

**General conditions applicable to EU-financed grant contracts for external actions: explanation of the background legislation, meaning of the clause and likely impact on civil society organizations operating in Palestine**

### Introduction

1. The European Union (EU) allocates around 10% of its budget to external action in the field of international cooperation and development, providing funding in the form of grants, contracts, and budget support.<sup>1</sup> Grant contracts typically contain both special conditions and annexes<sup>2</sup> (see footnote no. 2 for an overview of standard contract forms for a call for proposal addressed to Civil Society Organizations as Actors of Governance in Israel). Among the annexes, Annex II lays down the general conditions pertaining to all EU grants contracts for external actions. It takes precedence over the other annexes<sup>3</sup>. **In August 2018**, the general conditions were updated, in accordance with the updated version of the practical guide on contract procedures for European Union external action (PRAG) to include an explicit obligation of **due diligence** on the part of the **final grant beneficiaries**.<sup>4</sup> This provision was maintained in the 2019 versions of both the PRAG and Annex II.<sup>5</sup> Thus, the latter now contains a clause (**1.5 bis.**), which provides that:

“Grant beneficiaries and contractors must ensure that there is no detection of subcontractors, natural persons, including participants to workshops and/or trainings and recipients of financial support to third parties, in the lists of **EU restrictive measures**.”

2. The purpose of this memo is to **discuss the interpretation of this clause and the potential implications for civil society organizations operating in Palestine** (in this regard note that, however, due to the general application of the clause, except

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<sup>1</sup> [https://ec.europa.eu/international-partnerships/funding\\_en](https://ec.europa.eu/international-partnerships/funding_en).

<sup>2</sup> For a reference to standard contracts, see: <https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?ADSSChck=1575964603711&do=publi.detPUB&orderbyad=Desc&orderby=upd&page=1&aoref=167188&searchtype=QS&nbPubliList=15&userlanguage=en>.

<sup>3</sup> For more information, consult these slides explaining how EU funding works: <https://www.slideshare.net/ednannia/eu-project-management-training>.

<sup>4</sup> The practical guide on contract procedures for European Union external action (PRAG) is available at: <https://ec.europa.eu/europeaid/prag/document.do?nodeNumber=1>.

<sup>5</sup> See note 2.

for Part II, letter C, our findings could also be applied to other countries and contexts). The memo will be divided in two parts.

3. **Part I** (general background on EU restrictive measures) will cover, **A) the legal framework** governing EU restrictive measures (in this context, restrictive measures against persons and entities involved in terrorist acts will be examined, with a particular focus on the relevant definitions); **B) the legal consequences** arising from the adoption of the list (in this context, it will be shown that once restrictive measures have been adopted, both the EU and its **contractual partners** have a **legal obligation** to give them effect), **C) the right to challenge the legality** and to ask the review of the inclusion in the list of restrictive measures.
4. **Part II** (interpretation of the clause in light of the specificities of the Palestinian context) will cover, **A) the interpretation and impact of clause 1.5bis**, on Palestinian civil society organizations (in this context, an hypothetical interpretation of the clause – which seems to be aligned with the views of the EU Representative of Palestine and the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR) of the European Commission<sup>6</sup> – will be provided. We will suggest that a **literal interpretation of the clause** – in line with the principle of legal certainty and the necessity to avoid the imposition of excessive burdens on civil society organizations operating in an extremely difficult context of prolonged occupation, such as Palestine – requires to interpret the clause as meaning that only financial support to the listed entities themselves and to members acting in an official capacity is prohibited under the clause), **B) a comparison with the United States anti-terrorism regime** (in this context, it will be shown that the EU, conversely to the United States, provides guarantees to ensure that allegations of terrorism affiliation are well-substantiated and backed up by evidence that can be regarded as reliable in a court of law, opposed to vague and unfunded accusations commonly spread by Israeli lawfare organizations; **C) final remarks** on the EU response to the current smear campaign affecting civil

