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## **EU RESTRICTIVE MEASURES AGAINST NATURAL AND LEGAL PERSONS: FROM COUNTERTERRORIST TO THIRD COUNTRY SANCTIONS**

CHRISTINA ECKES\*

### **Abstract**

*The use of targeted sanctions has dramatically increased. The EU runs 29 different sanctions regimes, mainly geographically defined but also including two counterterrorist regimes. These measures are under great judicial pressure: more than 250 natural and legal persons have challenged their listings. In several high profile cases, the EU courts struck down sanctions based on UN lists, autonomous EU sanctions, counterterrorist sanctions and sanctions against third country regimes, triggering significant reforms in EU listing procedures. This article sets out the different regimes and addresses questions such as: what standard of judicial review should the EU courts apply? What is the relevance of the case law on counterterrorist sanctions for third country sanctions? Can the EU courts acknowledge procedural improvements in the UN context? Are EU sanctions preventive measures? Are they suitable to achieve their own objective of changing behaviour?*

### **1. Introduction**

EU restrictive measures against natural and legal persons (targeted sanctions) have become a cornerstone of European Common Foreign and Security Policy (CFSP), since their early beginnings nearly 15 years ago. Most of these sanctions regimes target the political regimes of third countries and their supporters, and apply to a specific geographical region. At the same time, the EU also runs two counterterrorist sanctions regimes, which are not geographically defined. Much has been written on the EU counterterrorist sanctions. Third country sanctions, by contrast, have remained largely absent from the academic debate. Third country sanctions consist predominantly of restrictive measures against the governing elites of third countries, their

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supporters and associated entities. This article looks particularly at this category of measures, comparing and contrasting them with counterterrorist sanctions. It does not address comprehensive embargoes against entire States and their nationals.

As the number of targeted individuals under the different EU sanctions regimes has been growing, targeted sanctions have come under great judicial pressure. More than 250 natural and legal persons have challenged their listings in more than 120 cases before the EU courts.<sup>1</sup> This amounts to roughly 20 percent of all those targeted.<sup>2</sup> In several high profile cases, the EU courts have struck down different types of EU sanctions. The most well-known cases challenging counterterrorist sanctions, *Kadi* and *PMOI*, have involved a series of critical judicial decisions.<sup>3</sup> In response, the EU institutions have significantly reformed their listing procedures to meet the requirements set by the EU courts. Furthermore, a number of cases have been brought before national courts, challenging listing requests and the failure to request delisting in the context of third country sanctions.<sup>4</sup> In the area of counterterrorist sanctions, both national and international courts have, in certain circumstances, established a duty of States to work towards delisting and have supported judicial review of compliance with that duty.<sup>5</sup>

Targeted sanctions are highly relevant for reasons of foreign policy but also challenge EU constitutional principles, as reflected not only in the great

1. As at 1 Dec. 2013.

2. Committee of Legal Advisers on Public International Law (CAHDI), March 2013.

3. See in particular: Joined Cases C-584, C-593 & C-595/10 P, *Commission and Others v. Kadi (Kadi II appeal)*, judgment of 18 July 2013, nyr; Case T-85/09, *Kadi v. Commission (Kadi I)*, [2010] ECR II-5177; Joined Cases C-402/05 & C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission (Kadi I appeal)*, [2008] ECR I-6351; Case T-315/01, *Kadi v. Council and Commission (Kadi I)*, [2005] ECR II-3649 for EU counterterrorist sanctions giving effect to UN lists and Case T-284/08, *People's Mojahedin Organization of Iran v. Council (PMOI III)*, [2008] ECR II-3487; Case T-256/07, *People's Mojahedin Organization of Iran v. Council (PMOI II)*, [2008] ECR II-3019 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council and UK (PMOI I)*, [2006] ECR II-4665 for autonomous EU counterterrorist sanctions.

4. See e.g. in the UK only: *R (Bredenkamp) v. Secretary of State for Foreign and Commonwealth Affairs*, [2012] EWHC 3297 (Admin), [2013] 2 CMLR 10; *R (El-Maghraby and El Gzaerly) v. HM Treasury and Foreign and Commonwealth Office*, [2012] EWHC 674 (Admin); *R (Europäisch-Iranische Handelsbank) v. Secretary of State for Foreign and Commonwealth Affairs* (CO/10718/2012)). See also for other issues: *Bank Melli and Persia International Bank v. Shere Shipping and others*, [2013] EWHC 2321 (Comm) and *Trinity Term*, [2013] UKSC 38. On appeal from: [2011] EWCA Civ 1, *Bank Mellat (Appellant) v. Her Majesty's Treasury (Respondent)* (No. 1), 19 June 2013.

5. ECtHR, *Nada v. Switzerland*, App. No. 10593/08, judgment of 12 Sept. 2012; UN Human Rights Committee, *Sayadi and Vinck* (1472/2006 of 22 Oct. 2008) and Swiss Supreme Court, *Youssef Mustapha Nada v. Staatssekretariat für Wirtschaft* [2007] 1A.45/2007.

amount of litigation before the EU courts<sup>6</sup> but also in the fact that the EU courts are still struggling to find a coherent approach and to establish minimum requirements of legality. In particular, in the past two years, the General Court repeatedly annulled restrictive measures against private entities associated with Iran.<sup>7</sup> In November 2013, in two appeal cases the ECJ confirmed the General Court's approach in some regards but not in others.<sup>8</sup>

This article aims to give an adequate understanding of the instrument of targeted EU sanctions, including both those adopted to give effect to UN regimes and autonomous EU sanctions. Some of the problems surrounding targeted third country sanctions run parallel to the problems raised in the debate on counterterrorist sanctions, e.g. in cases such as *Kadi* and *PMOI*. An example is the limited access of the EU courts to the information that supports the reasons for listing. Yet, sanctions against entities associated with third country regimes also create specific problems. An example here is the issue of what is a sufficient link between the listed person and the situation or governing regime in the third country.

Section two introduces targeted sanctions. This entails explaining not only the different types of EU targeted sanctions, and the legal framework, including the appropriate legal basis and the listing criteria, but also the nature of sanctions and their suitability to achieve the stated objective of changing the behaviour of those targeted. The section also sets out recent developments, both within the EU and the UN context. The latter is highly relevant where the EU gives effect to UN sanctions regimes, in particular the role of the UN Ombudsperson, her successes, the limits of her mandate, and the relevance of her office from the perspective of the EU judiciary. Section three turns to the central point of this article: domestic judicial review of targeted sanctions and in particular the role of the EU courts. It discusses the persistent lack of information shared with the EU courts, the requisite standard of review, and suggested structural limitations that could potentially avoid regular annulments. It then turns to other existing legal limits of "in principle full

6. On 28 Nov. 2013 the EU courts had decided 31 cases. Another 33 cases, involving 93 persons, that challenge sanctions against individuals and entities associated with Iran are pending before the EU courts: 30 before the GC and 3 appeals before the ECJ.

7. See most recently Case T-489/10, *Islamic Republic of Iran Shipping Lines (IRISL) v. Council*, judgment of 16 Sept., 2013, nyr; Case T-13/11, *Post Bank Iran v. Council*, judgment of 6 Sept., 2013, nyr; Case T-24/11, *Bank Refah Kargaran v. Council*, judgment of 6 Sept., 2013, nyr; Case T-8/11, *Bank Kargoshaei and Others v. Council*, judgment of 16 Sept. 2013, nyr.

8. Case C-280/12 P, *Council v. Fulmen & Fereydoun Mahmoudian*, judgment of 28 Nov. 2013, nyr and Case C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Naft*, judgment of 28 Nov. 2013, nyr. See *infra*.

review”,<sup>9</sup> such as the broadening of the listing requirements, the principle of sincere cooperation and the broad discretion of the Council.

## 2. Targeted EU sanctions

### 2.1. Political support for sanctions

The great importance of targeted UN and EU sanctions has been widely acknowledged.<sup>10</sup> The central argument in their favour is that they have less collateral effects than sanctions bluntly imposed on (the nationals of) entire States.

Sanctions are the EU’s strong suit in the area of CFSP. The EU possesses unmatched economic power: it is the biggest economy and the greatest trading power in the world. National governments further consider the EU in principle better placed to adopt not only comprehensive embargoes but also targeted sanctions.<sup>11</sup> The UK Government for example concluded in its recent report on the competence division between the EU and the UK that “in the area of sanctions, over the last ten years the UK has led the development of EU instruments and action that are closely joined up with the efforts of the wider international community, especially those of the United Nations (UN) and the US, and which have delivered important effect in line with British priorities on, for example, Libya, Burma and Iran”.<sup>12</sup> It further argued that “the EU has the ability to impose far more painful sanctions than the UK could do alone”.<sup>13</sup> The latter point is also true for the UN, only on a larger scale.

In recent years, the EU has tremendously increased its use of targeted sanctions. At present, it runs 27 separate country regimes<sup>14</sup> and 2 counterterrorist regimes.<sup>15</sup> Of the 29 different sanctions regimes, 13 are

9. *Kadi II appeal*, cited *supra* note 3, para 97; see also *Kadi I appeal* cited *supra* note 3, paras. 326–327.

10. See e.g. Biersteker and Eckert, “Due process and targeted sanctions: An update of the ‘Watson Report’” of Dec. 2012, available at: <[www.watsoninstitute.org/pub/Watson%20Report%20Update%2012\\_12.pdf](http://www.watsoninstitute.org/pub/Watson%20Report%20Update%2012_12.pdf)> (last visited 19 March 2014).

11. This has led to the introduction of a specific competence for targeted sanctions in Art. 215(2) TFEU. See also for the UK: Review of the Balance of Competences between the United Kingdom and European Union on Foreign Policy, which is throughout very positive about the EU’s role in the area of sanctions, available at: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/227437/2901086\\_Foreign\\_Policy\\_acc.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227437/2901086_Foreign_Policy_acc.pdf)> (last visited 19 March 2014).

12. UK: Review of the Balance of Competences, cited previous note, p. 14, para 1.5.

13. *Ibid.*, p. 48, para 3.65.

14. On 31 July 2013 (partially targeting more than one country).

15. Al Qaeda and foreign terrorist organizations.

predominantly giving effect to objectives and lists drawn up by the UN and 16 are autonomous sanctions regimes for which the EU itself designates the targets.<sup>16</sup> The EU for example adopts autonomous sanctions where their imposition fails in the UN context.<sup>17</sup> In the four years since the entry into force of the Treaty of Lisbon, the EU has adopted countless legal instruments, imposing, amending, or repealing targeted sanctions.<sup>18</sup> Indeed, the majority of all legal instruments and EU court cases in the area of CFSP concern sanctions.

## 2.2. *Different categories of targeted sanctions*

Different categories of targeted sanctions should be distinguished on the basis of three criteria. The first distinction is who decides on the list of targeted persons and entities. This has consequences for the effects of reforms of the EU sanctioning procedures and for the possibilities of the EU courts to access the relevant information and offer judicial protection. Autonomous EU sanctions and sanctions giving effect to UN lists should be distinguished. EU sanctions against Congo are an example of third country sanctions based on UN lists, drawn up by a UN Security Council Sanctions Committee.<sup>19</sup> For reasons of expediency, it is usually the task of the European Commission to amend the EU instruments giving effect to the UN lists.<sup>20</sup> Examples of autonomous EU sanctions regimes are the measures against Syria and

16. EU sanctions based on UN lists: Afghanistan, Al Qaida, Democratic Republic of Congo, Eritrea, Guinea-Bissau, Iran, Democratic People's Republic of Korea (DPRK; North Korea), Lebanon, Liberia, Libya, Somalia, Sudan, South Sudan.

