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Misappropriation Sanctions

Discovering the Threshold for Freezing Assets of Ousted Kleptocrats with EU Restrictive Measures

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<table>
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<th>Description</th>
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<tbody>
<tr>
<td>Basic Principles</td>
<td>Basic Principles on the Use of Restrictive Measures (Sanctions)</td>
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<td>Best Practices</td>
<td>Best Practices for the effective implementation of restrictive measures</td>
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<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>Commission</td>
<td>European Commission</td>
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<td>Council</td>
<td>Council of the European Union</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EU</td>
<td>European Union</td>
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<td>FRCWG</td>
<td>Foreign Relations Counsellors Working Group</td>
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<td>GC</td>
<td>General Court</td>
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<td>Guidelines</td>
<td>Guidelines on implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy</td>
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<td>MS(s)</td>
<td>EU Member State(s)</td>
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<td>Parliament</td>
<td>European Parliament</td>
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<td>TEU</td>
<td>Treaty of the European Union</td>
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<td>TFEU</td>
<td>Treaty of the Functioning of the European Union</td>
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1 Introduction

1.1 Background

The misappropriation sanctions refer to the European Union (EU) sanctions that the Council of the European Union (Council) has adopted against foreign kleptocrats – persons who use their power to steal their country's resources – to address the suspected theft of public funds. After the regimes had been successfully overthrown in the Arab Spring in Tunisia and Egypt in 2011 as well as the Maidan Revolution in Ukraine in 2014, the Council imposed the misappropriation sanctions as, in all three cases, the ousted leaders and their close associates were suspected of stealing vast amounts of public funds from their respective countries and hiding the misappropriated funds overseas. The misappropriation sanctions take the form of asset freezes against individuals considered being responsible for “misappropriation of state funds”, which make the funds and economic resources of the persons inaccessible.¹

As sanctions never had been used in response to misappropriation prior to the Arab Spring, the adoption of the misappropriation sanctions constituted a new category of EU restrictive measures – equivalent to the sanctions instrument – in the area of the Common Foreign and Security Policy (CFSP). A decisive factor behind EU’s decision to impose these sanctions was that the recovery of misappropriated funds was seen essential for the continuation of the democratisation process that started with the ousting of the governments.² The adoption of restrictive measures was thus a way for the EU to signal support for the new post-revolutionary governments in Tunis, Cairo and Kiev.³

The legal instruments of the misappropriation sanctions against targets in Tunisia, Egypt and Ukraine have equivalent scopes. The criteria target individuals who are responsible or identified as responsible for misappropriation of state funds. Based on the listing grounds used, the Council has primarily listed individuals subject to judicial proceeding or investigation in Tunisia, Egypt or Ukraine for misappropriation of state funds. The listing of individuals in the misappropriation sanctions is thus depended on national

¹ Cizmaziova, What are the EU misappropriation sanctions and what are we doing about them?, July 22 2019.
³ Cizmaziova, What are the EU misappropriation sanctions and what are we doing about them?, July 22 2019.
authorities in Tunisia, Egypt and Ukraine as the listing grounds in the misappropriation sanctions solely emanate from these authorities. Other third country sanctions by the EU are generally adopted in a procedure where the listings of individuals are proposed by the EU Member States (MSs) and the Council engages in listing and de-listing of entries disconnected from external processes, why the design of the legal instruments in the misappropriation sanctions is substantially different in comparison.4

While the use of the misappropriation sanctions is limited to Tunisia, Egypt and Ukraine, the sanctions in question have been extensively reviewed by the Court of Justice of the European Union (CJEU) as numerous of the targeted individuals have applied for annulment of the sanctions in the parts that concern them.5 The case law is not only interesting with regard to the misappropriation sanctions, but for the entire area of restrictive measures as it works as a test of the boundaries of the Council’s executive power regarding restrictive measures in the area of the CFSP. The nexus between a novel and different concept in the area of EU sanctions, limited, yet enough, adoptions of the sanctions in question and extensive case law from the CJEU make the misappropriation sanctions an interesting subject to examine.

1.2 Purpose and Research Question
The purpose of this thesis is to examine, on the basis of the case law of the CJEU, the threshold for legitimate listing of a targeted individuals in the misappropriation sanctions. The purpose is pursued by a two-folded assessment. Firstly, the Council’s adoption of restrictive measures in the area of the CFSP is described as it is necessary to comprehend the Council’s adoption of sanctions in general in order to understand the design of the legal instruments of the misappropriation sanction. Secondly, the scope of the legal instruments of the misappropriation sanctions is defined and the specific requirements for listing individuals in the misappropriation sanctions in regard of the criteria, the listing grounds and the obligation for the Council to respect fundamental rights are identified in the case law of the CJEU. The lack of explicit requirements in primary law regarding the adoption of restrictive measures entails for a presentation the general requirements regarding criteria, listing grounds and the obligation for the Council to respect

fundamental rights in restrictive measures. The general requirements are primarily found in the case law of the CJEU regarding listing of individuals in restrictive measures as well as soft law adopted by the Council. The assessment is hoped to generate a foreseeable compilation of the specific requirements of the misappropriation sanctions that can be used to draw conclusions regarding the legal aspects of both the sustentation of existing misappropriation sanctions as well as the future use of this new concept in restrictive measures.

1.3 Delimitation
The delimitation of the thesis come natural from the narrow character of the subject as the thesis solely examine the listing of targeted individuals in misappropriation sanctions against targets in Tunisia, Egypt and Ukraine. The misappropriation sanctions are imposed by the EU autonomously, why UN sanctions implemented by the EU are not examined. Even as the misappropriation sanctions are a form of third country sanctions, other third country sanctions are not examined in particular as that is not necessary to understand the misappropriation sanctions nor restrictive measures in general. Other measures than asset freezes are not assessed as the category of sanctions examined in the thesis only consists of one type of measures. Restrictive measures against legal persons are not discussed as the misappropriation sanctions only target individuals. Fundamental rights for individuals listed in the misappropriation sanctions are dealt with from the perspective the Charter of Fundamental Rights of the European Union (Charter), implicating that the European Convention on Human Rights is not examined as to its limited role in the case law from the CJEU regarding the misappropriation sanctions.

1.4 Method and Material
The thesis applies an EU legal method consisting of a combination of the teleological method and the systematic method when interpreting EU legal sources. The teleological method must be held to be the most distinguished of all methods in the EU legal method. It can be considered to fulfil three purposes when being used; benefit the purpose of a certain provision, tries to avoid unacceptable consequences and attempt to fill out gaps that otherwise would exist in the EU legal order. The teleological method is often applied in order to avoid a result too incongruous with other EU law. A rationale behind the use

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6 Hettne and Otken-Eriksson, EU-rättslig metod – Teori och genomslag i svensk rättstillämpning, p 159.
of the teleological method in the thesis is the particular position of restrictive measures and the area of the CFSP in the EU legal order. The systematic method considers the entire EU legal order when interpreting the legal sources. As the provisions in primary law regarding restrictive measures are rather vague and imprecise, the systematic method serves particularly well. The systematic method is closely connected with the teleological method. Applying a combination of the two methods is necessary in order to balance the lack of both primary and secondary law regarding restrictive measures as there is only a few explicit provisions laid down in the Treaty of the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU). It is probable that the CJEU has used a combination of the methods when reviewing restrictive measures in general as the case law has had an exceptional impact on what constitutes a permissible listing.

CJEU case law is the central legal source for the thesis as the listings of individuals in the misappropriation sanctions have been extensively reviewed by the CJEU and a vast majority of the cases by the General Court (GC). The European Court of Justice (ECJ) is superior in relation to the GC. However, it is necessary to note the legal value deriving from the case law from the GC – especially if there is no case law from the ECJ – as the consequence is that the GC case law has a higher legal value than other legal sources. The CJEU case law becomes particularly important as the legal instruments of restrictive measures generally are rather vague. Primary law comprises a limited amount of provisions guiding the Council when adopting restrictive measures. Secondary law consists of CFSP decisions and regulations adopting and implementing the Council’s decisions to impose restrictive measures. The lack of primary and secondary law is to a limited extent balanced by the Council’s adoption of soft law regarding restrictive measures, specifically Basic Principles on the Use of Restrictive Measures (Basic Principles), Guidelines on implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy (Guidelines) and Best Practices for the effective implementation of restrictive measures (Best Practices). Even as soft law has acquired status as a legal sources in EU law over time, it raises question about the legal value of the adopted acts. The ECJ has not made a single reference to

8 Ibid, p 56.
9 Ibid, p 47.
Basic Principles, Guidelines or Best Practices in the case law regarding the misappropriation sanctions, why it must be held that the documents simply constitute internal guidance rather than provisions that the Council is obliged to follow. The soft law in the thesis provides insight on the design of the legal instruments of restrictive measures. Legal doctrine regarding misappropriation sanctions to my knowledge is non-existent, why a publication written by a scholar in political science, Dr Portela, is used in order to examine the characterisation of the legal instruments in the misappropriation sanctions.\textsuperscript{10} Dr Portela’s expertise in the area of sanctions in general and work regarding the misappropriation sanctions is important in order to understand the subject and can rather add another dimension to the legal reasoning as restrictive measures is an instrument for implementing decisions in the very politicised area of CFSP.\textsuperscript{11}

1.5 Outline
The thesis is structured in six chapters. The first chapter introduces the subject as such, decides the scope of the thesis and explains the material and method used. The second chapter is devoted to a description of selected features of the CFSP as restrictive measures cannot be fully comprehended without understanding the legal environment of the CFSP. The third chapter describes the restrictive measures as the EU’s instrument for imposing sanctions by assessing the underlying objectives, the legal basis for the Council’s right to adopt restrictive measures and the fora and framework applicable when adopting restrictive measures. The fourth chapter is examining the legal instruments of the misappropriation sanctions in order to define the scope of the criteria and the listing grounds. The fifth chapter constitutes the main part of thesis as the specific requirements associated with the misappropriation sanctions in regard of the criteria, the listing grounds and the obligation for the Council to respect fundamental rights are identified by assessing the case law of the CJEU regarding the misappropriation sanctions. The sixth chapter concludes the earlier findings of the thesis and put them in a broader perspective.

\textsuperscript{10} Portela, Sanctioning kleptocrats. An assessment of EU misappropriation sanctions.
\textsuperscript{11} Hettne and Otken-Eriksson, EU-rättslig metod – Teori och genomslag i svensk rättstillämpning, p 121.
2 EU’s Common Foreign and Security Policy

2.1 Introduction
Restrictive measures as a concept is an integrated part of the CFSP and subordinate to the CFSP legal framework as well as the EU legal order. The area of the CFSP has developed substantially over time and especially after the entry into force of the Lisbon Treaty with great implications for restrictive measures. Consequently, it is important to understand the legal structure of the CFSP in order to understand the legal environment surrounding the adoption of restrictive measures. The following chapter will therefore introduce the area of the CFSP by assessing the principles and objectives, the competence and scope for the EU to act in foreign policy matters as well as the very limited judicial review by the CJEU due to a narrow jurisdiction.

2.2 Principles and Objectives
The provisions in primary law concerning the area of the CFSP are laid down in Title V of the TEU. Title V is two-folded and consists of the general provisions of the EU’s external actions, laid down in Chapter 1, as well as the specific provisions for the CFSP, laid down in Chapter 2. Article 23 TEU, a part of Chapter 2 concerning specific provisions of the CFSP, states that;

“The Union's action on the international scene, pursuant to this Chapter, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1.”.

The principles guiding the actions of the EU on the international scene can be found in Article 21(1) TEU and reads;

“The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: 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.”.

The objectives can be found in Article 21(2) TEU and includes, inter alia, that;

“The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to safeguard its values, fundamental interests, security, independence and integrity;
consolidate and support democracy, the rule of law, human rights and the principles of international law; preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty [...]”.

