Responsibility of Targeted Actors in the Context of Restrictive Measures: The Case of Belaeronavigatsia

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In the context of the Common Foreign and Security Policy (CFSP), the European Union may adopt restrictive measures, also known as sanctions, against natural or legal persons and groups or non-state entities. Such measures are one instrument – among many others – to achieve certain policy goals, including the protection of the Union's values and the advancement of fundamental rights, democracy, and the rule of law. There are sanctions of different kinds to coerce, constrain, or signal a targeted actor, and they are chosen and combined with a view to implement the most effective strategy. Belaeronavigatsia, a state-owned enterprise engaged in regulating airspace and providing air traffic assistance in Belarus, was deemed responsible for the repression of civil society and democratic opposition following its involvement in a flight diversion that ultimately led to the arrest of an opposition journalist and his companion. As a consequence, the Council froze its assets, a decision the enterprise contested by arguing that it could not be held 'responsible' for the referred act, and that the sanction was not in accordance with the principle of proportionality. The judgment in the case Belaeronavigatsia v. Council offers an overview of the main features of restrictive measures, reminds the interpretative criteria for undefined notions in Council's decisions and then clarifies the terms 'responsible for the repression' with a special focus on the element of causation, and assesses the principle of proportionality in an area influenced by political, economic, and social motivations, such as the CFSP.

Keywords: CFSP, restrictive measures, sanctions, freezing of funds, responsibility, causation, proportionality

1 INTRODUCTION

The guiding principles of the European Union's external action are contained in Article 21(1) of the Treaty on European Union,[1] largely matching the founding values outlined in Article 2 and linked with the statement regarding EU's relations with the wider world in Article 3(5). Such principles are 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms,

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1 ELI, http://data.europa.eu/eli/treaty/teu_2016/2020-03-01 (consolidated version). Accessed 9 Jun. 2023.

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respect for human dignity […] equality and solidarity, and respect for the principles of the United Nations Charter and international law'.

Freezing of funds and economic resources is one of the tools used by the EU to express concerns about what is believed to be an unacceptable behaviour on the international scene, and to reaffirm the Union's values – thus contributing to advance fundamental rights, democracy, and the rule of law. Within the conditionality policy followed by the European Union to protect and promote human rights, they would constitute one of the 'negative' conditionality elements.[2] Indeed, if preceded by a decision in the framework of the Common Foreign and Security Policy (CFSP) (Article 29 TEU), the Council may adopt 'restrictive measures' against natural or legal persons and groups or non-state entities (Article 215(2) of the Treaty on the Functioning of the European Union[3]). Restrictive measures in the latter provision are not limited to capital movements and payments, unlike the ones referred to in Article 75 TFEU within the scope of the area of freedom, security and justice – for the purpose of preventing and combating terrorism and related activities. Yet, in practice the economic and financial interests of those targeted are the main aspect affected.[4] This kind of measures are commonly known as 'sanctions', even if the term highlighted above encompasses both sanctions *stricto sensu* – imposed by an organization on its members, such as United Nations Security Council resolutions the EU gives effect to – and unilateral measures adopted on the Union's own initiative.[5]

Before turning to the background of the case analysed, *Belaeronavigatsia v. Council*,[6] it is worth recalling that restrictive measures are not punitive. Their aim is usually said to be putting pressure on a target party to make it change its policy, activities, or conduct. However, this would only capture the coercive aspect of sanctions, leaving aside the other two dimensions, namely constraining and signalling, which happen to be quite often their predominant purpose.[7] In the cited judgment, other than denying any punitive nature, the General Court underlines that sanctions are not administrative penalties, nor penalties for criminal offences as referred to in

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2 *See* Araceli Mangas Martín & Diego J. Liñán Nogueras, *Instituciones y Derecho de la Unión Europea* 153–155 (10th ed., Tecnos 2020).

3 ELI, http://data.europa.eu/eli/treaty/tfeu_2016/2020-03-01 (consolidated version). Accessed 9 Jun. 2023.

4 On the legal basis of restrictive measures, comparing Arts 75 and 215 TFEU, *see* Case C-130/10, *Parliament v. Council* [2012] ECLI:EU:C:2012:472; Claude Blumann & Louis Dubouis, *Droit matériel de l'Union européenne* 856–857 (8th ed., LGDJ 2019); Mangas Martín & Liñán Nogueras, *supra* n. 2, at 563–564; Ramses A. Wessel, *Common Foreign, Security and Defence Policy*, in *EU External Relations Law: Text, Cases and Materials* 312–313 (Ramses A. Wessel & Joris Larik eds, 2d ed., Hart Publishing 2020).