Autonomous EU sanctions: Belarus, Bosnia and Herzegovina, China (arms embargo; no list), Egypt, Republic of Guinea (Conakry), Haiti, Iran (both UN list and autonomous list), DPRK (both UN list and autonomous list), Moldova, Myanmar, Yugoslavia (Serbia and Montenegro), Syria, Tunisia, United States of America (against extra-territorial effects of legislation), Zimbabwe (suspended by: Council Decision 2013/160/CFSP of 27 March 2013 amending Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe, O.J. 2013, L 90/95), and restrictive measures against terrorists.

17. <[www.un.org/News/Press/docs/2008/sc9396.doc.htm](http://www.un.org/News/Press/docs/2008/sc9396.doc.htm)> (last visited 19 March 2014).

18. E.g. sanctions giving effect to UN counterterrorist lists: 91 Commission Implementing Regulations related to Al Qaida (latest instrument: Commission Implementing Regulation 1091/2013, O.J. 2013, L 293/36–37).

19. UNSC Resolution 1533 (2004); Decision 2010/788/CFSP, O.J. 2010, L 336/30; Regulation 889/2005 imposing certain restrictive measures, O.J. 2005, L 152/1 (exemptions Art. 3(1) – list of competent national authorities in the Annex), and Council Regulation 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo, O.J. 2005, L 193/1. See for the EU list of designated persons: Annex I to Regulation 1183/2005.

20. E.g. Recital 3 of Council Regulation 1183/2005, *ibid*.

Tunisia.<sup>21</sup> Other sanctions regimes, such as the one against Iran, have a dual system. In these cases, the EU copies the lists drawn up by the UN Security Council Sanctions Committee,<sup>22</sup> while it lists at the same time additional persons and entities, who meet separate EU listing criteria.<sup>23</sup>

Secondly, sanctions regimes can be categorized by whether they are geographically limited or not. Sanctions against third country regimes indicate a geographical region (usually a country) to which they apply; counterterrorist sanctions are not subject to such a limitation (and can in principle also target EU citizens). The former include for instance sanctions aimed to pressure those governing Iran, Syria, Libya, and Belarus.<sup>24</sup> The latter cover sanctions against Al-Qaida (based on a UN list) and against terrorist suspects that the EU identifies autonomously. Autonomous EU counterterrorist sanctions target predominantly regional groups, such as the *PKK*, *Al Aqsa* and the *LTTE*.<sup>25</sup> This distinction is relevant because a geographical criterion offers a way of confining the objective of the sanctions regime and the potential group of targets.

Thirdly, within the category of sanctions against third country regimes, a further differentiation can be made based on the grounds for listing. EU legislation regularly refers to two basic categories of targeted persons and entities: firstly, the leaders or members of government of the third country in question; and secondly, any person associated with an entity or body controlled by those rulers.<sup>26</sup> The ECJ considered these categories in the appeal case of *Pye Phyo Tay Za* concerning sanctions against Burma/Myanmar.<sup>27</sup> Several third country regimes further identify a third group of persons, who will also be subject to economic and financial sanctions: those violating the

21. Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria, O.J. 2013, L 147/14, and Council Decision 2011/72/CFSP of 31 Jan. 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia, O.J. 2011, L 28/62.

22. E.g. for Iran the committee established pursuant to UNSC Resolution 1737 (2006).

23. Council Decision 2010/413/CFSP, O.J. 2010, L 195, and Regulation 961/2010, O.J. 2010 L 281/1.

24. See for the list updated on 31 July 2013: <eeas.europa.eu/cfsp/sanctions/docs/measures\_en.pdf> (last visited 20 March 2014).

25. “Kurdistan Workers’ Party” – “PKK”; Al Aqsa – international charity with alleged ties to Palestinian militants; “Liberation Tigers of Tamil Eelam” – “LTTE”.

26. See e.g. Art. 11(1) of Regulation 194/2008 of 25 Feb. 2008, O.J. 2008, L 66/1, concerning Burma/Myanmar: “All funds and economic resources belonging to, owned, held or controlled by the individual members of the Government of Burma/Myanmar and to the natural or legal persons, entities or bodies associated with them, as listed in Annex VI, shall be frozen”. See also Council Common Position 2006/318/CFSP renewing restrictive measures against Burma/Myanmar, O.J. 2006, L 116/77.

27. Case C-376/10 P, *Pye Phyo Tay Za v. Council*, judgment of 13 March 2012, nyr, paras. 68–70. See: Pantaleo, annotation of *Tay Za*, 49 CML Rev. (2012), 1769–1786.

provisions of the sanctions regime.<sup>28</sup> The latter category should be distinguished from those subject to national secondary sanctions imposing penalties on anyone who participates in circumventing the prohibitions of the sanctions regime. Secondary sanctions can be of a criminal nature but they do not lead to an inclusion in the lists.<sup>29</sup>

Sanctions against third country regimes often specify the different categories further in the light of their specific objective, e.g. “persons having been identified as responsible for misappropriation of Egyptian State funds, and natural or legal persons, entities or bodies associated with them” (in the case of Egypt),<sup>30</sup> or persons or entities “that are involved, including through the provision of financial services, in the supply to or from the DPRK [Democratic People’s Republic of Korea] of arms and related material of all types, or the supply to the DPRK of items, materials, equipment, goods and technology which could contribute” to nuclear-related, ballistic missile-related or other weapons of mass destruction-related programmes.<sup>31</sup> As we will see in the rest of this article, the listing criteria are of great importance in the debate surrounding the choice of the appropriate legal basis, the objective of sanctions, and also for the judicial protection against imposition of sanctions.

### 2.3. *The UN origins of EU sanctions*

#### 2.3.1. *The Security Council, Sanctions Committees, and Focal Points*

Since nearly half of all EU sanctions regimes in fact give effect to UN lists of targets, it is helpful to outline briefly the UN context in which these lists are adopted. UN sanctions regimes are adopted by the Security Council as resolutions under Chapter VII of the UN Charter. This entails that the situation in the targeted country (or in the case of Al Qaida sanctions “international terrorism”) is classified as falling under the Security Council’s primary responsibility of maintaining international peace and security. It also means

28. E.g. sanctions against DPRK: “the persons and entities not covered by Annex I or Annex II working on behalf or at the direction of a person or entity listed in Annex I or Annex II or persons assisting the evasion of sanctions or violating the provisions of” the relevant UN Security Council resolutions or the relevant EU Council decision, see Art. 15 (c) of Council Decision 2013/183/CFSP, O.J. 2013, L 111/52.

29. See e.g. for counterterrorist sanctions based on UN lists: Art. 10 of Regulation 881/2002, O.J. 2002, L 139.

30. Art. 1(1) of Council Decision 2011/172/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt, O.J. 2011, L 76/63.

31. Art. 15(b)(i), (ii) and (iii) of Council Decision 2013/183/CFSP of 22 April 2013 concerning restrictive measures against the DPRK, O.J. 2013, L 111/52. See also the discussion of the broadening of the designation criteria in the case of Iran sanctions, *infra*.

that, pursuant to Article 103 of the UN Charter, Security Council sanctions resolutions benefit from primacy over international agreements.

For targeted sanctions, the Security Council resolutions set up committees which are in charge of drawing up lists of natural and legal persons that fall under the respective sanctions regime.<sup>32</sup> Sanctions committees are specialized fora, comprised of representatives of the same countries that are represented in the Security Council, which offer an efficient decision-making structure for listing requests<sup>33</sup> and exemptions.<sup>34</sup> For specific regimes the Security Council has further established enforcement mechanisms that aim to ensure effectiveness of implementation of targeted sanctions. For counterterrorist sanctions (the UN Al Qaida list), a “Monitoring Team” evaluates since 2004 the compliance of UN Member States and makes suggestions aimed to improve the effectiveness of the system.<sup>35</sup>

Procedural fairness remains a problem throughout the different UN sanctions regimes. The only option for those listed in any of the targeted country regimes is to bring their file to a so-called “focal point”. The establishment of these focal points, starting in 2006, was a big step for the UN, which does not provide any other channel for individuals to contact, address or participate in the organization. Indeed, focal points operate as an avenue of individual access to the UN system that did not exist before. Today, all UN

32. UNSC Resolution 1718: DPRK (<[www.un.org/sc/committees/1718/](http://www.un.org/sc/committees/1718/)>), Democratic Republic of the Congo (<[www.un.org/sc/committees/1533/](http://www.un.org/sc/committees/1533/)>), UNSC Resolution 1970: Libya (<[www.un.org/sc/committees/1970/](http://www.un.org/sc/committees/1970/)>), UNSC Resolution 1988: Afghanistan/Taliban (<[www.un.org/sc/committees/1988/](http://www.un.org/sc/committees/1988/)>), UNSC Resolutions 751 and 1907: Somalia and Eritrea (<[www.un.org/sc/committees/751/](http://www.un.org/sc/committees/751/)>), UNSC Resolutions 1267 and 1989: Al Qaida (<[www.un.org/sc/committees/1267/](http://www.un.org/sc/committees/1267/)>); UNSC Resolution 1737: Iran (<[www.un.org/sc/committees/1737/](http://www.un.org/sc/committees/1737/)>), UNSC Resolution 1518: Iraq and Kuwait (<[www.un.org/sc/committees/1518/](http://www.un.org/sc/committees/1518/)>), UNSC Resolution 1521: Liberia (<[www.un.org/sc/committees/1521/](http://www.un.org/sc/committees/1521/)>), UNSC Resolution 1572: Cote d'Ivoire (<[www.un.org/sc/committees/1572/](http://www.un.org/sc/committees/1572/)>), UNSC Resolution 1591: Sudan (<[www.un.org/sc/committees/1591/](http://www.un.org/sc/committees/1591/)>), UNSC Resolution 1636: Lebanon (<[www.un.org/sc/committees/1636/](http://www.un.org/sc/committees/1636/)>), UNSC Resolution 2048: Guinea-Bissau (<[www.un.org/sc/committees/2048/](http://www.un.org/sc/committees/2048/)>). Terminated Sanctions Committees (<[www.un.org/sc/committees/](http://www.un.org/sc/committees/)>): Sierra Leone (1997–2010); Rwanda (1994–2008); Eritrea and Ethiopia (2000–2001); Federal Republic of Yugoslavia, including Kosovo (1998–2001), no listings of individuals or entities; Liberia (1995–2001); Angola (1993–2002); Haiti (1993–1994); Yugoslavia (1991–1996); Libyan Arab Jamahiriya (1992–2003); Iraq and Kuwait (1993–2002); South Africa (1977–1994).

33. The 1737 Sanctions Committee (Iran) promises for example to decide within 10 working days on any written listing request, see guidelines of the committee at: <[www.un.org/sc/committees/1737/pdf/reviseguidelinesfinal.pdf](http://www.un.org/sc/committees/1737/pdf/reviseguidelinesfinal.pdf)>.

34. See e.g. Resolution 1718 (2006) of 14 Oct. 2006 on DPRK: “... Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligations, or where the Committee concludes that an exemption would otherwise further the objectives of the present resolution”.

35. Analytical Support and Sanctions Monitoring Team, its reports are available at: <[www.un.org/sc/committees/1267/monitoringteam.shtml](http://www.un.org/sc/committees/1267/monitoringteam.shtml)>.

sanctions regimes have a focal point. However, focal points only administer and pass on. They do not review and do not recommend either delisting or maintaining sanctions. Focal points should not be seen as more than a way of depositing delisting requests, and it remains unclear what the responsible decision-makers do with these requests.

### 2.3.2. *The limited role of the Ombudsperson*

The most relevant recent development, particularly in terms of procedural protection, in the UN context has been the creation of the position of the Ombudsperson. Where domestic measures give effect to UN lists of targets, this development may be relevant to the evaluation of due process by domestic courts, including the EU courts. Security Council Resolution 1989 (2011) introduced the extended powers of the UN Ombudsperson to review UN sanctions against Al Qaida. It also split the Taliban and Al Qaida regime and limited the powers of the Ombudsperson to the Al Qaida regime. The UN country regimes, now including the former Taliban sanctions as a country regime linked to Afghanistan, are thus outside the mandate of the Ombudsperson; they do not offer any form of independent review mechanism. As explained above, the only option for those placed on a third country list is to file a delisting request with the appropriate focal point. And, while requests filed with a focal point have resulted in the removal of specific individuals from the UN lists, this system cannot be compared to that of the Ombudsperson, since the focal points do not conduct any form of substantive evaluation.

