

Counter-terrorist sanctions regimes Legal framework and challenges at UN and EU levels

SUMMARY

Targeted sanctions against individuals and entities suspected of supporting terrorism are an important part of the United Nations Security Council's counter-terrorism programme. Under the main counter-terrorist sanctions regimes created under Chapter VII of the United Nations (UN) Charter, UN member states are obliged to impose an asset freeze, travel ban and arms embargo on persons and entities designated by the United National Security Council (UNSC), and also to take all necessary domestic measures to criminalise support of terrorism and to establish their own sanctions systems. The European Union (EU) implements all UN Security Council-imposed sanctions and has also instituted its own autonomous counter-terrorist restrictive measures regime.

However, both the UN and EU sanctions regimes have been severely criticised for infringing key fundamental rights, including due process rights. Legal challenges before national and regional courts prompted a series of procedural reforms, but critics still consider the regimes to fall short of accepted standards. The EU Court of Justice (CJEU) has been the leading jurisdiction to perform reviews of counter-terrorist sanctions, but the secrecy surrounding listings has impeded review of cases on the merits. Nevertheless, the CJEU has repeatedly annulled restrictive measures on procedural grounds, and in the process, affirmed the autonomy of the EU legal order. It is argued that, until the UNSC allows for judicial review, counter-terrorist sanctions will continue to be contested both in court and in the political arena.



In this briefing:

- UN targeted sanctions against terrorism suspects
- EU sanctions against persons, entities or groups involved in terrorist acts
- Terrorist sanctions lists and fundamental rights concerns
- The European Parliament
- Main references

UN targeted sanctions against terrorism suspects

Counter-terrorism is an important objective of UN Security Council (UNSC) sanctions adopted under [Chapter VII of the UN Charter](#).¹ According to one [estimate](#), counter-terrorism constituted the main purpose of around 15 % of targeted sanctions during the 1992-2013 period.² The two main UNSC regimes establishing sanctions against individuals and entities suspected of terrorism are known as the **1267 regime** and the **1373 regime**. They impose mandatory obligations on all UN members concerning their implementation. The European Union (EU) implements both regimes.

The 1267 sanctions regime

The 1267 sanctions regime was initially based on three UNSC resolutions. First, [UNSCR 1267 \(1999\)](#), adopted following the Al-Qaeda attacks on United States (US) embassies in East Africa, imposed a limited air embargo and assets freeze on individuals and entities connected with the Taliban in Afghanistan. Second, [UNSCR 1333 \(2000\)](#), extended those sanctions to individuals and entities associated with Osama Bin Laden and Al-Qaeda. This regime evolved to include [asset freezes](#), [travel bans](#) and [arms embargoes](#) against individuals and entities named on the 1267 Sanctions List, without the requirement of any territorial connection and for a potentially unlimited period of time ([UNSCR 1390 \(2002\)](#)). A Sanctions Committee was established to oversee the regime. In 2011, UNSCR 1988 split the regime in two: a new [Taliban sanctions regime](#) was established alongside the Al-Qaida sanctions regime. Finally, [UNSCR 2253 \(2015\)](#) extended the Al-Qaida Sanctions List to individuals and entities connected with the Islamic State of Iraq and Levant (ISIL/Da'esh), changing the [title](#) of the Sanctions Committee³ and of the Sanctions List, now the ISIL (Da'esh) and Al-Qaida Sanctions List.

Under the [listing procedure](#), any UN member state may submit names to the Sanctions Committee to request their inclusion on the Sanctions List. The committee approves or rejects the listing requests, unless a UNSC member objects within a certain period. Once an individual or entity is placed on the Sanctions List, all UN member states are obliged to implement the asset freeze, arms embargo and travel ban against them. The first consolidated list of individuals and entities associated with the Taliban and Al-Qaeda was [published](#) in March 2001, when it included 162 individuals and seven entities, the majority of which proposed by the USA. The 1267 Sanctions List now [comprises](#) 256 individuals and 75 entities (as of 26 September 2016); and the Sanctions List related to the Taliban contains 136 individuals and five entities (as of 7 September 2016).