The order with common principles and objectives for all of EU’s external actions, rather than exclusive CFSP objectives, stand out in relation to the rest of the CFSP. The common principles and objectives, in contrast to the area of the CFSP in general, reflect the Lisbon Treaty’s purpose to streamline. A consequence of this order is that no sharp line is drawn between the matters belonging to the CFSP and matters belonging to other external actions of the EU. Österdahl suggests that the difference between the two is merely constitutional in the sense that the boundary between the two areas is decided by who makes the decisions (the EU or the MSs), what type of decisions that are made (limited decisions in individual cases or general binding rules in the form of legislation) and how these decisions are made (unanimity or majority voting). Österdahl means that the CFSP is organised in an intergovernmental pattern that is regulated in the TEU, while the EU’s other external actions are part of a more or less supranational model that is regulated in the TFEU. In order to entirely understand the constitutional division between the CFSP and EU’s other external action, it is necessary to examine EU’s competence in the CFSP.

2.3 Competence and Scope
Before the Lisbon Treaty, the European Commission (Commission) and the European Parliament (Parliament) had side line positions and the CJEU appeared to have no role at all in the area of CFSP. Two of the major changes entailed to the Lisbon Treaty are the deconstruction of the pillar structure and the abolishment of the European Community. This resulted in larger unification as there is now a single legal personality of the EU when undertaking external actions and EU law has developed to both a distinct and unified legal discipline in regard of the EU’s actions on the international scene. But in regard of the CFSP, the Lisbon Treaty largely conserved the intergovernmental traits as the decision-making still is assigned to the Council, deciding in unanimity, with a very

12 Österdahl, Den nya rättsliga ramen för EU:s utrikes- och säkerhetspolitik efter Lissabonfördraget, pp 60.
limited role for the Commission, the Parliament and the CJEU to play. The distinction between the general order concerning other “common” policies and the CFSP is to some extent confirmed in Article 24(1) TEU as it states that the CFSP is “subject to specific rules and procedures”. Van Elsuwege holds that this is the result of the MSs showing willingness to cooperate, but still remaining reluctant to transferring competences.

EU’s competence in the area of the CFSP is laid down in Article 2(4) TFEU that states; “The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy […]”. As the formulation in the TFEU is rather broad and vague, Article 24(1) TEU is complementing with substance by stating that; “The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security […]”. This might indicate that the CFSP has moved beyond the intergovernmentalism mentioned earlier by Österdahl, as the competence as such is given to the EU from the MSs. Wessel holds that the nature of competence in the CFSP is unclear as the CFSP is not mentioned under any of the categories in Article 3-6 TEU. However, Wessel thinks that the competence in the CFSP appears to come closest to shared competences as both the EU and the MSs have roles to play in practice.

Article 24(1) TEU gives the European Council and the Council the right to define and implement the foreign policy acting unanimously in their decision-making, meaning that each MS formally has a veto. While the European Council consists of Heads of State or Government in the MSs according to Article 15(2) TEU, the Council consists of representatives of each MS on ministerial level according to Article 16(2) TEU. Article 24(1) also gives the High Representative of the Union for Foreign Affairs and Security Policies and the MSs the competence to put the CFSP into effect. Van Elsuwege holds that the intergovernmental pattern of the CFSP is strengthened by the fact that the orientation and implementation of the CFSP is almost exclusively determined by a close cooperation between the European Council, the Council and the High Representative of

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13 Eeckhout, EU External Relations Law, p 166.
15 Wessel, Common Foreign, Security and Defense Policy, p 394.
the Union for Foreign Affairs and Security Policies.\footnote{Van Elsuwege, EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency, pp 993-994.} Apart from putting the CFSP into effect, the role of the High Representative of the Union for Foreign Affairs and Security Policies also includes, inter alia, to ensure the consistency of the EU’s external action. When fulfilling that mandate, the High Representative is assisted by the European External Action Service according to Article 27 TEU. The High Representative and the European External Action Service can be considered to be a supranational counterweight to the intergovernmentalism that is characterising the implementation of the CFSP.

The intergovernmental pattern is also present in the CFSP decision-making. As the adoption of legislative acts is excluded in the CFSP according to Article 24(1) TEU, CFSP decisions are not adopted on the basis of the legislative procedure, characterised by an initiative by the Commission, co-decision by the Parliament and qualified majority voting. The CFSP is instead conducted by defining general guidelines and adopting decisions defining actions and positions to be undertaken by the EU as well as arrangements for the implementations of the decisions, according to Article 25(1) TEU.

The division of competence between the European Council and the Council in CFSP matters is clarified in Article 26 TEU. The European Council has the competence to decide strategic interest, determine objectives and define general guidelines, but can adopt decisions if necessary, according to Article 26(1) TEU. The Council has the competence to frame the policy and take the necessary decisions for defining and implementing the policy according to Article 26(2) TEU. The Council has a specific obligation to define EU’s approach to a particular matter of geographical or thematic nature according to Article 29 TEU.

The scope of the CFSP is somewhat limited as Article 40 TEU states that the implementation of the CFSP “[…] shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties […]”. Together with Article 1(2) TFEU, this creates a situation where the TEU and the TFEU have the same legal value. Van Elsuwege holds that these two provisions, and the mutual non-affection clause that they form together, attribute an equal weight in various types of EU external actions. This stands in contrast to the hierarchal former pillar system that was emphasised
by former Article 47 TEU aiming protect to the *acquis communautaire* against any infringement by the EU Treaties. Before the Lisbon Treaty, the CFSP seems to have been reduced to rather narrowly defined external action, while the scope now has been broadened.\(^{17}\)

### 2.4 Judicial Review

The CJEU has in general no jurisdiction in the area of CFSP according to Article 24(1) TEU and Article 275 TFEU. CFSP initiatives have been seen as ill-suited for judicial review considering that they are short-term, wide-ranging and sensitive responses to political crisis.\(^{18}\) The absence of judicial review in the CFSP is similar to the position of foreign policy matters within many constitutional systems in a number of states. Questions relating to foreign policy are often considered non-justiciable in many jurisdictions given the complexity and sensitivity why substantial judicial review regarding foreign policy matters is uncommon in general.\(^{19}\) Wessel holds that the lack of judicial control becomes visible in relation to the Commission and the Parliament as they cannot commence a procedure before the CJEU in situations where the Council has ignored their competence and rights, which are very few, in the CFSP decision-making procedure.\(^{20}\) However, two exemptions have been made from the general rule.

The first exemption, laid down in Article 40 TEU, concerns procedural questions as it is stated that the CFSP “[…] shall not affect the application of the procedures and the extent of the powers of the institutions […].” The central question is to decide the legal ground for a measure as it has consequences for the procedure if the TEU or the TFEU are applicable.\(^{21}\) Van Elsuwege holds that the task of the CJEU under the jurisdiction in Article 40 TEU is to “police the borderline with other Union policies”.\(^{22}\) When the legal basis in a CFSP decision is not disputed, the CJEU has no jurisdiction according to Article 40 TEU.

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\(^{17}\) Van Elsuwege, EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency, pp 1002-1003.

\(^{18}\) Koutrakos, Judicial Review in the EU’s Common Foreign and Security Policy, pp 1-2.

\(^{19}\) De Baere, European Integration and the Rule of Law in Foreign Policy, p 370.

\(^{20}\) Wessel, The legal dimension of European foreign policy, p 313.

\(^{21}\) Österdahl, Den nya rättsliga ramen för EU:s utrikes- och säkerhetspolitik efter Lissabonfördraget, p 68.

\(^{22}\) Van Elsuwege, EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency, p 994.
The second exemption concerns restrictive measures as Article 275(2) TFEU gives the CJEU jurisdiction to rule on proceedings in accordance with Article 263(4) TFEU when reviewing legality of regulations providing restrictive measures against natural or legal persons on the basis of Article 215(2) TFEU. The construction where Article 275(2) TFEU refers to Article 263(4) TFEU could be interpreted as a limitation of direct actions to only cover annulments. Nevertheless, the ECJ held in the Rosneft case that the CJEU also had jurisdiction regarding the legality of restrictive measures in preliminary ruling procedure. In this context, the ECJ particularly confirmed a fundamental right and a rule of law reading of judicial review that extend across the whole area of CFSP.23

Eckes is of the opinion that it is important to notice that the jurisdiction, when reviewing the legality of restrictive measures, is concerning the TFEU regulation and not the CFSP decision. However, Eckes acknowledges that this is an act of balancing as the regulation is in relevant parts prescribed by an underlying decision. Eckes has concluded that rulings on the legality of the TFEU regulation will carry persuasive weight regarding the legality of the CFSP decision even if the decision is not directly addressed.24 There are no possibilities for the CJEU to provide judicial protection within the CFSP such as references for preliminary rulings, actions for damages or infringement proceedings. Rather, the CJEU has jurisdiction when an individual is challenging an act that is of direct and individual concern to him or her. De Baere stress that the exemption concerning restrictive measures, that was added when the Lisbon Treaty entered into force, was an especially necessary extension of the CJEU’s jurisdiction regarding the CFSP from the perspective of fundamental rights and rule of law.25 Eckes fills in and explains that the substantive reason for more extensive judicial review regarding restrictive measures is the direct rights-relevance that comes into question when restrictive measures are imposed on individuals.26

The CJEU’s jurisdiction in the area of CFSP becomes evident when an individual listed in a restrictive measure applies to contest the legality of the listing as it is not the decision as a whole that is reviewed, but the parts of the decision in so far that the applicant is

23 C-72/15 Rosneft, paras 69-81.
24 Eckes, The law and practice of EU sanctions, p 212.
25 De Baere, European Integration and the Rule of Law in Foreign Policy, p 369.
26 Eckes, The law and practice of EU sanctions, pp 210-211.
concerned. This order acknowledges the direct-rights relevance when listing an individual in a restrictive measure as well as the broad acceptance for limited judicial review of foreign policy matters.

2.5 Summary

Only by scratching the very surface of the CFSP, it is clear that the institutional set-up differs from what is commonly called the “Community method”. While the latter is characterized by checks and balances of the polices, the former is dominated by the institutions given the executive power. The Council’s right to define and implement the CFSP in all areas of foreign policy with limited or even without judicial review, due to the precise jurisdiction of the CJEU, must be held to be equal to an extraordinary executive power that is uncommon in the EU legal order.

However, Van Elsuwege means that it is no longer correct to describe the CFSP as an intergovernmental form of cooperation between the MSs in the area of foreign affairs that is contrasting the supranational nature of other areas of EU law. The reasons are that case law from the CJEU and the evolution of the TEU and the TFEU together indicate that the normative order of the CFSP includes rules that diverse from international law and restrain the external competence of the MSs.27 In addition to that, Eeckhout has even identified that “there is a tendency to apply broadly the same constitutional rules, principles and disciplines to the CFSP as are applied to the EU’s internal policies”.28 Eckes holds that EU sanctions and restrictive measures have contributed in a significant way to the constitutionalisation because of the amount of litigation regarding CFSP as the CJEU has had the opportunity to apply general constitutional rules on the TFEU regulations that to a great extent copy the CFSP decisions.29

The area of the CFSP and restrictive measures seem to have evolved in parallel. While the institutional design still differs considerably from the EU legal order, the CJEU has gained leverage regarding restrictive measures against natural and legal persons to an extent that has affected the CFSP in general. The development in a slightly more

28 Eeckhout, The Constitutionalization of European Foreign Policy, p 171.
29 Eckes, The law and practice of EU sanctions, p 214.
supranational direction, while the design still is characterised by intergovernmentalism, concludes that the area of the CFSP has become a tug-of-war. Yet, the mere circumstance that the Council possess an executive power to define and implement the CFSP in all areas of foreign policy must still be considered when examining restrictive measures.
3 Restrictive Measures

3.1 Introduction
The Council’s adoption of the misappropriation sanctions against Tunisia, Egypt and Ukraine created a new category of restrictive measures. In order to fully understand the misappropriation sanctions, it is needed to assess why, when and how restrictive measures against individuals are adopted by the Council in general. The following chapter will describe essential features of restrictive measures consisting of a legal basis in the TFEU that is connected with the CFSP objectives in the TEU. The legal basis for restrictive measures must be concluded to be rather vague as the few provisions laid down in the TFEU and the TEU merely give the Council the competence to adopt measures with only a limited number of explicit restrictions concerning the design of the legal instruments. Subsequently, it is necessary to look beyond primary and secondary law in order to comprehend the basic aspects of restrictive measures. The Council has adopted a number of documents and thus established soft law that is critical to understand the general reasoning behind the measure imposed. Another important factor is the fora where restrictive measures in place are implemented and evaluated.