With regard to the Al Qaida regime, much has been done to reform the listing and delisting process. An important recent step forward is that it is now possible to make public which countries designated the person (except if they object to this).<sup>36</sup> The UN Ombudsperson Kimberley Prost has further demonstrated that her position makes a difference. She has achieved the delisting of 27 natural persons and 25 entities so far, while 3 of her delisting requests were denied and the individuals were retained on the list.<sup>37</sup> The delistings include Sheik Yassin Kadi, the applicant in the well-known *Kadi* cases before the EU courts. The Ombudsperson can collect and evaluate the information which associates and disassociates any listed person with terrorism. This of course depends on the willingness of countries to supply her with the relevant information. So far, she has concluded association and

36. 1267 Sanctions Committee concerning Al Qaida, Guidelines of the Committee for the Conduct of Its Work, of 15 April 2013, available at: < [www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf)>, Section 6. Listing (i).

37. See Office of the Ombudsperson of the Security Council's 1267 Committee, Status of Cases, available at: <[www.un.org/en/sc/ombudsperson/status.shtml](http://www.un.org/en/sc/ombudsperson/status.shtml)> (last visited 1 Dec. 2013).

cooperation agreements with 12 countries.<sup>38</sup> Originally, the Ombudsperson was not bound by a specific judicial standard in her evaluation. She herself defined the standard of review that she applies as “whether there is sufficient information to provide a reasonable and credible basis for the listing”.<sup>39</sup>

Despite all improvements, particularly in the Al Qaida regime, sanctioning in the UN context remains a political process. Transparency problems continue, and even though the Monitoring Team refers to “*rulings* of the Office of the Ombudsperson”<sup>40</sup> the secret recommendations of the UN Ombudsperson are not binding. First, the Sanctions Committee can reject a proposed delisting by consensus. If this does not happen within 60 days the decision is referred to the Security Council. When the delisting request of the Ombudsperson is referred, the Security Council can decide to delist. This happens pursuant to the usual voting procedures in the Security Council; hence, any permanent member can veto delisting.<sup>41</sup> Furthermore, neither the Sanctions committee nor the Security Council have to give grounds why a delisting recommendation is not followed. Moreover, the Ombudsperson draws up her delisting requests and comprehensive reports in secret.<sup>42</sup> It is not even made public who has submitted a delisting request. Furthermore, Al Qaida sanctions do not contain a sunset clause (time limit)<sup>43</sup> but only offer tri-annual reviews; sanctions hence continue in principle for an indefinite period of time. The “associated with” standard remains very broad and ultimately vague<sup>44</sup> and is not further explained in the

38. See Office of the Ombudsperson of the Security Council’s 1267 Committee, Access to Confidential/Classified Information, available at: <[www.un.org/en/sc/ombudsperson/access\\_info.shtml](http://www.un.org/en/sc/ombudsperson/access_info.shtml)> (last visited 1 Dec. 2013); the USA has agreed to ad hoc assistance.

39. Office of the Ombudsperson of the Security Council’s 1267 Committee, Approach to and Standard for Analysis, Observations, Principal Arguments and Recommendation, available at: <[www.un.org/en/sc/ombudsperson/approach.shtml](http://www.un.org/en/sc/ombudsperson/approach.shtml)>.

40. Fourteenth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2083 (2012) concerning Al-Qaida and associated individuals and entities, S/2013/467, p. 12 (our emphasis).

41. Resolution 2083, para 21, S/RES/2083 (2012).

42. Guidelines 7. Delisting (aa), cited *supra* note 36, p. 10.

43. A sunset clause was suggested by a well-known study of UN sanctions: Biersteker and Eckert, *op. cit. supra* note 10.

44. Paragraphs 2 and 3 of Resolution 2083, cited *supra* note 41: “2. Reaffirms that acts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida include: (a) Participating 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; (b) Supplying, selling or transferring arms and related materiel to; (c) Recruiting for; or otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof; 3. Confirms that any individual, group, undertaking or entity either owned or controlled, directly or indirectly, by, or otherwise supporting, any individual, group, undertaking or entity associated with Al-Qaida, including on the Al-Qaida Sanctions List, shall be eligible for designation;”.

guidelines.<sup>45</sup> Nor does the UN possess any mechanism to shed further light on the interpretation of the term. This is different within the national or EU legal order, where the domestic courts offer an interpretation of vague legal terms.

As mentioned above, the country regimes are outside the mandate of the Ombudsperson and do not offer any review mechanism. The case of Mr Jim'ale exemplifies this problem. Mr Jim'ale was first listed on the Al Qaida list. After an 11 months process of information gathering, dialogue and reporting with the UN Ombudsperson, the Ombudsperson recommended delisting.<sup>46</sup> Following this request, Mr Jim'ale was removed from that list. However, he was then included in the Eritrea and Somali list,<sup>47</sup> which falls outside the mandate of the Ombudsperson. At the time of writing, he is still listed.

In April 2011, the so-called group of like-minded States suggested using the Resolution 1267 guidelines as a model for the other sanctions committees.<sup>48</sup> The group of like-minded States comprises Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden, and Switzerland. It aims to contribute to enhancing the fairness and transparency of the various UN sanctions regimes, and ultimately to their credibility and effectiveness. The suggestion of the group of like-minded States appears as a logical step to improve the fairness of UN targeted sanctions against country regimes. Yet, it is also based on the assumption that the UN system can be reformed to target natural and legal persons directly without breaching basic procedural fairness standards<sup>49</sup> and ultimately entails a scenario that domestic review should be limited because the UN offers sufficient procedural guarantees.

The argument in this article is that, because the UN system does not offer these guarantees or the basic checks and balances that are the core of the rule of law in the EU Member States, the Union domestic courts must continue to exercise full judicial review and if necessary continue to annul the measures that give effect to the UN lists.

45. See Guidelines 6. Listing (e), cited *supra* note 36.

46. See Office of the Ombudsperson of the Security Council's 1267 Committee, Status of Cases, CASE 8 – Ahmed Ali Nur Jim'ale (formerly QI.J.41.01.), removed from the Al Qaida list on 17 Feb. 2012.

47. Relisted on the Somali/Eritrea list, entry 12 "Ali Ahmed Nur Jim'ale", see: <[www.un.org/sc/committees/751/pdf/1844\\_cons\\_list.pdf](http://www.un.org/sc/committees/751/pdf/1844_cons_list.pdf)>.

48. Group of like-minded States, Improving fair and clear procedures for a more effective UN sanctions system, available at: <[www.news.admin.ch/NSBSubscriber/message/attachments/22759.pdf](http://www.news.admin.ch/NSBSubscriber/message/attachments/22759.pdf)>.

49. See also Section 3.3.4 *infra*.

## 2.4. The EU legal framework

At present all EU sanctions, whether country-related or counterterrorist, and whether predetermined by the UN or autonomous, are adopted on the basis of Article 215 TFEU. The Treaty of Lisbon introduced a second (separate) legal basis, Article 75 TFEU, which pursuant to its wording could cover financial sanctions adopted in the context of the fight against terrorism. However, Article 75 TFEU has so far not been used and after the ECJ's extensive reading of Article 215 TFEU in *Parliament v. Council* of 2012, the latter provision remains the legal basis for all the measures discussed in this article.<sup>50</sup> Article 215 TFEU is located in part five of the TFEU, governing the Union's external actions and deals both with trade embargoes and individual sanctions. The provision foresees a two-tier procedure, which first requires a CFSP instrument containing the political decision to adopt sanctions, and then a regulation containing the actual operational measures. So far, all targeted sanctions, both *pre-* and *post-*Lisbon, have been adopted pursuant to this two-tier procedure.<sup>51</sup>

### 2.4.1. An important distinction: Article 215(1) and (2) TFEU

Council regulations adopting third country sanctions regularly refer to Article 215 TFEU without making the distinction between its first and second paragraph.<sup>52</sup> Sanctions against *Al Qaida* by contrast are explicitly based on Article 215(2) TFEU.<sup>53</sup> Article 215(1) TFEU governs "the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries" and Article 215(2) TFEU concerns "restrictive measures . . . against natural or legal persons and groups or non-State entities". The distinction between the two paragraphs may be relevant for exceptional judicial review of the CFSP decision and for a different evidentiary standard.

As to the former, Article 275(2) TFEU gives the EU courts the mandate to review "the legality of decisions providing for restrictive measures against

50. Case C-130/10, *Parliament v. Council*, judgment of 19 July 2012, nyr; See also: Eckes, "EU counterterrorist sanctions against individuals: Problems and perils", 17 EFA Rev. (2012), 113–132.

51. Art. 215 (ex 301, as amended) TFEU. Pre-Lisbon this used to be a CFSP common position; post-Lisbon the instrument is called CFSP decision.

52. E.g. Council Regulation 971/2013 amending Regulation 267/2012 concerning restrictive measures against Iran, O.J. 2013, L 272/1; Council Regulation 697/2013 amending Regulation 36/2012 concerning restrictive measures in view of the situation in Syria, O.J. 2013, L 198/28.

53. E.g. Council Regulation (EU) 596/2013 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaida network, O.J. 2013, L 172/1.

natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V [TEU]”.<sup>54</sup> This is an exception to the general rule that the jurisdiction of the EU courts does not extend to the CFSP. Article 275(2) TFEU makes no distinction as to the EU or UN origin of the sanctions. The article, in its original version in the Treaty establishing a Constitution for Europe, was drafted in 2002 and 2003. This was years before the wave of legal challenges against targeted sanctions.<sup>55</sup> In its current form, Article 275 TFEU entered into force in 2009 and hence after the EU courts had put pressure on the EU’s counterterrorist sanctions system, for example in *Kadi I* and the *PMOI* cases.

In the two-tier procedure, the CFSP decisions (on the basis of Chapter 2 of Title V TEU) set out the lists of “natural and legal persons”. The formulation “natural and legal persons” could be read as a link to Article 215(2) TFEU, which mentions groups and non-State entities. This raises the question whether judicial review of CFSP decisions is limited to those that are given effect by Union measures (regulations) adopted under Article 215(2) TFEU. In other words, do CFSP decisions listing natural and legal persons “associated with” the third country regimes and which are given effect by regulations based on Article 215 TFEU without specifying the paragraph, also fall under Article 275(2) TFEU?

As to the evidentiary standard for showing a sufficient connection between the sanctioned person and the third country regime, this may be stricter when the person or entity is designated under Article 215(2) TFEU. This could be justified for example if paragraph 1 was interpreted as only extending to the leaders of the third country regime. A connected question is what should be the link to the objective of the sanctions regime, i.e. to stop nuclear proliferation in Iran, if the ultimate aim is a change in behaviour in the light of that objective as set out by the 2012 EU Guidelines.<sup>56</sup>

The historical origin of Article 215(1) TFEU seems to support the adoption of targeted sanctions against third country regimes on its basis. The provision is the direct successor of Article 301 TEC. In its pre-Lisbon case law, the ECJ

54. The review extends to both the TFEU (former Community) instrument and the CFSP decision (adopted under the TEU), see Art. 275(2) TFEU.

55. The European Convention drafted the Treaty establishing a Constitution for Europe in 2002 and 2003. It contained Art. III–322(2) on restrictive measures against natural or legal persons and groups or non-State entities. Its Art. III–376 stated: “However, the Court shall have jurisdiction to . . . rule on proceedings, brought in accordance with the conditions laid down in Art. III–365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V”. Art. III–322(3) stated: “The acts referred to in this Article shall include necessary provisions on legal safeguards.”

