

DUE PROCESS OF LAW IN EUROPEAN UNION'S ECONOMIC SANCTIONS: THE RESPONSE TO UKRAINIAN CRISIS

*DEVIDO PROCESSO DE LEI NAS SANÇÕES
ECONÓMICAS DA UNLÃO EUROPELA:
A RESPOSTA À CRISE UCRANIANA*

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Abstract

This article focuses on the economic sanctions and the listing process in the light of due process of law, as well as the legitimacy of the European Union to impose such sanctions under international law. It has a qualitative approach, using the methodology of documental analysis (particularly the documents from the European Union Council and Commission) and bibliographical research. Since 2014 the European Union has imposed restrictive measures against the Russian Federation in response to the annexation of Crimea and Sevastopol, as well as 'destabilization' of Ukraine. Due to the imposition of these measures, 159 persons were subject to assets freezing and visa bans; 41 entities had their assets frozen in the EU; also including economic sanctions such as the limitation of Russian state-owned financial institutions to the European capital markets; and the access to 'sensitive' technologies, particularly in the energetic and military industries. As a conclusion, the listing process has improved considerably in the past years to align itself with the principle of due process. Critically, it is indicated the need to allow the targets to be heard and present their defense before any measures taken and in urgent matters which by its nature demand *inaudita alteram parte* decisions, the provision of injunctive relief.

Keywords

Economic sanctions. Restrictive measures. Smart sanctions. European Union. Russia vs Ukraine. Hard power. Due process of law. Legitimacy.

Resumo

Este artigo enfoca as sanções econômicas e o processo de listagem à luz do devido processo legal, bem como a legitimidade da União Europeia para impor essas sanções sob o direito internacional. Possui uma abordagem qualitativa, utilizando a metodologia de análise documental (principalmente os documentos do Conselho e da Comissão da União Européia) e pesquisa bibliográfica. Desde 2014, a União Europeia impôs medidas restritivas contra a Federação Russa em resposta à anexação da Crimeia e Sebastopol, bem como a "desestabilização" da Ucrânia. Devido à imposição dessas medidas, 159 pessoas estavam sujeitas a congelamento de ativos e proibição de vistos; 41 entidades tiveram seus ativos congelados na UE; incluindo também sanções econômicas, como a limitação das instituições financeiras estatais russas aos mercados de capitais europeus; e o acesso a tecnologias "sensíveis", principalmente nas indústrias energética e militar. Como conclusão, o processo de listagem melhorou consideravelmente nos últimos anos para se alinhar com o princípio do devido processo legal. Criticamente, indica-se a necessidade de permitir que os alvos sejam ouvidos e apresentem sua defesa antes de qualquer medida tomada e em caso de urgência que, por sua natureza, exijam decisões *inaudita alteram parte* e a prestação de medida liminar.

Palavras-chaves

Sanções econômicas. Medidas restritivas. Sanções inteligentes. União Europeia. Rússia x Ucrânia. Poder duro. Processo legal. Legitimidade.

INTRODUCTION

The aim of this article is to scrutinize the economic sanctions imposed by the European Union (EU) against the Russian Federation, its citizens and entities under the light of due process of law, as well as the EU legitimacy to impose them. It is notorious there are practical and political problems concerning economic sanctions and other enforceable actions under international law. However, it is not the purpose of this article to discuss disputes of power or political agendas. What should be considered is the international legal order and “what ought to be” in a perfect scenario ruled by law.

It has a qualitative approach, using the methodology of documental analysis and bibliographical research. The main documents analyzed were decisions from the Council of the European Union, rules of procedure of the European Court of Justice, guidelines and reports from United Nations and European Union departments. The literature consulted were primarily international and constitutional law, focusing on due process of law and economic sanctions.

Primarily this paper deals with the concept of restrictive measures and sanctions, as well as administrative and criminal sanctions. It is presented the types of sanctions imposed by the EU regarding the Ukrainian Crisis and an historical overview. In the following sections it is discussed the listing process for EU’s sanctions and due process of law and the *audi alteram partem* before the imposition of sanctions. Finally, in the last section the legitimacy of the EU to impose sanctions, particularly based on the sovereignty principle, is questioned.

1. CONCEPT OF RESTRICTIVE MEASURE AND SANCTIONS

The term ‘restrictive measure’ is constantly referred in the literature to accomplish policy goals and extract political conces-

sions from the targets. However, restrictive measures are, by definition, sanctions, a punishment. For instance, K. R. Nossal treats sanctions as ‘punitive’ instruments attributing to their very imposition the essence of their existence.