3.2 Definition
There is no legal definition of “sanctions” in international law as there is no authoritative legal source that provides a universally accepted definition of the term. There is neither a definition within EU law as the EU refers to the sanction instrument as “restrictive measures” as there otherwise would be a risk for legal imprecision. Because of lack of a legal and universal definition, the meaning must be concluded from the practice of states and that has created a wide array of legal figures within the instrument. Portela thinks that “measures taken by a state acting alone or jointly with others in reply to the behaviour of another state, which, it maintains, is contrary to international law” is the definition that conforms best to the practice in international relations. From a legal point of view, a sanction seems to fall into the category of “reprisal” or “retorsion”, but it is rather intended to be “coercive” than repressive or punitive. A part that decides to impose sanctions does not primarily intend to punish a second part, which could be a state, an
organization or an individual, for a wrongful act in the past, but to coerce the second part into ending the continuing situation that is connected with the initial action.\textsuperscript{30}

Restrictive measures as a concept is both a foreign policy tool and a legal instrument available in the sphere of the CFSP. It has become significant – even being described as a cornerstone – for the Council in the area of the CFSP during the last 15 years as the MSs have had both a willingness and an ability to impose restrictive measures as a foreign policy response.\textsuperscript{31} The widespread use of the instrument is merely an expression of the fact that the EU possess unmatched economic power as it is the largest economy and the greatest trading power in the world.\textsuperscript{32}

The Council has concluded that restrictive measures are preventive and non-punitive instruments that allows the EU to respond instantly to political challenges and developments, while at the same time being a part of an integrated and comprehensive policy dialogue, complimentary efforts and other instruments. Thus, the EU wants to put restrictive measures into a broader context than solitary measures.\textsuperscript{33} The question arise regarding the function and aim of restrictive measures in the broader context referred to by the Council. Eriksson holds that the EU decides to impose restrictive measures on the basis of several implicit strategies as discouragement, coercion, limitation or prevention, all applicable to several situations. Examples of situations that constitute political challenges and developments that require for the Council to adopt restrictive measures are human rights violations, lack of democracy, repressions against civilians, torture, genocide, terrorism and illegal annexation of territory. Eriksson means that the overall purpose of imposing restrictive measures in these situations is to safeguard the security of the EU as well as serving the national interests of the MSs.\textsuperscript{34}

Nevertheless, restrictive measures are also part of a CFSP policy with extraordinary operational means as the measures in essence target people with a binding effect for EU

\textsuperscript{30} Portela, European Union sanctions and foreign policy: when and why do they work?, p 21.
\textsuperscript{31} Eckes, EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions, p 869; Eriksson, Sanktionerna och den säkerhetspolitiska miljön i ett Europaperspektiv, p 85; Cardwell, The Legalisation of European Union Foreign Policy and the Use of Sanctions, p 2.
\textsuperscript{32} Eckes, EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions, p 872.
\textsuperscript{33} Annex I to Guidelines on implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy.
\textsuperscript{34} Eriksson, Sanktionerna och den säkerhetspolitiska miljön i ett Europaperspektiv, p 89.
citizens and businesses. The measures are thus the only CFSP policy that by definition affect individuals’ rights and occasionally implicate severe legal consequences for the targeted individuals.\textsuperscript{35} The targeting of individuals in restrictive measures is the result of a change in sanctions policy by the UN and the EU after the end of the Cold War, going from broad and comprehensive to targeted sanctions. Sanctions were traditionally state- and society-oriented but have developed into targeting, by political and economic means, individuals and groups connected to armed conflicts, terrorism, threats to international peace and security and international crimes, political violence and human rights abuse. The rationale behind targeted measures is to avoid harming actors that are not responsible for the policy that the sanctions intend to change. Rather than imposing comprehensive sanctions with collective punishment and suffering as a result, targeted entities are held accountable for the policy.\textsuperscript{36}

Cortright and Lopez have defined targeted measures as “[...] a smart sanctions policy is one that imposes coercive pressures on specific individuals and entities and restricts selective products or activities, while minimizing unintended economic and social consequences for vulnerable populations and innocent bystanders.”\textsuperscript{37} The introduction of targeted sanctions on carefully selected individuals and legal entities, instead of countries and societies, reflects the will of the part adopting sanctions to change, steer or even control the behaviour in the political sphere of the target. This is mainly done by hitting the political heart of decision-making power and thereby reducing the capability, both political and economic, of the ones targeted.\textsuperscript{38}

3.3 Legal Basis

Article 215(2) TFEU gives the Council the right to adopt restrictive measures against natural or legal persons. The Council shall act by a qualified majority on the joint proposal of the High Representative of the Union for Foreign Affairs and Security Policy and the Commission. The European Parliament has a very limited role and the Council is only ought to inform them thereof. The procedures surrounding restrictive measures follow from the procedures in Article 215(1) stating that the Council shall adopt necessary

\begin{itemize}
\item \textsuperscript{35} Eckes, The law and practice of EU sanctions, pp 209-210.
\item \textsuperscript{36} Eriksson, Targeting Peace – Understanding UN and EU Targeted Sanctions, p 2.
\item \textsuperscript{37} Cortright and Lopez, Smart sanctions: targeting economic statecraft, p 2.
\item \textsuperscript{38} Eriksson, Targeting Peace – Understanding UN and EU Targeted Sanctions, p 3.
\end{itemize}
measures after a CFSP decision to interrupt or reduce economic relations with one or more third countries. Necessary legal safeguards must be included in the provisions of the decisions and regulations adopted according to Article 215(3) TFEU.

Restrictive measures as a legal instrument does not fit very easily among other CFSP policies. The reason is merely that the restrictive measures as a legal instrument consist of a combination of a CFSP decision on the basis of the TEU and a regulation on the basis of the TFEU. The adoption of restrictive measures is done in a two-tier procedure; first a CFSP instrument in the form of a political decision to adopt restrictive measures in line with Article 24(1) TEU and second a regulation containing the actual operational measures as laid down in Article 215 TFEU. Thus, the legal basis for restrictive measures as well as this two-tier procedure linking the TEU and the TFEU together is Article 215 TFEU. It is not a joint legal basis, but a regulation adopted on the basis of the provision in TFEU cannot be applied unless there is prior adoption of a CFSP decision and instrument. Eckes thinks that the combination of the legal basis gives the CFSP the powerful legal instrument of a directly applicable TFEU regulation. This particularly as it is an exemption from the core purpose behind the separation of CFSP policies and TEU provided by Article 40 TEU.

Koutrakos notes that very fact that a CFSP measure is required as an integral part of the process when imposing restrictive measures demonstrates a “maturity” of the rules and practises of the EU’s foreign policy. The link works as a form of guarantee that the MSs are operating according to legal logics when adopting restrictive measures. Cardwell holds that in particular for autonomous restrictive measures, the MSs are imposing measures in a foreign policy context that is going to yield enforceable legal results as a part of the CFSP legal framework. Cardwell draws the conclusion that the structure of the discussions whether to adopt restrictive measures and how the measures are going to be imposed is a legal one.

39 Eckes, EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions, p 880.
40 Eckes, The law and practice of EU sanctions, p 208.
41 Koutrakos, EU international relations law, p 497.
42 Cardwell, The Legalisation of European Union Foreign Policy and the Use of Sanctions, p 17.
The adoption of restrictive measures according to Article 215 TFEU is linked to the objectives for EU’s external actions in Article 21(2) TEU as the measures may be adopted by the Council when this is stipulated by a CFSP decision that is required to be adopted in accordance with Chapter 2 of Title V of TEU. Therefore, restrictive measures against individuals should be adopted in order to, inter alia consolidate and support democracy, the rule of law, human rights and the principles of international law as well as preserve peace, prevent conflicts and strengthen international security. It is on the basis of these broad objectives that the Council decides to put sanctions in place after a series of other actions in order to halt a negative development in a region or a country.

3.4 Fora and Framework

3.4.1 Foreign Relations Counsellors Working Group and RELEX

The Council has entrusted the Foreign Relations Counsellors Working Group (FRCWG) with the task of implementing and evaluating sanctions.\(^{43}\) The FRCWG carries out a vast majority of the daily work connected with EU sanctions and consists of representatives from the MSs that are negotiating the texts in the legal instruments of the sanction regimes in the presence of representatives from the Commission and the Council.\(^{44}\)

In order to provide additional support to the Council when adopting sanctions, the Permanent Representatives Committee has established RELEX, a Sanctions Formation, that consists of the same members as FRCWG, but are reinforced by national experts and relevant ministries from the MSs.\(^{45}\) The mandate of the RELEX formation is to further monitor and evaluate the EU’s restrictive measures. This includes, inter alia, exchanging information as well as experiences concerning implementation of restrictive measures and contributing to best practices regarding implementation.\(^{46}\) This has resulted in the Council adopting Best Practices that provide guidelines on a number of matters related to targeting.\(^{47}\)

\(^{43}\) Cardwell, The Legalisation of European Union Foreign Policy and the Use of Sanctions, p 17.
\(^{45}\) Ibid, p 174.
\(^{46}\) Guidelines on implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy, para 94.
3.4.2 Basic Principles of the Use of Restrictive Measures

The Council has adopted Basic Principles that describes fundamental principles for the use of restrictive measures. The document should be considered central in the area of restrictive measures as it provides an understanding for when the instrument should be used. The use of sanctions is in general considered to be important to maintain and restore international peace and security in accordance with the principles of the UN Charter and the objectives in the CFSP.48 Sanctions are thus closely associated with traditional foreign policy objectives. The connection becomes visible as it is laid down in the Basic Principles that the objectives behind the Council’s decisions to impose restrictive measures are, inter alia, when there is a need to uphold respect for human rights, democracy, the rule of law and good governance and do so in conformity with international law.49 However, restrictive measures are not imposed as an isolated measure, but it is part of an integrated and comprehensive policy approach ranging from political dialogue to coercive measures.50

Restrictive measures imposed by the Council should be targeted in a way that impact those whose behaviour they want to change.51 The measures should be deployed in a flexible manner and in accordance with needs on a case-by-case basis where the objective is clearly defined in the enabling legal instrument and subject to regular review to achieve maximum impact.52

The Basic Principles are aligned with the general characteristic of the modern use of sanctions as the document prescribes the use of coercive, but not punitive, measures as a mean to achieve a change in behaviour relating to a foreign policy objective.

3.4.3 Guidelines on Implementation and Evaluation of Restrictive Measures

The Council has also adopted Guidelines that aims to standardise the implementation and strengthen the method regarding the adoption of restrictive measures. This includes designing, implementing, enforcing and monitoring. The Guidelines addresses a number of general issues, merely how and when restrictive measures should be used, and present

48 Basic Principles of the Use of Restrictive Measures, para 1.
49 Ibid, para 3.
50 Ibid, para 5.
51 Ibid, para 6.
52 Ibid, paras 8-9.
standard wording and common definitions that may be used in the legal instruments implementing restrictive measures.\textsuperscript{53}

The measures taken will vary depending on the objectives of the restrictive measures in the specific situation and their expected effectiveness in achieving these objectives under particular circumstances. In the Guidelines, the Council has stated that the measures include, inter alia, freezing funds or economic resources, restrictive on admission, arms embargoes, embargoes on equipment that can be used for internal repression, other export restrictions, import restrictions and flight bans.\textsuperscript{54}

Listing of targets and entities in restrictive measures is particularly dealt with in the Guidelines. The listing of individuals in restrictive measures should target persons and entities identified as responsible for the policies and actions that have encouraged the EU decisions to impose restrictive measures and those benefitting and supporting such policies and actions. On a more detailed level, the Guidelines contains different requirements that listings of individuals in restrictive measures to some extent should be compliant with.\textsuperscript{55} The requirements play a pivotal role in the design of the legal instruments as it is what the Council has considered as the threshold for adopting and implementing listings of individuals.

