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EU Counter-Terrorist Sanctions against Individuals: Problems and Perils

Christina Eckes*

This article gives a comprehensive account of the shortcomings of the European Union's (EU's) policy of sanctioning terrorist suspects and makes tentative suggestions on how to resolve them. While much has been written on the case law of the EU courts on counter-terrorist sanctions, the actual practice of adopting these measures has attracted much less attention. Imposing sanction on individuals remains qualitatively and quantitatively the most important Common Foreign and Security Policy of the EU, and individuals continue to bring challenges against sanctions before the EU courts. At the same time, many issues surrounding the EU's sanctioning practice remain unresolved. This article addresses these issues. Individual sanctions are not only the cornerstone of EU counterterrorist policies but also an oddly harmonized form of EU criminal law. The EU institutions continue to adopt sanctions based on pre-Lisbon instruments, which fall outside the jurisdiction of the court. Uncertainty surrounds the choice of the correct legal basis under the Treaty on the Functioning of the European Union (TFEU). The composite adoption procedure of autonomous EU sanctions does not give those sanctioned the necessary opportunities to be heard. Finally, pre-emption sandwiches Member States between EU law and their obligations under the UN Charter.

1 INTRODUCTION

Counter-terrorist sanctions against individuals¹ have acquired a somewhat dubious fame. First and foremost, they have been criticized for breaching fundamental rights, in particular, the right to judicial review.² Much has also been written on

* Amsterdam Centre for European Law and Governance (ACELG), University of Amsterdam. I would like to thank the participants of the Uppsala University European Law Colloquium on 31 Mar.–1 Apr. 2011, Stephan Hollenberg and Chris Koedooder, for their helpful comments. Any remaining errors are, of course, my own.

¹ The freezing of assets of individuals who have been identified as terrorist suspects. See, e.g., Common Position (CP) 2001/931/CFSP of 27 Dec. 2001 on combating terrorism, OJ 2001 L 344/93.

² C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford: Oxford University Press, 2009); European Center for Constitutional and Human Rights (ECCHR), *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights*, Report of the ECCHR (December 2010); see further, e.g., G. Harpaz, 'Judicial Review by the European Court of Justice of UN "Smart Sanctions" against Terror in the Kadi Dispute', *European Foreign Affairs Review* 14, no. 1 (2009): 65–88; N. Lavranos, 'The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC', *Yearbook of European Law* 28 (2009): 616 et seq., at 625; T. Tridimas, 'Terrorism and the COJ: Empowerment and Democracy in the EC Legal Order', *European Law Review* 34 (2009): 34; N. Lavranos, 'Judicial Review of UN Sanctions by the European Court of Justice', *Nordic Journal of International Law* 78, no. 3 (2009): 343–359, 357; International Commission of

the potential consequences of annulling them for the relationship between European Union (EU) and international law.³ However, individual sanctions remain a deserving topic of academic research. First, they remain qualitatively and quantitatively the most important Common Foreign and Security Policy (CFSP). Second, internal constitutional issues have attracted less attention than fundamental rights or the EU's relationship with international law. Third, much litigation is still pending,⁴ and many issues have not yet been resolved.

This article takes a step back and examines the EU's post-Lisbon sanctioning practice. The thread that runs through it is the search for inconsistencies and problems. Section II explains the uneasy fit of individual sanctions with both EU criminal law and CFSP. Section III briefly sketches the complexity of the two different regimes of EU counter-terrorist sanctions and their origins. Section IV explains the composite adoption procedure, which is characterized not only by a two-tier mechanism involving the Member States and the EU institutions but also by the interaction of previously all three EU pillars and now Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) instruments. This leads to the adoption of a multitude of instruments that pertain to different fields but are interconnected and dependent on each other. This makes it difficult to identify which rules apply and who was at the origin of any particular listing. Section V examines the situation since the entering into force of the Treaty of Lisbon. The Lisbon Treaty introduced two new legal bases: Articles 75 and 215(2) TFEU, which give the EU for the first time the competence to adopt

Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009), 116, at <<http://ejp.icj.org/IMG/EJP-Report.pdf>>.

³ Eckes, 2009, *supra* n. 2; E. Cannizzaro, 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the COJ Decision in the Kadi Case', *Yearbook of European Law* 28 (2009): 593 et seq., 599; I. De Jesus Butler, 'Securing Human Rights in the Face of International Integration', *International and Comparative Law Quarterly* 60 (2011): 125–165; C. Tomuschat, 'The Kadi Case: What Relationship Is There between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?', *Yearbook of European Law* 28 (2009): 663; D. Halberstam & E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', *Common Market Law Review* 46 (2009): 13–72, at 66 et seq.; T. Tridimas, 'Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments', *Cambridge Yearbook of European Legal Studies* 13 (2011): 455–490, at 457; J. Genser & K. Barth, 'When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform', *Boston College International and Comparative Law Review* 33, no. 1 (2010): 24.

⁴ More than forty cases are pending against different European Union (EU) sanctions (including country regimes); see, in particular, C-130/10, *Parliament v. Council*, joined by the Commission, the Czech Republic, Sweden, and France as interveners (Order of 10 Aug. 2010); C-584/10 P, *Commission v. Kadi* (Application OJ C 72/9, 05 Mar. 2011); C-593/10 P, *Council v. Kadi* (Application OJ C 72/9, 05 Mar. 2011); C-595/10 P, *UK v. Kadi* (Application OJ C 72/10, 05 Mar. 2011). On 1 Jun. 2011, nineteen of the twenty-one cases of the EU courts in the category 'Common Foreign and Security Policy (CFSP)' concerned sanctions.

sanctions against private individuals.⁵ The choice of the correct legal basis remains a challenge. Section VI discusses the practice of the EU institutions to continue adopting individual sanctions on the basis of pre-Lisbon instruments. This prolongs the unsatisfactory situation of sanctioning individuals outside of the jurisdiction of the EU courts on the basis of an instrument that was adopted without an (explicit) EU competence. Section VII brings to the fore that the EU institutions cannot avoid breaching EU law when giving effect to UN lists of terrorist suspects. They simply lack the necessary information. Section VIII examines the difficulties surrounding autonomous sanctions. Section IX reflects on the position of the EU Member States, which are sandwiched between UN and EU obligations. The final section presents conclusions and tentative solutions.

2 INDIVIDUAL SANCTIONS: THE ODD ONE OUT OR AHEAD OF THE TIME?

Within the EU, counterterrorist measures against individuals have been adopted since December 2001. They are the cornerstone of the EU's counterterrorist policies⁶ and form a hybrid between CFSP and EU criminal law.

