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CJEU Standards of Proof in Cases of EU Targeted Human Rights Sanctions

An assessment of CJEU's current standards of proof in EU targeted sanctions regimes, prospects for development through the future case law of EU Global Human Rights Sanctions Regime and concerns relating to the respect of the principle of legal certainty

Re-examining the Foundations of EU Law
Pro Gradu – Master's Thesis

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15.05.2022

The originality of this thesis has been checked in accordance with the University of Turku quality assurance system using the Turnitin Originality Check service.

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Abstract page

Master's thesis

Subject: Re-examining the Foundations of EU Law
Author(s): Nina Roos
Title: CJEU Standards of Proof in Cases of EU Targeted Human Rights Sanctions - An assessment of CJEU's current standards of proof in EU targeted sanctions regimes, prospects for development through the future case law of EU Global Human Rights Sanctions Regime and concerns relating to the respect of the principle of legal certainty
Supervisor(s): Jukka Snell
Number of pages: XXX + 79 pages
Date: 15.5.2022

With the first two decades of the 21st century marked by increasing political tensions and democratic crisis, the EU has risen to the occasion by assuming the position of a major foreign policy actor. Possessing a broad repertoire or foreign policy tools, the EU strives to uphold and advance its core values, including the human rights and fundamental freedoms, stated in Article 21 TEU. One foreign policy tool, namely, sanctions measures, have become widely used, resulting in added scrutiny on the functioning of this tool. With criticism on the negative humanitarian effects and perceived ineffectiveness of traditional state-focused sanctions measures, the EU has implemented targeted sanctions regimes with the most recent, the EU Global Human Rights Sanctions Regime, being adopted on the 7th of December 2020 through Council Decision 2020/1999 and Council Regulation 2020/1998. Although the targeted nature of sanctions has reduced the broad negative effects on civilians, it has simultaneously created new issues which remain unsolved.

This study uses the recently adopted EU targeted human rights sanctions regime to discuss issues of the CJEU's evidentiary standards in targeted sanctions cases. The aim of this study is to establish, 1) whether targeted human rights sanctions measures could have the character of criminally natured administrative sanctions, 2) what role standards of proof have in the Court's evaluation of targeted human rights sanctions cases, and, and 3) whether there could be concerns of the respect of the principle of legal certainty in this context.

The study is based on a legal dogmatic approach but utilizes also elements of comparative and problem-oriented approaches. The comparative approach of this study have been narrowed to the case law of the European Court of Human Rights, case law from the area of EU Competition law as well as some references to the UN Sanctions Regimes.

While there are some valid concerns on how the CJEU reviews evidence in targeted sanctions cases, the broadness and vagueness of EU standards of proof could be explained through the civil law legal traditions of the CJEU. It seems as though a natural way forward would be for the CJEU to adopt similar processes in targeted sanctions cases as it has done through competition law. Similarly, the direction from ECtHR case law could also be used to further develop the area of EU targeted sanctions.

Key words: EU Law, Court of Justice of the European Union, Council of the European Union, Common Foreign and Security Policy, targeted sanctions, standard of proof, procedural rights, human rights, counter-terrorism sanctions, competition law sanctions, principle of legal certainty.

TURUN YLIOPISTO
Oikeustieteellinen tiedekunta

Tiivistelmäsivu

Tutkielma

Oppiaine: Re-examining the Foundations of EU Law
Tekijä(t): Nina Roos
Otsikko: CJEU Standards of Proof in Cases of EU Targeted Human Rights Sanctions: An assessment of CJEU's current standards of proof in EU targeted sanctions regimes, prospects for development through the future case law of EU Global Human Rights Sanctions Regime and concerns relating to the respect of the principle of legal certainty
Ohjaaja(t): Jukka Snell
Sivumäärä: XXX + 79 sivua
Päivämäärä: 15.5.2022

Poliittisten kriisien alati lisääntyessä 2000-luvun aikana, EU on omaksunut merkittävän roolin ulkopoliittisena toimijana. EU:lla on laaja valikoima ulkopoliittisia välineitä, joilla se pyrkii ylläpitämään ja edistämään SEU-sopimuksen 21 Artiklassa määrittelyjä arvoja, mukaan lukien ihmis- ja perusoikeuksia. Yksi ulkopoliittinen väline, nimittäin pakotetoimenpiteet, ovat yleistyneet huomattavasti, lisäten niihin kohdistuvaa keskustelua ja kritiikkiä. Vastareaktiona perinteisten valtiokeskeisten pakotetoimenpiteiden negatiivisille humanitaarisille vaikutuksille ja koetulle tehottomuudelle, EU on luonut kohdennettuja pakotejärjestelmiä, joista viimeisin, EU:n globaali ihmisoikeuspakotejärjestelmä on pantu täytäntöön 7.12.2020 neuvoston päätöksen 2020/1999 ja neuvoston asetuksen 2020/1998 myötä. Vaikka pakotteiden kohdennettu luonne on vähentänyt niiden laajoja kielteisiä vaikutuksia siviileihin, ovat ne samalla nostaneet esille uusia ongelmakohtia, joihin ei vielä ole vastauksia.

Tämä tutkimus käyttää hiljattain hyväksyttyä EU:n kohdennettua ihmisoikeuspakotejärjestelmää keskustellakseen EUT:n näyttökynnykseen liittyviä haasteita kohdistetuissa pakotetapauksissa. Tutkimus pyrkii selvittämään, 1) voisivatko kohdennetut ihmisoikeuspakotteet olla luonteeltaan rikosoikeudellisia hallinnollisia seuraamuksia, 2) takaavatko EU:n tuomioistuimen nykyiset näyttökynnykset pakotekohteiden prosessuaaliset oikeudet riittävissä määrin, ja 3) onko tässä yhteydessä aihetta epäillä oikeusvarmuuden periaatteen loukkauksia.

Tutkimus perustuu oikeusdogmaattiseen lähestymistapaan, mutta hyödyntää myös vertailevaa ja ongelmalähtöistä lähestymistapaa. Tutkimuksen vertailevat aspektit on rajattu Euroopan ihmisoikeustuomioistuimen oikeuskäytäntöön, EU:n kilpailuoikeuden alaa koskevaan oikeuskäytäntöön, sekä tiettyihin viittauksiin YK:n pakotejärjestelmiin.

Vaikka huoli EUT:n tavasta toimia näyttökysymyksissä on perusteltua, näyttäisi EU:n näyttökynnyksen laajuus ja epämääräisyys viestimään pikemminkin EU:n siviilioikeudellisesta oikeusperinteistä kuin perusoikeudellisista ongelmista. Tutkimus esittää, että EUT:n kohdennettujen pakotetapausten luonnollinen kehittymissuunta, olisi seurata EU:n kilpailuoikeudessa omaksuttuja käytäntöjä. Sama koskee Euroopan ihmisoikeustuomioistuimen oikeuskäytäntöä kohdennettujen pakotteiden alueella.

Avainsanat: EU-oikeus, Euroopan unionin tuomioistuin, Euroopan unionin neuvosto, Yhteinen ulko- ja turvallisuuspolitiikka, henkilöpakotteet, näyttökynnys, prosessuaaliset oikeudet, ihmisoikeudet, terrorismin vastaiset pakotteet, kilpailuoikeuden sanktiot, oikeusvarmuuden periaate.

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List of Abbreviations

Common Foreign and Security Policy = CFSP
Council of the European Union = The Council
Court of Justice = ECJ
European Convention on Human Rights = ECHR
European Court of Human Rights = ECtHR
European Commission = The Commission
High Representative of the Union for Foreign Affairs and Security Policy = the High Representative
International Criminal Court = ICC
The Court of Justice of the European Union = The Court
Treaty on European Union = TEU
Treaty on the Functioning of the European Union = TFEU
United Nations = UN

1 INTRODUCTION

1.1 Background

With the first two decades of the 21st century marked by increasing political tensions and democratic crisis, the EU has risen to the occasion by assuming the position of a major foreign policy actor. Possessing a broad repertoire or foreign policy tools, the EU strives to uphold and advance its core values, including human rights and fundamental freedoms, stated in Article 21 TEU.[1] One foreign policy tool, namely, restrictive measures (hereon referred to as sanctions), have become widely used, resulting in added scrutiny on the functioning of this tool.

The development of EU sanctions, beginning in the 1980's, has gradually shifted from the EU mechanically implementing UN sanctions listings to actually creating its own autonomous sanctions.[2] Simultaneous to this development, sanctions, which started out with targeting entire states, have become increasingly targeted, now possessing a thematic, rather than geographic focus.[3] This shift has often been accredited to the negative humanitarian effects and perceived ineffectiveness of state sanctions.[4] In addition, the increase in terrorism and other non-state actor crimes speaks for the need to expand sanctions to include other than just state governments. So far, the EU has

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[1] Article 21 (1) TEU states "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."

[2] Cardwell 2015, p.295. The first EU autonomous sanctions were targeted on USSR and Argentina in early 1980's. See also, Léonard – Kaunert (2012, p. 475-475) about how the EU started developing targeted sanctions already in the 1990's.

[3] A list of all the EU's sanctions regimes, both thematic and geographic, can be found on the "EU Sanctions Map".

[4] On the negative humanitarian effects see, Cardwell 2015, p.301, Biersteker 2009-2010 pp. 99-101 and Léonard - Kaunert 2012 pp. 475. The example used most often is the case of Iraq where the imposing of comprehensive state-sanctions considerably worsened the humanitarian situation in the country. On the debate on the ineffectiveness of state sanctions see, Giumelli et al 2021, p.3, Léonard - Kaunert 2012, pp. 474-476, Eckes 2009, pp.72-77 and "EU Counterterrorism Policy: A Paper Tiger?".

implemented four targeted sanctions regimes with focus on counter-terrorism (2001)[5], chemical weapons (2018)[6], cyber-attacks (2019)[7], and human rights violations (2020).[8] The most recent addition to the EU foreign policy toolbox, the EU Global Human Rights Sanctions Regime, was adopted on the 7th of December 2020 through Council Decision 2020/1999 and Council Regulation 2020/1998.

Much like other targeted sanctions regimes, the new human rights sanctions allow the EU to sanction natural and legal persons, entities and bodies who are responsible for, or otherwise involved in, the committing of gross human rights violations.[9] Although the targeted nature of sanctions has reduced the broad negative effects on civilians,[10] it has simultaneously created new issues which remain unsolved. As sanctions have traditionally been used as tools for policy-change on state level, shifting the target of the sanctions from a state to a natural or legal person has created new aspects to consider, especially in the realm of procedural rights. Due to individuals not possessing the same legal or political avenues as states, the EU has had had to clarify, among other things, whether sanctions listings can be challenged in the EU court system and what types of procedural rights sanctioned individuals need to be afforded. Although there has been progress in this field, many questions remain unsolved.

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[5] Council Common Position (CFSP) 2001/931 and Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.
[6] Council Decision (CFSP) 2018/1544 and Council Regulation (EU) 2018/1542 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons.
[7] Council Decision (CFSP) 2019/797 and Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Members States.
[8] Russell 2020, p.2-3.
[9] Council Decision 2020/1999, 7 December 2020,
Art 2 para. 1 (a),(b): Member States shall take the measures necessary to prevent the entry into, or transit through, their territories of: (a) natural persons who are responsible for acts set out in Article 1(1); (b) natural persons who provide financial, technical, or material support for, or are otherwise involved in, acts set out in Article 1(1), including by planning, directing, ordering, assisting, preparing, facilitating, or encouraging such acts;
Art 3 1. All funds and economic resources belonging to, owned, held or controlled by: (a) natural or legal persons, entities or bodies, who are responsible for acts set out in Article 1(1); (b) natural or legal persons, entities or bodies, who provide financial, technical, or material support for or are otherwise involved in acts set out in Article 1(1), including by planning, directing, ordering, assisting, preparing, facilitating, or encouraging such acts; (c) natural or legal persons, entities or bodies, who are associated with the natural or legal persons, entities or bodies covered by points (a) and (b); as listed in the Annex, shall be frozen.
[10] *supra. 4.*

The questions of the Court's competency and applicability of different procedural rights have been addressed especially through the case law relating to counter-terrorism sanctions. In these cases, the Court has been quick to annul sanctions listings made by the Council, often basing its judgement on procedural deficiencies relating to inadequate procedural safeguards and fundamental rights issues. Furthermore, there is an open debate about some of the more fundamental aspects of sanctions, including whether targeted sanctions fall under the procedure of administrative or criminal law. The categorizing of sanctions under administrative or criminal law has an impact on the applicable procedural rights and therefore also the individual's fundamental rights. Most notably for this thesis, the Court has yet to establish clear standards of proof in targeted sanctions cases, leading to criticism on a general lack of clarity in the area.[11] A standard of proof is the standard used by the Court to evaluate how much evidence the parties need to show in order to persuade the judge of a certain outcome.[12] These standards differ depending on if the case falls under criminal, civil or administrative procedure. A lack of a clear and sufficient standard of proof, in its turn, has been brought up in legal scholarship as a possible issue from the standpoint of the general principle of legal certainty.

Being that the EU is based on principles of human and fundamental rights, it should be mindful of upholding the same standards that it expects of others. Imposing sanctions on the basis of ambiguous evidence and lacking procedural standards has led to accusations of double standards from third countries against the EU.[13] Only amplifying this narrative is the fact, that EU sanctions have often-times been annulled by the Court itself for breaches of fundamental rights.[14] This threatens to become a slippery slope if the EU wants to be perceived as a credible and legitimate actor on the international field.[15] With

[11] van der Have 2020, p. 71.
[12] Advocate General Kokott's Opinion 2009, fn. 64.
[13] Hellquist (2019, p. 406) and Russell (2020, p. 3) use the example of there being sanctions against Iran and Venezuela but not against Saudi Arabia. The implication is that the EU chooses sanctions targets based on its financial and political interests, rather than the gravity of the human rights violation. The discussion on the human rights impact of sanctions measures have also been topic of heated debate on the UN level, where criticism of especially US and EU sanctions measures has led to the creating on a mandate for a Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights. This mandate was already created in 2014, see for instance A/76/174/Rev.1 for a comprehensive picture of the human rights criticism of EU sanctions.
[14] Chachko 2019, pp. 24-27.
[15] Eckes (2014, p. 903) especially highlights the damage that annulled sanctions listings might have on the EU's credibility as an international actor.

the EU targeted human rights sanctions regime still in its infancy, it affords a great opportunity to re-evaluate possible deficiencies and identify ways on how to improve the procedural safeguards, namely the standard of proof.

1.2 Research question and scope

In this thesis, I will examine the standard of proof of the Court in targeted sanctions cases, especially focusing on EU's targeted human rights sanctions. As the sanctions regime is relatively new and has not resulted in any case law yet, the analysis will be conducted through examining other, already established sanctions regimes. The sanctions regimes that I have chosen for this purpose are the EU's counter-terrorism sanctions regime and EU competition laws sanctions. The counter-terrorism sanctions regime is one of the four existing EU targeted sanctions regimes and has produced several landmark cases, which could give insight into how the Court will review targeted human rights sanctions cases. Competition law sanctions are included, as many of the issues with targeted sanctions cases have also been discussed in the context of competition law sanctions. With the guidance found in the areas of counter-terrorism and competition law sanctions, I hope to establish some clarity on the existing standards of proof, and highlight how these could be applied in the context of EU human rights sanctions. In addition, I will include some relevant aspects from the United Nations (UN) and European Court of Human Rights (ECHR) levels.

With the research problem being the Court's ambiguous standard of proof in cases of targeted sanctions, it is essential to understand how the EU sanctions mechanisms works. The research will be conducted with focus on the EU's autonomous targeted sanctions regimes, i.e, sanctions regimes which have been drafted by the Council itself and which target natural and legal persons in contrast to entire states. This leaves outside sanctions listings based on UN sanctions regimes, as the Council in these cases only implements sanctions which have been decided on the UN level.[16] However, some of the more notable

[16] The EU Sanction Map differentiates between UN sanctions, UN/EU sanctions and EU sanctions.

cases, which are based on UN listings, such as the *Kadi I*[17] and *II*[18] cases, will be used in some capacity where appropriate. The EU's autonomous sanctions and UN-based sanctions listings adopted by the EU are in essence harmonized, meaning that the same processes apply to both of them.[19] The only real difference is that UN sanctions listings are created by the UN whereas EU's autonomous sanctions are created by the Council. It will therefore be more interesting to look at the EU's autonomous sanctions, as they have been created within the EU from start to finish and reflect the functioning of EU's internal processes. In addition to the separation of autonomous and UN sanctions, the focus will be on targeted sanctions, even if the EU also has the capacity to impose human rights sanction on state-level.[20]

To address the overarching research question, namely, what the standard of proof of the Court should be in the EU's targeted human rights sanctions regime, it is first essential to settle on an interpretation on the basic nature of sanctions. Hence, the first research questions asks, whether EU targeted measures have an administrative or criminal nature? What standard of proof is used, depends on whether a case falls within criminal or administrative procedure.[21] From the point of view of the Court, targeted sanctions are deemed to fall under administrative procedures, which has led to criticism from legal scholarship. After exploring the basic nature of targeted sanctions, I will turn to the second research question and consider what types of standards of proof could be applicable to the human rights sanctions regime. In connection, I will review both how the Court functions in targeted sanctions cases, as well as what the different options could be for a standard of proof in human rights sanctions cases. The third research question is, whether there might be issues of legal certainty in the standards of proof already used in targeted sanctions cases. The review will be limited to the general principle of legal certainty, as this narrative has been brought up specifically by legal scholars. With these

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[17] Joined Cases C-402/05 P & C-415/05 P , *Kadi v Council* (hereafter Kadi I).
[18] Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Commission v Kadi* (hereafter Kadi II).
[19] Wimmer 2013, p.1131 and Cuyvers 2014, p. 1768. The Court has applied the same principles to both autonomous and UN-based sanctions listings, even as there are some differences in how the regimes are built.
[20] EU sanctions can be either state-centered (i.e., geographic) or targeted (i.e., thematic).
[21] van der Have 2020, p. 60. According to van der Have, this question is still unsolved due to the different characteristics of individual sanctions.

questions answered, I aim to be able to conclude what the standard of proof in targeted human rights sanctions cases should be moving forwards.

Restrictive measures, as the EU calls them, will be used synonymously with the term "sanctions". There are also other terms used for sanctions, such as "unilateral coercive measures", referring to sanctions by individual states or groups of states (and therefore including EU sanctions while excluding UN sanctions). These terms will not be used in the scope of this thesis. In the question of targeted sanctions, there is also a variety of terms used interchangeably. For the sake of simplicity, I will refer to the EU's targeted sanctions regimes as "targeted sanctions", instead of other alternatives such as "individual sanctions" or "thematic sanctions". Additional formulations such as "smart sanctions" or "blacklisting" will also be avoided, as they are not as objective in nature.[22] Finally, the EU Global Human Rights Sanctions Regime has sometimes been referred to as the EU Magnitsky Act, as it drew inspiration of the US Global Magnitsky Act from 2016. For the purposes of this thesis, I will refer to the EU Global Human Rights Sanctions Regime as the "human rights sanctions regime" or "targeted human rights sanctions regime". When other types of human rights sanctions are discussed, this will be separately mentioned.

1.3 Methodology, material, and structure

In this thesis, I will be following the legal-dogmatic method to systematize and interpret existing legal structures of the EU.[23] This approach is essential to analyze the recently implemented human rights sanctions regime and examine how it fits in with the existing EU mechanisms. Due to the novelty of this regime, a comparative method will be used to draw information from other targeted sanctions systems in the EU and the UN. As the question of standard of proof in EU targeted sanctions cases is not well-researched, it requires discussing the issue through the material that is available. In essence, the research questions will facilitate a *de lege feranda* study, assessing, what legal developments could

[22] A point originally argued by Eckes 2009, p. 17.
[23] On the legal-dogmatic method, see Peczenik 2005, p. 249.

be used to ensure the legality of sanctions listings from a procedural view. Due to the political nature of EU sanctions policy, the study will also include a problem-oriented approach to consider the non-legal background to issues of evidentiary standards.[24] To understand how the Court reviews cases of EU targeted sanctions, it is important to understand the political background to why targeted sanctions measures were created in the first place, as well as their current role in EU foreign policy.

Due to the novelty of the subject, material relating to targeted human rights sanctions will be mostly derived from legal journals or publications by the EU itself. This includes the relevant Council Decisions and Regulations, as well as different guidelines published by the EU. In more general sanctions questions and fundamental rights aspects, the material will consist of written literature and case law. To conduct the comparative aspect of my thesis, case law will be an essential element. Even if the human rights sanctions regime is more recent, some of the discussions on the character of sanctions and different procedural standards are not as recent. These older sources, including literature and case law, have been chosen with consideration while ensuring that the material used is still relevant.

