


Research article

Are EU restrictive measures really targeted, temporary and preventive? The case of Belarus

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Abstract

Questions related to the EU's ability to foster change in the behaviour of third countries through sanctions have gained salience over the past three decades. This article explores how the nature and type of EU restrictive measures, initially conceived as targeted, preventive and temporary measures, have evolved considerably since then. The EU sanctions against Belarus are used as an illustrative case study in order to shed light on the evolutions within the EU's sanctions practice. This article first examines the erosion of the targeted character of EU sanctions against Belarus through the broadening of listing criteria and the increasing recourse to sectoral sanctions. It then questions the temporary character of EU sanctions against Belarus by highlighting their indefinite duration and cyclicity. Last but not least, it is argued that EU sanctions against Belarus have an increasingly punitive character. The article concludes with an analysis of the implications that the EU's evolving sanctions practice can have for the current EU's sanctions policy toward Belarus as well as for its other sanctions regimes.

Keywords Belarus; common foreign and security policy; targeted restrictive measures; sectoral economic sanctions; punitive measures

1. Introduction

Since August 2020, Belarus has found itself once again at the forefront of the European Union's (EU) foreign policy and of its restrictive measures framework. In response to the events that have unfolded since the 2020 presidential elections in Belarus, the EU has adopted a series of (additional) restrictive measures against that country.¹ The EU's reaction has been an eloquent illustration of how the EU uses restrictive measures in the framework of its Common and Foreign Security Policy (CFSP). Restrictive measures, often simply referred to as 'sanctions', are one of the most popular instruments of the EU's foreign policy, with more than 70 per cent of CFSP decisions being about the creation or modification of EU sanctions regimes.² The Council has defined them as 'measures imposed by the EU to bring about a change in policy or activity by the target country, part of country, government, entities or individuals'.³ They have been described as being intended to induce a change in behaviour, to deter from some action, to punish or isolate a State.⁴ The EU restrictive measures toolbox includes a broad set of measures ranging from travel bans and asset freezes to export bans and restrictions on access to financial markets. As stressed by the Council, the choice of a specific restrictive measure depends on the policy objectives and the likely effectiveness of sanctions in achieving these objectives.⁵

¹ See, in particular, Council Implementing Decision (CFSP) 2020/1388 implementing Decision 2012/642/CFSP concerning restrictive measures against Belarus [2020] OJ L319/13; Council Implementing Regulation (EU) 2020/1387 implementing Article 8a(1) of Regulation (EC) 765/2006 concerning restrictive measures in respect of Belarus [2020] OJ L319/1; Council Implementing Decision (CFSP) 2020/1650 implementing Decision 2012/642/CFSP concerning restrictive measures against Belarus [2020] OJ L370/9; Council Implementing Regulation (EU) 2020/1648 implementing Article 8a(1) of Regulation (EC) 765/2006 concerning restrictive measures in respect of Belarus [2020] OJ L370/1; Council Implementing Decision (CFSP) 2020/2130 implementing Decision 2012/642/CFSP concerning restrictive measures against Belarus [2020] OJ L426/14; Council Implementing Regulation (EU) 2020/2129 implementing Article 8a(1) of Regulation (EC) 765/2006 concerning restrictive measures in respect of Belarus [2020] OJ L426/1; Council Implementing Decision (CFSP) 2021/1002 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus [2021] OJ L219/70; Council Regulation (EU) 2021/996 amending Regulation (EC) 765/2006 concerning restrictive measures in respect of Belarus [2021] OJ L219/1; Council Implementing Regulation (EU) 2021/997 implementing Article 8a(1) of Regulation (EC) 765/2006 concerning restrictive measures in respect of Belarus [2021] OJ L219/3; Council Implementing Decision (CFSP) 2021/2125 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus [2021] OJ L430/16; Council Implementing Regulation (EU) 2021/2124 implementing Article 8a(1) of Regulation (EC) 765/2006 concerning restrictive measures in respect of Belarus [2021] OJ L430/1; Council Decision (CFSP) 2022/354 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial independence of Ukraine [2022] OJ L66/14; Council Implementing Regulation (EU) 2022/353 implementing Regulation (EU) 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L66/1; Council Decision (CFSP) 2022/356 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus [2022] OJ L67/103; Council Regulation (EU) 2022/355 amending Regulation (EC) 765/2006 concerning restrictive measures in view of the situation in Belarus [2022] OJ L67/1; Council Decision (CFSP) 2022/882 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L153/88; Council Regulation (EU) 2022/877 amending Regulation (EC) 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L153/11; Council Implementing Decision (CFSP) 2022/881 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L153/77; Council Implementing Regulation (EU) 2022/876 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L153/1.

² Ramses A Wessel, Elias Anttila, Helena Obenheimer and Alexandru Ursu, 'The Future of EU Foreign, Security and Defence Policy: Assessing Legal Options for Improvement' (2021) 26(5–6) *European Law Journal* 375.

³ Council of the European Union, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy 5664/18 (2018), para 4.

⁴ See, for instance, James Barber, 'Economic Sanctions as a Policy Instrument' (1979) 55(3) *International Affairs* 367; Paul Cardwell, 'The Legalisation of EU Foreign Policy and the Use of Sanctions' (2015) 17(1) *Cambridge Yearbook of European Legal Studies* 287.

⁵ Council Guidelines (n 3) para 14.

Since the first adoption of restrictive measures by the EU in the 1980s,⁶ their legal characteristics and framework have evolved considerably due to treaty revisions and the influence of the case law of the Court of Justice of the European Union (CJEU or 'the Court').⁷ Restrictive measures are now fully part of the EU legal order. They must comply with international law and respect human rights and fundamental freedoms, in particular due process rights.⁸

Three main legal features of EU restrictive measures have progressively emerged. First, due to a general shift from broad sanctions (such as embargoes) against sanctioned countries to 'smart sanctions', the EU ought to use targeted restrictive measures instead.⁹ It must target specific persons and/or entities in accordance with precise and pre-established criteria. Second, EU restrictive measures have been described as temporary and reversible measures,¹⁰ that is, that they are meant to be lifted once their objectives have been achieved.¹¹ Third, EU restrictive measures are alleged to be 'preventive in nature' and non-punitive,¹² meaning that they are not construed as sanctions against a country or group of persons or entities but as an incentive for the latter to change a specific behaviour.¹³

These are, therefore, the main features that every set of EU restrictive measures is supposed to share. Do they still reflect, however, the reality of the EU's sanctions practice? In view of the diversification of EU restrictive measures and their more extended average duration, can it still be argued that they are fully targeted, temporary and non-punitive?

This article aims to unveil a question of fundamental importance for both the theoretical understanding of sanctions and their practical implementation and effectiveness. It is argued that EU restrictive measures no longer fully reflect these three features. This hypothesis is demonstrated by using the case study of the EU restrictive measures on Belarus. There are three considerations for this choice of case study. First, the sanctions regimes imposed against Belarus have been some of the most comprehensive and lengthy ones. They have included a broad range of measures, from travel bans to arms embargoes. Second, the cyclical nature of EU sanctions on Belarus allows for a comparison of the evolution of the listing criteria and of the delistings by the Council. Third, the EU sanctions against Belarus are still in place and have been updated in 2020, 2021 and 2022. This analysis also relied on data surrounding other frameworks of restrictive measures in order to trace the evolution of the three alleged characteristics of EU sanctions over time.

The article starts with an overview of the global trend within the policy of restrictive measures over the last decades, namely their emergence as a distinct foreign policy (Section 2). On the basis of the Belarus case study as well as of collected empirical data on different sanctions regimes, the article demonstrates that it would be an oversimplification to call EU sanctions targeted (Section 3), temporary (Section 4) and non-punitive (Section 5). The article proposes a rethinking of the EU's sanctions policy by stressing the need for a thorough impact assessment, strategic planning, parliamentary oversight over sanctions, better coordination between Member States, and a better articulation of the conditions for the review and lifting of sanctions (Section 6).

⁶ See, for instance, Council Regulation (EEC) 596/82 amending the import arrangements for certain products originating in the USSR [1982] OJ L72/15; Council Regulation (EEC) 597/82 suspending in respect of Greece certain commercial policy measures applicable to imports originating in the USSR [1982] OJ L72/19; Council Regulation (EEC) 877/82 suspending imports of all products originating in Argentina [1982] OJ L102/1.

⁷ On the main evolutions of the CFSP and of the legal frameworks for restrictive measures see, for instance, Piet Eeckhout, 'A Panorama of Two Decades of EU External Relations Law' in Anthony Arnall, Piet Eeckhout and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (OUP 2008) 323–37; Inge Govaere, 'Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon' (2011) 13 *Cambridge Yearbook of European Legal Studies* 87; Christina Eckes, 'The Law and Practice of EU Sanctions', in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 206; Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (Hart Publishing 2019); Kevin Urbanski, *The European Union and International Sanctions – A Model of Emerging Actorness* (Edward Elgar Publishing 2020).

⁸ See, in particular, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat v Council* [2008] ECLI:EU:C:2008:461; 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; Council Guidelines (n 3) para 9.

⁹ See, in particular, Council Guidelines (n 3) paras 13–14.

¹⁰ See, for instance, Joined Cases T-37/07 and T-323/07 *El Morabit v Council* [2009] EU:T:2009:296, para 40; Case T-592/11 *Anboubia v Council* [2013] EU:T:2013:427, para 40; Case T-485/15 *Alsharghawi v Council* [2016] EU:T:2016:520, para 69.

¹¹ See, in particular, Council Guidelines (n 3) para 35.

¹² See, for instance, *ibid* 45; Joined Cases C-584/10 P, C-593/10 P & C-595/10 P *Commission and Others v Kadi*, para 130.

¹³ See, in particular, Council Guidelines (n 3) para 4.