Individual sanctions are at the same time a nightmare scenario and a vision of what substantive EU criminal law can look like. They go further than any other substantive EU criminal law measure, both in terms of fundamental rights violation (nightmare) and in terms of centralized harmonization (visionary, at least for those who favour integration). Indeed, while the discussion of whether or not the Community had the competence to adopt criminal law raged elsewhere,⁷ the most far-reaching fully harmonized EU criminal policy to date was adopted under the label of preventive administrative measures giving effect to CFSP. While listing individuals as terrorist suspects and freezing their financial assets may seem *prima facie* to be less far-reaching than other counterterrorist measures (detention, deportation, and so forth), these measures have 'disastrous effects on the life and the livelihood' of those listed, those associated with a listed organization, and those related to someone listed.⁸ 'The consequences can be legal, social, reputational, and

⁵ Eckes, 2009, *supra* n. 2, Ch. 2, disagreeing both with the Court of First Instance, T-315/01, *Kadi v. Council and Commission* (hereinafter '*Kadi I*') [2005] ECR II-3649, and the Court of Justice (CJ), C-402/05 P and C-415/05 P, *Kadi II* [2008] ECR I-6351.

⁶ E. Guild, 'The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the "Terrorist Lists"', *Journal of Common Market Studies* 46, no. 1 (2008): 173–193.

⁷ S. Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 2011), 769 et seq.

⁸ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009), 116, at <<http://ejp.icj.org/IMG/EJP-Report.pdf>>.

financial.⁹ Because of these devastating effects on the lives of those listed,¹⁰ individual sanctions amount to a criminal charge within the meaning of Article 6 European Convention on Human Rights (ECHR) and should be therefore, in substance, considered criminal law.¹¹

Individual sanctions are exceptional – not only in the intensity of fundamental rights restrictions that they impose but also because they are a fully harmonized policy. This is different for EU criminal law, which consists of measures facilitating cooperation between Member States¹² or is based on mutual recognition.¹³ The EU only has competence to harmonize national criminal law in order to establish minimum standards.¹⁴ This, of course, raises questions on why the EU does not have competence to harmonize criminal law but can nonetheless do so under the label of CFSP and counterterrorism.

At the same time, individual sanctions remain closely linked with CFSP, where such specific measures used to be unthinkable. Pre-Lisbon, all policy decisions to adopt individual sanctions were adopted in the form of Common Positions. However, both from reading the wording of ex-Article 15 TEU¹⁵ and from looking at practice,¹⁶ it seemed counter-intuitive to use Common Positions, which are meant to be policy instruments ‘defining an approach’ rather than specific measures targeting identified individuals. Counterterrorist measures adopted against private individuals are unrelated to any government. They do not express a general priority or point of view but determine the legal situation of singled-out individuals. Post-Lisbon, this is remedied by Article 25 TEU. This article provides that the EU shall conduct its CFSP by adopting ‘general guidelines’, ‘decisions’, ‘actions’, and ‘positions’. The term ‘decisions’ appears to allow for the adoption of specific measures with a narrow personal and substantive scope.¹⁷ Usually, however, the EU’s foreign policy is focused on

⁹ *Ibid.*

¹⁰ The General Court called them ‘particularly draconian’ (T-85/09, *Kadi v. Commission* (hereinafter ‘*Kadi II*’), judgment of 30 Sep. 2010, para. 149); The UK Supreme Court (UKSC) referred to those sanctioned as ‘prisoners of the State’ (UKSC, *Her Majesty’s Treasury (Respondent) v. Mohammed Jabar Ahmed and Others (FC) (Appellants)* (hereinafter ‘*Ahmed*’), *Her Majesty’s Treasury (Respondent) v. Mohammed al-Ghabra (FC) (Appellant)*, R (on the Application of Hani El Sayed Sabaei Youssef) (Respondent) v. Her Majesty’s Treasury (Appellant), judgment of 27 Jan. 2010 [2010] UKSC 2, paras 60 and 192).

¹¹ Eckes, 2009, *supra* n. 2, Ch. 3.

¹² See, e.g., Art. 82(2) Treaty on the Functioning of the European Union (TFEU): ‘Such rules should take into account the differences between the legal traditions and systems of the Member States’. Art. 84 TFEU excludes any harmonization.

¹³ For example, the European arrest warrant and the European evidence warrant.

¹⁴ Articles 82(2) and 83 TFEU.

¹⁵ ‘The Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.’

¹⁶ None of the large variety of measures adopted in CP appears as specific as individual sanctions. Examples are prohibitions of trade in arms, travel bans, participation in international organizations, the conclusion of international conventions, and the implementation of decisions of international tribunals.

¹⁷ Individual sanctions continue to be adopted under pre-Lisbon instruments, see s. VI *infra*.

cooperation rather than pursuance of a domestic interest. Individual sanctions are the hardest form of exercising power among the EU's CFSP policies – with direct legal consequences for individuals.

Individual sanctions are unusually specific, restrictive, and far-reaching in terms of harmonization – both in comparison with EU criminal law and in comparison to CFSP. Even if this might not be a problem as such, it raises questions as regards the democratic and judicial control of these measures (particularly CFSP instruments) and as to whether they should be adopted as an EU policy at all.

3 TWO SANCTIONS REGIMES IMPOSING THE SAME RESTRICTIVE MEASURES

The EU adopts counterterrorist measures against private individuals under two different sanctions regimes. One regime gives effect to lists of terrorist suspects drawn up and maintained by a specialized sanctions committee created by UN Security Council (UNSC) Resolution 1267.¹⁸ The other regime gives effect to the general call by the UNSC to freeze funds that could be used to finance terrorist activities (Resolution 1373).¹⁹ For the EU Member States, it is the EU that draws up lists of terrorist suspects and orders the freezing of the financial assets of those listed in directly applicable Regulations (autonomous European sanctions regime). The EU lists are based on the decision of a 'competent authority' of a Member State²⁰ that the person is suspected to have financed terrorism. This could, for example, be the decision to instigate investigations against a person for a terrorism-related crime.

The UN-based regime targets those 'associated with' al-Qaida or the Taliban.²¹ The autonomous EU sanctions regime targets groups and individuals that the EU considers to be involved in other, often regional, forms of 'terrorism'.²² Both are adopted under Chapter VII of the UN Charter. The two different European sanctions regimes link back to the choice of the UNSC of targeting those associated with global terrorism (al-Qaida/Taliban) at the UN level while decentralizing the fight against all other forms of terrorism by allowing UN

¹⁸ S/RES/1267 (1999) of 15 Oct. 1999, given effect by the EU in CP 2002/402/CFSP of 27 May 2002 (2002), OJ L 139/4, and Council Regulation 881/2002 of 27 May 2002 (2002), OJ L 139/9; see also EU Regulation 1286/2009 of 22 Dec. 2009 amending Regulation (EC) No. 881/2002 (2009), OJ L 346/42.