In this regard, according to Kelsen (1960, p. 114), sanctions can be defined as:

Sanctions are compulsory acts, which are defined as reaction to an action or omission, as determined by the legal order, such as the prison sentence imposed on theft [...];
Sanctions, in the specific sense of this word, occur in two different forms, as punishment (in the narrow sense of the word) and as execution (enforcement).

A common assumption argues that sanctions are imposed to change the targets’ behavior by inflicting economic pain, coercing them into a political change. This assumption is often expressed by the ‘pain-gain equation’ (GIUMELLI, 2013, p. 1-38).

Let’s distinguish the terminology of ‘restrictive measures’ and ‘sanctions’, as well as ‘administrative sanctions’ ‘administrative measures’ and ‘criminal sanctions’ within the European Union competence.

Firstly, restrictive measures have a reparatory nature, withdrawing a wrongly obtained advantage, while the purpose of the sanction is to apply a punishment to the offender, only imposed in cases of intent or negligence (VUGT, 2012).

On the other hand, criminal sanctions are linked to the concept of criminal charges, “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”. It is the intention to punish someone who committed a crime. This kind of sanction implicates in a series of guarantees and procedures (BROEK; HAZELHORST; ZANGER, 2010, p. 18).

If a criminal charge is made, the criminal procedure is applied, protecting the individual from the moment an official notification from a competent authority is received until the final decision, when the criminal sanction is imposed if the judgment is found against the target.

Since the *Engel Case*, the European Court of Human Rights (ECHR) has used three criteria to verify whether a special sanction has a criminal nature for the purposes of Articles 6 and 7 of the ECHR: “the classification of the offence in national law, the nature of the offence, and the degree of severity of the penalty imposed on the offender” (VILLALÓN, 2012, p. 14).

Although, in theory, the terminology and differences between criminal and administrative sanctions are clear, in practice they are not so obvious. The nature of administrative sanctions can be oddly doubtful. They can be percept as a punitive instrument to punish those who act against the established norms and a preventive and reparative mean to secure the compliance with the legal order at some point in the future. To clarify those concepts, sometimes administrative sanctions are distinguished from administrative measures: administrative measures are then reparative or preventive in nature and aimed at recovering benefits unduly received, while administrative sanctions are characterized as punitive (BROEK; HAZELHORST; ZANGER, 2010, p. 20).

Therefore, considering the differences above mentioned, administrative sanctions, in their nature, are not very different from criminal sanctions. They require stricter set of rules and procedures than administrative measures.

However, as per Saggio “the Court of Justice has never found it necessary to define the precise legal nature of the European Communities' power to impose sanctions, thereby avoiding having to concern itself with the distinction between administrative and penal sanctions” (STIX-HACKL, 2001).

Furthermore, there are authors who perceive sanctions in a wider way. Sanctions cannot be summed only as a coercive instrument, but also influence targets by constraining and signaling them. Therefore, the definition of sanctions presented by Francesco

Giumelli (2011, p. 33) is noteworthy. He divides restrictive measures in three categories or types: coercion, constraint and signal. In the first type sanction, the sender intends to change the behavior of the target by imposing a burden to affect the target's costs/benefits calculation. The second one includes the cases of sanctions imposed to thwart a target in the pursuit of its policy, imposing a burden to prevent the target from doing something. The last one includes the cases of restrictive measures imposed with the objective of sending a 'message' to one or more targets, without a direct burden.

Thus, every category of sanctions needs to be analyzed separately, to ascertain whether the specific sanction requires a stricter set of rules and procedural guarantees, particularly the ones described in the Articles 6 and 7 of the ECHR.

1.1. Types of Restrictive Measures

Since 2014 the European Union imposed restrictive measures against the Russian Federation in response to the annexation of Crimea and Sevastopol, as well as 'destabilization' of Ukraine. Among the sanctions imposed, 159 persons are subject to assets freezing and visa bans; 41 entities had their assets frozen in EU; economic sanctions include the limitation of Russian state-owned financial institutions to the European capital markets, as well as the access to 'sensitive' technologies, particularly in the energetic and military industries.

As the main objective of this article is on the economic sanctions and individual measures which can affect the business community and finances of Russian citizens; in the next sections they will be separately analyzed.