5 Mangas Martín & Liñán Nogueras, *supra* n. 2, at 563.

6 Case T-536/21, *Belaeronavigatsia v. Council* [2023] ECLI:EU:T:2023:66.

7 Francesco Giumelli, *How EU Sanctions Work: A New Narrative* 18–21 (European Union Institute for Security Studies 2013).

Article 49 of the Charter of Fundamental Rights of the European Union – thus no criminal-law aspect is to be found. Moreover, measures are targeted, something crucial to reduce unintended consequences – as explained in Principle 6 of the EU's *Basic Principles on the Use of Restrictive Measures (Sanctions)*.[8] Lastly, the freezing of assets does not amount to confiscating them, while applying for only a limited period of time and being reversible.[9] Quite logically, sanctions should be lifted when the objectives are met – so stated Basic Principle 9.[10]

Belaeronavigatsia v. Council finds its ultimate starting point in the restrictive measures that, since 2004, have been adopted on account of the political situation in Belarus. The more immediate background would be the renewed concerns arisen as a consequence of the questionable presidential elections held in that country in August 2020 – the European Union found they were not consistent with international standards. In this general context, Article 4(1)(a) of Decision 2012/642/CFSP,[11] and Article 2(4) of Regulation (EC) No 765/2006[12] as amended in November 2012, set out the freezing of all funds and economic resources owned, held, or controlled by natural or legal persons, entities, or bodies identified as being responsible for serious violations of human rights or the repression of civil society and democratic opposition, or whose activities otherwise seriously undermine democracy or the rule of law in Belarus.[13] The criterion of being 'responsible' for the described actions is at the core of the case, as will be seen below.

2 FACTS OF THE CASE

Belaeronavigatsia is a state-owned enterprise which provides air navigation services in Belarus. In particular, it is engaged in regulating airspace and controls air traffic. On 23 May 2021, a regular flight carrying an opposition journalist and his companion was diverted to Minsk airport, where they were detained and arrested. Considering the diversion had no valid justification and that it was politically motivated, the enterprise was included, as responsible for the repression of civil society and democratic opposition, on the lists of persons, entities, and bodies subject to the restrictive measures set out in the Decision and the Regulation

[8] 10198/1/04, REV 1, PESC 450, 7 Jun. 2004. The principles on the matter are now contained in the Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, 5664/18, 4 May 2018.

[9] Case T-536/21, *Belaeronavigatsia, supra* n. 6, paras 32–36.

[10] On the retention of a person or entity on a list of actors targeted by sanctions, *see* Case C-79/15 P, *Council v. Hamas* [2017] ECLI:EU:C:2017:584.

[11] Council Decision 2012/642/CFSP, of 15 Oct. 2012, concerning restrictive measures against Belarus (OJ L 285/1, 17 Oct. 2012).

[12] Council Regulation (EC) No 765/2006, of 18 May 2006, concerning restrictive measures against President Lukashenko and certain officials of Belarus (OJ L 134/1, 20 May 2006).

[13] Case T-536/21, *Belaeronavigatsia, supra* n. 6, paras 3–5, 28–29, 45, 53, 59.

mentioned in the previous section.[14] The targeted entity requested a review of the decision, but the Council decided to maintain its name on the lists until 28 February 2023, disregarding the observations submitted.[15]

Belaeronavigatsia filed an action under Article 263 TFEU to challenge the contested acts, seeking their annulment in so far as they concerned it, relying on two pleas in law. The first one was based on an error of assessment, centred on the notion of being 'responsible' for the repression, with a particular focus on the element of causation. The second one referred to an alleged violation of the principle of proportionality.[16] Both will be covered, but more emphasis is placed on the former because it raises more points.

