

## **EU SANCTIONS AND NON-PROLIFERATION OF NUCLEAR WEAPONS: THE CASE OF PRIVATE INDIVIDUALS CAUGHT IN THE CROSSHAIRS OF EU'S SANCTIONS POLICY**

### **Abstract**

Sanctions are one of EU's tools to promote the objectives of the Common Foreign and Security Policy, namely, the furtherance of peace, democracy and the respect for the rule of law and human rights. The sanctions the EU adopts within the framework of its Common Foreign and Security Policy bear important legal consequences upon the human rights situation of the natural and legal persons affected. The paper follows a case study approach, focusing on the case of an Iranian doctoral student being denied residence in Germany as a result of the application of EU's sanctions regime against Iran. The main aim is to examine the ways in which the protection of fundamental rights as one of the bedrocks of the EU legal order can be squared with the far-reaching restrictive effect of the EU-adopted sanctions.

**Key words:** Restrictive measures – Non-Proliferation of Nuclear Weapons – EU – Iran.

This paper centers on EU's authority to impose sanctions on foreign public and private entities as means for the realization of the objectives of its Common Foreign and Security Policy. It investigates the ways in which the Union discharges its competences and how the former is to be reconciled with the Union's equally important role as fundamental rights protector, both on the domestic and the international scene. Namely, the Union's authority to impose sanctions involves the adoption of targeted economic and non-economic sanctions on foreign states and legal entities. These sanctions find their primary legal source either in a hierarchically superior legal instrument (most frequently, UN Security Council resolution), or, alternatively, take the form of an independent EU measure enacted on the basis of the Union's founding Treaties.

The sanctions the EU adopts within the framework of its Common Foreign and Security Policy bear important legal consequences upon the human rights situation of the natural or legal persons affected. The paper follows a case study through the spectrum of which these legal consequences will be examined, more particularly, with regard to the situation of an Iranian doctoral student being denied residence in Germany as a result of the EU's sanctions regime employed against Iran. The main aim here will be to examine how the protection of fundamental rights as one of the fundamentals of the EU legal order can be reconciled with the far-reaching restrictive effect of the EU-adopted sanctions. The analysis will conclude by establishing how pertinently and efficiently the EU fulfills its role as a foreign and security actor which uses its authority to exert pressure on 'rogue' foreign governments, something which comes with the impending risk that certain human rights guarantees may fall behind.

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## I. EU'S POLICY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

The competence of the European Union in the field of non-proliferation of nuclear weapons has assumed two intrinsically linked dimensions, a legal and a policy dimension. While the former has been embodied by the nuclear safeguards regime created under the framework of the European Atomic Energy Community (Euratom), the latter has been assumed by the legal personality of the Union *stricto sensu* and appears as a subset of the larger Common Foreign and Security Policy (CFSP). The Union's policy on non-proliferation, being intergovernmental in character, has been devised on a confederal rather than a federal level<sup>1</sup> and can be described as a joint effort of the Union, the Euratom Community and the Member States, all of which coordinate their actions in accordance with their respective competences under the CFSP and the Euratom frameworks.<sup>2</sup>

EU's policy on the non-proliferation of nuclear weapons represents one of the many facets of the more expansive, EU-devised policy against the proliferation of Weapons of Mass Destruction (WMD) which covers the proliferation of nuclear, chemical and biological weapons.<sup>3</sup> In retrospect, the initial step marking the conception of a singular EU approach toward the issue of non-proliferation of nuclear weapons was the creation of a Working group on nuclear questions within the context of the European Political Cooperation (EPC) in 1981.<sup>4</sup> Ever since, the non-proliferation policy has been undergoing an active consolidation mainly on account of the new strategic environment created after the end of the Cold War which led to the creation of a separate CFSP pillar under the 1992 Maastricht Treaty thus facilitating a more intense and more immediate cooperation in foreign and security matters among the Member States (including in the area of WMD non-proliferation).<sup>5</sup> The WMD non-proliferation policy of the EU gained greater momentum on a global scale in the past decade, mostly as a result of the aftermath of the September 11<sup>th</sup> 2001 terrorist attacks on the USA and the US-led invasion of Iraq in March 2003.<sup>6</sup> EU's involvement in the field non-proliferation of WMD has been succinctly described as being developed on *three levels*: the *first* level is designated for the political dialogue the EU conducts with third countries concerning the non-proliferation agenda, the most prominent feature here being the introduction of the requirement for a '*non-proliferation clause*' to be included in EU agreements with third countries.<sup>7</sup> The requirement was

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<sup>1</sup> H. Müller, Non-proliferation Policy in Western Europe: Structural Aspects, in H. Müller (ed.), *A European Non-Proliferation Policy: Prospects and Problems*, Clarendon Press, 1987, p.92.