3.4.4 Best Practices for the Effective Implementation of Restrictive Measures
Another document adopted by the Council is the Best Practices. These best practices are supposed to be seen as non-exhaustive recommendations of general nature for effective implementation of restrictive measures in accordance with applicable EU law and national legislation. However, the best practices are not legally binding and should not be seen as recommending any measures that would be incompatible with EU law or national legislation.\textsuperscript{56}

The Best Practices contains a section regarding financial restrictive measures that is particularly interesting in the light of the misappropriation sanctions freezing assets of

\textsuperscript{53} Guidelines on implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy, para 1.
\textsuperscript{54} Ibid, paras 13-14.
\textsuperscript{55} Ibid, paras 15-19.
\textsuperscript{56} EU Best Practices for the effective implementation of restrictive measures, para 3.
targeted individuals. The scope of financial restrictive measures against individuals is very broad as all funds and economic resources belonging to or owned by the targeted person are covered when financial restrictive measures are imposed.\textsuperscript{57} However, as the measures adhere to the non-punitive character of restrictive measures in general, the broad scope does not imply that financial restrictive measures involve change of ownership of the frozen funds and economic resources.\textsuperscript{58} Freezing of funds is therefore rather an administrative act that primarily should be considered as the basis for comprehensively preventing all uses and transactions made from the frozen funds. It is important to distinguish from judicial freezing, seizure and confiscation as they do not fall within the scope of restrictive measures.\textsuperscript{59}

### 3.5 Summary

Restrictive measures as a foreign policy tool is traditionally associated with conventional foreign policy objectives as, inter alia, when there is a need to uphold respect for human rights, democracy, the rule of law and good governance and do so in conformity with international law. This becomes evident as the legal basis for the Council’s right to adopt restrictive measures against individuals laid down Article 215(2) TFEU is linked to the objectives for EU’s external actions stated in Article 21(2) TEU. It has been considered to be justified to adopt restrictive measures against individuals on rather broad objectives as the instruments are both preventive and non-punitive as well as part of an integrated and comprehensive policy dialogue, complimentary efforts and other instruments.

The legal basis of restrictive measures must however be held to be relatively vague as it lacks clear and explicit requirements regarding the adoption of restrictive measures against individuals. A consequence of the vague legal basis, together with the very political character of the CFSP in general, is that the Council in regard of restrictive measures possesses an executive power with arbitrary elements that allow them to adopt decisions with far-reaching effects based on political objectives. This executive power is strengthened by the two-tier procedure when adopting restrictive measures as the political decision is the base for the regulation containing the actual operational measures. Yet, the executive power of the Council should not be concluded to be absolute as the two-tier

\textsuperscript{57} EU Best Practices for the effective implementation of restrictive measures, para 34.
\textsuperscript{58} Ibid, para 32.
\textsuperscript{59} Ibid, para 28.
process equals an order where the “political” CFSP is linked to the “legal” Community order.\textsuperscript{60} The very fact that a CFSP measure is required as an integral part of the process when imposing restrictive measures demonstrates a “maturity” of the rules and practises of the EU’s foreign policy. The conclusion is that restrictive measures are a key foreign policy tool at the disposal of the Council and the EU that is to some extent underpinned by legal processes.

With regard of the lack of requirements for the adoption of restrictive measures laid down in primary and secondary law, the soft law adopted by the Council, consisting of the Basic Principles, the Guidelines and the Best Practices, play a pivotal role in the design of the measures and provide a deeper understanding of the legal instruments constituting the measures adopted. Eckes holds that the Guidelines is a key document as it gives insight to the EU’s sanctioning practice.\textsuperscript{61} An evident impact is the synchronising of language as the documents offer standard wording for different situations. Eriksson holds that one could argue that the documents to some extent define the contours of the policy at an early stage.\textsuperscript{62} Yet, the Basic Principles, the Guidelines and the Best Practices are not binding for the Council when adopting restrictive measures. It is ultimately the requirements laid down in primary law that limit the broad and far-reaching competence of the Council. A conclusion is therefore that the requirements laid down in soft law is what the Council generally has considered as the threshold for adoption of restrictive measures and specifically what is required to enlist individuals in such measures.

\textsuperscript{60} Cardwell, The Legalisation of European Union Foreign Policy and the Use of Sanctions, p 15.
\textsuperscript{61} Eckes, EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions, p 883.
4 Misappropriation Sanctions

4.1 Introduction

In order to understand the listing of targeted individuals in the misappropriation sanctions, the following chapter examines the legal instruments of the sanctions, consisting of CFSP decisions and regulations, where the criteria as well as the listing grounds are laid down. These elements are fundamental in a sanction regime where individuals are targeted as the criterion is deciding the scope of the sanction and the listing ground provides the reason why an individual is considered to fall within that scope.

Prior to the Arab Spring, the EU had never imposed CFSP sanctions in response to misappropriation. Rather, traditional security and foreign policy threats as, inter alia, human rights violations, armed conflicts and breach of international law were targeted in sanctions. The misappropriation sanctions regimes are fundamentally different from other CFSP sanctions. A very important difference is the lack of a coercive element related to a request for changed behaviour. While CFSP sanctions, as well as sanctions in general, are imposed to coerce a change in policy or activity in the targeted country, part of the country, government, entities or individuals, the misappropriation regimes were not adopted in the means of pressure to change activity of the targeted individuals or national authorities. The freeze of assets was instead imposed with a two-fold intention, one of them rather technical and the other one political.

First, the freezing of assets creates a pre-requisite for a later recovery of the assets. As the objective was to prevent members of the overthrown government and their associates from fleeing the country with capital, the freezes are meant to prevent the flight of misappropriated funds until they can be recovered. The freezes were temporary in character as the urgency of the situation, merely posed by the fact that as the leaders in the respective country left office swiftly with retained possibility to transfer public funds, called for prompt action. The intention from the EU was to replace the sanction with a formal request of mutual legal assistance from Tunisia, Egypt and Ukraine that would be the way forward for the recovery of the assets in line with the ultimate objective of the sanctions. This confirms that the misappropriation sanctions never intended to be

64 Ibid, p 5.
coercive in order to change the behaviour of any government or individual, which anyway would have been an ineffective intention as the targeted individuals no longer hold public offices. Second, the EU wanted to support the new leadership that replaced the ousted governments and framed the adoption of misappropriation sanctions as a part of a policy of democracy promotion. As new governments find it difficult to build legitimacy and implement reform with limited resources, the recovery of funds was also a way to aid the economic development.\textsuperscript{65} The objectives of the misappropriation sanctions are clearly in compliance with the objectives laid down in Article 21(2) TEU stating that the EU’s action on the international scene should consolidate and support democracy and foster sustainable economy in developing countries.

The rationale behind the Council’s atypical choice to impose restrictive measures, fundamentally different from other CFSP sanctions, is the very circumstance that the Arab Spring was an atypical crisis. EU lacked a “blueprint” for addressing successful revolutionary revolts as the ones happening in Tunisia and Egypt. This is why the Council resorted to the CFSP and possibility to impose sanctions as it provided an instrument that frequently used asset freezing as a mean as well as the fact that the situation was seen as a foreign policy matter that needed a foreign policy response.\textsuperscript{66}

\textbf{4.2 Tunisia}

In Decision 2011/72/CFSP, the Council decided to adopt restrictive measures against persons responsible for the misappropriation of Tunisian State funds and who are depriving the Tunisian people of the benefits of the sustainable development of their economy and society and undermining the development of democracy in their country. In relation to that decision, the Council also had decided to reaffirm its support with Tunisia and its people in their efforts to establish a stable democracy with rule of law and full respect for human rights and fundamental freedoms.\textsuperscript{67}

The criterion for the restrictive measure can be found in Article 1(1) in Decision 2011/72/CFSP and operationalised through Article 2(1) Council Regulation No 101/2011: “\textit{All funds and economic resources owned, held or controlled by persons...}”

\textsuperscript{65} Portela, Sanctioning kleptocrats. An assessment of EU misappropriation sanctions, pp 5-6.
\textsuperscript{66} Ibid, p 10.
\textsuperscript{67} Decision 2011/72/CFSP, recitals 1-2.
responsible for misappropriation of Tunisian State funds, as listed in the Annex, shall be frozen”. The criterion is ambiguous in the sense that it is clear and vague at the same time. On one hand, the scope is determining that it is only the persons being responsible for the misappropriation of state funds whose funds are going to be frozen. On the other hand, it can be questioned who can be considered to be responsible for the misappropriation of state funds. The actual scope of the measures is therefore demonstrated by the listing grounds of the targeted individuals as that will disclose how the criterion has been interpreted by the Council.

Article 3(1) in the Council Regulation No 101/2011 decided that the Annex shall include the grounds for listing the persons and entities. Annex I contain the list of the persons referred to in Article 2(1), i.e. the persons responsible for misappropriation of Tunisian State funds. The list of targeted individuals contains 48 persons and ranges from the former Tunisian President Ben Ali and members of the former government to Tunisian businessmen and their family members. The listing grounds are identical for everyone: “Person subject to judicial investigation by the Tunisian authorities in respect of the acquisition of movable and immovable property, the opening of bank accounts and the holding of financial assets in several countries as part of money-laundering operations”.

The listing ground in the light of the criterion generates an interpretation of the criterion where a person investigated by the judiciary in Tunisia due to, inter alia, the acquisition of movable and immovable property can be held as responsible for misappropriation of state funds in the sanction regime. Following the judgement in the case Trabelsi and Others⁶⁸, the Council modified the listing ground by adopting Decision 2014/49/CFSP, amending Decision 2011/72/CFSP: “Person subject to judicial investigations by the Tunisian authorities for complicity in the misappropriation of public monies by a public office-holder, complicity in the misuse of office by a public office-holder to procure an unjustified advantage for a third party and to cause a loss to the administration, and complicity in exerting wrongful influence over a public office-holder with a view to obtaining directly or indirectly an advantage for another person”. The new listing ground clearly broadened the scope of the persons considered to be responsible for the misappropriation of Tunisian state funds.

4.3 Egypt

In Decision 2011/172/CFSP, the Council decided to adopt restrictive measures against persons identified as responsible for misappropriation of Egyptian State funds and who are thus depriving the Egyptian people of the benefits of the sustainable development of their economy and society and undermining the development of democracy in the country. In prior to the sanctions against Egyptian targets, the Council had also decided to support the peaceful and orderly transition to a civilian and democratic government in Egypt based on the rule of law, with full respect for human rights and fundamental freedoms and to support efforts to create an economy, which enhances social cohesion and promotes growth.69

The criterion for the restrictive measures is laid down in Article 1(1) in Decision 2011/172/CFSP and operationalised through Article 2(1) Council Regulation No 270/201: “All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for misappropriation of Egyptian State funds, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen”. The criterion in the misappropriation sanction against Egyptian targets features two substantial additions in contrast to the Tunisian predecessor. The measures target not only persons responsible for misappropriation of state funds but also persons being identified as responsible for the misappropriation. The measures also explicitly extend to cover entities and bodies associated with the listed individuals. Both additions expand the scope of individuals potentially being targeted in the misappropriation sanctions against Egyptian targets. As the misappropriation sanctions against Egyptian and Tunisian targets are closely connected in motive, substance and time, it is not arbitrary to analyse them together.

Article 3(1) in Council Regulation No 270/2011 decides that the Annex shall include the grounds for listing the persons and entities. Annex I of Council Regulation No 270/2011 is a list of the persons referred to in Article 2(1), i.e. the persons responsible for misappropriation of Egyptian State funds. This list comprised 19 persons with very different statuses as it includes both former President of Egypt Hosni Mubarak and the former Minister of Tourism in Egypt to their family members. The listing grounds are

69 Preamble to Decision 2011/172/CFSP, recitals 1-2.
identical: “Person subject to judicial proceedings by the Egyptian authorities in respect of the misappropriation of State Funds on the basis of the United Nations Convention against corruption”. This listing ground creates an interpretation of the criterion where a person investigated by the judiciary in Egypt in regard of misappropriation of state funds can be held responsible for misappropriation of state funds. The difference from the restrictive measures against Tunisian targets is that the proceedings must be on the basis of the United Nations Convention against Corruption.