3 CAUSATION AND RESPONSIBILITY

3.1 Preliminary remarks

Belaeronavigatsia argued that being 'responsible' in the sense of the relevant restrictive measures implied an intentional element, i.e., that the targeted entity deliberately participated in the repression of civil society and democratic opposition. Furthermore, it affirmed that the Council had established purely factual imputability of the diversion of the flight. The applicant tried to justify the diversion in its role as responsible for regulating airspace and providing air traffic assistance in accordance with the applicable international conventions. It claimed that its actions were in good faith, raising that it might have been manipulated by external services which had informed it of the presence of a bomb onboard. Lastly, it affirmed that the pilot had only been issued a recommendation to land in Minsk, thus being him the one who made the decision.[17]

Leaving aside other considerations and focusing now on the intentional element and factual imputability, the use of these arguments does not seem unreasonable if the grounds supplied by the Council in the contested acts are checked. The latter characterized Belaeronavigatsia as responsible for Belarusian air traffic control and therefore for diverting the flight. It subsequently affirmed that

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[14] Council Decision (CFSP) 2021/1001 of 21 Jun. 2021 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ L 219 I/67, 21 Jun. 2021); Council Implementing Regulation (EU) 2021/999 of 21 Jun. 2021 implementing Art. 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (OJ L 219 I/55, 21 Jun. 2021).

[15] Council Decision (CFSP) 2022/307 of 24 Feb. 2022 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ L 46/97, 25 Feb. 2022); Council Implementing Regulation (EU) 2022/300 of 24 Feb. 2022 implementing Art. 8a of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus (OJ L 46/3, 25 Feb. 2022).

[16] It is to note that Council Decision (CFSP) 2023/421 of 24 Feb. 2023 (OJ L 61/41, 27 Feb. 2023) has renewed Decision 2012/642/CFSP until 28 Feb. 2024, and the applicant remains on the list of natural and legal persons, entities, and bodies whose funds and economic resources are frozen.

[17] Case T-536/21, *Belaeronavigatsia, supra* n. 6, paras 18–21.

such diversion was 'politically motivated' and aimed at arresting the two people concerned. Since the arrests were deemed to be a form of repression against civil society and democratic opposition in Belarus, the responsibility of the enterprise for actions described in the restrictive measures followed.[18] It is important to mention here that, even if the reasons given for a measure are brief and concise, they may be sufficient and respect the rights of the defence. In general terms, the measure must take place in a context known to the targeted actor, thus allowing to understand its scope. Basically, the addressee must be able to understand the actions justifying the adoption of the act and to dispute its merits. The measure must additionally place the EU judicature in a position to review its legality.[19]

As the next sections will show, the judgment of the General Court explains both that intention was not required under the disputed criterion of being 'responsible' for the repression, and that causation is more complex than a pure material link.

3.2 The interpretation of the disputed criterion

According to the restrictive measures adopted, the freezing of funds and economic resources affects persons, entities, or bodies which are 'responsible for serious violations of human rights or the repression of civil society and democratic opposition, or whose activities otherwise seriously undermine democracy or the rule of law in Belarus'. However, the lack of any definition of being responsible in this sense leads to determine its meaning based on its usual meaning in everyday language, the context, and the purpose of the measures.[20] This is settled case-law, matching Article 31(1) of the Vienna Convention on the Law of Treaties of 23 May 1969.[21]

Concerning the context and purposes, the General Court elaborates on the conceptualization of restrictive measures and the background for the taken ones. Nothing suggests the need to find an intentional element to repress civil society and democratic opposition, or undermine democracy or the rule of law, to be deemed 'responsible' for such actions – conclusion reinforced by the non-punitive nature of the referred measures. Besides, this is fully in line with the usual meaning of the discussed term. One is said to be responsible for the consequences of some acts when he was aware, or could not reasonably be unaware, of those consequences.[22] In sum,

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18 *Ibid.*, paras 3–5, 28–29.

19 Case C-417/11 P, *Council v. Bamba* [2012] ECLI:EU:C:2012:718, paras 49–59; Case T-392/11, *Iran Transfo v. Council* [2013] ECLI:EU:T:2013:254, paras 22–29.

20 Case T-536/21, *Belaeronavigatsia, supra* n. 6, paras 24–25.

21 Case C-549/07, *Wallentin-Hermann* [2008] ECLI:EU:C:2008:771, para. 17; Case C-532/18, *Niki Luftfahrt* [2019] ECLI:EU:C:2019:1127, paras 31, 34.

