TARGETED SANCTIONS AGAINST ECONOMIC WRONGDOING AT THE UN AND EU LEVEL

*By Benjamin Vogel**

I. Aims and General Characteristics of the Legal Regime

Targeted sanctions are supranational measures adopted by the United Nations or the European Union to address threats to international peace and security under Chapter VII of the Charter of the United Nations or objectives of the Common Foreign and Security Policy under Title V of the Treaty on European Union. EU sanctions, here called 'restrictive measures', will often serve to implement UN sanctions at the European level, but the EU is today increasingly also using its power under Article 215 of the Treaty on the Functioning of the European Union (TFEU) to adopt economic sanctions autonomously of UN sanctions.[1] Unlike embargoes targeting entire countries, targeted sanctions aim at individuals or entities. At the UN level, targeted sanctions have primarily been developed since the end of the 1990s in response to what were often perceived as excessive non-intended side effects of country embargoes on a targeted country's wider population.[2] Targeted sanctions were subsequently introduced as a means to change a state's policy by putting pressure on high-ranking officials and their associates or on particular economic sectors.[3] Since then, supranational sanctions have developed beyond their initial focus on states and have increasingly been applied against risks emanating from non-state actors. Starting with sanctions against Al Qaida and the Taliban,[4] targeted sanctions expanded broadly to address the financing of terrorism,[5] the illegal trade in natural resources,[6] and, more recently at the

* Dr. Benjamin Vogel, LL.M., Senior Researcher at the Max Planck Institute for Foreign and International Criminal Law.

[1] On the so far unexploited possibility to adopt EU restrictive measures under Art. 75 TFEU, thus outside the Common Foreign and Security Policy (CFSP), see C. Murphy, EU Counter-Terrorism Law: Pre-Emption and the Rule of Law, pp. 128–129.

[2] I. Cameron, in: id. (ed.), EU sanctions: law and policy issues concerning restrictive measures, Intersentia 2013, p. 3.

[3] Cf. for example UN Security Council Resolution 661 (1990) of 6 August 1990, imposing a comprehensive embargo on Iraq, and Resolution 1737 (2006) of 23 December 2006, imposing targeted sanctions on entities and persons involved in Iran's nuclear and ballistic missile programs.

[4] UN Security Council Resolution 1267 (1999) of 15 October 1999.

[5] UN Security Council Resolution 2253 (2015) of 17 December 2015; EU Council Common Position 2001/931/CFSP of 27 December 2001.

[6] See notably UN Security Council Resolution 2078 (2012) of 28 November 2012 and EU Council Decision 2012/811/CFSP of 20 December 2012 (Democratic Republic of the Congo); UN Security Council Resolution 2134 (2014) of 28 January 2014, and EU Council Decision 2014/125/CFSP of 10 March 2014 (Central African Republic).

EU level, the misappropriation of state funds by former senior state officials.[7] Depending on the purpose of a sanctions regime, targeted sanctions can have various aims: still more in line with a traditional focus on state actors, sanctions can seek to exert pressure on government officials and their associates in order to incentivize a change of government policy. As regards counter-terrorism financing as well as the illegal trade in natural resources, sanctions will usually have a more immediate preventive aim in that they are meant to prevent the flow of economic resources to terrorist entities or to non-state armed groups.[8] Finally, as regards the misappropriation of state funds, sanctions serve to temporarily secure misappropriated funds in foreign jurisdictions so that they can then be repatriated by the competent authorities of the injured state.[9]

II. Sanctions and Their Substantive Requirements

A. Types of Sanctions

Sanctions at both the UN and EU level consistently include economic restrictions, which states are under an obligation to enforce. In many cases the imposition of sanctions also includes further restrictions such as travel bans and a prohibition to make weapons available to sanctioned individuals and entities. The economic restrictions are typically worded as follows (or something similar):[10]

(i) [f]reeze without delay the funds and other financial assets or economic resources of targeted individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction;

(ii) [e]nsure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, by their nationals or by persons within their territory.

Both UN and EU instruments provide for some exemptions to property-related sanctions. Such exemptions particularly apply to funds determined by the relevant State as necessary

[7] EU Council Decision 2011/72/CFSP of 31 January 2011 (Tunisia); EU Council Decision 2011/172/CFSP of 21 March 2011 (Egypt); EU Council Decision 2014/119/CFSP of 5 March 2014 (Ukraine).

[8] See Art. 3 para. 1 (g) of EU Council Decision 2010/788/CFSP as amended by Council Decision 2016/2231 (Democratic Republic of the Congo); GC, judgment of 23 October 2008 (PMOI I), T-256/07, at para. 136 (terrorism financing).

[9] GC, judgment of 5 October 2017 *(Ben Ali v. Council of the European Union)*, T-149/15, at para. 77.

[10] UN Security Council Resolution 2253 (2015), at para. 2, and EU Council Decision (CFSP) 2016/1693, at Arts. 2–3 (ISIL (Da'esh) and Al-Qaida); for other examples see UN Security Council Resolution 1807 (2008), at paras. 9 and 11, and EU Council Decision 2010/788/CFSP as amended by Council Decision 2016/2231, at Arts. 4 and 5 (Democratic Republic of the Congo); UN Security Council Resolution 1970 (2011), at paras. 15 and 17, and EU Council Decision (CFSP) 2015/1333, at Arts. 8 and 9 (Libya); UN Security Council Resolution 2374 (2017), at paras. 1 and 4, and EU Council Decision (CFSP) 2017/1775, at Arts. 1 and 2 (Mali); Council Decision 2011/72/CFSP, at Art. 1 (Tunisia).

for an individual's 'basic expenses', including for foodstuffs, rent, medical treatment, and legal fees, to payments into frozen accounts, and, where applicable after prior approval by the competent UN Sanctions Committee, to some extraordinary expenses.[11]

B. Substantive Requirements and Safeguards for Imposing Sanctions

For each of their respective sanctions regimes, UN Security Council resolutions and EU Council decisions define the applicable substantive requirements. These designation criteria can be formulated in broad terms that might be further specified by other resolutions or decisions, or by the jurisprudence of the EU Courts. For the UN's counter-terrorism sanctions regime, Security Council Resolution 2368 (2017) determines that activities indicating that an individual, group, undertaking, or entity is eligible for inclusion in the sanctions list include

> [p]articipating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of […] Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof.[12]

Not least in view of the finding that the so-called Islamic State (ISIL) greatly benefited from trade in order to finance its territorial expansion and its terrorist activities, the Security Council further clarified that commercial ties with terrorist organizations could satisfy the listing criteria, stating in particular that

> any engagement in direct or indirect trade, in particular of petroleum and petroleum products, modular refineries, and related materiel including chemicals and lubricants […] would constitute support for such individuals, groups, undertakings, and entities and may lead to further listings.[13]

This link between terrorism and trade is also taken into account by the European Union's autonomous counter-terrorism framework against ISIL, Al-Qaida, and related entities. EU Council Decision 2016/1693 defines as possible targets of sanctions in particular persons and entities

> engaging in trade with ISIL (Da'esh), Al-Qaeda or any cell, affiliate, splinter group or derivative thereof, in particular of oil, oil products, modular refineries and related material, as well as trade in other natural resources and trade in cultural property;[14]

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[11] See for example UN Security Council Resolution 1452 (2002) at para. 1; Resolution 1596 (2005) at para. 16; Resolution 2253 (2015) at paras. 9–10; Resolution 2399 (2018) at paras. 17–18; EU Council Decision 2013/798/CFSP at Art. 2b paras. 3–6; Council Decision 2010/788/CFSP at Art. 5 paras. 3–5.

[12] UN Security Council Resolution 2368 (2017) at para. 2.

[13] UN Security Council Resolution 2368 (2017) at the 40th recital. See already Security Council Resolution 2199 (2015) at para. 1.

[14] EU Council Decision (CFSP) 2016/1693 of 20 September 2016 at Art. 3 para. 3(a)(iii).

Beyond the UN's counter-terrorism sanctions framework, the Security Council has in some cases explicitly expanded designation criteria to cover commercial activities seen as fueling armed conflict. Notably for the UN's sanctions regime regarding the situation in the Democratic Republic of the Congo, Security Council Resolution 2293 (2016) states that relevant acts include

> supporting individuals or entities, including armed groups or criminal networks, involved in destabilizing activities in the DRC through the illicit exploitation or trade of natural resources, including gold or wildlife as well as wildlife products.[15]

In other cases, businesses might be subjected to sanctions because they provide economic support to a government, either regardless of the nature of their commercial activity or only if their activity is linked to a particular government policy. EU Council Decision 2013/255/CFSP concerning restrictive measures against Syria determines that financial sanctions shall apply to

> leading businesspersons operating in Syria; [such persons shall not be designated] if there is sufficient information that they are not, or are no longer, associated with the regime or do not exercise influence over it or do not pose a real risk of circumvention.[16]

In addition to defining substantive designation criteria, some EU sanctions regimes additionally require that competent authorities of a Member State or a third State have commenced investigations against the targeted individual or entity in respect of the accusations that underpin the designation motive. Most prominently, Council Common Position 2001/931 as the EU's basis for the imposition of autonomous counter-terrorism sanctions against EU external targets unrelated to Al-Qaida and ISIL provides that designations shall be done

> on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.[17]

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[15] UN Security Council Resolution 2293 (2016) at para. 7. See already Security Council Resolution 1857 (2008) at para. 4. For its implementation in the EU see Council Decision 2010/788/CFSP as amended by Council Decision 2017/1340, at Art. 3(g). See also Security Council Resolution 2134 (2014) at para. 37(d) and EU Council Decision 2013/798/CFSP as amended by Council Decision 2017/412/CFSP, at Art. 2b(f) (Central African Republic).

[16] Council Decision 2013/255/CFSP as amended by Council Decision (CFSP) 2017/917, at Art. 28; see ECJ (GC), judgment of 21 April 2015 *(Anbouba v. Council of the European Union)*, C-630/113 P at paras. 43–51.

[17] EU Council Common Position 2001/931/CFSP at Art. 1(4).