Procedural reforms of the 1267 Sanctions Regime

The listing of individuals and entities on the UNSC terrorist blacklist has been criticised for infringing a number of fundamental rights, such as the right to judicial review, to a fair process and to an effective remedy, the right to be heard, and the right to property. Moreover, listing has been considered a threat to the rule of law as it confers unconstrained powers to the executive.⁴

Initially, individuals affected were not informed that they had been [listed](#) and no criteria for inclusion on the list were provided. The assessment that a person or entity was a member of or associated with Al-Qaida and the Taliban was based largely on secret intelligence material that was not shared or made public.⁵ Furthermore, no avenues existed for challenging listing decisions. States could provide their listed nationals/residents with some assistance through diplomatic channels, but they still had no access to the listing criteria unless they were part of the Security Council.⁶ Over time, however, [legal challenges](#) brought before the EU courts, the European Court of Human

Rights (ECtHR) and domestic courts have provided an impetus for reform of UNSC's listing and delisting procedures. Also, while the UNSC continues to insist on the temporary and preventive nature of sanctions, it has become increasingly aware that the lack of due process for listed individuals and entities creates additional problems. The sometimes conflicting obligations under international human rights law and the terrorism sanctions regime mean that states not only face legal and political obstacles in implementing UNSC sanctions, increasingly eroding the credibility of the system, but also that they are becoming reluctant to propose names for lists. Several [measures](#) have aimed to improve procedures, in a process spanning over a decade.

UNSC 1267 Sanctions Regime: main procedural reforms

Since 2002, when the 1267 Committee produced listing [guidelines](#) ([updated](#) in 2013), several UNSC resolutions have introduced important changes: allowing for exceptions to sanctions on [humanitarian](#) grounds; [setting up](#) a [Focal Point](#) within the UNSC secretariat to receive delisting requests directly from listed individuals ; introducing some formal [criteria](#) for delisting; requiring more [information](#) from states on their proposals for listing; demanding periodic reviews of all names included on the list; requiring that the Sanctions Committee release the [narrative summary](#) of reasons behind each listing; and, importantly in 2009, [establishing](#) an [Ombudsperson Office](#).

The [Ombudsperson](#) receives individual requests for delisting, answers questions from the petitioner about procedures for delisting, gathers information on the case,⁷ facilitates the exchange of information between all parties and recommends that the Sanctions Committee grant or deny a delisting request. The Focal Point [remains](#) in place for the other sanctions regimes and is authorised to receive requests for asset freeze and travel ban **exemptions** for persons on the Al-Qaida and the Taliban Sanctions Lists.

Despite these reforms, according to experts, listing still does not comply with rule of law requirements, accepted standards of due process or the right to an effective remedy. Neither the Focal Point nor the Ombudsperson's Office has the power to delist persons or entities. Both ombudspersons so far have voiced [concerns](#) about lack of transparency in the process and insufficient guarantees of the office's independence.

A [High-level Review of UN Sanctions](#) concluded in November 2015 that, in order to prevent the credibility of UN sanctions from being eroded and to maintain the support of states for their implementation, more effort was needed to ensure fair and transparent sanctions procedures and to address human rights and due process issues at UN level, but also at national or regional levels. Moreover, the review process insisted on the need to provide individuals affected by sanctions with more information about the availability of exemptions and simplify the procedures for them.⁸ Some courts have declared [judicial review](#) to be the only form of effective remedy. Finally, the UNSC use of Chapter VII exceptional measures to enact its counter-terrorism programme has been criticised for overriding established international processes of law-making, through treaties, and denounced as *ultra vires*.⁹

The 1373 sanctions regime

The other main counter-terrorist [sanctions regime](#) was set up by the UNSC by means of Resolution 1373 (2001) in the aftermath of the attacks on 11 September, 2001. The resolution requires states to criminalise the support of terrorism, by freezing the funds of those suspected of making financial resources available to terrorists and by introducing domestic legislation making support for terrorist acts a serious criminal offence, sanctioned accordingly. UNSCR 1373(2001) therefore [establishes](#) a 'parallel' or

'decentralised' listing system, whereby UN member states are given discretion over decisions on whom to list. Under this regime, suspects or groups need not therefore necessarily be associated with Al-Qaeda or the Taliban, as UNSCR 1373 allows for the listing of individuals or groups as considered necessary 'to prevent and suppress the financing of terrorist acts'. As these designations are made at national or regional level, however, individuals or groups have greater means to challenge their listing, including through judicial review. The 1373 [Counter-Terrorism Committee](#) (CTC) was established as a subsidiary body of the UNSC to monitor the implementation of the 1373 regime.¹⁰

EU sanctions against persons, groups or entities involved in terrorist acts

The EU [implements](#) all sanctions imposed by the UNSC. When it comes to [counter-terrorist sanctions against individuals or entities](#), the EU has taken over the listing of terrorist suspects on behalf of its Member States.¹¹ The EU **implements the 1267 sanctions regime** by instituting asset freezes, travel bans and arms embargoes against those included on the UNSC list. Moreover, the EU may impose **autonomous sanctions** against suspected individuals and entities, in line with its obligations under UNSCR 1373. Like the UNSC, the EU insists on the preventative/administrative nature of the restrictive measures. EU sanctions apply only within the jurisdiction of the EU.