1.1.1. Assets freezing

The term "asset freezing" refers to financial resources and funds (bank deposits, cash, checks, stocks and shares) owned or controlled by entities or individuals that cannot be used, altered,

moved, transferred or accessed, or when it concerns economic assets, they cannot be sold, rent or mortgaged. It applies to both tangible and intangible assets. Asset freezing can also include restrictions on trades to the targets, meaning that EU companies and citizens are prohibited to provide goods and make payments to them, consequently suspending business transactions. It is also important to mention that for this type of sanction to be imposed, the name of the target person or entity first has to be included on either the UN or autonomous EU blacklist after a request from a State (European Union Committee, 2017, p. 7).

Regarding the observation to due process, the ECHR case law includes the right to a fair and public hearing by an independent and impartial tribunal, while EUCJ case law refers merely to the right of a fair hearing. Therefore, the current procedure regarding freezing measures guarantees only the target's right to present its view to the administrative authority which imposes the sanctions, hence, lacking impartiality and independence (BROEK; HAZELHORST; ZANGER, 2010, p. 18-27).

1.1.2 Economic sanctions

Reisman (2008) classifies the policy instruments in four generic types in which individuals or groups try to influence others:

The first is the military instrument, which involves the application through different modalities, of high levels of coercion by specialists in violence against the target. The second is the economic instrument, involving the granting or withholding of indulgences or deprivations from the target. The third is the diplomatic instrument, involving communications ranging from persuasion to coercion, directed at the elite of the target. The fourth is propaganda, which involves the modulation of signs

and symbols directed to the politically relevant strata of a community rather than to its elite.

Furthermore, those instruments are known as ‘sanctions’ when used by the international community or authorized by it: military sanction, economic sanction, diplomatic sanction and ideological sanction. This article focusses in the economic sanctions, a policy instrument that has the potential to be very destructive and can be applied in ways that not only the responsible and decision-maker suffer the burdens (REISMAN, 2008).

In this regard, economic sanctions can be defined as a policy tool designed and intended to cause financial damage to States or specific individuals and institutions. Economic sanctions can comprehend policies like asset freezes, import tariffs, trade barriers, travel restrictions, and embargoes (LIN, 2016). Therefore, considering the potential burdens of restrictive measures to the targets, especially economic sanctions, such policy instrument must be applied after deep deliberations, and most importantly, after hearing the targets arguments.

Weiss (1997), along with the former United Nations Secretary-General Boutros-Ghali, describes economic sanction as a “blunt instrument”, explaining that:

Uneven political utility, they are nevertheless capable of causing serious humanitarian consequences. When political gain is evident, civilian pain seems tolerable and justifiable. Such was the case in Haiti and South Africa, where, in addition, most of the population embraced the pain of the sanctions as a possible stepping-stone to meaningful political change. However, when political gain is less apparent, as in Iraq and the former Yugoslavia, civilian pain is less tolerable and justifiable”.

Hence, the decision-making process to impose economic sanctions should consider the probable positive and negative effects, the humanitarian consequences, delineating a transparent and precise plan with concrete objectives, in order to verify whether the sanctions lead to the fulfillment of the goals established, and most importantly, if the civilian pain is justifiable when compared to the political gain to be accomplished.

2.2. Economic Sanctions: Hard or Soft Power?

Joseph Nye (2004) describes power as the capability to affect the behavior of others to obtain the desirables results, appointing several ways to accomplish those outcomes: threats, payments or attract and co-opt them to want the same results. The first ones constitute hard power, which rest on inducements ('carrots') and threats ('sticks') and the former is soft power, which rests on the ability to attract.

Soft power is a recent phenomenon in diplomacy, an alternative to hard power. It is the art of using cultural aspects, ideals and other influential means of attraction to gain support rather than hostility (ANGUELOV, 2015). It is a way to obtain the desirable outcomes in the world politics because other countries admire the values, emulate the example, aspire to reach the same level of prosperity and openness, following the same agenda (NYE JUNIOR, 2004).

On the other hand, hard power is a mean to reach the results by constraining others using coercive measures such as the threat of military force or economic sanctions. As discussed on section 1, economic sanctions are coercive measures intended to inflict economic pain to force the target to change its behavior, therefore, there is nothing soft about them. It is merely an alternative to military enforcement, but it does not make it a less hard power instrument, especially for the target.