The Court of Justice has specified that the decision to investigate or prosecute must

> form part of national proceedings seeking, directly and chiefly, the imposition on the person concerned of measures of a preventive or punitive nature, in connection with the combating of terrorism […] That requirement is not satisfied by a decision of a national judicial authority ruling only incidentally and indirectly on the possible involvement of the person concerned in such activity.[18]

The Court of Justice has confirmed that a designation under Council Common Position 2001/931 can also be based on proceedings in a third State.[19] The Court has furthermore ruled that, once designated on the basis of a national decision, the continuation of sanctions beyond an initial period of six months[20] can be based on additional information that has not been the subject of the national decision, provided that the national decision remains in force and does not contradict the assessment that the sanctioned individual or entity continues to be involved in terrorist activity.[21]

Beyond counter-terrorism, past or ongoing proceedings by a national authority will regularly also be a substantive requirement for EU sanctions regarding the misappropriation of state funds. EU Council Decision 2011/72/CFSP in view of the situation in Tunisia designates as targets

> persons responsible for misappropriation of Tunisian State funds, and natural or legal persons or entities associated with them.[22]

Even if the relevant Council decisions do not explicitly require past or ongoing judicial proceedings in the injured third State, it is clear from the purpose of those sanctions to safeguard a repatriation of stolen assets and from the jurisprudence of the Court of Justice that the imposition of sanctions requires that the targeted person has been found guilty of the misappropriation of state funds or of having been an associate in the commission of such crimes, or that credible steps are being taken by the judicial authorities of the third State to establish that the targeted person has indeed misappropriated funds, been an associate therein, or benefited thereof.[23] Such EU sanctions will therefore be inadmissible in particular

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[18] GC, judgment of 30 September 2009 (Sison II), T-341/07, at para. 111; see also GC, judgment of 16 October 2014 *(LTTE v. Council)*, T-208/11, at para. 114.

[19] ECJ (GC), judgment of 26 July 2017 *(Council v. LTTE)*, C-599/14 P, at para. 24. See also Council of the European Union, Working methods of the Working Party on restrictive measures to combat terrorism, Document 14612/1/16 REV 1 of 23 November 2016, Annex II, no. 3.

[20] See Art. 1 para. 6 of EU Council Common Position 2001/931/CFSP.

[21] ECJ (GC), judgment of 26 July 2017 *(Council v. LTTE)*, C-599/14 P, at para. 62; ECJ (GC), judgment of 26 July 2017 (Hamas), C-79/15 P, at para. 40.

[22] EU Council Decision 2011/72/CFSP as amended by Council Decision (CFSP) 2017/153 at Art. 1(1). See also EU Council Decision 2011/172/CFSP as amended by Council Decision (CFSP) 2017/496 at Art. 1(1) (Egypt); EU Council Decision 2014/119/CFSP as amended by Council Decision (CFSP) 2017/381 at Art. 1(1) (Ukraine).

[23] ECJ, judgment of 5 March 2015 *(Ezz and others v. Council)*, C-220/14 P at para. 72; GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at para. 67.

if national proceedings that aim to seek a repatriation of the assets in question are no longer ongoing, especially where they are precluded by statutes of limitation.[24]

Beyond the above-described requirements and due to the objectives pursued, the time that passes between the wrongdoing and the imposition of sanctions is of substantive relevance. Both UN and EU frameworks provide for a regular review of the designation of individuals and entities. The review can address new findings that may raise doubts about the facts underlying the initial designation, but it primarily aims to ensure that, in light of subsequent developments and the objectives pursued, the sanctioning of an individual or entity is still appropriate.[25] At the UN level, while UN sanctions are in principle open-ended, Sanctions Committees will, in addition to possible delisting requests, on their own initiative review their decision at certain intervals.[26] In this, the assessment of the (continuing) appropriateness seems to be guided by two primary, not necessarily cumulative, objectives: 'to hamper access to resources in order to impede, impair, isolate and incapacitate' a threat and 'to encourage a change of conduct' of those who are members of a targeted entity or associated with it.[27]

Autonomous EU sanctions go further in this regard. They require not only a review where relevant new information is brought to the attention of the EU Council, but their application is limited from the start to a period of six months[28] or one year,[29] depending on the particular sanctions regime. A continuation of sanctions beyond this period requires a new decision of the EU Council, based on a reassessment of whether the sanctions, in light of the objectives pursued, are still appropriate and proportionate.[30] Where subsequent events raise doubts on

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[24] See GC, judgment of 5 October 2017 *(Ben Ali v. Council)*, T-149/15, at para. 176; GC, judgment of 12 December 2018 *(Mubarak v. Council)*, T-358/17, at para. 116.

[25] GC, judgment of 20 July 2017 *(Badica and Kardiam v. Council)*, T-619/15, at para. 75; see also Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Approach to Analysis, Assessment and Use of information*, available at https://www.un.org/securitycouncil/ombudsperson/assessment-information#_ftn8, last accessed on 10 March 2019, at para. 4.2. ('Relevant factors for assessing disassociation' from ISIL and Al-Qaida) and para. 4.2.1 ('Change of state of mind, acceptance of responsibility, remorse, reconsideration and rejection of violent extremism').

[26] See for example Security Council Committee established pursuant to Resolution 2127 (2013) concerning the Central African Republic, *Guidelines of the Committee for the Conduct of its Work*, as revised and adopted by the Committee on 20 March 2017, at para. 9(a), providing for an annual review; Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida, and associated individuals, groups, undertakings and entities, *Guidelines of the Committee for the conduct of its work*, adopted on 7 November 2002, at para. 10(d), providing for a review at least in every three years.

[27] Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Approach and Standard*, available at https://www.un.org/securitycouncil/ombudsperson/approach-and-standard, accessed on 10 March 2019.

[28] Council Common Position of 27 December 2001 (Terrorism), at Art. 1 para. 6.

[29] Council Decision 2011/72/CFSP (Tunisia), at Art. 5; Council Decision 2011/172/CFSP (Egypt), at Art. 5; Council Decision 2014/119/CFSP (Ukraine), at Art. 5; Council Decision (CFSP) 2016/1693 (ISIL and Al-Qaida), at Art. 6.

[30] See GC, judgment of 18 September 2017 *(Uganda Commercial Impex v. Council)*, T-107/15, at paras. 123 and 125; GC, judgment of 27 September 2018 *(Ezz and others v. Council)*, T-288/15, at para. 130.

whether the sanctions are still appropriate, in particular whether the targeted individual or entity continues to pose a relevant risk, the EU Council will need to reassess the situation based on new findings. Accordingly, where an organization that had initially been designated as a terrorist organization incurs a military defeat by its main state adversary and was thereby significantly weakened, the EU Council could not base its decision to retain the designation of this organization solely on findings dating back ten years.[31] Similarly, regarding the designation of individuals as being associated with terrorism, the passing of sixteen years since the sanctioned wrongdoing does, even in the absence of information indicating a changed state of mind of the target, render this wrongdoing insufficient grounds for imposing sanctions.[32] In case of sanctions targeting the misappropriation of state funds, their imposition must cease more promptly, at the latest where judicial investigations in the respective third State have concluded that the targeted individual had no responsibility for the alleged misappropriation.[33] By contrast, the cessation of a company's business operations alone is insufficient to justify a lifting of sanctions, as this constitutes an intended consequence of the sanctioning.[34]

III. Procedures and Their Safeguards

A. Institutions and Actors

1. Investigating and deciding authorities

As regards the United Nations, the designation of targeted individuals and entities as well as the decision to withdraw sanctions is taken by a Sanctions Committee of the Security Council, which is composed for each sanctions regime of all the Security Council's Member States. This Sanctions Committee takes its decisions by consensus on the request of a UN Member State; if consensus cannot be reached, a matter may be referred to the Security Council.[35] For country-specific sanctions regimes, the respective Committee is regularly assisted by a Group of Experts that is tasked with monitoring the implementation of the sanctions regime and with collecting information and supporting evidence on individuals

[31] ECJ (GC), judgment of 26 July 2017 *(Council v. LTTE)*, C-599/14 P, at para. 55.

[32] See ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 156.

[33] GC, judgment of 5 October 2017 *(Ben Ali v. Council)*, T-149/15, at para. 113.

[34] GC, judgment of 18 September 2017 *(Uganda Commercial Impex v. Council)*, T-107/15, at para. 89.

[35] See notably Security Council Committee established pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo, *Guidelines of the Committee for the Conduct of its Work*, as adopted by the Committee on 6 August 2010, at paras. 2(e)(f) and 4; Security Council Committee established pursuant to Resolution 2127 (2013) concerning the Central African Republic, *Guidelines of the Committee for the Conduct of its Work*, as revised and adopted by the Committee on 20 March 2017, at para. 4; Security Council Committee pursuant to Resolutions 1267 (1999), 1989 (2011), and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida, and associated individuals, groups, undertakings and entities, *Guidelines of the Committee for the conduct of its work*, adopted on 7 November 2002, as last amended on 5 September 2018, at para. 4.

or entities fulfilling the respective designation criteria.[36] Designation requests by a UN Member State must be accompanied by a statement of case that forms the basis of a designation. This statement must contain specific findings that the designation criteria have been met, supporting evidence or documents, and specify the nature of the supporting evidence, which can originate notably from groups of experts, intelligence agencies, judicial authorities, or the media.[37]

Targeted sanctions of the EU are adopted under Articles 29 and 31 of the Treaty on European Union by consensus of all Member States. Designation proposals are submitted by the European External Action Service or an EU Member State.[38] Proposals should include individual and specific reasons, which can be amended by other Member States. Reasons for country-specific sanctions will be finalized by a special sanctions formation of the Council Working Party of Foreign Relations Counsellors and for counter-terrorism sanctions by the Council Working Party on Restrictive Measures to Combat Terrorism, which comprise experts from all Member States and which will then decide on the designation proposal to be put to a vote in the Council.[39]

2. *Control authorities and range of control*

Under the UN sanctions regimes, a designated individual or entity can submit a petition to request review of the case to the Sanctions Committee. The petition will be forwarded to the designating state, the state of nationality, and the state of residence for possible comments. Subsequently, if any of these states or any Member of the Sanctions Committee recommends delisting the petitioner, the Committee decides by consensus.[40] A more stringent review procedure applies within the UN Security Council's ISIL (Da'esh) and Al-Qaida Sanctions Committee. Here, an independent Ombudsperson reviews the delisting requests by designated individuals or entities. The Ombudsperson is tasked with personally interacting

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[36] See UN Security Council Resolution 1533 (2004) at para. 10(g); Security Council Committee established pursuant to Resolution 1533 (2004), *Guidelines of the Committee for the Conduct of its Work*, at para. 2; Security Council Resolution 2399 (2018) at para. 32(f); Security Council Committee established pursuant to Resolution 2127 (2013), *Guidelines of the Committee for the Conduct of its Work*, at para. 6. For the Monitoring Team of the ISIL (Da'esh) and Al-Qaida Sanctions Committee, see Security Council Resolution 2368 (2017).