22 Case T-536/21, *Belaeronavigatsia, supra* n. 6, paras 26–37.

responsibility in the context of the restrictive measures at issue requires, be it awareness that a given action or conduct would lead to repression or to undermine democracy and the rule of law, or unreasonable unawareness that it would be so.

On another level, the disputed criterion does not require the acts of repression to be repeated nor the violations of human rights to be systematic. It is also irrelevant the fact that the applicant is a legal person governed by public law and responsible for regulating airspace and providing air traffic assistance. The pertinent provisions of the Treaty and the contested acts make no distinction with regard to the nature of the actor or of its activities.[23]

3.3 Aspects to the proven, and the applicable standard of proof

Even if intention is not needed, in order to conclude that the sanction is well founded, some kind of legal wrong must be identified along with the intervention in the chain of events ending with the repression. This somehow recalls the two dimensions of the causal link in tort law, namely factual and legal causation – or '*conditio sine qua non*' and 'scope of liability' in the Principles of European Tort Law.[24] In the case at hand, two elements are to be established, namely that the actions of the targeted actor contributed to the repression of civil society and democratic opposition, and the awareness of unreasonable unawareness of the consequences of such actions. Concerning the standard of proof, it is certainly set at a lower threshold than in criminal law – where the required degree of belief reaches 'beyond a reasonable doubt' or 'virtual certainty'. A comparison with such degree for civil matters is more difficult to make due to the divergences among jurisdictions and systems, and a frequent lack of explicit indications in statutory law. In this regard, some set it at the same level as in criminal cases, but that coexists with preponderance of the evidence or balance of probability, and with in time conviction.[25] In *Belaeronavigatsia v. Council*, the General Court underlines that the presumption of innocence does not preclude the adoption of restrictive measures because of their non-punitive nature, while deeming sufficient to have a set of 'indicia sufficiently specific, precise and consistent' to satisfy the required standard of proof.[26]

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[23] *Ibid*., paras 39, 59.

[24] Jaap Spier, *Chapter 3. Causation*, in *Principles of European Tort Law: Text and Commentary* 43–44, 59–60 (European Group on Tort Law, Springer 2005); Cees van Dam, *European Tort Law* 310–311 (2d ed., Oxford University Press 2013).

[25] Ingeborg Puppe & Richard W. Wright, *Causation in the Law: Philosophy, Doctrine and Practice*, in *Causation in European Tort Law* 55 (Marta Infantino & Eleni Zervogianni eds, Cambridge University Press 2017). For an overview of the standard of proof in common law and civil law countries, with regard to both criminal and civil matters, *see* Bohdan Karnaukh, *Standards of Proof: A Comparative Overview from the Ukrainian Perspective*, 2(10) Access J. E. Eur. 28–32 (2021), doi: 10.33327/AJEE-18-4.2-a000058.

[26] Case T-536/21, *Belaeronavigatsia, supra* n. 6, paras 38, 60.

Such benchmark is no stranger in EU case-law. For instance, in a judgment concerning Directive 85/374/EEC on liability for defective products,[27] *W and Others*, the Court interpreted the text as not preventing a national court from concluding that there is a defect and a causal link between defect and damage when, lacking scientific evidence on the matter – either establishing or ruling it out – 'certain factual evidence relied on by the applicant constitutes serious, specific and consistent evidence' enabling it to reach such conclusion.[28] In the context of the CFSP, and regarding the freezing of funds of certain persons and entities, the discussed standard is commonly applied. In *Anbouba v. Council*, the Court found a set of 'indicia sufficiently specific, precise and consistent' to establish that the targeted person was linked to the Syrian political regime being combated.[29] Citing the previous judgment, in *Badica and Kardiam v. Council* the General Court reaffirmed that 'the Council discharges the burden of proof borne by it if it presents to the EU Courts a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the entity subject to a measure freezing its funds and the regime or, in general, the situations, being combated'.[30]

3.4 Contribution to the repression of the democratic opposition

From a material point of view, it cannot be put into question that the diversion of the flight and subsequent landing at Minsk airport led to the arrest of an opposition journalist and his companion, nor the link between the applicant and the political regime being combated.