Chapter 2 presents an overview of EU sanctions, while providing the legal basis for both targeted sanctions and human rights sanctions. This includes a more comprehensive look on the human rights sanctions regime itself, including a presentation of important definitions and criteria. Following this general basis, I will discuss the different interpretations of the nature of sanctions found in scholarly literature. After concluding on an interpretation to be used in this thesis, I will move on to a closer examination of the role of the Court in targeted sanctions cases in Chapter 3. This Chapter highlights how the area of targeted sanctions has changed through the Court's case law and presents the central rules and standards currently used by the Court in targeted sanctions cases. In Chapter 4, I will focus on the concept of standard of proof and discuss some of the different standards of proof used by the Court. The discussion will also include points of reference from the EU counter-terrorism sanctions regime and EU competition law

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[24] Neuhold 2016, p. 3. This approach focuses on identifying the non-legal problems to be solved by law, which entails looking into the relevant political aspects.

sanctions. The aim is to conclude on the applicability of these regimes on cases of targeted human rights sanction. Furthermore, I will address the current criticism on the Court's standards of proof in targeted sanctions and consider some of the circumstances that could lead to breaches of the principle of legal certainty. Finally, Chapter 5 will conclude on potential solutions and discuss some ways forward in relation to human rights sanctions.

2 SANCTIONS AS AN EU FOREIGN POLICY TOOL – THE LEGAL BASIS AND CHARACTER OF TARGETED SANCTIONS

2.1 What is the legal basis of targeted EU sanctions?

2.1.1 The general legal basis

In order to discuss the complexities of the EU's targeted human rights sanctions regime, it is essential to first understand the fundamental aspects of EU targeted sanctions. This Chapter aims to provide a general understanding of how EU targeted sanctions are created and what the EU's targeted sanctions regimes are legally based on. This overview is applicable to all EU's targeted sanctions regimes, although the intention is to highlight the aspects relevant for targeted human rights sanctions. After discussing the general legal basis of targeted sanctions, I will move on to explaining the background and central definitions of targeted human rights sanctions. The definitions work also as a tool to exemplify how sanctions regimes work in practice. Lastly in this Chapter, I will discuss the legal character of targeted sanctions, that is, whether targeted sanctions fall into the category of administrative or criminal law. The discussion on the legal character is essential for the general understanding of the topic, as it ties closely to the procedural and fundamental rights discussions later in the thesis.

When it comes to the general legal basis of the EU's targeted sanctions regimes, there are two alternative treaty bases found, namely, in Article 215 TFEU and Article 75 TFEU. The fundamental difference between these two articles is in the procedure for adopting restrictive measures – Article 215 TFEU places sanctions decisions under the procedure of EU Common Foreign and Security Policy (CFSP), whereas Article 75 TFEU places them under the ordinary legislative procedure.[25] So far, the EU has only relied on the procedure under Article 215 TFEU when adopting targeted sanctions measures. The

[25] Eckes (2014 p. 880) discusses the legal bases more in depth, also explaining that while Article 215 TFEU provides the clearer basis, the wording of Article 75 could encompass financial sanctions adopted in the context of the fight against terrorism.

question of the correct legal basis came up in the Court in 2012 through the case *Parliament v Council*, where both the EU Parliament and Council claimed to have primary competency to adopt targeted sanctions measures, especially in the context of counter-terrorism sanctions.[26] The Court sided with the Council and therefore confirmed that the correct treaty basis in these cases was Article 215 TFEU.[27] Article 215 TFEU states that "the Council may adopt restrictive measures […] against natural or legal persons and groups or non-State entities".[28]

Apart from giving the Council competency to adopt restrictive measures, Article 215 TFEU requires that these measures are adopted in conformity with Chapter 2 of the TEU. Chapter 2 includes the most central provisions of the EU's Common Foreign and Security Policy and provides the specific legal basis and adoption procedure, on which targeted sanctions measures are based on.[29] The procedure for creating a sanctions regime, in accordance with Article 215 TFEU, is based on the Council adopting Council Decisions and Regulations. In practical terms, the procedure for a Council Decision is initiated by a proposal from the High Representative of the Union for Foreign Affairs and Security Policy (the High Representative).[30] The proposed sanctions regime is examined and discussed by the relevant Council preparatory bodies and a Council Decision is thereafter adopted unanimously by the Council.[31] For the Council Decision to enter into force it is published in the Official Journal of the European Union.[32] In situations where the Council wishes to impose economic sanctions such as asset freezes, there is further need to adopt

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[26] Case C-130/10, *Parliament v Council.*
[27] *Ibid*. para. 85.
[28] Article 215 TFEU states: "1) Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2) Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities, 3) The acts referred to in this Article shall include necessary provisions on legal safeguards.".
[29] This basis can be found in Article 29 TEU. The Article states that; "The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions." Article 29 is followed by Articles 30 and 31 TEU, which include the adoption procedure for a Council Decision.
[30] Council of the European Union: Adoption and review procedure for EU sanctions.
[31] *Ibid.*
[32] *Ibid.*

a Council Regulation. This is due to the particular nature of Council Decisions; although they qualify as legal acts, they are not adopted through a legislative procedure and retain therefore a stronger political focus.[33] To adopt a Council Regulation, the High Representative and the Commission present a joint proposal to the Council.[34] After being unanimously adopted by the Council, the European Parliament is informed, whereupon the regulation will be legally binding for any person or entity within the EU.[35]

After a sanctions regime has been created through the adoption of a Council Decision and/or Regulation, the High Representative and the EU Member States can make suggestions on who should be listed to the sanctions regime.[36] Decisions to enlist a person or entity are made unanimously by the Council, whereafter the name of the person or entity will be added to the Annexes included in the relevant Council Decision and Regulation. This procedure applies for to all of the EU's targeted sanctions regimes apart from the counter-terrorism regime, which is built on a two-step system.[37] Although the procedure is different for the EU counter-terrorism regime, it is still the most valuable point of reference for targeted human rights sanctions, as much of the evolution of targeted sanctions regimes has happened through the case law in counter-terrorism sanctions.[38] It is therefore necessary to understand how the differences in procedure effect

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[33] Wessel 2016, p. 341-342.
[34] Council of the European Union: Adoption and review procedure for EU sanctions.
[35] *Ibid.*
[36] Council Decision 2020/1999, Article 5.
[37] House of Lords EU Justice Sub-Committee: The Legality of EU Sanctions, 11 October 2016. Andrew Murdock's answer on Q2. As further background it should be noted that the EU has in fact two counter-terrorism sanctions regimes. The first regime is based on UN Security Council listings and directly implements UN sanctions lists on the EU level. The regime is implemented through Council Decision 2003/402/CFSP and Council Regulation 881/2002/EC. The second regime, which is discussed in this context, is an autonomous EU sanctions regime, implemented through Council Common Position (2001/931/CFSP) and Council Regulation (EC) No 2580/2001. The Council Common Position (2001/931/CFSP) Article 1(4); the regime states that sanctions "(…) shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list."
[38] The area of counter-terrorism sanctions measures is complex as the EU has counter-terrorism sanctions with basis on UN Security Council Resolutions, autonomous EU sanctions as well as country specific sanctions with a focus on targeting terrorist activity. Although these regimes are all implemented through different Council Decisions and Regimes, the Court has seemed to hold that the same procedural rules apply to counter-terrorism sanctions generally. As the EU's autonomous counter-terrorism regime is closest to

the applicability of the counter-terrorism sanctions regime's case law to the human rights sanctions regime.

For a sanctions target to be listed under the two-step process of the EU counter-terrorism regime, there has to first be a decision from a competent national authority, showing that the person or entity has participated, facilitated or attempted to perpetrate a terrorist act.[39] Furthermore, the competent national authority is required to have processes that respect the rule of law and fundamental rights and the decision has to be based on precise information or evidence.[40] The second step of the procedure entails that the Council reviews the national decision and thereafter concludes whether it has been based on serious and credible evidence as well as the rule of law.[41] In question of targeted human rights sanctions, however, the procedure is more simplified and does not require the involvement of national authorities.[42] Even if the two-step process creates more procedural certainty with the inclusion of national courts, the adopting of a similar type of system would be difficult in the context of human rights sanctions. As the regime targets human rights violations in third countries, the availability of decision by competent national authorities, especially ones where the rule of law requirements are met, is difficult to come by. I will therefore not go as far as to suggest the adoption of a two-step procedure in EU targeted human rights sanctions, but rather, be mindful of the differences while comparing the two regimes with each other.

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the targeted human rights sanctions regime, the focus will be on that regime. It should, however, be noted that the case law relating to counter-terrorism sanctions is also derived from all three types of EU counter-terrorism sanctions regimes.

[39] Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), Article 1(4).

[40] Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), Article 1(4)."

[41] House of Lords EU Justice Sub-Committee: The Legality of EU Sanctions, 11 October 2016. Andrew Murdock's answer on Q2.

[42] The more simplified procedure applies to the human rights sanctions regime but also to the chemical weapons and cybercrime regimes. In these types of sanctions cases, the listing decision is only based on a decision made by the Council, without any specific requirements of national decisions. While it would be more logical to compare the human rights sanctions regime to the chemical weapons and cybercrime regimes, many of the issues relevant to this thesis have been discussed through the counter-terrorism regime. Furthermore, the chemical weapons and cybercrime regimes are not developed as the counter-terrorism sanctions regime.

Apart from the Treaty basis found in Article 215 TFEU, the Council has published a document containing Basic Principles[43] in 2004 and furthermore, documents containing Guidelines[44] and Best Practices[45] which are regularly updated. With the latest versions of Guidelines and Best Practices being from 2018, they contain definitions, objectives, and procedures in relation to targeted sanctions, aiming to standardize and strengthen the procedures found in the Treaties.[46] The specific objectives of sanctions, contained in the Basic Principles and Guidelines documents will be referred to more in depth in relation to the fundamental character of targeted sanctions, discussed in Chapter 2.2. For now, it suffices to mention that according to the Basic Principles, sanctions are not meant to be permanent, and will, therefore, have to be lifted once they have fulfilled their objectives.[47] Listings need to be accompanied by accurate, up-to-date and defendable reasons for the sanctions listing, and the sanctioned have additionally a right to be notified and make their views heard in the matter.[48] In order to ensure these rights, it is imperative that sanctions listings have clear objectives, and are regularly monitored.

2.1.2 The legal basis of the EU Global Human Rights Sanctions Regime

As briefly introduced in the previous Chapter, the most recent addition to the EU's foreign policy toolbox, the EU targeted human rights sanctions regime, was created through two legal instruments, i.e., Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998, on December 7th, 2020. The human rights sanctions regime is the fourth targeted sanctions regime created by the EU, and it expands the EU's powers in the field of human rights sanctions. Previous to this regime, the EU had already for decades imposed sanctions on state governments responsible for human rights violations.[49] A

[43] General Secretariat of the Council: Basic Principles on the Use of Restrictive Measures (Sanctions), 10198/1/04, 7 June 2004 (hereafter Basic Principles).
[44] General Secretariat of the Council: Sanctions Guidelines – update, 5664/18. 4 May 2018 (hereafter Guidelines).
[45] General Secretariat of the Council: Restrictive measures (Sanctions) – Update on the EU Best Practices for effective implementation of restrictive measures, 8519/19. 4 May 2018 (hereafter Best Practices).
[46] Guidelines 2018, p. 4, and Best Practices 2018, p. 3.
[47] Basic Principles 2004, p. 3 para. 9.
[48] Guidelines 2018, p. 9 para. 17.
[49] Eckes 2020, p. 5.

notable example is the longstanding state sanctions regime on Myanmar/Burma, imposed already in 1996 to address the systematic human rights abuses in the country.[50] While the focus was initially on the democratization of the country, the regime has been later modified and focuses currently on the crimes against the Rohingya minority and coup d'état of February 1, 2021.[51] The new targeted human rights sanctions, in contrast to the older country-specific regimes, serve a purpose in addressing arising human rights violations without the harsh political or humanitarian effects as state sanctions.

Modelled after the US Global Magnitsky Act of 2016, the human rights sanctions regime is intended to sanction human rights violations committed globally.[52] The US Global Magnitsky Act of 2016 is an instrument further developed from the Sergei Magnitsky Rule of Law Accountability Act, which was initially adopted by the United States in 2012 to sanction Russian officials involved in the death of a Russian whistleblower by the name of Sergei Magnitsky.[53] Mr. Magnitsky was involved in unveiling widespread tax fraud in Russia, ultimately leading to his own prosecution and death.[54] These aspects were later included in the US Global Magnitsky Act, which sanctions individuals for human rights violations.[55] Due to the specific origin of the regime, it, however, retained a focus on sanctioning human rights violations committed against whistleblowers, human rights defenders and also, against acts of significant corruption.[56]

When the EU, on the initiative of the Netherlands in 2018, started discussions of creating a similar human rights focused regime, the scope of the regime was decided as more general.[57] Crimes of corruption were not included in the human rights sanctions regime and references to the US Global Magnitsky Act were left out to avoid any misleading

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[50] Giumelli – Hoffmann – Książczaková 2021, pp. 6, 10.
[51] See the difference between Common Position of 28 October 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union on Burma/Myanmar (96/635/CFSP) and Council Decision 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP.
[52] European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)).
[53] Russell 2019, p. 1.
[54] Russell 2021, p. 2.
[55] The Senate and House of Representatives of the United States of America; "Global Magnitsky Human Rights Accountability Act S.284, April 18, 2016.
[56] *Ibid.*
[57] Ruys 2021, p. 298-299.

references to Russia.[58] The scope of the human rights sanctions regime, in its current form, covers sanctions for serious human rights violations and abuses committed globally. For a basic understanding of the human rights sanctions regime, it is essential to define, first, what serious human rights violations entail in this context, second, who are targeted by these sanctions, and third, what types of restrictive measures the EU has at its disposal. These aspects will be discussed below. A more in-depth examination of how persons are enlisted to the human rights sanctions regime will follow in Chapter 3, which discusses the function of the EU Courts in sanctions cases.

According to the non-exhaustive list in Article 1 of Council Decision 2020/1999, serious human rights violations and abuses include acts such as a) genocide, b) crimes against humanity, c) a list of serious human rights violations or abuses, including torture, slavery, extrajudicial killings, enforced disappearance and arbitrary arrests, and d) other human rights violations or abuses that are widespread, systematic or otherwise of serious concern as regards to the CFSP goals set out in Art 21 TEU. Examples of violations mentioned in 1d include, for instance, human trafficking, sexual and gender-based violence and violations of freedom of peaceful assembly and of association.[59] The Council Decision also makes reference to customary international law and widely accepted instruments of international law, including central UN human rights Treaties and the European Convention on Human Rights (ECHR).[60]

According to Article 1 of Council Decision 2020/1999 the Council can impose targeted sanctions on natural or legal persons, entities, and bodies.[61] This list of targets

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[58] Ruys 2021, p. 289. The focus is meant to be global, so a reference to Russia could give the wrong impression.

[59] Article 1(d) includes "other human rights violations or abuses, including but not limited to the following, in so far as those violations or abuses are widespread, systematic or are otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU: (i) trafficking in human beings, as well as abuses of human rights by migrant smugglers as referred to in this Article, (ii) sexual and gender-based violence, (iii) violations or abuses of freedom of peaceful assembly and of association, (iv) violations or abuses of freedom of opinion and expression, (v) violations or abuses of freedom of religion or belief.

[60] For instance, the Conventions on the rights of children, women and disabled persons as well those on the prevention of torture, genocide, racial discrimination and enforced disappearances.

[61] For the sake of simplicity, I will be referring to only "persons and entities" when talking about the targets of the human rights sanctions regime. Entities and bodies are however also included in this formulation, unless not specified.

encompasses 1) state actors, 2) other actors exercising effective control or authority over a territory, and 3) other non-state actors.[62] EU targeted sanctions are therefore not only limited to persons working under a state government but extend to private actors and bodies, such as members of terrorist organizations. The targets of human rights sanctions include persons responsible for acts set out in Article 1, as well as persons who have 1) provided financial, technical, or material support or 2) have otherwise been involved with the act or 3) are associated with a person responsible the act.[63] Examples of those who provide support or are involved or associated with the commitment of human rights violations include companies who provide services, business partners and family members who have a close relationship and even profit from the commitment of these acts.[64] The evaluation of who falls within the personal scope is made on a case-by-case basis and have many times been challenged by the sanctioned individuals and entities themselves.

By being listed to the human rights sanctions regime, natural and legal persons are subjected to 1) travel restrictions and 2) economic sanctions, consisting of asset freezes and prohibitions to make funds or economic resources available to the sanctions targets.[65] The EU can, however, only impose sanctions on assets that are located in the EU.[66] The same goes for travel restrictions; these measures are limited to travel to EU Member States and operators who fall under EU jurisdiction.[67] As the EU strives for their sanctions to be as targeted and differentiated as possible, measures are customized to the circumstances of every case.[68] Sanctions measures can be modified by the Council and should be lifted once they have fulfilled their objectives.[69] Council Decisions have to be

[62] Council Decision 2020/1999, Article 1(3).
[63] Article 2(1) states that the EU should sanction; (a) natural persons who are responsible for acts set out in Article 1(1); (b) natural persons who provide financial, technical, or material support for, or are otherwise involved in, acts set out in Article 1(1), including by planning, directing, ordering, assisting, preparing, facilitating, or encouraging such acts; (c) natural persons who are associated with the persons covered by points (a) and (b); as listed in the Annex.
[64] The concept of "associated persons" has been largely created through the Court's case law, which will be further discussed later.
[65] Council Decision 2020/1999, Articles 2 and 3.
[66] European Commission: "Overview of sanctions and related tools – where do EU sanctions apply?"
[67] *Ibid.*
[68] Basic Principles p. 3 para. 9.
[69] Council of the European union: "Adoption and review procedure for EU sanctions".

extended every 12 months, whereas economic sanctions included in the Council Regulation are adopted as open-ended.[70]

On the time of writing, the human rights sanctions regime has focused its sanctions listings on sitting or ex-state officials and legal persons, namely from Russia (in connection to the poisoning and imprisonment of Alexander Navalny, human rights violations against the LGBTI minority in Chechenia and the activities of the Wagner Group), China (In relation to the treatment of the country's Uighur minority), Democratic People's Republic of Korea (in relation to human rights violations), Libya (in relation to the alleged extrajudicial killings and enforced disappearances of persons by the Kaniyat Militia in the years 2015-2020), South Sudan (in relation to extrajudicial killings and arbitrary executions) and Eritrea (in relation to arbitrary arrests, extrajudicial killings, enforced disappearances of persons and torture). The latest amendments to the regime have been made 13 December 2021.[71]

2.2 What is the legal character of targeted EU sanctions – the debate between administrative law and criminal law

2.2.1 Administrative sanctions vs criminal sanctions – why does it matter?

In this subchapter, I will consider whether targeted sanctions are measures that should be regarded as administrative or criminal law proceedings. The discussion about the correct legal basis is one that has been raised especially by legal scholars in recent years, who have claimed that the Council does not acknowledge the punitive nature of targeted sanctions measures.[72] Determining whether targeted sanctions follow the procedural rules of administrative or criminal law is central, as this classification influences the types of procedural rights the defendant has in court.[73] The Court has certain foundational

[70] *Ibid.*
[71] Council Decision (CFSP) 2021/2197 of 13 December 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.
[72] Ruys 2021, p. 299; van der Have 2019, p. 60; Van Thiel 2008, pp. 437-492; Léonard - Kaunert 2012 p. 475; Eckes 2020 p. 9-10.
[73] Eckes 2014b, p. 885. In the UN context the Security Council has held that due to sanctions measures' preventive nature criminal standards are not applicable to them. See UN Security Council Resolution 1822 of 30 June 2008.

principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality and procedural justice that apply for both administrative and criminal cases.[74] However, procedural rights, such as the presumption of innocence, right to be informed of the accusation, the principle of legality and the principle of guilt, have traditionally only applied in criminal proceedings.[75]

In addition, the Court's evidentiary standards, i.e., standard of proof, is determined based on the legal character of the case. Criminal cases require a higher standard of proof than administrative cases.[76] As my second research question is to examine the different standards of proofs applicable in future human rights sanctions cases, it should first be established whether the basis of the sanctions regimes should be in administrative or criminal law. With this question still much up for debate, I will review both the EU's own standpoint as well as arguments arising from the legal scholarship. As the same issue has been discussed in EU competition law, it will be used as a point of reference. In competition law cases, the discussion has even extended to civil law standards of proof but as the debate in targeted sanctions is mostly between administrative and criminal law, this will be the focus of this Chapter.