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<sup>6</sup> In light of what PNGO reported from a meeting held with the EU Representative, Mr. Tomas Niklasson, on December 16, 2019, where he held that “*given that there is no individual Palestinian included in the EU list*); *the obligation not to transfer funds to any of the seven Palestinian organisations currently on the list does not create any additional obligation for civil society organisations (beyond their obligations under domestic legislation) and that there is no obligation or expectation from the EU’s side that we would discriminate against a person based on political affiliation*”, as well as from the minutes of a meeting between EU External Action (Paloma Portela) and EC DEVCO (Mrs. Francesca Pessina) with directors of Palestinian NGOs in Brussels on 22 January, 2020, where it was stated that “*the clause did not impose new nor different obligations on EU beneficiaries in Palestine.*”

society organizations operating in Palestine (in this context, it will be suggested that the EU appears to be less prone than other actors to criminalize the activities of civil society organizations and to portray them as sponsors of terrorist organizations, concluding that the inclusion of the clause is unlikely to have significant tangible repercussions).

## **Part 1: General background on EU Restrictive Measures**

### **A. EU Restrictive Measures**

5. EU restrictive measures or sanctions are a tool of the EU's Common Foreign and Security Policy (CFSP), a specific field of EU external relations law, which regulates the relationships between the EU and the rest of the international community. Restrictive sanctions are adopted to pursue specific objectives, set out in Article 21 of the Treaty on the European Union (TEU), including the consolidation and support of democracy, the rule of law, human rights and the principles of international law, as well as the preservation of peace, the prevention conflicts and the strengthening of international security, in accordance with the purposes and principles of the United Nations Charter. To this aim, **the EU can adopt different typologies of sanctions** either against third states or specific individuals or entities. With regards to Palestine, only EU-restrictive measures in the field of anti-terrorism are relevant, and therefore they are the only typology which will be discussed in this memo. The EU first adopted restrictive measures against persons and entities involved in terrorist acts in December 2001 (after 9/11).<sup>7</sup> They provide for the freezing of assets and impose a prohibition to make funds available to the listed individuals or entities.

### **Relevant Definitions**

#### **Persons, groups and entities involved in terrorist acts:**

6. Defined as<sup>8</sup>:

<sup>7</sup> COUNCIL COMMON POSITION of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>.

<sup>8</sup> Article 1, paragraph 2 of COUNCIL COMMON POSITION of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>.

- persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts.
- groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities **acting on behalf of, or under the direction of**, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

Terrorist act:

7. Defined as<sup>9</sup>: one of the following intentional acts, which, given their nature or context, may seriously damage a country or an international organization, and which are considered as an offence under national law, where committed with the aim of:
- seriously intimidating a population.
  - unduly compelling a Government or an international organization to perform or abstain from performing any act.
  - seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization:
    - o attacks upon a person's life which may cause death.
    - o attacks upon the physical integrity of a person.
    - o kidnapping or hostage taking.
    - o causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, and likely to endanger human life or result in major economic loss.
    - o seizure of aircraft, ships or other means of public or goods transport.
    - o manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons.
    - o release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life.

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<sup>9</sup> Article 1, paragraph 3 of COUNCIL COMMON POSITION of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>.

- interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life.
- directing a terrorist group, participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

### Terrorist group

8. Defined as<sup>10</sup>: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. A ‘Structured group’ means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

### Basis for being included in the list

9. According to Article 1, paragraph 4 of the “Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism”, to be included in the list of restrictive measures the Council need to have **precise information** or material 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.<sup>11</sup>

### Meaning of the word: “competent authority”

10. For the purposes of the previous definition, ‘**competent authority**’ means a **judicial authority**, or, where judicial authorities have no competence in the area covered by Article 1, paragraph 4 (counterterrorism), an equivalent competent authority in that area.

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<sup>10</sup> Article 1, paragraph 3 of COUNCIL COMMON POSITION of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>.

<sup>11</sup> Article 1, paragraph 4 of COUNCIL COMMON POSITION of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>.