[37] Security Council Committee established pursuant to Resolution 1533 (2004), *Guidelines of the Committee for the Conduct of its Work*, at para. 5(c); Security Council Committee established pursuant to Resolution 2127 (2013), *Guidelines of the Committee for the Conduct of its Work*, at para. 6; Security Council Committee pursuant to Resolutions 1267 (1999), 1989 (2011), and 2253 (2015), *Guidelines of the Committee for the conduct of its work*, at para. 6(h).

[38] Council of the European Union, *Sanctions Guidelines*, as approved on 8 December 2003 and last updated on 4 May 2018, Annex 1, at para. 1.

[39] Council of the European Union, *Sanctions Guidelines*, as approved on 8 December 2003 and last updated on 4 May 2018, Annex 1, at paras. 9 and 14; Council of the European Union, *Working methods of the Working Party on restrictive measures to combat terrorism*, Document 14612/1/16 REV 1 of 23 November 2016, Annex II.

[40] Security Council Committee established pursuant to Resolution 1533 (2004), *Guidelines of the Committee for the Conduct of its Work*, at para. 7; Security Council Committee established pursuant to Resolution 2127 (2013), *Guidelines of the Committee for the Conduct of its Work*, at para. 6.

with the petitioner, relevant states, and organizations in order to provide an independent review of the merits of a petitioner's designation. Following a review of the evidence disclosed to the Ombudsperson by the designating state, he or she makes a recommendation to the Sanctions Committee. In cases where the Ombudsperson recommends a delisting, the petitioner will be delisted unless the Sanctions Committee decides, by consensus, to retain the listing.[41]

Under the EU regimes, requests for delisting by designated individuals and entities can be submitted to the Council Secretariat and will be assessed by the sanctions formation of the Council Working Party of Foreign Relations Counsellors following a preliminary analysis of the request by the European External Action Service and the Council Legal Service[42] or, for counter-terrorism sanctions, by the Council Working Party on Restrictive Measures to Combat Terrorism.[43] In addition, the relevant Council decisions setting forth the substantive and procedural requirements of autonomous EU sanctions provide for a regular review of the designation independently of any delisting request. As part of the preparation of the review, the Working Party of Foreign Relations Counsellors shall ask the state that proposed the designation; in addition, all other Member States should be asked whether they have additional relevant information.[44] In the same vein, the Working Party on Restrictive Measures to Combat Terrorism will base its review on any relevant information in particular on new facts and developments provided by Member States and the European External Action Service.[45]

Targeted sanctions of the European Union are furthermore subject to review by the EU Courts, irrespective of whether these sanctions are implementing UN sanctions or constitute autonomous European sanctions. The Courts must ensure in particular, on the one hand, 'whether the obligation to state reasons laid down in Article 296 TFEU has been complied with', that is, 'whether the reasons relied on are sufficiently detailed and specific', and, on the other hand, 'whether those reasons are substantiated'.[46] Furthermore, the Courts 'must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable

[41] UN Security Council Resolution 2368 (2017), Annex 2, in particular at paras. 7 and 15.

[42] Council of the European Union, *Sanctions Guidelines*, as approved on 8 December 2003 and last updated on 8 December 2018, Annex 1, at paras. 18 and 20.

[43] Council of the European Union, *Working methods of the Working Party on restrictive measures to combat terrorism*, Document 14612/1/16 REV 1 of 23 November 2016, Annex II, at para. 24.

[44] Council of the European Union, *EU Best Practices for the effective implementation of restrictive measures*, as updated on 4 May 2018, at paras. 19–20.

[45] Council of the European Union, *Working methods of the Working Party on restrictive measures to combat terrorism*, Document 14612/1/16 REV 1 of 23 November 2016, Annex II, at para. 22.

[46] ECJ (GC), judgment of 26 July 2017 *(Council v. LTTE)*, C-599/14 P, at para. 70; ECJ (GC), judgment of 26 July 2017 (Hamas), C-79/15 P, at para. 48; see also ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 118.

of substantiating the conclusions drawn from it'.[47] The Council enjoys no margin of appreciation in establishing matters of law and of fact that are preconditions for the imposition of sanctions, but it has 'broad discretion as to what matters to take into consideration for the purpose of adopting economic and financial sanctions' as part of the Common Foreign and Security Policy. This discretion concerns 'in particular the assessment of the considerations of appropriateness on which such decisions are based';[48] here, the Courts must not substitute their own assessment for that of the Council.[49] In this respect, the legality of a sanction can be affected only if it is 'manifestly inappropriate' in view of the objective pursued by the Council.[50]

B. Investigative Powers and Duties to Cooperate

1. Investigative powers

Under the UN framework, a Sanctions Committee can seek information from relevant states and other UN organs, in particular from regional UN missions, not least, where relevant, regarding the financing of armed groups. In this respect, the investigation of cases is primarily a matter of Member States and their respective national laws, without the UN sanctions regimes imposing particular restrictions on evidence to be admissible before the competent Sanctions Committee. Where a Sanctions Committee is assisted by a Group of Experts, evidence can also be gathered by these panels, who are independent and non-judicial bodies. A Group of Experts by itself does not have subpoena powers[51] but can conduct on-site visits, directly approach individuals or entities suspected of sanctions violations, as well as witnesses, and request information from relevant national authorities. States must ensure cooperation with the Group of Experts by individuals and entities within their jurisdiction or under their control and unhindered and immediate access, in particular to persons, documents, and sites that the Group of Experts deems relevant for its mandate.[52]

As regards the EU sanctions framework, the EU Council and in particular its Working Party of Foreign Relations Counsellors will rely on information from the European External

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[47] GC, judgment of 4 December 2008 (PMOI II), T-284/08, at para. 55; GC, judgment of 30 September 2009 (Sison II), T-341/07, at para. 98; GC, judgment of 16 October 2014 *(LTTE v. Council)*, T-208/11, at para. 163.

[48] GC, judgment of 23 November 2011 (Sison III), T-341/07, at paras. 54 and 57.

[49] GC, judgment of 30 September 2009 (Sison II), T-341/07, at para. 98.

[50] ECJ, judgment of 28 November 2013 *(Council v. Manufacturing Support & Procurement Kala Naft)*, C-348/12 P, at para. 120.

[51] Report of the Informal Working Group of the Security Council on General Issues of Sanctions, UN Doc. S/2006/997, at para. 19.

[52] See UN Security Council Resolution 2360 (2017) at para. 7; UN Security Council Resolution 2399 (2018) at para. 38; UN Security Council Resolution 2441 (2018) at para. 17; for the lesser investigative role of the Monitoring Team of the ISIL (Da'esh) and Al-Qaida Sanctions Committee, see Security Council Resolution 2368 (2017), Annex 1 (v), that tasks the Monitoring Team '[t]o consult, in confidence, with Member States' intelligence and security services, including through regional forums, in order to facilitate the sharing of information'.

Action Service and EU Member States to identify targets and supporting evidence. The Working Party might also request additional information from the Council's regional working party in charge of the country subject to sanctions.[53] The Working Party of Foreign Relations Counsellors' best practice furthermore stresses the need for an information exchange of Member States in particular with the European External Action Service, Europol, and the UN Sanctions Committees.[54] As regards the EU's counter-terrorism sanctions, Council decisions will first be prepared by the Council Working Party on Restrictive Measures to Combat Terrorism, which will rely on information from EU Member States and, where the designation proposal is made on the basis of a decision of a competent authority of a third State, from the European External Action Service. The Council Working Party may invite to its meetings representatives from competent bodies, notably Europol, Eurojust, and the EU Intelligence Analysis Centre, for contributions to a particular subject.[55] The Court of Justice, however, has ruled that, in the absence of any specific legislation to this effect, the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on European Union alone does not permit the Council to require the competent authorities of Member States to conduct particular investigations to assist the Council.[56]

2. *Duties to cooperate and right against self-incrimination*

Neither the UN nor the EU sanctions regimes contain a duty on targeted persons and entities to cooperate with the supranational authorities, let alone a duty to incriminate oneself. However, it is clear from the design of the review mechanisms and from the distribution of the burden of proof that the targeted individual or entity will, in principle, be expected to contribute to the fact-finding. A failure by the target to present exonerating evidence will effectively be taken as an additional indication that an accusation is well founded.[57] There is also no rule that would prohibit using as evidence incriminating statements of the targeted person against herself.[58] The Ombudsperson of the UN Security Council's ISIL and Al-Qaida Sanctions Committee, however, does treat as inadmissible information obtained through torture or inhuman or degrading treatment. Information is excluded as supporting evidence of a UN Security Council designation under the ISIL and Al-Qaida sanctions regime if 'there is sufficient information to provide a reasonable and credible basis for the allegation of torture;' the same standard seems to apply to information allegedly obtained through

[53] Council of the European Union, *Sanctions Guidelines*, as approved on 8 December 2003 and last updated on 4 May 2018, Annex 1, at paras. 8–9.

[54] Council of the European Union, *EU Best Practices for the effective implementation of restrictive measures*, as updated on 4 May 2018, at para. 90.

[55] Council of the European Union, *Working methods of the Working Party on restrictive measures to combat terrorism*, Document 14612/1/16 REV 1 of 23 November 2016, Annex II, para. 12.