56. Council, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU CFSP, 11205/12 of 15 June 2012 (EU Sanctions Guidelines). See also Section 2.3.3 *infra*.

held that “the concept of a *third country*, within the meaning of Articles 60 EC and 301 EC [now Article 215(1) TFEU], may include the rulers of such a country and also individuals and entities associated with or controlled, directly or indirectly, by them”.<sup>57</sup> However, Article 215(2) TFEU was introduced only with the Treaty of Lisbon and the ECJ’s pre-Lisbon interpretation of Article 301 TEC is hence unhelpful for distinguishing between the two paragraphs. Post-Lisbon, in the *Fulmen* appeal of 28 November 2013, the ECJ indirectly confirmed that sanctions against an Iranian company under Council Decision 2010/413 and Article 7(2) of Regulation 423/2007 were based on Article 215(2) TFEU.<sup>58</sup>

The understanding that sanctions against persons and entities connected to third country regimes fall under Article 215(2) TFEU further brings them firmly within the scope of Article 275(2) TFEU. It is also in line with the objective of this provision, which was introduced to offer legal safeguards to natural and legal persons, as opposed to countries. Hence, since the introduction of the distinction between Article 215(1) and (2) TFEU, the first paragraph should be understood to cover embargoes against third States and the second paragraph should be understood to cover all targeted sanctions, i.e. all “restrictive measures against natural and legal persons”. The distinction should not be based on whether the reason for sanctioning is the connection with terrorist activities or with a third country regime, or even how closely those sanctioned are involved with that third country regime. An explicit adoption of targeted sanctions on the basis of Article 215(2) TFEU would further explicate that there is no automatic link, but that in each individual case “a sufficient link” between those targeted and the third country regime needs to be shown.<sup>59</sup>

In 2013, the General Court further distinguished between “personalized devices” and “objective devices” of the EU sanctions regime against Iran.<sup>60</sup> “Personalized devices” are freezing of funds and economic resources belonging to the listed persons and entities pursuant to Article 20 of Council Decision 2010/413/CFSP and Article 23 of Regulation 267/2012. The embargo on key equipment and technology for the oil and natural gas industry in Iran was identified as an “objective device”. In a different case, also concerning sanctions against Iran, the ECJ confirmed that “it is the *individual nature* of those measures” which, in accordance with Article 275(2) TFEU,

57. *Kadi 1 appeal*, cited *supra* note 3, para 166. Discussed in much detail in *Tay Za*, cited *supra* note 27.

58. *Fulmen*, cited *supra* note 8, para 58 (the case concerned Implementing Regulation 668/2010).

59. *Tay Za*, cited *supra* note 27, para 44.

60. Case T-5/13 R, *Iran Liquefied Natural Gas Co v. Council*, Order of 29 Aug. 2013, paras. 5–6.

permits access to the EU courts.<sup>61</sup> The distinction between personalized (or individual) and objective parts of a sanctions regime is a viable basis for distinguishing between measures that fall under Article 215(1) and (2) TFEU, respectively. It also explains why the legal instruments establishing third country sanctions do not specify on which paragraph they are based: they usually contain elements based on either of the two paragraphs.

The ECJ further clarified in *Kala Naft*, a case concerning autonomous EU sanctions in the context of Iran, that Article 275(1) TFEU prevented it from reviewing Article 4 of Decision 2010/413, which allows imposing travel bans.<sup>62</sup> Economic measures, for instance asset freezes and export bans, fall within the competence of the Union. Pursuant to the above-explained two-tier procedure they require separate implementing legislation in the form of a Council regulation. Certain other measures, such as arms embargoes and travel bans, are implemented directly by Member States.<sup>63</sup> In the EU context, such measures require a decision by the Council (but not an EU Regulation). Council decisions are binding on EU Member States but do not immediately form part of the national legal order. The wording of Article 275 TFEU refers more generally to restrictive measures against natural or legal persons and does not explicitly exclude EU measures that are implemented by the EU Member States. However, the Court interpreted its exceptional jurisdiction under Article 275(2) TFEU to only extend to cover CFSP decisions that provide for restrictive measures against natural or legal persons that are implemented by the Union, i.e. by Regulations under Article 215 TFEU. In the ECJ's interpretation, travel bans imposed by Member States remain challengeable before national courts, while the EU decisions requiring such travel bans remain outside the scope of judicial review.

#### 2.4.2. *The EU Guidelines: Nature and purpose of sanctions*

The EU has adopted "Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of EU CFSP", which is a key document, giving insights into the EU's sanctioning practice.<sup>64</sup> These Guidelines apply to all types of sanctions, i.e. both counterterrorist and third country sanctions; and they apply to both autonomous sanctions and those based on UN lists. Annex I to the Guidelines sets out more specific guidelines

61. Joined Cases C-478-482/11 P, *Laurent Gbagbo et al v. Council*, judgment of 23 April 2013, nyr, para 57 (our emphasis).

62. *Kala Naft*, cited *supra* note 8, para 99. The Court only refers to Art. 215 TFEU without specifying the paragraph.

63. E.g. in Germany measures adopted on the basis of chapter 8 of the Außenwirtschaftsverordnung (AWV).

64. EU Sanctions Guidelines, cited *supra* note 56.

for autonomous sanctions. These Guidelines specify that EU sanctions are not punitive, but designed to bring about a change in policy or activity by the target country, entities or individuals.<sup>65</sup> This raises the question: What determines the nature of a measure?

#### 2.4.2.1. *The new role of the European External Action Service*

The EU Sanctions Guidelines have been amended several times since their adoption in 2003.<sup>66</sup> A recent change is the involvement of the European External Action Service (EEAS). With regard to autonomous sanctions, the 2012 Guidelines stipulate that the EEAS “should have a key role in the preparation and review of sanctions regimes as well as in the communication and outreach activities accompanying the sanctions, in close cooperation with Member States, relevant EU delegations and the Commission”.<sup>67</sup> The 2012 Guidelines also place a stronger emphasis on communication and outreach activities, and underline the importance of “regular review in order to assess the efficiency of the adopted restrictive measures with regard to the *objectives stated*” for all sanctions.<sup>68</sup> This extends the review practice of autonomous EU counterterrorist sanctions under Common Position 2001/931 to all sanctions; under Common Position 2001/931, the Council is required to review the list of terrorist suspects at a regular interval, at least every six months.<sup>69</sup> The review is conducted by the relevant Council working parties and committees, where appropriate on the basis of EU Heads of Mission reports.<sup>70</sup> Heads of Missions are particularly relevant in the context of third country sanctions. They may for instance help to ensure unambiguous identification of the targeted persons<sup>71</sup> and are “invited to provide, where appropriate, their advice on proposals for restrictive measures or additional designations”.<sup>72</sup> The strong involvement of the EEAS underlines the CFSP nature of sanctions.

65. *Ibid.*, II.A.4.

66. The first version of the guidelines was adopted by the Council on 8 Dec. 2003 (doc. 15579/03); updated versions were agreed on 1 Dec. 2005 (doc. 15114/05) and on 22 Dec. 2009 (doc. 17464/09).

67. EU Sanctions Guidelines, cited *supra* note 56, Annex I Recommendations for working methods for EU autonomous sanctions.

68. *Ibid.*, II.A.6 (emphasis added).

69. Art. 1(6) Common Position 2001/931 (O.J. 2001, L 344/94).

70. EU Sanctions Guidelines, cited *supra* note 56, II.A.6.

71. *Ibid.*, II.D.22.

72. *Ibid.*, Annex I Recommendations for working methods for EU autonomous sanctions, para 3.

#### 2.4.2.2. *Indeterminacy of duration*

The UN, the EU institutions, and the ECJ argue that sanctions are *preventive* measures rather than having a punitive character; hence they require a lower standard of proof and procedural protection than criminal measures.<sup>73</sup> In *Kadi I* (2008) and *Al Aqsa* (2012), the ECJ referred to them as “temporary precautionary measures”.<sup>74</sup> In *Kadi II* (2013), the ECJ only spoke of their “preventive nature”.<sup>75</sup> In the case of *Kadi*, dropping the term “temporary” made particular sense, since the applicant had been listed for more than ten years.<sup>76</sup> The long duration of sanctions has further led both scholars<sup>77</sup> and judicial authorities<sup>78</sup> to question their preventive administrative nature. Most of the literature concerns *counter-terrorism* sanctions but the argument is also valid for those listed under third country sanctions regimes. Sanctions have been labelled “draconian measures, unlimited as to time and quantum”, as having “devastating” consequences.<sup>79</sup> The United Nations High Commissioner for Human Rights explained:

“[B]ecause individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction”.<sup>80</sup>

Indeed, under the ECHR the crucial determinant for the procedural protection under Article 6 ECHR are the effects (severity) and not the label (formal

73. For the UN see e.g. Security Council Resolution 1822 of 30 June 2008.

74. Joined Cases C-539 & 550/10 P, *Al Aqsa v. Council and Netherlands v. Al Aqsaj*, judgment of 15 Nov. 2012, nyr, para 120: “The freezing measure imposed by the contested acts constitutes a temporary precautionary measure which is not supposed to deprive the persons concerned of their property [reference to *Kadi I appeal*, cited *supra* note 3, para 358]. It does, however, undeniably entail a restriction of the exercise of the appellant’s right to property that must, moreover, be classified as considerable, having regard to the general application of the freezing measure and the fact that it was imposed on it for the first time by a decision of 27 June 2003.”

75. *Kadi II appeal*, cited *supra* note 3, para 130.

76. Oct. 2001 to Oct. 2012.

77. Cameron, “The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions”, Report to the Council of Europe, 2006, available at: <[www.coe.int/t/dlapil/cahdi/Texts\\_& Documents/Docs%202006/I.%20Cameron%20Report%2006.pdf](http://www.coe.int/t/dlapil/cahdi/Texts_& Documents/Docs%202006/I.%20Cameron%20Report%2006.pdf)>; Eckes, *EU CounterTerrorist Policies – The Case of Individual Sanctions* (OUP, 2009), Ch. 3.

78. GC, *Kadi II*, cited *supra* note 3.

79. A.G. Maduro, Opinion in *Kadi I appeal*, para 47; see also GC, *Kadi II*; both cited *supra* note 3.

80. Report to the General Assembly of the United Nations of 2 September 2009, entitled “Report on the protection of human rights and fundamental freedoms while countering terrorism”, document A/HRC/12/22, point 42.

classification) given to the measure. The debate on whether EU (counterterrorist) sanctions amount to a criminal charge within the meaning of Article 6 ECHR has been conducted elsewhere.<sup>81</sup> Suffice to note that duration has been a central argument supporting the criminal nature of sanctions, and that duration is certainly highly relevant to whether sanctions can be classified as preventive. Advocate General Bot argued in his Opinion in *Kadi II* that as long as the threat continues the preventive measures should be continued. As regards the threat of terrorism (*Kadi II*) or nuclear proliferation in Iran (*Kala Naft*) the end seems not yet in sight. The *indeterminacy* of the duration of sanctions by contrast is a strain that has so far escaped attention. In the field of psychology it has long been established that the indefinite duration of for instance an illness or incarceration is psychologically particularly strenuous because of the high level of uncertainty that it creates for those listed.<sup>82</sup> This has been extensively explored with regard to unemployment<sup>83</sup> and detention of asylum seekers.<sup>84</sup>

Most EU sanctions regimes are currently adopted for a limited amount of time, usually one year, and are subject to regular examination pursuant to the EU Guidelines. However, neither the legal instruments establishing the different sanctions regimes, nor the EU Guidelines determine that the burden to make a convincing case of involvement with either terrorism or the targeted country regime should grow with the time that authorities had to investigate. The latter would be an important improvement strengthening the argument that sanctions are preventive in nature. It would also contribute to avoiding keeping sanctions routinely in place on the basis of very thin indications, rather than evidence of involvement.