11. In this regard, it is necessary to emphasize that a national competent authority does not necessarily have to be located in one of the EU Member States. Indeed, the Court of Justice of the European Union (CJEU) has recognized that an **authority of a third State** (such as Israel) can, in principle, be classified as a competent authority.<sup>12</sup> However, the Court has also stressed that, due to the fact that a decision of such an authority constitutes the pre-condition for the adoption of a restrictive measure, the Council is required to “carefully verify that the relevant legislation of that State ensures **protection of the rights of defense** and a **right to effective judicial protection** equivalent to that guaranteed at EU level”<sup>13</sup>, taking into account the relevant obligations stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Moreover, the third state in question does not merely have to recognize the protection of fundamental rights in its legislation formally, but it also has to **respect them in practice**.<sup>14</sup> In conclusion, unless the Council is able to demonstrate an equivalence between the level of protection ensured by the legislation of a third State and that ensured at EU level, a restrictive measure based on information coming from a third state would be in violation of EU law.
12. With respect to the Palestinian context, note that the EU has never commented upon the Israeli judiciary system as such. However, there have been discussions in the EU Parliament (see the following [policy brief](#) of the European Parliament expressing concern over the “parallel justice system” reserved to Palestinians in Israel). For this reason, notwithstanding the fact that the policy brief does not represent the view of the EU, its publication by the Directorate General for External Policies proves that there is awareness about the lack of proper due process guarantees in Israel. This, coupled with a number of reports coming from authoritative NGOs denouncing Israel’s discriminatory system,<sup>15</sup> can lead us to assume that the CJEU would not consider Israeli authorities as competent to provide reliable information at the basis of the adoption of a restrictive measure, as Member States would hardly be able to demonstrate that Israel has the same standard of fundamental rights protection ensured at the European level.

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<sup>12</sup> Judgement of the General Court of the European Union, Joined Cases T-208/11 and T-508/11, Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union, ECLI:EU:T:2014:885, para. 136.

<sup>13</sup> Ibidem, para. 139.

<sup>14</sup> Idem.

<sup>15</sup> E.g. 2019 Human Rights Watch “Born Without Civil Rights” Report, available at [https://www.hrw.org/sites/default/files/report\\_pdf/palestine1219\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/palestine1219_web_0.pdf).

## Listing Procedure

13. The listing procedure is regulated by the title V of the Treaty of the European Union (TEU) (articles 29 and 31) and article 215 of the Treaty of the Functioning of the European Union (TFUE). Restrictive measures affecting entities or individuals are based on a proposal made by the High Representative of the Union for Foreign Affairs and Security Policy (HR) to the Council. The Council, then, examines and discusses the proposed measure, and finally adopts it by **unanimity**. In addition, if the measures provide for an asset freeze and/or other types of economic and/or financial sanction (as in the case of Palestine), an additional Regulation needs to be adopted, on the basis of a joint proposal by the High Representative and the Commission to the Council, which adopts it at **qualified majority** (15/27 Member States), after having informed the European Parliament. Finally, the council needs to notify the listed persons and entities that a measure against them has been taken<sup>16</sup>.
14. In this regard, due to the fact that the implementation of restrictive measures providing the assets freezing require the adoption of two different legislative acts, one of them with an unanimity voting procedure, renders unlikely that the Council would undertake targeted decisions against individual Palestinians, especially if they are not officially affiliated with the already listed individuals (see para. 21). Note that the list was firstly adopted in 2001 and it has never been updated, with regard to Palestinians. **No Palestinian entity or individual has been added to the list recently.**

### **B. The legal effect of EU sanctions and the prohibition to make funds available**

15. EU restrictive measures are directly applicable in the European Union. This implies that, when implementing the EU budget (as in the case of EU-funded grant contracts), the Commission **must** give effect to EU restrictive measures. The same obligation is also imposed on persons or entities entrusted with **indirect management** by virtue of Article 62(1)(c) of the EU Financial Regulation, which requires implementing partners to ensure that **funds are only distributed in accordance with EU law, including therefore the implementation of EU restrictive measures**.<sup>17</sup> Such a legal obligation constitutes the **legal basis** for the update of the General Conditions to include of **clause 1.5 bis** in Annex II. Indeed, the obligation to ensure that funds from EU budget is not

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<sup>16</sup> <https://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/>

<sup>17</sup> See the Practical Guide on Procurement And Grants for European Union external actions, available at: <https://ufmsecretariat.org/wp-content/uploads/2012/09/ePrag-en-2019.0.pdf> (Section 2.4).

allocated to listed entities applies to both EU institutions and all EU contracting partners, both at the initial distribution of funds but also down to the **level of final beneficiary**, as specified in the PRAG (see note 15).