2. Restrictive measures as a distinct foreign policy?

Before delving into an analysis of the main features of EU restrictive measures, some details are necessary to understand their place within the EU's foreign policy. This section argues that restrictive measures have become a distinct EU foreign policy.

Restrictive measures are defined by the EU as instruments intended to 'bring about a change in policy or activity by the target country, part of country, government, entities or individuals'.¹⁴ They can consist of asset freezes, travel bans, arms embargoes, embargoes on equipment that might be used for internal repression, other export restrictions (targeting specific sectors) or import restrictions.¹⁵ The EU can also implement a ban on the provision of financial services and/or investment bans against a targeted country,¹⁶ or a prohibition on EU operators satisfying certain contractual claims emanating from the third country concerned.¹⁷ Finally, as exemplified by the restrictive measures against Belarus or Russia, the EU can also implement flight bans,¹⁸ restrictions on access to its airspace¹⁹ and ports,²⁰ or a ban on land road transport.²¹

CFSP restrictive measures are adopted according to a double-step system: the Council first adopts a CFSP Decision under Article 29 Treaty on European Union (TEU). Based on the allocation of competences between the EU and Member States, the measures provided in the CFSP Decision are then implemented either at EU or national level. Measures such as arms embargoes or travel bans are implemented by Member States. Other measures, such as asset freezes and sectoral restrictions, require an implementation at EU level and, thus, the adoption of a Council Regulation on the basis of Article 215 Treaty on the Functioning of the European Union (TFEU). As indicated in the CFSP decisions and in the Council Guidelines,²² restrictive measures are officially adopted for a defined period (usually 6–12 months) and must thus frequently be reviewed and renewed.

The use of restrictive measures by the EU has increased steadily over recent decades, turning these legal instruments into, undeniably, the most used tool in the EU's foreign policy as a response to international situations.²³ This phenomenon has manifested itself in several ways. First, the number of third countries targeted by EU restrictive measures has multiplied. While in the 1980s the EU sanctioned only a handful of countries (such as Argentina²⁴ or the USSR),²⁵ 40 country-related sets of restrictive measures, targeting 31 countries, are currently in force.²⁶

¹⁴ *ibid* para 4.

¹⁵ *ibid* para 14.

¹⁶ *ibid*.

¹⁷ See, for instance, Council Regulation (EC) 1264/94 prohibiting the satisfying of claims by the Haitian authorities with regard to contracts and transactions the performance of which was affected by the measures imposed by or pursuant to United Nations Security Council resolutions 917 (1994), 841 (1993), 873 (1993) and 875 (1993) [1994] OJ L139/4.

¹⁸ Council Decision (CFSP) 2021/908; Council Regulation (EU) 2021/907.

¹⁹ Council Decision (CFSP) 2022/335 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L57/4; Council Regulation (EU) 2022/334 amending Council Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L57/1.

²⁰ Council Decision (CFSP) 2022/582 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L110/55; Council Regulation (EU) 2022/576 amending Council Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L111/1.

²¹ Council Decision (CFSP) 2022/582; Council Regulation (EU) 2022/576.

²² Council Guidelines (n 3) paras 6 and 31.

²³ Wessel et al (n 2) 375.

²⁴ Council Regulation (EEC) 877/82.

²⁵ Council Regulation (EEC) 596/82 and Council Regulation (EEC) 597/82.

²⁶ A list of all EU sanctions regimes currently in force is available at <<https://www.sanctionsmap.eu/#/main>>. Several sanctions instruments, such as those targeting Bosnia, China in relation to the events at the Tiananmen Square protests of 1989, Haiti, Lebanon or Montenegro do not contain any listed persons or entities (either because the EU has not used such sanctions regimes yet or because they only provide for a prohibition to satisfy claims). They nevertheless illustrate the wide number of countries targeted by EU restrictive measures.

Second, the EU has adopted restrictive measures in order to pursue an increasingly diversified range of objectives. Sanctions are now adopted to counter terrorism²⁷ or nuclear proliferation,²⁸ or in order to protect the territorial integrity of a third country.²⁹ The EU has also increasingly enacted restrictive measures to promote its values, democracy and the rule of law. This has been exemplified by the adoption of country sanctions linked to human rights abuses³⁰ or misappropriations of State funds,³¹ or the enactment of the first EU Global Human Rights sanctions³² regime. More recently, and in response to the migration situation at the border between Poland and Belarus, the EU has amended its sanctions regime against the latter to target persons and entities 'contributing to activities by the Lukashenka regime that facilitate illegal crossing of the EU's external borders'.³³ This diversification of objectives has also led to a significant shift in the geographical scope of EU sanctions. While most EU sanctions remain connected to the situation in a specific third country, the EU increasingly adopts thematic, horizontal sanctions regimes. In addition to its counter-terrorism sanctions, the EU adopted restrictive measures against the proliferation and use of chemical weapons³⁴ in 2018, against cyber-attacks³⁵ in 2019 and, as stated above, against serious human rights violations and abuses³⁶ in 2020. More recently, the European Parliament has called for the creation of a sanctions regime against disinformation.³⁷

Finally, the EU has showed its willingness to adopt unilateral restrictive measures. While the first EU sanctions were only adopted to comply with the Member States' obligation to implement sanctions adopted through United Nations (UN) Security Council resolutions, most of today's EU sanctions regime are not, or only partially, UN based. Among the 45 EU sanctions regimes currently in force, eight are entirely UN based (i.e., the EU has only targeted persons and/or entities that are listed at EU level), 11 are partly autonomous (meaning that the EU went beyond the UN's sanctions list by targeting additional persons and entities) and 26 are entirely autonomous (meaning that no sanctions regime was adopted at UN level).³⁸ The fact that a large majority of EU sanctions regimes either go beyond UN sanctions or

²⁷ See, for instance, Council Common Position on the application of specific measures to combat terrorism [2001] OJ L344/93 and Council Regulation (EC) 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L344/70, as amended by subsequent legal acts.

²⁸ Council Decision 2010/413/CFSP concerning restrictive measures against Iran and repealing Common Position 2007/410/CFSP [2010] OJ L195/39 and Council Regulation (EU) 267/2012 concerning restrictive measures against Iran and repealing Regulation (EU) 961/2010 [2010] OJ L88/1.

²⁹ Council Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L78/16; Council Regulation (EU) 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L78/6.

³⁰ See, for instance, Council Decision 2011/235/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Iran [2011] OJ L100/51; Council Regulation (EU) 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran [2011] OJ L100/1.

³¹ See, for instance, Council Decision 2011/72/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia [2011] OJ L28/62; Council Regulation (EU) 101/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia [2011] OJ L31/1; Council Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2014] OJ L66/26; Council Regulation (EU) 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2014] OJ L66/1.

³² Council Decision 2020/1999 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410/13; Council Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410/1.

³³ Council Decision (CFSP) 2021/1990 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus [2021] OJ L405/10; Council Regulation (EU) 2021/1985 amending Regulation (EC) 765/2006 concerning restrictive measures in respect of Belarus [2021] OJ L405/1.

³⁴ Council Decision (CFSP) 2018/1544 concerning restrictive measures against the proliferation and use of chemical weapons [2018] OJ L259/25; Council Regulation (EU) 2018/542 concerning restrictive measures against the proliferation and use of chemical weapons [2018] OJ L259/12.

³⁵ Council Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2019] OJ L129/13; Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2019] OJ L129/1.

³⁶ Council Decision 2020/1999; Council Regulation (EU) 2020/1998.

³⁷ See European Parliament, Draft Report of 18 October 2021 on foreign interference in all democratic processes in the European Union, including disinformation (2020/2268(INI)); European Parliament Press Release, 'EU should build a sanctions regime against disinformation' (25 January 2022) <<https://www.europarl.europa.eu/news/en/press-room/20220119IPR21313/eu-should-build-a-sanctions-regime-against-disinformation>> accessed 15 February 2022.

³⁸ The present numbers rely on the quantitative data on restrictive measures accessible at <<https://www.sanctionsmap.eu/#/main>>.

are adopted outside any UN framework is a sharp indicator of the emergence of restrictive measures as an independent EU foreign policy tool.

Restrictive measures have thus become a tool that is almost automatically used by the EU when facing an international situation which it considers contrary to international law and/or the values it promotes. This might be due primarily to symbolic considerations: restrictive measures allow policy makers to display strong leadership in crisis situations.³⁹ Authors such as Hugo Flavier have, however, argued that the multiplication of restrictive measures has been such that it can be questioned whether sanctions are not in fact becoming a foreign policy in their own right whereas, on the contrary, they should be a mere supporting instrument to a foreign policy.⁴⁰ The recent creation of coordinating programmes for the implementation of restrictive measures against Russia, such as the Commission's 'Freeze and Seize' Taskforce⁴¹ or Europol's Operation OSCAR,⁴² is a further indicator of that. Even more interestingly, the publication by the Commission of its Guidelines on foreign direct investment originating from Russia and Belarus in the light of the sanctions targeting these countries⁴³ reflects how restrictive measures are now impacting, and interacting with, other areas of EU policies.

This emergence of restrictive measures as an almost 'normal' tool of foreign policy, or as a distinct foreign policy, can also be seen in the evolution of the treaties. Previous legal bases for the adoption of EU restrictive measures, such as Article 73g TEC and then Article 60 TEC, provided that the Council, acting by qualified majority upon a Commission proposal, took the 'necessary urgent measures'. Such reference to the emergency nature of restrictive measures is no longer included in the successor to these provisions, namely Article 75 TFEU, which provides for the adoption of restrictive measures in the framework of the Area of Freedom, Security and Justice (AFSJ). Its CFSP counterpart, namely Article 215 TFEU, has likewise omitted any mention of emergency. As argued by Hugo Flavier, the disappearance of the reference to 'necessary urgent measures' was due to the fact that it was not necessary:⁴⁴ most EU restrictive measures, be they AFSJ or CFSP based, have been adopted in reaction to urgent situations. This evolution in the wording of current Article 75 TFEU and, indirectly, of Article 215 TFEU, might nevertheless have further 'normalised' the use of sanctions.