¹⁹ S/RES/1373 (2001) of 28 Sep. 2001, given effect by the EU in CP 2001/931/CFSP of 27 Dec. 2001 on combating terrorism, OJ 2001 L 344/93, and Council Regulation 2580/2001, OJ 2002, L 116/33. Article 1(4) of CP 2001/931/CFSP of 27 Dec. 2001 on combating terrorism, OJ 2001 L 344/93.

²⁰ Compare the mandate of the 1267 Sanctions Committee at <www.un.org/sc/committees/1267/>.

²² Prominent examples are the Kurdistan Workers' Party (*Partiya Karkerên Kurdistan* (PKK)), the People's Mujahedin of Iran (delisted in 2010), and Basque organizations.

Member States identify suspects. Overlap is avoided by giving the al-Qaida/Taliban list priority.²³

The separation into two sanctions regimes is not a choice of the EU. At the same time, the same restrictive measures (the freezing of assets) are imposed under different legal instruments and different procedures in which the EU institutions have different powers. This adds to the (unnecessary) complexity of European counter-terrorist sanctions. For reasons of completeness, it should also be mentioned that besides these two sanctions regimes that target terrorist supporters, the EU has about thirty sanctions regimes in place that target the governing elites of countries.²⁴

The similarities of the effects of the two counter-terrorist sanctions regimes for those listed raise the question of whether procedural and judicial protection should not be equivalent under both regimes. In the 1267 regime, the decision and relevant information lie at the UN level. In the 1373 regime, the decision and information lie at the national level. Should the same level of proof be required that an individual has a link with terrorist activities? Should the same intensity of judicial review apply?²⁵ Why should EU Member States and non-EU Member States collectively be allowed to lower the protection of specific individuals?

4 CROSS-PILLAR INSTRUMENTS AND TWO-TIER PROCEDURES

Pre-Lisbon measures under both sanctions regimes were adopted as cross-pillar instruments in a two-tier procedure. Directly applicable Regulations were based on a joint legal basis of ex-Articles 301, 60, and 308 EC Treaty (EC).²⁶ The two-tier procedure was set out in ex-Article 301 EC. It required first a 'strategic decision' to adopt individual sanctions in a CFSP Common Position.²⁷ This CFSP instrument was then implemented by a Regulation containing the actual operational measures, such as asset freezes and travel bans. Both instruments contained (nearly) identical lists of terrorist suspects. Hence, even though only the Regulation contains operative measures, both instruments are equally harmful for the reputation of those listed.

²³ Recital 4 of CP 2001/931/CFSP of 27 Dec. 2001 on combating terrorism, OJ 2001 L 344/93, states that those included on a UN list will not be covered by the autonomous European sanctions regime.

²⁴ For a full list, see <http://ec.europa.eu/external_relations/cfsp/sanctions/docs/measures_en.pdf>.

²⁵ The General Court answered this question in T-85/09, *Kadi II*, judgment of 30 Sep. 2010, in the affirmative.

²⁶ See comprehensively on the use of Arts 301, 60, and 308 EC Treaty (EC) as a joint legal basis for the adoption of individual sanctions: Eckes, 2009, *supra* n. 2, Ch. 2.

²⁷ Article 301 EC also mentioned the possibility of using a 'joint action'. In practice, however, a joint action had never been used.

Member States further exchanged information under the former third pillar. This was the reason why Common Position 2001/931/CFSP²⁸ was adopted as a cross-pillar instrument based on ex-Articles 15 (CFSP) and 34 (police and judicial cooperation in criminal matters (PJCCM)) TEU. This became relevant in the case of *Segi*, and others²⁹ where the applicant was listed in the Common Position without being sanctioned by the implementing Community Regulation.³⁰ The General Court considered the relevant provisions of the Common Position to belong to the third pillar and decided therefore that it could not rule on the applicants' action. On appeal, the Court of Justice did not accept direct jurisdiction either but referred the applicants to the national courts to challenge 'any decision or other *national* measure relating to the drawing up of an act of the European Union or to its application' supplemented by the possibility of seeking a preliminary ruling.³¹ Indeed, the Court interpreted the possibility of a preliminary ruling very broadly and stated that '[t]he right to make a reference . . . must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties'.³² Hence, *Segi* opened an avenue for preliminary rulings concerning Common Positions that were not codified under the European Treaties before the entering into force of the Treaty of Lisbon.³³ We will see below that this continues to be relevant so long as the European institutions continue to sanction individuals based on pre-Lisbon CFSP instruments.

In summary, the EU's pre-Lisbon sanctions regimes consist of instruments adopted under the first pillar (Regulations), the second pillar (CFSP Common Positions giving effect to UN lists), and jointly under the second and third pillar (cross-pillar Common Positions, autonomous sanctions regime). This in itself creates a complicated landscape of legal instruments, which are not only adopted according to different adoption procedures but also subject to different degrees of judicial control. Pre-Lisbon, second pillar instruments were not subject to the Court of Justice's jurisdiction at all. Second and third pillar instruments could be challenged in preliminary rulings. Only first pillar instruments were subject to full review under the EC Treaty. This leads to great complexity and results in different judicial protection from identical lists of terrorist suspects contained in different legal instruments (Regulations contain the operational provisions that order the actual asset freezing). Post-Lisbon, this situation has changed to some extent. Yet,

²⁸ CP 2001/931/CFSP of 27 Dec. 2001 on combating terrorism, OJ 2001 L 344/93.

²⁹ T-338/02, *Segi and Others* [2004] ECR II-1647.

³⁰ Ex-Art. 301 EC.

³¹ C-355/04 P, *Segi v. Council* [2007] ECR I-1657, para. 56.

³² *Ibid.*, para. 53.

³³ Ex-Art. 35(1) Treaty on European Union (TEU) did not enable national courts to refer a question to the Court for a preliminary ruling on a CP.

the two-tier adoption procedure continues to be followed at least for some sanctions against private individuals. This will be discussed in the following section.

5 THE RIGHT LEGAL BASIS: ARTICLE 75 OR 215(2) TFEU?

The Treaty of Lisbon has introduced two provisions that confer on the EU the competence to sanction individuals: Articles 75 and 215(2) TFEU. Under both provisions, specific restrictive measures are adopted by the Council acting by qualified majority following a Proposal of the Commission (Article 75 TFEU) or a Joint Proposal from the Commission and the High Representative (Article 215 TFEU). However, since Articles 215 and 75 TFEU set out very different procedures for the basic policy decision (CFSP decision or framework under the Area of Freedom, Security and Justice (AFSJ)), the choice of the legal basis is crucial for the division of competences between the EU and its Member States, for the influence of the different EU institutions, and for the geographical scope of the measures. The first point relates to the question of whether Member States are precluded from adopting separate national measures once the EU has taken action.³⁴

On 11 March 2010, the European Parliament³⁵ challenged the Regulation³⁶ that reformed the European sanctioning regime giving effect to UN sanctions. The Parliament argued that ‘having regard to its aim and content, the correct legal basis for the Regulation is Article 75 TFEU’ and not Article 215(2) TFEU. Clearly, it wanted the measures to be adopted on the basis of the legal provision that gives it more extensive legislating powers. It is worth noting that the Parliament did not challenge the Regulation on grounds of fundamental rights violation.