16. For this reason, it is **very unlikely that the EU will accept to remove the clause from the general conditions** applicable to its grant-contracts. However, there are some **safeguards** in place in the event that an entity or an individual is included in the list, both with regard to the subjects listed themselves and to the contractors who need to comply with the obligation to ensure that funds are not allocated to them, which will be examined in Part. 2, letter A).

### **C. The right to Judicial Review of the Inclusion in the Restrictive Measures List**

17. In accordance with Article 215, paragraph 3 TFEU, if a person or an entity is included in the list of restrictive measures, legal safeguards need to be ensured. In this regard, Article 275 TFEU gives the Court of Justice of the European Union (CJEU), the **power to review the legality** of decisions providing for restrictive measures against natural or legal persons adopted by the Council.
18. An extensive body of case-law<sup>18</sup> shows that the CJEU requires to prove the existence of **detailed and specific reasons** (as opposed to general and circumstantiated allegations – usually employed by Israeli lawfare organizations aimed at delegitimizing and stigmatizing civil society organizations operating in Palestine)<sup>19</sup> to justify the inclusion of an entity or individual in the list, and that it is willing to undertake **full judicial review** to assess:
- the general criteria according to which individual targets are chosen in a given sanctions regime (“designation criteria”);
  - the reasons or justification for targeting a specific person (“statement of reasons”);
  - the evidence supporting that statement of reasons (“supporting evidence”)<sup>20</sup>.

<sup>18</sup>For an overview consult the following report: [https://um.fi/documents/35732/48132/eu\\_targeted\\_sanctions\\_and\\_fundamental\\_rights/14ce3228-19c3-a1ca-e66f-192cad8be8de?t=1525645980751](https://um.fi/documents/35732/48132/eu_targeted_sanctions_and_fundamental_rights/14ce3228-19c3-a1ca-e66f-192cad8be8de?t=1525645980751).

<sup>19</sup> See PWG Report on NGO Monitor attempt to silence civil society organizations: [http://policyworkinggroup.org.il/report\\_en.pdf](http://policyworkinggroup.org.il/report_en.pdf).

<sup>20</sup> See report above, p. 6.



## **Part 2: Interpretation of the clause in light of the specificities of the Palestinian context**

### **A. Interpretation of Clause 1.5 bis with regard to Palestinian Civil Society**

#### **Organizations**

19. Clause 1.5 bis requires beneficiaries of EU grants or contracts to make sure that individuals and entities included in the list of EU restrictive measures do not receive any financial support deriving from EU grants. This means that subcontracting or giving financial support to third parties (in terms of procurement of services, supplies or works) or to natural persons (including participant to workshops and/or trainings) included in the list is prohibited.
20. Before proceeding to the interpretation of the clause, it is necessary to stress that (to this date) it has never been used to terminate a grant's contract. In addition, no guidelines regarding its practical implementation are (yet) available. Thus, the information provided here is hypothetical.

#### **Palestinians included in the list of EU restrictive measures**

21. EU restrictive measures are directed towards **certain Palestinian organizations**. However, they do **NOT** include any **individual**<sup>21</sup>:
1. Abu Nidal Organization (ANO)/ Fatah – The Revolutionary Council.<sup>22</sup>
  2. The al-Aqsa Martyrs' Brigades.<sup>23</sup>
  3. Hamas (appealed).<sup>24</sup>
  4. Palestinian Islamic Jihad.<sup>25</sup>
  5. Popular Front for the Liberation of Palestine.<sup>26</sup>
  6. Popular Front for the Liberation of Palestine - General Command.<sup>27</sup>
  7. The al-Aqsa Foundation (international charity established in Germany and found to have enabled Hamas activities).<sup>28</sup>

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<sup>21</sup><https://www.sanctionsmap.eu/#/main/details/6/lists?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D>.