[56] See ECJ (GC), judgment of 26 July 2017 *(Council v. LTTE)*, C-599/14 P, at para. 66.

[57] See GC, judgment of 18 September 2017 *(Uganda Commercial Impex v. Council)*, T-107/15, at para. 62.

[58] See GC, judgment of 21 July 2016 *(Bredenkamp and others v. Council)*, T-66/14, at para. 73.

inhuman or degrading treatment.[59] Similarly, as regards sanctions imposed by the European Union autonomously or in transposition of UN sanctions, statements of the suspect obtained by torture or inhuman or degrading treatment will be inadmissible in light of Article 47 of the Charter of Fundamental Rights, if such origin has been established beyond reasonable doubt. This standard may also be reached by 'the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'.[60]

C. General Procedural Safeguards

1. Safeguards of the UN framework

Unlike the existing safeguards in the framework of EU sanctions that were primarily developed by the jurisprudence of the EU Courts, there is still largely no system of safeguards at the UN level. The Office of the Ombudsperson of the Security Council's ISIL (Da'esh) and Al-Qaida Sanctions Committee is a notable exception in this regard, though similar review mechanisms do not yet exist for the Security Council's other sanctions regimes. Furthermore, even if the Ombudsperson process has adopted some adversarial elements, its procedural safeguards are much more limited than those provided in the EU legal order.

As regards the evidentiary threshold applied by the respective Sanctions Committees to designate individuals and entities, the applicable standard remains barely defined, except for the ISIL and Al-Qaida Sanctions regime. Here, a designation requires merely a 'reasonable basis' that the target has been or is involved in conduct satisfying the Security Council's designation criteria. This standard is understood to be significantly less demanding than an evidentiary standard commonly used in national criminal proceedings to determine guilt.[61] However, due to the largely confidential nature of deliberations of the Sanctions Committees and of the reports of the Ombudsperson,[62] the exact meaning of this standard remains unclear. The broad nature of admissible evidence (including intelligence and media reports) in the review process before the Ombudsperson might offer some indications as to the prior decision-making of the Sanctions Committee. UN Member States are encouraged by the Security Council to share all relevant information, including confidential information, with the Ombudsperson.[63] In any case, the Ombudsperson 'must comply with any confidentiality restrictions placed upon such information' by the disclosing

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[59] Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Approach to Analysis, Assessment and Use of information*, at para. 2.2., available at https://www.un.org/securitycouncil/ombudsperson/assessment-information#_ftn8, last accessed on 10 March 2019.

[60] See ECtHR, judgment of 3 June 2010 *(Gäfgen v. Germany)*, App. no. 22978/05, at paras. 92, 173, 176; ECJ, judgment of 3 September 2008 (Kadi), C-402/05 P, at para. 285.

[61] See UN Security Council Resolution 2253 (2015) at para. 44; Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Approach and Standard*, available at https://www.un.org/securitycouncil/ombudsperson/approach-and-standard, accessed on 10 March 2019.

[62] See UN Security Council Resolution 2368 (2017) at paras. 13(c) and 18.

[63] UN Security Council Resolution 2253 (2015) at para. 60.

State.[64] The procedural standards of the Ombudsperson accept that a 'significant part' of information taken into account in the review process merely consists of 'statements or summaries by States of the relevant information they possess', without the Ombudsperson being 'aware of the origins of the information gathered and even less so of its source'. The same standards specify that information will be insufficient as a basis for upholding a retention of sanctions if this information 'consists of very broadly framed statements, without details, particulars or supporting material or information' in particular where the targeted person 'disputes the information and his or her denials are supported by credible information and explanations'.[65]

As regards the position of targeted individuals or entities in the UN sanctions process, they are usually neither heard by the Sanctions Committee nor otherwise involved in the process prior to the imposition of sanctions. An exception to this rule does, however, exist where, for country-specific sanctions, a designation by a Sanctions Committee is based on recommendations by a Group of Experts. Groups of Experts, in their function as investigative organ to identify and recommend potential targets to the Sanctions Committees, are encouraged as best practice and to the extent that this is 'appropriate' in light of the respective material, 'to make available to suspected individuals and entities any evidence of wrongdoing for their review, comment and response'.[66] Thereby, Groups of Experts provide suspects with an opportunity to be heard prior to the adoption of sanctions at least as regards the main incriminating evidence. However, Groups of Experts are under no obligation to provide suspects or targeted individuals or entities with comprehensive access to the file.[67] Only after the adoption of sanctions, the respective Sanctions Committee will publish, on its website, a 'narrative summary of reasons' with 'relevant publicly releasable information'. The narrative summary contains a brief explanation with 'specific information' demonstrating that the target meets the designation criteria, in particular 'information about any acts or activities' to this effect. This information will usually be limited to a description of the general context and nature of relevant conduct without necessarily providing details about its exact time and place or the names of accomplices and victims. The State where the target is believed to be located and, in case of a targeted individual, the State of nationality, are required to take measures to notify the target of this

[64] Security Council Committee pursuant to Resolutions 1267 (1999), 1989 (2011), and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida, and associated individuals, groups, undertakings and entities, *Guidelines of the Committee for the conduct of its work*, adopted on 7 November 2002, as last amended on 5 September 2018, at para. 6(z)(aa).

[65] Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Approach to Analysis, Assessment and Use of information*, at para. 2, available at https://www.un.org/securitycouncil/ombudsperson/assessment-information#_ftn8, last accessed on 10 March 2019.

[66] Report of the Informal Working Group of the Security Council on General Issues of Sanctions, UN Doc. S/2006/997, at para. 28.

[67] See GC, judgment of 20 July 2017 *(Badica and Kardiam v. Council)*, T-619/15, at para. 95; GC, judgment of 18 September 2017 *(Uganda Commercial Impex v. Council)*, T-107/15, at para. 115.

information, together with information about the UN process for delisting requests and about available exemptions.[68]

For the implementation of UN sanctions by the EU Council as part of the CFSP, the Court of Justice has underlined that implementing measures of the EU are subject to review by the EU judicature, due to the lack of sufficient procedural safeguards at the UN level. These deficits of the UN process involve in particular the right to be heard and the right to an effective judicial review.[69] The deficits continue to apply even in respect of the UN's ISIL and Al-Qaida sanctions regime, as, in the eyes of the Court, the creation of the Office of the Ombudsperson has so far not fundamentally improved the procedural status of the targeted individual or entity.[70] Insofar, the procedural standards of the EU legal order described in the following subsections are applicable to both the implementation of UN sanctions and to the imposition of autonomous EU sanctions.

2. *Proof of claim*

While the EU Courts do in principle provide a full review of the legality of sanctions, including of the evidence relied on by the Council, it is important to note that the taking of evidence follows a nuanced distribution of the burden of proof, allowing in particular for the Council to rely on rebuttable presumptions. The Court of Justice has pointed to the 'difficulty' that the Council faces 'in obtaining evidence in a State at civil war and having an authoritarian regime'. Under such circumstances, 'the Council discharges the burden of proof borne by it if it presents to the Courts of the European Union a set of *indicia sufficiently specific, precise and consistent* to establish that there is a sufficient link between the person subject to measure freezing his funds and the regime being combatted.'[71] It has therefore been held that an important position in the economic life of a country under authoritarian rule, in particular by having important positions in major domestic companies and in a chamber of commerce, and close relations with a member of the family of the authoritarian ruler, can constitute a set of *indicia* sufficient to establish that the targeted person provided economic support for the political regime. Where the Council can establish such *indicia*, it is incumbent upon the targeted person to rebut this conclusion by demonstrating that he or

[68] Security Council Committee established pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo, *Guidelines of the Committee for the Conduct of its Work*, as adopted by the Committee on 6 August 2010, at paras. 5(g)(h) and 6(e); Security Council Committee established pursuant to Resolution 2127 (2013) concerning the Central African Republic, *Guidelines of the Committee for the Conduct of its Work*, as revised and adopted by the Committee on 20 March 2017, at para. 6(j)(k); Security Council Committee pursuant to Resolutions 1267 (1999), 1989 (2011), and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida, and associated individuals, groups, undertakings and entities, *Guidelines of the Committee for the conduct of its work*, adopted on 7 November 2002, as last amended on 5 September 2018, at paras. 6(q), (t)-(v), 9(d).

[69] ECJ (GC), judgment of 3 September 2008 (Kadi and Al Barakaat), C-402/05 and C-415/05, at paras. 302–326.

[70] ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 133.

[71] ECJ (GC), judgment of 21 April 2015 *(Anbouba v. Council)*, C-630/13 P, at paras. 47 and 53 (emphasis added) regarding Council Decision 2011/273 (Syria).

she did not provide such economic support.[72] Similar evidentiary standards apply where a country being under an authoritarian regime, while not at civil war, is subjected to a 'policy of violence and large-scale intimidation directed against the population of this country'.[73]

As regards the Council's burden of proof to establish sufficient *indicia*, it is furthermore crucial to understand that such *indicia* can be based on various forms of evidence, including, at least if complemented by additional and more reliable sources, press articles and publications by research institutions.[74] In this context, reports by the UN Security Council's Groups of Experts that are tasked with monitoring country-specific sanctions regimes are of particular relevance. Where the EU Council imposes sanctions against individuals or entities that have already been designated by the UN Security Council, it can rely on the information provided by the UN, in particular on the reports of Groups of Experts. In this respect, it is immaterial that reports by such Groups of Experts are to a large extent based on testimony of anonymous witnesses or hearsay evidence.[75] Groups of Experts are, however, encouraged 'to ensure the veracity of information gained in confidence against independent and verifiable sources', in particular by inviting comments from the suspect.[76]

The standards of proof for EU sanctions implementing UN counter-terrorism sanctions against ISIL and Al-Qaida are similar to the abovementioned standards for country-specific sanctions. In fact, the Court of Justice has accepted that, in order to prove support for a terrorist organization, it is not necessary for the EU Council to establish particular acts with a level of detail akin to a criminal indictment. Rather, notably, it suffices for the Council to produce evidence that the targeted person was having an important function in an organization and that this organization was supporting terrorism or that the targeted person had provided assistance to organizations or individuals known to the targeted person to support terrorism.[77]

In EU sanctions regimes that rely on past or ongoing national proceedings against the targeted individual or entity, the extent of the burden of proof varies. For EU counter-terrorism sanctions against targets unrelated to ISIL or Al-Qaida, the evidentiary standards reflect the fact that those sanctions are autonomous supranational preventive measures that 'do not seek to accompany or support national criminal law procedures'. In the absence of the Council having its own investigative organs, reliance on national proceedings is meant to protect the persons concerned by ensuring a sufficiently solid factual basis for their

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[72] ECJ (GC), judgment of 21 April 2015 *(Anbouba v. Council)*, C-630/13 P, at paras. 49–55.