According to the Council itself, targeted sanctions are administrative measures with an aim to *maintain* and *restore* international peace in accordance with the principles of the UN Charter and the EU's foreign and safety policy objectives.[77] These foreign and safety policy objectives include among other things; 1) safeguarding EU values, fundamental interests, and security; 2) consolidating and supporting democracy, the rule of law, human rights and the principles of international law; and, 3) strengthening international security.[78] According to the Council, the concrete aim of the sanctions is to impact the behavior of the targets of the sanctions measures, and, when appropriate, work as incentives to encourage policy and behavior change.[79] The Council's Guidelines describe EU sanctions as preventive and, non-punitive instruments which should allow the EU to

[74] Craig 2018, p. 264.
[75] Al-Nassar et al. 2021, p. 4.
[76] Eckes 2014b, p. 885.
[77] Basic Principles, p. 2, para. 1.
[78] Article 21 TEU.
[79] Basic Principles, pp. 1-2.

respond swiftly to political challenges and developments.[80] The swift and flexible nature of targeted sanctions is made possible through their classification as administrative measures. As administrative measures, they do not require the same high level of certainty and procedural safeguards as criminal sanctions would.[81]

The line between administrative and criminal law is not always clear-cut, as there are many cases that seemingly embody aspects of both legal areas.[82] When it comes to administrative law, it is generally held that administrative procedures can have punitive characteristics, as long as the purpose of those characteristics is reparation, rather than punition.[83] In the case of antitrust fines, there is a difference between fines that aim to compensate the experienced economic loss and fines that go beyond reparation and act more as a punishment and deterrent.[84] The fact that the Council describes targeted sanctions as "preventive and non-punitive instruments" is not quite enough to conclude that this is actually the case. The aim of prevention is often connected to criminal law, as criminal sanctions partly aim to prevent the commitment of future crimes. Only because a measure is intended to be preventive, does therefore not exclude it from being punitive. In fact, these aims often go hand in hand.[85] With this being said, it is necessary to look further into the arguments which support the administrative nature of targeted sanctions.

As I see it, the most convincing argument in favor of the administrative nature of targeted sanctions is that the procedure inherently resembles an administrative process or at least comes closer to it than to traditional criminal procedures. Targeted sanctions are imposed on individuals and entities through an administrative institution (in this case the Council), not by a court or on the initiative of a victim or prosecutorial authority.[86] Furthermore, targeted sanctions are adopted without a court procedure, and sanctions targets are not afforded the same procedural rights as used in criminal procedures. Unlike criminal

[80] Guidelines, Annex 1, p. 46.
[81] Eckes 2014b, p. 885.
[82] Sanctions measures are great examples of measures which have been categorized as administrative but have punitive effects due to their considerable size and broad effects.
[83] Opinion of Advocate General Campos Sanchez-Bordona in the case of Garlsson Real Estate SA et al. v Consob (C-537/16) 12 September 2017, para. 64.
[84] *Garlsson Real Estate and Others v Commission*, para. 33.
[85] van der Have 2019, p. 60-71.
[86] Kärner 2021, p. 158.

sanctions, which aim to find and hold perpetrators of certain acts accountable, targeted sanctions are not built to establish this type of link between an act and a perpetrator.[87] Furthermore, the requirement of a higher level of certainty in criminal cases is tied to the harsh way criminal penalties restrict the perpetrator's fundamental rights. Even if targeted sanctions restrict the target's right to property and freedom of movement, the effects are still not as far-reaching as imprisonment.[88]

The Court has previously in the *Al-Asqa* judgement held that terrorism-related sanctions were generally not of criminal nature.[89] The Court concluded that counter-terrorism sanctions were temporary precautionary measures which were not supposed to deprive targets of their property or act as support for national criminal procedures.[90] The aim of these sanctions, according to the Court, was mainly to prevent the commitment of terrorist acts in the future. In this context, what has been concluded about counter-terrorisms sanctions can also be extended to human rights sanctions, due to their similar nature as EU targeted sanctions. While it has been held that counter-terrorism sanctions are not of criminally nature, the wording of the Court in *Al-Asqa* is not absolute, seemingly leaving the possibility for criminally natured targeted sanctions open.[91]

The ECtHR, contrary to the Court, has looked at the legal nature of sanctions from a broader perspective, accepting on multiple occasions that administrative sanctions have been of criminal nature.[92] For instance, in the case of *Jussila*, the ECtHR held that competition law sanctions constituted criminal measures under Article 6(1) of ECHR, but that they did not carry the same degree of stigma as traditional criminal law cases.[93] In *Menarini*, the ECtHR held that an administrative body could only impose criminal

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[87] Wils 2005, p. 2. Case T-49/07 *Fahas v Council*, para. 67. The Court in Council held that terrorism related sanctions did not constitute criminal sanctions and therefore, did not imply an accusation of criminal nature. See also, case T-47/03 *Sison v Council*, para. 101.
[88] *Ibid.*
[89] Joined Cases C-539 & 550/10 P*, Al-Aqsa v Council and the Kingdom of the Netherlands v Al-Aqsa,* judgement of 15 November 2012, para. 72.
[90] *Ibid.* para. 120.
[91] Wimmer 2013, p. 1129-1130.
[92] Cases where the ECtHR has accepted the criminal nature of administrative sanctions include for instance, *A. Menarini Diagnostics S.R.L. v. Italy* Application no. 43509/08; *Dubus S.A. v. France* Application no. 5242/04; *Öztürk v. Germany* Application no. 8544/79; Jussila *v. Finland* Application no. 73053/01.
[93] *Jussila v. Finland*, Application no. 73053/01, para. 43.

penalties if there was a judicial body that had full jurisdiction to review the decision, including the legal and factual grounds.[94] For a long time, the Court seemed unwilling to accept the precedent from ECtHR case law, mainly under the argument of effectiveness. In *Compagnie Maritime Belge* the Court noted that "the effectiveness of competition law would be seriously affected if the argument that competition law penalties are criminal charges were accepted".[95] The Court has, however, started to shift away from this reasoning in the area of competition law, which will be discussed more in depth later. With the varying conclusions found in the CJEU's and ECtHR's case law, legal scholarship has actively participated in the conversation by providing arguments against the purely administrative nature of targeted sanctions measures. The following sub-chapter will include some of the main arguments often brought up by scholars.

2.2.2 The objective of EU targeted sanctions – arguments from the legal scholarship

As the EU has held, and quite strongly so, that targeted sanctions are preventive and administrative measures, much of the opposing arguments have been voiced through scholarly literature. The discussion within legal scholarship seems to be quite unified in that targeted sanctions measures should not be regarded as purely administrative procedures. Even if targeted sanctions measures bear more resemblance to the traditional administrative law with quicker procedures and less safeguards, it does not automatically translate to targeted sanctions being purely administrative measures. In many senses, the traditional administrative procedures have dealt with matters quite different from targeted sanctions measures.[96] Furthermore, the fact that sanctions measures combine legislative acts, which are inherently abstract instruments, with individualized lists of sanctions targets, creates conflict in the nature of sanctions measures.[97] In this sense, it would be difficult to categorize targeted sanctions measures as purely administrative measures.[98]

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[94] *A. Menarini Doagnostics S.R.L v Italy* paras. 57-67.
[95] Case T-276/04, *Compagnie Maritime Belge*, para. 66.
[96] Nuotio 2013, pp. 120-121. Nuotio suggests that sanctions measures could be seen as "strongly security oriented, emergency law type of actions" and therefore as extensions of administrative law.
[97] *Ibid.*
[98] *Ibid.*

A central argument advocating for the punitive characteristics of sanctions measures is that targeted sanctions, developed from state sanctions, are still not adapted enough for the targeting of individuals.[99] State sanctions have been categorized as administrative measures from the beginning, owing partly to the fact that criminal responsibility of states is still a very underdeveloped area of international law.[100] Sanctions directed towards entire states have much broader effects on a state's economic and diplomatic relations, and the importance of procedural safeguards is less relevant. Keeping in mind the fundamental differences between state sanctions and targeted sanctions, it can be noted that just because state sanctions do not have punitive characteristics, does not mean that targeted sanctions could not have them. As the violations included in the human rights sanctions regime are wide-spread and systemic, it is easier to for a state to demonstrate policy or behavior change, for instance, through change in state policy or by seizing the condemned activity or acknowledging the commitment of an internationally wrongful act.[101] This change in behavior, however, is not as evident in individuals who are only a part of, support, or associate with activity that has been condemned by the EU. The individual's ability to demonstrate a behavior change can be especially challenging in cases where the individual cannot change certain circumstances or does not understand what the Council requires in order to de-list the individual.

To continue from the previous point, another aspect in support of targeted sanctions' punitive nature is how sanctions measures are perceived by sanctions targets.[102] Targeted sanctions create a link between individuals and international legal instruments, in essence, labelling individuals as human rights violators without a trial.[103] Similarly to criminal procedures, the human rights sanctions regime is focused on sanctioning human rights

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[99] Van Thiel 2008, pp. 437-492; Léonard - Kaunert 2012 p. 475.
[100] Rome Statute of the International Criminal Court RC/Res.6 of June 2010. Article 25 states that "No provision in this Statute relating to the individual criminal responsibility shall affect the responsibility of States under international law". The issue was further explored by the International Law Commission, which concluded in the commentary of its Report A/56/10 (2001, pp. 48, 111) that the Responsibility of States for Internationally Wrongful acts is only limited to natural persons. For further discussion see, Foroughi – Mirzaei 2016, pp. 268-270 and Gilbert 1990.
[101] Eckes 2020, p. 8.
[102] An argument that has been generally raised by Eckes.
[103] Eckes 2009, p. 77.

violations which have already been committed.[104] By being enlisted, the target's fundamental rights to freedom of movement and property will be directly impacted. Although there are humanitarian exceptions to ensure that targets have access to basic necessities, reversing a sanctions listing is oftentimes a long and complicated process. The most blatant example of the complexities of the procedure can be seen in the *Kadi* cases, where the defendant was re-listed directly after winning his case and stayed on the EU's sanctions list for over 10 years.[105] It is common practice for sanctions targets to remain listed for long periods of time, and even when they are de-listed by the Court, to be re-listed on different grounds by the Council.[106] Being the target of fundamental rights restrictions for an undefined, but often long-lasting time-period, is not far from the effects of criminal sanctions. Even disregarding the longstanding restrictive effects on sanctions targets' finances and freedom of movement, the effect of being associated with the commitment or support of grave human rights violations might bear even more long-lasting stigmatizing effects.[107]

An aspect also worth highlighting, is how the aim of policy or behavior change is used in relation to targeted sanctions measures. It could be argued that an objective of policy and behavior change through targeted human rights sanctions is, in itself, quite an ambitious goal.[108] Considering that targeted sanctions are intended to be used in combination with other foreign policy tools, there is not much concrete evidence on sanctions actually changing the behavior of its targets.[109] According to a study, sanctions can be said to have succeeded in reaching some level of policy change in around 30% of cases.[110] However,

[104] Eckes 2020, pp. 9-10. The violations that are targeted by the human rights sanctions regime are either ongoing or have already happened. In many grave human rights violations, there is a requirement that the violation is systemic and consists therefore of multiple smaller violations which, in combination can result in grave human rights violations.
[105] Eckes 2014b, p. 885.
[106] Chachko 2019, pp.27-28. Out of 126 individual sanctions cases under the EU's Iran and Syria sanctions 57% of sanctinos targets where relisted if the Court had annulled their sanctions listing.
[107] Eckes 2014a, pp. 323-324.
[108] van der Have 2019, p. 68; Giumelli et al. 2021, p. 3; Ruys 2021, p. 300; Biersteker 2016 pp. 220-247; Hofer 2019, pp. 163-168.
[109] *Ibid.* Basic Principles (2004, p. 2) state that sanctions are used as a part of an "[…] integrated, comprehensive policy approach, which should include political dialogue, incentives, conditionality and could even involve, as a last resort, the use of coercive measures in accordance with the UN Charter.".
[110] Wallensteen – Grusell (2012, p.255) points to targeted sanctions only being effective in 20-34% of cases. The number does not appear to differ in the UN sanctions context, regardless of if sanctions are targeted or state-wide. Portela 2018, p. 22 uses the study by Wallensteen – Grusell in her own work while noting that

another study focusing on earlier sanctions on Russia concluded, that state sanctions bore the risk of only further alienating the targeted state while fueling an EU-sceptic narrative and increased nationalism.[111] Even if targeted sanctions do not target an entire population, they still risk being used in anti-Western rhetoric, while not having a big enough effect on the violations themselves.[112] Especially in relation to targeted sanctions, it is good to acknowledge that while sanctions measures have an aim of policy change, the measures in themselves are not constructed accordingly. Considering that sanctions measures often target individuals and entities with no real power to accomplish policy changes, the effects of sanctions become more indirect only putting pressure on people related to human rights violators and signaling disapproval of certain behavior.

Instead of trying to change a person's behavior through restrictions, sanctions seem much more adept to condemn the acts by a state, person or entity.[113] For instance, the sanctions listings made so far in the human rights sanctions regime, focusing on Chinese state officials and entities involved in the violations towards the Uighur minority, are a clear act of condemnation by the EU.[114] However, if the EU strives to maintain the objective of policy change, it would be essential to further clarify what the desired policy change would be in individual cases. Sanctioning persons without clearly informing them of the reason for the listing, will most likely not induce a behavioral change, but only come off as punitive or even performative. Furthermore, making the concrete aims of targeted sanctions listings clear and transparent would be a general improvement to the regimes and further support their nature as administrative foreign policy tools. Considering the arguments supporting the punitive characteristics of targeted sanctions measures, it seems as if targeted sanctions measures, in fact, embody aspects of both administrative and criminal law.

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there is little available data on the impacts of EU sanctions. The success of sanctions can sometimes be very difficult to perceive.

[111] Guter-Sandu – Kuznetsova (2020, pp. 608-611) point to the fact that sanctions can be used to fuel anti-Western rhetoric in authoritarian states.

[112] *Ibid* pp. 605-617. Also, as the people in actual power are rarely the target of sanctions themselves, this leads the question of how much policy change is even possible.

[113] The aspect of condemning acts is mentioned as one aim of targeted sanctions, although I find that it could merit a more central position.

[114] See Council Decision (CFSP) 2021/481 of March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

2.2.3 ECtHR and CJEU caselaw in Competition law sanctions cases – what can be learned?

With arguments from both sides, it is clear that targeted sanctions are an instrument of complex nature. Especially as the aims of prevention and policy change can be linked both to punitive and non-punitive aims, it is necessary to find support from additional methods. To tackle the question of whether administrative measures have punitive characteristics, the ECtHR created the so-called *Engel* criteria*,* which has later even been used by the EU Court.[115] Even if the criteria was originally connected to disciplinary penalties for offences against military discipline in the Netherlands, it has been used on cases ranging from tax surcharges to customs- and exchange offences.[116] In the context of the EU Court, the *Engel* criteria has been used especially in connection to EU competition law. According to the criteria, administrative measures can have punitive characteristics; 1) if the measure is classified as punitive in domestic law, 2) if the measure is legally binding to a specific group with a special status or to all citizens, and 3) by assessing the nature and degree of severity of the penalty.[117] These criteria will be expanded on and further exemplified below through the perspective of EU competition law.

In connection to competition law sanctions cases, there has been a longstanding debate on the potentially punitive nature of the administrative competition law sanctions. Much like the Council in targeted sanctions cases, the Commission has held that competition law sanctions are purely administrative measures, intended to crack down swiftly on

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[115] *Case of Engel and Others v. the Netherlands*, Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 23 November 1976.

[116] See for instance, *Pişkin v. Turkey,* Application no. 33399/18 (on the criminal nature of decree law), *Jussila v. Finland,* Application no. 73053/01 (on tax surcharges), *Bendenoun v. France,* Application no. 12547/86 (on customs and exchange -control offences), *Benham v. the United Kingdom*, Application no. 19380/92 (on community charges), and *Sergey Zolotukhin v. Russia,* Application no. 14939/03 (on administrative and criminal sanctions for disorderly conduct).

[117] *Engel and Others v. the Netherlands*, paras. 80-83.

condemned activities without the stiff procedural rules of criminal law.[118] The process of issuing competition law fines bears similarities to the human rights sanctions regime, as the standard of proof placed on the Commission for finding breaches of competition law is lower than it would be in criminal sanctions cases. The Court has even stated in the case of *Aragonesas Industrias y Energia v Commission* that the standard of proof in cartel cases could be further lowered from the normally used administrative law standard of proof, due to the inherently clandestine nature of cartels.[119] However, as competition law sanctions consist of administrative fines that can sometimes be tenfold of the assumed monetary gain of the violation, these measures can hardly be seen as reparative.[120]

The Court has quite recently issued judgments, where it has evaluated whether administrative fines can be criminally natured in the context of competition law sanctions. In these cases, the Court accepted the existence of a category of "criminally natured administrative fines", at least in the context of competition law sanctions.[121] By accepting that competition law sanctions can have a hybrid-nature, the Court has also been able to clarify what procedural rights could apply in these cases. For instance, in the cases of *Garlsson Real Estate and Others*[122] and *Nordzucker and Others*[123] the Court accepted that the principle of *ne bis in idem* was applicable when there was both a criminal sanction

[118] Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, Art. 23(5).
[119] Cases C-204/00 P *Aalborg Portland and Others v Commission* 2004, para. 57 and T-348/08 *Aragonesas Industrias y Energia v Commission* 2011, paras. 55-57, 98. The standard of proof that is generally used in competition law sanctions cases is "sufficiently precise and consistent evidence to support the firm conviction". The Court, however, suggested that this could be lowered to accept that "the evidence viewed as a whole amounted to precise and consistent evidence".
[120] The Court has i.e., stated in Case C-537/16 *Garlsson Real Estate and Others v Consob* (22 March 2022, para. 35) that an administrative fine 10 times greater than the gained proceeds or profit should be seen as criminally natured. Furthermore, the Commission has in its own guidelines (see, Commission: "Fines for breaking EU Competition law", p.1.) specified, that although the inherent goal of competition law sanctions is prevention, they also serve a goal to punish and deter. The argument used by the Commission here is that breaking competition law rules is profitable for companies as long as there is no threat of punishment. This approach is somewhat different from EU targeted sanctions, where the Council has not acknowledged the punitive aspect of sanctions. The Commission admitting that sanctions have punitive aims raises, however, the question of why the Commission still argues that they are purely administrative measures.
[121] Although I will be referring to the more recent cases in the area of competition law, the first instance where the Court accepted that administrative sanctions can have punitive characteristics seems to have been in Case C-489/10 of *criminal proceedings against Łukasz Marcin Bonda, (Bonda),* 5 June 2012. This case was dealt with criminal and administrative penalties relating to the common agricultural policy.
[122] Case *C-537/16 Garlsson Real Estate and Others.*
[123] Case C-151/20 *Bundeswettbewerbsbehörde v Nordzucker AG and Others*, 22 March 2022.

and a criminally natured administrative sanction in the same matter.[124] In the case of *DB v Consob* the Court accepted the existence of a right to silence in criminally natured administrative competition law cases. [125] Furthermore, the Court accepted in *Enzo di Puma v Consob* that the principle of *res judicata* could be applied to administrative fines in a limited scope.[126]

To exemplify how the Court uses the *Engel* criteria in its own judgements, I will look closer into the case of *Garlsson Real Estate and Others*, where the Italian authorities had imposed an administrative fine of 5 million euros as a result of market manipulation.[127] One of the questions considered by the Court was whether imposing an administrative fine on a person was possible, when there already was a standing criminal conviction on the same matter.[128] Imposing both administrative and criminal sanctions on the same conduct was not in itself a problem, but the imposing of two overlapping punitive measures would on the other hand raise questions on the respect of the principle of *ne bis in idem.*[129] To evaluate whether the administrative sanction was punitive in character, the Court evaluated, 1) the legal classification of the offence under national law, 2) the intrinsic nature of the offence and 3) the degree of severity of the penalty that the person concerned is liable to incur.[130]

The first criterion used by the Court, namely, the legal classification of the offence under national law entails that a measure is most likely criminal if it is criminalized under national law.[131] According to the Court in *Menci*, the criterion is not limited to acts which are criminalized in national processes, but extends to proceedings and penalties which

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[124] See also, Case C-524/15, *Menci* and Case C-117/20, *Bpost SA v Autorité belge de la concurrence*.
[125] Case C-481/19 *DB v Commissione Nazionale per le Società e la Borsa (Consob)*, para. 39-40. On the right to silence (privilege against self-incrimination) see also ECtHR cases, *Saunders v. United Kingdom,* Application no. 19187/91, para. 71 and *Corbet and Others v. France,* Application no. 7494/11, para. 34.
[126] Joined cases C-596/16 and C-597/16, *Enzo Di Puma v Commissione Nazionale per le Società e la Borsa* (Consob) and *Commissione Nazionale per le Società e la Borsa (Consob) v Antonio Zecca*.
[127] *Garlsson Real Estate and Others*, paras. 10-14.
[128] *Ibid.*, para. 20.
[129] *Ibid.*, paras. 15-17.
[130] *Ibid.*, para. 28.
[131] *Ibid.*, para. 29. See also case C-146/14 PPU *Bashir Mohamed Ali Mahdi* para. 79; C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordhein*, para. 58; joined cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, para. 23; and case C-232/09 *Dita Danosa v LKB Līzings SIA*, para. 34.

must be considered to have a criminal nature based on the two other criteria.[132] Furthermore, in cases where national law is lacking, EU law can be equated with "national law".[133] In the case of *Garlsson Real Estate* the defendant was penalized for market manipulation both through an administrative and criminal proceeding. Although the administrative fine was not nationally criminalized, the Court supported itself on the argument from *Bonda*, stating that the first criteria was met due to the criminal nature of the administrative fine.[134]

If the first *Engel* criteria was applied in the context of targeted human rights sanctions, the evaluation of "national law" would have to be based on EU law, rather than any national law. This is due to the character of targeted human rights sanctions, which do not have a specific connection to any one EU Member State jurisdiction. Also, as most of the sanctions measures in the human rights sanctions regime are targeted on third States with questionable rule of law -standards, finding support in the national jurisdiction of the third State would not be appropriate.[135] Although the Council has categorized targeted human rights sanctions as administrative measures, this does not prevent them from having a criminal nature, much like in the case of competition law sanctions. The commitment and involvement in grave human rights violations, such as genocide, crimes against humanity, torture and slavery, is globally criminalized through international conventions. As State Parties to these conventions, the commitment and involvement in the commitment of human rights violations is also generally criminalized in national jurisdictions. Furthermore, these crimes can be prosecuted both on the UN and EU level through the ICC and the ECtHR. Stating that human rights sanctions could be criminally natured would therefore not be far-fetched.