4.4 Ukraine

In Decision 2014/119/CFSP, the Council agreed to focus restrictive measures on the freezing and recovery of assets of persons identified as responsible for the misappropriation of Ukrainian State funds. In comparison to the misappropriation sanctions in the cases of Tunisia and Egypt, the measures regarding Ukraine also cover persons responsible for the human rights violations in Ukraine and persons associated with them.70

The criterion for the restrictive measures is laid down in Article 1(1) in Decision 2014/119/CFSP and operationalised through Article 2(1) Council Regulation No 208/2014: “All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen”. The formulation is mirroring the language used in the criterion in the misappropriation sanctions against Egyptian targets as the scope covers persons being identified as responsible for misappropriation as well as entities and bodies associated with them. But the reference to human rights creates a situation where there is a concurrent human rights sanctions regime to the misappropriation sanctions regime. Portela thinks that the two-folded criterion reflects the intervention in Ukraine by foreign actors. The embezzlement of state funds can be presumed to have been committed by Ukrainian officials, while the perpetration of human rights violations is not limited geographically to the same extent.71 The inclusion of human rights in the

70 Preamble to Decision 2014/119/CFSP, recital 2.
misappropriation sanctions implies a broadening of the listing criterion as the scope of the earlier misappropriation sanctions definitely was smaller.

The Council renewed the misappropriation sanctions against Ukrainian targets in Decision 2015/143/CFSP. Along with the renewal, the Council also amended a definition of persons being identified as responsible for the misappropriation of Ukrainian state funds. Article 3(1) clarifies that persons identified as responsible include persons subject to investigations by Ukrainian authorities: a) for misappropriation of Ukrainian public funds or being an accomplice of thereto; or b) for the abuse of office as a public office-holder in order to procure an unjustified advantage for him- or herself or for a third party, and thereby causing a loss to Ukrainian public funds or assets, or being an accomplice thereto. The mere existence of a definition of “persons being identified as responsible for misappropriation of state funds” is a significant difference compared to previous regimes in the field of misappropriation sanctions. The difference certainly makes the misappropriation sanctions against Ukrainian targets more detailed. It must be held that it is disputable if the explicit definition has any implications on the scope of the regime as the reference to the judiciary of a third country earlier was done in the listing ground instead of being part of the listing criterion. Therefore, it seems to be a change of form rather than a change in substance.

Article 3(1) in Council Regulation No 208/2014 stipulates that Annex I shall include persons who have been identified by the Council as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine and persons associated with them. Annex I to Council Regulation No 208/2014 constitute the list of the persons referred to in Article 3(1). The list includes 18 persons targeting high level persons as former President of Ukraine Viktor Yanukovych as well as more anonymous individuals, for example a brother to the President’s Head of Administration. The common listing ground used was: “Person subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine”. The listing grounds in Council Implementing Regulation No 364/2015 were diversified with several versions of a more basic writing than the earlier one: “Person subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets and for being an accomplice thereto”.
4.5 Summary

The legal instruments of the misappropriation sanctions against targets in Tunisia, Egypt and Ukraine can be concluded to more or less have equivalent scopes. The criteria of the measures target individuals who are responsible or identified as responsible for misappropriation of state funds in the respective country. The listing grounds of the individuals listed in the measures have in general been that the individuals are subject to judicial proceeding or investigation in a third country for misappropriation of public monies, misappropriation of state funds or embezzlement of state funds.

As the misappropriation sanctions constitute a new category of restrictive measures, there is particularly one trait must be held to be characteristic for the legal instruments of these sanctions. The listing of individuals in the misappropriation sanctions are dependent on national authorities in Tunisia, Egypt and Ukraine because the listing grounds solely emanate from these authorities. This leads up to a situation where the Council finds itself upholding restrictive measures against individuals not yet convicted, but investigated, in their home countries. The threshold to be listed in the misappropriation sanctions must be held to be considerably low as an ongoing judicial investigation is sufficient to fall within the scope of the misappropriation sanctions according to the Council’s decision and regulation. The fact that the listing grounds do not originate from the MSs, but from a third country, make the sanctions fundamentally different from other CFSP sanctions.

Portela means that there is a risk that the Council can face problems to fend off annulments from the CJEU due to the design of the listing grounds.\footnote{Portela, Sanctioning kleptocrats. An assessment of EU misappropriation sanctions, p 27.} In order to fully grasp the threshold for listing an individual in the misappropriation sanctions, it is compulsory to assess the case law of the CJEU regarding the sanctions.
5 Listing Requirements

5.1 Introduction

The design of the legal instruments of the misappropriation sanctions against targets in Tunisia, Egypt and Ukraine raises several questions. In regard of the criteria – stating that the measures target individuals who are responsible for misappropriation of state funds in the respective country – it is diffuse what acts that constitute “misappropriation of state funds” as well as who can be identified as “responsible for the misappropriation”. In regard of the listing ground – consisting of the fact that individuals are subject to judicial proceeding or investigation in a third country for misappropriation of state funds – there is a need to assess how much discrepancy that can be tolerated between the criteria and the listing ground, if it is acceptable to use identical listing grounds, what evidence is needed to present concerning the listing ground and if there is an obligation to verify the material accuracy in the listing ground. Thereto, asset freezing as the primary mean of the misappropriation sanctions is a use of coercive measure, why there is a need to assess how the misappropriation sanctions are relating to fundamental rights of the targeted individuals.

In the following chapter, the questions above regarding the legal instruments of the misappropriation sanctions, divided into the subsections of criteria, listings grounds and fundamental rights, are assessed from a number of perspectives. Each subsection consists of two phases. First, an assessment of the different requirements for listing an individual in restrictive measures laid down in soft law, primary law and case law of the CJEU in order to determine the general threshold when listing individuals in restrictive measures. Second, an examination of the case law of the CJEU regarding the misappropriation sanctions as the design of these legal instruments has been extensively reviewed by the CJEU when listed individuals have applied for annulment of the parts of the restrictive measures that apply to them individually. The purpose is to identify the general requirements when listing individuals in restrictive measures as well as the specific requirements associated with the misappropriation sanctions.
5.2 Criteria

5.2.1 Requirement for Clear Criteria

The Council has laid down a requirement for clear criteria in Paragraph 16 in the Guidelines. The essence of the requirement is that criteria in restrictive measures have to be tailored to each specific sanction regime. The requirement for a clear criterion is important in order to determine who may fall within the scope of the criterion. However, the requirement for clear criteria does not seem to have an obvious legal basis in primary law. In Declaration 25, there is a connection between fundamental rights and the requirement for clear criteria as it reads: “[…] in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure.”. Thus, the requirement of clear criteria seems to serve the purpose of being a counterweight against arbitrary application regarding whom can fall within the scope of the criteria and is therefore comparable to the principle of legality in Article 49 in the Charter, even though it is not adequate to state that it works as a legal ground for the requirement found in the Guidelines.

The criteria of restrictive measures have been discussed primarily by Eckes, who has stressed that there is a general trend in third country sanctions of stepwise broadening the listing criteria to include additional individuals. In connection with the broadening of the listing criteria, Eckes has stressed that criteria also have become vaguer over time. The extended scope of sanctions and especially the broadening of listing criteria in restrictive measures have been subject to judicial review by the CJEU. In the IRISL case, the GC took a stand on the Council’s role as legislator regarding the scope of sanctions when writing “[…] if the Council is of the opinion that the applicable legislation does not enable it to intervene in a sufficiently effective manner in order to combat nuclear proliferation, it is open to the Council to amend it in its role as legislator – subject to a review of lawfulness by the courts of the European Union – so as to extend the situations in which restrictive measures may be adopted.”. However, the GC likewise set up a limit for the Council’s role when thriving against the broadest possible preventive effect of

73 Declarations Annexed to the Final Act of the Intergovernmental Conference Which Adopted the Treaty of Lisbon.
74 Eckes, EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions, p 889 f.
restrictive measure by stating that the result of the thrive cannot be that “[…] the legislation in force being interpreted contrary to its clear wording.”. In Kala Naft case, the ECJ confirmed that the Council, as legislator, is enabled to amend and extend the situations in which restrictive measures can be adopted and accepted that “a serious risk” that the entity furthers proliferation was sufficient in order to list the entity in the restrictive measures reviewed, i.e. that actual support is not required.

5.2.2 Misappropriation of State Funds
A central part of the criteria laid down in the legal instruments of the misappropriation sanctions is the meaning and scope of “misappropriation of state funds” as it is mirroring the objective behind the sanctions, namely the theft of public funds by now ousted government officials. But the legal instruments do not provide a general definition of “misappropriation of state funds”, why the scope becomes rather unclear.

When the GC examined the meaning and the scope of the criterion in the misappropriation sanctions against Tunisian targets in the Trabelsi and Others case, it was held that the criterion was clear and precise enough. An important aspect was that the term does not cover all economic crime, but only actions that can be characterised as misappropriation of Tunisian state funds. The wording was furthermore consistent with the objectives as it was evident from the preamble of the legal instruments that the decision to adopt restrictive measures was intended to support the Tunisian people to establish democracy. The GC held that the objectives, that were in line with Article 21(2)(b) and (d) TEU, were designed to be achieved by an asset freeze against persons responsible for misappropriation of state funds and whose actions are “liable to have jeopardised the proper functioning of the Tunisian public institutions”.

The scope of the criteria in the misappropriation sanctions does not cover every act of misappropriation of state funds. As the objectives of the sanctions relate to the democracy of the countries, the acts have to jeopardise or damage the democracy or the democratic institutions in order for them to fall within the scope. It is apparent that the amount being

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76 T-489/10, Islamic Republic of Iran Shipping Lines v Council, paras 64-65.
77 C-348/12 P, Council v Manufacturing Support & Procurement Kala Naft, para 84.
misappropriated will be central when deciding whether an act of misappropriation of state funds is endangering the democratisation or not.

5.2.3 Identified as Responsible

The listing ground is the part of the legal instrument that answer to the criterion and therefore illustrates who actually may be listed according to the Council. The misappropriation sanctions are targeting persons “identified as responsible” for misappropriation in the respective country, but it was not until the renewal of the misappropriation sanctions against Ukrainian targets in Decision 2015/143/CFSP that the term was defined.

In the Ezz and Others case the GC stated, when interpreting “identified as responsible”, that the Council could not wait to adopt misappropriation sanctions against Egyptian until those persons had been convicted in Egyptian courts as the effectiveness of the sanctions would be seriously undermined. This since the persons concerned would, during the criminal proceedings, have enough time to transfer their assets to states without cooperation with Egyptian authorities. The GC concluded that the criterion must be interpreted broadly under those circumstances. That lead the GC to determine that “identified as responsible” must comprise five separate categories of persons. First, the persons that have been found guilty of misappropriation of state funds. Second, associates that have been found to be accomplices of persons guilty of misappropriation of state funds. Third, persons being prosecuted for misappropriation of state funds. Fourth, persons being prosecuted for being associates. Fifth, all persons being associated with the individuals being subject to judicial proceedings, in particular persons that may have benefitted of the misappropriation of state funds, possibly without their knowledge, who may intend to preserve the assets arising from such misappropriation. In the appeal of the Ezz and Others case, the ECJ further interpreted “identified as responsible” as that only the existence of judicial proceedings connected to criminal proceedings for misappropriation of state funds may be accepted as a basis for restrictive measures against an individual.

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80 C-220/14, Ezz and Others v Council, para 84.
In a later ruling, the GC opened for a lower bar for the third category that can be listed under misappropriation sanctions – persons being prosecuted for misappropriation – as it was stated that investigations in criminal proceedings for conduct that may be characterised as misappropriation of state funds cannot take place at a too early stage in the proceeding for the person concerned to be capable of being identified as responsible and fall within the criterion. This was justified by holding that the freezing of assets is by nature a precautionary, temporary and reversible measure.81

In their emphasis of the necessity of a broad interpretation of the criterion in order to maintain the effectivity of the misappropriation sanctions, the GC has held that it is conceivable that “unlawful actions that have not been characterised in terms of criminal law by Tunisian judicial authorities as misappropriation of state funds may have the effect of unduly depriving Tunisian public authorities of funding, thus making it necessary to freeze the assets of those responsible for such actions” if the acts correspond to the Council’s intended definition of the concept. In relation to this, the GC reminds that broad discretion of the Council includes the right to establish a general criterion defining the category of persons that could fall within the criterion and be subject to restrictive measures.82

The purpose of including persons associated with persons responsible for misappropriation of state funds, as the GC did in the Ezz and Others case, is to ensure that the freezing of assets is not circumvented by persons identified as responsible for misappropriation through the transfer of such assets to associated persons. The GC held that the expression “associated persons” should be interpreted strictly, but at least include persons regarded as accomplices of the persons being held responsible of misappropriation of state funds.83

The GC has further held that if it is not possible to regard a person under judicial proceedings for complicity in misappropriation of state funds as responsible, the person in question should at the very least fall within the category of persons associated with those responsible for misappropriation of state funds. A more restrictive interpretation

81 T-545/13, Al Matri v Council, para 90.
82 Ibid, para 94.
83 Ibid, para 110.
was considered to undermine the effectiveness of the provisions as circumvention of the asset freeze would be possible.\(^{84}\)

It is evident that “identified as responsible” is being interpreted very broad as the CJEU emphasised the necessity of a broad interpretation of the criterion in order to maintain the effectivity of the misappropriation sanction. The reason, that must be considered to be legitimate, is that this interpretation is necessary to ensure that the freezing of assets is not circumvented by persons identified as responsible for misappropriation through the transfer of such assets to associated persons. This order implies that “identified as responsible” should be interpreted as only the existence of judicial proceedings connected to criminal proceedings for misappropriation of state funds may be accepted as a basis for restrictive measures against an individual.