It is in this context of normalisation of EU restrictive measures that their intrinsic characteristics will be analysed. The increasing and almost automatic use of EU restrictive measures in response to international challenges has had visible consequences for the features of these legal instruments. It has created a gap between the characteristics of sanctions 'on paper' and the reality of their implementation. The next section exemplifies this by exploring the evolution of a first aspect of restrictive measures: their targeted nature.

3. Are restrictive measures still targeted?

The mid-1990s were marked by a revolution in the sanctions practice worldwide. The UN acknowledged the negative humanitarian consequences of broad economic measures against third States and induced a shift to 'smart' and targeted measures. Their logic is to maximise the impact on the responsible decision-makers, while minimising the suffering of ordinary people. The EU followed the UN's lead, and since then EU restrictive measures have usually been accompanied by the word 'targeted'. This definition is, however, difficult to square with the reality, which is more nuanced. There has been a shift

³⁹ See, in particular, Taehee Whang, 'Playing to the Home Crowd? Symbolic Use of Economic Sanctions in the United States' (2011) 55(3) *International Studies Quarterly* 787.

⁴⁰ Hugo Flavier, 'Réflexions sur la démocratisation des relations extérieures à l'aune du contentieux de l'accès aux documents / Reflections on the Democratisation of External Relations in the Light of the Case Law on Access to Documents' in Eleftheria Neframi and Mauro Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 276.

⁴¹ See Commission Press release 'Enforcing sanctions against listed Russian and Belarusian oligarchs: Commission's "Freeze and Seize" Task Force steps up work with international partners (17 March 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1828> accessed 20 March 2022.

⁴² See Europol Press release 'EU-wide operation targeting criminal assets in relation to the Russian invasion of Ukraine' (11 April 2022) <<https://www.europol.europa.eu/media-press/newsroom/news/eu-wide-operation-targeting-criminal-assets-in-relation-to-russian-invasion-of-ukraine>> accessed 5 May 2022.

⁴³ Commission Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions [2022] C/151/1.

⁴⁴ Hugo Flavier, *La contribution des relations extérieures à l'ordre constitutionnel de l'Union européenne* (Bruylant 2012) 481.

towards less targeted and broader measures within the EU's sanctions practice, as exemplified by the EU restrictive measures against Belarus. This section sheds light on the blurry definition of 'targeted' measures (Section 3.1). It also demonstrates the mismatch between how EU restrictive measures are presented on paper and what they are in reality. They are indeed not fully targeted due to the broadening of listing criteria on the one hand (Section 3.2), and to the increasing recourse to sectoral sanctions on the other (Section 3.3).

3.1. The blurry concept of 'targeted' restrictive measures

The use of 'targeted sanctions' or 'smart sanctions' emerged as a result of dissatisfaction with the severe humanitarian consequences of the UN embargo on Iraq.⁴⁵ The then Secretary-General Boutros Boutros-Ghali questioned whether it was ethical to inflict suffering on vulnerable groups in the target country in order to change the behaviour of political leaders.⁴⁶ This brought to light several shortcomings of the sanctions instrument. The redesigning of sanctions, notably a shift from broad to 'smart' measures, was meant to alleviate the negative humanitarian impacts of sanctions regimes on the targeted countries' populations, while exerting pressure only on the alleged wrongdoers.⁴⁷ This refinement of sanctions was referred to as the 'gilet de sauvetage' [life jacket] of the compromised sanctions instrument.⁴⁸ Following the change of practice at UN level, the EU also shifted to targeted measures.⁴⁹

Today, especially in the aftermath of the Russian invasion of Ukraine, one can observe another turning point in EU sanctions practice. Sanctions are increasingly becoming broader and having a greater impact on the target to the extent that the targeted nature of sanctions may become nothing other than a relic of the past. This raises questions as to the definition of 'targeted' and of what is meant by 'targeted' measures. As early as the 1990s, the shift to 'targeted sanctions' had raised questions at UN level as to what ought to be understood as 'targeted'. At the time, two different approaches had emerged.⁵⁰ One approach considered that the term 'targeted' should be reserved for sanctions that directly target elites and do not affect the population, while the second approach understood the concept 'targeted' in a wider sense, including selective bans.⁵¹

The Council has defined restrictive measures as those that 'target those identified as responsible for the policies or actions that have prompted the EU decision to impose restrictive measures and those benefiting from and supporting such policies and actions'.⁵² As stated above, the Council Guidelines list a broad range of measures under this definition.⁵³ It thus seems that the EU opted for the second approach to the concept of 'targeted' sanctions, namely a broad reading of what they can cover. Such elasticity in the EU's interpretation of targeted measures and in their practical implementation seems, however, difficult to square with the rationale of targeted measures. The latter are meant to 'reduc[e] to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries'.⁵⁴ However, some of the EU's restrictive measures, which are increasingly used in certain situations, are likely to have effects for entire sectors of the country's economy and for its population. This is particularly exemplified by the EU restrictive measures against Belarus due to a double phenomenon: the progressive broadening of the listing criteria on the one hand, and the increasing recourse to sectoral sanctions on the other.

⁴⁵ Clara Portela, 'Are European Union Sanctions "Targeted"?' (2016) 29(3) *Cambridge Review of International Affairs* 912; UN Security Council Resolution 661 (1991); Boutros Boutros-Ghali, 'Supplement to An Agenda for Peace: Position Paper of the Secretary General on the Occasion of the Fiftieth Anniversary of the United Nations' (1995) UN Doc. A/50/60-S/95/1, para 70.

⁴⁶ Boutros-Ghali (n 45) para 70.

⁴⁷ Francesco Giumelli, 'Understanding United Nations Targeted Sanctions: An Empirical Analysis' (2015) 91(6) *International Affairs* 1351; Gary Clyde Hufbauer and Barbara Oegg, 'Targeted Sanctions: A Policy Alternative?' (2000) Peterson Institute for International Economics.

⁴⁸ Michael Brzoska, 'From Dumb to Smart? Recent Reforms of UN Sanctions' (2003) 9(4) *Global Governance* 519.

⁴⁹ Clara Portela, 'The EU's Use of "Targeted" Sanctions: Evaluating Effectiveness' (2014) CEPS <<https://www.ceps.eu/ceps-publications/eus-use-targeted-sanctions-evaluating-effectiveness/>> accessed 9 June 2022.

⁵⁰ Michael Brzoska, 'Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions. Results of the "Bonn-Berlin Process"' (2000) Bonn International Centre for Conflict Studies 69.

⁵¹ *ibid.*

⁵² Council Guidelines (n 3) para 13.

⁵³ *ibid* para 14.

⁵⁴ Council of the European Union, *Basic Principles on the Use of Restrictive Measures* (2004) para 6.

3.2. Belarus as an example of a tendency towards the broadening of listing criteria

EU sanctions are considered (and are required to be) targeted in the sense that, as stated above, they must be adopted according to specific listing criteria. The wording of the listing criteria thus has significant consequences for the scope of EU restrictive measures. Broader listing criteria are easier to fulfil and allow more targets to be reached. The EU has demonstrated a clear tendency towards the broadening of listing criteria in order to increase pressure on the targeted countries. This has taken two forms. On the one hand, the Council has changed the wording of pre-existing listing criteria by significantly extending their scope. On the other hand, the Council has added new listing criteria targeting additional groups of individuals or entities.

Belarus is, in that regard, a clear example of this double trend. For purposes of clarity, this section analyses the evolution of the listing criteria in chronological order.

The EU enacted its first targeted CFSP restrictive measures against Belarus in 2004.⁵⁵ They targeted four Belarusian officials allegedly responsible for the disappearances of four well-known persons in Belarus in 1999/2000 and for the subsequent obstruction of justice.⁵⁶ The consecutive broadening of the listing criteria occurred with each new election round. They were modified to target those responsible for the violations of international electoral standards in the 2004 election and referendum,⁵⁷ and the 2006 and 2010 presidential elections, as well as the repression that followed.⁵⁸

Another significant broadening of the scope of the EU restrictive measures against Belarus occurred in 2012, where the Council went beyond narrow and specific event-related listing criteria, such as fraudulent elections and referenda or the forced disappearance of certain persons. The pre-existing listing criteria were increasingly extended to target, *inter alia*, persons '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, or any person associated with them'.⁵⁹ A broad range of activities can be sanctioned under these listing criteria, including the dissemination of falsified information through State-controlled media, the excessive use of force against peaceful protesters, or systematic and coordinated violations of international human rights standards and Belarusian law.⁶⁰ Furthermore, new listing criteria were added to target those 'benefitting from or supporting the Lukashenka regime'.⁶¹ This opened the door for imposing asset freezes against entities or bodies owned or controlled by persons supporting or benefitting from the regime.⁶² The broadening of listing criteria led to a higher number of listed persons and entities: 243 individuals were targeted by travel bans and asset freezes and 32 entities considered as supporting Lukashenka's regime were subject to asset freezes.

The listing criteria have also evolved following the events unfolding in Belarus since August 2020.⁶³ The first three sanctions packages, respectively adopted in October, November and December 2020, omitted the detailed description of listing criteria.⁶⁴ Instead, they referred to the possibility of taking 'measures against those responsible for violence, unjustified arrests and falsification of election results' 'in view of the gravity of the situation in Belarus'.⁶⁵ This allowed the EU to target officials of the Ministry of Internal Affairs, members of the Belarus Central Electoral Commission, and officials of detention

⁵⁵ While the EU imposed first visa bans on a number of Belarusian officials in response to the expulsion of Western diplomats from diplomatic residences in the Drodzy in 1998, those measures were of a diplomatic nature. See Council Common Position 2004/661/CFSP concerning restrictive measures against certain officials of Belarus [2004] OJ L301/67.