81. Eckes, op. cit. *supra* note 77, Ch. 3. See also Van den Broek, Hazelhorst and de Zanger, "Asset freezing: Smart sanction or criminal charge?", (2010) *Utrecht Journal of International and European Law*, 18–27.

82. Smithson, "Psychology's ambivalent view of uncertainty" in Bammer and Smithson (Eds.), *Uncertainty and Risk: Multidisciplinary Perspectives* (Earthscan Publications Ltd, 2008), pp. 205–217.

83. Kinicki, McKee-Ryan, Song and Wanberg, "psychological and physical well-being during unemployment: A meta-analytic study", 90 *Journal of Applied Psychology* (2005), 53–76.

84. Wade, "Preparation and transition planning for unaccompanied asylum-seeking and refugee young people: A review of evidence in England", 33 *Children and Youth Services Review* (2011), 2424–2430, 2427; Hutchinson and Martin, "Australia's human rights obligations relating to the mental health of refugee children in detention", 27 *International Journal of Law and Psychiatry* (2004), 529–547, 541; Radford, "'Unkind cuts': health policy and practice versus the health and emotional well-being of asylum-seekers and refugees in Ireland", 36 *Journal of Ethnic and Immigration Studies* (2010), 889–915, 903.

#### 2.4.2.3. *Aiming to change behaviour?*

The 2012 EU Sanctions Guidelines state clearly that “[i]n general terms, restrictive measures are imposed by the EU to bring about a change in policy or activity by the target country, part of country, government, entities or individuals, in line with the objectives set out in the CFSP Council Decision”.<sup>85</sup> Sanctions are aimed at changing the “policy” of the third country regime or the “activity” of those targeted, i.e. to achieve a change in behaviour. This change is evaluated against the objectives of the sanctions regime. The problems connected to assessments of changes in behaviour were brought to the point by the ECJ in *Tay Za*:

“It is not easy to establish a link, even an indirect link, between the absence of progress towards democratization and the continuing violation of human rights in Myanmar, which . . . is one of the reasons which led to the adoption of the regulation, and the conduct of the family members of those in charge of businesses, which, in itself, has not been criticized”.<sup>86</sup>

This ties in with the above discussion of the correct legal basis. The cited passage expresses how the objective of the sanctions regime is relevant to determining what is a sufficient link of association between all sanctioned persons and entities and the leaders of a country. Only if those sanctioned are in the position to contribute to achieving the objective – by withdrawing support for the governing elite – can these sanctions be justified. The EU Guidelines do not explain what may constitute a change in policy or behaviour. The wording “a change in policy or activity by the target country, part of country, government, entities or individuals”<sup>87</sup> is rather unclear. Transparent rules on what constitutes a change would need to be determined, at least for autonomous sanctions. How is it possible to demonstrate that someone is no longer supporting terrorism or a third country regime? In particular, if that person’s funds are frozen? Can sanctions also aim to change the behaviour of those individuals listed in the second or third categories outlined above (i.e. persons associated with the regime, and persons acting against the objective of the sanctions regime, see section 2.2.)? Or does their listing ultimately depend on a policy change of the third country regime?

Further, for a “change in behaviour” to be determined, substantive information would have to be on file about the specific behaviour allegedly justifying imposing sanctions – particularly for targets in the third category. Any change can only be evaluated against the backdrop of previous behaviour.

85. EU Sanctions Guidelines, cited *supra* note 56, II.A.4.

86. *Tay Za*, *supra* note 27, para 67.

87. EU Sanctions Guidelines, cited *supra* note 56, II.A.4.

The real possibility to end application of targeted sanctions through a change in behaviour would speak in favour of their preventive nature.

The EU has suspended sanctions as a result of political developments in the country; this has recently been the case for Belarus and Zimbabwe.<sup>88</sup> However, there is no publicly available information that the EU has ever delisted an individual from any of the targeted sanctions lists because that person or entity has demonstrated a change in behaviour. In some cases, the Council has even argued on the basis of a presumption that economically active individuals in a sanctioned third country *must be* connected with the governing regime to be able to engage in successful economic activity. The General Court accepted this for instance in the case of *Issam Anboub*.<sup>89</sup> In such a case, what could constitute a change in behaviour?

#### 2.4.3. Broadening listing criteria

A long-standing EU third country sanctions regime that exemplifies particularly well a general trend towards broadening the circle of targeted persons and entities is the regime directed against Iran.<sup>90</sup> Since 2007, the EU has been adopting targeted sanctions in order to hinder and dissuade Iran from developing a capacity to produce nuclear weapons.<sup>91</sup> From the beginning the sanctions regime, which gives effect to UN Security Council Resolutions,<sup>92</sup>

88. Council Decision 2013/160/CFSP of 27 March 2013 amending Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe, cited *supra* note 16.

89. Case T-592/11, *Issam Anboub v. Council*, judgment of 13 Sept. 2013, nyr, para 48.

90. Another example is Belarus. See Council Common Position 2004/661/CFSP of 24 Sept. 2004 concerning restrictive measures against certain officials of Belarus (listing four officials) O.J. 2004, L 301/67, and Art. 2(4) and (5) of Council Regulation 765/2006 concerning restrictive measures in respect of Belarus, O.J. 2006, L 134/1 (as amended by Council Regulation (EU) No 1014/2012 of 6 November 2012). See also point (a) of Art. 4(1) of Council Decision 2012/642/CFSP concerning restrictive measures against Belarus, O.J. 2012 L 285/1, targeting those “responsible for serious violations of human rights or the repression of civil society and democratic opposition, or whose activities otherwise seriously undermine democracy or the rule of law in Belarus, or any natural or legal persons, entities and bodies associated with them, as well as legal persons, entities or bodies owned or controlled by them” or “benefiting from or supporting the Lukashenka regime, as well as legal persons, entities and bodies owned or controlled by them”.

91. Common Position 2007/140/CFSP of 27 Feb. 2007 concerning restrictive measures against Iran, O.J. 2007, L 61/49–55, many times amended and repealed by Council Decision 2010/413/CFSP, O.J. 2010, L 195/39. Council Regulation (EC) No 423/2007 (O.J. 2007, L 103) repealed by Council Regulation (EU) 961/2010 of 25 Oct. 2010 on restrictive measures against Iran (O.J. 2010, L 281/1).

92. UN Resolution 1737/2006; UN Resolution 1747/2007; UN Resolution 1803/2008 and UN Resolution 1929/2010.

has been based on a dual listing system.<sup>93</sup> On the one hand, the Commission lists person and entities following entries and amendments of the UN list.<sup>94</sup> On the other, the Council lists additional persons and entities who meet EU listing criteria in view of the objectives of UN Security Council Resolution 1737.<sup>95</sup> The Council and Commission lists are complementary. One difference is that the Council gives more extensive reasons for autonomous listings. In 2011, an additional autonomous EU sanctions regime was set up, which concerns the worsening human rights situation in Iran.<sup>96</sup> The different lists and regimes continue to run parallel.

At present, the listing requirements are set out by Articles 19 (restriction on admission) and 20 (freezing of funds and economic resources) of Council Decision 413/2010/CFSP and Article 23 (freezing of funds and economic resources) of Council Regulation 267/2012.<sup>97</sup> The list of persons subject to restrictions broadly matches the list of *natural* persons (as opposed to entities) whose assets have been frozen under Article 23. As explained above, travel restrictions do not fall under EU competence but are implemented by the EU Member States under national law.

In 2010, the scope of the UN sanctions regime was extended to include the Iranian Revolutionary Guard Corps and the transport sector, in particular the Islamic Republic of Iran Shipping Lines (IRISL) and its many subsidiaries.<sup>98</sup> The EU immediately expanded its sanctions against Iran to reflect these changes in the UN context but also went further, in particular in the area of trade (primarily in dual-use products), transport (aviation and shipping) and

93. Art. 7(1) in combination with recital 5 and Art. 7 (2) in combination with recital 6 of Regulation 423/2007. Currently, Arts. 19 (a) and 20 (a) of Council Decision 2010/413/CFSP give effect to UN lists, O.J. 2010, L 195. Arts. 19 (b) and 20 (b) call on the Council to draw up autonomous lists.

94. See Annex IV of Regulation (EC) 423/2007. The latest Commission regulation amending Regulation 423/2007 is Commission Regulation (EU) 532/2010 of 18 June 2010 amending Council Regulation (EC) 423/2007 concerning restrictive measures against Iran, O.J. 2010 L 154/4.

95. See Annex V of Regulation 423/2007. The latest Council implementing regulation is Council Implementing Regulation (EU) 668/2010 of 26 July 2010 implementing Art. 7(2) of Regulation (EC) No 423/2007 concerning restrictive measures against Iran, O.J. 2010 L 195/25.

96. Council Decision 2011/235/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Iran, O.J. 2011, L 100/51, and Council Regulation 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran, O.J. 2011, L 100/1.

97. Council Decision 2013/685/CFSP (O.J. 2013, L 316/46–49) amending Council Decision 2010/413/CFSP, which has so far been amended 73 times. Council Regulation (EU) 961/2010 on restrictive measures against Iran (O.J. 2010, L 281/1).

98. UNSC Res 1929, paras. 12 and 19.

into the energy and financial sectors.<sup>99</sup> The EU, in its autonomous lists, further continues to impose restrictive measures on a number of *additional* persons and entities with links to the Iranian nuclear or missile technology programme, or the Iranian Revolutionary Guard Corps. The Council has several times broadened the scope of the Iranian sanctions by amending the listing requirements since the adoption of the 2010 Council decision.<sup>100</sup> The latest amendment was introduced after the General Court's rulings of 16 September 2013.<sup>101</sup> The Council seems to follow a suggestion of the General Court in the *IRISL* case:

“... if the Council is of the opinion that the applicable legislation does not enable it to intervene in a sufficiently effective manner in order to combat nuclear proliferation, it is *open to the Council to amend it in its role as legislator* – subject to a review of lawfulness by the courts of the European Union – so as to *extend the situations in which restrictive measures may be adopted*.”<sup>102</sup>

Compared to the previous version,<sup>103</sup> the amended Article 20(1)(b) of Council Decision 2010/413 adds the possibility to sanction persons and entities for “evading or violating” Security Council resolutions or the relevant EU Council decision or for “providing insurance or other essential services” to the Islamic Revolutionary Guard Corps (IRGC) and the IRISL.<sup>104</sup> Previously, sanctions were limited to those directly assisting designated persons or entities in evading or violating and to persons and entities acting on behalf of the IRGC and IRISL. As mentioned, the criteria had already previously been expanded several times, including between the listing of the applicants and the decisions of the General Court on 16 December 2013. Hence, the General Court's interpretation of the listing criteria in past rulings is of limited value for the current version.

The General Court's comments on the Council's discretion as a legislator and the repeated broadening of the listing criteria raise concerns as to how far

99. Council Decision 2012/35/CFSP, O.J. 2012, L 19/22, Council Decision 2012/152/CFSP, O.J. 2012, L 77/18, and Council Decision 2012/169/CFSP amending Council Decision 2010/413/CFSP, which remains in force as the underlying decision, O.J. 2012 L 87/90.

100. Art. 20 of Decision 413/2010 (broadened in October 2010 and in January, March, October and December 2012 and Art. 23 of Regulation 267/2012, O.J. 2012, L 88/1 (broadened in August and December 2012).

101. See Recital 2 and Art. 1 of Council Decision 2013/497/CFSP, O.J. 2013, L 272/46, and Council Regulation 971/2013, O.J. 2013, L 272/1.

102. Case T-489/10, *Islamic Republic of Iran Shipping Lines (IRISL)*, cited *supra* note 7, para 64.

103. Council Decision 2012/829/CFSP of 21 Dec. 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran, O.J. 2012 156/71.