The choice of the legal basis is not straightforward. Both EU counter-terrorist sanctions regimes have a link to a UN Resolution (1267 and 1373) and herewith arguably a link to foreign relations and security (CFSP). At the same time, many European counter-terrorist suspects under both regimes are internal rather than external. They are either EU citizens and organizations, groups, and bodies that are incorporated or constituted under the law of a Member State, or when they are targeted at third-country nationals or organizations, groups, and bodies from outside of the EU, they apply to financial assets and business located within the EU. In conclusion, both regimes have links with CFSP *and* AFSJ.

³⁴ See s. 9 *infra*.

³⁵ Application in C-130/10, *Parliament v. Council*, joined by the Commission, the Czech Republic, Sweden, and France as interveners (Order of 10 Aug. 2010).

³⁶ EU Regulation 1286/2009 of 22 Dec. 2009 amending Regulation (EC) No. 881/2002 (2009), OJ L 346/42.

Four different ways of delimiting the two legal bases appear conceivable. The first makes the choice of the legal basis depending on the origins of the listings: Article 75 TFEU for the autonomous sanctioning procedure (1373 regime) and Article 215(2) TFEU for sanctions based on UN lists (1267 regime).³⁷ To base each of the two sanctions regimes on one of the two new legal bases seems natural. Also, the 1267 regime is giving effect to a specific international obligation that could justify a particular need for a CFSP decision. However, against this reading could speak the requirement that CFSP decisions are adopted by unanimity. The requirement of unanimity appears less important where the EU has no discretion but simply copies the names provided by the UN Sanctions Committee than where the EU takes an autonomous decision of who is considered to be a terrorist suspect. The same argument is true for the existence of Article 275 TFEU, which provides for judicial review of CFSP decisions that lead to the adoption of individual sanctions under Article 215(2) TFEU. This provision expresses the understanding of the Member States that separate judicial review of the *listing* decision in the CFSP instrument is necessary. This could be seen as implying that an actual discretionary decision is taken.

A second possible interpretation is that Article 75 TFEU is *lex specialis* for counterterrorist measures, while Article 215(2) TFEU applies to government officials. This would mean that both autonomous and UN-based counter-terrorist sanctions should be adopted under Article 75 TFEU. This finds support in the fact that Article 75 TFEU, by contrast with Article 215 TFEU, specifically refers to terrorism. Further, paragraph 2 of Article 215 TFEU is an add-on to its paragraph 1, which allows for the adoption of state sanctions. Its predecessor, ex-Article 301 EC, was predominantly used to give effect to UNSC Resolutions imposing sanctions on *states*.³⁸ Yet, comprehensive state sanctions have gone out of fashion. They have been replaced by more targeted sanctions against the political elite of the country that acts in blatant violation of international law (often human rights).³⁹ Hence, Article 215(1) and (2) TFEU together could be read to replace ex-Article 301 EC and mean to cover both the old-fashioned state sanctions and more targeted sanctions against government officials.

A third way of reading Articles 75 and 215 TFEU could be to see them as a joint legal basis for financial sanctions, as were Articles 301 and 60 EC. This interpretation would strengthen the position of the European Parliament. Because

³⁷ The Council chose Art. 215(2) TFEU as the basis for EU Regulation 1286/2009 of 22 Dec. 2009 amending Regulation (EC) No. 881/2002 (2009), OJ L 346/42, giving effect to Resolution 1267.

³⁸ Article 301 EC referred to 'third countries'.

³⁹ See as an example for the latter, most recently the sanctions against Muammar Gaddafi, his family, and supporters: Council Decision 2011/137/CFSP of 28 Feb. 2011, OJ 2011 L 58/53–62, Annex I, list of persons referred to in Arts 5(1)(a); EU Regulation 204/2011 of 2 Mar. 2011, OJ 2011 L 58/1–13, Annex II, list of natural and legal persons, entities, or bodies referred to in Art. 6(1).

of the different procedures in Article 75 TFEU and Article 215 TFEU, the Parliament would have, at all times, the power to act as a co-legislator. However, ex-Article 60 EC and Article 75 TFEU are phrased very differently. Article 75 TFEU sets out a separate procedure for the adoption of sanctions that is different from Article 215 TFEU. It refers to the objectives of the AFSJ set out in Article 67 TFEU. Article 60 EC, by contrast, referred to the procedure in ex-Article 301 EC. Hence, the wording of Article 75 TFEU does not support the interpretation as joint legal basis. Article 75 TFEU should be understood as a legal basis in its own right.

Finally, it would also be possible to adopt all sanctions giving effect to UNSC Resolutions, including all counterterrorist measures adopted with this purpose, on the basis of Article 215 TFEU. An argument in favour of this reading is that ex-Article 301 EC, now replaced by Article 215(2) TFEU, was introduced with the intention to give the EU the competence to give effect to sanctions adopted in UNSC Resolutions. It has ever since been the legal basis for EU measures implementing UN sanctions, be it state sanctions or individual sanctions. Furthermore, the close link between paragraph 2 and paragraph 1 of Article 215 TFEU supports this understanding. Article 75 TFEU would then only be used for a separate legal framework of counterterrorist measures that is not based on a UN Resolution. However, the choice does not become any easier by making the existence of a UNSC Resolution the decisive criterion for distinction. First, also the autonomous European sanctions regime refers to UNSC Resolution 1373. Second, nearly identical measures against political leaders of third countries are adopted both with and without underlying UNSC Resolution. In other words, should the sanctions against Libya⁴⁰ (based on a UNSC Resolution) and Tunisia⁴¹ (autonomous sanctions) be adopted on different legal bases? Both are in practice based on Article 215 TFEU.

The choice of the correct legal basis for individual sanctions is not obvious. The wording of the Treaties does not offer a clear delimitation of the two legal bases; practice is yet to be established, and the Court has not yet ruled. The blurry boundaries of the legal bases cause uncertainties and inconsistencies. Particularly in view to the consequences: besides the differences in the decision-making procedure, the legal basis also has repercussions for the geographical application of the sanctioning measures. Articles 75 and 215 TFEU differ with regard to their geographical scope. The United Kingdom and Denmark have an opt-out for

⁴⁰ Council Decision 2011/137/CFSP of 28 Feb. 2011, OJ 2011 L 58/53-62; Council Regulation 204/2011 of 2 Mar. 2011, OJ 2011 L 58/1-13.