[73] GC, judgment of 21 July 2016 *(Bredenkamp and others v. Council)*, T-66/14, at para. 72 regarding Council Common Position 2004/161 (Zimbabwe).

[74] See GC, judgment of 21 July 2016 *(Bredenkamp and others v. Council)*, T-66/14, at paras. 82–87.

[75] GC, judgment of 18 September 2017 *(Uganda Commercial Impex v. Council)*, T-107/15, at paras. 62–63. See for instance UN Security Council, Final report of the Group of Experts on the Democratic Republic of the Congo of 4 June 2018, S/2018/531.

[76] Report of the Informal Working Group of the Security Council on General Issues of Sanctions, UN Doc. S/2006/997, at paras. 28 and 24.

[77] See ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at paras. 151–163.

designation.[78] Accordingly, the standard of proof of this particular sanctions regime is focused primarily on the evidence produced by the national authorities and only accessorily on the progress of the national proceedings. The Council must, at the moment of a target's initial designation, produce 'precise information or material' from the file of the competent national authority that shows that the target has been or is investigated or prosecuted for involvement in terrorism on the basis of 'serious and credible evidence or clues'.[79] This substantive standard does, in principle, only require that the Council present to the EU Courts the content of the national file to allow the Courts to assess whether the relevant evidence or intelligence is sufficiently serious and credible to justify the imposition of a preventive freezing of assets.[80] The targeted individuals or entities can, however, 'dispute all the material relied on by the Council to demonstrate that the risk of their involvement in terrorist activities is ongoing'. In the event of such a challenge and provided that the target's submissions are suited to undermine the Council's assessment, the Council will need to produce additional evidence to establish that the allegations are well founded and that the national decision is in fact based on sufficiently serious and credible evidence or intelligence.[81] In their assessment of the credibility of the evidence presented by the Council, the EU Courts will, however, be entitled to rely largely on the assessment of this evidence by the national authorities of an EU Member State, without the EU Courts themselves having access to all underlying evidence produced at the national level.[82] A lesser degree of trust is put into evidence originating from the investigation of a third State. Here the Council must, in addition, establish that the 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' and that there is no 'evidence showing that the third State in practice fails to apply that legislation.'[83]

In contrast, EU sanctions regimes targeting the misappropriation of state funds have the purpose to support national proceedings that aim to recover stolen funds. Hence the standard of proof of those regimes reflects primarily a concern for progress of the national proceedings and only accessorily for the evidence produced in these proceedings. The Council therefore only needs to establish that relevant proceedings against the targeted person at the national level are ongoing.[84] It is not necessary that the Council produce details as regards the alleged crimes of misappropriation being investigated by the national authorities, such as the precise dates of the suspected offences or the quantum of assets.[85]

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78 ECJ, judgment of 15 November 2012 (Al-Aqsa II), C-539/10, at paras. 67–69.

79 EU Council Common Position 2001/931/CFSP at Art. 1(4).

80 See GC, judgment of 23 November 2011 (Sison III)), T-341/07, at para. 57.

81 See ECJ (GC), judgment of 26 July 2017 *(Council v. LTTE)*, C-599/14 P, at paras. 71 and 78–79; ECJ (GC), judgment of 26 July 2017 (Hamas), C-79/15 P, at para. 49.

82 See ECJ, judgment of 15 November 2012 (Al-Aqsa II), C-539/10, at para. 74.

83 GC, judgment of 16 October 2014 *(LTTE v. Council)*, T-208/11, at para. 139.

84 GC, judgment of 27 September 2018 *(Ezz and others v. Council)*, T-288/15, at para. 65.

85 GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at paras. 146–149; GC, judgment of 5 October 2017 *(Ben Ali v. Council)*, T-149/15, at paras. 133–135.

According to the General Court, 'it is not, in principle, for the Council itself to examine and assess the accuracy and relevance of the evidence on which those authorities have relied.'[86] However, in the event that the targeted person submits exonerating evidence, the Council may, depending on the substance of those submissions, be required to request additional evidence from the national authorities in order to assess whether he or she can be deemed responsible for a misappropriation of state funds. Such submissions can include notably evidence that statements made by the national authorities to the Council are inaccurate or evidence on procedural irregularities within the national proceedings, provided, in each case, that these deficiencies could have a material effect on the outcome of the national proceedings.[87]

3. *Access to the file*

According to the jurisprudence of the Court of Justice, which thereby makes reference to Article 41 para. 2 of the Charta of Fundamental Rights, respect for the rights of defense of an individual or entity subjected to targeted sanctions must be ensured in the process of adopting both autonomous European sanctions[88] and European sanctions that aim to implement UN sanctions.[89] This includes the right of access to the file. However, such access must only be provided if the targeted individual or entity requests so; thus, the Council is not required to provide the target with incriminating evidence spontaneously.[90]

The EU Courts also admit that the right to access the file is subject to legitimate interests in maintaining confidentiality.[91] Such legitimate interest can result from overriding considerations to do with state security or overriding considerations to do with the international relations of the European Union and of its Member States.[92] This applies especially to the identity or content of particular pieces of incriminating evidence but may go well beyond it. In fact, for the adoption of autonomous counter-terrorism sanctions by the EU Council that are based on a decision of a national authority, legitimate confidentiality claims can also extend to the content or the grounds for that decision, or even the identity of

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[86] GC, judgment of 5 October 2017 *(Ben Ali v. Council)*, T-149/15, at para. 140; see also ECJ, judgment of 5 March 2015 *(Ezz and others v. Council)*, C-220/14 P, at para. 77.

[87] See ECJ, judgment of 19 October 2017 *(Yanukovych v. Council)*, C-598/16 P, at para. 75; GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at para. 153; GC, judgment of 5 October 2017 *(Ben Ali v. Council)*, T-149/15, at para. 148–151; GC, judgment of 27 September 2018 *(Ezz and others v. Council)*, T-288/15, at paras. 67 and 91–102.

[88] ECJ, judgment of 2 December 2011 (PMOI II), C-27/09, at paras. 64–66.

[89] ECJ (GC), judgment of 3 September 2008 (Kadi and Al Barakaat), C-402/05 and C-415/05, at para. 326.

[90] ECJ, judgment of 31 January 2019 *(Islamic Republic of Iran Shipping Lines and others v. Council)*, C-225/17 P, at para. 89; GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at para. 161.

[91] ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 99; GC, judgment of 28 October 2015 (Al-Faqih II), T-134/11, at para. 59.

[92] ECJ (GC), judgment of 3 September 2008 (Kadi and Al Barakaat), C-402/05 and C-415/05, at para. 342; GC, judgment of 12 December 2006 (OMPI), T-228/02, at para. 133; GC, judgment of 11 July 2007 (Sison), T-47/03, at para. 180.

the national authority that took it. Exceptionally, confidentiality can even prevent the identification of the Member State or third country whose authority took the decision if such disclosure could jeopardize public security.[93]

4. Right to be heard and oral hearing

The rights to be informed of the grounds for the imposition of sanctions and to an oral hearing are recognized by the EU Courts under Article 41(2) of the Charter of Fundamental Rights and Article 296 TFEU for both autonomous EU sanctions and EU sanctions that aim to implement UN sanctions. The targeted individual or entity must be informed of the evidence adduced to justify the sanction and must be afforded the opportunity effectively to comment on that evidence.[94] The Council must, in principle, communicate its decision to impose sanctions together with the grounds individually, though an omission to this effect will not affect the validity of the decision 'when such a failure did not have the effect of depriving the person or entity concerned of an opportunity of knowing, in good time, the reasons for that act or of assessing its validity'.[95] Furthermore, the Council is under an obligation to conduct an oral hearing only when the targeted individual or entity asks for it.[96]

As regards the scope of the right to be informed, the EU Courts require the Council to provide not only the legal basis of the decision but also 'the actual and specific reasons' for the freezing of funds.[97] These reasons must be sufficiently detailed to enable the targeted individual or entity to challenge their correctness in the EU Courts.[98] However, the statement of reasons does not require a detailed description of the relevant facts. It must only be sufficiently specific to enable the target, in light of the circumstances in which it was adopted and known to him or her, to understand the scope of the measure.[99] Such circumstances can notably consist of national proceedings against the targeted person for offences underlying the EU sanctions or previous contact of the targeted person with a UN Group of Experts investigating the same matter.[100] It then suffices that the statement of reasons includes the nature of the wrongdoing, without the need for specifying the place and date of the conduct

[93] GC, judgment of 12 December 2006 (OMPI), T-228/02, at para. 136; GC, judgment of 11 July 2007 (Sison), T-47/03, at para. 183.

[94] ECJ (GC), judgment of 3 September 2008 (Kadi and Al Barakaat), C-402/05 and C-415/05, at para. 336; GC, judgment of 12 December 2006 (OMPI), T-228/02, at para. 93.

[95] ECJ (GC), judgment of 16 November 2011 *(Bank Melli v. Council)*, C-548/09 P, at paras. 52 and 55; GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at para. 181.

[96] ECJ (GC), judgment of 3 September 2008 (Kadi and Al Barakaat), C-402/05 and C-415/05, at para. 341; GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at para. 183.

[97] GC, judgment of 23 October 2008 (PMOI I), T-256/07, at para. 81; see GC, judgment of 16 October 2014 *(LTTE v. Council)*, T-208/11, at para. 162.

[98] GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at para. 114.

[99] GC, judgment of 5 October 2017 *(Ben Ali v. Council of the European Union)*, T-149/15, at para. 91.

