reference to the role of the Governor of the Central Bank of Syria, and in particular to his influence over the management of the Central Bank,[94] and, in another case, in order to demonstrate that the applicant was an influent Syrian businessman.[95] A similar approach has been adopted in the framework of the restrictive measures adopted in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine in order to demonstrate that the weapons supplied by the Russian Federation were used by separatists.[96] Similarly, *Internet-based information* has been a decisive source of evidence in order to demon-

of 4 March 2019 implementing Regulation (EU) No. 208/2014 [2019] OJ L 64/1) will hopefully provide the EU Courts with the possibility to clarify their case-law in this respect (these new measures are currently under appeal before the General Court).

[94]In order to reverse the applicant's claim, according to which he carried out only functions of an administrative or technical nature and had no real influence over the management of the Central Bank of Syria, which is a State body, the Council produced two press articles showing that the applicant was in a position to take significant decisions relating to the monetary policy of Syria, articles which, according to the General Court, confirmed that the applicant, as Governor, exercised fundamental functions within the Central Bank of Syria, which could not be characterised as merely administrative or technical (Joined Cases T-307/12 and T-408/13, *Mayaleh/Council*, EU:T:2014:926, paras. 140–142). However, it is worth noting that, at the same time, the General Court referred to the principle according to which a person exercising functions which confer on him the power to manage an entity covered by restrictive measures may, as a general rule, himself be considered to be involved in the activities that justified the adoption of the restrictive measures covering the entity in question (*ibidem*, para. 143, with reference to Case T-58/12 *Nabipour and Others/Council*, EU:T:2013:640, para. 110).

[95]In order to demonstrate that the applicant was an influent Syrian businessman, the Council referred to a number of press articles (namely from the *New York Times*), news releases (namely from *BBC News*, *Reuters*, *Middle East Channel*) and publications (namely from *Stanford University Press*, the *Institute for Policy and Strategy*, and *International Affaires*) (Case T-410/16 *Makhlouf/Council*, EU:T:2017:349, para. 81). It is worth adding that, in respect of the situation in Syria, the General Court has consistently held that the Council discharges the burden of proof borne by it if it presents to the EU Courts a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the person subject to a measure freezing his funds and the regime being combated (Case C-630/13 P *Anbouba/Council*, EU:C:2015:247, para. 52).

[96]The Council, in order to demonstrate that the weapons supplied by the Russian Federation were used by the separatists, including for shooting down aeroplanes, produced numerous press articles reporting on the shooting down of Ukrainian army aircraft and helicopters by the separatists, indicating that, in some cases, the separatists claimed direct responsibility for those acts. Referring to previous case-law (Joined Cases T-307/12 and T-408/13 *Mayaleh/Council*, EU:T:2014:926, paras. 141–142, and T-161/13 *First Islamic Investment Bank/Council*, EU:T:2015:667, para. 59), the General Court concluded that press articles may be used in order to corroborate the existence of certain facts (in the case at issue, the fact that the

strate the existence of a public campaign supporting the Russian Government's policy to integrate Crimea into Russia.[97] In some cases, a *mix of different sources of information* were put forward in order to justify the listing. In these cases, the EU Courts examined whether the different elements of proof provided by the Council were sufficient to substantiate the factual basis of the decision both in themselves and in combination. The General Court approach has been made particularly clear in the framework of the restrictive measures taken against Iran with the aim of preventing nuclear proliferation.[98]

5 Conclusion

Judicial review of EU action is a fundamental principle in a 'community based on the rule of law'.[99]

weapons provided by Russia were used by the separatists in Eastern Ukraine, including for shooting down aeroplanes) where they come from several different sources and they are sufficiently specific, precise and consistent as regards the facts there described, adding that it would be excessive and disproportionate to require the Council itself to investigate on the ground the accuracy of facts which are re-laid by numerous media (Case T-255/15 *Almaz-Antey Air and Space Defence/Council*, EU:T:2017:25, paras. 144–148). Interestingly, the General Court, while recognising the possibility that the media coverage of the Ukrainian conflict by the western media may also be partially biased, considered that genuine objectivity is impossible, and accepted that the press articles in question corroborated the existence of Russian involvement in the Ukrainian conflict, including the supply of weapons and military equipment to the separatists in Eastern Ukraine. It has to be add, in any case, that, according to the General Court, the applicant had not called into question the purely factual information reported in those articles in that regard, nor had it even sought to establish in what way they were manifestly incorrect.

[97] The Council referred, amongst other, to a public relations campaign implemented by the publishing house of which the applicant was the chairman of the board of directors that was designed to persuade Crimean children that they were Russian citizens living in Russia and thereby supporting the Russian Government's policy to integrate Crimea into Russia. In order to substantiate the existence of the project at issue and its wide scope, the Council relied on several open-source documents, notably excerpts from the website of the Public Council under the Ministry of Education and Science of the 'government' of Crimea and from the website of the applicant's publishing house, as well as by a statement of a public relations company involved in the campaign (Case T-720/14 *Rotenberg/Council*, EU:T:2016:689, para. 127). The General Court recognised the probative value of such evidence (*ibidem*, Para. 129).

[98] The issue was whether the persons and entities concerned provided support to the Government of Iran. The applicant company was listed based on the fact that it was owned or controlled by a person providing support to the Iranian Government. Evidence of this relation was provided by the Council by way of a report from a Tajik news agency stating that, in 2011, the applicant's parent company was converted into a bank named Kont Bank Investment, an extract from the website of Kont Bank Investment, according to which that bank was owned by the Turkish company Kont Kozmetik ve Diş Ticaret Limited Şirketi, an extract from the website of Kont Kozmetik ve Diş Ticaret Limited Şirketi, according to which it was part of the Kont Group, which includes companies active in the field of tourism and financial services, and an extract from the website of the Sorinet Group stating that the person at issue is the head of that group and, moreover, identifies the applicant, its parent company, Kont Bank Investment and other members of the Kont Group as forming part of the Sorinet Group. The General Court concluded, accordingly, that the evidence presented by the Council indicated, at a minimum, a relationship of control between the person at issue and the applicant, through Kont Kozmetik ve Diş Ticaret Limited Şirketi and through Kont Bank Investment. Also, a sufficient probative value was recognised to the evidence, due to the fact that it was coming from the websites of a news agency and from the companies concerned themselves (Case T-161/13 *First Islamic Investment Bank/Council*, EU:T:2015:667, paras. 50–59).

[99] Case 294/83 *Les Verts/Parliament*, EU:C:1986:166 para. 23.

While, in pursuing policy goals in the framework of the CFSP, the EU institutions enjoy a broad margin of political discretion,[100] the application of the above principle requires effective judicial review of the lawfulness of restrictive measures, in particular with regard to the protection of fundamental rights.[101]

By setting up effective and appropriate evidence standards, in particular as to fact checking, the EU Courts are keen in pursuing a fair balance between these two basic requirements. It can be expected that a thorough proportionality review of the legality of the general listing criteria in the light of the EU foreign policy objectives enshrined in Art. 21 TEU, on the one hand, and a complete review of the factual basis of individual listing grounds, on the other, allow them guaranteeing effective review of the lawfulness of restrictive measures with regard to the protection of fundamental rights, while avoiding undue interference with the establishment and the implementation of the CFSP.

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[100] Case C-348/12 P *Council* v *Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776, para. 120.

[101] *Kadi II*, para. 97.