⁴¹ Council Decision 2011/72/CFSP of 31 Jan. 2011, OJ 2011 L 28/64; EU Regulation 101/2011 of 4 Feb. 2011, OJ 2011 L 31/1-12; Council Implementing Decision 2011/79/CFSP of 4 Feb. 2011 implementing Decision 2011/72/CFSP, OJ 2011 L 31/40-47.

measures adopted on the basis of Article 75 TFEU (Ireland does not). Yet, the UK intends to opt in to Article 75 TFEU measures.⁴² There is no opt-out for Article 215 TFEU.

6 STUCK IN THE PAST: SANCTIONS BASED ON PRE-LISBON INSTRUMENTS

More than one and a half years post-Lisbon, both autonomous sanctions and sanctions giving effect to UN lists are still adopted under pre-Lisbon legislation. Autonomous sanctions continue to be based on the pre-Lisbon Common Position 2001/931/CFSP and pre-Lisbon Regulation 2580/2001/EC.⁴³ As to sanctions giving effect to UN lists, the Council has adopted a new post-Lisbon Regulation.⁴⁴ However, this new Regulation implements a pre-Lisbon Common Position. In the above-mentioned application, the Parliament challenged this practice.⁴⁵ It argued that the requirements of Article 215 TFEU were not satisfied in absence of a new CFSP decision (post-Lisbon). The Court's ruling on this application could bring the adoption of individual sanctions on the basis of pre-Lisbon instruments to a (desirable) stop.

The CFSP Common Position for autonomous sanctions has been in force for nearly ten years.⁴⁶ The CFSP Common Position for sanctions giving effect to UN lists only six months less.⁴⁷ Sanctions against individuals are controversial and will continue to be subject to a high number of judicial actions. Currently, the EU has about thirty sanctions regimes in place.⁴⁸ Against these thirty different regimes, forty cases are pending before the General Court and the Court of Justice.⁴⁹ Several of the sanctions regimes against officials of third countries are based on post-Lisbon CFSP decisions⁵⁰ and are therefore subject to jurisdiction under Article 275 TFEU. With regard to the two counter-terrorist sanctions regimes, the situation is the same as before Lisbon: the two pre-Lisbon CFSP Common

⁴² Peers, 2011, *supra* n. 7, 74 et seq.

⁴³ See, for both instruments, *supra* n. 19.

⁴⁴ EU Regulation 1286/2009 of 22 Dec. 2009 amending Regulation (EC) No. 881/2002 (2009), OJ L 346/42.

⁴⁵ C-130/10, *Parliament v. Council*, joined by the Commission, the Czech Republic, Sweden, and France as interveners (Order of 10 Aug. 2010).

⁴⁶ See CP 2001/931/CFSP of 27 Dec. 2001 on combating terrorism, OJ 2001 L 344/93.

⁴⁷ See the mandate of the 1267 Sanctions Committee at <www.un.org/sc/committees/1267/>.

⁴⁸ See <http://ec.europa.eu/external_relations/cfsp/sanctions/docs/measures_en.pdf>.

⁴⁹ Committee of Legal Advisers on Public International Law (CAHDI), UN Sanctions and Respect for Human Rights, Report of the CAHDI (17 March 2011). Of the twenty-eight judgments categorized as falling within the field of CFSP on <www.curia.eu>, twenty-six concern individual sanctions.

⁵⁰ For example, Council Decision 2011/72/CFSP of 31 Jan. 2011, OJ 2011 L 28/64; EU Regulation 101/2011 of 4 Feb. 2011, OJ 2011 L 31/1-12; Council Decision 2011/137/CFSP of 28 Feb. 2011, OJ 2011 L 58/53-62; Council Regulation 204/2011 of 2 Mar. 2011, OJ 2011 L 58/1-13.

Positions can only be challenged in preliminary rulings and not in direct actions. From the perspective of the rule of law and fundamental rights, this is a reason weighing in favour of adopting post-Lisbon measures. However, from the perspective of the Council and the Commission, the high likelihood that any new measures will become subject to a legal challenge is a discouragement for adopting new CFSP decisions. Not only because of the controversial pre-Lisbon competence of the EU to adopt these measures but also because of the extended jurisdiction of the EU courts, it would be desirable if the EU institutions adopted a new CFSP instrument and/or an administrative framework under the AFSJ. It would also lead to greater legal clarity and submit the adoption of sanctions to the improved post-Lisbon rules.⁵¹

7 LACK OF INFORMATION: THE EU INSTITUTIONS CANNOT DO IT RIGHT

Under the 1267 sanctions regime, lack of information is the main problem. Because the EU institutions do not have access to the relevant information, they cannot share it with the courts. However, so long as they cannot share the relevant information with the courts, they cannot give effect to UN lists without infringing procedural rights guaranteed by EU law. Essentially, the problem results from the fact that the UNSC and the EU institutions consider individual sanctions to be preventive administrative measures falling outside the rules of national criminal law, while the Court of Justice held that their great impact on human rights makes certain procedural guarantees indispensable.

The EU tried to address the criticism that led to the annulment in the case of *Kadi v. Council and Commission* (hereinafter '*Kadi I*').⁵² Previously, the Commission simply copied the UN lists and froze the assets of those listed. In Regulation 1286/2009,⁵³ the EU moved from this 'automatic compliance' to 'controlled compliance'.⁵⁴ The Commission continues to copy the UN lists and immediately freeze all funds. The only difference is that the Commission will now issue a 'statement of reasons', notify those listed (if possible), and give them the opportunity to be heard.⁵⁵ However, the 'statement of reasons' issued by the Commission is identical to the publicly releasable portion of the 'statement of

⁵¹ See also the reference to legal safeguards in Arts 75 and 215(2) TFEU.

⁵² COJ, C-402/05 P and C-415/05 P, *Kadi I* [2008] ECR I-6351.

⁵³ EU Regulation 1286/2009 of 22 Dec. 2009 amending Regulation (EC) No. 881/2002 (2009), OJ L 346/42.

⁵⁴ See the evaluation of EU Regulation 1286/2009 in the ECCHR Report, *supra* n. 2.

⁵⁵ EU Regulation 1286/2009 of 22 Dec. 2009 amending Regulation (EC) No. 881/2002 (2009), OJ L 346/42, in particular: Recital 6, Art. 1(1)(b), Art. 1(9). See s. VIII *infra*.

case as provided by the Sanctions Committee',⁵⁶ and that information is not enough to ensure due process.⁵⁷ It contains only general assertions that are not substantiated by factual data. This does not allow individuals to respond to the case against them.