<sup>22</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:183:0009:0010:EN:PDF>.

<sup>23</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XG1201\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XG1201(01)&from=EN).

<sup>24</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CJ0079&from=EN>.

<sup>25</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011XG1115\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011XG1115(01)&from=EN).

<sup>26</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011XG1115\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011XG1115(01)&from=EN).

<sup>27</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011XG1115\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011XG1115(01)&from=EN).

<sup>28</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011XG1115\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011XG1115(01)&from=EN).

## Interpretation of the clause

22. Due to the inclusion of certain Palestinian entities in the list, grant or contract beneficiaries need to make sure that no money benefits the said organizations. However, **it is unclear whether the same obligation applies towards natural persons who are not listed but are a part of the organization, either formally or informally**. It can be assumed that if the EU intention was to cut off financial resources to members of the said organization acting in a private capacity, they would also have included natural persons in the list of EU restrictive measures, which is not the case, differently from the US which has also listed natural persons.
23. Thus, adopting a **literal interpretation of the provision**, it would appear that the only requirement is to prohibit the distribution of EU financial resources in a manner which would benefit the **listed organizations itself and organizations owned or controlled by them** (e.g. by subcontracting them part of the contract<sup>29</sup> or financially supporting their activities, events, workshops and training, either formally organized or sponsored by them), as well as to prohibit the invitation of members of the listed organization acting in an **official capacity** to take part to activities, events, workshops and training, as well as the reimbursement of their speaking engagement skills and travel costs.
24. The adoption of a literal interpretation would also take due account of the principle of **legal certainty**, which requires all laws to be sufficiently precise to allow a person to foresee, to a reasonable degree, the consequences which a given action may entail<sup>30</sup>. Such a principle encompasses the doctrine of **legitimate expectations**, which is a central element of the general principle of legal certainty in European Union law. Indeed, it would be unreasonable to require civil society organizations to carry out costly and time-consuming additional vetting procedures, which go beyond what is strictly required by EU law (that is, to prohibit funding to entities, and not to individuals). This is even more relevant in light of the peculiarities of the Palestinian context, in which civil society organizations find themselves required to operate in a state of prolonged military occupation.

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<sup>29</sup> Subcontracting is the implementation, by a third party with which one or more beneficiaries have concluded a procurement contract, of specific tasks forming part of the action as described in annex to the grant contract.

<sup>30</sup> The concept of legal certainty has been recognised as one of the general principles of European Union law by the European Court of Justice since the 1960. See, for instance : Radu Florin Salomie, Nicolae Vasile Oltean v Direcția Generală a Finanțelor Publice Cluj, Case C-183/14, CJEU, para. 31 - 32. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CJ0183&from=EN>

25. This interpretation seems also to be in line with the discussions undertaken at the EU institutional level as European Union representatives have stated in two different occasions that the **clause does not create any additional contractual obligations** (see note no. 7). In this regard, the *Medialine* newsagency reported that:

“The EU spokesperson’s office asserted to The Media Line that the new clauses aren’t really new, as they’re consistent with EU policy since 2001 to avoid financing groups classified as terrorist organizations. “We don’t have a single name of a Palestinian persona, but only movements and armed wings. We are not asking them [the NGOs] to recognize any [Palestinian] political party as a terrorist group, but [only] to refrain from funding them in any way.”<sup>31</sup>

26. In this light, we suggest interpreting the “**must ensure**” requirement” as meaning that grant beneficiaries should only make sure that their employees, financial beneficiaries or EU-funded training/event participants **do not include individuals representing in an official capacity on of the listed entities**. Other typologies of political, familiar, or personal connections are irrelevant in this regard. This interpretation would also be in line with **Palestinian law** preventing civil society organizations from funding any political party.