<sup>2</sup> European Commission, Communication from the Commission to the Council and the European Parliament, Communication on nuclear non-proliferation, Brussels, 26.3.2009, COM (2009) 143 final.

<sup>3</sup> Council of the European Union, *EU Strategy against proliferation of weapons of mass destruction*, 15708/03, 10 December 2003, p.3.

<sup>4</sup> C. Portela, *The Role of the EU in the Non-Proliferation of Nuclear Weapons: The Way to Thessaloniki and Beyond* (Research Report no.65), Peace Research Institute, Frankfurt, 2003, p.2. The activities of the Working group were confidential, its existence being formalized in 1986 with the Single European Act (see, P. Van Ham, The European Union's WMD Strategy and the CFSP: A Critical Analysis, *Non-Proliferation Papers*, September 2011, p.1). For a more elaborate view on the external dimension of EU's non-proliferation policy, see P. J. Cardwell (ed.), *EU External relations law and policy in the post-Lisbon era*, Springer, 2012.

<sup>5</sup> An additional enabling factor for the reinforcement of the EU non-proliferation policy was France's long-awaited accession to the Non-Proliferation Treaty in 1992 as the last EU Member State to accede to the Treaty (see, Van Ham, *supra*, p.2);

<sup>6</sup> Van Ham, P., The European Union's WMD Strategy and the CFSP: A Critical Analysis, *Non-Proliferation Papers*, September 2011, p.3.

<sup>7</sup> A. Wetter, *Enforcing European Union Law on Exports of Dual-use Goods*, Stockholm International Peace Research Institute Research Report No.24, Oxford University Press, 2009, p.23,24.

introduced with the adoption of the *Basic Principles for an EU Strategy against Proliferation* at the European Council Summit in Thessaloniki in 2003.<sup>8</sup> The *second* level covers activities pertaining to the implementation of the safeguards systems and the commitments undertaken by the Member States in the context of the export controls and non-proliferation regimes<sup>9</sup>, and the *third* level being concerned with strategizing and implementing assistance programmes for third countries.<sup>10</sup>

The *European Security Strategy*<sup>11</sup> and the *EU Strategy against Proliferation of weapons of mass destruction*<sup>12</sup>, adopted in 2003, are the key policy documents that provide the structural framework for conducting the EU's non-proliferation policy which equally serve as the basis for the future adoption of all EU documents concerning non-proliferation. Furthermore, the EU is equipped with a satisfactory institutional capacity and manpower put at disposal for the realization of the non-proliferation goals. EU's *WMD monitoring centre*, founded in 2003 and attached to the Council Secretariat, serves to enhance the consistent implementation of the *EU Strategy against Proliferation of weapons of mass destruction*, ensuring a joint collaboration among the High Representative for Foreign Affairs and Security Policy, the Commission and the Member States.<sup>13</sup> One of the chief tasks of the centre is to oversee the collection of information and intelligence regarding the flow of WMD-related materials and provide for a permanent channel of communication with the relevant international bodies.<sup>14</sup> The Centre is the focal point bringing together the work of the Council (i.e. the Member States) and the Commission<sup>15</sup>. Rather than monitoring WMD-related developments around the world as its name suggests, the centre acts more as a coordination mechanism aimed at streamlining the non-proliferation policies of EU institutions.<sup>16</sup>

Upon the entry into force of the Lisbon Treaty, the responsibility for providing consistency in EU's action in the field of non-proliferation of WMD had been principally taken over by the European External Action Service (EEAS), headed by the High Representative of the Union for Foreign Affairs and Security Policy, and more concretely, under the auspices of the Directorate for Non-Proliferation and Disarmament.<sup>17</sup> In this respect, it is important to mention

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<sup>8</sup> The 'Basic Principles for an EU Strategy against Proliferation' were drafted in parallel to the EU's first-ever security strategy, both having been presented at the Thessaloniki European Council in June 2003. See, Council of the European Union, Action Plan for the Implementation of the Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction, 10354/1/03 Rev 1, 13 June 2003.