⁵⁶ *ibid* art 1(1).

⁵⁷ Council Common Position 2004/848/CFSP amending Common Position 2004/661/CFSP concerning restrictive measures against certain officials of Belarus [2004] OJ L367/35, art 1(1).

⁵⁸ Council Common Position 2006/276 concerning restrictive measures against certain officials of Belarus and repealing Common Position 2004/661/CFSP [2006] OJ L101/5, art 1(1)(c); Council Decision 2011/69/CFSP amending Decision 2010/639/CFSP concerning restrictive measures against certain officials of Belarus [2011] OJ L 28/40, art 1(1).

⁵⁹ Council Decision 2012/642/CFSP concerning restrictive measures against Belarus [2012] OJ L285/1, art 3(1)(a).

⁶⁰ *ibid* recital 5.

⁶¹ *ibid* art 3(1)(b).

⁶² *ibid* art 4(1).

⁶³ Council Implementing Decision (CFSP) 2020/1388; Council Implementing Regulation (EU) 2020/1387.

⁶⁴ Council Implementing Decision (CFSP) 2020/1388, recital 2; Council Implementing Decision (CFSP) 2020/1650, recital 2; Council Implementing Decision (CFSP) 2020/2130, recital 6.

⁶⁵ *ibid*.

centres which inflicted torture and degrading treatment on arrested protesters. The EU also targeted entities in its third round of restrictive measures in December 2020.⁶⁶ In the same vein, following ‘the escalation of serious human rights violations’ and the forced landing of a Ryanair flight, the Council listed additional persons and entities in the fourth package of restrictive measures.⁶⁷ This time sanctions targeted judges, members of the prosecutor’s office responsible for numerous politically motivated rulings against journalists and protesters, members of the Chamber of Representatives, journalists involved in propagandist activities, and rectors of universities responsible for expelling students taking part in protests.⁶⁸

Finally, in November 2021 the listing criteria were updated to target persons ‘responsible for the facilitation of the illegal crossing of the EU-Belarus border by the Lukashenka regime and of the illegal transfer of restricted goods’.⁶⁹

Table 1 summarises the evolution of the listing criteria against Belarus:

Table 1. Evolution of the listing criteria against Belarus.

Sanctions package	Listing criteria
2004 restrictive measures	<ul style="list-style-type: none"> -Persons considered involved in the unresolved disappearances of four well-known persons in Belarus in 1999–2000. -Those responsible for the fraudulent elections and referendum in Belarus in 2004, as well as severe human rights violations.
2006 restrictive measures	<ul style="list-style-type: none"> -Those responsible for the violations of international electoral standards in the presidential elections in 2006, and the crackdown on civil society and democratic opposition.
2011–12 restrictive measures	<ul style="list-style-type: none"> -Those responsible for the violations of international electoral standards in the presidential elections in 2010, and the crackdown on civil society and democratic opposition.
	<p>The listing criteria were later updated to the following:</p> <ul style="list-style-type: none"> -Those responsible for serious violations of human rights, or any person associated with them. -Those benefitting from or supporting Lukashenka’s regime
Restrictive measures enacted from 2020 onwards	<ul style="list-style-type: none"> -Those responsible for repression in the wake of the 2020 presidential elections in Belarus, and for the Central Electoral Commission’s misconduct of the electoral process for those elections. <p>The listing criteria were later updated to the following:</p> <ul style="list-style-type: none"> -Those organising or contributing to activities by the Lukashenka regime that facilitate the illegal crossing of the external borders of the Union.

The Belarusian case thus illustrates a general tendency towards the broadening of listing criteria of sanctions against other countries. In most of the cases, this broadening takes place through the updating of listing criteria in order to cover a new set of activities. Similar trends can be identified with respect to

⁶⁶ Council Implementing Decision (CFSP) 2020/2130; Council Implementing Regulation (EU) 2020/2129.

⁶⁷ Council Implementing Decision (CFSP) 2021/1002.

⁶⁸ *ibid.*

⁶⁹ Council Decision (CFSP) 2021/1990.

other EU sanctions, an example being those against Myanmar.⁷⁰ Following the military coup in February 2021, the Council modified the listing criteria for the previously suspended EU sanctions on Myanmar⁷¹ to target natural and legal persons associated with the Myanmar armed forces and therefore involved in activities that undermine democracy and the rule of law in Myanmar.⁷²

The most obvious example of EU sanctions becoming more comprehensive, however, remains the restrictive measures against Russia. Following Russia's military aggression against Ukraine which started on 24 February 2022, the EU resorted to even broader listing criteria in order to increase the pressure on Russia. For instance, the EU has extended the possibility to impose asset freezes and travel bans to 'natural persons conducting transactions with the separatist groups in the Donbas Region'⁷³ and to 'leading business persons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation'.⁷⁴ This shows the EU's double trend of both adopting additional listing criteria and broadening the pre-existing ones.

The broadening of listing criteria can undeniably be seen as a legal creativity tool. From the EU's perspective, broadening the listing criteria is one of the immediately available options to increase the pressure against a third State in the event of an aggravation of its internal situation or of an international situation to which it is party. Such a broadening, however, raises questions for current and future EU sanctions practice. How far can the Council go with the extension of listing criteria? Can the Council apply sanctions to family members of key Belarusian business persons? Would such a tendency to the broadening of listing criteria be compatible with the fundamental rights of listed individuals?

Indeed, there are limitations to the broadening of listing criteria by the Council, in particular with respect to extending them to family members of those associated with the rulers of a third country. For instance, Advocate General Mengozzi⁷⁵ represented those targeted by restrictive measures as three concentric circles:⁷⁶ first, the rulers themselves, who have real decision-making power; second, persons associated directly or indirectly with the rulers belonging to the first circle, such as members of the rulers' families and persons who benefit from the economic policies; and third, the family members of persons who benefit from the economic policies of a specific country, who are the most remote from the decision-making. The listing of individuals from the third circle has raised questions in the past as to the scope of EU sanctions. The Council probably resorted to such extension to limit the risk of circumvention of the sanctions. Nevertheless, neither the Advocate General nor the Court agreed with such a broad and 'unfair' use of EU restrictive measures in the absence of precise, concrete evidence.⁷⁷ In other words, effectiveness must not take priority over respect for the rights of individuals.⁷⁸ To sum up, the broadening of listing criteria presents opportunities for the EU's global sanctions' reach but also carries risks for the lawfulness of EU sanctions. This should be borne in mind all the more given that, as explained above, the EU increasingly resorts to EU restrictive measures in response to international crises.

3.3. EU sanctions on Belarus: from targeted to sectoral measures

The EU restrictive measures imposed on Belarus also illustrate another growing tendency within the EU's practice, namely the progressive recourse to sectoral measures against the sanctioned countries. Indeed, it appears that in reaction to a deterioration of the situation in a targeted country, or as a reaction to a specific event, the EU is introducing more wide-ranging restrictive measures targeting entire sectors of the country's economy.

⁷⁰ Council Decision (CFSP) 2021/482 amending Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma [2021] OJ L99 I/37; Council Decision (CFSP) 2022/243 2022 amending Decision 2013/184/CFSP concerning restrictive measures in view of the situation in Myanmar/Burma [2022] OJ L40/28.

⁷¹ Council Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP [2013] OJ L111/75.

⁷² Council Decision (CFSP) 2021/482, recital 5.

⁷³ Council Decision (CFSP) 2022/329 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L50/1; Council Implementing Regulation (EU) 2022/332 implementing Regulation (EU) 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L53/1.

⁷⁴ *ibid.*

⁷⁵ AG Mengozzi Opinion in Case C-376/10 P *Pye Phyo Tay Za v Council* ECLI:EU:C:2011:786.

⁷⁶ *ibid.* para 43.

⁷⁷ Case C-376/10 P *Pye Phyo Tay Za v Council* [2012] ECLI:EU:C:2012:138, paras 69–70.

⁷⁸ AG Mengozzi Opinion in Case C-376/10 P, para 44.

Several of the packages of EU sanctions against Belarus have been intended to gradually increase pressure by introducing measures with a higher impact for the country. While the EU reacted to the internal political crisis in Belarus by enacting three rounds of restrictive measures against natural persons and legal entities in 2020,⁷⁹ a shift occurred after the forced landing of the Ryanair plane in May 2021 and opened a second period within the EU's sanctions practice against Belarus. The EU reacted to the alleged breach of international air transport rules by imposing a ban on the overflight of the EU's airspace by Belarusian airlines in June 2021.⁸⁰ This flight ban was also quickly followed by sectoral sanctions targeting an increasing number of sectors and with increasing consequences for Belarus's economy. The EU prohibited the export of software intended for the surveillance of internet and telephone communications, and of goods used to produce tobacco products.⁸¹ More importantly, the Council enacted an import ban on petroleum and potassium products from Belarus and restricted Belarusian financial institutions' access to EU capital markets.⁸²

Finally, and even more crucially, the EU expanded its sectoral restrictions against Belarus due to its implication in Russia's military aggression against Ukraine. In particular, the EU banned the import of wood, cement, iron, steel and rubber products originating in or exported from Belarus.⁸³ It also imposed rarer measures such as the prohibition on transactions with the Central Bank of Belarus,⁸⁴ and a ban on the road transport of goods between the EU and Belarus.⁸⁵ Four Belarusian banks were cut off from SWIFT as a result of EU sanctions.⁸⁶

The EU's growing tendency to enact sectoral economic sanctions in response to threats to European or regional security can also be seen with respect to other third countries. One need only recall the example of the restrictive measures against Russia. They were first enacted as targeted restrictive measures – asset freezes and visa bans – against some high-level Russian officials.⁸⁷ However, in response to the deterioration of the situation in Ukraine, including the increasing inflows of fighters and weapons from the Russian territory into Donbas, the EU extended the scope of sanctions. Those included an embargo on arms and dual-use items, an export ban on oil drilling technologies and services, and a prohibition on access to the capital market for State-owned Russian financial institutions and certain Russian entities.⁸⁸ Following Russia's recent military aggression against Ukraine, the EU has extended its sanctions on Russia considerably by targeting Russian finance, energy, transport and technology sectors.⁸⁹ For instance, restrictions on access to capital markets can now be imposed on any Russian State-owned entity 'in which Russia, its Government or Central Bank has other substantial economic relationships'.⁹⁰ The EU also cut off prominent Russian banks from SWIFT and closed its airspace

⁷⁹ See, in particular, Council Implementing Decision (CFSP) 2020/1388; Council Implementing Decision (CFSP) 2020/1650; Council Implementing Decision (CFSP) 2020/2130.