[100] See GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at para. 114; GC, judgment of 18 September 2017 *(Uganda Commercial Impex v. Council)*, T-107/15, at para. 115; GC, judgment of 5 October 2017 *(Ben Ali v. Council of the European Union)*, T-149/15, at para. 94.

or the names of accomplices.[101] Even in the absence of such explanatory circumstances, the Court of Justice has accepted, in the context of EU sanctions implementing UN counter-terrorism sanctions, that the Council's statement of reasons could be limited to a brief description of the targeted person's link to a specific terrorist organization or to specific terrorists. The Council must then briefly specify why the respective organization or individuals are suspected of having a link with terrorism. There is, however, no need to specify in the statement of reasons particular acts carried out by the target within the terrorist organization or the exact time and place of the targeted person's contact with individual terrorists.[102] According to the Court, such information enables the targeted individual or entity effectively to challenge the Council's decision by disputing the truth of the underlying claims.[103] In this case, it is then for the Council to establish the relevant facts in line with the above-mentioned distribution of the burden of proof.

In the context of the EU's counter-terrorism sanctions and sanctions targeting the misappropriation of state funds, where the Council bases the imposition of sanctions on national proceedings by a third State, the Council must furthermore briefly explain in the statement of reasons why, in its view, the national proceedings respected the rights of the defence and the right to effective judicial protection.[104]

Limitations to the rights to be informed and to a hearing can, however, be justified. In order not to jeopardize the effectiveness of sanctions and especially to enable a surprise effect of the freezing of assets, the Council is not required to communicate the grounds for the imposition of sanctions or to provide the opportunity for a hearing.[105] The targets have then to be notified of the grounds and afforded the right to be heard at least immediately after sanctions are adopted.[106] This exception to a prior communication of grounds and a prior hearing do not apply to the decision to review whether sanctions against a particular target continue to be justified, as in this case it is no longer necessary to ensure a surprise effect. A decision to retain sanctions against a particular target must therefore be preceded by the notification of new incriminating evidence and the possibility of a hearing.[107] Those rights

[101] See GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at paras. 86 and 114; GC, judgment of 18 September 2017 *(Uganda Commercial Impex v. Council)*, T-107/15, at para. 117; GC, judgment of 5 October 2017 *(Ben Ali v. Council of the European Union)*, T-149/15, at para. 97.

[102] See ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at paras. 28 and 140–141.

[103] ECJ, judgment of 15 November 2012 *(Council v. Bamba)*, C 417/11 P, at para. 59.

[104] GC, judgment of 16 October 2014 *(LTTE v. Council)*, T-208/11, at para. 33; ECJ, judgment of 19 December 2018 *(Azarov v. Council)*, C-530/17 P, at para. 30.

[105] See ECJ (GC), judgment of 21 December 2011 (PMOI II), C-27/09, at para. 61; see ECJ (GC), judgment of 3 September 2008 (Kadi and Al Barakaat), C-402/05 and C-415/05, at para. 338.

[106] ECJ (GC), judgment of 21 December 2011 (PMOI II), C-27/09, at para. 61.

[107] ECJ (GC), judgment of 21 December 2011 (PMOI II), C-27/09, at para. 62; ECJ, judgment of 28 July 2016 *(Tomana and others v. Council)*, C-330/15 P, at paras. 66–67.

do, however, not arise where the Council, to justify its decision, relies on essentially the same evidence as in previous decisions.[108]

5. Secret evidence

As already said above, overriding considerations to do with state security or the conduct of the international relations of the EU and of its Member States can justify the non-disclosure of some incriminating evidence to the targeted individual or entity. For autonomous EU sanctions, the Council is, however, not entitled to base its decision to impose sanctions on evidence in the file communicated by a Member State, if the Member State is not willing to authorize the communication of this evidence to the EU Courts within proceedings to review the lawfulness of the Council's decision.[109] Somewhat different rules apply for EU sanctions that aim to implement UN sanctions, as here the Council will before the adoption of the implementing sanctions usually not be in possession of supporting evidence of the respective UN Sanctions Committee.[110] Hence, the Council will be required to assess the UN's supporting evidence only after the targeted individual or entity requests a review of the Council's decision. In the event of a challenge of that decision before the EU Courts, the Council is not under an obligation to submit all the evidence provided to the Council by the respective UN Sanctions Committee. For the Council's decision to be upheld, it is, however, necessary that the evidence disclosed by the Council in the proceedings before the EU Courts by themselves support the grounds of this decision. If the Council is unwilling or unable to comply with a request by the Courts to produce certain evidence to support a factual claim, namely because the UN Sanctions Committee or the designating UN Member State do not consent to its disclosure to the EU Courts, the Courts will disregard this factual claim when deciding the case.[111]

If the Council is willing and able to disclose confidential evidence to them, the EU Courts must apply 'techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process'.[112] Article 105 of the Rules of Procedure of the General Court now provide for such techniques, in particular by specifying that the General Court must first decide on whether the material in question does indeed merit to be treated

[108] ECJ, judgment of 31 January 2019 *(Islamic Republic of Iran Shipping Lines and others v. Council)*, C-225/17 P, at paras. 90–91; ECJ, judgment of 18 June 2015 *(Ipatau v. Council)*, C-535/14 , at paras. 26–27; GC, judgment of 27 September 2018 *(Ezz and others v. Council)*, T-288/15, at paras. 313 and 337.

[109] GC, judgment of 4 December 2008 (PMOI II), T-284/08, at para. 73; see GC, judgment of 30 September 2010 (Kadi II), T-85/09, at para. 145.

[110] See ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 107.

[111] ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at paras. 122–123.

[112] ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 125; see also ECJ (GC), judgment of 3 September 2008 (Kadi and Al Barakaat), C-402/05 and C-415/05, at para. 344.

as confidential. To the extent that the material is found to be relevant for deciding the case but no overriding reasons justify the confidential treatment, the General Court asks the party concerned to authorize the communication of that material to the other party. If the first party objects to such communication, that information or material will not be taken into account by the General Court in deciding the case.[113] By contrast, if, in the eyes of the General Court, the confidential treatment is justified and to the extent that the material is relevant for deciding the case, the Court must then provide for measures to strike a fair balance between the conflicting interests. Specifically, the General Court may request the Council to produce 'a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof and enabling the other main party, to the greatest extent possible, to make its views known'.[114]

To assess whether the targeted individual or entity was given a fair hearing despite the use of undisclosed evidence, the General Court, by analogy, refers to the standards developed by the European Court of Human Rights (ECtHR) in the context of Article 5 para. 4 ECHR. According to the General Court's reading of ECtHR jurisprudence, one could justify certain exceptions to the general rule that all incriminating evidence used against the suspect had in principle to be disclosed to him or her. However, an opportunity effectively to challenge the allegations was lacking 'in cases in which the disclosed (open) material had consisted purely in general as assertions', and the decision was based 'solely or to a decisive degree' on undisclosed material.[115] However, as the Court of Justice has indicated, reference to Article 5 para. 4 ECHR in the context of EU targeted sanctions might be potentially misleading, as the level of specificity of the allegations required for the imposition of such sanctions and thus the applicable evidentiary standards are much less demanding than those required for criminal charges.[116] In any case, according to the Court of Justice, the EU Courts must 'assess whether and to what the extent the failure to disclose confidential information or evidence to the person concerned' and the resulting inability to comment on such material 'affect the probative value of the confidential evidence'.[117]

D. Discretion to Impose Sanctions

The imposition of sanctions is discretionary in nature, both at the UN and EU level. At the UN Security Council, the standards guiding the exercise of the Sanctions Committees' power seem so far little developed, and the practice of the UN Sanctions Committees

[113] Art. 105 para. 4 of the Rules of Procedure of the General Court of 4 March 2015; see also ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 127.

[114] Art. 105 para. 6 of the Rules of Procedure of the General Court of 4 March 2015; see also ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 129.

[115] GC, judgment of 30 September 2010 (Kadi II), T-85/09, at para. 176 with reference to ECtHR (GC), judgment of 19 February 2009 *(A. and others v. United Kingdom)*, App. no. 3455/05, in particular at para. 220.

[116] See ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 140.

[117] ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 129.

indicate a large margin of appreciation with regard to the appropriateness of sanctions.[118] Similarly, and as already pointed out above, the EU Courts acknowledge that, within the CFSP, the EU Council 'enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions',[119] including as regards the definition of the designation criteria.[120] Consequently, and in light of the significance of the CFSP objectives pursued,[121] notably the maintenance of international peace and security and support for the rule of law and human rights in countries in transition, the EU Courts have so far been reluctant to constrain the Council's discretion. In particular, as regards the Council's duty under Article 52 para. 1 of the Charter of Fundamental Rights to respect the principle of proportionality, the EU Courts will usually not extensively scrutinize whether the Council could have adopted measures that are less onerous but as appropriate as those adopted in the particular instance.[122]

In line with this, the General Court held that, in respect of counter-terrorism sanctions, the Council cannot be required 'to state with greater precision' how the freezing of the targeted individual's funds 'may in concrete terms contribute to the fight against terrorism' or to produce evidence that the funds may be used to contribute to acts of terrorism.[123] Similarly, where the Council pursued the objective of encouraging businesses to reject government policies that led to serious human rights violations in a third State, it was within the Council's margin of discretion to target companies controlled by a member of the respective government without establishing that this member was himself linked to serious human rights violations in this country.[124] In contrast, the Council's discretion seems somewhat narrower where it bases its decision on national criminal proceedings, in a third State, against the targeted individual for the misappropriation of state funds where the Council ultimately pursues, through the sanctions, the objectives of promoting the rule of law and human rights in the third State. According to the General Court, 'political and institutional instability' and 'shortcomings in the protection of the independence of the judicial authorities' would by themselves not yet demonstrate a manifest error of assessment by the Council. This, however, will be the case where, in view of the evidence, 'the reliability of the criminal proceedings against that person would probably be irreversibly affected by serious infringements' concerning the right to a fair trial and the presumption of innocence.[125] Yet,

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[118] See notably Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Approach and Standard*, available at https://www.un.org/securitycouncil/ombudsperson/approach-and-standard, accessed on 10 March 2019.