<sup>9</sup> Wetter, *supra*, p.24.

<sup>10</sup> *Idem*, p.25.

<sup>11</sup> European Council, A Secure Europe in a Better World: European Security Strategy, Brussels, 12 December 2003.

<sup>12</sup> Council of the European Union, *EU Strategy against proliferation of weapons of mass destruction*, 15708/03, 10 December 2003; Both the *European Security Strategy* and the *EU Strategy against proliferation of weapons of mass destruction* identify the WMD proliferation as potentially the greatest threat to EU security.

<sup>13</sup> Council of the EU, *EU Strategy against the proliferation of WMD: Effective multilateralism, prevention and international cooperation*, November 2008, p.12.

<sup>14</sup> Action Plan for the Implementation of the Basic Principles, *supra*, part B point 14; See also, Council of the EU, *EU Strategy against the proliferation of WMD: Monitoring and enhancing consistent implementation*, 16694/06.

<sup>15</sup> *Idem*.

<sup>16</sup> In 2003, the former High Representative for Foreign Affairs and Security Policy, Mr. Javier Solana, appointed a Personal Representative for Non-Proliferation of WMD (See, [http://www.consilium.europa.eu/uedocs/cmsUpload/09-06-22\\_speech\\_Sopot\\_AG.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/09-06-22_speech_Sopot_AG.pdf)).

<sup>17</sup> <http://www.consilium.europa.eu/eeas/foreign-policy/non-proliferation,-disarmament-and-export-control-/wmd?lang=en>.

the work of the European Council Working Group on Global Disarmament and Arms Control<sup>18</sup>, as well as the Council of the EU's Working Party on Non-Proliferation (CONOP) and the Working Party on Global Disarmament and Arms Control (CODUN) which are now permanently chaired by EEAS officials.<sup>19</sup>

With the adoption of *Council Decision 2010/430/CFSP establishing a European network of independent non-proliferation think tanks in support of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction*<sup>20</sup>, the WMD non-proliferation role of the EU further evolved through the establishment of a network assembling foreign policy institutions and research centres from across the EU in order to encourage political discussion and exploration of measures to combat the proliferation of weapons of mass destruction and their delivery systems. The EU Non-Proliferation Consortium, introduced by virtue of the former Council Decision, counts over sixty think-tanks from all over Europe and has assumed a large part of the technical operation and responsibilities, working in close cooperation with the European External Action Service.

## II. THE NATURE AND SCOPE OF EU RESTRICTIVE MEASURES

The sanctions the EU adopts are not punitive in nature, but are rather designed to bring about a change in policy or activity by the target country, entities or individuals.<sup>21</sup> These restrictive measures are always targeted at concrete policies or activities, the means to conduct them and those responsible for them. The European External Action Service (EEAS) uses the terms 'sanctions' and 'restrictive measures' interchangeably, describing them as measures designed "to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles".<sup>22</sup>

The usual 'life cycle' of an EU sanction starts with the prior existence of a UN Security Council Resolution that introduces sanctions against a particular state or legal entity, succeeded by the adoption of a Council Common Position (a CFSP measure) and a Council Decision (again, a CFSP measure)<sup>23</sup>, and thereafter followed by the adoption of a Council Regulation and/or Council Implementing Regulation (an EU legal act). Although the EU is obligated to implement all sanctions imposed by the UN, it can, additionally, 'reinforce' the UN sanctions by applying stricter and additional measures. Finally, where the EU deems it necessary, it may decide to impose autonomous sanctions.

The Council adopts the sanctions by way of a decision adopted at unanimity. While this decision contains all measures imposed, additional legislation may be needed to give full legal

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<sup>18</sup> <http://www.consilium.europa.eu/eeas/foreign-policy/non-proliferation,-disarmament-and-export-control/-ms-clara-ganslandt?lang=en>.

<sup>19</sup> Van Ham, *supra*, p.6.