The applicant is a state-owned enterprise responsible for regulating airspace and provides air traffic assistance. The diversion took place following a recommendation issued by the enterprise through an air traffic controller who was in contact with the pilot of the flight. The fact that the recommendation was not made by the airline, nor by the airports of departure or of arrival, results from a transcript of the communications between pilot and controller contained in the Council's evidence that based the decision to include Belaeronavigatsia on the lists of people and entities subject to sanctions. The connection between the recommendation and the arrest can easily be established, and the Court uses a *conditio sine qua non* or but-for test: 'without the applicant's recommendation to land at Minsk airport, flight FR4978 would not have

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[27] Council Directive 85/374/EEC of 25 Jul. 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210/29, 7 Aug. 1985).

[28] Case C-621/15, *W and Others* [2017] ECLI:EU:C:2017:484.

[29] Case C-605/13 P, *Anbouba v. Council* [2015] ECLI:EU:C:2015:248, paras 51, 52, 54.

[30] Case T-619/15, *Badica and Kardiam v. Council* [2017] ECLI:EU:T:2017:532, para. 99.

been diverted to that airport and [that] diversion led to the arrest'. The next step is characterizing the arrest as an act of repression against civil society and democratic opposition, something not difficult for the Court to make. *First*, the arrest happened some months after the 2020 presidential elections in Belarus. *Second*, these elections were not considered in conformity with international standards, and they were said to have been followed by an intensification of the violations of human rights and repression of opponents of the regime in power. And *third*, the journalist arrested was charged with terrorism offences, his activities as journalist and opponent being connected with those charges. The conclusions drawn when the enterprise was first included on the lists of actors subject to sanctions were reinforced by information becoming available at a later time.[31]

The elements just presented lead to the conclusion that the factual basis for the decision was sufficiently solid, as required to ensure the effectiveness of the judicial review guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. It is settled EU's case-law, on the one hand, that evidence and information in that regard must be examined contextualized,[32] and, on the other, that that review cannot be limited to an abstract assessment of the strength of the factual allegations giving rise to sanctions – it is needed to verify whether at the very least one of the reasons for the adoption of measures is detailed and specific enough, substantiated, and deemed sufficient in itself to support that decision[33] – the annulment of the decision would not be justified just because the other reasons are not.[34]

3.5 Awareness, or unreasonable unawareness, of the consequences of the actions

A series of indicia also support the conclusion that Belaeronavigatsia could not reasonably be unaware that its actions leading to the diversion of the flight were contributing to the repression of civil society and democratic opposition. At least, the applicant had to know that aviation safety concerns were not motivating such diversion, while happening in the aftermath of the 2020 presidential elections in Belarus.

Among other things, the day of the flight diversion, the applicant's Director-General and another individual – ultimately belonging to the Belarusian State Security Committee – spoke with the air traffic controller's supervisor, who subsequently informed the controller about the aircraft having a bomb onboard. At

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31 Case T-536/21, *Belaeronavigatsia, supra* n. 6, paras 40–47.
32 C-605/13 P, *Anbouba, supra* n. 29, para. 50; Case T-619/15, *Badica and Kardiam, supra* n. 30, para. 99.
33 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v. Kadi* [2013] ECLI:EU:C:2013:518, para. 119; C-605/13 P, *Anbouba, supra* n. 29, para. 45; Case T-619/15, *Badica and Kardiam, supra* n. 30, paras 97–98.
34 Case T-619/15, *Badica and Kardiam, supra* n. 30, para. 98.

that moment, the aircraft was however not in Belarussian's airspace, but Ukraine's. Therefore, the controller was told to wait to notify the pilot about the threat, in order to avoid an eventual decision to land at the nearest airport, which was not located in Belarus. Furthermore, the air traffic controller's answers to the pilot were all guided by the individual accompanying the applicant's Director-General. Later investigations confirmed the conclusions drawn when the sanctions were first adopted. Moreover, responsibility had to fell on the legal person and not – or not only – on specific representatives and employees involved. These agents were not acting for their own benefit, but on behalf of the enterprise, in the context of the duties entrusted to them, and using its resources and powers.[35]