2. HISTORICAL OVERVIEW OF ECONOMIC SANCTIONS

As economic sanctions involving Russia are wildly politically discussed, the legal perspective also comes into vogue. The recent economic sanctions against Russian entities and citizens concerning the destabilization of Ukraine raised some legal issues which might be opened to judicial review. Notwithstanding, before analyzing the legal perspective, it is essential to examine the historical evolution of sanctions.

Historically, sanctions have been a mean to compel States to abandon undesirable courses of action. Hence, the senders and targets of restrictive measures were countries. With the establishment of the League of Nations in 1920 and the United Nations in the middle 40s, international organizations took an important part as political actors in the global scenario (HUFBAUER, 2007).

During the World Wars and Cold War periods, sanctions were usually linked to military activities. A well-known example is the Suez Crisis, in 1956. When the President of the United States, Dwight D. Eisenhower, heard about the invasion of Egypt by French and British troops (allegedly because of the “threat” to the Suez Canal) he threatened to apply sanctions and go to the United Nations to stop the operation in the region. In the year that followed, the United States manage to exert pressure, along with the Soviet Union and the United Nations, to force a withdraw of French and British troops from the Suez region (MATTEWS, 2016).

On the postwar period, sanctions were also used to undermine a country’s economic capability to limit its potential to engage in warfare and foreign incursions, as well as an instrument to national security policies. For instance, the United States imposed sanctions against the Soviet Union and China in the late 40s to control some areas of trade, especially regarding military equipment (HUFBAUER, 2007).

Modernly, the military impairment has been used to force compliance with nuclear nonproliferation safeguards, as wisely appointed Hufbauer (2007):

The modern-day version of the military impairment case studies are episodes aimed at hampering a target country's efforts to develop weapons of mass destruction, most notably nuclear capabilities. The United States and Canada frequently used sanctions in the 1970s and 1980s to enforce compliance with nuclear nonproliferation safeguards. In 1974 Canada acted to prevent Pakistan from acquiring a reprocessing capability and tried to control the reprocessing of spent fuel in both India (Case 74-2) and Pakistan (Case 74-3) to guard against the production of nuclear weapons. The United States joined the Canadians in applying financial pressure on South Korea (Case 75-1) to forestall its purchase of a nuclear reprocessing plant. Subsequently the United States imposed sanctions on shipments of nuclear fuel and technology to South Africa (Case 75-3), Taiwan (Case 76-2), Brazil (Case 78-2) Argentina (Case 78-3), India (Case 78-4) and Pakistan (Case 79-2) in similar attempts to secure adequate multilateral surveillance of nuclear facilities or to prevent the acquisition of technologies that could contribute to nuclear weapons development.

When the Cold War came to an end, sanctions (especially economic) have been used both as a response to threats to interna-

tional peace and a foreign policy tool. Modernly there's a new pattern established: the old model which served mainly to military strategy, have given place to a wider range purpose. Sanctions are now an instrument to “repel aggression, restore democracy, condemn human rights abuse and punish regimes harboring terrorists and international war criminals” (WEISS, 1997).

Since the 1990s and later because of the September 11th, 2001 attack on the World Trade Center and the Pentagon, President Bush deployed economic sanctions on his ‘war on terror’. The United States introduced a sanction policy to induce other countries to contribute in the war against terrorism (HUFBAUER, 2007).

Specifically, sanctions have been used as a soft power instrument to keep peace in international scenario, forcing the compliance with nuclear nonproliferation safeguards, controlling the trade of military equipment in sensible areas, limiting the ability to wage war and preventing terrorism, serving both as national and international security policy.

As the number of sanctions increased as the decades passed by, the costs to the target countries also raised. From 1920 – 1930, the cost per year represented something around \$2 billion. In 1980, the aggregate annual cost to the targets increased to almost \$7 billion. The single case of Iraq cost an average \$15 billion annually. More recently, in the 2000s, the costs to the target countries reached the sphere of \$27 billion per year (HUFBAUER, 2007).

3. LEGAL BASIS TO EUROPEAN UNION’S RESTRICTIVE MEASURES

The foremost European Union’s (EU) legal basis to impose restrictive measures (or sanctions) against the Russian citizens and entities is the Article 215 of the Treaty on the Functioning of the European Union (TFEU). The scope of those sanctions is to reduce or interrupt the economic and financial relations with the target in particularly sensible fields. Considering the abovementioned article, the Council of the European Union can decide when

to impose restrictive measures against third countries (non-EU), individuals or entities. In general, according to the EU's guidelines on implementation and evaluation of restrictive measures, sanctions are imposed to provoke a desirable change in the political scenario or in the behavior of the target country, government, entity or individuals (Council of the European Union, 2005).