<sup>20</sup> Council Decision 2010/430/CFSP of 26 July establishing a European network of independent non-proliferation think tanks in support of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction, OJ L 202/5.

<sup>21</sup> [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/423/Sanctions%20policy](https://eeas.europa.eu/headquarters/headquarters-homepage_en/423/Sanctions%20policy)

<sup>22</sup> *Idem*.

<sup>23</sup> For a commentary on the potentially legally binding nature of CFSP acts and the EU Court of Justice's jurisdiction in this sense, see: G. Butler, A Question of Jurisdiction: Art. 267 TFEU Preliminary References of a CFSP Nature, *European Papers*, Vol. 2, No 1, 2017; P. Van Elsuwege, Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft Case (posted on 6 April 2017 at: <https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/>).

effect to the sanctions. Certain sanctions, such as arms embargoes and travel bans, are implemented directly by member states. The sanctions most frequently come in the form of:<sup>24</sup>

- *Arms embargo* - An arms embargo normally covers sale, supply, transport of the goods included in the EU common military list;

- *Asset freeze* - An asset freeze concerns funds and economic resources owned or controlled by targeted individuals or entities. It means that funds, such as cash, cheques, bank deposits, stocks, shares etc., may not be accessed, moved or sold. All other tangible or intangible assets, including real estate, cannot be sold or rented, either. An asset freeze also includes a ban on providing resources to the targeted entities and persons. As a result, EU citizens and companies are not allowed to make payments or supply goods and other assets to them. In certain cases, national competent authorities can permit derogations from the asset freeze under specific exemptions, for instance to cover basic needs (such as food, medicines, taxes, etc.).

- *Visa or travel ban* - Persons targeted by a travel ban will be denied entry to the EU at the external borders. If visas are required for entering the EU, these will not be granted to persons that are subject to the restrictive measures.<sup>25</sup>

### III. THE LEGAL BASIS FOR EU RESTRICTIVE MEASURES

The legal bases for the adoption of EU sanctions mainly derive from two sources: *the Charter of the United Nations* and *Articles 75 and 215 of the Treaty on the Functioning of the European Union (TFEU)*. The UN sanctions serve to implement UN Security Council decisions to maintain or restore international peace and security. Individual EU Member States are legally bound to follow the rules laid down in the UN Charter whereas the EU as a whole is under an obligation to implement UN decisions. Where UN Security Council resolutions require the Member States to enact coercive measures, a legal process takes place within the EU to bring the UN decision into EU law. In implementing the restrictive measures the EU institutions effectively reduce the scope for Member State discretion. In instances where the EU lacks jurisdiction over certain issue areas (e.g. arms exports), Member States must implement the concerned sanctions through their national legislation.

The TFEU entrusts the Council of the EU with the authority to adopt autonomous restrictive measures in the pursuit of the CFSP objectives. The implications from enacting unilateral EU measures, either as extensions of UN sanctions or as autonomous EU sanctions, are different. Unilateral sanctions passed solely under the TFEU framework are more flexible because they are decided by the EU only and the EU is therefore free to alter their content and suspend or cancel them more easily.<sup>26</sup> However, the EU sanctions adopted pursuant to UN Security Council resolutions are not as flexible. Although unilateral sanctions passed under the scope of the TFEU are more flexible, the EU has displayed a tendency to adopt UN sanctions and add extensions rather than adopt a separate decision outlining the measures which go beyond the scope of UN sanctions.<sup>27</sup>

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<sup>24</sup> *Idem*.

<sup>25</sup> Factsheet on EU Restrictive measures, issued by the Council of the EU in April 2014, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/135804.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/135804.pdf)

<sup>26</sup> D. Esfandiary, *Assessing The European Union's Sanctions Policy: Iran As A Case Study*, *Non-Proliferation Papers* No. 34, December 2013, p.3.

<sup>27</sup> *Idem*.

Under the terms of *Art. 215 TFEU* titled “Restrictive measures”, where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union (relevant to the European Area of Freedom, Security and Justice), provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council acts by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission by adopting the necessary measures. Equally, the Council may adopt restrictive measures under the same procedure against natural or legal persons and groups or non-State entities.