5.2.4 Support for the Rule of Law in Sanctions against Ukrainian Targets
The listing criterion in the misappropriation sanctions against Ukrainian targets contains an additional component as the preamble to Decision 2014/119/CFSP states that the asset freezes against persons identified as responsible for misappropriation of state funds are imposed to consolidate and support rule of law.

In the Klyuyev case, the GC interpreted the criterion in the misappropriation sanctions against Ukrainian targets as aiming at offences consisting of misappropriation of state funds and that the criterion exists within a legal framework that aim to pursue the objective of consolidating and supporting the rule of law in Ukraine. These two factors led the GC to the conclusion that any act classifiable as misappropriation of state funds committed in a third country cannot justify an EU action with the objective of consolidating and supporting the rule of law. The GC stated that it is necessary, at the very least, that the disputed acts should be of the character that they “undermine the legal and institutional foundations of the country concerned”, having regard to the amount or the type of funds or assets being misappropriated or to the context in which the acts were committed, in order to fall within the scope of the criterion. The GC concluded that the

criterion covers “persons being identified as responsible for a misappropriation of Ukrainian State funds that is capable of undermining the rule of law in Ukraine.”

Comprehensive case law have provided a non-exhaustive list of principles and standards which may fall within the concept of rule of law that includes: principles of legality, legal certainty and the prohibition on arbitrary exercise of power; independent and impartial courts; effective judicial review, extending to respect for fundamental rights and equality before law. The GC reaffirmed that for an act to be classifiable as misappropriation of state fund, in the meaning of the criterion in the misappropriation sanctions against Ukraine, the act has to, at the very least, undermine the legal and institution foundations of Ukraine and in particular the principles and standards of the non-exhaustive list regarding the concept of rule of law.

The additional component regarding rule of law in the criterion of the misappropriation sanctions against Ukrainian targets was broadening the scope. However, in order to fall within the scope of the criterion the disputed acts should be of the character that they “undermine the legal and institutional foundations of the country concerned”, having regard to the amount or the type of funds or assets being misappropriated or to the context in which the acts were committed. This implies an addition prerequisite that the Council has to satisfy when listing individuals in the misappropriation sanctions against Ukrainian targets.

5.3 Listing Grounds
5.3.1 Requirement for Statement of Reasons
According to Paragraph 17 in the Guidelines, it is mandatory that proposals for listing of persons in restrictive measures are accompanied by accurate, up-to-date and defendable statements of reasons. In detail, this means that the proposals should include individual and specific reasons for the listing of each person. The main purpose of the statement of reasons is to state, as concretely as possible, why the Council has decided that the persons fall under the designation criterion laid down in the CFSP decision and regulation. In this statement, the Council should consider the objectives of the measures as they are

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86 T-346/14, Yanukovych v Council, para 98 and 101.
expressed in its introductory paragraphs. It is important to notice that the Council exercise its discretion when deciding why a person falls under the designation criterion in the relevant legal act.\textsuperscript{87}

There are also two legal grounds that together require a statement of reasons from the Council when listing an individual as a part of a restrictive measure. The first legal ground is Article 296(2) TFEU that says that “all legal acts adopted by the EU institutions shall state the reasons on which they are based”. The second legal ground is Article 41(2)(c) of the Charter of Fundamental Rights of the EU that states that the right to good administration includes, inter alia, “the obligation of the administration to give reasons for its decision”. In case law, it has consistently been held by the CJEU that the statement of reasons must be appropriate to the measures at issue and to the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal manner the reasoning of the institution which adopted the measure in order for the persons concerned to understand the measure and enable the CJEU to exercise power of review of the lawfulness. It is not necessary to go into every relevant fact and law to meet the requirement. Rather, the reasons given for a measure are sufficient if the measure was adopted in a context which was known for the person concerned and which enabled him or her to understand the scope of the measures.\textsuperscript{88} Though, the degree of precision of the statement of reasons for a measure must be balanced against practical realities as well as time and available technical facilities. The reasons cannot consist of a general and stereotypical formulation only but need to indicate the specific reasons why the Council considers that the relevant rules are applicable on the person concerned.\textsuperscript{89}

An issue worth stressing in regard of statement of reasons is the scope of the Council’s discretion when deciding to target a person in a restrictive measure. In the Fahas case, the GC upheld a counter terrorism sanction and discussed the scope of the Council’s discretion by stating that “[…] the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions […]. That discretion concerns, in particular, the assessment of the

\textsuperscript{87} Annex I to Guidelines on implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy, para 7.
\textsuperscript{88} C-417/11 P, Council v Bamba, paras 50-54.
\textsuperscript{89} T-228/02, Organisation des Modjahedines du people d’Iran v Council, paras 141-143.
considerations of appropriateness on which such decisions are based.”. In the Kala Naft case, the ECJ explained that the boundary for the broad discretion in the EU’s legislature, involving political, economic and social factors, is if the measures is unproportionable in the sense that it is “manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”. The particular scope of the Council’s broad discretion when listing individuals in restrictive measures was deliberated in the case of Pye Phyo Tay Za. ECJ held that the Council’s discretion should not be interpreted as a competence to list anyone on any possible ground as the underlying information need to be precise and provide concrete evidence in order to impose restrictive measures against the person in question. The ECJ further noted that the effectiveness of judicial review guaranteed by Article 47 in the Charter implicates that the CJEU are to ensure that the decision, affecting the person individually, is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision.

5.3.2 Discrepancy between Listing Ground and Criterion
As the main purpose of the statement of reasons is to state why the Council has decided that the persons fall under the designation criterion, it becomes problematic if there is a discrepancy between the listing ground and the criterion. This has to some extent occurred in the legal instruments of the misappropriation sanctions and been examined in case law.

The GC decided in the Trabelsi and Others case that the fact that an individual was under judicial investigation for cross-border money-laundering operations from Tunisia did not constitute “misappropriation” per se and thus the judicial investigation could not establish a ground for listing of an individual in the misappropriations sanction against Tunisian targets. The reason was that it was impossible to conclude that the investigation for money-laundering included misappropriation of state funds. The GC therefore annulled the listing of the applicant.

90 T-49/07, Fahas v Council, para 83.
91 C-348/12 P, Council v Manufacturing Support & Procurement Kala Naft, para 120.
93 C-584/10, C-593/10 and C-595/10 P, Commission and Others v Kadi, para 119.
In the *Al Matri* case, the GC further argued that the listing ground refers to a term, money-laundering, which is not used in the listing criterion for the misappropriation sanctions against Tunisian targets. This order is further proved by the fact that the Council neither established nor claimed that a person should be regarded as responsible for misappropriation of state funds solely because that person is subject to judicial investigation for money-laundering. The GC even held that the mere fact that the persons in question was subject to an investigation regarding money-laundering resulting from the abuse of professional and social activities is not enough as there is a need for a link between the activities and the exercise of state authority in Tunisia. This link was impossible to conclude in the *Al Matri* case as Tunisian authorities sent a list of persons being subject to judicial investigation for money-laundering resulting from abuse of official positions and professional and social activities, without any indication whether the persons were responsible for misappropriation of state funds or had acted against the interests of the Tunisian state or public. The GC annulled the listing of the applicant in Decision 2011/79/CFSP as it was impossible to conclude that the applicant was responsible for misappropriation of state funds.95

5.3.3 Stereotypical Language
The CJEU has in previous case law held that stereotypical language cannot be used as the listing ground must indicate the specific reasons why the Council considers that the relevant rules are applicable on the person concerned. This is highly relevant for the misappropriation sanctions as identical listing grounds are used for all listed individuals in the sanctions against Tunisian targets and the same goes for sanctions against Egyptian as well as Ukrainian targets.

In *Ezz and Others*, the applicant raised the question regarding the use of identical listing ground for all person listed in the misappropriation sanctions against Egyptian targets, as the applicant held that the reasons given were not detailed enough. The GC held that the listing grounds were not stereotypical in nature as they did not “copy the wording of a general provision”, but rather sought to describe the situation of the applicant who, like others, in the Council’s view was subject to judicial proceedings concerning

95 T-200/11, Al Matri v Council paras 48, 62, 64, 66 and 74.
misappropriation of state funds. Thus, it is possible for the Council to use identical listing grounds for all targeted individuals in a particular sanction, but cannot copy the wording to other sanctions.

5.3.4 Evidence for Listing Ground

The question whether information given by authorities in a third country can be used as evidence for a listing ground is critical for the misappropriation sanctions as a concept since all listing grounds solely emanate from national authorities in Tunisia, Egypt and Ukraine.

In the Ezz and Others case, three of the applicants were considered to be “subject to judicial proceedings in Egypt linked to investigations concerning misappropriation of State funds” as they were subject of an order of the Egyptian Prosecutor General seeking to seize their assets. The order had been endorsed by a criminal court and was part of investigation concerning misappropriation of state funds. The order was thus considered to be enough evidence to validate the listing ground.

In the misappropriation sanctions against Ukrainian targets, the Council held that a letter from the Public Prosecutor’s Office of Ukraine was proof enough to conclude that the listed persons were identified as responsible for misappropriation of state funds and thus falling under the criterion of the measures. This was challenged in the Portnov case. The GC held that the letter contained “only a general statement to the effect that the applicant, among other senior officials, was the subject of an inquiry of those acts, not further specified, involving misappropriation of state funds”. The letter did not give any details of the applicant’s responsibility. The GC found that the Council did not have any information regarding the act of the applicant and that the letter from Ukrainian authorities did not constitute a sufficiently solid factual basis to include the applicant’s name on the list on the ground that he was identified as responsible.

Thus, the GC has accepted that information given by authorities in a third country can be used as evidence for a listing ground given that the information constitutes a sufficiently

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96 T-256/11, Ezz and Others v Council, paras 114-115.
97 Ibid, paras 128-134.
98 T-290/14, Portnov v Council, paras 44 and 48.
solid factual basis to include the individual’s name on the list on the ground of being identified as responsible for misappropriation of state funds.

5.3.5 Obligation to Verify Material Accuracy

In relation to the necessity of a sufficiently solid factual basis regarding the information used in the listing ground, the question arises to what extent the Council has an obligation to verify material accuracy, both in regard of whether there actual is an judicial investigation regarding misappropriation of state funds against the individual in question and whether that investigation is well founded.