⁸⁰ Council Decision (CFSP) 2021/908 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus [2021] OJ L197/3; Council Regulation (EU) 2021/907 amending Regulation (EC) 765/2006 concerning restrictive measures in respect of Belarus [2021] OJ L197/1.

⁸¹ Council Decision (CFSP) 2021/1031 amending Council Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus [2021] OJ L224/15.

⁸² *ibid.*

⁸³ Council Decision (CFSP) 2022/356; Council Regulation (EU) 2022/355.

⁸⁴ Council Decision (CFSP) 2022/399 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L82/9; Council Regulation (EU) 2022/398 amending Regulation (EC) 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L82/1.

⁸⁵ Council Decision (CFSP) 2022/579 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L111/81; Council Regulation (EU) 2022/577 amending Regulation (EC) 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine [2022] OJ L111/67.

⁸⁶ Council Decision (CFSP) 2022/882; Council Regulation (EU) 2022/877.

⁸⁷ Council Decision 2014/145/CFSP.

⁸⁸ Council Decision 2014/512/CFSP; Council Decision 2014/659/CFSP amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L271/54.

⁸⁹ Council Decision (CFSP) 2022/337 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L59/1; Council Implementing Regulation (EU) 2022/336 implementing Regulation (EU) 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L58/1.

⁹⁰ Council Decision (CFSP) 2022/327.

to Russian planes.⁹¹ Following the discovery of atrocities committed by the Russian army in the Kyiv region, the EU prohibited access to its ports by Russian vessels⁹² and imposed an import ban on Russian coal.⁹³ The partial embargo on Russian crude oil and petroleum products⁹⁴ is the latest example of the increasing recourse to sectoral measures.

The shift from strictly targeted measures to broader ones can obviously be explained by practical considerations. The effectiveness of targeted restrictive measures to extract any concessions from the target has raised questions in the past:⁹⁵ more targeted sanctions mean a more limited impact.⁹⁶ The refinement of the EU's sanctions toolbox to include sectoral economic measures has most likely been a deliberate solution: the greater the social and economic impact of sanctions, the more successful they are in achieving their policy objectives.⁹⁷ Against this backdrop, the sectoralisation of sanctions becomes essential to increasing their effectiveness. Sectoral sanctions have a greater scope and are, for understandable reasons, more severe: they can affect whole industries through import bans, embargoes and financial restrictions.⁹⁸

The question can nevertheless be raised as to what extent sectoral measures are still targeted measures. The prohibition on transactions with the Belarusian Central Bank or the prohibition on the road transport of goods between the EU and Belarus are undeniably much less targeted measures than individual asset freezes or travel bans. They are likely to affect the Belarusian population much more than the Belarusian leaders, on whom the EU intends to exert pressure and many of whom are already on the EU's sanctions list. Furthermore, they will certainly trigger negative long-term externalities for EU–Belarus relations. Similar questions can be raised as regards the sectoral sanctions now targeting Russia: by targeting an increasing number of (crucial) sectors of its economy, is the EU not close to imposing sectoral embargoes?

These questions are all the more crucial given that, as pointed out by some scholars, the increasing litigation in respect of restrictive measures might very well encourage the Council to resort to more general measures.⁹⁹ Broad economic measures can potentially escape judicial review since the Court has repeatedly stressed that applicants have no standing to challenge general restrictive measures and that it has jurisdiction solely over restrictive measures targeting individuals and entities.¹⁰⁰ The recent judgment in *Venezuela v Council*, which granted a third State standing to challenge export bans applying to EU operators,¹⁰¹ may open up an alternative route to challenge EU restrictive measures. The fact remains, nevertheless, that the admissibility criteria for an action for annulment within the meaning of Article 263 TFEU are far more difficult to fulfil for sectoral measures than for individual restrictive measures. The EU's growing recourse to less and less targeted sanctions might thus raise increasingly pressing legal questions as to the compatibility of that practice with fundamental rights.

⁹¹ *ibid*; Council Decision (CFSP) 2022/335; Council Regulation (EU) 2022/334; Council Decision (CFSP) 2022/346 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L63/5; Council Regulation (EU) 2022/345 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L63/1.

⁹² Council Decision (CFSP) 2022/582; Council Regulation (EU) 2022/576.

⁹³ *ibid*.

⁹⁴ Council Decision (CFSP) 2022/884 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L153/128; Council Regulation (EU) 2022/879 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L153/53.

⁹⁵ Daniel Drezner, 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice' (2011) 13(1) *International Studies Review* 96, 97.

⁹⁶ Kimberly Ann Elliot, 'Trends in Economic Sanctions Policy' in Peter Wallensteen and Carina Staibano (eds), *International Sanctions: Between Words and Wars in the Global System* (Frank Cass 2005) 3, 11.

⁹⁷ David Cortright and George Lopez, *Smart Sanctions* (Rowman and Littlefield 2002) 8.

⁹⁸ Iva Kopraleva and Maarten P Vink, 'EU Sanctions in Response to Intra-State Conflicts: A Comparative Approach' (2015) 20(3) *European Foreign Affairs Review* 315, 323.

⁹⁹ Eva Nanopoulos, *The Juridification of Individual Sanctions and the Politics of EU Law* (1st edn, Bloomsbury Publishing 2020) 4; Matthew Happold, 'Targeted Sanctions and Human Rights' in Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law* (Hart Publishing 2016) 90.

¹⁰⁰ Case C-72/15 P *JSC Rosneft Oil Company* [2017] ECLI:EU:C:2017:236, paras 102–3.

¹⁰¹ Case C-872/19 P *Venezuela v Council* [2021] ECLI:EU:C:2021:507.

4. Are restrictive measures really temporary and reversible?

The adoption by the EU of subsequent rounds of sanctions against Belarus in response to the 2020 fraudulent election puts under the spotlight another problematic aspect of EU sanctions: their temporary and reversible nature, or rather the lack thereof. For purposes of clarity, these two elements will be discussed separately.

As mentioned above, a first key feature that characterises EU restrictive measures is that they are supposed to be temporary. The Council Guidelines on the use of sanctions are silent on the duration of restrictive measures. They do stress, however, that the CFSP legal instruments must set out an expiration date and be reviewed, and that 'to be effective restrictive measures should be lifted when their objectives have been met'.¹⁰² The underpinning rationale is that restrictive measures are only meant to last until the targeted country, person or entity has proceeded to the change of behaviour pursued by the sanctions. The CJEU has built on this rationale in its case law. Although it has stressed on repeated occasions that restrictive measures must, in the light of their seriousness, be limited in time,¹⁰³ it has never departed from its assertion that sanctions are 'temporary precautionary measures'¹⁰⁴ since the Council is under an obligation to review them regularly and they ought to be lifted when their objectives have been achieved.¹⁰⁵

While this overall rationale remains uncontested from a theoretical point of view, the implementation of EU restrictive measures differs in practice. This is true as regards two aspects. The first one relates to the conditions for the lifting of EU restrictive measures. The Council has indicated that they should be lifted when their objectives have been met.¹⁰⁶ However, it remains unclear how to assess whether such objectives have been achieved: how to determine, based on the available evidence, whether human rights violations in a certain country have ended; or how to assess whether a specific country has ended its policy of internal repression. Such an exercise is even more difficult given that the objectives of EU sanctions are not always straightforward and clear cut. Furthermore, as shown in practice, the EU is often unrealistic and too ambitious in expecting that the targeted country or regime will be ready to modify its behaviour in order for the sanctions to be lifted. This situation leads to a stalemate, where the cost of compliance for a targeted country is higher than the cost of non-compliance.¹⁰⁷ Against this backdrop, the conditions for the lifting of restrictive measures might never be met. Given that neither the treaties nor the Council Guidelines provide for a maximum duration for the application of restrictive measures, the latter can in effect be renewed indefinitely if Member States still share the consensus that the objectives of the sanctions have not been met.¹⁰⁸

This state of play is confirmed by a second aspect, which is the practical duration of the EU restrictive measures currently in force. In that regard, Belarus is an acute example of the absence of the temporary nature of sanctions: the first restrictive measures under the CFSP were imposed in 2004¹⁰⁹ and it has been subject to restrictive measures almost ever since. Of course, some sets of sanctions have ultimately expired and, as explained in Section 3, both the listing criteria and the types of restrictive measures adopted with regard to Belarus have evolved. The fact nevertheless remains that Belarus has been subject to a quasi-permanent state of sanctions for more than 20 years. Even when the EU has episodically 'relaxed' its sanctions regime towards Belarus, mostly in order to push a certain diplomatic agenda in respect of that country, some of the restrictive measures have remained in force and have

¹⁰² Council Guidelines (n 3) para 35.