Further, for the purpose of preventing and combating terrorism and related activities, *Art.75 TFEU* gives the option to the European Parliament and the Council to adopt regulations in accordance with the ordinary legislative procedure that will establish a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. The Council, on a proposal from the Commission, will adopt further measures to implement the former framework. Importantly, there is an exception embedded here: *Art.275 TFEU* stipulates that the Court of Justice of the European Union (hereinafter, CJEU) is exempted from jurisdiction with respect to the provisions relating to the CFSP, or with respect to acts adopted on the basis of those provisions. Nevertheless, the CJEU is to have jurisdiction to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

In addition, *Declaration No.25 on Articles 75 and 215 of the Treaty on the Functioning of the European Union*, attached to the same Treaty, recalls that the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure.

#### **IV. EU’S SANCTIONS REGIME AGAINST IRAN AND THE SIGNING OF THE JOINT COMPREHENSIVE PLAN OF ACTION**

The signing of the Joint Comprehensive Plan of Action (JCPOA)<sup>28</sup> in 2015 was considered as a resounding success for EU diplomacy. Signed by France, Germany and the United Kingdom (EU-E3), the US, and Iran, the JCPOA’s main objective is to accomplish a comprehensive and progressive lifting of all UN Security Council sanctions against Iran in a way that the implementation of the JCPOA serves to ensure the progressive termination of Iran’s nuclear military programme and thus guarantee the exclusively peaceful nature of Iran’s nuclear programme. The timeline for the progressive lifting of the sanctions i.e. the “Implementation plan” for the JCPOA comprised of several different stages: Finalisation Day (conclusion of negotiations: July 2015), Adoption Day (coming into effect: October 2015), Implementation Day (lifting of economic sanctions: January 2016), and lastly, Transition Day (October 2023 or earlier, a projected date when all sanctions against Iran will be abolished).

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<sup>28</sup> For the text and a brief historical background on the JCPOA, see: <http://www.consilium.europa.eu/en/policies/sanctions/iran/jcpoa-restrictive-measures/>

What has thus far been accomplished at the EU level is the suspension of most of EU's economic sanctions against Iran, mirroring the implementation on the part of Iran of the agreed non-proliferation measures. The former entails a suspension of the asset freeze and visa ban measures for persons and entities specified in the JCPOA. However, the former comes with an important caveat which is that certain proliferation-related sanctions *remain* in effect after Implementation Day – specifically, those pertaining to the arms embargo, missile technology and nuclear-related transfers and activities.

As concerns Iran, the UN and EU instruments adopted to implement the JCOA are the following:

- UN Security Council Resolution 2231(2015)
- EU restrictive measures lifted in accordance with the JCPOA as set out in Council Decision 2010/413/CFSP33 and Council Regulation (EU) No 267/2012 (“previous sanctions regime”);
- Council Decision (CFSP) 2015/1863 of 18 October 2015 amending Council Decision 2010/413/CFSP concerning restrictive measures against Iran;
- Council Regulation (EU) 2015/1861 of 18 October 2015 amending Regulation (EU) No 267/2012 concerning restrictive measures against Iran;
- Council Implementing Regulation (EU) 2015/1862 of 18 October 2015 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran;
- Council Decision (CFSP) 2016/37 of 16 January 2016 concerning the date of application of Decision (CFSP) 2015/1863 amending Decision 2010/413/CFSP concerning restrictive measures against Iran;
- Council Decision (CFSP) 2015/1863 of 18 October 2015 amending Council Decision 2010/413/CFSP concerning restrictive measures against Iran;
- Council Regulation (EU) 2015/1861 of 18 October 2015 amending Regulation (EU) No 267/2012 concerning restrictive measures against Iran;
- Council Implementing Regulation (EU) 2015/1862 of 18 October 2015 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran;

## V. THE SAHAR FAHIMIAN CASE

The *Sahar Fahimian v Germany*<sup>29</sup> case, decided in 2017, concerns a member of the scientific community of Iran being denied visa to reside in Germany for the purpose of pursuing her doctoral studies. It is a provoking judgment to read and analyze, indicative of the degree of the scrutiny that both the Member State authorities and the EU Court of Justice are willing to perform in order to secure the preservation of the “public order” and “public security” of Member States.