27. Finally, with regard to the **modalities** used by the EU to **evaluate** the compliance with the clause requirements, Article 8 of Annex II provides that Annex I (which defines the framework governing the action for which a specific grant contract is awarded) should describe in detail the monitoring and evaluation arrangements that the beneficiaries will put in place. It also states that if the European Commission carries out an interim or ex post evaluation or a monitoring exercise, the beneficiary’s coordinator of the action (identified in the special conditions of the specific grant contract) needs to provide to the Commission the documents or information necessary for the evaluation or monitoring exercise. Such documents (whose typology is not specified in the general conditions) will most likely need to prove that the beneficiary **undertook due diligence measures to prevent the allocation of funds to entities listed in the restrictive measures**.

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<sup>31</sup> DIMA ABUMARIA, *Palestinian NGOs Refuse ‘New’ Terror-Related EU Funding Terms*, The Media Line, 01/06/2020, available at: <https://themedialine.org/by-region/palestinian-ngos-refuse-new-terror-related-eu-funding-terms/>.

## Disclaimer

28. It **cannot be excluded** that the EU could adopt a broader interpretation of the clause, thus requiring grant beneficiaries to also make sure that financial resources are not allocated to natural persons affiliated to the entities listed in the restrictive measures, in line with its interpretive guidelines on sanctions.<sup>32</sup> For example, this is likely in circumstances in which there is public and reliable evidence that a majority of NGO Board members, its director or its financial officer or auditor is affiliated to / part of a listed organization. In this context, if the NGO in question is a beneficiary of EU grant contract, a broad interpretation of the clause could lead the EU to terminate it.
29. Either way, in absence of a list identifying natural persons, there must be a clear connection supported by **serious and credible evidence** – in line with the standard used for the inclusion of the entity in the list in the first place – proving that the **funding received by the individual in question was used for activities benefitting one of the listed entities**. At any rate, the NGO in question would have the **right to challenge** the termination of the contract. Indeed, Article 133 of the Financial Regulation applicable to the EU general budget (which finances the EU external actions grant) provides that:

“Before adopting any measure adversely affecting the rights of a participant or a recipient the authorizing officer responsible shall ensure that the participant or the recipient has been given the **opportunity to submit observations**. Where a measure of an authorizing officer adversely affects the rights of a participant or a recipient, the act establishing that measure shall contain an indication of the available means of **administrative and/or judicial redress** for challenging it.”

## B. Comparing the EU Approach with US Anti-Terrorism Procedures

### Background<sup>33</sup>

<sup>32</sup> EU Sanctions Guidelines – update of 2018 (page 21, 55b. and page 22), 5664/18, <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>

<sup>33</sup> Information retrieved from the following website: <https://www.pgdc.com/pgdc/implications-anti-terrorist-financing-rules-us-charities-compliance-executive-order-13224>.

30. On September 14, 2001, President Bush signed Executive Order 13224, entitled "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism" (the "Executive Order").<sup>34</sup> It was renewed every year to this date.<sup>35</sup> The Executive Order is not a law, but it carries the force of law as it represents the President's exercise of statutory authority granted by Congress under the International Emergency Economic Powers Act and the National Emergencies Act. It prohibits **financial transactions carried out using US funds** with "persons" (including individuals and organizations) deemed by the Executive Branch to be associated with terrorism. It blocks any assets controlled by or in the possession of such individuals and organizations and those who support them. **It has neither a knowledge nor an intent requirement.** Even if an organization has no intent to support terrorism and does not know it is providing support to such individuals or organizations or has otherwise become "associated with" a terrorist organization as defined in the Executive Order, its assets can be frozen by the government.

31. **Differently from EU restrictive measures**, the US government **does not have to provide any pre-freeze notice or opportunity to respond to the freeze, nor is there any requirement of prior notice of a determination of terrorist status.** On the contrary, under the Executive Order, it has the authority to freeze all assets of individuals and organizations identified as terrorists, controlled by terrorists, supportive of terrorists or otherwise associated with terrorists. It specifically prohibits donations to such individuals and organizations and all transactions involving property frozen under the Executive Order. Individuals and organizations whose property are automatically frozen include:

- those specifically listed in the Annex to the Executive Order;
- those determined by the Secretary of State "to have committed, or pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States"; and
- those determined by the Secretary of the Treasury "to be controlled by, or to act for on behalf of such individuals and organizations."<sup>36</sup> (This last paragraph implies that even if an entity or an individual is not included in the list, if the Secretary of

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<sup>34</sup> <https://www.treasury.gov/resource-center/sanctions/Documents/13224.pdf>.