In the appeal of the Ezz and Others case, the ECJ emphasised that “it was not for the Council or the General Court to verify whether the investigations to which the appellants were subject were well founded, but only to verify whether there was the case regards the decision to freeze funds in the light of the request for assistance”. 99

What the Council has to prove and not in regard of material accuracy in the listing ground of a person targeted in a misappropriation sanction was examined in the Al Matri case. The GC stated in the case that the Council must ascertain that the information from Tunisian authorities, in form of a certificate, prove that the applicant is subject to judicial investigations in respect of actions that may be characterised as misappropriation of state funds and whether those investigations can be considered to satisfy the criterion laid down in measures. The GC also specified that the Council, in principle, do not have to examine and assess the accuracy and relevance of the information from Tunisian authorities. The reason is that the purpose of the Council’s action is not to punish misappropriation, but to help Tunisian authorities to identify misappropriation and recover misappropriated funds. However, this does not imply that the Council can adopt the findings of Tunisian judicial authorities in all circumstances as that would be contrary to the principles of good administration. In that regard, the GC held that it is for the Council to assess, on the basis of the circumstances in the case, whether is it is necessary to investigate further. The necessity can come from doubt by the Council itself or information submitted by the person being listed. In the particular case, the applicant objected against being listed in measures against Tunisian targets, as him being son-in-law of the former President of

99 C-220/14, Ezz and Others v Council, para 77.
Tunisia, made it necessary for the Council to further investigate the certificates that claimed the applicant was under investigation for misappropriation of state funds as that investigation could be politically motivated. The applicant invoked documents from a non-governmental organisation stating that the Tunisian judicial system is not independent vis-à-vis the political system. The GC concluded that the applicant could not prove that this was the case regarding his investigation and held that the Council was not obliged to further investigate the accuracy of the facts in the certificates.100

In relation to reaffirming the ECJ’s stance that a listing in a restrictive measure should be taken on a sufficiently solid factual basis, the GC held in the Klyuyev case that it is the task of the Council to verify that the listing ground was well founded irrespective of the stage reached in the proceedings against the person. The rationale behind this order is the fact that it is the Council that independently decides when it is appropriate and necessary to adopt measures irrespective of whether a third country have made a request for such measures and whether the national authorities of a third country earlier had taken decisions that were enough for the Council to rely on sufficiently solid factual basis when adopting measures.101

In the Yanukovych case, the GC said that irrespective of the stage reached in proceedings against the applicant, the Council could not adopt restrictive measures against him without having any knowledge of the act that the Ukrainian authorities accused him of having committed. Only with the knowledge of the specific acts that the applicant is accused of having committed, the Council is in the position to decide whether the acts can be classified as misappropriation of state funds and if the acts are undermining rule of law in Ukraine.102

In the Thabet and Others case, the GC concluded that the Council is not obligated to verify if the accuracy and relevance of the information transferred to them from authorities of a third country “if there is no concrete evidence that would give rise to

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100 T-545/13, Al Matri v Council, paras 65-76.
101 T-340/14, Klyuyev v Council, paras 118-120.
102 T-346/14, Yanukovych v Council, para 47.
legitimate questions on its part as to the existence or basis of the judicial proceedings in question”.

A sufficiently solid factual basis seems to be proof of the listed individual being subject to judicial investigations in respect of actions that may be characterised as misappropriation of state funds and whether those investigations can be considered to satisfy the criterion laid down in measures. This means that the Council cannot adopt restrictive measures against an individual without having any knowledge of the act that the authorities of a third country accused the individuals of having committed. However, the Council is not obliged to examine and assess the accuracy and relevance of the information from Tunisian authorities as the purpose of the Council’s action is not to punish misappropriation, but to help Tunisian authorities to identify misappropriation and recover misappropriated funds. The non-punitive element of the restrictive measures in general is crucial for the relatively low threshold of verifying information when using coercive measures as extensive as the freezing of assets in the misappropriation sanctions.

5.4 Fundamental Rights

5.4.1 Requirement of Due Process Rights

The foundation of the respect for fundamental rights in restrictive measures is the Kadi cases. In the Kadi and Al Bakrakaat case, the ECJ held that the CJEU must ensure the review, in principle full review, of the lawfulness of all legal acts adopted by the EU in the light of fundamental rights forming an integral part of the EU legal order. This includes, inter alia, respect for the rights of defence and the right to effective judicial protection. In the Kadi II case, the ECJ explained that this obligation for the CJEU is unambiguously laid down in Article 275(2) TFEU. Those fundamental rights include, inter alia, the rights of defence and the right to effective judicial protection. The ECJ stated that the rights of defence, codified in Article 41(2) in the Charter, includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality. The ECJ also recognised that the right to effective judicial protection, codified in Article 47 in the Charter, requires that the person in question must be able to ascertain the reasons behind the decision taken in relation to him or her. This

103 T-274/16 and T-275/16, Thabet and Others v Council, para 148.
104 C-402/05 P, Kadi and Al Barakaat International Foundation v Council and Commission, para 326.
requirement can be met by either letting the person read the decision itself or by requesting and obtaining disclosure of those reasons.\footnote{C-584/10, C-593/10 and C-595/10 P, Commission and Others v Kadi, paras 97-100.}

Paragraph 15 in the Guidelines states that listing of targeted individuals in restrictive measures must respect fundamental rights as stipulated by the TEU. In order to satisfy the requirement for respect of fundamental rights, the Council must at the very least guarantee the due process rights of targeted individuals in a way that is consistent with case law of CJEU, inter alia, regarding the principle of effective judicial protection and the rights of defence. The substance of the requirement for fundamental rights in the Guidelines recalls the principle of effective judicial protection laid down in Article 47 of the Charter and the rights of defence laid down in Article 48 of the Charter. The Council is obliged to respect the rights and observe the principles of the Charter when implementing EU law according to Article 51 of the Charter, why the provision in the Charter constitute a legal basis laid down in primary law for the requirement regarding respect for fundamental rights when adopting restrictive measures against individuals. The importance of fundamental rights when adopting restrictive measures against individuals in accordance with Article 215(2) TFEU was emphasised in Declaration 25: “\textit{The Conference recalls that the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. […]}”\footnote{Declarations Annexed to the Final Act of the Intergovernmental Conference Which Adopted the Treaty of Lisbon.}

In regard of the misappropriation sanctions, the GC held in the \textit{Al Matri} case that the Council by disclosing to the applicant the precise reasons why the applicant were going to be maintained as listed in a renewal of the misappropriation sanctions against Tunisian targets had met the requirement regarding the right to effective judicial protection and thereby enabled the applicant to exercise the rights of the defence.\footnote{T-545/13, Al Matri v Council, para 132.}

5.4.2 Limitation of Rights

As the Intergovernmental Conference which adopted the Treaty of Lisbon, the case law of CJEU and the Council itself all have emphasised the need to guarantee due process

\footnote{C-584/10, C-593/10 and C-595/10 P, Commission and Others v Kadi, paras 97-100.}
rights, especially the right to defence and the principle of effective judicial protection, it must be concluded that these rights are absolute when listing individuals in restrictive measures. However, in accordance with Article 52 in the Charter, other rights recognised by the Charter can be limited to the extent that the limitation respect the essence of those rights and freedoms. There are three prerequisites that the Council needs to satisfy in order to limit rights when adopting restrictive measures against individuals. First, the limitation must be provided by law, i.e. have a legal basis. Second, the limitation must refer to an objective of public interest recognised by the EU, as the objectives pursued in the context of the CFSP. Third, the limitation may not be excessive, meaning that it must be necessary and proportional to the aim sought and cannot impair the substance of the right or freedom being limited. In the Bank Melli case, the ECJ held that the fundamental right in question, right to property, is not absolute and can be limited.\textsuperscript{108} The question is whether the CJEU has deemed that misappropriation sanctions can targeted individuals to the extent that the measures limit other rights recognised by the Charter.

The first prerequisite is that the limitation must be of a general interest recognised by the EU. The ECJ stated in the case Ezz and Others that the measures against Egyptian targets “forms a part of a policy of supporting the new Egyptian authorities, intended to promote both the economic and political stability of Egypt, and in particular, to assist the authorities of that country in their fight against the misappropriation of state funds” in a way that is compatible with the objectives for the EU’s external measures including the aim to consolidate and support democracy, the rule of law, human rights and the principles of international law laid down in Article 21(2)(b) and (d) TEU.\textsuperscript{109}

The second prerequisite is that the limitation must be necessary and proportional in relation to the aim of the measure. The GC emphasised in the Yanukovych case that rule of law is one of the primary values on which the EU was founded on, referring to Article 2 TEU, making that a weighty objective for adopting restrictive measures against individuals undermining rule of law by acts classifiable as misappropriation of state funds.\textsuperscript{110} On the other hand, in the case of Klyuyev, the GC held that it is not acceptable that any act classifiable as misappropriation of state funds committed in a third country

\begin{itemize}
  \item \textsuperscript{108} C-548/09 P Bank Melli Iran v Council, para 113.
  \item \textsuperscript{109} C-220/14 P, Ezz and Others v Council, paras 43-48.
  \item \textsuperscript{110} T-348/14, Yanukovych v Council, para 98.
\end{itemize}
justifies action by the EU using the power of the CFSP. It was stated that a minimum level is that the disputed acts should be such as to undermine the legal and institutional foundation of a country. Rather, the criterion in the misappropriation sanctions against Ukrainian targets must be interpreted as “it concerns acts classifiable as misappropriation of State funds or public assets which, having regarding 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, prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, to undermine respect for the rule of law in that country”. The GC considered the listing criterion to be compatible with and proportionate to the relevant objectives in the TEU.\textsuperscript{111} Even an asset freeze against a person being subject to a pre-trial investigation for misappropriation of state funds that undermine rule of law have been considered to be justified by the ECJ as “the effectiveness of a decision to freeze funds would be undermined if the adoption of restrictive measures were made subject to the criminal convictions of persons suspected of having misappropriated funds, since those persons would have enough time pending their conviction to transfer their assets”.\textsuperscript{112}

The third prerequisite is that the limitation must have a legal basis. In the case Ezz \textit{and Others}, the GC considered a limitation of the right to property to be regarded as “provided for by law”, i.e. have a legal basis, if the criteria laid down in the legal instruments have been complied with.\textsuperscript{113} This conclude that the targeting of an individual, and the limitation of that individual’s rights, has a legal basis only if the acts that the targeted individual is accused of strictly fall within the stated objective of the measure. Thus, the acts of individuals targeted in misappropriation sanctions must constitute “misappropriation” to have a legal basis. The scope of the term “misappropriation” is undefined in all legal instruments connected to the misappropriation sanctions. In the \textit{Ivanyuschenko} case, the GC established the scope through Directive (EU) 2017/1371 of the Parliament and of the Council of 5 July 2017 on the fight against fraud to the EU’s financial interests by means of criminal law. The definition of “misappropriation” in the Directive is “the action of a public official who is directly or indirectly entrusted with the management of funds or

\textsuperscript{111} T-340/14, Klyuyev v Council, para 89 and 91.
\textsuperscript{112} C-599/16 P, Yanukovych v Council, para 60.
\textsuperscript{113} T-256/11, Ezz and Others v Council, para 202.
assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union’s financial interests”.

In the case law examined above, the CJEU ruled that misappropriation sanctions can meet all prerequisites necessary in order to limit fundamental rights in accordance with Article 52(1) in the Charter. Thus, the CJEU has confirmed that freezing assets of individuals in restrictive measures in the area of the CFSP in order to counter misappropriation of state funds in a third country can be considered an acceptable as to the need of limiting individual rights laid down in the Charter.

5.4.3 The Scope of the Requirement for Due Process Rights
As stated previously, the listing of individuals in the misappropriation sanctions are dependent on national authorities in Tunisia, Egypt and Ukraine, not infrequently judicial ones, as there is a strong connection between the criteria targeted at “persons responsible for misappropriation of state funds” and the grounds for listing that in a vast majority of the cases referring to the person listed as “subject to judicial investigation”. This order is confirmed in the Council’s renewal of the misappropriation sanctions against Ukrainian targets in Decision 2015/143/CFSP as the Council amended a definition of persons being identified as responsible for the misappropriation of Ukrainian state funds to include persons subject to investigations by Ukrainian authorities, inter alia, for misappropriation of Ukrainian public funds or being an accomplice of thereto. The Council’s dependence on judicial investigations in third countries when adopting misappropriation sanctions raises the issue about the scope of the requirement of respect for fundamental rights. Is the Council obliged to verify that an investigation or verdict in a third country has satisfied the requirement for respect of fundamental rights when the adoption of a restrictive measure is based on that investigation or verdict?

In the Mabrouk case, the applicant held that the judicial investigation in Tunisia against him should already have been concluded and that the investigation is unlawful due to the excessive length, why the Council should bring an immediate end to the freezing of his assets. The GC stated that principles of the rule of law and human rights is required of all

114 T-246/15, Ivanyushchenko v Council, para 92.
the actions of the EU and in particular the EU’s action on the international scene according to Article 21(1) TEU, which also refers to the respect of international law. The right to a fair trial includes the principle that proceedings should be concluded within a reasonable time and is safeguarded in a number of binding instruments of international law, in particular Article 14(3)(c) of the International Covenant on Civil and Political Rights adopted by the United Nations, to which both the MSs and Tunisia are parties. The GC held that the consequence is that “it cannot be ruled out that, where there is objective, reliable, specific and consistent evidence such as to raise legitimate questions concerning observance of an applicant’s rights to have his case heard within a reasonable time in the context of the ongoing judicial investigation concerning him, which serves as the basis for the freezing of his assets in the EU, the Council may be required to carry out necessary verifications”. Thus, the GC is opening up for an order where the Council is obligated to verify that a listed individuals due process rights, as the principle of effective judicial protection in Article 47 in the Charter, is satisfied in a judicial investigation in a third country if the same investigation serves as basis for a listing of that individual.