The initial platform of restraining measures, imposed on 31 July 2014, limits the access of Russian State-owned financial institutions to EU capital markets and restricts the obtainment of sensitive technologies, particularly regarding the oil industry. The restrictive measure package also includes an embargo on trade in arms and export ban for dual use goods for military end use and end users (European Commission, 2015), a substantial sector in Russian economy.

The arms embargos are directly implemented by the Member-States, legally bonded to act accordingly to EU's general positions. Sanctions which have the purpose of reducing or interrupting economic relations with the third country are necessarily preceded by a proposal from the competent commission, strictly based on the provisions of the treaty establishing the European Community, and just then, implemented by a European Council Regulation. The sanctions are periodically submitted to legal review to verify the real effectiveness of the measures, checking if the results indeed meet the scope previously established (Council of the European Union, 2014).

Since 2013, in the Kadi II judgment in the EUCJ, the Council and its Member States have been making a great effort to improve the listing process and the quality of evidences which supports the listing of an entity or individual. Before this judgment, targets did not receive any notification or were provided with a statement of reason for their listing whatsoever. It was an important starting point, but there is a long way to go (European Union Committee, 2017).

4. SMART SANCTIONS IN THE RUSSIAN CASE

It is a major concern to the Council that restrictive measures objectives are clearly stated and, therefore, the positive (or negative) development of the sanction can be properly verified in the light of its scopes. The limitation of the overall strategy and specific objective in the legal instrument, along with the legal context of the measure, reveals the commitment of the EU in preventing the negative effects of the sanctions, hence, affecting (within its possibilities) only the fields necessary to fulfill its goals. As a reflection of this purpose, the chosen economic sanctions imposed against Russia are ‘target sanctions’, frequently referred as “smart sanctions”. Those specific sanctions aim to be more effective by putting direct pressure on individual national policymakers and avoid the humanitarian damages of broad trade sanctions. However, previous to Iraq sanctions, humanitarian impact was not a major point of consideration in the sanction’s literature (GORDON, 2011).

The position of the Secretary-General (1995) of the United Nations (UN) on the fiftieth anniversary of the UN (2017) is extremely relevant in that matter:

Sanctions, as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects.

Idriss Jazairy, Special Rapporteur on the negative impact of unilateral sanctions and United Nations expert restated this affirmation in a press conference held in Moscow on the April 28th, 2017: “The measures are intended to serve as a deterrent to Russia

but run the risk of being only a deterrent to the international business community, while adversely affecting only those vulnerable groups which have nothing to do with the crisis”. On the same opportunity he emphasized the ineffectiveness of those sanctions in achieving their aim and “harming the human rights of innocent people” (UN, 2017).

Therefore, sanctions present a risk not only to the business community, but the entire country, especially the most vulnerable groups: the common working-class who suffer the consequences of a crisis which they were not the cause. Given the fact that sanctions which aim at reducing or interrupting economic relations with a third country are necessarily preceded by a proposal from the competent commission, it would be a significant precaution a previous hearing of the target country, entities or individuals, followed by a deliberation. This simple, but essential change, would allow the targets to present their arguments and clarify facts used as basis to impose the imminent sanctions.

A case ruling in the Court of Justice of the European Union (CJEU) can be slow, considering the proceedings before the Court. When the case is submitted to the Court, it is assigned to the Grand Chamber, or a chamber of five or three judges, depending on its complexity and importance. After the assignment to a chamber, a judge-rapporteur is assigned as well. The procedure for dealing with cases is divided in two parts: a written and an oral part. The written procedure involves an exchange of pleadings between the parties. Once the procedure is closed, a preliminary report is presented by the judge-rapporteur to the general meeting of the Court. Some measures of inquiry can be hold by the Court in this phase, such as hearings (opened and conducted by the president), requests for documents and information, experts’ reports, the personal appearance of the parties and inspection of the thing or place *sub judice*. Finally, the advocate general expresses an opinion (whether the Court decides it is necessary) and a final decision is delivered. Also, it is possible to appeal against a decision by the General Court (European Union, 2012).

Allowing *audi alteram partem* before a harmful measure which would affect the target adversely is taken by the Council could prevent those measures to be imposed and cause unnecessary damages until the CJEU can annul the act.