[119] GC, judgment of 12 December 2006 (OMPI), T-228/02, at para. 159; GC, judgment of 4 December 2008 (PMOI II), T-284/08, at para. 55.

[120] ECJ (GC), judgment of 21 April 2015 *(Anbouba v. Council of the European Union)*, C-630/113 P, at para. 42.

[121] See Art. 21 TEU.

[122] See for example GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at paras. 232–233; GC, judgment of 18 September 2017 *(Uganda Commercial Impex v. Council)*, T-107/15, at paras. 126–128; GC, judgment of 5 October 2017 *(Ben Ali v. Council of the European Union)*, T-149/15, at para. 170.

[123] GC, judgment of 7 December 2010 *(Fahas v. Council)*, T-49/07, at para. 57.

[124] GC, judgment of 18 September 2014 *(Georgias and others v. Council)*, T-168/12, at paras. 78 and 95.

[125] GC, judgment of 27 September 2018 *(Ezz and others v. Council)*, T-288/15, at paras. 143–148 and 187–193.

again evidencing its broad discretion, the Council was allowed, in the context of sanctions targeting the misappropriation of state funds, to comprehensively freeze all assets of the targeted person without inquiring, with the authorities of the investigating third State, into the likely amount of misappropriated assets.[126] This was held even where sanctions and consequently the freezing of the target's asset had already been in force for several years.[127]

E. Relationship with National Legal Regimes

Following initial doubts expressed by the General Court in this regard,[128] the Court of Justice held that the imposition of targeted sanctions does not follow punitive but instead 'purely precautionary' objectives and does therefore not require a finding of criminal guilt.[129] Accordingly, the imposition of targeted sanctions and punishment at the national level for the acts underlying those sanctions will not lead to the application of criminal law principles, including the principle of *ne bis in idem*.[130]

Despite this position of the EU judicature, targeted sanctions are in two ways regularly closely related to the criminal process. First, as seen in particular at the EU level, targeted sanctions are in many cases an accessory to ongoing criminal proceedings against the targeted individual or entity at the national level in that they aim to enforce precautionary measures before any finding of guilt by the competent national criminal courts. As a consequence, targeted sanctions will often extensively rely on evidence from national criminal proceedings. Second, EU Council decisions require Member States to provide for 'effective, proportionate and dissuasive' penalties applicable to infringements of the prohibitions resulting from the imposition of EU sanctions, frequently leading to a criminalization by Member States' legislators.[131] This follow-up criminalization usually covers property-related conduct of the targeted individual or entity in violation of an asset freeze as well as conduct by third parties that make assets available to a designated individual or entity. National authorities are thereby effectively enabled to apply criminal sanctions, at least to some extent, on the basis of a mere suspicion, thus without having yet obtained a criminal conviction for the suspected underlying wrongdoing. As the EU Courts' preoccupation with confidentiality shows, targeted sanctions, through their non-criminal

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[126] GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at para. 67; GC, judgment of 30 June 2016 *(CW v. Council)*, T-516/13, at para. 178; GC, judgment of 8 November 2017 *(Klymenko v. Council)*, T-245/15, at para. 210.

[127] GC, judgment of 5 October 2017 *(Ben Ali v. Council of the European Union)*, T-149/15, at paras. 171 and 176.

[128] GC, judgment of 30 September 2010 (Kadi II), T-85/09, at para. 150.

[129] GC, judgment of 20 July 2017 *(Badica and Kardiam v. Council)*, T-619/15, at paras. 71 and 73.

[130] ECJ, judgment of 31 January 2019 *(Islamic Republic of Iran Shipping Lines and others v. Council)*, C-225/17 P, at para. 59; see also GC, judgment of 5 October *2017 (Ben Ali v. Council of the European Union)*, T-149/15, at para. 107.

[131] See for example EU Council Regulation (EC) No 881/2002, at Art. 10 para. 1; EU Council Regulation (EU) No 208/2014, at Art. 15; ECJ (GC), judgment of 29 June 2010 *(Generalbundesanwalt beim Bundesgerichtshof v. E and F)*, C-550/09, at para. 62.

standards of evidence, thereby have the function of allowing the imposition of precautionary measures and an extension of the applicability of the criminal law on the basis of evidence that, in view of its confidential origin, would as such not be admissible in a criminal court.[132] Thus, targeted sanctions are a response not least to the evidentiary difficulties arising in transnational evidence-gathering, in particular as regards wrongdoing in places where the collection of evidence, not least due to civil strife or obstruction by local government officials, would seem futile.[133] As such, targeted sanctions are a response to the normative and practical limits of the criminal justice system and are marked, at their very core, by the transfer of evidence from the national to the supranational level.

IV. Evaluation

A. Safeguards

Over the last decade, the EU Courts have made important contributions to the development of safeguards for targeted sanctions and thereby remedied some grave lacunas of the initial EU and, indirectly,[134] also the UN framework. Nevertheless, serious concerns remain both at the level of substantive and of procedural law.

With regard to targeted sanctions' substantive requirements, two areas appear to be particularly deficient: legal certainty and proportionality. On the one hand, the definition of the targeted wrongdoing in EU Council decisions often remains vague, reflecting extensive discretion of the Council to define designation criteria. By rejecting the criminal law character of targeted sanctions and thereby the principle of legality according to Article 49 para. 1 of the Charter of Fundamental Rights, the EU judicature has endorsed a vision of targeted sanctions that sees them primarily as an instrument for precautionary injunctions and much less, if at all, an instrument to communicate and enforce clearly defined norms.[135] This vision is not only problematic in light of the fundamental rights of those who might become subject to highly coercive measures without sufficient fair warning but also seems to reflect a mistaken perception of today's role of sanctions. For, at least as regards sanctions that do not work in support of national criminal proceedings, their purpose is arguably not so much about securing assets but about enforcing prohibitions defined by the UN Security Council or the EU Council.

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[132] See T. Ojanen, , Administrative counter-terrorism measures – a strategy to circumvent human rights in the fight against terrorism?, in: D. Cole/F. Fabbrini/A. Vedaschi (eds.), Secrecy, National Security and the Vindication of Constitutional Law, Edward Elgar 2013, pp. 254–259; Financial Action Task Force, Terrorist Financing Report to G20 Leaders, November 2015, p. 2.

[133] C. Eckes, EU Counter-Terrorist Sanctions: The Questionable Success Story of Criminal Law in Disguise, in: C. King/C. Walker (eds.), Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets, Ashgate 2014, pp. 317–330.

[134] On this impact see G. Le Floch, L'influence des jurisprudences Kadi sur le régime des sanctions instauré par la résolution 1267 (1999), in: E. Saulnier-Cassia (ed.), La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne, pp. 305–312.

[135] See notably GC, judgment of 27 February 2014 *(Ezz and others v. Council)*, T-256/11, at paras. 67–80.

On the other hand, the EU Courts' jurisprudence regarding the proportionality of targeted sanctions remains very much underdeveloped.[136] While a broad margin of appreciation of the Council in the CFSP is understandable, in principle, the Court of Justice's assertion of a 'purely precautionary' character of targeted sanctions would be significantly strengthened if both Council and judicature were to demonstrate greater diligence as to the temporal and quantitative scope of asset freezing measures. The General Court had already singled out this concern in the past by expressing its doubts, in the context of counter-terrorism sanctions, that a quasi-total freezing of an individual's assets over a period of almost ten years could still be described as 'preventative',[137] a concern not shared, however, to the same extent by the Court of Justice.[138] While measures adopted as part of the CFSP cannot realistically be expected to satisfy the same standards as those of national criminal proceedings, greater coherence and transparency of the Council's designation standards would counter the perception of political arbitrariness, thereby strengthening the moral credibility of these measures.

With regard to the procedural safeguards for targeted sanctions, again two points merit particular consideration: the standards of proof and the use of undisclosed incriminating evidence. As regards the former, the EU Courts have developed over the last years an increasingly refined jurisprudence characterized at its core by a reversal of the burden of proof to the detriment of the targeted individual or entity. As shown above, where the Council can establish sufficiently substantiated *indicia* for the suspected wrongdoing, the target will effectively need to demonstrate that the resulting suspicion is unfounded. In view of the difficulties the Council often faces in producing evidence in the context of the CFSP, a partial reversal of the burden of proof like this may seem appropriate in many cases, at least for business wrongdoing in a civil war context. However, it is especially problematic that such a reduced standard is applicable also where targeted sanctions are imposed without a prior hearing of the targeted individual or entity, as the target then lacks any opportunity to refute possibly erroneous *indicia*. But this weakness could be remedied by requiring the Council, at the moment of the initial decision to freeze funds, to meet a significantly higher standard of proof than the standard that applies to subsequent decisions to retain sanctions.

Finally, as for the use of undisclosed incriminating evidence, this is probably the most controversial element of the EU's sanctions framework. In fact, both the above-described distribution of the burden of proof and the extensive admissibility of anonymous

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136 See F. Fontanelli, Kadieu: connecting the dots – from Resolution 1267 to Judgment C-584/10 P: the coming of age of judicial review, in: M. Avbelj/F. Fontanelli/G. Martinico (eds.), Kadi on Trial, pp. 14–21.

137 GC, judgment of 30 September 2010 (Kadi II), T-85/09, at para. 150; see also C. Eckes, EU Counter-Terrorist Sanctions: The Questionable Success Story of Criminal Law in Disguise, in: C. King/C. Walker (eds.), Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets, pp. 323–326.

138 ECJ (GC), judgment of 18 July 2013 (Kadi II), C-584/10, at para. 358.

testimony[139] can be understood as ways to overcome the Council's evidentiary difficulties without having recourse to the use of secret incriminating evidence as an even more intrusive procedural method. The use of undisclosed evidence, even though Article 105 of the General Court's Rules of Procedure allows it now, prevents the targeted person as well as the public from fully scrutinizing the imposition of sanctions, which signifies a radical renunciation of the open justice principle[140] and a further weakening of the quality of judicial review.[141] Given that the EU Courts seem to admit the possibility of combining a reversal of the burden of proof with the admission of undisclosed evidence, the path the EU judicature has chosen, notably without explicit legislative basis to this effect, is even more worrying. If at all, and provided there is a sufficient legislative basis for it, undisclosed evidence should only be used in *ex post* judicial review proceedings to assess the legality of the initial decision to impose sanctions, notably for the purpose of compensation claims. This would ensure the Council's respect for the above-proposed higher standard of proof for initial listing decisions. By contrast, undisclosed evidence should not be used in judicial review proceedings that serve to assess the legality of a continuing retention of sanctions (where, due to the active procedural participation of the target, sanctions could continue to rely on a shared burden of proof).