The question regarding the scope of the requirement for respect of fundamental rights was further examined in the Azarov case. The ECJ held that “the Council cannot conclude that a listing decision is taken on a sufficiently solid factual basis before having itself verified that the rights of the defence and the right to effective judicial protection were respected at the time of the adoption of the decision by the third State in question on which it intends to base the adoption of restrictive measures”. The circumstance that Ukraine has acceded to the European Convention on Human Rights could not “render a superfluous verification, by the Council, that the decision of a third State on which it bases its restrictive measures has been taken in compliance with fundamental rights and in particular the rights of defence and the right to effective judicial protection”. The ECJ meant that the question of compliance with the requirement for respect of fundamental rights by nature entails review. The consequence of this ruling by the ECJ is that the Council’s obligation to ensure respect for fundamental rights when adopting restrictive measures has been extended to cover decisions in third countries.

116 C-530/17, Azarov v Council, para 34 and 36.
The enlargement of the scope of the requirement of respect for fundamental rights when adopting misappropriation sanction may be considered excessive in comparison with the ECJ’s case law in the area before the *Azarov* case. Previously, the Council’s obligations to satisfy the rights of defence and the right to effective judicial protection were considered to be applied in the relation between the individual being listed in a restrictive measure and the EU adopting the measures in question. Now, the Council’s obligation includes the verification of the respect for the rights of defence and the right to effective judicial protection in third countries when the measures in question are adopted on the basis of a decision by a third state.

### 5.5 Summary

The design of the legal instruments forming the misappropriation sanctions must be concluded to be generally accepted by the CJEU as to the case law examined above. The common criteria – targeting individuals who are responsible or identified as responsible for misappropriation of state funds in the respective country – has been considered to be clear enough to maintain the sanctions with the very same criteria. The CJEU’s acceptance for the criteria acknowledges the Council’s role as a legislator and the accompanying executive power to adopt restrictive measures against individuals. This becomes evident as the misappropriation regimes were not adopted in the means of pressure to change activity of the targeted individuals or national authorities, as sanctions normally do, but to prevent members of the overthrown governments and their associates from fleeing their countries with capital in order to support the new leaderships that replaced the ousted governments. The common listing ground – consisting of information emanating from national authorities in third countries that individuals are subject to judicial proceeding or investigation in a third country for misappropriation of public monies, misappropriation of state funds or embezzlement of state funds – have principally been recognised as accurate, up-to-date and defendable statements of reasons. Yet, the case law of the CJEU has established several requirements for the listing of individuals in the misappropriation sanctions that more or less restraint the traits of the legal instruments of these sanctions.

In order for the acts of an individual to fall within the scope of criteria in the misappropriation sanctions, the acts have to jeopardise or damage the democracy or the
democratic institutions, why every act of misappropriation will not be covered. If the acts can be considered to fall within the scope, the individuals in question must be subject judicial proceedings connected to criminal proceedings for misappropriation of state funds in order to be considered responsible or identified as responsible. The threshold for whom can be considered responsible or identified as responsible is relatively low as the CJEU has concluded that there must be a broad interpretation regarding whom may be considered responsible or identified as responsible in order to avoid circumvention of the funds. Similarly, the investigations in criminal proceedings for acts that may be characterised as misappropriation of state funds cannot take place at a too early stage in the proceeding for the person concerned to be capable of being identified as responsible and fall within the criterion. This is justified as the freezing of assets is by nature precautionary, temporary and reversible.

Regarding the listing grounds, the CJEU has held that the information emanating for national authorities in third countries must constitute a sufficiently solid factual basis in order to be used to list an individual in the misappropriation sanctions. A sufficiently solid factual basis seems to be proof of the listed individuals being subject to judicial investigations in respect of acts that may be characterised as misappropriation of state funds and whether those investigations can be considered to satisfy the criterion laid down in the measures. The Council is not obligated to verify the accuracy and relevance of the information transferred to them from authorities of a third country if there is no concrete evidence that would give rise to legitimate questions on its part as to the existence or basis of the judicial proceedings in question.

The misappropriation sanctions have met the general requirement for fundamental rights as the listings of individuals have satisfied the due process rights. Additionally, the CJEU has in case law ruled that misappropriation sanctions can meet all prerequisites necessary in order to limit fundamental rights in accordance with Article 52(1) in the Charter. But the impact of the requirement of fundamental rights was dramatically changed after the Azarov case as the ECJ held that a listing decision cannot be considered to have a sufficiently solid factual basis before having verified that the rights of the defence and the right to effective judicial protection were respected at the time of the adoption of the decision by the third country providing the information. An important difference regarding the requirement from the Azarov case is that the enlargement of the scope of
the requirement of respect for fundamental rights when adopting misappropriation sanction is limiting the very foundation of the legal instruments in these sanctions.

The common threshold that the case-law-based requirements regarding the listing of individuals in the misappropriation sanctions constitute is to some extent ambiguous. On one hand, the CJEU has emphasised the necessity of a broad interpretation of the criteria and the categories of individuals that might fall within the scope as another order would risk the effectiveness of the misappropriation sanctions. On the other hand, the rather excessive enlargement regarding the scope of the requirement of respect for fundamental rights when adopting misappropriation sanctions is critically limiting the Council’s executive power to list individuals. Apart from the ambiguity, the specific requirements must be considered to be anticipated in order to clarify the legal status of the misappropriation sanctions.
6 Conclusions

The adoption of the misappropriation sanctions is dependent on the extraordinary institutional setup dominant in the area of the CFSP. The Council’s right to define and implement the CFSP in all areas of foreign policy with limited or even without judicial review due to the precise jurisdiction of the CJEU must be held to be an extraordinary executive power that is uncommon in the EU legal order. Although restrictive measures as a foreign policy tool is traditionally associated with conventional foreign policy objectives, the flexible manner and case-by-case approach enabled this unprecedented use of restrictive measures to target ousted presidents and their entourage accused for kleptocracy with the short-term aim to freeze their misappropriated assets and the long-term aim to return the assets to their respective countries. Yet, the misappropriation sanctions have not been excluded from the general development where the CFSP, and especially restrictive measures against individuals, has become a tug-of-war between the Council and the CJEU. The design of the legal instruments forming the misappropriation sanctions has been generally accepted by the CJEU, but the extensive case law of the CJEU regarding the misappropriation sanctions has also resulted in annulments of several listings of individuals.

The case law from the CJEU has been necessary in order to decide the scope of the criteria used in the misappropriation sanctions by illuminating what constitute misappropriation of state funds as well as whom can be considered to be responsible for the misappropriation. Equally, the case law of the CJEU has created several requirements regarding the use of information given by authorities in third countries as evidence for a listing ground – the most characteristic trait of the misappropriation sanctions – as a sufficiently solid factual basis is required. The requirements regarding the criteria or the listing grounds must in general be regarded as being reasonable for the Council to satisfy and therefore have a very marginal effect on the sustentation of existing misappropriation sanctions as well as the future use of this new concept in restrictive measures.

As the respect for fundamental rights of targeted individuals traditionally is a critical issue in sanctions and restrictive measures, it has been essential that the misappropriation sanctions have been considered to satisfy the respect for due process rights as well as all prerequisites necessary in order to limit fundamental rights in accordance with Article...
52(1) in the Charter. However, after the ruling by the ECJ in the Azarov case, the scope of the requirement of fundamental rights in restrictive measures has become a question of survival for the concept of misappropriation sanctions. The requirement that the Council has to verify that the decision of a third country, on which it bases the listing of individuals in the restrictive measures, has been taken in compliance with fundamental rights, in particular the rights of defence and the right to effective judicial protection, creates a situation where the Council has to obtain special evidence in order to prove that. In comparison with other requirements relating to the misappropriation sanctions, the threshold is set very high and does not appear to be as reasonable for the Council to satisfy. It remains to be seen how the requirement is going to be implemented in practice and what type of evidence that would be sufficient to satisfy the requirement according to the CJEU.

Additionally, the ruling in the Azarov case also implicates that judicial investigations in third countries are required to correspond to a European level of fundamental rights when being used as listing grounds. As the misappropriation sanctions intended to support countries in their transition to democracy after successful revolutions ousting kleptocratic leaders, it seems improper to envisage that the institutions of these countries will not be weak, nor to some extent corrupt, when former presidents and other high government officials are going to be investigated, prosecuted and maybe convicted. The extended scope of the requirement might therefore be even more demanding for the third countries to satisfy than it is for the Council to collect eventual evidence.

If the practical implementation of the requirement for fundamental rights equals a situation where the threshold is set too high, it could jeopardise the foundation of the current design of the legal instruments where the listing grounds solely emanate from information given by national authorities. This could render in a situation where applications for annulment by listed individuals will be difficult to fend off as the Council cannot verify that the decision of a third country, on which it bases its restrictive measures, has been taken in compliance with fundamental rights. The extended scope of the requirement of fundamental rights must be concluded to be an immediate risk for the Council’s sustentation of existing misappropriation sanctions as well as the future use of the same measures. If the Council considers the political price for managing the legal obstacles too high, there is a chance that the misappropriation sanctions in its current legal
design never will be imposed again. This especially if the CJEU keeps annulling listings of targeted individuals as the Council cannot satisfy the requirements constituting the threshold for a lawful listing of an individual. Yet, the requirement might also be a logical consequence of the design of the misappropriation sanctions as anything other might risk being too alien for the EU legal order when using coercive measures against individuals.

This year, it is eight years since the misappropriation sanctions against Tunisian and Egyptian targets were adopted by the Council and five years since the equivalent against Ukrainian targets. When reviewing the misappropriation sanctions in the lights of their objectives, it can be concluded that one of two objectives should be considered fulfilled as the EU successfully supported the new leaderships that replaced the ousted governments and promoted the transitions towards democracy. Yet, the second objective recovering the frozen assets to the respective countries has not been achieved as the design of the legal instruments of the misappropriation sanctions has impeded the fulfilment. While the asset freeezes were initially successful in preventing members of the ousted governments and their associates from fleeing these countries with capital, very few of the listed individuals have been indicted and a majority of the targeted individuals are still listed in the sanctions. The misappropriation sanctions can therefore be concluded to be satisfactory from a short-term perspective, but inadequate from the long-term perspective.

The question is how long the objectives of the misappropriation sanction will remain valid from a legal point of view. In the case law of the CJEU, it has been held that as long the persons responsible for the misappropriation of state funds are able to retain those funds and thus continue to deprive the people of the benefits and of the sustainable development of their economic and society and undermine the future development of democracy in the respective country, the objectives will be valid. The measures are to that extent dependent of the successful outcome of the judicial proceedings against persons identified as responsible and not the process of transition to democracy in their respective countries. Consequently, it is the legal design of the misappropriation sanctions that has generated

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117 Cizmazoïva, What are the EU misappropriation sanctions and what are we doing about them?, July 22 2019.
a situation where the lack of indictments of listed individuals in the third countries is hindering the EU from enabling a recovery of the misappropriated funds.

As time passes, the continuation of the misappropriation sanctions becomes problematic. Restrictive measures as an instrument is preventive and non-punitive, allowing the EU to respond instantly to political challenges and developments, while at the same time being a part of an integrated and comprehensive policy dialogue, complimentary efforts and other instruments, but the misappropriation sanctions run the risk of being semi-permanent with a decreasing chance of indictments of the targeted individuals. As the misappropriation sanctions are currently in a no man’s land, the future is solely decided by the political will of the Council to encounter the legal requirements laid down in the case law of the CJEU. From a legal perspective, it is difficult to envisage that the misappropriation sanctions in its current design will be the blueprint when EU is addressing successful revolutionary revolts where the ousted governments have consisted of kleptocrats.
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