Ms. Fahimian, born in 1985, is an Iranian national. She holds a Master of Science degree in the field of information technology awarded by the Sharif University of Technology in Iran (hereinafter, SUT), a university that specialises in technology, engineering science and physics. On 21 November 2012 Ms Fahimian applied to the Embassy of the Federal Republic of Germany in Teheran for a visa in order to pursue doctoral studies at the Darmstadt Technical University in Germany, Center for Advanced Security Research Darmstadt where she had previously been admitted and awarded a scholarship to pursue her doctorate. However, the subjects of Ms Fahimian's research project were described as ranging from “security of mobile

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<sup>29</sup> C-544/15 *Sahar Fahimian v Germany*, ECLI:EU:C:2017:255.

systems, especially intrusion detection on smartphones to security protocols” and Ms. Fahimian’s duties for the project encompassed finding ‘new efficient and effective protections mechanisms for smartphones under the well-known restrictions of restricted power, restricted computing resources, and restricted bandwidth’.<sup>30</sup>

When her application for a visa was refused by the German authorities on 27 May 2013, Ms. Fahimian made a request for reconsideration which was dismissed by a decision of 22 October 2013. On 22 November 2013 she challenged that decision before the referring German court, seeking the granting of the visa for which she had applied. The referring court observed that, in essence, the parties disagree on whether the grounds of public security within the meaning of Article 6(1)(d) of *Directive 2004/114 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service*<sup>31</sup> preclude Ms. Fahimian from entering German territory. Namely, Article 6(1)(d) of the Directive states that admission for the purposes set out in the Directive may be refused if a Member State considers, based on an assessment of the facts, that the third-country national concerned is a *potential threat* to public policy or public security. Additionally, in the language of Article 6, the notions of ‘public policy’ and ‘public security’ extend to cases in which a third-country national belongs or has belonged to an association which supports terrorism, supports or has supported such an association, or has or has had extremist aspirations.

However, there was another EU act the terms of which were at play and had a role in the final outcome of the judgment so that the CJEU when reaching its final decision effectively applied the two acts in conjunction. More particularly, Article 23(2)(d) of *Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran*<sup>32</sup>, provides for the freezing of the funds and economic resources of the persons, entities and bodies listed in Annex IX to that regulation who have been identified as ‘being other persons, entities or bodies that provide support, such as material, logistical or financial support, to the Government of Iran and entities owned or controlled by them, or persons and entities associated with them’. In the version as amended by Council Implementing Regulation (EU) No 1202/2014 of 7 November 2014<sup>33</sup>, the Sharif University of Technology, Fahimian’s alma mater, was included in the list of persons and entities involved in nuclear or ballistic missile activities and persons and entities providing support to the Government of Iran.<sup>34</sup> The reasons provided for including SUT in that list were that “[SUT] has a number of cooperation agreements with Iranian Government organisations which are designated by the UN and/or the EU and which operate in military or military-related fields, particularly in the field of ballistic missile production and procurement. (...) SUT is part of a six-university agreement which supports the Government of Iran through defence-related research; and SUT teaches graduate courses in unmanned aerial vehicle (UAV) engineering which were designed by the Ministry of Science (...)”.

Taking all the foregoing facts into consideration, the German authorities were satisfied that SUT had a significant record of engagement with the Government of Iran in military or military-related fields which can be construed as constituting support to the Government of

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<sup>30</sup> Para.19 of judgment.

<sup>31</sup> Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ 2004 L 375, p. 12.

<sup>32</sup> Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran, OJ 2012 L 356, p. 34.

<sup>33</sup> Council Implementing Regulation (EU) No 1202/2014 of 7 November 2014, OJ 2014 L 325, p. 3.

<sup>34</sup> Para.12.