<sup>35</sup> <https://www.whitehouse.gov/presidential-actions/executive-order-modernizing-sanctions-combat-terrorism/>.

<sup>36</sup> Executive Order No. 13224 §§ 1(a), (b) and (c); 31 C.F.R. § 594.201(a)(1), (a)(2) and (a)(3).

Treasure believes that such entity or individual is controlled or is acting for someone included in the list, it will freeze their assets and properties.)

32. Under the Executive Order, **the government may also freeze the assets of other parties who assist, sponsor or provide financial, material or technological support for, or provide other resources to or in support of, acts of terrorism or such individuals and organizations or are "otherwise associated with" such individuals or organizations,**<sup>37</sup> thus including charitable grantees and non-profit/civil society organizations.

### **Palestinian entities listed**

33. There are both Palestinian entities and individuals included in the US Department of State Sanction List. The list is long and constantly updated. It can be consulted at the following link selecting “Palestinian” in the drop-down box: <https://sanctionssearch.ofac.treas.gov/>.

### **The USAID-funded assistance in West Bank and Gaza**

34. As a consequence of the above mentioned anti-terrorism procedure, the United States Agency for International Development (USAID) grant program requires all contractors to sign the Anti-Terrorist certificate (ATC), in order to certify that those contractors will refrain from giving any type of support to the ‘terrorists’. It also includes mandatory clauses reminding contractors and grantees of their legal duty to comply with applicable anti-terrorism laws and regulations.<sup>38</sup> In this regard, USAID retains the right to terminate any contract or agreement if the contractor/recipient is deemed to be involved in or advocates for terrorist activities. Again, **differently than from EU-funded grants, no right to challenge the measure** seems to be foreseen.

### **C. Final remarks on the EU Approach and likely impact on civil society organizations operating in Palestine**

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<sup>37</sup> Executive Order No. 13224 §§ 1(d)(i) and (d)(ii); 31 C.F.R. § 594.201(a)(4)(i) and (a)(4)(ii).

<sup>38</sup> “The Contractor/Recipient is reminded that U.S. Executive Orders and U.S. law prohibit transactions with, and the provision of resources and support to, individuals and organizations associated with terrorism. It is the legal responsibility of the Contractor/Recipient to ensure compliance with these Executive Orders and laws.”, Updated Anti-Terrorism Procedures, Update to Mission Order #21, ATTACHMENT D, Sent to All USAID/West Bank and Gaza Contractors, Grantees and Recipients on October 5, 2007.

35. As outlined during the memo, **the EU regime governing restrictive measures contains a number of safeguards aimed at making sure that anti-terrorism legislation is line with international human rights and humanitarian law**, since: **1)** individuals and legal persons and entities affected by EU restrictive measures and grant/contract beneficiaries which may be deprived of funds due to their affiliations with the listed entities, have the right to judicial review; **2)** the very inclusion of an entity in the list needs to be justified by the existence of well-funded evidence coming from a judicial authority which affords the same due process guarantees of the EU.
36. Accordingly, information coming from Israeli military court will most likely not be considered by the EU as falling under the scope of the notion of “competent authority” for the purpose of adopting a restrictive measure, as explain in paragraph 9 (see para. 12).
37. The EU approach is, indeed, sharply criticized by Israeli lawfare organizations, as well as the Israeli Strategic Affairs Minister Gilad Erdan which have attacked the EU for “funding for NGOs with ties to terror and boycotts against Israel.” In this context, former High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, Federica Mogherini, rejected such allegations as “**vague and unsubstantiated, which serve only to contribute to disinformation campaigns.**” She also added that “Allegation of the EU supporting incitement or terror are unfounded and unacceptable. The title of the report itself is also inopportune and misleading; it mixes terrorism with the boycott issue and it creates unacceptable confusion in the public eye regarding these two distinct phenomena.” She also recalled that “the EU has very strict rules to screen and vet the beneficiaries of EU funds. We take any allegation of misuse of EU funds very seriously and are committed to investigate all those presented with **substantive evidence.**”<sup>39</sup>
38. Such a position seems to confirm the EU willingness to fully recognize “Palestinian civil society not only as service providers or implementers of EU strategies, but also as **key political actors** in the governance and development processes. Such recognition implies that engaging in a structured dialogue with civil society has become a specific