The legal wrong underlying behind the requirement of 'awareness or unreasonable unawareness' precludes holding responsible all those playing an instrumental role resulting in the arrest of the opposition journalist and his companion. The General Court states that the proper interpretation of the disputed criterion does not make irrelevant the substantive classification of any activity contributing to the repression in the sense of the *conditio sine qua non* test, such as the one of the air traffic controller. Only conducts susceptible of being classified as acts of repression of civil society and democratic opposition are meaningful, thus excluding actions lacking by their nature any intrinsic connection with it.[36] This brings to mind the approaches used in different legal cultures to limit causation – i.e., to assess which one of the causes must be legally relevant, such as the direct cause, foreseeability, or adequacy.[37] It could also be put in relation with the factors used in Article 3:201 of the Principles of European Tort Law to establish legal causation or the 'scope of liability', most notably foreseeability of the damage, the nature and the value of the protected interest, and the protective purpose of the rule.[38]

In *Bank Refah Kargaran v. Council*, the Court affirmed that EU Courts do have jurisdiction to rule on an action brought by persons or entities subject to restrictive measures seeking damages for the harm caused by the sanctions imposed in CFSP decisions.[39] Following the judgment, scholars welcomed the increased protection of the rights of actors targeted by sanctions, while also pointing out that such judgment could have an impact on the Council – which might be more cautious when addressing the adoption and duration of restrictive measures against somebody. Nevertheless, they underlined that such impact could be more theoretical than practical because of the conditions to hold the Union non-contractually liable: the rule of EU law infringed must be intended to confer rights on

[35] Case T-536/21, *Belaeronavigatsia, supra* n. 6, paras 48–54, 58, 63.
[36] *Ibid*., paras 56–57.
[37] *See* van Dam, *supra* n. 24, at 342.
[38] *See* Spier, *supra* n. 24, at 60–63.
[39] Case C-134/19 P, *Bank Refah Kargaran v. Council* [2020] ECLI:EU:C:2020:793, para. 43.

individuals, the breach of that rule must be sufficiently serious, and there must be a direct causal link between the breach and the damage sustained by the injured parties.[40] Particularly hard to meet the first two, considering the highly political dimensions of the policy decisions by the Council.[41] It seems obvious that setting the standard of proof on 'indicia' affects the chances of success of a liability claim, even if clues must be 'sufficiently specific, precise and consistent'. In this context, some remarks made in the case *W and Others* on liability for defective products can be used by analogy for our purposes here.

The effectiveness of the restrictive measures compels not to render practically impossible or excessively difficult to justify their adoption, reason why demanding only indicia is entirely reasonable. After all, and not without acknowledging the heterogeneity of the possible situations, it is fair to assume that the powers of investigation where the actions are undertaken and the targeted actors are located may be severely limited, coupled with the eventual urgency to adopt sanctions.[42] In any event, the burden of proof remains on the Council even if the standard is set at the level of indicia. Consequently, this makes it easier to base a decision, but the Council will still have to prove the factual elements anchoring its conclusion. The standard must not be applied in such a way that unjustified presumptions are introduced in practice – for instance, relying on irrelevant evidence. Lastly, indicia must be 'sufficiently specific, precise and consistent', adjectives to which one could add their seriousness.[43]

4 THE PRINCIPLE OF PROPORTIONALITY

As already noted, the applicant in *Belaeronavigatsia v. Council* also challenged the contested acts on the basis of a violation of the principle of proportionality. Indeed, the use of Union competences is governed by the principles of subsidiarity and proportionality (Article 5(1) TEU), and regarding the latter Article 5(4) TEU clarifies that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. This principle requires measures adopted by EU institutions to be appropriate or suitable for attaining the legitimate objectives pursued, to be the less onerous or restrictive ones necessary to attain them when there is a choice between several appropriate measures, and not

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40 Case C-352/98 P, *Bergaderm and Goupil v. Commission* [2000] ECLI:EU:C:2000:361, paras 41–42.

41 Graham Butler & Ramses A. Wessel, *Jurisdiction of the Court for Non-contractual Liability and Actions for Damages Claims Within the CFSP: Bank Refah Kargaran*, in *EU External Relations Law: The Cases in Context* 997–998 (Graham Butler & Ramses A. Wessel eds, Hart Publishing 2022).

42 *See* Opinion of Advocate General Bot in *Anbouba v. Council*, delivered on 8 Jan. 2015, ECLI:EU:C:2015:2, points 53, 55, 171, 206. For a summary of the requirements relating to the burden of proof in matters concerning restrictive measures, *see* points 127–131 of the same Opinion.