5. EU AS SUBJECT OF INTERNATIONAL LAW

In the past century, the legal personality of entities was an extremely controversial matter in the doctrine. Traditionally, only individual States, and not the individual human beings, States solely and exclusively were considered subjects of international law. It means that only States were responsible to follow international law, having rights and duties, not its citizens or entities (OPPENHEIM, 1905).

Oppenheim explained that rights which needed to be granted to an individual human being were not international rights, but merely rights warranted by internal law due to a duty imposed upon the State subject of international law. Furthermore, duties imposed upon individuals are not international duties, but obligations imposed by the State concerned by international law.

Throughout its history, the necessities of the international life have stimulated the development of international law. The collective activities of States in the international scenario introduced certain entities which were not States. The highlight of this development was the creation of the United Nations Organization in 1945 (UN, 1949). Therefore, as international organizations were established, this concept of subject of international law had to evolve. Modernly, a subject of international law is an entity endowed of owning international rights and obligations and having the capacity to maintain its rights by bringing international claims (BROWNLIE, 1990).

In 1949 the International Court of Justice concluded that an International Organization is an international person, hence, EU can be considered a subject of international law. At this point, this statement has the modest objective to elucidate that EU can possess international rights alongside with duties. Furthermore, it must

be added that the Organization is a political body, charged with political tasks of an important character. It must develop friendly relations among nations and the international co-operation in the solution of problems of economic, social, cultural and humanitarian characters (BROWNLIE, 1990).

Nevertheless, its political means to deal with members and nearby countries, EU is bound by respective rules of international law. According to Brownlie (1990), in accordance with the established system of sources of international law, international organizations must observe such standards by virtue of international treaties, customary international law, or general principles of law recognized by the members of the international community.

In a decision of 2002, the Court of First Instance referred to Articles 41(1) and 47 of the Charter, laying down a person's right to have his or her affairs handled impartially, and to secure an effective remedy where rights are violated. The Court described those Charter rights as confirming existing "general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States" (MORIARTY, 2012, p. 193).

Thus, due to the historical development of international law and long before the establishment of the EU in 1993, international organizations were considered international persons, capable of possessing rights and duties. Moreover, EU, one of the most influential and powerful international organizations in the world, has the obligation to comply with international law, especially regarding sanctions, a mean which can be oddly harmful to the target State.

6. DUE PROCESS OF LAW – *AUDI ALTERAM PARTEM* BEFORE THE IMPOSITION OF SANCTIONS

The concept of due process principle has its origin traced back to the thirteenth century, in the *Magna Carta*, signed by King John of England, in 1215. The article 39 states:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land (England. *Magna Carta Libertatum of June 15, 1215*).

Nevertheless, the expression was not literally in the text; it is clear the intention to secure the right of a fair trial and the due process of law. The legal document was written to regulate and restrain the absolute power of the monarch and protect the rights of all the subjects of the realm, guaranteeing that no one should be arbitrarily deprived of his rights. In 1354, the first remarkable use of the expression was found in an English statute: “no man of what estate or condition soever he be, shall be put out of his lands or tenements, nor taken or imprisoned, nor indicted, nor put to death, without he be brought in to answer by *due process of law*” (GARCIA, 2010).

In the early seventeenth century (1627), the Crown’s prerogative to restrain one’s freedom by special command of the King was challenged in the Five Knights’ case (or Darnell’s case), the paramount case regarding the due process of law. The prisoners petitioned for a habeas corpus writ to have their released secured or set bail, under the plea the imprisonment was not in compliance with the law of the land and the due process of law. The judges found in favor of the Crown, refusing to interfere, the court decision was a ‘rule of court’ not a proper judgment. The outcome of the case was that it should be refused bail to the knights, not in fact deciding if the Crown could imprison without cause (TOMKINS, 2005).

Later, the Fifth and the Fourteenth Amendments of the United States Constitution amplified the concept of due process, barring the authorities to deprive any person of life, liberty or property without the due process of law, affording both substantive and procedural protections. For that matter, before depriving a

person of a protect interest, it must be provided a notice and an opportunity to be heard (WASSERMAN, 2004), in all spheres of a government, extending alike to the executive, judicial and legislative activities (McGEHEE, 1906).

It's noteworthy the Article 41 of the EU Charter, which enlightens the idea of the “right to good administration”, not just an effective remedy in the judicial sphere, defined as follows:

Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

(a) ***the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;***

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions (European Union, 2012).