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<sup>39</sup><https://www.haaretz.com/israel-news/.premium-israeli-minister-snaps-at-eu-after-unprecedented-reprimand-1.6288162>.

priority for the EU, as a way to make development strategies closer to citizens' perspective and needs, as well as more effective and sustainable.”<sup>40</sup>

39. This background, coupled with the fact that the CJEU has recently recognized that “*the settlements established in some of the territories occupied by the State of Israel are characterized by the fact that they give concrete expression to a policy of population transfer conducted by that State outside its territory, in violation of the rules of general international humanitarian law*”<sup>41</sup>, sparking a “furious reaction” in Israel<sup>42</sup>, seems to suggest that the EU is less prone than other actors to fall victim of the smear campaign affecting NGOs advocating for Palestinian rights worldwide.<sup>43</sup>
40. **In conclusion**, taking into account the historical relationships between the EU and Palestinian Organizations, as well as the strict procedural safeguards afforded by EU law, seems to point out that **the inclusion of this clause will not have any tangible effect on Palestinian Civil Society Organizations** based on the fact that: **1)** the clause is included in all EU contracts with civil society organizations worldwide, and it is not intended for creating a chilling effect against the funding of Palestinian NGOs by the EU or other donors, particularly; **2)** a literal interpretation of the clause proves that no additional contractual obligation has been imposed on Palestinian Civil Society Organizations, as the list did not change from 2001, and no natural persons were ever included in any case.
41. However, we can never be certain that restrictive measures would not be extended to individuals in the future, or that a broad interpretation of the clause would not lead to also prohibit support to natural persons closely affiliated with the said organizations or that frivolous investigations will not be launched. At the same time, it has to be noted that safeguards to ensure judicial review of eventual measures taken are in place (see Part 1, letter C for safeguards relating to the individuals/entities listed themselves, and

<sup>40</sup> Palestine – EU Country Roadmap for Engagement with Civil Society 2014-2017, p. 17, available at: [https://library.euneighbours.eu/sites/default/files/attachments/20140723\\_palestine\\_eu\\_civil\\_societyroadmap\\_en.pdf](https://library.euneighbours.eu/sites/default/files/attachments/20140723_palestine_eu_civil_societyroadmap_en.pdf).

<sup>41</sup> JUDGMENT OF THE COURT (Grand Chamber), Organisation juive européenne, Vignoble Psagot Ltd v. Ministre de l'Économie et des Finances, Case C-363/18, ECLI:EU:C:2019:954, para. 48.

<sup>42</sup> <https://www.telegraph.co.uk/news/2019/11/12/eus-top-court-rules-food-israeli-settlements-must-carry-special/>

<sup>43</sup> As also underlined in the Draft PNGO Study, where the author (Wafaa Saadeh) pointed out that “In general, the Palestinian CSOs rely heavily on funding generated from the EU and EU Member States, it is commonly perceived that the EU, Scandinavian countries and international organizations such as the United Nations do perceive the Palestinian cause in “no bias in favor of any one group” particularly in counter-terrorism and security matters and they likely to use context-accurate descriptions more than other donors, quoting Jeremy Wildman, “ Donor Perceptions Of Palestine: Limits To Aid Effectiveness“, Al Shabaka, June 2019, 4.



Part 2, letter A, para. 29 for safeguards relating to organizations deprived of funds on the basis of terrorist affiliations).

**Amsterdam, 07.03.2020**

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**Giovanni Fassina, *ELSC coordinator***