Iran.<sup>35</sup> Consequently, in its submission before the CJEU, the German Government noted that the situation in Iran gives reason to fear that the knowledge Ms. Fahimian, who still maintains contacts with persons in that university, would acquire during her stay for study purposes would later be misused in her country of origin.. According to the German Government, due to the fact that the Iranian Government has for a long time been developing a large scale cyber-programme by which it hopes to gain access to confidential information in Western countries, it could not be ruled out that the knowledge Ms. Fahimian would acquire during her studies in Germany could also be used for purposes of internal repression in Iran, or in connection with human rights violations.<sup>36</sup> Further, it claimed that the technologies which are the subject of Ms. Fahimian's research project could be used by the Iranian authorities for surveillance of the population.<sup>37</sup>

What is notable is the level of scrutiny employed by the German Government and the extreme caution exercised in the matter of preservation of the public order and public security. Equally, the pervasive use of the use of words such as “potentially” and “could” in the German Government's submission clearly proves a remoteness (if not inexistence) of causality which is the reason why the referring German court itself expressed doubts as to whether Article 6(1)(d) of Directive 2004/114 could indeed be relied on, seeing as no specific circumstance relating to Ms. Fahimian's conduct or her contacts with certain persons has been put forward. Effectively, the German Government as the defendant in the case had not made clear the relationship between the skills which would be acquired by her during her doctoral studies and their subsequent misuse.<sup>38</sup>

For its part, the CJEU underscored the difference in treatment regarding to the freedom of movement of EU nationals and third country nationals concerning the assessment of the existence of a “threat to public security”. Hence, Article 27(2) of *Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*<sup>39</sup> requires that where a measure is taken on grounds of public security, it must be based exclusively on the personal conduct of the individual concerned as a conduct which represents a ‘genuine, present and sufficiently serious threat’ to the fundamental interests of society. By contrast, Article 6(1)(d) of Directive 2004/114, read in the light of recital 14 of that directive, provides that the admission of a third country national may be refused if the national authorities find, on the basis of an assessment of the facts, that he/she is a threat, “*if only potential*”, to public security.<sup>40</sup>

As concerns the judicial review performed at the national level of the discretion enjoyed by the competent national authorities, the CJEU considered that in the assessment of the relevant facts for the purpose of deciding on the grounds set out in Article 6(1)(d) of Directive 2004/114, relating to the existence of a threat to public security, the said national authorities enjoy a *wide discretion*.<sup>41</sup> Such judicial review should be of a limited nature and confined to the *absence of*

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<sup>35</sup> Para.13.

<sup>36</sup> See paras. 25 and 26, for the German Government's arguments.

<sup>37</sup> *Idem*.

<sup>38</sup> Para.27.

<sup>39</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 7, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

<sup>40</sup> Para.42.

<sup>41</sup> Para.40.

*manifest error of assessment* on the part of the competent national authorities<sup>42</sup>. The Court posited that it is of fundamental importance that the judicial review be subject to procedural guarantees. Those guarantees include the obligation for the national authorities to examine carefully and impartially all the relevant elements of the situation in question while the national court hearing the action is directed to ascertain whether the decision to deny the issuing of the visa is based on sufficient grounds and a sufficiently solid factual basis and take account of all the elements of Ms. Fahimian's situation.<sup>43</sup> Among these elements, those considered to be of particular importance with respect to Article 6(1)(d) of Directive 2004/114 are: the fact that she obtained her degree from SUT (which is on the list of entities subject to restrictive measures in Annex IX to Regulation No 267/2012) and the fact that the research she intends to conduct in Germany for her doctorate relates to the field of information technology security as a field sensitive to public security<sup>44</sup> - giving reason to fear that the knowledge acquired during the research may subsequently be used for purposes contrary to public security.<sup>45</sup>

## VI. CONCLUSION

It is evident that the EU-adopted sanctions bear important legal ramifications upon the fundamental rights of natural or legal persons, while it cannot always be conclusively established whether on each and every occasion the EU, or the Member States enforcing the sanctions, have adequately respected the requisite human rights guarantees. Based on the EU Court of Justice's final points in the *Sahar Fahimian* judgment and the generous guidance the Court has offered to the national court hearing the case, it can be surmised that the CJEU is effectively condoning the application by the Member States' authorities of a precautionary approach to fields of national and international security interest, however, at the expense of a member of the scientific community that has relied on their right of residence in their capacity as student, under the terms of *Directive 2004/114 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service*. By acknowledging the possibility for the curtailment of such and other related rights for doctoral students and scientists such as Ms. Fahimian, the CJEU has, deliberately or not, interfered with the very nature and scope of the notions of "academic freedom" and "scientific freedom" as these have been construed at the EU level and within the EU borders.

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<sup>42</sup> Para.46.

<sup>43</sup> Para.50.

<sup>44</sup> Para.48.

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