B. Effectiveness

The effectiveness of targeted sanctions has increasingly been questioned, not least by the UN Security Council, which criticized Member States for their insufficient implementation.[142] In fact, initially high political expectations as to the preventive potential of counter-terrorism sanctions have been muted by the rather modest overall sums frozen globally as a consequence of UN sanctions and by the finding that individuals and entities that operate in a conspiratorial manner seem to encounter few difficulties in the continued concealment of assets.[143] These doubts have been supplemented by concerns about unintended side effects of targeted sanctions to the detriment of innocent bystanders or even entire communities, likely as a result especially of the limited reliability of the underlying fact-

[139] See on the latter J. Mazzone/T. Fischer, The normalization of anonymous testimony, in: D. Cole/F. Fabbrini/A. Vedaschi (eds.), Secrecy, National Security and the Vindication of Constitutional Law, pp. 204–208.

[140] R. Goss, 'To the Serious Detriment of the Public': Secret Evidence and Closed Material Procedures, in: L. Lazarus/C. McCrudden/N. Bowles, Reasoning Rights: Comparative Judicial Engagement, pp. 122–124.

[141] G. Van Harten, Weaknesses of adjudication in the face of secret evidence, The International Journal of Evidence and Proof 2009, vol. 13, pp. 10–18.

[142] UN Security Council Resolution 2252 (2015) at para. 15; C. Eckes, EU Counter-Terrorist Sanctions: The Questionable Success Story of Criminal Law in Disguise, in: C. King/C. Walker (eds.), Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets, pp. 329–330.

[143] See O. Bures, Ten Years of EU's Fight against Terrorism Financing: A Critical Assessment, in: J. Argomaniz et al. (eds.), EU Counter-Terrorism and Intelligence, pp. 28–35; J. Biersteker/M. Tourinho/S.E. Eckert, Thinking about United Nations targeted sanctions, in: J. Biersteker et al. (eds.), Targeted Sanctions: The Impacts and Effectiveness of United Nations Action, pp. 27–31.

finding and of an overly risk-sensitive implementation by the financial sector.[144] Finally, questions have also been raised on whether many of the sanctions were based less on the target's dangerousness and more on reasons of political expediency within the supranational decision-making organs.[145]

Yet, not least the more recent experience with the terrorist organization ISIL also highlighted a range of application for targeted sanctions that was clearly not in the focus of supranational institutions when counter-terrorism sanctions were developed, especially in the aftermath of the 9/11 attacks. The focus shifted increasingly to the business activities of terrorist organizations that control territories and exploit them to generate income for themselves, not least by selling oil and other natural resources. Even beyond the context of terrorism, there is a noticeable tendency at both the UN and EU level to have recourse to targeted sanctions as a means to address business wrongdoing, in particular the role of businesses in civil war contexts. It is here that targeted sanctions seem to play a potentially more effective role. Instead of identifying assets held by terrorists and their backers, the focus moves on to those who, despite their lack of ideological affiliation, support terrorists and other armed groups for purely economic interests. From this perspective, targeted sanctions might play a much greater role in future than they have until now, in that they have the potential to become the instrument of choice to economically isolate businesses which, through their commerce in war-torn regions, provide economic incentives to warlords. In view of this objective, the effectiveness of targeted sanctions would need to be assessed differently. Instead of measuring the amounts of frozen assets, such assessment would primarily ask whether the sanctions have at least de-incentivized legitimate business actors from interacting with terrorist and other armed entities, and thereby weakened (or, ideally, ruined) the economic viability of such entities.

C. Outlook

In light of their currently weak substantive and procedural safeguards, targeted sanctions still have a long way to go in order to become respectable parts of the legal order, not least in the EU. If supranational institutions wish to enhance the sanctions' practical potential to address business wrongdoing, major changes to the currently existing frameworks appear necessary. In particular, both the UN and the EU will need to clarify and reform the purposes so far pursued by sanctions. This will likely require a partial abandoning of the objectives that underpinned the first generation of counter-terrorism sanctions developed in the 2000s.

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[144] See M. Eriksson, The unintended consequences of United Nations targeted sanctions, in: J. Biersteker et al. (eds.), Targeted Sanctions: The Impacts and Effectiveness of United Nations Action, pp. 193–204; V. Ramachandran/M. Collin/M. Juden, De-risking: An unintended negative consequence of AML/CTF regulation, in: C. King/C. Walker/J. Gurulé (eds.), The Palgrave Handbook on Criminal and Terrorism Financing Law, vol. 1, pp. 246–251.

[145] M. Brzoska/G.A. Lopez, Security Council dynamics and sanctions design, in: T.J. Biersteker/ M. Tourinho/S.E. Eckert (eds.), Targeted Sanctions: The Impacts and Effectiveness of United Nations Action, p. 77; I. Cameron, in: id. (ed.), EU sanctions: law and policy issues concerning restrictive measures, p. 22.

In particular, policymakers will need to rethink whether the future focus of targeted sanctions should continue to be the confiscation of assets, or whether it should shift primarily towards the neutralization of malign economic actors.[146] Depending on the chosen objectives, it might be unnecessary to overly emphasize the importance of a 'surprise effect' of sanctions, which usually comes at the price of denying a prior fair hearing. By abandoning the emphasis on speed, targeted sanctions could then be reinforced by safeguards that ensure greater procedural fairness and thus greater reliability in fact-finding. A reformed system such as this would still offer significantly more flexibility than criminal justice systems, in particular by allowing for non-criminal standards of evidence appropriate for the specific context of countries at civil war. At the same time, less emphasis on speed in the supranational decision-making process could avoid excessive limitations on rule of law standards that today continue to jeopardize the credibility of existing supranational sanctions frameworks.[147]

Selected publications

Bures, Oldrich, Ten Years of EU's Fight against Terrorism Financing: A Critical Assessment, in: Argomaniz, Javier/Bures, Oldrich/Kaunert, Christian (eds.), EU Counter-Terrorism and Intelligence, Routledge 2016, p 17.

Biersteker, Thomas J./Tourinho, Marcos/Eckert, Sue E., Thinking about United Nations targeted sanctions, in: Biersteker, Thomas J./ Eckert, Sue E./Tourinho, Marcos (eds.), Targeted Sanctions: The Impacts and Effectiveness of United Nations Action, Cambridge University Press 2016, p 11.

Cameron, Iain, in: I Cameron (ed.), EU sanctions: law and policy issues concerning restrictive measures, Intersentia 2013, p 28.

Eckes, Christina, EU Counter-Terrorist Sanctions: The Questionable Success Story of Criminal Law in Disguise, in: King, Colin/Walker, Clive (eds.), Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets, Ashgate 2014, p 317.

Fabbrini, Federico/Larik, Joris, Global counter-terrorism sanctions and the European due process rules: the dialogue between the CJEU and the ECtHR, in: Avbelj, Matej/Fontanelli, Filippo/Martinico, Giuseppe (eds.), Kadi on Trial, Routledge 2014, p 137.

146 For additional policy options, see notably European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime, 2019/2580(RSP).

147 See notably ECtHR (GC), judgment of 21 June 2016 *(Al-Dulimi and Montana Management Inc. v. Switzerland)*, App. no. 5809/08, at para. 36-3; on the underlying dialogue between the ECtHR and the CJEU, see F. Fabbrini/ J. Larik, Global counter-terrorism sanctions and the European due process rules: the dialogue between the CJEU and the ECtHR, in: M. Avbelj/F. Fontanelli/G. Martinico, Kadi on Trial, pp. 149–154.

Fontanelli, Filippo, Kadieu: connecting the dots – from Resolution 1267 to Judgment C-584/10 P: the coming of age of judicial review, in: Avbelj, Matej/Fontanelli, Filippo/ Martinico, Giuseppe (eds.), Kadi on Trial, Routledge 2014, p 7.

Goss, Ryan, 'To the Serious Detriment of the Public': Secret Evidence and Closed Material Procedures, in: Lazarus, Liora/McCrudden, Christopher/Bowles, Nigel, Reasoning Rights: Comparative Judicial Engagement, Hart Publishing 2014, p 117.

Le Floch, Guillaume, L'influence des jurisprudences Kadi sur le régime des sanctions instauré par la résolution 1267 (1999), in Saulnier-Cassia, Emmanuelle (ed.), La lutte contre le terrorisme dans le droit et la jurisprudence de l'Union européenne, LGDJ 2014, p 319.

Mazzone, Jason/Fischer, Tobias, The normalization of anonymous testimony, in: Cole, David/Fabbrini, Federico/Vedaschi, Arianna (eds.), Secrecy, National Security and the Vindication of Constitutional Law, Edward Elgar 2013, p 195.

Murphy, Cian C, EU Counter-Terrorism Law: Pre-Emption and the Rule of Law, Hart Publishing 2012.

Ojanen, Tuomas, Administrative counter-terrorism measures – a strategy to circumvent human rights in the fight against terrorism?, in: Cole, David/Fabbrini, Federico/Vedaschi, Arianna (eds.), Secrecy, National Security and the Vindication of Constitutional Law, Edward Elgar 2013, p 249.

Vijaya Ramachandran/Matthew Collin/Matt Juden, De-risking: An unintended negative consequence of AML/CTF regulation, in: Colin King/Clive Walker/Jimmy Gurulé (eds.), The Palgrave Handbook on Criminal and Terrorism Financing Law, volume 1, Palgrave 2018, p 237.

Van Harten, Gus, Weaknesses of adjudication in the face of secret evidence, The International Journal of Evidence and Proof 2009, volume 13, p 1.