¹⁰³ See, for instance, Joined Cases T-37/07 and T-323/07 *El Morabit v Council*, para 40; Case T-592/11 *Anbouba v Council*, para 40; Case T-485/15 *Alsharghawi v Council*, para 69.

¹⁰⁴ See, for instance, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat v Council*, para 358; Joined Cases C-539/10 P and C-550/10 P *Stichting Al-Aqsa v Council* [2012] ECLI:EU:C:2012:711, para 120; Case T-215/15 *Azarov v Council* [2017] ECLI:EU:T:2017:479, para 85.

¹⁰⁵ Case T-262/15, *Kiselev v Council* [2017] ECLI:EU:T:2017:392, para 124.

¹⁰⁶ Council Guidelines (n 3) para 35.

¹⁰⁷ Jean-Marc F Blanchard and Norrin M Ripsman, 'Asking the Right Question: When Do Economic Sanctions Work Best?' (2007) 9(1–2) *Security Studies* 225; Francesco Giumelli, 'The Purpose of Targeted Sanctions' in Thomas J Biersteker, Sue E Eckert and Marcos Tourinho (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Actions* (CUP 2016) 43.

¹⁰⁸ It is worth noting that this concern was already raised a decade ago at the UN level. In the UN 'Report [. . .] on the protection of human rights and fundamental freedoms while countering terrorism' (document A/HRC/12/22, point 42), the UN Commissioner for Human Rights stressed that 'because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent, which, in turn, may amount to criminal punishment due to the severity of the sanctions'.

¹⁰⁹ Council Common Position 2004/661/CFSP.

thus never been suspended. For instance, when the EU suspended some of the sanctions in 2008,¹¹⁰ the suspension only covered travel restrictions and the latter were only temporarily and selectively suspended for a period of six months, extended to nine months in 2009. The Council could renew those measures at any time if there was no progress towards democratisation. The suspension of travel bans did not cover those involved in the disappearances which occurred in 1999 and 2000 nor the President of the Central Electoral Commission. In any event, the suspended sanctions were reintroduced in 2011 as a follow-up to the 2010 presidential elections,¹¹¹ which were considered undemocratic by the EU. Similarly, when the EU resorted to another suspension of sanctions in 2015–16, it proceeded selectively: some sanctions were suspended in 2015¹¹² and made conditional upon further review, and then selectively lifted in 2016.¹¹³ Other sanctions, such as arms embargoes, as well as certain listings (specifically against those suspected of involvement in the enforced disappearances), were never suspended.

In addition, the previous suspensions of the sanctions against Belarus did not result from the fulfilment of their objectives but were motivated by pragmatic security-related considerations. Belarus played a positive role as a negotiations platform for the Minsk 1 and Minsk 2 agreements in 2014–15 to ensure the ceasefire in Donbas.¹¹⁴ The Council justified the suspension of the sanctions by the fact that Belarus had released political prisoners and that it had taken steps that had 'contributed to improving EU–Belarus relations'.¹¹⁵ Nevertheless, the most fundamental objective of the restrictive measures, namely some significant progress on the democratic front in Belarus, was not attained. The reintroduction of restrictive measures a few years later further proves that the Belarusian authorities have never made any substantial changes to the political system that would justify the suspension or lifting of sanctions. If anything, these suspensions have only showed that restrictive measures are more likely to be suspended or lifted for political considerations rather than because their conditions for lifting have been met. Beyond any discussion on what this implies from the point of view of the effectiveness of EU sanctions, this clearly shows that the duration of sanctions is an arbitrary decision of Member States.

When it comes to the duration of EU restrictive measures, Belarus is hardly an isolated case. One only needs to think of counter-terrorism restrictive measures, some of which have been in force since the takeover of Afghanistan by the Taliban in 1999.¹¹⁶ The current restrictive measures linked to the situation in Tunisia were adopted in 2011.¹¹⁷ Russia has been targeted by EU sanctions since 2014.¹¹⁸ The unlimited duration of restrictive measures becomes even more apparent when one looks at how long individuals and entities have remained on the EU's sanctions list. The average duration for a person or entity's listing is 10 years.¹¹⁹ The maximum duration of listing for certain persons or entities has, for instance, been as follows: 11 years for Tunisia and Syria; 12 years for Somalia; 13 years for North Korea; 16 years for Iran in connection with non-proliferation of weapons of mass destruction; 17 years for the Democratic Republic of Congo; 18 years for Belarus; and up to 22 years for the sanctions linked to the Taliban regime in Afghanistan. These results bring to light a puzzling question as to what the EU expects to achieve by keeping persons and entities on its sanctions list for more than a decade. Furthermore, this data is the ultimate example of the gap that has emerged between what restrictive measures are in theory and what they have become in practice.

This gap can also be found as regards the second alleged key feature of EU restrictive measures that is analysed in this section, namely that these measures are reversible. Although the Council Guidelines

¹¹⁰ See, in particular, Council Common Position 2008/844/CFSP amending Common Position 2006/276/CFSP concerning restrictive measures against certain officials of Belarus [2008] OJ L300/56, art 2.

¹¹¹ See Council Decision 2011/69/CFSP amending Council Decision 2010/639/CFSP concerning restrictive measures against certain officials of Belarus [2011] OJ L28/40.

¹¹² See Council Decision (CFSP) 2015/1957; Council Regulation (EU) 2015/1948.

¹¹³ See, in particular, Council Regulation (EU) 2016/277.

¹¹⁴ Full text of the Minsk Agreement (Financial Times, 12 February 2015) <<https://www.ft.com/content/21b8f98e-b2a5-11e4-b234-00144feab7de>> accessed 9 March 2022.

¹¹⁵ See, for instance, Council Press release of 29 October 2015 <<https://www.consilium.europa.eu/en/press/press-releases/2015/10/29/belarus/>> accessed 15 February 2022; Council Press Release, Conclusions on Belarus of 15 February 2016 <<https://www.consilium.europa.eu/en/press/press-releases/2016/02/15/fac-belarus-conclusions/>>, paras 3–4, accessed 15 February 2022.

¹¹⁶ See Council Common Position 1999/727/CFSP concerning restrictive measures against the Taliban [1999] OJ L294/1.

¹¹⁷ See Council Decision 2011/72/CFSP; Council Regulation (EU) 101/2011.

¹¹⁸ See Council Decision 2014/512/CFSP; Council Regulation (EU) 833/2014.

¹¹⁹ The data used for the purpose of the present analysis has been gathered by relying on the list of the currently listed persons and entities in the various legal instruments providing for restrictive measures. It does not take into account the previous listings and delistings but merely takes the example of the persons and entities that are still on the sanctions list.

make no mention of that feature, the CJEU has consistently held that restrictive measures are by nature reversible.¹²⁰ While it has never explained why this is so, one could assume that it is due to the nature of certain restrictive measures such as asset freezes. The latter are not supposed to entail a loss of the targeted persons' economic resources located in the EU, since they are merely made unavailable to them and they can retrieve them in full once the asset freeze ends. Asset freezes nevertheless have the potential to trigger long-lasting effects on the target's economic situation, even if they are ultimately lifted. This is all the more true in the light of the current ongoing discussions about a possible confiscation of Russian Central Bank funds and Russian oligarchs' luxury goods and assets that have been frozen, in order to aid Ukraine.¹²¹ Such a possibility is mainly being explored in the United States¹²² and Canada,¹²³ and in the EU.¹²⁴ Should such measures be adopted, however, they would be the most extreme illustration of the irreversible nature of asset freezes.

The significant economic impact of restrictive measures is even greater when it comes to sectoral restrictions and export bans, which can target entire sectors of a country's economy. Not only do they affect the operators in the given sectors, they can trigger long-lasting effects on the country's society as a whole. This argument was made by Russian bank Vnesheconombank, which has been targeted by an investment ban and restrictions on access to capital markets.¹²⁵ Vnesheconombank argued that since it funded numerous societal and public projects, subjecting it to sanctions would equate to also sanctioning the Russian people, which is precisely what targeted sanctions are supposed to avoid.¹²⁶ While this argument was unsurprisingly rejected by the EU judges, it reflects a certain reality of restrictive measures on the ground. The significant impact of restrictive measures is such that authors such as Helen Over de Linde have described it as 'both undeniable and irreversible'.¹²⁷ Advocate General Poiares Maduro has referred to sanctions as unlimited in time and quantum¹²⁸ and as having 'devastating'¹²⁹ consequences.

This is exemplified, once again, by the restrictive measures against Belarus. By having increasing recourse to sectoral sanctions, as explained above, the EU is likely to trigger a long-lasting impact on Belarus's economy. There will most likely be negative and long-lasting consequences for the reputations of prominent firms in the sectors concerned, for instance potassium and oil. This will likely entail loss of their market shares and disruption of their supply channels on European markets. Recovering former market positions would be extremely difficult, even if the restrictive measures were ultimately to be lifted. This will inevitably also have a long-lasting impact on the targeted country's population as a whole. It seems difficult, once again, to conclude that restrictive measures are reversible measures.

The various sets of restrictive measures that have been imposed against Belarus over time are thus symptomatic of a more general trend within the EU's sanctions practice, namely their undefined duration. This state of play is not necessarily incompatible with EU law. However, it no longer corresponds to the official description of what restrictive measures are. This might call for some adjustments within the EU's sanctions practice, particularly as regards the protection of the fundamental rights of the persons concerned. The Court itself has acknowledged, in some of its latest judgments relating to restrictive measures linked to misappropriations of State funds, that when sanctions have been renewed for a

¹²⁰ See, for instance, Case T-262/15, *Kiselev v Council*, para 124; Case T-274/16 *Thabet and Others v Council* [2018] ECLI:EU:T:2018:826, para 283.