104. Art. 1(2) of Council Decision 2013/497/CFSP, O.J. 2013 L 272/46.

these criteria might be expanded. So far, the EU courts have not drawn any red lines in this regard. “Evading or violating” the provisions of the applicable UNSC resolutions or the relevant EU Council decision is a broad formulation. Furthermore in the slightly later *Kala Naft* case, the ECJ accepted that “a serious risk” that the entity furthers proliferation is sufficient, i.e. that actual support is not required.<sup>105</sup> Additionally, besides expanding the listing requirements, the Council regularly re-lists applicants, who had previously achieved their delisting before the EU courts.<sup>106</sup> Any such re-listing is then reviewed in the light of the new listing criteria and potentially an amended listing procedure.

### 3. In principle full judicial review by the EU courts

More than a hundred cases have been brought to the EU courts challenging different types of targeted sanctions, including those giving effect to UN lists. Article 103 of the UN Charter does not stand in the way of reviewing domestic implementation measures in domestic courts. This was confirmed both by the European Court of Human Rights (ECtHR) in *Nada*<sup>107</sup> and the ECJ in *Kadi I* and *II*.<sup>108</sup> Judicial review extends to persons who have in the meantime been removed from the UN lists.<sup>109</sup> In *Kadi II*, the ECJ took largely the same view as in *Kadi I*, reiterating that the EU courts “must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union”.<sup>110</sup> Article 275(2)

105. *Kala Naft*, *supra* note 8, para 84. See also section 4.3.1 *infra*.

106. Council Implementing Regulation (EU) 1203/2013 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran, O.J. 2013, L 316/1. Recital 2 specifically refers to the judgments of the GC of 16 Sept 2013 annulling the Council’s decision to include various parties. Council Decision 2013/685/CFSP, amending Decision 2010/413/CFSP concerning restrictive measures against Iran, O.J. 2013, L 316/41. Recital 5 sets out that three entities that were removed by the GC in earlier judgments (Case T-392/11, *Iran Transfo v. Council*, judgment of 16 May 2013, nyr; Case T-404/11, *Turbo Compressor Manufacturer (TCMFG) v. Council*, Judgment of 17 April 2013, nyr; Case T-63/12, *Oil Turbo Compressor Co. (Private Joint Stock) v. Council*, judgment of 26 Oct. 2012, nyr) remain delisted.

107. ECtHR, *Nada v. Switzerland* (No 10593/08), judgment of 12 Dec. 2012, para 211.

108. *Kadi I* appeal and *Kadi II* appeal, both cited *supra* note 3; but see also Joined Cases C-399 & 403/06 P, *Hassan v. Council and Commission*, *Ayadi v. Council*, [2009] ECR I-11393.

109. Case C-239/12 P, *Abdulrahim v. Council and Commission*, judgment of 28 May 2013 and C-183/12 P, *Ayadi v. Commission*, judgment of 6 June 2013, nyr; but see *Kadi II* appeal, cited *supra* note 3.

110. *Kadi II* appeal, para 97; see also *Kadi I* appeal, paras. 326–327, both cited *supra* note 3.

TFEU now confirms for the EU legal order that those subject to targeted sanctions must have legal safeguards and judicial review at their disposal.

This section will draw on case law concerning counterterrorist and third country sanctions. This is because the ECJ uses the former cases regularly as point of reference for the latter. In the discussion on the standard of judicial review in cases concerning autonomous EU sanctions against Iran, for example, the ECJ extensively referred to its case law concerning counterterrorist sanctions based on UN lists.<sup>111</sup> In the *Melli Bank* appeal, the Court referred to *Kadi I* to establish that the primacy of a Security Council resolution at the international level cannot stand in the way of domestic judicial review of the lawfulness of EU implementing measures.<sup>112</sup> In *Kala Naft*, the ECJ relied in 8 consecutive paragraphs on its ruling in *Kadi II* to argue that full judicial review of the adopted measures is appropriate in the light of fundamental rights and their limitations as defined under EU law.<sup>113</sup> The *Fulmen* appeal refers to *Kadi II* in 17 consecutive paragraphs to confirm full judicial review and make the additional point that the EU institutions must share with the EU courts the information that supports the reasons for sanctioning.<sup>114</sup> It is hence fair to conclude that the full judicial review standard that the ECJ outlined in the *Kadi* cases applies in the context of sanctions aiming to stop nuclear proliferation in Iran.

There are further good reasons for judicial review of all sanctions measures. Courts have been central in improving the system of protection. Most UN sanctions regimes do not offer any form of review and even the UN Ombudsperson with all her achievements is part of the flawed UN system that works along the logics of politics, rather than the rule of law. Only an obligation to *justify* targeted restrictive measures in a judicial context brings them into the realm of human rights. Courts have been able to take the perspective of those targeted, rather than the perspective of high politics, where those targeted remain necessarily pawns within a bigger chess game. They have exercised considerable reform pressure.

At the same time, judicial review raises difficult issues. Essentially, the Commission's lists of targets are not based on a *decision* of the Commission. All EU sanctions giving effect to UN lists, against Al Qaida and against third countries, follow expressly every listing and delisting made by the relevant UN Sanctions Committee.<sup>115</sup> Any review of the *merits* is hence a review of the

111. Case C-548/09 P, *Bank Melli Iran v. Council*, [2011] ECR I-11381; *Fulmen* and *Kala Naft*, both cited *supra* note 8.

112. *Bank Melli Iran*, *ibid.*, para 105.

113. *Kala Naft*, *supra* note 8, paras. 65–73.

114. *Fulmen*, cited *supra* note 8, paras. 58–74.

115. Commission Implementing Regulation (EU) 370/2013 amending Council Regulation (EC) No 329/2007 concerning restrictive measures against the DPRK, O.J. 2013, L 111/43: “On

actual listing decision taken by a UN Sanctions Committee. The UN is a context stripped of the administrative and judicial apparatus that the EU Member States or the European Union offer. Sanctions decisions are taken outside any system of checks and balances. This is an additional argument for stringent judicial review rather than for a structural limitation of domestic review.

### 3.1. *Confidential information as obstacle to judicial review*

A continuing problem is that only very limited information is shared with the EU courts. In the context of both counterterrorist and regime sanctions the Council has failed to share the relevant information that would allow the EU courts to carry out full scrutiny of the merits. The ECJ distinguishes between reasons for listing and the information or evidence supporting those reasons.<sup>116</sup> While the reasons must meet the listing requirements (question of law), the information produced must support that those reasons are well founded (question of fact). EU courts cannot exercise “full review” if they are not provided with the information that substantiates the reasons of the listing decision.<sup>117</sup> Time and again, the EU courts have confirmed that the institutions must “produce information or evidence, confidential or not, relevant to [the] examination” of the Court.<sup>118</sup> If no information is provided, the courts will delist.

In the *Fulmen* case (sanctions against Iran), the General Court brought this to the point:

“... taking into consideration the essential role of judicial review in the context of adoption of restrictive measures, the courts of the European Union must be able review the lawfulness and merits of such measures without it being possible to raise objections that the evidence and information used by the Council is secret or confidential. Further, the Council is not entitled to base an act adopting restrictive measures on

7 March 2013 the Sanctions Committee of the UNSC added three natural persons and two entities to the list of persons, entities and bodies to whom the freezing of funds and economic resources should apply. Those entities and natural persons should be included in the list set out in Annex IV to Regulation (EC) No 329/2007.” Recital 7, CFSP Council Decision of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP: “UNSCR 1929 (2010) extends the financial and travel restrictions imposed by UNSCR 1737 (2006) to additional persons and entities, including IRGC individuals and entities as well as entities of the Islamic Republic of Iran Shipping Lines (IRISL).”

116. *Fulmen*, cited *supra* note 8, para 67.

117. *Kadi II appeal*, para 123: “the duty of those Courts to base their decision solely on the material which has been disclosed to them”.

118. *Kadi II appeal*, para 120, cited *supra* note 3; see, by analogy, Case C-300/11, *ZZ v. Secretary of State for the Home Department*, judgment of 4 June 2013, nyr, para 59.

information or evidence in the file communicated by a Member State, if that Member State is not willing to authorize its communication to the courts of the European Union whose task is to review the lawfulness of that decision.”<sup>119</sup>

The latter part of this paragraph specifically considers autonomous sanctions, where the listing usually originates from a Member State (rather than a third country) and where the Council takes the listing decision (rather than a UN Sanctions Committee). This may indeed mean that the Council or a supporting Member State has access to the relevant information and could share it with the EU courts. In practice however Member States hesitate to share confidential information with the EU courts.<sup>120</sup> With regard to sanctions based on UN lists, the situation is even more complicated: the EU institutions do not participate in the forum where the sanctions decision is taken (UN Sanctions Committee) and do not have access to the relevant information.

When confidential information is shared with the EU courts, they would first have to decide whether nondisclosure of the relevant information was justified and secondly, whether the evidence can justify the imposed measures. In line with ECtHR case law,<sup>121</sup> the ECJ emphasized in *Kadi II*<sup>122</sup> that it is for the courts to determine whether the reasons relied on by the EU authorities to preclude information being disclosed to the applicant are well founded. This seems justified in light of existing analyses of overclassification, which demonstrate that institutions tend to overclaim secrecy.<sup>123</sup> A pressing issue remains the Court’s access to EU classified information (EUCI). This is a concern that affects other areas beyond the sanctions debate, though it is here particularly apparent. In *Kadi II*, the ECJ referred to “techniques which accommodate . . . legitimate security considerations about the nature and the sources of information”.<sup>124</sup> It is difficult to say to which techniques the Court referred in this quote. The EU judiciary is not yet equipped with such procedural techniques. Yet, the quote reflects a rather positive view of the opportunities that could be created by formally introducing such techniques, e.g. closed procedures. In this regard,

119. Joined Cases T-439 & 440/10, *Fulmen*, judgment of 21 March 2012, nyr, para 100 (see also the appeal decision, *Fulmen*, cited *supra* note 8); Referring by analogy to: Case T-228/02, *PMOI I*, para 155 and *PMOI III*, para 73, both cited *supra* note 3.

120. See e.g. on autonomous counterterrorist sanctions, Eckes, “Decision-making in the Dark? – Autonomous EU Sanctions and National Classification”, in Cameron (Ed.), *Legal Aspects of EU Sanctions* (Intersentia, 2013), pp. 177–198.

121. Eckes, *op. cit. supra* note 77, Ch. 3.

122. *Kadi II appeal*, cited *supra* note 3, para 126.

123. E.g. Curtin, “Official secrets and the negotiation of international agreements: Is the EU executive unbound?”, 50 *CML Rev.*, 423–458.

124. *Kadi II appeal*, cited *supra* note 3, para 125.

its position seems to differ from the rather critical view of the UK Supreme Court in a case on sanctions against an Iranian bank earlier in 2013.<sup>125</sup> At present, the General Court is in the process of revising its Rules of Procedure. This revision aims *inter alia* to improve the Court's access to classified information by providing the necessary institutional and procedural accommodation of EUCI. Pursuant to Articles 253(6) and 254(5) TFEU, the General Court and the ECJ decide on their Rules of Procedure with the approval of the Council. At the time of writing, the suggestions by the courts are not yet public. After they have been made public, a possibly lengthy process in the Council is likely to follow before the amendments become law. The impact of internal rule changes on the sharing of information in practice remains to be seen.

### 3.2. *Structurally lower standard of review to avoid repeated annulments?*

On many occasions the EU courts have annulled sanctions because they were not provided with the relevant information to conduct judicial scrutiny. One way of avoiding such annulments is by structurally limiting judicial review below the usual standard. This would lead to exceptional deference to the political decision to sanction a natural or legal person and allow the EU institutions to continue adopting restrictive measures without sharing (all) the relevant information that support the reasons for listing.