As regards to the second criterion of the *Engel* criteria, the Court's formulation differs slightly from the one used in ECtHR case law. Instead of seeing whether the measure

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[132] C-524/15, *Menci*, para. 30.
[133] *Bonda,* para. 38. The Court refers in this instance to the case law of the ECtHR.
[134] *Garlsson Real Estate and Others*, paras. 52-53.
[135] The Council can in some cases support sanctions listings on decisions of national authorities from a third State. This possibility has, however, been restricted as the Court has found, that the decisions made by third States' authorities could not always be trusted. See cases C-72/19 P, *Saleh Thabet and Others v Council*, para. 37 and C-530/17 P, *Azarov v Council*, para. 26.

applied to all citizens or a specific group of people, the Court considered what the intrinsic nature of the offence was.[136] Essentially, this meant, that the Court had to conclude on whether the purpose of the administrative sanction was punitive, deterrent or reparative.[137] Traditionally, punitive measures aim to both punish the unlawful act, and deter future violations.[138] A deterrent aim is therefore not enough to conclude that the measure could not be punitive at the same time. On the other hand, a sanctions measure with only a reparative aim could qualify as a purely administrative measure without punitive qualities.[139] The fine in *Garlsson Real Estate* was 3-10 times the amount of proceeds obtained from the market manipulation.[140] Furthermore, the fine was imposed after the confiscation of the gained profit and was therefore, above what could be deemed as reparative.[141] Considering that human rights sanctions lack a product or profit that could be measured monetarily, the evaluation is somewhat different from competition law sanctions cases. However, much like in competition law cases, the aim of human rights sanctions is not to repair the damage which has been caused by the human rights violation. Rather, the aim is connected to obtaining the EU's CFSP goals and seeking policy and behavior change.

Even if it can be convincingly argued that the aim of human rights sanctions is not reparative, but rather punitive and deterrent, it should be noted that competition law and human rights sanctions might not be fully comparable on this point. Although the aim of reparation is possible in competition law sanctions, the Council has never claimed that human rights sanctions would have this kind of reparative aim. Furthermore, evaluating the intrinsic nature of sanctions does not seem to provide any clear answers, as this is the same discussion that has been raised within legal scholars. The second criterion used in the original *Engel* criteria, formulated by the ECtHR, could, however, provide more guidance in relation to human rights sanctions. It considers whether a measure is legally binding to a specific group with special status or to all citizens.[142] In this context the

[136] *Ibid.*, para. 28.
[137] *Ibid.*, paras. 33-34.
[138] *Ibid.*
[139] Opinion of Advocate General Campos Sánchez-Bordona in Case C-524/15 Luca Menci, para. 47.
[140] *Garlsson real Estate and Others* para. 34.
[141] *Ibid.*
[142] See for instance, *Öztürk v. Germany*, Application no. 8544/79, para. 53.

ECtHR has noted that in order for a measure to be criminally natured, it needs to apply to everyone who behaves in a certain way, not only to a certain specific group of people.[143] In the context of human rights sanctions, any person or entity, anywhere in the world, can be targeted by EU sanctions, once they meet the criteria listed in Council Decision 1999/2020. If the original version of the *Engel* criteria was applied, targeted human rights sanctions would meet the second criterion.

Moving to the third criterion of the *Engel* criteria, the severity of the penalty, the Court held in *Garlsson Real Estate and Others*, that an administrative fine 3-10 times the size of the profit obtained in the offence had a high degree of severity.[144] This was the case especially considering that the defendant had already been criminally charged for the offence and had returned the profit which he had received from the offence.[145] The Court therefore accepted that all of the three criteria were met and that the administrative fine in question could be seen as criminal natured. Imposing a criminally natured administrative sanction violated in its turn the principle of *ne bis in idem*, as there already was a criminal conviction in the matter. Although the Court has in cases of competition law sanctions seemed to focus on the monetary value of the fines, this should not be the only indicator of severity. The ECtHR has for instance in the case of *Öztürk v Germany* accepted a traffic fine amounting to *circa* thirty euros as severe.[146] The ECtHR's motivation in the case was that seriousness of the penalty did not matter as the offence itself was inherently criminal in character.[147]

In relation to targeted human rights sanctions, the evaluation of severity is once again different from competition law sanctions where the severeness can be estimated more precisely from the size of the fines. With human rights sanctions, the fiscal impact of travel restrictions and asset freezes is much more difficult to calculate and depends on the amount of assets the sanctions target has in the EU.[148] The Court has in *Bosphorus v*

[143] *Ibid.*
[144] *Garlsson Real Estate v Others*, para. 35.
[145] *Ibid.*, para. 34.
[146] *Öztürk v. Germany*, Application no. 8544/79, para. 11.
[147] *Ibid.*, para. 54.
[148] As stated in the case of *Öztürk*, the fiscal impact might not even be the determining factor in whether a measure is severer or not.

Minister for Transport, Energy and Communications and Others stated that asset freezes of private actors' funds are not in themselves a disproportionate invasion of the actors' fundamental rights when there are important foreign policy objectives at stake.[149] However, even if restrictions of fundamental rights are not inherently disproportionate measures, that does not mean that they could not be severe. The severity of sanctions measures depends undoubtedly on the individual case, but the baseline, that all funds and economic resources belonging to, owned, held or controlled by the targeted person should be frozen, is a notable restriction of the individual's fundamental rights.[150] Asset freezes include the economic resources available to the target directly, indirectly or for the benefit of the targeted person. Considering that these measures can be imposed on persons for multiple years without a clear de-listing procedure, the measures included in human rights sanctions regime can, as I see it, be deemed as "severe".

2.3 Could targeted human rights sanctions have a hybrid nature?

Having reviewed different arguments on the nature of targeted sanctions, it is clear that targeted sanctions do not easily fall into the traditional categories of either administrative or criminal law. Especially when considering that the financial restrictions and stigmatizing effects of sanctions can be very long-lasting, it is difficult to argue that targeted sanctions would be truly preventive, without any punitive aspects.[151] With the help of the *Engel* criteria, we can conclude that human rights sanctions, do, in fact, have the potential to qualify as criminally natured administrative measures.[152] Considering the first criteria of the *Engel* criteria, i.e. the nature of the measure, the commitment of grave human rights violations is criminalized internationally through the Rome Statute of the

[149] Case C-84/95*, Bosphorus v Minister for Transport, Energy and Communications and Others*, para. 26.
[150] Advocate General Sharpston highlighted in her opinion on the case C-599/14 LTTE (para. 102) that suspending a sanctions target's normal economic life is a very serious consequence which merits the existence of rigorous procedures that respect fundamental rights of defence and effective judicial protection.
[151] Cameron 2016, p. 565. See also, House of Lords EU Justice Sub-Committee: The Legality of EU Sanctions, 11 October 2016, p. 22.
[152] Similar conclusion was reached by Al-Nassar (2021, p. 12) when reviewing asset freezes under the EU targeted human rights sanctions regime.

International Criminal Court and the ECHR.[153] Furthermore, most of the human rights violations under Council Decision 1999/2020 have been codified in the EU Charter of Fundamental Rights.[154] Although the Court always evaluates the individual circumstances in each case, I believe that these arguments would be sufficient to meet the requirements of the first *Engel* criterion.[155]

As for the second criterion, targeted human rights sanctions measures target all citizens equally and not only a specific group of people. The second criterion is therefore met. The third criterion, requiring an assessment on the severity of sanctions measures should be made on a case-by-case -basis, as the effects on sanctions targets are different for each case. Considering the overall punitive nature of targeted sanctions, however, I find there to be reasonable grounds to accept that targeted sanctions measures would be inherently severe measures, therefore also meeting the third criteria of the *Engel* criteria. The ECtHR has previously stated that the second and third criteria are alternative, rather than cumulative.[156] A cumulative approach can, however, be possible if the separate analysis of the two criteria does not provide clear answers.[157] Although I find there to be reasonable grounds for the inherently severe character of targeted sanctions measures, there is no absolute requirement for a certain level of severeness. Taking all of these aspects into consideration, there would be reason to accept the hybrid nature (including both administrative and criminal aspects) of targeted human rights sanctions measures.

Although there are good arguments supporting the criminal nature of targeted sanctions, it should still be recalled that the criminal nature of sanctions is limited, and the basis of these measures still administrative. The limitations of targeted sanctions depend on their general scope, meaning that targeted sanctions regimes are not built in a way where they could ascertain guilt of a person by creating a link between the act and the perpetrator.

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[153] See generally, Rome Statute of the International Criminal Court (A/CONF.183/9), 17 July 1998 and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

[154] See, Charter of Fundamental Rights of the European Union (2012/C 326/02), 26 October 2012. The Charter includes prohibitions on torture, extrajudicial killings and slavery.

[155] Furthermore, the first criterion is not decisive for whether a measure can criminally natured or not. *Öztürk v. Germany*, Application no. 8544/79, para. 49.

[156] Case of *S.C. IMH Sucaeva S.R.L v. Romania,* Application no. 24925/04, para. 50.

[157] Cases of *Jussila v. Finland,* Application no. 73053/01, paras. 30-31 and *Ezeh and Connors v. United Kingdom,* Application nos. 39665/98 and 40086/98, paras. 82-86.

Due to these differences in procedure, targeted sanctions measures cannot be held to the same high standards as traditional criminal procedures. Another aspect to consider in this context is also the inherently political nature of targeted sanctions.[158] It should be noted that targeted sanctions measures have the fundamental intent of enforcing EU's foreign policy goals globally. Especially when combined with the enforcement of human rights, which in themselves are universal, indivisible, and absolute, it becomes challenging to recognize the political interests that may lie behind human rights sanctions measures.[159] This is not to say that the EU would be out of place by wanting to protect human rights – on the contrary, it is important to signal globally that the EU does not tolerate human rights violation. Nevertheless, it should be kept in mind that the scope of what targeted sanctions measures can do is limited, and the instrument neither can, or is meant to provide justice or solve complex structural issues.[160] Articulating clearly what the EU's targeted sanctions regimes can and are meant to do would be useful to prevent unrealistic or distorted expectations on the EU.[161]

Using EU competition law sanctions as a reference has been helpful to understand how the Court has acted in other areas of EU sanctions law. Although competition law sanctions are based on a system of fines and focus on infringements committed by companies operating in the EU, thereby having a clear connection to national jurisdictions, the issues relating to the nature of the sanctions measures is the same. The EU strives in both cases to impose harsh penalties under the agenda of future deterrence. The violations in both targeted sanctions cases and EU competition law cases are similar in the sense, that they are often broad and difficult to prove. However, the difficulty with proving violations of this kind is not a sufficient reason to not provide targets with the necessary procedural safeguards. As the Court has concluded in competition law

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[158] This argument has been especially highlighted by Eckes. See for instance, Eckes 2014(a), p. 330 and Eckes 2014(b), pp. 878-880.

[159] This discussion is mostly related to the inconsistencies that some scholars have raised in the EU's sanctioning policies. Eckes has, among others, raised concerns that the EU's decisions on who to target would depend on its political interests. This seems contradictory to the EU's position as a "human rights defender" as the urgency to intervene in human rights violations should not depend on political relationship.

[160] Eckes 2020, pp. 27-28.

[161] It seems to me that a part of the criticism on the EU's sanctions regimes comes from there being frankly unrealistic expectations on what sanctions measures can do. This becomes especially clear in the discussions on the effectivity of sanctions measures, where a clarification of what sanctions can realistically do could help to eliminate some of the criticism.

sanctions cases, there is a category of criminally natured administrative sanctions which create a type of hybrid procedure between administrative and criminal procedures. Acknowledgement of the punitive aspects of sanctions measures opens the possibility for the Court to create a hybrid procedure, still giving the EU flexibility and swiftness, while providing sanctions targets with the correct level of procedural safeguards.

In the question of EU's targeted human rights sanctions measures, I believe that the answer to their legal character would be naturally found in a hybrid procedure, combining administrative and criminal law aspects. Only following the traditional criminal procedure would not be possible as this would change sanctions' inherent nature as swift and flexible foreign policy tools.[162] Furthermore, changing the whole structure of sanctions measures to resemble criminal procedures would create overlap with the jurisdiction of already existing international tribunals, such as the ICC.[163] On the contrary, the traditionally administrative legal procedure does not account for the necessary procedural safeguards and provide sufficient ways to challenge targeted sanctions measures. Moving to assess the Courts procedures and use of standards of proof in sanctions cases, it is essential to understand that targeted sanctions constitute a legal area with special needs. Extending the concept of criminally natured administrative measures to human rights sanctions would provide for better tools to respond to the special needs of the area.

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[162] It should be recognized that sanctions measures have their own role in the EU system and the aim should not be to create more traditional prosecutorial mechanisms (i.e. Courts and tribunals). Rather, the goal should be to ensure that sanctions measures can be implemented in their current way, while still providing sufficient procedural safeguards. This can be accomplished either through increasing the procedural safeguards applicable to sanctions measures or by limiting the types of sanctions measures that can be implemented under the existing systems.

[163] "Jurisdictional Overlap: Security Council Sanctions and the ICC", Opinio Juris, 25 July 2014. The issue has also been raised by Eckes (2020, p. 10), especially in connection to the EU targeted human rights regime.

3 THE POSITION OF THE CJEU IN TARGETED SANCTIONS CASES

3.1 The legal basis for CJEU competency

Moving onwards from the first research question, we now have a clearer understanding of the basic functions of targeted sanctions, and more specifically, the EU's human rights sanctions regime. Moving closer to the second research question, relating to the standard of proof of the Court in targeted sanctions cases, we can proceed with the understanding that targeted sanctions are not purely administrative or criminal measures. Instead, it would be natural to categorize targeted sanctions in the same manner as competition law sanctions i.e., as criminally natured administrative sanctions. This categorization allows for a more open discussion without the limitations created by traditional legal areas. In regard to different standards of proof, this translates to a need to adapt the existing standards of proof to the hybrid nature of sanctions measures. Blindly accepting a purely administrative or criminal standard of proof would likely not correspond to the needs raised of targeted sanctions.

Before delving into the issues of the standard of proof, there is, however, need for a general discussion on the Court's position in EU targeted sanctions cases. The aim of this Chapter is to provide just that. Essential in this context is to understand, what type of jurisdiction the Court has in sanctions cases, where the legal basis for the Court's competency stems from, and what types of requirements are laid on targeted sanctions cases. In an effort to cover these aspects, the Chapter will be divided into two parts. The first part provides a general overview of the legal basis for the Court's jurisdiction and broadly outlines how cases are brought to the Court. The second part of the Chapter discusses the Court's procedure by asking "what criteria needs to be met for a targeted sanctions listing to be upheld by the Court?"[164] This viewpoint opens the avenue to discuss the background and challenges of current Court procedures.

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[164] This part of the analysis follows the same structure used by Pursiainen in his 2017 article, "Targeted EU Sanctions and Fundamental Rights".

The Court, consisting of the General Court and Court of Justice, has played an important role in the forming of EU targeted sanctions policies. The jurisdiction of the Court in this area has nevertheless a complex history, as the field of EU CFSP has traditionally fallen outside the Court's jurisdiction.[165] In fact, before the adoption of the Lisbon Treaty in 2009, the Court was explicitly excluded from any jurisdiction in the field of CFSP.[166] With changes to the constitutional makeup of the Union, the Lisbon Treaty introduced two exceptions inscribed in Article 24 (1) TEU, bringing the Court within the scope of a limited amount of CFSP matters.[167] The first exception applies to cases, where there is uncertainty on whether a question falls under CFSP or other EU provisions.[168] The area of CFSP is subject to specific rules and procedures and covers all areas of foreign policy and all questions relating to the Union's security.[169] Sometimes questions of CFSP, however, fall very close to the ordinary jurisdiction of the Union, creating a tug of wars between the Parliament and the Council.[170] The second, and for this thesis, more interesting exception, gives the Court jurisdiction to review the legality of EU targeted sanctions listings.[171]

Regardless if the Court only officially gained jurisdiction to process CFSP cases with the adoption of the Lisbon Treaty, the Court had in actuality started ruling on CFSP matters already before that.[172] Before the adoption of the Lisbon Treaty, the Court's competency in CFSP matters was founded on a combined reading of Articles 60, 301 and 308 of the Treaty establishing the European Community.[173] The first CFSP ruling where the Court

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[165] Koutrakos 2018 pp. 5-6.
[166] Léonarts and Kaunert 2012, pp. 476-477.
[167] Article 24(1) states that "[…] The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions (referring to CFSP matters), with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union."
[168] Article 40 TEU stipulates on the separation of CFSP and other Union competences. The implementation of CFSP policies should not affect the implementation of the remaining EU policies and vice versa.
[169] Article 24(1) TEU.
[170] Exemplified for instance in Case C-130/10 *Parliament v Council*, where counter-terrorism sanctions had two possible legal grounds, one under CFSP provisions and the under the ordinary EU jurisdiction.
[171] More specifically, Article 275 states that the Court has jurisdiction to review the legality of restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V TEU.
[172] This was done in a limited capacity. The Court could annul EC Council Decisions, while holding that it did not have the competency to jurisdiction to review CFSP common positions. See, Eckes 2007, p. 1118.
[173] This reading of the convention was quite controversial and received criticism from scholars. For further arguments on the Court's lack of jurisdiction before the Libson Treaty see, Tridimas and Gutierrez-Fons 2009, pp. 660-679 and Eckes 2009, pp. 78-124.

annulled a sanctions listing was delivered in the *Organisation des Modjahedines du peuple d'Iran v Council* (*OMPI*) case in 2006.[174] Following that, a landmark case, establishing the Courts competency in targeted sanctions cases, *Kadi and Al Bakaraat v Council* (*Kadi I*), was issued in 2008.[175] In the case of *Kadi I*, the defendants Mr Kadi and Al Bakaraat had been sanctioned for suspicion of supporting the Al-Qaeda network. The EU's sanctions measures consisted of flight restrictions and asset freezes for which Mr Kadi and Al Bakaraat requested annulment, arguing that their fundamental rights, including right to respect for property, right to be heard before a court and the right to effective judicial protection had been infringed.[176] To further complicate matters, the sanctions listings were originally imposed by the UN Security Council and only thereafter adopted by the EU.[177] This meant that the decision to sanction Mr Kadi and Al Bakaraat was initially made on the UN level and thereafter directly implemented by the EU.