¹²¹ Paul Stephan, *Giving Russian Assets to Ukraine—Freezing Is Not Seizing* (Lawfare, 26 April 2022) <<https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing>> accessed 2 May 2022.

¹²² *ibid.*

¹²³ See the draft Bill C-19 'An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures', point 441 <<https://www.parl.ca/DocumentViewer/en/44-1/bill/C-19/first-reading>> accessed 2 May 2022; draft Bill S-217 'An Act respecting the repurposing of certain seized, frozen or sequestered assets' <<https://www.parl.ca/DocumentViewer/en/44-1/bill/S-217/first-reading>> accessed 2 May 2022.

¹²⁴ Commission Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation 2022/0167(COD) [2022].

¹²⁵ Case T-737/14 *Vnesheconombank v Council*.

¹²⁶ *ibid* para 90.

¹²⁷ Helen Over de Linden, 'The Court of Justice's Difficulty with Reviewing Smart Sanctions as Illustrated by Rosneft' (2019) 24(1) *European Foreign Affairs Review* 39.

¹²⁸ Opinion of Advocate General Poiares Maduro in Case C-402/05 P *Yassin Abdullah Kadi v Council and Commission* [2008] ECLI:EU:C:2008:11, para 47.

¹²⁹ *ibid.*

certain time, additional verifications must be carried out by the Council.¹³⁰ This does not bode well for the assertion that sanctions are by nature temporary and reversible. A similar gap between reality and practice can be noted as regards the alleged 'preventive' nature of restrictive measures.

5. Are EU restrictive measures preventive?

It is often taken for granted that EU restrictive measures are preventive in nature and not punitive.¹³¹ However, it seems that there is no clear understanding in the EU as to what is meant by 'preventive'. According to *Law Insider*, preventive measures are 'any reasonable measures taken by any person in response to an incident, to prevent, minimize, or mitigate loss or damage'.¹³² According to the *Oxford English Dictionary*, preventive means 'intended to try to stop something that causes problems or difficulties from happening'. If EU restrictive measures are preventive, they are meant to be applied in order to prevent something from happening. A similar approach has been articulated in the scholarship on UN sanctions. They have an inherently preventive character and are not necessarily adopted in response to a breach of an international obligation.¹³³ For instance, the UN Security Council does not need to find a violation of international law for their enactment, but only a 'threat to the peace, a breach of the peace or an act of aggression' within the meaning of Article 39 of the UN Charter.¹³⁴

It also follows from the CJEU case law that sanctions are not intended to be punitive but are preventive measures taken on the basis of CFSP provisions.¹³⁵ Their preventive purpose means they are different from criminal sanctions and aim at supporting international peace and security.¹³⁶ The Court also repeatedly stresses that restrictive measures are not penalties and do not imply any accusation of a criminal nature.¹³⁷ For instance, the assets of targeted persons are not confiscated as the proceeds of a crime, but frozen as a precautionary measure.¹³⁸

Nevertheless, it is difficult to square this viewpoint on EU sanctions as preventive measures with the fact that they are increasingly formulated as reactions to prior violations of human rights or threats to international peace and stability. Defining EU restrictive measures as only preventive equates to overlooking their other functions such as coercing, constraining, signalling or stigmatising.¹³⁹ Kim Nossal considers that sanctions are a form of international punishment¹⁴⁰ and that 'the desire to punish will always be an integral factor in their imposition'.¹⁴¹ Margaret Doxey has described sanctions as 'penalties linked to real or alleged misconduct'.¹⁴² Nienke van der Have has called for the acknowledgement of the punitive aspect of individual sanctions.¹⁴³ Some scholars even refer to the CFSP overall as a punitive policy.¹⁴⁴

Once again, the restrictive measures against Belarus are a clear example of that. The three rounds of restrictive measures imposed in 2020 were clearly intended to respond to a crackdown on civil society that was already taking place. Similarly, the restrictive measures adopted in 2021 in response to the Ryanair

¹³⁰ See, for instance, Case T-290/17 *Stavytskyi v Council* [2019] ECLI:EU:T:2019:37, para 132.

¹³¹ Council Guidelines (n 3) 45.

¹³² Law Insider <<https://www.lawinsider.com/dictionary/preventive-measures>> accessed 1 March 2022.

¹³³ Tom Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework' in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar Publishing 2016) 19.

¹³⁴ Hans Kelsen, 'Collective Security and Collective Self-Defense Under the Charter of the United Nations' (1948) 42(4) *The American Journal of International Law* 783, 789.

¹³⁵ See, for instance, Joined Cases C-584, C-593 & C-595/10 P *Commission and Others v Kadi*, para 130.

¹³⁶ Joined Cases T-128/12 and T-182/12 *HTTS v Council* [2013] ECLI:EU:T:2013:312, para 42.

¹³⁷ Case T-439/11 *Sport-Pari v Council* [2014] ECLI:EU:T:2014:1043, para 89; Case T-256/11 *Ezz and Others v Council* [2014] ECLI:EU:T:2014:93, paras 77–80; Case T-619/15 *Bureau d'achat de diamant Centrafrique v Council* [2017] ECLI:EU:T:2017:532, para 71.

¹³⁸ *ibid.*

¹³⁹ Larissa J Van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for Its Individualized UN Sanctions Regimes' (2014) 19 *Journal of Conflict and Security Law* 427, 433.

¹⁴⁰ Kim Richard Nossal, 'International Sanctions as International Punishment' (1989) 43(2) *International Organization* 301.

¹⁴¹ *ibid.* 321.

¹⁴² Margaret P Doxey, *International Sanctions in Contemporary Perspective* (Macmillan 1987) 4.

¹⁴³ Nienke van der Have, 'The Proposed EU Human Rights Sanctions Regime – A First Appreciation' (2019) 30 *Security and Human Rights* 56, 71.

¹⁴⁴ Wessel et al (n 2): 'the CFSP is largely characterised by punitive rather than by "constructive" foreign policy decisions'.

incident and the instrumentalisation of migrants were enacted as a form of reaction to or punishment of the Belarusian authorities. Some EU sanctions target behaviours that can be subject to criminal indictments under other foreign jurisdictions. For instance, the New York Court in the US started criminal proceedings against those responsible for the act of air piracy.¹⁴⁵ In addition, those involved in torture in Belarus can be held responsible under universal jurisdiction. In this respect, sanctions on some Belarusian officials seem to be a form of transnational punishment for violations of the rule of law in Belarus. More recently, the punitive dimension of EU sanctions has been illustrated by the restrictive measures imposed against Belarus due to its involvement in the war in Ukraine.¹⁴⁶

Once again, Belarus has not been an isolated case in that respect. Most of the country-related sanctions regimes have been adopted in reaction to, and not to prevent, a specific behaviour of the targeted country. The most recent (and extreme) example of the punitive dimension of restrictive measures is the EU's response to the military aggression against Ukraine by Russia. When confronted with the massing of Russian troops near the Ukrainian border and with the imminent threat of a Russian military operation, the EU refrained from using the preventive potential of EU restrictive measures against Russia. Instead, draft sanctions were prepared to be implemented immediately in the event of an escalation of Russia's military aggression in Ukraine.¹⁴⁷ The timeline in which the EU responded to the military aggression of Ukraine confirms that: four additional rounds of sanctions against Russia were adopted within a seven-day period.¹⁴⁸ In this specific context of the recent sanctions on Russia, restrictive measures were taken in response to a prior breach of international law. EU sanctions are thus becoming increasingly punitive in intent and penalise acts of wrongdoing.

The reluctance of the Council and of the CJEU to recognise this punitive character of sanctions is perfectly understandable. There might indeed be some unease about proceeding unilaterally with international punishment in the absence of a central international authority that establishes what constitutes a wrongdoing (and acknowledging that this role belongs to a sole authority, such as the UN, would undermine the legitimacy of EU autonomous restrictive measures). The punitive character of restrictive measures is nevertheless more apparent in recent country-specific listings on Belarus and Russia as well as in horizontal sanctions frameworks that target specific past misconduct such as human rights violations or cyber-attacks.¹⁴⁹

6. Rethinking the EU's sanctions practice

It would not be an exaggeration to say that the EU's sanctions practice has changed considerably over time. Today's sanctions no longer fit the description embedded in the Council Guidelines or the CJEU case law. The evolving sanctions design explored throughout this article goes along with a different impact of sanctions for a targeted State and the EU itself. This requires, to some extent, a rethinking of the EU's current and future sanctions practice. The main suggestions for changes in EU sanctions at both enactment and implementation stages are outlined below.

As regards sanctions enactment, several elements might be worth exploring. The first is the need for a more thorough impact assessment of envisaged restrictive measures.¹⁵⁰ While asset freezes and travel bans are targeted measures, the accelerating shift to broader measures calls for a preliminary assessment of their unintended consequences for the wider population of the targeted country and for EU citizens.

¹⁴⁵ US Department of Justice, 'Belarusian Government Officials Charged with Aircraft Piracy for Diverting Ryanair Flight 4978 to Arrest Dissident Journalist in May 2021' (2022) <<https://www.justice.gov/opa/pr/belarusian-government-officials-charged-aircraft-piracy-diverting-ryanair-flight-4978-arrest>> accessed 1 March 2022.

¹⁴⁶ Council Decision (CFSP) 2022/356; Council Regulation (EU) 2022/355.

¹⁴⁷ Russia/Ukraine & 6th EU–AU Summit: Remarks by High Representative Josep Borrell upon arrival (EEAS, 17 February 2022) <https://eeas.europa.eu/headquarters/headquarters-homepage/111097/russiaukraine-6th-eu-au-summit-remarks-high-representative-josep-borrell-upon-arrival_en> accessed 9 March 2022.