In his Opinion in *Kadi II*, Advocate General Bot expressly defended greater deference towards the UN, which would flow from a lower standard of review for sanctions based on UN lists: review of the external lawfulness (procedure) and only limited review of the internal lawfulness (substance).<sup>126</sup> He argued that:

“the review performed by the EU judicature of the internal lawfulness of EU acts giving effect to decisions taken by the Sanctions Committee must not, in principle, call into question the merits of the listing, except in cases where the implementation procedure for that listing within the European Union has highlighted a flagrant error in the factual finding made, in the legal classification of the facts or in the assessment of the proportionality of the measure.”<sup>127</sup>

125. UK Supreme Court, *Bank Mellat (Appellant) v. Her Majesty's Treasury* (Respondent)(No. 1), judgment of 19 June 2013, Trinity Term [2013] UKSC 28. See also the appeal pending before the ECJ: Case C-176/13 P, *Council v. Bank Mellat*.

126. A.G. Bot, Opinion in *Kadi II appeal*, paras. 96–104 (external lawfulness); paras. 105–110 (internal lawfulness).

127. *Ibid.*, para 110.

His suggestion was warmly welcomed by the Monitoring Team in its 2012 report as “*significant* because it lays out the key legal arguments in favour of limiting national and regional review of the Committee’s decisions and provides long-awaited support for the institution of the Office of the Ombudsperson”.<sup>128</sup> From the perspective of those listed, the Advocate General’s fervent defence that formal rules guarantee substantive lawfulness<sup>129</sup> is very problematic. The Advocate General did not discuss how procedural review can ensure a basic level of substantive review in the context of composite decision-making procedures, where the actual decision is not made in the same procedure as that being reviewed. In the case of sanctions, Advocate General Bot suggested that the ECJ should only exercise review of the procedural lawfulness with regard to the EU implementation of a decision made in the UN context. The UN context, however, logically cannot benefit from any procedural review of EU law.

With regard to autonomous EU sanctions against Iran, Advocate General Bot equally argued, in his Opinion in the *Kala Naft* appeal, in favour of a lower standard of review. Here, he argued that sanctions as *preventive* measures justify applying a lower standard of review than repressive measures.<sup>130</sup> He explained that the Court should not analyse each reason on its individual merit and should not require the Council to meet a “criminal law” standard,<sup>131</sup> but that the Council’s *broad margin of discretion* limited the Court to reviewing whether the former had made a manifest error of assessment.<sup>132</sup> However, with respect, the Advocate General’s understanding of “discretion” seems to be based on a misconception.<sup>133</sup> Discretion of the political decision-maker is accepted for the *interpretation* or *assessment* of facts, not for the existence of the facts themselves.<sup>134</sup> Hence, the Court would still need to be convinced that the factual basis on which the Council had founded its decision is correct. Furthermore, Advocate General Bot’s starting point for his proportionality tests were the abstract objectives of stopping terrorism (*Kadi II*) and nuclear proliferation (*Kala Naft*). This is an indirect way of limiting judicial review: by taking weighty abstract objectives as the yardstick the proportionality test is voided of its meaning. A proportionality evaluation must consider the

128. Fourteenth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2083 (2012) concerning Al-Qaida and associated individuals and entities, S/2013/467, p. 12.

129. A.G. Bot, Opinion in *Kadi II appeal*, para 97.

130. A.G. Bot, Opinion in *Kala Naft* cited *supra* note 8, at para 164.

131. *Ibid.*, para 11.

132. *Ibid.*, para 31.

133. A.G. Bot, Opinion in *Kadi II appeal*, para 109.

134. Arai-Takahashi, “Discretion in German Administrative Law: Doctrinal Discourse Revisited” (2000) EPL, 69–80; Fritzsche, “Discretion, Scope of Judicial Review and Institutional Balance in European Law”, 47 CML Rev., (2010), 361–403.

specific case; i.e. as far as possible, the test must evaluate what the individual assets and actions of the targeted person contribute to terrorism or nuclear proliferation.

Similarly, in 2012, the US District Court of Columbia opted for an exceptionally low standard of review when reviewing Kadi's listing as a "specially designated global terrorist" by the *Office of Foreign Asset Control (OFAC)*. The District Court limited its review to the question of whether the agency's decision was "arbitrary and capricious".<sup>135</sup> It further limited the review in its judgment of 19 March 2012 to the administrative record as it stood in March 2004,<sup>136</sup> and came to the conclusion that the listing was justified. At the time of writing, Kadi remains on the OFAC list.

By contrast with the ECJ, the US District Court had access to "the entire administrative record, which consists of both the classified and unclassified record".<sup>137</sup> Yet, Mr Kadi himself only had access to the unclassified part of the administrative record, which appeared to have predominantly relied on newspaper articles as background information.<sup>138</sup> The US District Court acknowledged that the information given to Mr Kadi [the March 2004 OFAC Memorandum], "standing alone, may be somewhat unsatisfying to Kadi".<sup>139</sup> Nevertheless, applying the low review standard, the US Court came to the opposite conclusion from the ECJ in *Kadi I* and *Kadi II* (concerning Kadi's EU listing). The US District Court did not even mention the fact that the UN Sanctions Committee had listed Kadi, but based the reduced standard of review on a logic of deference towards the political decision of the US administration.

In *Kadi II* the ECJ applied the full standard of review in the light of the legal safeguards and human rights guarantees in EU law; it ruled that the summary reasons were sufficiently detailed and specific,<sup>140</sup> but that information to substantiate the summary reasons was missing, i.e. not shared with the EU courts.<sup>141</sup> It did not follow Advocate General Bot, nor did it explicitly confirm the General Court's assumption that the standard is the same as in autonomous sanctions,<sup>142</sup> but from its references to case law concerning autonomous

135. United States District court for the District of Columbia, Civil Action No. 090-0108 (JDB), p. 10.

136. US District Court, *ibid.*, p. 15.

137. US District Court, *ibid.*, p. 10; see also on p. 11: "OFAC emphasized that its determination rested on the "totality of the record" (both classified and unclassified)".

138. US District Court of Columbia, p. 21.

139. US District Court of Columbia, p. 34.

140. This was found for the first reason (para 143); second reason (145); third reason (147); and the fourth reason (149). Only the fifth reason was insufficiently detailed (141).

141. *Kadi II appeal*, paras. 151–162, cited *supra* note 3.

142. GC, *Kadi II*, para 138, cited *supra* note 3. However, the ECJ did refer to its case law on autonomous sanctions at several instances.

sanctions such a conclusion can be inferred.<sup>143</sup> The ECJ further rejected the argument of the Commission, the Council and the UK that such review must take account of the international context in which the measures were adopted.<sup>144</sup> The ECJ stated on the contrary that judicial review was “all the more essential since, despite the improvements”, the UN Ombudsperson mechanism did not offer effective judicial protection.<sup>145</sup> This argument applies even more strongly to third country sanctions regimes, where the Ombudsperson has no role at all.

As was explained above, exercising full review creates great problems where the EU institutions do not or cannot produce the information to substantiate the imposed sanctions before the EU courts. As we have further seen in Advocate General Bot’s Opinion in *Kadi II* and in the ruling of the US District Court of Columbia, one suggested way out is structurally reducing the standard of judicial review. However, this would arguably go against the applicant’s rights under EU law and under the ECHR. If the EU courts, after such a light review, upheld sanctions adopted in a procedure that infringes EU human rights standards, this would vest these measures with judicial blessing and leave the applicants without protection. Indeed, this is the case for *Kadi* in the US. For the EU and the majority of the Member States, who are not permanent members of the UN Security Council, this would further mean that measures adopted without their involvement in the UN context are imposed on their jurisdictions through EU law.<sup>146</sup> It would leave Member States without effective legal means to disagree with the listing decisions of the UN.

### 3.3. *Inherent limitations of judicial review in the context of sanctions*

The usual full standard of judicial review is also subject to a number of practical and legal limitations in the context of sanctions. These inherent limitations are different from a conscious structural reduction of the judicial review in deference to the political sanctioning decision, because they are rooted in the EU legal order and would as a matter of principle apply in other contexts. They are also unrelated to the confidentiality of the information that supports a listing.

143. See e.g. *Kadi II appeal*, cited *supra* note 3, para 113.

144. *Ibid.*, para 72.

145. *Ibid.*, para 133.

146. Eckes, “Protecting supremacy from external influences: A precondition for a European Constitutional Legal Order?”, 18 *ELJ* (2012), 230–250.

### 3.3.1. Listing requirements and the existence of “a serious risk”

Even though in all sanctions cases the ECJ applied full judicial review, the context of third country regimes differs from counterterrorist sanctions.<sup>147</sup> One relevant difference between UN based counterterrorist sanctions (*Kadi*) and autonomous third country sanctions (the Iranian cases) lies in the listing requirements. The General Court found in *IRISL* that a serious risk of support for nuclear proliferation was *not* sufficient to justify the adoption or maintenance of sanctions under the clear wording of Council Decision 2010/413 and Council Regulation 423/2007 as they stood in 2010.<sup>148</sup> However, the listing requirements have since been amended<sup>149</sup> and, moreover, in November 2013 the ECJ held in the *Kala Naft* appeal that the General Court had erred in law when it had held that the Council needed to show that the entity had “actually previously acted reprehensibly”.<sup>150</sup> The ECJ concluded that the relevant provision has to be interpreted in the light of their underlying documents (i.e. Security Council Resolution 1929 (2010) and the European Council Declaration of 17 June 2010) and it also covers “a serious risk” that the person or entity may further proliferation. A serious risk is hence sufficient under the existing sanctions regime against Iran to target a person or an entity. In light of the above mentioned repeated broadening of listing criteria, judicial review of whether the criteria are met will lose part of its bite if they are phrased or interpreted too broadly.

### 3.3.2. Duty of sincere cooperation

The principle of sincere cooperation in Article 4(3) TEU is also a potentially limiting factor. It plays a particular role in the evaluation of the duties of the different national and European actors involved in the composite adoption procedure of EU sanctions.<sup>151</sup> In the context of autonomous EU sanctions, it places limits on the Council’s ability to re-examine the decision of the competent national authority. It also strengthens the Member States’ obligation to keep each other informed of any changes or developments in the factual or legal circumstances that underlie the relevant decision.<sup>152</sup> While the principle of sincere cooperation applies to both country and counterterrorist sanctions, it applies differently to autonomous EU sanctions

147. The case law in this section concerns both counterterrorist and targeted sanctions against third country regimes. The former serves in many ways as a point of reference of the EU courts when deciding the latter.

148. Case T-489/10, *IRISL*, cited *supra* note 7, paras. 65–66.

149. See section 3.1.2 *supra*.

150. *Kala Naft*, *supra* note 8, para 84.

151. For autonomous EU sanctions see: Case T-284/08, *PMOI III*, para 52; Case T-256/07, *PMOI II*, para 132 and Case T-228/02, *PMOI I*, *supra* note 3, para 123, all cited *supra* note 3.