43 Case C-621/15, *W and Others*, *supra* n. 28, paras 26–29, 34–37.

to impose a disproportionate burden in the sense that a balance is maintained between the objective pursued and the interests harmed.[44]

The principle of proportionality is a criterion for the lawfulness of any act of the institutions of the Union.[45] Having said that, when the act concerns an area involving political, economic, and social choices, where assessments are complex – such as the CFSP, the European Union is allowed a broad discretion. That is why the legality of a measure in this kind of fields can be affected only if it is 'manifestly inappropriate' to attain the objective pursued.[46] Scholars highlight how, in the application of the principle of proportionality, EU Courts are more stringent with regard to measures adopted by the Member States which may limit a right granted by EU law than when the assessment concerns an act of the Union itself. It has also been said that, in the latter situation, some voices believe the analysis relies almost exclusively on the appropriateness, while the other two requirements of the principle as established in case-law are somehow shadowed. However, in fact the Court checks all three even if from a pure formal perspective, the suitability of the measure seems to prevail.[47] This can also be said of *Belaeronavigatsia v. Council*.

The Court dismisses the argument related with the fact that both the applicant and its director have been penalized, whereas the try of the applicant to place the responsibility on the specific members of its staff who intervened on the flight diversion is unsuccessful. The main element to base the reasoning is the margin the Council has to determine the best way to implement restrictive measures. The severity of the sanctions and the negative consequences for the targeted actor derived thereof is acknowledged, but it is justified on two grounds. First, consistency with the objectives pursued. Second, the profits made recently by the enterprise, and the lack of any precise evidence regarding the risks that its operations may be jeopardized in the long run. Finally, the possibility to obtain authorizations to dispose of, or transfer, funds is considered unworkable in practice by the targeted actor, because of being unsuited to the specifics of aviation safety operations. However, no concrete evidence in support of that argument was given.[48]

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[44] Joined Cases C-581/10 and C-629/10, Nelson and Others [2012] ECLI:EU:C:2012:657, para. 71; Alan Meneghetti & Thomas van der Wijngaart, *Disproportionate Jurisprudence: The CJEU's Approach to Proportionality in Regulation 261/2004*, in *From Lowlands to High Skies – A Multilevel Jurisdictional Approach Towards Air Law: Essays in Honour of John Balfour* 164–165 (Pablo Mendes de Leon ed., Martinus Nijhoff Publishers 2013); Marc Blanquet, *Droit général de l'Union européenne* 124–125 (11th ed., Sirey 2018).

[45] Case T-319/11, *ABN Amro Group v. Commission* [2014] ECLI:EU:T:2014:186, para. 75.

[46] Case C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Naft* [2013] ECLI:EU:C:2013:776, para. 120; Case C-72/15, *Rosneft* [2017] ECLI:EU:C:2017:236, para. 146; Case T-536/21, *Belaeronavigatsia, supra* n. 6, para. 68.

[47] *See* Blanquet, *supra* n. 44, at 125–127.

[48] Case T-536/21, *Belaeronavigatsia, supra* n. 6, paras 63–65, 69–74.

To close up the remarks on the principle of proportionality, it is worth noting both the complexity of the scenarios where the European Union's external action may take place, and how this influences the effectiveness of sanctions depending on their approach and characteristics. In particular, the freezing of assets may have a varying impact depending on the profile of those targeted, the number of actors subject to sanctions, and the sector affected. Careful analyses are strongly recommended to avoid negative side-effects and hamper the achievement of the policy goals.[49]

5 CONCLUSIONS

Taking the *Belaeronavigatsia v. Council* case as anchor, this study has covered several issues concerning restrictive measures in the context of the CFSP. The referred judgment is interesting because it recalls the fundamentals of sanctions and the interpretative criteria for undefined notions in Council's decisions, reaffirms the standard of proof of causation in this field – placed at indicia sufficiently specific, precise, and consistent, and confirms the assessment of the principle of proportionality in areas influenced by political, economic, and social considerations.

The way all these aspects are translated into, and applied in, other scenarios may give rise to frictions, due to their heterogeneity. This is the reason why, before implementing restrictive measures, it is important to have in mind that they are just one policy tool among many others, and to check how all of them might interact.

[49] Giumelli, *supra* n. 7, at 23.