¹⁴⁸ For a short summary of the sanctions timeline, see Celia Challet, 'A Revolution within the EU's Common Foreign and Security Policy: EU Sanctions Adopted in Reaction to Russia's Aggression' (EU Law Live 2022) <<https://eulawlive.com/weekend-edition/weekend-edition-no92/>> accessed 3 May 2022.

¹⁴⁹ Christina Eckes, 'EU Human Rights Sanctions Regime: Ambitions, Reality and Risks' (2020) 64 Amsterdam Law School Research Paper, 10.

¹⁵⁰ Some scholars came up with a 'checklist' for the pre-assessment and contingency planning phase of sanctions. See Anthonius W de Vries, Clara Portela and Borja Guijarro-Usobiaga, 'Improving the Effectiveness of Sanctions: A Checklist for the EU' (2014) CEPS <<https://www.ceps.eu/ceps-publications/improving-effectiveness-sanctions-checklist-eu/>> accessed 9 June 2022.

As an illustration, the import ban on Russian oil will entail important repercussions for the economy of numerous (if not all) EU Member States. The sanctions against Belarusian fertilisers might ultimately have negative consequences for crucial sectors of EU agriculture. The ban on Belarusian airlines has already raised questions with respect to the feasibility of the annual treatment of Chernobyl children from Belarus in Italy and, therefore, exposed again the negative humanitarian consequences of such measures.

The second evolution that should characterise current and future EU sanctions revolves around improved strategic planning. Sanctions are a foreign policy instrument that should consider the whole context of EU relations with a specific country, including regional security. EU sanctions should be based on a clearer calculation of what the EU aims to achieve in a long-term perspective. In the case of Belarus, the EU sanctions enacted after Russia's invasion of Ukraine seem to place Russians and Belarusians on the same scale. Such an approach, while understandable given the tragic circumstances, is neither tailored nor country specific. Equating Belarus to Russia is ultimately in line with the Russian imperial viewpoint.¹⁵¹ Since sanctions are meant to last, they should adopt a forward-thinking approach given the broader EU interests with respect to the country in question.

The fact that EU restrictive measures increasingly carry the risk of affecting entire populations of targeted countries, and of backfiring on the EU itself, calls for a third proposed change: stronger scrutiny and democratic oversight of sanctions. This could be achieved by requiring the European Parliament's (EP) consent for the adoption of sectoral economic sanctions. The current version of Article 215 TFEU only requires the EP to be informed.¹⁵² This contrasts with the wording of Article 75 TFEU, which provides for the adoption of sanctions under the AFSJ according to the ordinary legislative procedure. The contrast is all the more apparent given that only restrictive measures against persons and entities (i.e., sanctions with a lesser impact overall) can be adopted under Article 75 TFEU. Given the growing importance of sanctions for the EU's internal policies, including energy and food security, more involvement of the EP with respect to sectoral economic sanctions under the CFSP would ensure the legitimacy of the EU sanctions policy. In that regard, a simplified procedure of Article 48(7) TEU could be relied upon to allow the European Council to adopt a decision providing for the shift to the ordinary legislative procedure for the adoption of sectoral economic measures. Whether there could be any political consensus in that direction is, of course, an entirely different matter.

As regards the implementation stage, sanctions would benefit from a better coordination between Member States in order to prevent their circumvention. The adoption of EU sanctions in reaction to Russia's aggression against Ukraine has begun to pave the way towards more coordination within the EU. The creation of the 'Freeze and Seize' Taskforce¹⁵³ and of Europol's Operation Oscar,¹⁵⁴ as well as the enhancement of the Directorate-General for Financial Stability, Financial Services, and Capital Markets Union (DG FISMA)¹⁵⁵ and the introduction of the EU Sanctions Whistleblower Tool¹⁵⁶ allowing EU institutions to be informed about sanctions breaches, are illustrations of this. Time will tell whether these new instruments will remedy the existing deficiencies of EU sanctions implementation.

Since sanctions are reviewed on a regular basis, a better articulation of conditions for the review of sanctions is also advisable. The reasons for the introduction of the sanctions regime, new listings or new sectoral measures and other changes to the restrictive measures are mentioned in the recitals to the relevant legal acts. However, the conditions for the review of EU sanctions are indicated separately in the Council Conclusions, for instance those of 12 October 2020¹⁵⁷ regarding Belarus. Council Conclusions are, however, a soft law instrument that expresses a political position. The latter might evolve depending

¹⁵¹ Vladimir Putin 'On the Historical Unity of Russians and Ukrainians' (Kremlin, 12 July 2021) <<http://en.kremlin.ru/events/president/news/66181>> accessed 30 May 2022: 'There may be an argument: if you are talking about a single large nation, a triune nation, then what difference does it make who people consider themselves to be – Russians, Ukrainians, or Belarusians.'

¹⁵² Case C-130/10, *Parliament v Council of the European Union* (2012) ECLI:EU:C:2012:472.

¹⁵³ 'Enforcing sanctions against listed Russian and Belarussian oligarchs: Commission's "Freeze and Seize" Task Force steps up work with international partners' (17 May 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1828> accessed 3 May 2022.

¹⁵⁴ Europol, 'EU-wide operation targeting criminal assets in relation to the Russian invasion of Ukraine' (2022) <<https://www.europol.europa.eu/media-press/newsroom/news/eu-wide-operation-targeting-criminal-assets-in-relation-to-russian-invasion-of-ukraine>> accessed 1 May 2022.

¹⁵⁵ Interview with an official of FISMA (December 2021, Brussels).

¹⁵⁶ See Commission website https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/overview-sanctions-and-related-tools_en#whistleblower accessed 20 May 2022.

¹⁵⁷ Council Conclusions on Belarus 11661/20 (2020) <<https://www.consilium.europa.eu/media/46076/council-conclusions-on-belarus.pdf>> accessed 28 April 2022. They list the following conditions for review of sanctions: the end of repression and

on processes within Member States, making the EU sanctions policy subject to political conjuncture and potentially undermining its efficiency. At the same time, it can be argued that such flexibility might also increase the EU's bargaining power.

Overall, therefore, the EU sanctions policy is going through a mini-revolution due to the shift from targeted to broader economic measures. This requires a rethinking of the EU's sanctions practice to catch up with the evolving reality. Only a more tailored, pragmatic and forward-thinking approach to sanctions can preserve the EU's role as an international sanctions actor.

7. Concluding remarks

This article has demonstrated, through the case study of EU restrictive measures on Belarus and by integrating data on other sanctions, that the main (alleged) features of restrictive measures have evolved significantly over time. In light of the current EU sanctions practice, it can no longer be argued that restrictive measures are fully targeted, purely temporary and preventive. First, while restrictive measures are nominally targeted within the meaning of the definition provided by the Council, they tend to become increasingly broader. Second, EU sanctions are unlimited as to their duration, and their effects can hardly be reversible. Third, the punitive intent of EU sanctions is undeniable since they are increasingly framed (and advertised) as responses to acts of wrongdoing.

The evolution of these three features of restrictive measures has gone hand in hand with their 'normalisation' within the EU foreign policy, as described in the article. Restrictive measures have become an almost automatically used tool to react to international crises and threats to EU and international security. It is, however, likely that by multiplying sanctions the EU is in practice reducing their impact. Existence under sanctions becomes a 'natural habitat' for some countries. New rounds or packages of restrictive measures from the EU lose their exceptional character since it is expected that the EU will ultimately adopt sanctions. Combined with the fact that sanctions can in effect last for an indefinite period of time and, with one caveat regarding the latest sanctions against Russia, restrictive measures are losing their emergency nature and their ability to trigger a change of behaviour from the State or the persons/entities concerned. This, in turn, is likely to lead the EU to adopt more wide-ranging sanctions, thereby creating a vicious circle from which no gain can be expected. This is all the more so given that some targeted countries, such as Belarus, Russia and China, have now resorted to counter-sanctions,¹⁵⁸ thereby emphasising the ever more punitive dynamic of restrictive measures.

Overall, it seems that the EU's sanctions practice is returning to square one: in spite of the previous shift from broad economic sanctions to 'smart' and targeted measures, the EU is now increasingly adopting ever broader sectoral sanctions bordering on embargoes. Is the EU reaching the limits of what can be achieved through targeted restrictive measures? All these elements thus call for a broader reflection on how current and future EU sanctions should be used. Restrictive measures must remain compliant with the fundamental rights of targeted individuals and entities. Furthermore, the EU needs to adopt a forward-thinking approach with respect to its restrictive measures. More attention should be paid not only to the long-term objectives pursued through sanctions, but also to the prior assessment of long-lasting consequences of broad sanctions for the economies and societies of the countries concerned, as well as on the EU. It is high time that EU sanctions were acknowledged as a fully fledged foreign policy and that the necessary conclusions were drawn.

abuses of the human rights, release and rehabilitation of political prisoners; return of those in political and forced exile; start of inclusive political process resulting in free and fair elections.

¹⁵⁸ Some examples of those counter-measures include: Belarus MFA Statement on Belarus counter-measures in response to unlawful sanctions (Заявление МИД об ответных мерах Республики Беларусь на незаконное внешнее санкционное давление) (MFA of the Republic of Belarus, 6 December 2021) <https://mfa.gov.by/press/news_mfa/e09607cfe7591a5e.html> accessed 7 March 2022; Decree No. 79 On the Application of Special Economic Measures in Response to the Unfriendly Actions of the United States of America, Other Foreign States and International Organisations Involved in the Anti-Russia Sanctions (Kremlin, 28 February 2022) <<http://kremlin.ru/acts/news/67881>> accessed 7 March 2022; 'Chinese counter-sanctions on EU targets, At a glance' (European Parliamentary Research Service, May 2021) <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690617/EPRS_ATA\(2021\)690617_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690617/EPRS_ATA(2021)690617_EN.pdf)> accessed 18 April 2022.

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