The problem remains that the EU institutions cannot comply with the standard of procedural protection under EU law developed by the Court of Justice based on the case law of the European Court of Human Rights (ECtHR).⁵⁸ They appear not to have access to the relevant information when it gives effect to the decisions of the UN Sanctions Committee. The General Court considered that even under the new rules, the 'applicant's rights of defence have only been "observed" in the *most formal and superficial* sense'⁵⁹ and that the applicant did not have 'even the most minimal access to the evidence against him'.⁶⁰ Hence, the EU institutions continue to issue purely formal and empty statements of reasons, most likely, because they do not have the necessary information themselves. This is inconsistent with the EU's general commitment to respect fundamental rights. The problem also highlights the contrast between the EU's competence to implement UN lists and the absence of any influence of the EU on the adoption of these measures in the UNSC.

8 THE AUTONOMOUS SANCTIONS REGIME: RIGHTS LOST IN COMPOSITE PROCEDURES

Under the autonomous sanctions regime, the Council and the Member States cooperate in a composite procedure that requires the Council, when listing someone, to defer as far as possible to the assessment of the competent national authorities. The EU listing is contingent upon 'the commencement and active continuation of national proceedings seeking, directly and chiefly the imposition . . . of [counterterrorist] measures . . . or the delivery and implementation of a decision convicting the person concerned'.⁶¹ Three separate but interrelated problems of procedural protection arise from this composite procedure. First, the EU institutions repeatedly have not provided the courts with

⁵⁶ Article 1(1)(b) of EU Regulation 1286/2009 of 22 Dec. 2009 amending Regulation (EC) No. 881/2002 (2009), OJ L 346/42.

⁵⁷ Check the UN website for the lack of detail of these statements: <www.un.org/sc/committees/1267/narrative.shtml>.

⁵⁸ See the discussion on the standard of judicial protection from individual sanctions, Eckes, 2009, *supra* n. 2, Ch. 3 (with references to the case law of the European Court of Human Rights).

⁵⁹ General Court, T-85/09, *Kadi II*, judgment of 30 Sep. 2010, para. 171. This was an evaluation of the rules under Commission Regulation 1190/2008.

⁶⁰ *Ibid.*, para. 173.

⁶¹ T-348/07, *Stichting Al Aqsa*, judgment of 9 Sep. 2010 (see also the appeals: C-539/10 and C-550/10), para. 176.

the necessary information to rule on the merits of the listing decision. This is similar to the problem under the 1267 regime, described in the previous section. Second, the general rule developed by the judiciary that in composite procedures the right to be heard must, in the first place, be protected at the national level leads in the particular case of individual sanctions to a gap in the procedural protection of those sanctioned. Third, any flaws occurring at the national level are likely to be reproduced at the EU level. This means that even if the national authority exercised its discretion incorrectly, its decision might still lead to a listing at the EU level.

As to the first point, EU institutions should, in principle, possess the relevant information. However, in court proceedings, they remain unwilling to share information with the EU courts.⁶² Autonomous sanctions are adopted by the Council based on a decision of the competent national authority. The relevant legal provision stipulates that decisions of the national authorities should be ‘based on serious and credible evidence or clues, or condemnation for such deeds’.⁶³ The EU listing is the result of an additional procedure with additional adverse effect for the individual.⁶⁴ The national procedure is often, but by no means always, a criminal procedure.⁶⁵ EU sanctions, even though in themselves they amount to a criminal charge within the meaning of Article 6 ECHR, pursue a different aim: preventing the funding of terrorist activities.

The Council’s listing decision is a discretionary decision. In order to exercise its discretion, the Council must consider substantive information. The question whether or not the person has links with terrorism may not even be answered by the competent national authority, but even where it may, the exercise of discretion requires the Council to make a substantive evaluation. The division of tasks in the composite listing procedure should not allow the Council to rubber stamp decisions of a particular national authority and attach significant additional effects to it without being informed of its substantive basis. However, the General Court has repeatedly found that it was not in the position to assess the well-foundedness of a particular listing because the Council was either unwilling or (possibly) unable

⁶² See, in particular: T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council and UK* (hereinafter ‘OMPI I’) [2006] ECR II-4665; Case T-256/07, *People’s Mojahedin Organization of Iran v. Council* (hereinafter ‘OMPI II’) [2008] ECR II-3019; Case T-284/08, *People’s Mojahedin Organization of Iran v. Council* (hereinafter ‘OMPI III’) [2008] ECR II-3487.

⁶³ Article 1(4) of CP 2001/931/CFSP of 27 Dec. 2001 on combating terrorism, OJ 2001 L 344/93.

⁶⁴ See, for more detail, C. Eckes & J. Mendes, ‘The Right to be Heard in Composite Administrative Procedures: Lost in between Protection?’, *European Law Review* 36 (2011): 651–670.

⁶⁵ For example, T-47/03, *Sison v. Council and Commission* (hereinafter ‘Sison I’) [2007] ECR II-73; T-341/07, *Sison v. Council* (hereinafter ‘Sison II’), ECR [2009] II-3625. In these cases, the national decision concerned the rejection of refugee status in the Netherlands rather than criminal proceedings.

to share the relevant information.⁶⁶ Hence, the problem of sharing the relevant information with the judiciary subsists also under the autonomous regime – only, for slightly different reasons.

As to the second point, the right to be heard is not sufficiently protected where the Council takes a discretionary decision (and therefore may have a different assessment of the facts) with additional adverse effects for individuals. The judiciary has established the rule that in the autonomous sanctions procedure, the right to be heard must, in the first, place be ensured at the national level.⁶⁷ This does not allow the affected individual to address the Council's substantive reasoning⁶⁸ and leads to gaps in the procedural protection where the exercise of discretion and the effects at the EU level do not match the limited opportunities to be heard at the EU level.

Third, any flaws of the national decision are carried onto the EU level. Member States have even adopted national decisions 'pending the adoption' of an EU measure.⁶⁹ These national measures were used to justify the EU listing, but as soon as the EU measure came into force, they were repealed. This goes against the internal logic of the autonomous listing procedure in which the EU listing should be based on a separate national procedure that serves its own purpose and can result in a separate outcome at the national level. The General Court ruled that adopting national measures pending the adoption of EU measures is 'inevitably tainted by circular logic' and renders the listing at the EU level unlawful.⁷⁰

By way of conclusion, the EU autonomous listing procedure suffers from a number of procedural shortcomings. However, pushed by a large amount of unfavourable litigation,⁷¹ the EU institutions have been forced to reform the rules.⁷² They still have to improve their practice. Under the autonomous listing regime, it is, *in principle*, possible for EU to lawfully list individuals as terrorist suspects and freeze their financial funds.⁷³ However, the large amount of litigation, including the recent ruling in the case of *Stichting Al Aqsa*, demonstrates that in practice, this remains problematic.

⁶⁶ T-228/02, *OMPI I* [2006] ECR II-4665, paras 162, 165, and 166. T-47/03, *Sison I* [2007] ECR II-73, and T-341/07, *Sison II*, ECR [2009] II-3625.