The question in the *Kadi I* case was in essence, whether the Court could review the legality of UN Security Council Resolutions.[178] The Court held that it, *per se*, did not have jurisdiction to review the legality of UN Security Council Resolutions, but that it did have jurisdiction to review whether the EU had breached the defendants' fundamental rights in implementing international law.[179] The Court noted also, that there was no real way to challenge a UN Security Council Resolution in the UN systems and that this meant, that if the EU Courts denied the appeal, the applicants would not have had any real way of challenging the legality of the sanctions imposed on them.[180] With this ruling, the Court demonstrated that no case could absolutely be excluded from the scope of its judicial review. In relation to the substantive questions, the Court found a breach of the defendants' rights of defence, in particular the right to be heard, right to effective judicial

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[174] Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council (OMPI I),* 12 December 2006.
[175] Joined cases C-402/05 and C-415/05 P, *Kadi and Al Bakaraat v Council (Kadi I)*, 3 September 2008.
[176] *Kadi I*, paras. 49-50.
[177] Even though the case was brought to the EU Courts, the Court had not been the one to originally impose the sanctions but had only implemented the UN decisions to its own system. This meant that the Court did not have the same competences as if the sanctions measure would have been autonomously created by the Council.
[178] Vestergaard 2019 p. 88.
[179] *Kadi I*, para. 327.
[180] *Kadi I*, paras. 319-321.

protection, right to an effective legal remedy and right to property.[181] The breaches in defence rights were, according to the Court, a result of the Council not communicating the grounds nor evidence for enlistment with the defendants and the unjustified restrictions to the applicants property.[182]

In addition to confirming the Court's jurisdiction and establishing standards in the area of defence and fundamental rights, the *Kadi I* case also had an impact on the UN level, with the UN establishing of the Office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaeda Sanctions Committee in 2009.[183] The Ombudsperson is an independent and impartial actor who reviews delisting requests in relation to the ISIL (Da'esh) and Al-Qaeda Sanctions Committee.[184] In this position, the Ombudsperson assists the ISIL and Al-Qaeda Sanctions committee by providing an analysis and recommendations on delisting requests.[185] As the UN does not have a court system where sanctions targets could challenge the legality of UN measures, the position of the UN Ombudsperson comes closest to the position of the Court's position in sanctions cases. Even if these two mechanisms are different, the UN has also held that the information gathered by the Ombudsperson needs to be assessed through a consistent standard of proof.[186] The question of standard of proof rises therefore in both mechanisms and will be discussed in Chapter 4.

As demonstrated especially through the case of *Kadi I*, the Court has worked to increase its standing in EU sanctions cases and has not accepted the suggestion that international law or the area of CFSP would be inherently immune to the Court's fundamental rights review. This also shows how the development of targeted sanctions has been connected to the Court's case law, with it contributing to some notable changes in the area.

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[181] *Kadi I*, paras. 334, 348-349, 371.
[182] *Kadi I* paras. 346-348.
[183] Cameron 2016, p.552. The mandate was created through UN Security Council Resolution 1904 (2009).
[184] Riccardi 2018, p.3. The independence of the Ombudsperson was questioned by the General Court in its judgement of *T-85/09 Kadi v Commission, (Kadi III)* from 30 September 2010 (para 128). The issue according to the Court was that the Ombudsperson could merely issue recommendations without a binding effect on the UN Security Council. Furthermore, the Ombudsperson was struggling with the same issues with confidential information. Regardless of this criticism and for the purposes of this thesis, I will still follow the UN
[185] The Office of the Ombudsperson: Approach and Standard.
[186] *Ibid.*

Originating from more traditional, state-centered sanctions, targeted sanctions provided initially insufficient procedural rights for individuals. For instance, targets were not informed about listings or the grounds for the listing and for a while, it seemed like the Council was unable to adapt to the standards set by the Court, as a majority of the challenged sanctions listings were later annulled by the Courts.[187] Through a number of reforms, the Council has however managed to make progress. Some of the reforms have included creating a mechanism for notifying sanctions targets about the measures taken against them, procedures for targets to request a reconsideration of their listing, and a periodic review of sanctions lists.[188] While these improvements have had notable impacts, there are still issues which will be highlighted in the next subchapter.

3.2 Targeted sanctions procedure in the CJEU

3.2.1 General provisions

Having considered how the Court gained jurisdiction in targeted sanctions cases and where there the legal basis for this jurisdiction can be found, I will now turn to discuss the second aspect of this Chapter, namely, the central attributes of the Court's procedure in targeted sanctions cases. This part of the Chapter provides a closer examination of what alternatives a sanctions target has when challenging a sanctions listing and what the practical steps of the review process are. As already noted, the Court's case law has been in a central position in ensuring that the Council provides sanctions targets with sufficient procedural safeguards. To understand the current issues of targeted sanctions, especially relating to the standards of proof, it is necessary to dive deeper and review the Court's procedure in targeted sanctions cases. Through this review we gain clarity on what the Court finds important when evaluating targeted sanctions cases and what types of standards it has created through its case law. This casts light on the progress but also weaknesses of the area of sanctions cases, which will be useful in the later phases of the analysis.

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[187] Pursiainen 2017, p. 5.
[188] Council Document 10826/07, p. 1.

Starting from the very beginning of the process, once a sanctions regime is created, the Member States and the High Representative can make listing suggestions to the Council.[189] A person or entity becomes officially a sanctions target once the Council has made a unanimous listing decision based on the listing suggestions.[190] Following the listing decision, the listed persons and entities are informed of the decision, either through a letter from the Council or by publishing the listing in the Official Journal of the European Union.[191] In connection to publishing the listing decision, the Council has to disclose all of the reasons for the listing, as well as provide instructions on how the sanctions target can challenge the listing decision.[192] The targets of EU sanctions measures, wanting to challenge their listing decision, can then choose between raising an administrative delisting request to the Council or challenging the listing in the EU Court system.[193]

In cases where the sanctions target believes that the Council has, for instance, mistakenly targeted the wrong person, the sanctions target can request a delisting through the Council's administrative delisting process.[194] Other common claims for de-listing are that 1) the sanctions target has not been involved in the accused activities or 2) the targeted activities are wrongfully or unproportionally targeted by the EU's sanctions measures.[195] In these situations, the sanctions target sends a letter and supporting documents to the responsible Council working group, asking to be de-listed.[196] The working group can then review the listing decision and consider whether the listing should be maintained or amended. In practice, however, the Council's working groups have been slow to review

[189] Riccardi 2018, p. 9.
[190] European Council: Adoption and review procedure for EU sanctions.
[191] *Ibid.*
[192] This was established in *Kadi I* (paras. 348-349) where the lack of information amounted to an infringement of the applicants' rights of defence.
[193] Ruys 2021, p. 300. First to the General Court and then to the ECJ.
[194] *Ibid.*
[195] Cameron 2015, p. 338.
[196] House of Lords European Union Committee 11 Report of Session 2016-17, para. 78.

de-listing claims, forcing sanctions targets oftentimes to also challenge the listing in the EU Court system under the annulment action of Article 263 TFEU.[197]

Once an annulment action is brought to the Court, the Court then assesses whether the listing should be overturned or upheld. Having established some fundamental rights standards in the ruling of *Kadi I*, the Court did not have to wait long for its next notable judgement in the area. Following the first *Kadi* judgement in 2008, where the Court found that the sanctions listing to freeze Mr. Kadi's assets breached his fundamental rights, the Commission sent Mr. Kadi a letter, rectifying the procedural deficiencies pointed out by the Court. In this letter the Commission informed Mr. Kadi of the summary reasons for his initial sanctions listing and that the Commission would be re-listing him on the basis of the same information, having now corrected its procedural mistakes.[198] After this re-listing decision entered into force December 3rd 2008, Mr. Kadi brought a new annulment action to the Court, demanding the annulment of the re-listing decision and the disclosure of all the documents relating to his re-listing.[199] Again in this case, the Court sided with Mr. Kadi, stating that the summary reasons given by the Council were not sufficient to ensure Mr. Kadi's right to access to information and evidence and therefore breached his rights of defence.[200] The listing was annulled by the Court for a second time in 2013 and Mr. Kadi was this time permanently removed from the sanctions list.

Notable in the *Kadi II* case was that the Court confirmed that it had jurisdiction to conduct a full judicial review in targeted sanctions cases, encompassing both procedural and substantive aspects.[201] The concept of a full judicial review entailed, according to the Court, that it would review whether 1) the listing was made on a sufficiently solid basis, 2) the factual allegations were verifiable, and 3) whether the allegations were substantiated and sufficient in themselves to support the decision.[202] In the case of

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[197] Written evidence (EUS0001) from Maya Lester QC, Brick Court Chambers 10 October 2016, paras. 49-53. The sanctions target has only two months from the notification or publication of the listing decision to raise an annulment action to the Court.
[198] Joined cases C-584/10P, C-593/10 P and C-595/10 P, *Commission and Others v Kadi (Kadi II)*, 18 July 2013, para. 28.
[199] *Ibid.,* paras. 36-37.
[200] *Ibid.,* paras. 138-140.
[201] Riccardi p.1. Also see, *Kadi II*, pp. 97.
[202] *Kadi II* para. 119.

Anbouba, the Court further specified that it would in targeted sanctions cases focus its review on, 1) the general criteria of inclusion to a sanctions list, 2) the grounds stated for the enlistment, and 3) the evidence that the enlistment was well-founded.[203] These three aspects have become the cornerstones of EU targeted sanctions cases; if the Council fails to meet any one of these three criteria, the listing will be annulled by the Court. In the scope of this thesis, these criteria will be discussed as 1) designation criteria, 2) statement of reasons, and 3) supporting evidence. Due to their important position in sanctions cases, this subchapter delves into the fundamental aspects and challenges of each of these criteria.

3.2.2 Designation criteria

Every sanctions regime has a specific designation criteria, under which persons and entities can be added to the regime. These criteria can be found in the Council Decision and Regulation, relevant for each EU sanctions regime. In the context of human rights sanctions, a natural or legal person, entity or body can be imposed sanctions if they are responsible, support or associate with the commitment of a human rights violation included in Article 1 of Council Decision 2020/1999. When the designation criteria are drafted by the Council, there is a fundamental requirement, that the criteria should fall under the EU's area of competence.[204] In other words, the designation of a person or entity needs to always be connected to the EU and to the promotion of one of the Union's CFSP goals detailed in Article 21 TFEU.[205] As the goals in Article 21 TFEU include objectives, such as democracy promotion and conflict prevention, they are accepted by the Court in the vast majority of cases.[206]

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[203] Case C-605/13 P, *Anbouba v Council,* para. 40.
[204] Pursiainen, 2017, p. 7.
[205] *Ibid.*
[206] Article 21 TFEU.

Generally, it is held that the Council has a broad discretion to determine how the designation criteria is formulated in the relevant Council Decisions and Regulations.[207] The Council is the EU organ with competency over the EU's foreign policy measures and the Court cannot directly criticize how the Council evaluates the EU's foreign policy threats and goals.[208] While drafting the Lisbon Treaty, the Intergovernmental conference specified that sanctions listings should be based on clear and distinct designation criteria, tailored to the specifics of each restrictive measure.[209] However, in practice, the Council has often resorted to using broad formulations, sometimes even broadening the designation criteria after they have been adopted for the first time.[210] An example of the broadening of the designation criteria can be seen in EU's Iran sanctions regime, where the original criteria of "involvement in nuclear proliferation" was later changed by the Council to "providing support to the Government of Iran.[211] By keeping the designation criteria broad, the Council has an easier time listing people and entities to the regime. This was suggested to have been the reason for the change of designation criteria in the case of the Iran sanction regime.[212] The risk with the broadening of the designation criteria is that if the criteria becomes too broad, individuals might not understand why they have been targeted by the sanctions measures in the first place. This notion has been highlighted as a potential concern for the principle of legal certainty by Eckes.[213]

The broadness of the designation criteria varies between different sanctions regimes. Human rights sanctions, much like the EU counter-terrorism regime, focus on sanctioning ongoing and past violations, whereas, for instance, the EU's chemical weapons sanctions regime focuses more on preventing the construction of chemical weapons.[214] Prevention-

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[207] Cameron 2016, p. 557. See for instance Case C-348/12, *Council v Kala Naft,* para. 120; Case T-390/09, *Bank Melli Iran v Council,* paras. 35-38; Joined cases T-246/08 and T-332/08, *Melli Bank PLC v Council,* paras. 44-46; Case C-266/05, *Sison v Council,* para. 33 and Case T-228/02, *OMPI I,* para. 159.
[208] *Ibid.*
[209] Declaration 25 on Articles 75 and 215 of the Treaty on the Functioning of the European Union.
[210] Chachko 2019, pp. 29-32.
[211] Compare Art 23(2)(d) in Council Regulation (EU) 267/2012 of 23 March 2012 and Council Regulation (EU) 961/2010 of 25 October 2010.
[212] House of Lords EU Justice Sub-Committee: The Legality of EU Sanctions, 11 October 2016.; comment made by Michael Bishop in Q17.
[213] Eckes 2021, p. 10.
[214] Eckes 2020, pp. 9-10. See also Council Decision 2018/1544, Art 2(1)(a) (the EU targeted chemical weapons regime) and Council Common Position 2001/931/CFSP, Art 2. (the EU targeted counter-terrorism regime). The chemical weapons regime is focused on sanctioning the manufacturing of chemical weapons, therefore working to prevent the building of chemical weapons

driven designation criteria can in extreme cases result in so called risk-based designation criteria, meaning that persons are designated only for posing a serious risk of committing future wrongful acts.[215] The Court has accepted this type of designation based only on future risk in for instance the case of *Kala Naft v Council*, where an Iranian oil company was sanctioned for potentially supporting the nuclear activities of Iran.[216] The sanctions listing was based on the company's purchases of oil and gas industry -related equipment that could also be used for Iran's nuclear program.[217] Furthermore, the company, according to the Council, had ties to companies involved in Iran's nuclear program.[218] The case demonstrated how wide the Council's discretion could be, even encompassing situations where there was only a potential connection to wrongful activity.

The use of risk-based designation criteria, in my opinion, is treading the line of becoming too broad. Even if the Court has previously accepted this type of designation criteria, it would not be proportionate or effective to impose measures based on hypothetical scenarios.[219] In relation to human rights sanctions, the listings are already based on a certain level of uncertainty. Adding the possibility to sanction persons based on a future risk of committing, supporting or associating with grave human rights violations would open up the possibility to target a notable amount of persons and entities who should not actually be sanctioned. No one should not be sanctioned for an activity they are not involved in, especially considering the complex de-listing process, restrictions on the target's assets and movement as well as the stigmatizing effects of sanctions. Even if there are incentives to pressure perpetrators of grave human rights violations, the choice of targets should still be made consciously. The aim of behavior change is not obtainable if there is no wrongful activity to begin with.

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[215] Pursiainen 2017, p. 9.
[216] Case T-509/10, *Kala Naft v Council*. The Court later annulled the sanctions measures on *Kala Naft* through case C-348/12. The listing was based on Security Council Resolution 1929 (2010) and Council Decision 2010/413, which states that sanctions listings could be made on a potential connection between the target and proliferation sensitive nuclear activity. It should be noted that the requirement of a "potential connection" is very low.
[217] Case T-509/10, *Kala Naft* v Council, para. 19.
[218] *Ibid.*
[219] An argument also raised by Pursiainen 2017, p. 9.

3.2.3 Statement of reasons

Once a person has been listed to a sanctions regime, the listing decision is accompanied with a statement of reasons, providing the specific grounds for why the person or entity has been listed.[220] The statement of reasons is inherently connected to the designation criteria in the sense, that the stated reasons have to fall under the scope of the designation criteria. In the context of human rights sanctions, the statements of reasons should provide the specific reasons for why the Council believes that a person or entity has committed, supported or been associated with the commitment of grave human rights violations. As already mentioned, the requirements for statements of reasons have developed notably since the adoption of the first EU targeted sanctions regimes, going from none whatsoever to there now being an established minimum standard.[221] Especially in the Court's earlier sanctions case law, the Court ended up ended up annulling multiple cases due to insufficient statements of reasons.[222] As the Court does not have the jurisdiction to criticize who the Council chooses to sanction, it has seemingly focused on ensuring that the statements of reasons and supporting evidence for the listing decisions are made on sufficient grounds.

The current minimum standard for the statements of reasons is found in the Court's ruling of *Kadi II*. Through this case the Court established that statements of reason need to "identify the individual, specific and concrete reasons" for why the competent authorities consider that a person must be subject to restrictive measures.[223] The Council could therefore not support its listing decisions on only the general criteria expressed in the

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[220] Article 296 TFEU. Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.
[221] House of Lords; Written evidence (EUS0001) given by Maya Lester QC, Brick Court Chambers. Under the heading of "vague reasons", Lester states that in early case law people and entities were listed on the basis of no reasons. In the *OMPI I* case the Court argued that the organization could be sanctioned as it was on a list of terrorist organizations (The UK Terrorist Act 2000). The Court, however, did not accept this but required the Council to provide actual and specific grounds. See Case T-228/02, *OMPI I*, paras. 2 and 143).
[222] See for instance, Case T-15/11, *Sina Bank v Council*; Case T-24/11, *Bank Refah Kargaran v Council*; Case T-262/12, *Central Bank of Iran v Council* and Case C-176/13, P *Bank Mellat v Council*.
[223] *Kadi II*, para. 116.

designation criteria.[224] The Court further specified in *Bank Saderat Iran*, that the standard was met as long as the statements of reason provided enough information for the target to understand the accusations and refute the correctness of them.[225] This seems reasonable as the targets do not have a realistic chance of winning their cases if they are not aware of the reason they are being sanctioned for. Considering the Council's goal of policy and behavior change, it would also seem beneficial for the Council to inform the targets of the behavior that they are expected to change.[226] The Council, however, seems to have an increased focus on explaining why sanctions have been adopted, rather than detailing the change they expect to see in conduct. Furthermore, it is equally important for the Court to know the individual, specific and concrete reasons behind a sanctions listing to be able to rule on the case.[227] With the evidence behind sanctions cases often consisting of confidential information, it is not a given that the Court or the sanctions targets would be aware of the reasons for a listing decision.[228]

Even with the existence of the criteria of individuality, specificity, and concreteness, the Court has not always interpreted these criteria in a coherent way.[229] Through its judgement in *Bank Saderat Iran*, the Court, in essence, opened up the possibility for the Council to make certain presumptions on which facts sanctions targets were expected to understand.[230] Although basing listings on mere repetitions of designation criteria is not accepted by the Court, the use of presumption-based statements of reason has been allowed to some extent, resulting in contradictions in the Court's case law. The use of presumption-based statements on reasons have been common in cases where the listing has been based on the sanctions target's status or relationship with the main sanctions target. Typical examples of these grounds include the targets status in a regime, business

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[224] The Court has on multiple instances expressed that merely repeating the designation criteria is not sufficient to fulfil the criteria laid for statements of reasons. See e.g., Case T-228/02 *OMPI I* para. 143; Case T-53/12, *CF Sharp Shipping Agencies v Council*, para. 38; Case T-421/11, *Qualitest FZE v Council*, para. 33.
[225] Case C-200/13, *Council v Bank Saderat Iran*, para. 74. The Court has in some cases expressed that a "mere repetition of the designation criteria" is not sufficient to fulfill the criteria and required individual and case-specific reasons to uphold a listing.
[226] Pursiainen 2017, p. 10.
[227] Without this information the Court cannot judge on the legality of the sanctions listings.
[228] See e.g., *Kadi II*, para. 44.
[229] Chachko 2019, p. 16.
[230] Case C-200/13, *Council v Bank Saderat Iran*.

partnership, being an influential figure or having a family relation to the main sanctions target.[231] The concern with presumption-based statements of reasons, however, is that the target's status or relationship to the main sanctions target might not always be an indicator of their involvement or association with sanctioned activity.[232]

An example of where the Court did not accept the use of a presumption-based statement of reasons was in the case of *Tay Za*, where the son of an influential Myanmarese businessman was sanctioned on the basis of his father's connection to the sanctioned state regime.[233] The presumption here was that the son could benefit from his father's association to the regime. The listing was initially upheld by the General Court but overturned on appeal by the Court of Justice.[234] The Court held in this regard that the personal scope could not be extended as far to include the family members of an associated person.[235] This was a useful judgement to clarify how far the Council could go in imposing sanctions. In the case of *El-Qaddafi v Council*, the General Court annulled the sanctions listing on former Libyan leader Muammar Qaddafi's daughter, as it held that basing the statement of reasons on the target's family relation did not provide a strong enough basis for a listing and violated the right to effective judicial protection.[236]

In other cases, however, the Court has accepted the use of presumptions-based statements of reason.[237] This was the case in *Central Bank of Iran v Council*, where the Court held

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[231] Filpo (2020, p. 621) brings up the examples of T-203/12, *Alchaar v Council*, para. 138, where a Syrian minister for economy and commerce was listed to the EU Syrian sanctions regime as they could be seen as responsible for the acts of the country through their position. The other example used by Filpo was Case T-202/12, *Al Assad v Council,* para. 96, where the sister of the Syrian leader Bashar Al Assad was listed. According to the Court, the family relation was sufficient to presume the connection to the Syrian leaders.
[232] *Ibid.*
[233] Case C-376/10 P, *Tay Za v Council,* para. 65. Other examples of where the Court did not accept the use of presumption-based statements of reason include e.g. Case T-66/12, *Sedghi v Council*, para. 69; Case T-58/12, *Nabipour v Council*, para. 107; Joined Cases T42/12 & T-181/12, *Bateni v Council*, paras. 64-66.
[234] Compare the judgements T-181/08 and C-376/10 P (*Tay Za v Council)* from the General Court and the ECJ.
[235] Case C-376/10 P, *Tay Za v Council*, para. 69-72.
[236] Case T-681/14, *El-Qaddafi v Council.* After the sanctions listing was annulled in 2017, the Council relisted El-Qaddafi on new grounds in 2019. The listing was challenged by El-Qaddafi and annulled again through Case T-322/19, 21 April 2021. The grounds for the annulment were different in the second case, with the Court stating that it did not make sense to keep her sanctioned anymore as her father was killed in 2011. The original basis for the listing seems to have been based on threats by El-Qaddafi to avenge his father.
[237] Chachko 2019, p. 15.

that a bank's status as the central bank of Iran was enough to prove its support of the government of Iran.[238] Similar arguments were used by the Court in the case of *Bamba*.[239] In *Bamba*, the targets position as a director of a newspaper was enough for the Council to draw the conclusion, that the target was aware of the political situation in her home country of Cote d'Ivoire, as well as of the destabilizing effects of her work.[240] Furthermore, in the case of *Anbouba*, the Court deemed that a Syrian businessman could be assumed to have a link with the Assad regime due to his status as an influential figure.[241] The assumption here was that a businessman in Syria could not attain such position without supporting the sanctioned regime.[242] Same types of presumptions have been made in cases with individuals who hold senior posts in sanctioned political regimes, unless they have taken specific action to distance themselves from the regime.[243]

As the Court requires that the statements of reasons are sufficiently individual, specific and concrete for the target to understand why they are targeted, the specificity will vary from case to case.[244] It seems, however, like there could be more clarity on when the Council is allowed to base statements of reason on presumptions and when not. The issue of presumption-based statements of reasons even ties into the question of evidentiary rules and standards of proof. The types of presumptions the Council is allowed to make influences the quality and quantity of evidence that the Council is expected to provide in court. The stricter the Court is in allowing presumption-based statements of reason, the higher the quality of the evidence has to be to prove the validity of a sanctions listing.