Henceforth, the due process of law constitutes more than procedural rules, but the right to hold life, property and freedom without being deprived from them before being heard, presenting a proper defense. Regarding the imposition of so considered administrative sanctions by the European Union, there is a lack of opportunity to be heard before those sanctions are imposed. The procedures guarantee the notice to the targets, but do not offer them the opportunity to be heard before they enter into force.

7. *AUDI ALTERAM PARTEM*: AN ALTERNATIVE

As the main point of this article is to present an alternative to the current procedure, where the targets firstly suffer the consequences of the sanctions and just then can seek a remedy from the administrative or judicial authority, the following topic will explain it.

The testimony from Maya Lester, a member of the Queen Council (United Kingdom) is the quintessential example of the risks of denning *audi alteram partem* before the imposition of sanctions. She presented a case of mistaken identity in which her client in Syria had been mistaken for a member of President Bashar Al Assad's family. Representations were made before the European Union Council explaining that "our client's physical safety is in danger because of the Council's false allegations and representations that he is financing Shabiha. The danger is serious and may be imminent" (United Kingdom, 2017). It took the Council six whole weeks to analyze and confirm the allegations. Meanwhile, there was a death threat made to Ms. Lester's client and a security guard was attacked. She also explained before the Council that "as a result of the Council's actions, our client is, accordingly, now living under the specter of a direct and express threat to his life" (United Kingdom, 2017).

For that matter, it is particularly significant that the Council codifies and adopts a stricter standard of proof in the listing process, as well as the express provision of the right to be heard and present a previous defense before any adverse measures are taken. It would make the proceedings more transparent and provide a much-needed assurance of observation to due process and a guarantee that the same standards are used by all Member States in the Council, which unfortunately, is not currently the situation (United Kingdom, 2017).

In her testimony, Ms. Lester also expresses her concern about the costs and time taken to bring an annulment proceed before the European Court, which are too expensive and only recovers a tiny portion of the damages caused by a deliberate Council

decision. “At the moment the European Court process is slow and expensive, and in practice does not provide either injunctive relief (i.e. suspending the effect of sanctions pending the outcome of a case), or expedition even in urgent cases, or damages for wrongful listings or realistic recovery of legal costs.” (United Kingdom, 2017).

Henceforth, it is a matter of justice that targets can be heard and present their response to the allegations presented in the statement of reasons which supports their listing. Whether the reasons are not accurate, or the evidence presented is too weak, there is no plausible reason for the listing, therefore, it can be prevented before entering into force and causing any unnecessary damage.

It is recognized here that are some urgent measures that need to be taken *inaudita alteram parte*, for instance, measures intended to prevent terrorism. Notwithstanding, in cases such as the Ukrainian Crisis, apparently there are no eminent threats that could justify the denial of previous response to the targeted citizens or entities. Moreover, for the urgent measures taken *inaudita alteram parte*, should be secured a costless and nimble injunction procedure before the Court in order to avoid further damages unjustly inflicted by such measures.

8. EU LEGITIMACY TO IMPOSE SANCTIONS REGARDING THE UKRAINIAN CRISIS

The main justification for the EU imposing sanctions regarding the Ukrainian Crisis is the allegedly ‘destabilization’ the region and the violation of Ukraine’s territorial integrity and sovereignty:

All funds and economic resources belonging to, or owned, held or controlled by:

(a) natural persons responsible for, actively supporting or implementing, actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability

or security in Ukraine, or which obstruct the work of international organizations in Ukraine, and natural or legal persons, entities or bodies associated with them;

(b) legal persons, entities or bodies supporting, materially or financially, actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine;

(c) legal persons, entities or bodies in Crimea or Sevastopol whose ownership has been transferred contrary to Ukrainian law, or legal persons, entities or bodies which have benefited from such a transfer; or

(d) natural or legal persons, entities or bodies actively supporting, materially or financially, or benefiting from, Russian decision-makers responsible for the annexation of Crimea or the destabilisation of Eastern Ukraine, as listed in the Annex, shall be frozen.’ (European Union, 2014).

That said, it is not clear in what grounds or authority the EU impose the sanctions, given the fact that Ukraine is not part of the EU. Furthermore, there is no clear definition of ‘destabilization’ or why it would be against international law. Moreover, whether it is considered the principles of sovereignty and non-intervention and sovereignty, the rightful claimant would be Ukraine, since it is their sovereignty that is allegedly threatened, not EU’s (MAROSSI; BASSETT, 2015).