⁶⁷ See, e.g., T-228/02, *OMPI I* [2006] ECR II-4665, para. 119 [emphasis added]; nearly identical: T-47/03, *Sison I* [2007] ECR II-73, para. 166.

⁶⁸ See, for a more detailed argument, Eckes & Mendes, 2011, *supra* n. 64.

⁶⁹ T-348/07, *Stichting Al Aqsa*, judgment of 9 Sep. 2010 (see also the appeals: C-539/10 and C-550/10), para. 177.

⁷⁰ *Ibid.*

⁷¹ See, in particular, the *OMPI* saga, T-228/02, *OMPI I* [2006] ECR II-4665; T-256/07, *OMPI II* [2008] ECR II-3019; T-284/08, *OMPI III* [2008] ECR II-3487.

⁷² Council Document 10826/07 on the fight against the financing of terrorism – implementation of CP 2001/931/CFSP of 21 Jun. 2007, Annex II.

⁷³ Most recently, T-348/07, *Stichting Al Aqsa*, judgment of 9 Sep. 2010 (see also the appeals: C-539/10 and C-550/10).

9 MEMBER STATES SANDWICHED BETWEEN THE UN CHARTER AND EU LAW

The EU courts have repeatedly annulled sanctions under both regimes. So far, the EU institutions have reformed the listing procedure and relisted those affected.⁷⁴ In the case of autonomous sanctions, the repeated annulments have finally led to several delistings,⁷⁵ while so far the EU institutions have not delisted anyone who is identified as a terrorist suspect by the UN Sanctions Committee.

Many cases are still pending before the EU courts. Further annulments are likely, as it remains impossible to give effect to the UN lists in compliance with EU law.⁷⁶ If one day the EU refrains from (re)listing terrorist suspects, Member States would still have to comply with their obligations under the UN Charter. They remain bound by their UN obligations, irrespective of what the EU does. This raises the question of whether Member States could actually adopt the necessary measures without breaching their obligations under EU law.

The answer to this question depends on whether EU law exists on this specific point, whether it pre-empts national measures, and whether Member States could successfully rely on Article 351 TFEU to derogate from EU law. As to the first point, it is inherent in the principles of supremacy that Member States are precluded from adopting the same measure that the EU has already adopted in a directly applicable Regulation.⁷⁷ Hence, as soon as the EU has listed someone in a Regulation, Member States can no longer sanction that person under national law. The second point relates to the principle of pre-emption,⁷⁸ which is codified in Article 2 TFEU and stipulates that Member States are fully precluded from adopting national measures in two instances: when the EU has exclusive competence in the field (Article 3 TFEU) and when it has exercised shared competences (Article 4 TFEU). Beyond this pre-emption *stricto sensu*, the duty of sincere cooperation in Article 4(3) TEU precludes Member States more broadly

⁷⁴ For repeated annulments and relistings under the autonomous sanctions regime, see T-228/02, *OMPI I* [2006] ECR II-4665; T-256/07, *OMPI II* [2008] ECR II-3019; and T-284/08, *OMPI III* [2008] ECR II-3487, and T-47/03, *Sison I* [2007] ECR II-73, and T-341/07, *Sison II*, ECR [2009] II-3625. For the sanctions regime based on UN lists, see T-315/01, *Kadi I* [2005] ECR II-3649, and COJ, C-402/05 P and C-415/05 P, *Kadi I* [2008] ECR I-6351; T-85/09, *Kadi II*, judgment of 30 Sep. 2010.

⁷⁵ Both in the cases of T-228/02, *OMPI I* [2006] ECR II-4665; T-256/07, *OMPI II* [2008] ECR II-3019; and T-284/08, *OMPI III* [2008] ECR II-3487, and T-47/03, *Sison I* [2007] ECR II-73, and T-341/07, *Sison II*, ECR [2009] II-3625.

⁷⁶ See *supra* s. 7.

⁷⁷ See, e.g., Case 39/72, *Commission v. Italy* [1973] ECR 101; Case 50/76, *Amsterdam Bulb* [1977] ECR 137.

⁷⁸ See for an overview, D. Chalmers, G. Davies, & G. Monti, *European Union Law: Cases and Materials* (Cambridge: Cambridge University Press, 2010), 206 et seq.

from undermining the *effet utile* of EU law.⁷⁹ Pre-emption goes further than preventing the listing of an already listed individual. They could prohibit the adoption of individual sanctions under national law as such. First, it should be noted that counter-terrorist sanctions do not form part of the explicit exclusive competences of the EU.⁸⁰ The Lisbon Treaty has introduced two legal bases for the adoption of individual sanctions: Article 75 TFEU and Article 215(2) TFEU. The former article forms part of the provisions on the AFSJ and is a shared competence (Article 4(2)j TFEU). Hence, Member States are pre-empted from giving effect to a particular UN Resolution once the EU has done so. So far, however, the EU has not adopted measures under Article 75 TFEU. Autonomous sanctions continue to be adopted under pre-Lisbon legislation.⁸¹ Article 215(2) TFEU has been used as a legal basis. However, the new Regulation was based on a pre-Lisbon CFSP instrument.⁸²

The EU can only take action under Article 215 TFEU after it has adopted a prior CFSP decision.⁸³ The EU's competence for CFSP is neither exclusive nor shared but parallel.⁸⁴ CFSP measures do not prevent Member States from adopting parallel policies.⁸⁵ Yet, the duty of sincere cooperation is also applied to the CFSP;⁸⁶ this precludes Member States from adopting measures that are capable of undermining CFSP objectives. Once a CFSP instrument specifically calls upon the EU to adopt sanctions under the TFEU, parallel national measures would run contrary to CFSP objectives.

Finally, Member States could try to rely on Article 351 TFEU, which allows them, under strict conditions, to derogate from EU law to honour anterior international agreements with third parties. The UN Charter is an anterior agreement for nearly all Member States, and the Court of Justice appears to consider Article 351 TFEU as applicable to the UN Charter.⁸⁷ However, in the appeal of *Kadi I*, the Court specifically ruled that even if Member States may derogate from primary EU law under Article 351 TFEU, they may not act contrary to the 'very foundations' of EU law, including the respect for fundamental rights. The Court discussed this in the context of the 1267 regime and even though it was not directly required to do so: the case concerned the

⁷⁹ See, for a conceptual approach, R. Schutze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Pre-emption', *Common Market Law Review* 43 (2006), 1023.

⁸⁰ Article 3 TFEU.

⁸¹ See *supra* s. 6.

⁸² *Ibid.* For the two-tier adoption procedure, see *supra* s. 4.

⁸³ This is clear from the wording ('Where a decision . . . provides . . . the Council . . . shall adopt') and was confirmed for Art. 301 EC by the General Court in T-315/01, *Kadi I* [2005] ECR II-3649.

⁸⁴ Article 2 TFEU deals with it in a separate paragraph, para. 3.