3.2.4 Supporting evidence in the CJEU

The third criterion of the Court's judicial review in sanctions cases consists of the evidence that supports the statement of reasons. The purpose of supporting evidence, in

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[238] Case C-266/15, *Central Bank of Iran v Council,* paras. 46-47.
[239] Case C-417/11 P, *Bamba v Council*.
[240] *Ibid*. para. 58.
[241] Case C-605/13 P, *Anbouba v Council*.
[242] *Ibid.*, para. 51.
[243] Case C-330/15 P, *Tomana and Others v Council*, para. 84.
[244] Eckes 2020, p. 17.

essence, is to show that the allegations made by the Council in the statements of reasons can be sufficiently verified. Once a sanctions target has raised an annulment action under Article 263 TFEU, the Council then bears the burden of proof to provide the factual basis for the statement of reasons.[245] When the Council has provided sufficient evidence to support its claims, the burden flips to the sanctions target to disprove the accusations. The supporting evidence in targeted sanctions cases has been broadly discussed by legal scholars as well as the Court, resulting in some notable case law in the area. The central concerns have been connected to the disclosure of confidential information and the Court's standard of proof. Both of these issues will be assessed, although the focus will be maintained on the issues of standard of proof.

Like the question of statement of reasons, the current standards for supporting evidence were established through the *Kadi II* case. The fundamental issue with supporting evidence at the time of the *Kadi II* case was, that the Council often denied both the sanctions target and the Court any access to evidence.[246] The reasoning of the Council was that sanctions listings were often based on confidential information and that the disclosure of such information could threaten national security and the exposure of informants.[247] With the Council's intelligence coming from mostly Member State intelligence services or third States, there was a concern that the flow of information would stop if the States knew that their intelligence would be disclosed to the Courts and possibly the sanctions targets themselves.[248] A leak of confidential information could understandably have grave effects on international relations and was argued by the Council to be a proportionate reason to refuse the disclosure of information.[249]

In the ruling of *Kadi II*, the Court took a stance on whether the Council could use the confidentiality of information as a reason to not provide any evidence in Court. The Court concluded that the confidentiality of information was, in fact, not a reason to refuse to

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[245] Filpo 2020, pp. 617-618. The general rule is that the burden of proof lays on the EU authority. In relation to the burden of proof the Council is discharged of its duty to provide evidence in the case of well-known facts and presumptions. In this case the burden shifts to the other party.
[246] Pursiainen 2017, p. 14.
[247] *Ibid.*
[248] *Ibid.*
[249] *Ibid.*, p. 15.

provide the target with any reasons.[250] National security could be used as a grounds to limit the amount of information, but the provided evidence still needed to be sufficient to support the statements of reasons.[251] This requirement could also be fulfilled by providing the target with a summary containing the essence of the evidence.[252] Following the judgement of *Kadi II* in 2013, the Court initiated a reform of its rules of procedures relating to the treatment of confidential information.[253] This was an effort to create a special procedure, under which the Court could be able review confidential evidence while balancing the Member State's national safety concerns. [254] With the special procedure, a party could produce confidential information through a separate document, if it held that the communication of information would harm the security of the Union, a Member State or the conduct of international relations.[255]

The new procedure for managing confidential evidence can be initiated by one of the parties or through the Court's request.[256] If a request is made, the party holding the confidential information is asked to disclose the information to the Court, accompanied with the reasons for the confidentiality of the material.[257] If the party claiming to have confidential information refuses to produce the information, the Court makes its judgement without this information.[258] If the party decides to share the confidential information with the Court, the Court reviews the material and decides if it agrees with the confidential nature of the information.[259] If the Court finds that the material relevant

[250] *Ibid.*, para. 123-130. In practice this means that if the Council cannot provide some evidence, the Court would rule on the case without that evidence.
[251] Following the Kadi II judgement, the Court has reiterated this line of argument trough e.g., Case T-181/13, *Sharif University of Technology v Council*, para. 69; Case T-155/13, *Zanjani v Council*, paras. 68-74; Case T-8/11, *Bank Kargoshaei v Council*, paras. 114-17; Case T-13/11, *Post Bank Iran v Council*, paras. 126-30; Case T-12/11, *Iran Insurance Company v Council*, paras. 122-26 and Joined Cases T-439/10 & T-440/10, *Fulmen v Council*, paras. 99-101.
[252] *Kadi II*, para. 123.
[253] Pursiainen 2017, p. 14. This reform was made through an amendment of Article 105 of the Rules of Procedure of the General Court. This procedure constitutes an exception to Article 64 of the Rules of Procedure, which states that the Courts procedure is based on the adversarial principle. The reform was implemented by Decision (EU) 2016/2387 of the General Court of 14 September 2016 concerning the security rules applicable to information or material produced in accordance with Article 105(1) or (2) of the rules of procedure.
[254] Chachko 2019, p. 17.
[255] Rules of Procedure of the General Court, Article 105 (1).
[256] *Ibid.* Article 105 (2).
[257] *Ibid.* Article 105 (1).
[258] *Ibid.* Article 105 (4).
[259] *Ibid.*

for the ruling of the case is to be held confidential, the Court has to conduct a balancing of the principle of the right to effective judicial protection and the security interests of the Union and/or a Member State.[260] Based on this balancing, the General Court can provide both of the main parties with a non-confidential summary of the original material, giving the other main party the possibility to make its views known.[261]

Even with the adoption of this special procedure, Member States have expressed doubt about sharing confidential information with the Court and preferred not to share information.[262] As it seems like the Council and Member States have rejected the utility of this procedure, it begs the question, whether further reform could be necessary. Striking the right balance between individual procedural rights and national security interests is a challenging task and requires a high degree of adaptability from the Court. With the current special procedure at place, however, the issues of evidence seem to have slightly shifted away from the main spotlight, creating more space for other issues to be discussed. Instead, it seems as legal scholars increasingly focus on issues relating to the Courts use of standards of proof in targeted sanctions cases. Although questions of standards of proof inherently fall under the area of supporting evidence, they also have ties to the issues discussed in connection to the designation criteria and statements of reason. To provide a more independent discussion on the different aspect of standard of proof, the subject will be discussed under a Chapter of its own.

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[260] *Ibid.* Article 105 (5).
[261] *Ibid.* Article 105 (6).
[262] Chachko 2019, p. 17. For a Member State point of view, see also the Letter from Rt. Hon. Baroness Anelay of St. Johns DBE, Minister of State, Foreign & Commonwealth Office, to Lord Boswell of Aynho, Chair of the House of Lords Select Committee on European Union, pp. 3-4.

4 STANDARDS OF PROOF – WHAT ARE THEY AND WHAT IS THEIR POSITION IN EU TARGETED HUMAN RIGHS SANCTIONS CASES?

4.1 Standard of proof

4.1.1 General provisions

The previous Chapter aimed to clarify the Court's position is in targeted sanctions cases through an analysis of the current standards and concerns in targeted sanctions cases. Discussing the central aspects of the Court's review process emphasizes the complex nature of sanctions proceedings and the fact, that there is still room for improvements in the areas of designation criteria, statement of reasons and supporting evidence. The concerns that were raised, including the Court's use of risk-based designation criteria, presumption-based statements of reasons and the proper use of confidential information, are all issues with connections to one another. Furthermore, these concerns also extend to the Court's evidentiary standards, that is, what the Court accepts as sufficient evidence in targeted sanctions cases. Issues with the Court's evidentiary standards i.e., standard of proof, have recently been brought up by scholars, especially in relation to the new regime of targeted human rights sanctions.[263] The criticism has been focused on the Court's evidentiary standards being too ambiguous and broad, which in turn, could make it difficult for parties to know, what types of evidence they are expected to provide.[264] This has been argued to compromise the respect of the principle of legal certainty, as the lack of known, precise, stable, certain, and predictable legal standards could make the Court's processes more arbitrary in nature.[265]

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[263] The criticism has been sparked by the creating of the new regime, scholars such as Eckes (2021, p. 10) and van der Have (2020, p. 71) have raised possible concerns, including the standard of proof and legal certainty issues. Others include Pursiainen (2017, p. 13), Al-Nassar 2021 and the House of Lords EU Justice Sub-Committee.
[264] *Ibid.*
[265] According to Amalfitano (2018, p. 15), the use of minimum procedural standards has been seen as one way to exemplify the principle of legal certainty. The requirement of known, precise, stable, certain and predictable legal standards was set in Case C-72/10, *Criminal proceedings against Costa*, para. 74.

Interesting from the standpoint of this thesis is, what type of standards of proof could be adopted in the area of EU targeted human rights sanctions, as the Court has yet to take a stance in this matter. On one hand, reference could be drawn from other EU sanctions regimes, such as the counter-terrorism sanctions regime and the EU's competition law sanctions regime. On the other hand, there are interesting points of reference found on the UN and ECHR levels. Furthermore, it should be considered whether the EU's current standards of proof could be problematic for the principle of legal certainty. As the EU counter-terrorism sanctions regime is the only EU targeted sanctions regime where the Court has explicitly established a standard of proof, it will be especially focused on.[266] Similarly, even though there are standards of proof in many areas of EU law, the focus will be held on the EU's competition law sanctions as it is the area with most discourse on evidence and proof in EU law.[267] The human rights sanctions regime being the newest addition to the EU's sanctions toolbox provides also an opportunity to contribute to the general debate on the necessity of clear standards of proof.

When targeted sanctions cases are brought to the Court, the Council bears the burden of proof to show the legal grounds, reasons, and proof for why a sanctions listing should be upheld by the Court.[268] It is then up to the Court to evaluate, whether the proof provided by the Council is persuasive enough to conclude on the factual assertations made in the case.[269] The concept of a required level of persuasiveness of evidence is known as the "standard of proof" and has its roots in common law legal traditions.[270] Different standards of proof can be found both on the national and international level, varying in strictness between different areas of law.[271] In the EU system, standards of proof have

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[266] House of Lords; Written evidence (EUS0001) provided by Maya Lester QC, Brick Court Chambers.
[267] Nic Shuibhne – Maci 2013, p. 967.
[268] McBride: "The case law of the European Court of Human Rights on evidentiary standards in criminal proceedings", pp. 5-6. Note that, the burden of proof refers to rules on which party has to provide proof first. This concept is separate from the standard of proof, although these concepts are highly dependent of one and other.
[269] *Ibid.* See also case T-256/07, *OMPI II*, para. 134.
[270] Filpo (2020, p. 616 fn. 5) states that the level of persuasiveness is an inherent part of the common law standard of proof. For a more general definition of the standard of proof, see the Opinion of Advocate General Kokott's Opinion in Case C-97/08 P, *Azko Nobel e.a. v Commission* fn. 64.
[271] Standards of proof exist in national jurisdictions but also in the EU, UN and ECtHR systems.

traditionally been governed by Member States under national law.[272] This is the case under the preliminary reference procedure, as it entails that the Court interprets national legislation, therefore also using the national evidentiary standards. The use of national evidentiary standards has, however, led to the construct of standard of proof not being well-developed in most areas of EU law.[273] The same applies to the ECtHR, which has traditionally considered evidentiary rules to fall within the jurisdiction of national courts.[274] As a result the ECtHR has gotten used to accommodate a range of national standards.

When we consider the need for EU standards of proof it should be noted that the EU's targeted sanctions regimes are different from the traditional EU preliminary reference procedure as they lack a clear connection to Member State jurisdictions. Even as the Court has a number of independent evidentiary standards in different areas of EU law, the application of them remains fragmented, making it difficult to draw support from them. Most notably, although the EU has a long history of sanctioning human rights violations, this has previously been done under state sanctions which do not impact the individual's rights and freedoms as directly. With the shift to targeted human rights sanctions, it seems as the EU is not acknowledging the rising need for stronger and more comprehensive procedural rules, independent from any specific Member State jurisdiction. Considering that targeted sanctions measures are only becoming more common, the creating of EU-wide evidentiary standards in the area of targeted sanctions would help ensure that the Court is able to act independently. To further discuss the possible standards of proof in EU human rights sanctions cases, I will start by looking into the different existing standards.

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[272] For EU Competition law context, see, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Recital 5 of the Council Regulation states, "This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law."
[273] Filpo 2020, p. 620.
[274] McBride: 'The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings', p.6. See also, *Garcia Ruiz v. Spain*, Application no. 30544/96, para. 28.

4.1.2 Criminal, civil and administrative law standards of proof

Standards of proof have generally been tied to specific legal areas with the most common categorization being between criminal, civil and administrative law. As these areas have distinct characteristics, standards of proof have been adapted to the needs of each area. The highest standard of proof is found in the area of criminal law, traditionally requiring a standard of "beyond reasonable doubt".[275] In practice, this means that the evidence in criminal cases must show "beyond reasonable doubt" that a defendant is guilty of a crime. With the criminal standard of proof, there are certain procedural rights, such as the right to presumption of innocence and protection against self-incrimination which have traditionally only become applicable in criminal cases.[276] The need for these higher procedural standards, as discussed previously, stems from the inherently harsh punishments of criminal law and the aim of finding and convicting the perpetrator of an illegal act.

The criminal standard of "beyond reasonable doubt" has its roots in national legal systems, where it has had a role in ruling on criminal guilt and civil liability.[277] This nature also translates to the EU Court system, where the standard is mostly used in connection to preliminary rulings.[278] In the context of the ECHR, the standard of "beyond reasonable doubt" has been a part of the ECtHR's evidentiary procedures since the *Greek Case* in 1969.[279] It should, however, be noted, that the ECtHR uses the standard in a different aim to rule on the Contracting States' responsibility under the Convention.[280] Adopting the criminal law standard of proof in targeted sanctions cases would, however, not be realistic as the Council simply does not have access to the type of evidence that would prove a

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[275] Villamarín López 2017, p. 351.
[276] *Ibid.*, pp. 348-349. The presumption of innocence is a part of a broader right to fair trial which can be found from Article 48 of the Charter of Fundamental Rights and Article 6(2) of the European Convention on Human Rights.
[277] Gunn 2020, p. 200.
[278] In fact, it is difficult to find examples of cases where the Court would have used the standard of beyond reasonable doubt, save for when this standard has been raised by national courts. See, for instance Case C—330/19, *Staatssecretaris van Financiën v Exter BV.*
[279] Gunn 2020, p. 200, fn. 12. The use of the "beyond reasonable doubt" -standard was later confirmed in the case of *Ireland v. The United Kingdom*, Application no. 5310/71. For the *Greek case* see cases Case of *Denmark v. Greece*, Application no. 3321/67; Case of *Norway v. Greece*, Application no. 3322/67; Case of *Sweden v. Greece*, Application no. 3323/67; Case of *Netherlands v. Greece*, Application no. 3344/67.
[280] *Ibid.*

sanctions target's involvement in sanctioned activity "beyond reasonable doubt".[281] This is tied to the third State -nature of sanctions, meaning that the sanctioned activity usually takes place outside of EU borders, where the EU does not have jurisdiction or access to the same investigative powers as within EU borders.[282] Therefore, it would be better to look at alternative standards of proof that could provide sufficient procedural safeguards, while considering the restrictions to the Council's investigative powers.

Moving to the lower standards of proof i.e., the civil and administrative law standards of proof, the standard of proof used in civil law has been seen as a "middle ground" between the criminal and administrative law alternatives. The most common standard of proof in civil law cases is known as "the balance of probabilities", meaning that the Court will accept that an event has happened if the evidence shows that it is more likely to have happened than not.[283] In other words, the evidence brought to the Court has to convince the judge that there is an over 50% chance that something has happened. The standard is, however, quite flexible with the evaluation first and foremost proving that one event is more probable than the other.[284] The standard of balance of probabilities has for instance been used by the UK courts in civil competition law proceedings.[285] However, in the context of human rights sanctions, the debate on the correct standard of proof is often limited to the areas of criminal and administrative law.[286] The exclusion of the civil law standard of proof could be explained by the nature of annulment actions, which require

[281] Pursiainen 2017, p. 13.
[282] In many cases the Council is reliant on confidential information from Member State intelligence services or information from third States.
[283] Smith 2021, p. 184. The standard of "balance of probabilities" is also known as the "preponderance of evidence".
[284] *Ibid.*
[285] Kwok 2016, p. 1. See also the article by Yeung – Yeung (2021) that discusses different competition law standards of proof in common law jurisdictions. There seems to be some differences between how competition law sanctions are categorized in different common law jurisdictions. While Hong Kong has adopted a criminal standard of proof in competition law cases, Australia, New Zealand and the UK have adopted the civil law standard of "balance of probabilities".
[286] UK Supreme Court (UKSC 2014/0028): *Youssef v Secretary of State for Foreign and Commonwealth Affairs*. In the case the applicant raised an annulment action, arguing that he should be de-listed from the UN based counter-terrorism sanctions list. The UK Supreme Court stated in para. 50 that; "[…] The position of a decision-maker trying to assess risk in advance is very different from that of a decision-maker trying to determine whether someone has actually done something wrong. Risk cannot simply be assessed on a balance of probabilities. It involves a question of degree". The judgement provides one explanation for the exclusion of civil law standards of proof in cases of targeted sanctions cases.

an assessment of risk, which the "balance of probabilities" -standard is not adept for.[287] With the excessively high standard of the traditional criminal standard and inapplicability of the civil law standard, the only remaining standard is the one found in administrative law procedures.

Compared to criminal and civil law standards of proof, the general consensus seems to be that the standard of proof in administrative law cases is lower than the others.[288] This could reflect the fact that administrative processes are not deemed as intrusive and severe in nature as criminal processes, with administrative punishments often limited to fines and financial sanctions. In the context of EU administrative law, there does not seem to be one particular standard of proof but rather a variety of different standards, depending on the legal area and national jurisdiction. Many areas of EU administrative law, however, include standards with formulations of "sufficient evidence"[289], "specific and consistent evidence"[290], and "manifest error"[291].[292] Following the EU's own categorization, the standards of proof used in sanctions cases would fall under the umbrella of administrative law. The standard of proof used in sanctions cases have, however, been criticized for their broadness and ambiguity, raising the question of whether they can provide sufficient procedural safeguards. Regardless, the standards used in administrative sanction cases provide a good starting point for the analysis in this thesis.[293]

With administrative standards of proof being lower than the criminal and civil law standards, the procedural rights in connection to administrative law cases have also been more limited, as discussed in Chapter 2. The existence of a category of criminally natured administrative procedures in EU competition law, would however, open up the possibility

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[287] *Ibid.*
[288] Wils 2005, p. 2.
[289] Joined cases C-68/94 and C-30/95, *French Republic and Others v Commission*, para. 228; Case T-310/01 *Schneider Electric v Commission*, paras. 179, 209, 349.
[290] Case T-114/02, *BaByliss v Commission*, para. 353.
[291] House of Lords; Written evidence (EUS0001) provided by Maya Lester QC, Brick Court Chambers.
[292] Prete – Nucara 2005, p. 5. These standards can be found in cases relating to e.g., merger control anti-trust infringements and state aid review.
[293] This applies especially to the standard of proof used in the EU's counter-terrorism sanctions regime. This conclusion is drawn considering the close relationship between the counter-terrorism sanctions regime and the human rights sanctions regime. Both of these regimes are EU targeted sanctions regimes with an aim to obtain EU foreign policy goals.

for administrative law cases to have stronger procedural rights. The Court has for instance accepted that the principles of *ne bis in idem*, *res judicata* and privilege against self-incrimination can become applicable in EU competition law sanctions cases. With the similarities between competition law and EU targeted sanctions regimes, targeted human rights sanctions could very well also have a hybrid nature. As criminally natured administrative sanctions could have higher procedural rights than normal administrative sanctions, it should be considered what effects this categorization could have for the standard of proof in human rights sanctions cases. To consider this question, I will start by reviewing the EU standard of proof that seems like the most applicable to human rights sanctions cases, namely the one found in EU targeted counter-terrorism sanctions.