152. Council Document 10826/1/07 REV 1, annex II, paras. 8 and 24.

from EU sanctions giving effect to UN lists. It is an internal EU principle that governs the relationship between the EU institutions and the Member States, including their different bodies and authorities. It does not directly apply to the cooperation between the EU and the UN. However, it is possible to argue that the EU institutions owe the Member States a duty of sincere cooperation when giving effect to UN sanctions lists. The European Treaties contain numerous references that bind the Union (under EU law) to “the principles of the UN Charter” and that emphasize the need to cooperate with the United Nations.<sup>153</sup> In combination with the principle of sincere cooperation, this allows to argue that the EU institutions should not place Member States in a situation where they are forced to breach their obligations either under EU law or under the UN Charter.<sup>154</sup>

To what extent the principle of sincere cooperation restricts the Council’s scrutiny of listing proposals by the competent national authorities is a contentious point. The Council argued in the *Fulmen* appeal that the General Court erred in holding “that, in order to verify that the adoption, on the proposal of a Member State, of restrictive measures is justified, the Council must, if necessary, request the Member State concerned to submit to it the evidence and information required for that purpose”.<sup>155</sup> According to the Council, where that material comes from confidential sources, it may legitimately decide to adopt a restrictive measure on the basis only of the explanatory memorandum submitted by a Member State, provided that that memorandum is objectively probable. The ECJ did not further discuss this point, but decided in favour of *Fulmen* that the Council had not adduced sufficient evidence of *Fulmen*’s involvement in proliferation. This does not contradict the Council remaining bound by the principle of sincere cooperation and, by that principle, being limited in reassessing the conclusions that the competent national authority draws from the evidence.

The two-tier procedure in combination with the duty of sincere cooperation may have further consequences not only for the level of scrutiny by the Council<sup>156</sup> but potentially also for judicial review by the EU courts. The question arises to what extent the principle may also apply to the judiciary – in particular where the competent national authority is a judicial authority.

153. See in particular Art 3(5) and 21(1) TEU, but also most explicitly Declaration 13: “the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security.”

154. Eckes, “International sanctions against individuals: A test case for the resilience of the European Union’s Constitutional Foundations”, 15 EPL (2009), 351–378.

155. *Fulmen*, cited *supra* note 8, para 44.

156. Eckes and Mendes, “The right to be heard in composite administrative procedures: Lost in between protection?”, 36 EL Rev.(2011), 651–670.

Indeed, Common Position 2001/931 (counterterrorist sanctions) speaks of authorities equivalent to a judicial authority.<sup>157</sup> This could require the EU courts to show at least deference to the assessment of a *national judicial* authority. In practice however, the competent national authorities appear to be mostly part of the executive branch<sup>158</sup> and that naturally limits the application of the principle of sincere cooperation.

### 3.3.3. *Broad discretion to assess the relevant information*

Another factor that could restrain the intensity of judicial review is “the Council’s broad discretion”.<sup>159</sup> It led the General Court to explain that the EU courts:

“may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power.”<sup>160</sup>

This is not a structural reduction of the standard of review, as suggested both by Advocate General Bot and the US District Court, but it will nonetheless have an influence on the intensity of review. What highlights the difference is that the Court further clarified that it will check that the file “contains all the relevant information to be taken into account in order to assess the situation”, that the “evidence is factually accurate, reliable and consistent”, and whether the relevant information is “capable of substantiating the conclusions drawn from it”.<sup>161</sup> Discretion relates in this approach exclusively to the *evaluation* of the information.<sup>162</sup> At the same time, the case law is not coherent. In *Sofiane Faha*, the General Court seemed satisfied with the existence of a decision of a competent national authority within the meaning of Article 1(4) of Common Position 2001/931, without further investigating the evidentiary background that led to the decision. It upheld the autonomous EU counterterrorist sanctions against the applicant, and concluded:

157. Art. 1(4) of Council Common Position of 27 Dec. 2001 on the application of specific measures to combat terrorism, O.J. 2001, L 344/93.

158. E.g. for Somalia: Annex II to Council Regulation 356/2010. See also Eckes and Mendes, *op. cit. supra* note 156.

159. *PMOI I*, cited *supra* note 3, para 159.

160. *Ibid.*

161. *PMOI III*, cited *supra* note 3, para 55.

162. See section 2.4.2. *supra*.

“that the Council enjoys broad discretion with regard to the matters to be taken into consideration for the purpose of adopting or of maintaining in force a measure freezing funds. In those circumstances, the Council cannot be required to state with greater precision in what way freezing the applicant’s funds may in concrete terms contribute to the fight against terrorism or to produce evidence to show that the applicant might use his funds to commit or facilitate acts of terrorism in the future.”<sup>165</sup>

### 3.3.4. *Engagement with the UN origin*

In the context of sanctions giving effect to UN lists, the fact that the actual listing decision is made outside the EU legal order will obviously limit the possibilities for judicial review. Besides the difficulties of accessing the relevant information, this decision-making procedure is outside the jurisdiction of the EU courts. In *Kadi II*, the ECJ did not seriously engage with the UN origin of the measure – unlike in *Kadi I*. Indeed, the Court said very little on the institutional and procedural improvements in the UN context.<sup>164</sup> By contrast, Advocate General Bot welcomed in his Opinion in *Kadi II* the improvements at UN level in several lengthy paragraphs.<sup>165</sup> The Court’s lack of engagement with the improvements in the UN context was criticized for depriving those UN member States that push for reform of an important argument.<sup>166</sup> However, it should be noted in this context that the proposal of the like-minded States (2011) was rejected some time before the ECJ’s ruling in *Kadi II* (2013).

From the perspective of the applicants, it might even be disadvantageous to focus on the UN level, at least with regard to the Al Qaida regime. Applicants might feel that the UN Ombudsperson mechanism may be used against them, i.e. that they are required to bring a delisting request to the Ombudsperson first, before they could receive protection from the EU courts. If the EU courts engage with the office of the UN Ombudsperson, it would be crucial to make a clear difference between administrative review in the UN context and domestic judicial review. Furthermore, even though the Ombudsperson has had considerable success, notwithstanding the procedural improvements and strengthening (and the very creation) of the position of the Ombudsperson, the UN context does not offer guarantees equivalent to those offered by EU law.

163. Case T-49/07, *Sofiane Fahas*, [2010] ECR II-5555, para 57, referring to Case T-228/02, *PMOI I*, cited *supra* note 3, para 159 and Case T-341/07, *Sison v. Council* [2009] ECR I-3625, paras. 65 and 66.

164. *Kadi II appeal*, cited *supra* note 3, para 133.

165. A.G. Bot, Opinion in *Kadi II appeal*, paras. 81–84.

166. E.g. Van den Herik, *Kadi II – A Dialogue of the Deaf? Views from EU Constitutional and Public International Law*, University of Amsterdam, seminar held 25 Feb. 2014.

Much of the success of the present UN Ombudsperson depends on her personality, her ability to work with the UN member States, and her independence. This success should not be taken for granted if another Ombudsperson is appointed, either in any of the country regimes or as her successor within the Al Qaida regime.

The General Court was criticized for taking the role of a world court when it evaluated sanctions in the light of *jus cogens* in *Kadi I*. The ECJ in *Kadi II* was criticized for not engaging sufficiently with the UN context and not giving enough credit for the improvements made. Only if the EU courts take a very deferential position towards the UN sanctions regimes and only if the Ombudsperson mechanism is further strengthened (public and binding recommendations) and extended to the country regimes might the EU courts be able to consider the protection the Ombudsperson as sufficient. From a rule of law perspective many reservations remain and it is unclear how the EU courts could take more account of the improvements in the UN context if the procedural guarantees are still not sufficient – and most likely never will be.

#### 4. Conclusion

The EU will not and should not stop adopting targeted sanctions. But clearer rules and better internal control mechanisms are needed – not only to stop the large number of annulments but also to protect the Union's credibility as a Union of law. A Union of law does not only require judicial review, which – confirmed by the large number of annulments and successful appeals – is indeed in place in the EU, but also compliance of the other EU institutions with these rulings and with the spirit of the Treaties. A Union of law is also undermined when the Council and the Commission knowingly and deliberately continue to adopt measures that are not in compliance with basic procedural rights guaranteed by EU law and that, in the event of a judicial challenge, can be expected to face annulment by the courts. This finds indirect confirmation by the above-mentioned duty of political institutions to work towards delisting when circumstances have changed.

In particular targeted sanctions in the context of third country sanctions regimes are capable of limiting the political and human rights costs as compared to comprehensive sanctions or military means. However, despite several reforms, certain problems continue: most importantly, the lack of information why a person is sanctioned; the regular broadening of listing criteria, covering in certain cases the mere risk of a (future) contribution to nuclear proliferation in Iran; and the mismatch between the objective of

changing behaviour and a system that is not set up to recognize a change in behaviour should it occur.

EU-UN cooperation is an important objective of the EU.<sup>167</sup> This objective justifies making a great effort to ensure that this cooperation works. However, the current UN sanctions regimes do not meet relatively basic standards of separation of powers in the sense of independent control. The mandate of the UN Ombudsperson is limited to just one of the 13 UN sanctions regimes: the Al Qaida regime. Targeted UN country regimes do not offer any form of review mechanism. Furthermore, even under the Al Qaida regime, while the Ombudsperson offers an independent review, she does not have the power to annul or hold the decision-makers to account; her recommendations are not even public. EU sanctions giving effect to UN lists are tainted by any substantive deficiencies in the UN context. A reform of the EU system can only improve the procedural rules in the EU context, or indirectly lead to better cooperation between the UN and third countries on the one hand and the EU institutions on the other.

Both Advocate General Bot and the US District Court of Columbia advocated greater deference towards political sanctions decisions and consequently a lower standard of review. This would allow for some judicial review, while stopping the regular annulments. The difference in the proposed standards of review is largely explicable by the different views on the nature of the measures in question. Advocate General Bot started from the assumption that targeted sanctions are policy tools, just like trade embargoes. The EU courts by contrast consider targeted sanctions to be specific applications of a general policy and hence conclude that they need to meet certain evidentiary requirements that justify the specific designation decision of the targeted person. This becomes clear in the contrast between Advocate General Bot's reference to the general nature of the CFSP and the ECJ's reference to the individual nature of targeted sanctions.<sup>168</sup> Advocate General Bot's understanding of the measures becomes further indirectly apparent in his question of whether in the light of *reciprocity* it is justified to require the Council to produce more and more specific information while the Islamic Republic Iran does not meet the information requests of the Security Council and the International Atomic Energy Organization (IAEO).<sup>169</sup> With due respect, such considerations are beside the point. When the EU imposes restrictive measures on natural and legal persons it is committed to offering adequate judicial and procedural safeguards – by the ECHR, the EU Treaties,

167. See in particular: Arts. 3(5), 21(1) and 21(2)(c) TEU.

168. Compare the Opinion of A.G. Bot in *Kala Naft*, cited *supra* note 8, para 21, with the decision of the ECJ in *Gbagbo*, cited *supra* note 61 at para 57.

169. Opinion of A.G. Bot, *Kala Naft*, *ibid.*, para 194.

and the case law of the ECJ. The EU courts' case law on counterterrorist sanctions is highly relevant for the standard of review applied to third country sanctions. So far, nearly all challenges against third country regimes concerned autonomous EU listings. However, in principle those applicants who are listed by the UN may also have a reasonable case.

Targeted EU sanctions could be improved in several ways. Third country sanctions should make an explicit distinction concerning the objective parts, which are adopted on the basis of Article 215(1) TFEU, and the individualized parts, which are adopted on the basis of Article 215(2) TFEU. The former are for example trade embargoes for certain goods, the latter are all sanctions specifically targeted at persons and entities. In the context of the latter, also the CFSP decision with the original lists of targets should be subject to judicial review. Furthermore, a clearer distinction should be made between the three examined categories of targeted persons and entities: first, persons actually governing the country in question; second, those associated with the leaders of that country; and third those who act against the UN and CFSP objectives of the sanctions regime. Particularly with regard to the second category, sanctions regimes should define what constitutes a sufficient link to the government of the third country. The Council would then have to meet the defined standard for a sufficient link and demonstrate it before the EU courts. With regard to the third category, the Council would have to identify in court the specific acts in question that undermined the objectives of the sanctions regime. With regard to both categories, it should be made clear what the change in policy or activity is at which the sanctions aim. Furthermore, the alleged preventive nature of targeted sanctions should be a central consideration. This has consequences for their temporary limitation, clearer rules for the regular substantive review, the specificity of reasons for listing, and the possibility to demonstrate a change in behaviour.