⁸⁵ See Declarations 13 and 14 annexed to the Lisbon Treaty.

⁸⁶ This is clear from the fact that it moved from the old EC (Art. 10) to TEU (Art. 4(3)).

⁸⁷ C-124/95, *Centro-Com* [1997] ECR I-81, paras 58–59.

legality of a European legal instrument rather than a national law derogating from EU law. In the light of this and the above considerations that giving effect to UN lists will necessarily breach fundamental procedural rights,⁸⁸ it appears reasonable to conclude that the Court would not accept relying on Article 351 TFEU for the adoption of national measures giving effect to UNSC Resolution 1267.

By way of conclusion, Member States cannot lawfully adopt sanctions against a person that is already sanctioned in a directly applicable EU Regulation. Beyond this, Member States are precluded from giving effect to UNCS Resolutions once the EU has adopted a framework under Article 75 TFEU or agreed on a CFSP decision with the same intention. Furthermore, derogation under Article 351 TFEU appears excluded for giving effect to UN lists. This leaves Member States in an uncomfortable position of being sandwiched between their obligations under the UN Charter and EU law. Conflicting obligations of this sort endanger the common ground of goodwill and compliance on which the European legal order is built.

10 CONCLUSIONS

Complexity can be necessary. It does not necessarily have to result in inconsistencies. Hence, the intricacies of the EU's sanctioning practice are not as such a problem. Furthermore, some of the issues addressed in this article either remain outside of the EU's realm of influence, such as the division into the 1267 and the 1373 regime (section III), or predate the Lisbon Treaty and will, at some point, automatically become an issue of the past (section VI). However, this article has demonstrated that EU counter-terrorist sanctions entail problems that go beyond the simple conclusion that they infringe fundamental rights and that many of these problems are the responsibility of the EU.

The findings of this article can be summarized as follows. First, counter-terrorist sanctions go further in terms of intensity of fundamental rights restriction and detail than other EU criminal law and CFSP measures (section III). This raises questions of judicial review. It also sheds doubts on whether the EU is the right entity to adopt these measures. Second, individual sanctions continue to be adopted in a complex two-tier procedure based on a combination of TEU and TFEU instruments. This leads to differences in democratic legitimation and judicial review of nearly identical instruments (section IV). Third, this is aggravated by the fact that sanctions against individuals continue to be adopted on pre-Lisbon instruments (section VI). Fourth, the scope of the two new legal bases for the adoption of individual sanctions requires definition (section V). They have different

⁸⁸ See *supra* s. 7.

implications when it comes to the involvement of the EU institutions and the Member States, as well as to the geographical scope of the measures. Sixth, the central problem of EU sanctions giving effect to UN lists of terrorist suspects is the lack of information (section VI). The EU institutions are unable to give effect to UN listings without breaching procedural rights. Seventh, autonomous European sanctions, while they could be adopted in compliance with EU law, continue to unduly restrict the procedural rights of those listed because of the artificially splitting of the right to be heard (section VIII). Finally, the position of Member States of being sandwiched between EU and UN laws could indirectly cause problems at the EU level. If the EU courts continue to annul individual sanctions, Member States might become unable to comply with both UN and EU laws. This will put the role of the EU in giving effect to UNSC Resolutions in question.

How should the EU address these problems? First, the EU should firmly stick to a criminal justice approach and fight terrorism financing through harmonization of national criminal laws. This could include an autonomous sanctions regime that guarantees sufficient procedural rights at the EU level, including a hearing on the Council's substantive considerations cumulating in the listing. Second, the flawed UN sanctioning procedure⁸⁹ and the secrecy surrounding it appear to make it impossible for the EU to implement UN lists without lowering EU standards of fundamental rights protection. Despite the extended influence over Member States' actions at the UN level under the Lisbon Treaty,⁹⁰ the EU has no direct influence and it appears unrealistic that it can oblige Member States to work towards changing the 1267 regime. Furthermore, several Member States are adopting parallel measures⁹¹ – albeit in breach of EU law. It might be time for the EU to stop lending itself to implement flawed UN policies.⁹² The best solution, for the EU, for fundamental rights protection and for the credibility of the UNSC, might be if the 1267 sanctions regime was brought to an end and identification of terrorist suspects took place at exclusively the domestic level, where it is subject to judicial review (1373 regime). Decentralization does not necessarily mean that individual sanctions become less effective. Indeed, compliance with UNSC Resolution 1373 is much higher than

⁸⁹ See Harpaz, 2009, *supra* n. 2, 79 et seq. (with further references).

⁹⁰ See, in particular, Art. 34(2) TEU.

⁹¹ See UKSC, *Ahmed*, judgment of 27 Jan. 2010 [2010] UKSC 2, para. 22.

⁹² Protocol 13 states that the EU is bound by the UN Charter, irrespective of the fact that it is not a member; however, the COJ held in C-402/05 P and C-415/05 P, *Kadi I* [2008] ECR I-6351, that this is not the case.

with UNSC Resolution 1267.⁹³ However, this is obviously not the EU's call. The EU could only try to persuade those Member States that are represented in the UNSC to work towards this aim. Third, the action brought by the Parliament in March 2010⁹⁴ might solve the problems related to pre-Lisbon instruments. The Court might rule that a post-Lisbon CFSP instrument is required to adopt sanctions under Article 215(2) TFEU. Fourth, so long as the 1267 regime remains in place, the standard of judicial review in the EU courts for the different types of sanctions should, as a matter of principle, be the same. If anything, it could be argued that sanctions giving effect to UN lists should be subject to a stricter level of review. The effects on the individual are the same. Under both regimes, it is ultimately states who suggest the listing – either states at the UN level (including Member States) or individual Member States – directly to the Council. However, the involvement of third states that are not necessarily committed to the rule of law as it is understood under EU law should – if anything – require a higher level of judicial control. Furthermore, within the EU Member States, individuals have national remedies at their disposal against the national listing suggestions. Often, this is not the case against the listing suggestions that lead to the listings at the UN level.

The overall conclusion is negative. The EU's practice of sanctioning terrorist suspects is characterized by unnecessary institutional and procedural complexity, as well as legal uncertainty. It fits badly with other EU policies and remains problematic both from the perspective of fundamental rights protection and for the division of powers between the EU and its Member States. The EU should bring its sanctioning practice in order, even if this requires accepting its own limitations.

⁹³ R. Barrett, Coordinator of the UN al-Qaida Taliban Monitoring Team, European and United States Counter-Terrorism Policies, the Rule of Law and Human Rights: The United Nations Perspective, Presentation at the Global Governance High-Level Policy Seminar (European University Institute, Florence, 15 Mar. 2011).

⁹⁴ C-130/10, *Parliament v. Council*, joined by the Commission, the Czech Republic, Sweden, and France as interveners (Order of 10 Aug. 2010).