4.2 EU Counter-terrorism sanctions

Following the conclusion in Chapter 2 that targeted human rights sanctions could qualify as criminally natured administrative sanctions, the standard of proof applied to these cases would have to be adjusted to the nature of the sanctions measures. This would entail finding a standard of proof outside the traditional standards used in criminal, civil and administrative law as the traditional standards do not seem to address the concerns raised in connection to sanctions cases. To look for examples, it seems the most natural to start with the standard of proof that has been previously used in targeted sanctions cases, namely the one used in EU counter-terrorism sanctions cases. In connection to the EU's counter-terrorism sanctions, the Court has articulated a standard of proof, which according to the Court's own classification of sanctions cases, should fall under administrative law. This is the standard of "sufficiently solid factual basis", originally articulated in the *Kadi II* case.[294] The existence of a standard or proof in the EU counter-terrorism sanctions regime would seemingly provide a clear example for how the Court should rule in human rights sanctions cases. After all, the counter-terrorism and human rights sanctions regimes are both EU targeted sanctions regimes targeting violations of

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

international law. The standard has, however, been criticized for being excessively broad and ambiguous, requiring a deeper review of the criticism.[295]

To fall within this standard of "sufficiently solid factual basis" the Court requires that 1) the reasons provided by the Council fall within the designation criteria, and 2) are substantiated.[296] In practice the Court has only specified that the "sufficiently solid factual basis" -standard falls somewhere between the criminal law standard of "beyond reasonable doubt" and cases with no evidence at all.[297] This would only exclude the two extreme scenarios, while providing little guidance on how the Court will evaluate evidence in targeted sanctions cases. There is not much indication on what procedural rules the standard would include either. In addition to this criticism on the ambiguity of the "sufficiently solid factual basis" -standard, some scholars have found that the standard would not apply to the other EU targeted sanctions regimes, apart from the counter-terrorism sanctions regime. [298] This gives reason to question whether the standard of "sufficiently solid factual basis" could even be applicable to the human rights sanctions regime.

Even though the Court uses similar formulations of "sufficient evidence" across all EU targeted sanctions regimes, some scholars do not seem to accept these formulations as standards of proof. In this context, the counter-terrorism sanctions regime has been singled out as the only regime with a standard of proof, seemingly due to the two-step listing procedure of the regime.[299] The procedure of counter-terrorism sanctions, unlike

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[295] Pursiainen 2017, pp. 13, 44, 47.
[296] House of Lords EU Justice Sub-Committee: The Legality of EU Sanctions, 11 October 2016. Answer of Michael Bishop on Q12. One has to be sufficiently certain that the criteria for listing are satisfied in a given case. On that basis, the court's case law will help. The Court might have given judgments in similar circumstances, where the Council will have a clear idea of what kind of evidence will be required and what will not satisfy the requirement.
[297] Pursiainen 2017, p. 13.
[298] Written evidence of Maya Lester, answer on Q11. This would exclude the cyber crime and chemical weapons sanctions regimes.
[299] *Ibid.* Lester holds that there are no standards of proof in the area of targeted sanctions, aside from the one used in counter-terrorism sanctions. As the formulations used by the Court are very similar across EU targeted sanctions regimes, it seems like the standard of "sufficiently solid factual basis" is not enough on its own to constitute a standard of proof. The counter-terrorism sanctions regime, however, provides a stronger basis to review evidence, as it is already based on a decision by a national authority. Hence, it would seems as though the existence of a standard of proof, in this context, requires a formulation used by the Court, backed up by something more robust (e.g. the two-step system used in counter-terrorism cases).

the chemical weapons and cyber-crime sanctions regimes, consists of a two-step listing procedure that requires both a decision of 1) a competent national authority and 2) the Council.[300] The national authority, oftentimes a national court, is required to have processes that respect the rule of law and fundamental rights and the decision has to be based on precise information or evidence that a person or entity has participated, facilitated or attempted to perpetrate a terrorist act.[301] After a decision by a competent national authority has been made, the second step of the process is for the Council to take a listing decision, thereby officially adding the sanctions target to the EU sanctions list. Before making this decision, the Council has to ensure that the national decision has been based on serious and credible evidence and complies with the rule of law.[302]

In its earlier case law, the Court has annulled sanctions listings if the national decisions had not met the requirements listed above. This was the case for instance in *Azarov v Council* and *Saleh Thabet and Others v Council*, where the Court stated that if the Council acted on the basis of a decision by an authority of a third State, it had the obligation to verify that the decision was adopted in accordance with the rights of defence and the right to effective judicial protection.[303] Compared to the counter-terrorism regime, the procedure of the human rights sanctions regime is more simplified, lacking the requirement of a decision of a national authority. The Council simply lists persons and entities based on suggestions from Member States and the High Representative.[304] The quality of evidence in human rights sanctions cases can therefore be weaker as the two-step procedure used in counter-terrorism cases allows the Council to benefit from the investigative resources of national authorities.[305] Furthermore, decisions made by

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[300] House of Lords, EU Justice Sub-Committee: The Legality of EU Sanctions, 11 October 2016. Answer of Michael Bishop on Q12.
[301] Joined cases T-208/11 and T-508/11, *LTTE v Council*, paras. 100, 164-165. For further discussion see, House of Lords EU Justice Sub-Committee: Legality of EU Sanctions, 11 October 2016. Answers of Andrew Murdoch (on Q2) and Maya Lester (on Q12).
[302] *Ibid.*
[303] House of Lords EU Justice Sub-Committee: The Legality of EU Sanctions, 111 October 2016. Point made by Maya Lester on Q12. Lester brings up the concern that the Council cannot (and should not) always trust the decisions made by third States as these regimes do not always respect the rule of law. This has been the case in relation to Tunisia, Egypt, and Ukraine. See also, C-72/19 P, *Saleh Thabet and Others v Council*, para. 37; C-599/14 P, *Council v LTTE*, para. 24; C-530/17 P, *Azarov v Council*, para. 26.
[304] Council Decision 2020/1999 Article 5.
[305] House of Lords EU Justice Sub-Committee: The Legality of EU Sanctions, 11 October 2016. Answer of Andrew Murdoch on Q2. National authorities often have better resources and access to evidence than the Council.

national authorities are often based on stricter procedural standards – for instance, acts of terrorism are often tried in national courts under criminal law, leading the national courts to implement the criminal law standard of proof.[306]

The evidence available to the Court under targeted sanctions regimes is often either not shared with the Court due to its confidential nature, or difficult to verify due to the unreliability of open-source material. The Court has annulled multiple sanctions listings where the Council has not been able to sufficiently support the allegations made in the statements of reasons.[307] This was the case in *Iran Insurance Company v Council* and *Good Luck Shipping v Council*, where the Court concluded that the Council had based its sanctions listings on mere unsubstantiated allegations. [308] In some cases, the Court has taken a stance on the types of evidence used by the Council, stating that sanctions listings under the two-step procedure could not be based on just open-source material from the press or internet.[309] This was established in e.g. the *LTTE v Council* and *Hamas v Council* -cases, where the Court annulled sanctions listings as they were based on press releases and news articles.[310]

As there is a narrative of the EU's simplified listing procedure being insufficient for the needs of standards of proof, it should be considered how the procedure could be adapted to accommodate the adoption of a standard of proof. Due to the nature of targeted human rights sanctions, the use of a two-step procedure would simply be possible, so the review is focused on other alternatives, where the simplified sanctions procedure can be balanced with the individual's procedural rights. One suggestion by van der Have has been, that the requirements on standards of proof could be impacted by geographical distance and the sparseness of direct evidence.[311] This discussion has been explicit to the human rights

[306] *Ibid.*
[307] House of Lords EU Justice Sub-Committee, Written evidence (EUS0001) provided by Maya Lester QC, Bricks Court Chambers.
[308] Case T-12/11, *Iran Insurance Company v Council,* para. 127 and Case T-57/12, *Good Luck Shipping LLC v Council*, paras. 67-68.
[309] Case T-208/11, *LTTE v Council*, para. 187.
[310] Case T-208/11, *LTTE v Council,* para. 186-229 and Case T-400/10, *Hamas v Council*, para. 125.
[311] van der Have 2019, p. 62.

sanctions regime, where sanctions targets are geographically further away from the EU and the access to direct evidence more challenging. [312]

According to van der Have, the standard of proof used in counter-terrorism sanctions cases should be lowered, if applied to human rights sanctions cases.[313] The argument is based on the notion that the counter-terrorism regime has an inherently stronger connection to EU jurisdiction, even when difference in geographical distance is disregarded. In counter-terrorism sanctions cases, the connection to EU jurisdiction is often established through the terrorism-related activity happening within EU borders[314] or being directed towards the EU or like-minded countries.[315] While it is true, that maintaining the same standard of proof in human rights sanctions cases is more challenging due to the geographical distance and sparseness of direct evidence, the standard used in counter-terrorisms sanctions should, in my view, not be lowered merely due to the Council's difficulty of finding sufficient evidence. This should at least not be the case if the harshness of sanctions measures is not equally impacted by the added geographical distance.[316]

In general, sanctions measures seem to have a bigger impact on the sanctions target the stronger the target's connection to EU jurisdiction is. As the Council can only freeze assets and limit travel through European operators, it would seem natural that the less of a connection the sanctions target has to EU these operators, the smaller the impact of sanctions would be. This could be one argument in support of the lowering of the standard of proof as a result of increased geographical distance. On the contrary, I find that these types of generalizations can be harmful as the impact of sanctions measures still changes from case to case. Furthermore, considering the stigmatizing effects and complicated de-listing procedure, the evidentiary standards should not be lowered only based on "lesser"

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[312] *Ibid.* Although van der Have focuses on the human rights sanctions regime, the discussion also applies to other EU targeted sanctions regimes.
[313] *Ibid.*
[314] See the Annex to Council Common Position (2001/931/CFSP). Sanctions have been imposed e.g., in relation to the terrorist-activity in Catalonia and Ireland.
[315] *Ibid.* Currently sanctions listings are mostly connected to terrorist attacks directed towards the United States.
[316] Fundamental rights issues arise especially in situations, where the EU maintains the same punishments regardless of the quality of evidence available.

impact on the sanctions target. This is true especially in the case of the human rights sanctions regime (and other similar sanctions regimes), where the procedure is simplified and based on only a decision made by the Council. In this sense it could even be argued that the standard of proof in human rights sanctions cases should be stricter than the "sufficiently solid factual basis" to compensate for the lack of national decisions. This would help to ensure that the Council makes sanctions listings based on sufficiently clear and specified evidence.

One alternative for the "sufficiently solid factual basis" -standard could be found in the UN system, as suggested by Pursiainen.[317] In connection to the UN's ISIL (Da'esh) and Al-Qaeda Sanctions regime[318], the UN Ombudsperson has stated that sanctions listings need to be based on "sufficient information to provide a reasonable and credible basis for a listing".[319] This standard is used by the Ombudsperson to evaluate whether it should accept or discard a de-listing request made by the sanctions target. Although the standard is close to the standard used in counter-terrorism sanctions cases, it seems to provide a little more guidance and clarity.[320] While providing a viable option, I believe it to be more feasible to continue exploring the standard of "sufficiently solid factual basis". As there does not seem to be anything making the counter-terrorism standard inherently unapplicable, it would only have to be established, whether it can be adapted to the hybrid and simplified nature of sanctions. To get a better understanding of how the Court has viewed evidentiary standards of criminally natured administrative measures, I will turn to perspectives from EU Competition law. Much like the discussion on the legal character of sanctions, competition law sanctions have also for long lacked clear guidance on the applicable standard of proof in the Court.[321] The discussion seems to, however, be more advanced in the area of competition law, providing a good reference for how the standard could be formulated in human rights sanctions cases.[322]

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[317] The alternative has been brought up by Pursiainen 2017, p. 13.
[318] See, the Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh) Al-Qaida and associated individuals groups undertakings and entities.
[319] The Office of the Ombudsperson: 'Approach and Standard'.
[320] Pursiainen 2017, p. 13.
[321] United Nations Conference on Trade and Development 2016, pp. 5-6.
[322] Nic Shuibhne – Maci 2013, p. 967.

4.3 Perspectives from EU Competition Law

In competition law sanctions cases, the Court has generally required that the Commission shows "sufficiently precise and consistent evidence to support the firm conviction" that an alleged infringement has taken place.[323] In cartel cases the Court has, however, also accepted a lower standard of proof, stating in the case of *Aragonesas Industrias y Energia v Commission* that it sufficed for the Commission to show that "[…] the evidence viewed as a whole amounted to precise and consistent evidence".[324] The lower standard of proof in cartel cases was explained through the clandestine nature of cartels and the sparseness of available evidence.[325] The establishing of anti-competitive practice is often a result of a number of coincidences and indicators which taken together, in the absence of another plausible explanation, suffice to conclude on an infringement.[326] This reasoning is similar to the arguments made by van der Have in connection to targeted human rights sanctions, using the geographic distance and sparseness of evidence as grounds to lower the evidentiary standard. The Court seems to have accepted this logic in connection to competition law sanctions, leaving open the question of whether the same could be done with regards to targeted human rights sanctions.

Questions of standard of proof have been prevalent in EU competition law already for decades. The expression "standard of proof" appeared first in the Courts' caselaw under the case of *Sumitomo* in 2006.[327] This case is also one of the few cases, where the term "standard of proof" has been explicitly used. In *Sumitomo*, the applicants appealed their case to the ECJ, alleging that the General Court had erred in defining the requisite standard of proof in their cases.[328] In its judgement the ECJ highlighted that it only had jurisdiction to review the substantive inaccuracy of the General Court's conclusions based

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[323] Balasingham 2019, p. 368. The established this standard through Case T-67/00 *JFE, Engineering v Commission*, para. 179.
[324] *Ibid.* See, Case T-348/08, *Aragonesas Industrias y Energia v Commission*, para. 98.
[325] Balansingham 2019, p. 368-369. See also, Case C-204/00 P, *Aalborg Portland and Others v Commission*, paras. 55-57.
[326] *Ibid.*
[327] Joined cases C-403/04 P and C 405/04 P, *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission*.
[328] *Ibid.*, para. 26.

on the evidence, the distortion of the evidence, the legal characterization of evidence and whether the rules relating to the taking of evidence had been observed.[329] In this sense, the question of whether the General Court had applied the correct legal standard when examining evidence, was a question of law. The ECJ could, however, not question the General Court's assessment of evidence, i.e., if the General Court's conclusion that evidence was precise and consistent, was correct or not. The ECJ ended up dismissing the applicants claims on these grounds. It should be noted, that even when applicants directly challenged the legality of the Court's standard of proof, the Court refrained from using the term "standard of proof" in its judgement but instead used the formulation of "the correct legal standard".

This overview of the Court's caselaw in competition law sanctions cases demonstrates how competition law sanctions share similarities with the area of EU targeted sanctions. There is, however, another discussion relating to standards of proof in the area of competition law which I find worth highlighting. This discussion, raised by Gippini-Fournier and supported by other authors, suggests that there could be a fundamental misconception of what standards of proof are and how they are intended to be used.[330] The fact is, that the Court does not use standards of proof in the same way as they have traditionally been used in common law jurisdictions.[331] This discrepancy between the traditional common law standard of proof and the EU's standards of proof could provide an explanation for the criticism by some scholars. Gippini-Fournier argues in his work that the Court's way of phrasing standards of proof in an ambiguous and broad manner only reflects the fact that the Court legal traditions stem from civil law, rather than common law traditions. [332]

In common law jurisdictions, the purely adversarial approach to litigation, including the need to formulate jury instructions in criminal cases and the central role of precedent in the formation of new law has led to standards of proof being in a very important

[329] *Ibid.*, para. 39.
[330] See Gippini-Fournier 2010, but also Voss 2020; Reeves – Dodoo 2005 and Castillo de la Torre 2009.
[331] Gippini-Fournier 2010, p. 189-190.
[332] Ibid.

position.[333] In the EU, the UK as one of the only European common law jurisdictions has been the biggest proponent of creating EU wide standards of proof.[334] This is understandable as the existence of clearly stated standards of proof is a natural part of the national court procedure in the UK. It should be noted that standards of proof still play a role in civil law jurisdictions, but they are interpreted more freely compared to the traditional common law sense of the term.[335] Furthermore, it should be highlighted that the Court itself does not seem to use the term "standard of proof" when it reviews evidentiary rules. The different standards of proof are only constructed after hand by commentators and scholars through scholarly literature. [336] It should therefore be clarified, to what extend the Court's evidentiary standards follow the common law type standard of proof and what their position is in in the EU Court system.

In common law jurisdictions, national courts evaluate evidence from a perspective of; is the evidence persuasive enough to meet a specific standard of proof?[337] The approach used in civil law jurisdiction, on the other hand, is based on the principles of free appreciation of the evidence and intime conviction, which give judges the liberty to review evidence and base their judgements on their personal conviction.[338] The amount of evidence needed to persuade the judge is therefore not decided beforehand, but depends on the amount of evidence needed to convince the judge of a specific conclusion.[339] The use of standards of proof is still applicable to civil law jurisdictions, but judges are not similarly bound by them as if they were legal rules.[340] Against this background, it would be understandable that the Courts evidentiary standards in sanctions cases have been more

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[333] Ibid., p. 189.
[334] House of Lords EU Justice Sub-Committee: The Legality of EU Sanctions, 11 October 2016. Point made by Mathew Findlay on Q2. This statement is made with the acknowledgement that the UK is no longer a EU Member State since February 1, 2020.
[335] Filpo 2020, p. 616, fn. 5.
[336] Gippini-Fournier 2010, p. 190.
[337] *Ibid.*, p. 188.
[338] *Ibid.*, pp. 190-191. Gippini Fournier highlights this point by a reference to the French Code of Criminal Procedure (Article 427) which I find especially fitting. Article 427 of the French Code of Criminal Procedure establishes that "The law does not ask judges to justify the means by which they have been convinced, it does not set any rules by which they must gauge the fullness and sufficiency of the evidence; it stipulates that they must search their conscience with sincerity, and serenely and thoughtfully ask themselves what impression the evidence given against the accused and the defence's arguments have made upon their mind. The law asks them only one question which sums up all of their duties: 'What is your personal conviction'?".
[339] *Ibid.*
[340] *Ibid.,* p. 192.

open and general in nature. It seems like the Court has distanced itself from the common law procedure, but not explicitly ruled out the possibility of using common law type standards of proof either. The perspective, that the EU Court simply does not follow the common law interpretation of standard of proof would in my opinion, explain much of the criticism that has been directed towards the Courts evidentiary standards.

In addition to the Court seemingly preferring the principles of free appreciation of the evidence and intime conviction, the Court seems to also review evidence itself in a way that is more aligned with civil, rather than common law traditions. This would seem quite natural, as the majority of Member State jurisdictions have roots in civil law traditions. An example of the Court's way of reviewing evidence is how the EU's evidentiary standards, both in the context of competition law and targeted sanctions, are defined through the objective characteristics of the evidence.[341] Such expressions are, for instance, "sufficiently solid", "precise" and "consistent". These types of evidentiary standards are focused on the quality of the evidence itself and provide guidance on what types of evidence the parties should present to the Court.[342] In common law jurisdictions, the focus is, however, more on the type of pre-defined degree of persuasion the evidence should induce in a judge.[343] This type of pre-defined degree of persuasion can be seen, for instance in the cases, where a judge must be convinced "beyond a reasonable doubt" or convinced that one scenario is more likely than another i.e. the "balance of probabilities" -standard.

If the standards used by the Court in competition and counter-terrorism cases were assessed in the same way as under common law jurisdictions, the use of the wrong standard of proof would mount to an error of law and be reviewable on appeal.[344] With the Court's general way of formulating the standard of proof, the choice of the correct evidentiary standard does not appear to be something that the Court regards in a strict sense. The Court has even stated in the case of *General Motors v Commission* that the

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[341] Gippini-Fournier 2010, p. 192-193.
[342] *Ibid.*
[343] *Ibid.*, pp. 191-192.
[344] *Ibid.*

probative force of evidence is not reviewable on appeal.[345] This would further support the argument, that the Court's standards of proof have not been intended to be interpreted in the same way as in common law jurisdictions. On the contrary, they seem to follow the principles of free evaluation of evidence and intime conviction, allowing for judges to become persuaded without the restricts of abstract standards.