Sovereignty expresses the idea of internal supremacy of governmental institutional institutions and externally the supremacy of the State as a legal person (SHAWN, 2008). A condition of any one state’s sovereignty is a corresponding obligation to respect every other state’s sovereignty: the norm of non-intervention is enshrined in Article 2.7 of the UN Charter. A sovereign state is empowered in international law to exercise exclusive and total jurisdiction within its territorial borders. Other states have the corresponding duty not to intervene in the internal affairs of a sovereign state. If that duty is violated, the victim state has the further right to

defend its territorial integrity and political independence (International Commission on Intervention and State Sovereignty, 2001).

Regarding sovereignty, it was a widely discussed matter in UN is the “responsibility to protect”. The concept of the responsibility was elaborated based on the idea of Francis Deng’s about “State sovereignty as a responsibility” which presents the notion that sovereignty is both the protection from outside interference and a matter of states having positive responsibilities for their population’s welfare, and to assist each other. Consequently, the primary responsibility for the protection rests first and foremost with the State itself. However, there is a ‘residual responsibility’ also lied with the broader community of states (UN), which was ‘activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities’ (United Nations, 2005).

The logical condition for a State to exercise its right to sovereignty is the mutual respect of every state’s sovereignty fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities’ (United Nations, 2005). This assumption is referred in the doctrine as the non-intervention principle:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law (United Nations, 1965).

This norm is also applied to the UN, and it is enshrined in Article 2.7 of the UN Charter:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters

which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities’ (United Nations, 1945).

Under international law, a sovereign state has the right to exercise exclusive and total jurisdiction within its territory. Consequently, other states shall not intervene in the internal affairs of a sovereign state. Whether that obligation is violated, the victim state is entitled to defend its territorial integrity and political independence (International Commission on Intervention and State Sovereignty, 2001).

Therefore, based on the sovereignty principle, it is Ukraine’s responsibility and right to protect its own sovereignty and territorial integrity, and subsidiarity, whether the referred State is unable to protect itself, the international community can act through UN, “the competent organization to maintain international peace and security on the basis of protecting territorial integrity, political independence and national sovereignty of its member states” (International Commission on Intervention and State Sovereignty, 2001).

9. CONCLUSIONS

In the past five years, the Council of the European Union and its Member States have been making a considerable effort to align the listing process with the principle of due process, particularly regarding the evidence gathering to support the listing. However, in the current procedure is guaranteed the notice to the targets and a statement of reasons after their listing without offering any opportunity to be heard before they enter into force.

Considering that asset freeze and economic sanctions can include restrictions on trade and the suspension of business transactions, imposing such measures without allowing the target to present its defense can be unnecessarily harmful to the business community and the common population of a State. Hence, the decision-making process should include the target's perspective. Whether the target could be heard it would be possible to present consistent evidence to the contrary, consequently preventing its listing and avoiding damages. This simple change in the process would contribute to the transparency and fairness of the listing, also avoiding litigation in Court. Furthermore, seeking remedy in Court can be slow and expensive for the plaintiff, considering the procedure rules and the result of recovering only a tiny portion of the damages caused by a deliberate decision.

Henceforth, it is a matter of justice that targets can be heard and present their response to the allegations presented in the statement of reasons which supports their listing. Whether the reasons are not accurate, or the evidence presented is too weak, there is no plausible reason for the listing.

Notwithstanding, there are urgent measures which need to be taken *inaudita alteram parte*, for instance, measures intended to prevent terrorism. However, in cases such as the Ukrainian Crisis, apparently there are no eminent threats that could justify the denial of previous response to the targeted citizens or entities. Moreover, for the urgent measures taken *inaudita alteram parte*, should be secured a costless and nimble injunction procedure before the Court in order to avoid further damages unjustly inflicted by such measures.

Concerning the legitimacy to impose sanctions, it is not clear in what grounds or authority the EU imposes sanctions against Russia and its citizens and entities, concerning the Ukrainian Crisis. It is referred the 'sovereignty' and 'destabilization' of Ukraine to justify the sanctions. However, based on the sovereignty principle, it is Ukraine's responsibility and right to protect its own sovereignty and territorial integrity, and subsidiarity, the competent

authority to protect territorial integrity, political independence and national sovereignty.

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