Even if none of the existing EU sanctions regimes seem to provide a clear-cut answer to how the Court should review evidentiary standards in human rights sanctions cases, they still provide guidance in a broader sense. I find that the discussion within competition law provides clarity on why the current EU standards of proof have been built in a more broad and ambiguous way. Understanding the different legal traditions in civil and common law systems also clarifies what can be expected out of the Court's evidentiary standards. Criticizing the EU solely for using evidentiary standards in line with civil law traditions, instead of common law traditions should not by itself constitute fundamental rights concerns, like some scholars have suggested. It would, however, be useful for the Court to clarify, how it views the standard of proof. This issue becomes increasingly important, the more independent from national jurisdictions the Court becomes. Although I am already inclined to conclude that the lack of or ambiguity of standards of proof do not, in themselves, constitute problems from the sense of legal certainty, this narrative has been brought up, especially by Eckes. For this reason, I will continue my analysis to consider whether ambiguous evidentiary standards could constitute a violation of the principle of legal certainty.

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[345] Gippini-Fournier 2010, p. 192. See also, Case C-551/03 P, *General Motors BV v Commission*, paras. 52-54. The Court states in para. 52 that, "The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it."

4.4 The applicability of the principle of legal certainty in targeted human rights sanctions cases

The argument that ambiguous standards of proof could constitute a violation of the principle of legal certainty have been echoed by legal scholarship in connection to both competition law sanctions and EU targeted sanctions. In relation to competition law sanctions, authors like Bailey have suggested already in 2003 that the case of *Dunlop Slazenger v Commission* could confirm the need for standards of proof from a point of legal certainty.[346] In that particular case, the Court held that Commission had not applied competition law sanctions in alignment with the principle of legal certainty.[347] Furthermore, the Court held that economic operators had a right to rely on the requirement of legal certainty, meaning that when there was an infringement of competition law, the Commission had to provide evidence which would sufficiently establish the existence of the facts constituting the infringement.[348] In this context, following the principle of legal certainty entailed that if there was no evidence directly establishing the duration of an infringement, the Commission had to provide at least evidence of facts that were sufficiently proximate for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates.[349] The interpretation that followed from this case was that the lack of sufficiently clear evidence could be a concern from a legal certainty perspective.

The conclusion has, however, received criticism for interpreting the Court's judgement in an excessively broad manner.[350] Gippini-Fournier has, among others, argued that case considered evidentiary rules on a more general level, rather than referring to the specific issues of standard of proof.[351] Regardless of the criticism, similar arguments have still been echoed, now also in relation to targeted sanctions. Eckes, van der Have and

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[346] Bailey 2003, p. 848.
[347] Case T-43/92, *Dunlop Slazenger v Commission*, para. 79.
[348] *Ibid.* See also Al-Nassar 2021 p.11 ft. 62 for a discussion on the principle of legal certainty and the Court's case law on the specific category of "economic operators".
[349] *Ibid.*
[350] Gippini-Fournier 2010, p. 194. Furthermore, it seems like the Court has distinguished specific rules for the category of "economic operators", stating that the lack of sufficiently clear evidence can infringe the principle of legal certainty in these cases. It is unclear, if the rules relating to economic operators would be applicable to other groups of actors.
[351] *Ibid.*

Pursiainen, have, among others, pointed out, that the lack of standards of proof or ambiguity of them, could be problematic from the point of view of legal certainty.[352] However, these arguments are often made in a general manner, lacking any deeper analysis that would clarify what the arguments are based on. Although claims of an infringement of the principle of legal certainty have been made in targeted sanctions cases, as far as I am aware, the Court has never accepted a violation on this basis. The Court has instead chosen to focus its evaluations on the rights of defence, and especially the principle of effective judicial protection.[353] It is not fully clear, which aspects raise concerns of legal certainty in the context of sanctions measures, which is why I will consider some of the aspects that would seem the most viable to me.

Eckes has in her work relating to the EU human rights sanctions regime, argued e.g., that the Court's use of presumption-based sanctions listings could be problematic for the principle of legal certainty.[354] This argument is based on the Court's contradictory use of presumption-based statements of reason, which have already been covered earlier in the scope of Chapter 3. In the context of standards of proof, the concern is that the Court has sometimes accepted sanctions listings solely based on a person's status or relation. However, sometimes the Court has stated that a target's status or relationship has not, by itself, been sufficient grounds for a listing decision to be upheld. In these cases the Court has required that the Council provides "individual, specific and concrete reasons" which can be sufficiently supported by evidence. The ambiguity on what types of presumptions the Council can make could cause issues from the legal certainty -perspective, as it makes it difficult for both the Council and the sanctions target to understand what types of evidence a sanctions listing can be based on.

Another concern raised by Eckes is the broad personal scope of the human rights sanctions regime.[355] The personal scope defines who can be targeted by a sanctions

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[352] Eckes (2021, p. 10.) has in her work on the targeted human rights sanctions regime, expressed concern that excessively broad designation criteria, such as "persons responsible for human rights violations" is a slippery slope from a legal certainty standpoint. According to her, the criteria for what constitutes a grave human rights violation risks being excessively broad in its current form.
[353] The Court has accepted infringements of the principle of effective judicial review in e.g., Case T-228/02, *OMPI I;* Case C-72/19 P, *Saleh Thabet;* Case C-530/17 P, *Azarov* and Case C-376/10 P, *Tay Za.*
[354] Eckes 2021, p. 10.
[355] Eckes 2020, p. 13.

regime and is stated in the designation criteria of each sanctions regime. In the context of the human rights sanctions regime, any person who is responsible for an act or involved, associated or supportive of the prohibited acts in human rights regime can become a target under the Council Decision and Regulation. Being directly involved in the commitment of grave human rights violations or financially supporting the commitment of these acts is an understandable ground for a sanctions listing, but it is not clear how far the personal scope can be extended. The broad personal scope could become even more problematic in cases where the Council bases sanctions listings on future risk or presumption. In connection to *Tay Za*, the Court has stated that sanctioning family members of a person associated with sanctioned activity was a step too far.[356] However, the fact that the term "associated person" is not defined in EU targeted sanctions regimes leaves the personal scope too open to interpretation. As suggested by Eckes, this can become problematic from a legal certainty perspective if sanctions targets cannot anticipate becoming sanctioned.[357]

It is therefore the specific issues of presumption-based listings and the broad personal scope of the sanctions regime that could, in my view, pose a risk from the standpoint of the principle of legal certainty. It is, however, still unclear whether the principle of legal certainty would apply to these types of questions. The principle of legal certainty is a General Principle of EU law but also one, that is found in most national and international jurisdictions. First recognized as a General Principle of EU law in 1961, legal certainty is a part of the rule of law as well as an umbrella principle, covering sub-principles of its own.[358] In abstract, legal certainty requires that rules of law are known, precise, stable, certain, and predictable.[359] The Court has furthermore articulated that individuals should be able to "unequivocally ascertain what their rights and obligations are and the extent of

[356] Case C-376/10 P, *Tay Za.*
[357] Eckes 2020, p. 13.
[358] The principle of legal certainty appeared first in the case of *Société nouvelle des usines de Pontlieue—Aciéries du Temple (SNUPAT) v High Authority* 1961, p.87. Groussot (2006, p.24) was the first to describe the principle of legal certainty as an "umbrella principle". The description has been later used by Van Meerbeeck (2016, p. 280).
[359] Van Meerbeeck 2016, p.275. See also Case C-72/10, *Criminal proceedings against Costa*, para. 74.

obligations imposed on them, in order to take steps accordingly".[360] Among other things, this means that sufficient information should be made public for all parties to know the law and to be able to apply it. This also extends to measures such as not being prosecuted or sentenced without sufficient evidence and not being sentenced without legal support.[361]

Regardless of the broad way the principle of legal certainty has been worded, the Court has in practice held that a level of uncertainty is inevitable in the application of law.[362] In the case *Belgium v Commission*, the Court held that the principle only applied in cases where the legal measures at hand were so ambiguous that it made it difficult to understand the scope and meaning of the regulations with sufficient certainty.[363] The requirement of foreseeability is therefore not absolute, but requires that laws are formulated in a way that enables legal subject to regulate their conduct in conformity with that.[364] For the Court to hold itself to excessively stringent procedural standards could restrain it excessively, leading to judgements that are not effective and proportional. Therefore, it is important for the Court to find the right balance between fundamental rights of the individual and the effectivity of the measures by the EU.

In general, legal certainty -based challenges have not been very successful in the Court. This is a result of the Court preferring to retain a narrow scope of application.[365] Although the principle of legal certainty includes a variety of different aspects, the Court has in practice focused on the sub-principles of retro-activity, vested rights and legitimate expectations.[366] In addition, the principle has been used to justify time limitations, the obligation on authorities to act within reasonable time and some rules of interpretation.[367] Although the principle of legal certainty has been applied to cases of competition law

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[360] Case C-245/06, *Heinrich*, para. 44. Furthermore, Ahmetaj (2014 p. 21) notes that even if the earliest definition of the principle of legal certainty was given already in 1961, the *Heinrich* -case provides the most accurate definition of the principle.
[361] Suominen 2014, p. 6-7.
[362] Case C-110/03, *Belgium v Commission*, para. 31.
[363] *Ibid.*
[364] Case of *The Sunday Times v. the United Kingdom*, Application no. 6538/74, para. 49. The different aspects of principle of legal certainty were mapped out in the Venice Commission's Rule of Law Checklist. For more on the foreseeability of laws see pp. 25-26 of the Rule of Law Checklist.
[365] Van Meerbeeck 2016, p. 282.
[366] *Ibid.* p. 281.
[367] *Ibid.*

sanctions, it seems like the circumstances are still quite different from the cases of targeted EU sanctions.[368] There is even a number of cases where the sanctions target has initially raised claims on violations of the principle of legal certainty, but the Court has instead chosen to focus on other fundamental rights aspects, such as the right to effective judicial protection.[369] This has especially been the case in relation to the ambiguous statements of reason and cases of presumption-based sanctions listings.

Although the ambiguity of evidence was enough to infringe the principle of legal certainty in the case of *Dunlop Slazenger*, it seems more likely that cases of targeted human rights sanctions would be adjudicated under other principles, namely the right to effective judicial protection. This view is also supported by the fact, that the Court has so far only based targeted sanctions cases with ambiguous evidence under the right to effective judicial protection. The Court still has the opportunity to open the category of "economic operators" to other types of actors and therefore, include sanctions targets in the scope of the principle. It seems, however, like the right to effective judicial protection can currently provide sufficient protection in questions relating to presumption-based listing decisions and the broad personal scope of sanctions regimes. As the Court's use of standards of proof in targeted sanctions cases does not, in my view, constitute legal certainty concerns, it does not seem like there would be any need for the Court to open the scope to include sanctions cases. Ultimately, this will be for the Court to decide in the future.

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[368] Case T-43/92, *Dunlop Slazenger v Commission*. The focus was explicitly on "economic operators".

[369] See for instance Case C-376/10 P *Tay Z*a, where the applicant raised a claim of infringement of the principle of legal certainty in General Court (Case T-181/08) but did not raise the claim in the ECJ (Case C-376/10 P).

5 CONCLUSIONS

The aim of this thesis has been to provide clarity to issues relating to the Court's standard of proof in targeted sanction cases and furthermore, to discuss how the Court could improve its evidentiary standards in the context of targeted human rights sanctions. As legal certainty -concerns have been raised in connection to EU targeted sanctions, the recently adopted human rights sanctions regime has provided an opportunity to assess the validity of these concerns. To conduct this study, I have focused on answering three research questions. These questions have allowed me to review, 1) whether targeted sanctions could have the legal character of "criminally natured administrative measures", 2) what role standards of proof have in the Court's evaluation of targeted human rights sanctions cases, and 3) whether the lack of or ambiguity of standards of proof can be an issue from the point of view of the principle of legal certainty. After concluding that the Court's standards of proof do not, in themselves, risk violating the principle of legal certainty, I continued to further examine some specific scenarios, which are connected to the Court's evidentiary evaluation. The aim here was to consider, whether these specific scenarios could have potentially violated the principle of legal certainty.

The scope of the EU's sanctioning power has been highlighted recently in the ongoing military conflict between Ukraine and Russia. As a response to the unlawful Russian military advances in Ukraine, the EU has responded with aggressive sanctions, reflecting the acuteness of the situation and the direct aim to end the conflict. In contrast to these aggressive sanctions, the EU's targeted human rights violations regime sanctions persons and entities in a way that does not reflect the same urgency or send as strong of a political message. The use of forceful state-wide sanctions like those imposed in Russia on April 8, 2022, cannot be maintained for very long without negatively impacting the population and weakening the infrastructure of the targeted state. This is one of the reasons for why the use of state sanctions has decreased during the past decade. Setting aside the recent sanctions on Russia, it seems like the use of the less-intrusive targeted sanctions will only be increasing in the future.

The use of targeted sanctions measures has understandably gained popularity, as they allow for the EU to quickly react to foreign policy concerns without having to assess the wide foreign policy implications of state sanctions. The damage on the EU's own foreign policy relations is arguably smaller when sanctions measures are only targeted on specific individuals, in contrast to when sanctions are targeted on entire states. It is also easier to reach consensus within the Council when sanctions measures are targeted, rather than state-wide.[370] In this sense the creating of targeted sanctions regimes has been an efficient way for the EU to impose sanctions. As the basis of the targeted sanctions regime is created once through the Council Decision and Regulation, the Council does not need to create a new sanctions regime every time they wish to impose sanctions on an individual or entity.[371] The downside, as brought up in this thesis, is that the effects of targeted sanctions measures can have significant effects on the targeted individuals where the listings are imposed without a clear end in sight. This increases the necessity of sufficient procedural standards and clearer criteria for the de-listing of sanctions targets.

The first research question relating to the legal nature of targeted sanctions measures was discussed from a broader perspective, including both aspects from EU and ECHR law. As similar discussions have existed on the ECtHR -level for decades, looking into the ECtHR's case law provided clarity on how the legal character of administrative sanctions has been assessed. The existence of the *Engel* criteria was especially helpful as it provided concrete steps to evaluate, whether targeted human rights sanctions could qualify as "criminally natured administrative sanctions". Even though the fundamental rights recognized in the ECHR are already inscribed as either General Principles of EU law or fundamental rights stated in the EU Charter of Fundamental Rights, there are clear differences in how these systems assess procedural rights in sanctions cases.[372] Discussing the Court's case law in EU competition law sanctions highlighted these differences, while demonstrating how the Court has started to slowly shift towards the evaluation used by the ECtHR. This can be seen in the Court's recent competition law case law, where it has accepted that competition law sanctions can have criminal

[370] Considering that sanctions decisions require unanimity in the Council.
[371] Point being that there are certain acts and violations which the EU generally targets. It is therefore easier to create thematic categories than to create new geographic sanctions regimes every time.
[372] See, Article 6(3) TEU and Article 52(3) of the Charter of Fundamental Rights.

characteristics, which require the adoption of additional procedural rights. As the Court has started to shift its previously narrow view of sanctions measures, the criminal nature of targeted sanctions measures should also be explored. This is increasingly important as the EU is once again taking steps towards acceding to the ECHR.[373]

With the harsh impact of targeted sanctions on the individual's fundamental rights and freedoms, it is reasonable to question whether targeted sanctions can be categorized as purely administrative measures. As seen in the context of competition law sanctions, acknowledging the hybrid nature of sanctions measures has made the balancing act between the EU's and the individual's interests easier. Furthermore, it allows for the Court to acknowledge that individuals should have some of the procedural rights traditionally only tied to criminal law. So far, the Court has accepted the use of the principles of *ne bis in idem, res juricata* and priviledge against self-incrimination. Although these procedural rights have not been applied to targeted sanctions cases, the applicability of stronger safeguards could provide an answer to the current criticism on targeted sanctions. While there are some inherent differences between the EU's competition law sanctions regimes and targeted sanctions regimes, the Court should acknowledge that competition law sanctions and targeted human rights sanctions have the same hybrid basis.

Following this discussion, the second research question was analyzed from an understanding that targeted sanctions measures should include aspects from both administrative law and criminal law. This was essential in order to discuss different standards of proof, including those outside the traditional standards of proof in administrative law and criminal law. Although there is a broad variety of evidentiary standards in national and international systems, the considerations in this thesis were limited to the standards of proof in EU counter-terrorism sanctions and EU competition law. As the standard of "sufficiently solid factual basis" is the closest regime to the EU's targeted human rights sanctions regime, much of the discussion was focused on its

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[373] Targeted sanctions measures could possibly violate the right to a fair trial under Article 6 ECHR. Such suggestions have been made earlier and the acknowledging of the hybrid nature of targeted sanctions would be a great first step to respond these challenges

applicability. The standard has previously received criticism for being too broad and ambiguous, making it important to establish, whether the standard of proof was actually applicable to the human rights sanction regime or not. Furthermore, it appeared like there were some considerable differences between the counter-terrorism and human rights sanctions regimes, which gave reason to consider the raising and lowering of the standard of proof when applied to the human rights sanctions regime. This has been possible in the area of competition law sanctions, where the Court has expressed that the clandestine nature of cartel cases could justify the use of lower evidentiary standards. However, I did not find convincing reasons to lower the standard of proof of "sufficiently solid factual basis", as it could exacerbate the current issues relating to the sufficiency of procedural rights.

As I reviewed the different EU standards of proof it became clearer that the EU was using broader and more ambiguous standards than those traditionally used in common law jurisdictions. Through a review of the scholarly debate in relation to EU competition law sanctions, it also became evident that the EU's legal traditions reflected more of the legal traditions found in the civil law jurisdictions than common law jurisdictions. Following the criticism of the EU's standards of proof as ambiguous and vague, my premise was based on an assumption that the existence of rigid standards of proof was necessary for the EU legal system. The discussion highlighted, however, that the current form of the EU's standards of proof was not a result of a lack of development but rather, a decision to follow the civil law legal traditions. It is true that in the vast majority of EU Member States, the national courts allow for free evaluation of evidence, even when there are standards of proof. The Court's use of the principles of free evaluation of evidence and intime conviction is arguably no worse than the use of common law type standards of proof, just a different way of evaluating evidence.

In connection to the third research question, I find that the Court's current formulations of evidentiary standards, which are broader and more abstract way than traditional common law standards, do not constitute legal certainty issues solely for the way they are formulated. This conclusion could be drawn based on the perspectives raised in connection to EU competition law sanctions cases. The EU's evidentiary standards are in

line with the principles of free evaluation of evidence and intimate conviction and therefore constitute a valid way to review evidence. Where the possible concerns for legal certainty rise, is when the Court implements the standard of proof in a contradictory way. It can therefore be concluded that regardless of the possible deficiencies in the Court's evidentiary rules, violations of the principle of legal certainty are unlikely. The principle has previously been used on specific scenarios which do not resemble the circumstances in targeted sanctions cases. Moreover, it seems like possible violations would primarily fall under other principles, such as the principle of effective judicial protection.

As this principle has been accepted by the Court in relation to e.g., insufficient statements of reasons, it would seem applicable on the matters relating to presumption-based statements of reasons and broad personal scope of sanctions. Although there is a risk for fundamental rights violations in these questions, they are very dependent on the circumstances of individual cases and require a case-by-case evaluation. I don't see the Council's ability to make some presumptions as an inherent problem, as long as the presumptions are justifiable. In the context of the sanctions listings made to the human rights sanctions regime so far, these listings have been directly connected to the activities of the sanctions targets. The problem arises, if the Court's case law becomes contradictory and the outlines of the Council's competency blurred. If these types of problems would arise in connection to the human rights sanctions regime, it would be advisable for the Court to clarify the standards used in these types of questions. For the time being, it seems, however, like the sanctions listings have not been made on grounds that would risk violating the targets' fundamental rights.

The fundamental question to be answered in this thesis is what standard of proof the Court could use in the future when cases of human rights sanctions listings are brought to the Court. Concluding this study, I do not see an issue with the use of the counter-terrorism sanctions standard. The Court should clarify some aspects relating to its use of standards of proof, namely, that targeted sanctions are not purely administrative measures and can require using procedural rules outside those traditionally used in administrative law. Furthermore, the Court should further clarify its criteria relating to the personal scope of sanctions measures and presumption-based evidence. This would make the system more

transparent and decrease the criticism on the procedure. Furthermore, the Council's administrative complaint procedures could be improved, which could save valuable time and resources in cases that could be more simply solved. For instance, the response time of the Council could be quicker and the time period for the target to raise an annulment action to the Court longer.