Legal basis

Following the Lisbon Treaty's entry into force,¹² the EU acquired explicit competence to adopt restrictive measures against individuals and legal persons, groups and non-state actors, under Articles [75](#) (Area of Freedom, Security and Justice, AFSJ) and [215\(2\)](#) (Common Foreign and Security Policy, CFSP) of the Treaty on the Functioning of the European Union (TFEU). These provisions are deemed separate [legal bases](#) with different aims and functions. Unlike Articles 60 and 301 of the Treaty establishing the European Community (TEC), which they replace, Articles 75 and 215 TFEU do not cross-reference each other but establish different procedures for the adoption of sanctions.

Article 75 TFEU allows for the [adoption](#) of measures necessary to achieve the objectives of the AFSJ as regards **preventing and combating terrorism and related activities**. It provides for the adoption of 'a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-state entities', which is to be adopted by the Council and the EP in accordance with the ordinary legislative procedure; subsequently, the Council implements the framework, acting on a proposal from the Commission. Article 75 TFEU therefore provides a clear EU competence to adopt autonomous financial sanctions against home-grown terrorists or EU-internal terrorists; this was lacking before the Lisbon Treaty, when the Council could rely only on third-pillar instruments (police and judicial cooperation in criminal matters) and was unable to adopt measures to freeze assets, which remained a competence of the Member States.

Article 215 belongs to Part V of the TFEU dealing with the Union's external action. Besides providing for the adoption of sanctions against third countries, Article 215 TFEU includes in its second paragraph the possibility of sanctions against individuals ('natural and legal persons, groups and non-state entities'). For both types of restrictive measure, the **procedure** is the same: a CFSP decision (previously a common position) must be adopted by the Council with unanimity, to be implemented by another decision adopted by the Council acting by qualified majority on a joint proposal from the High Representative (HR/VP) and the Commission. The European Parliament (EP) is informed

only. While [restrictive measures](#) such as arms embargos and travel bans based on a CFSP decision are implemented directly by the Member States, after a decision by the Council, economic sanctions such as asset freezes falling under the competence of the EU require additional legislation, through a Council regulation (with direct effect), based on a joint proposal from the HR/VP and the Commission.

The Court of Justice of the EU (CJEU) has the power, according to Article [275](#) TFEU, to review the legality of CFSP decisions providing for restrictive measures against natural or legal persons.¹³ Regulations providing for the freezing of assets in implementation of CFSP decisions are also subject to judicial review by the CJEU.

So far, the EU has introduced [terrorism-related sanctions](#) against individuals/entities only on the basis of Article 215 TFEU. Article 75 TFEU has not yet been used, despite [calls](#) and legal action from the European Parliament in this respect.

Delimitation of competences

While the Treaty of Lisbon adapted the EU's legal framework to the practice of targeted sanctions against individuals suspected of terrorism, it also raised some new [competence](#)-related concerns. As internal and external security are intertwined, the question of the demarcation between AFSJ and CFSP remains relevant and the choice of the correct legal basis regarding the adoption of sanctions against suspected terrorists has produced some constitutional tensions in the post-Lisbon era. The question as to whether counter-terrorism sanctions against individuals belong to the EU's counter-terrorism policy as an objective of the AFSJ or are an objective of the CFSP aiming to promote international peace and security has important [implications](#).

Although Article 75 TFEU is specifically aimed at [preventing terrorism](#), it is debatable whether the article is linked to the international fight against terrorism and whether sanctions against suspected terrorists operating outside the EU's territory could be adopted on its basis. Also, Article 75 is a shared competence, meaning that once the administrative framework is adopted by the EU, Member States can no longer act, whereas Article 215 TFEU is neither a shared nor exclusive competence, leaving Member States the freedom to adopt national measures in parallel as long as they are not contrary to the objectives of the CFSP. However, [some](#) point to the fact that, despite the ordinary legislative procedure provided for under Article 75 TFEU, 'the expression is rather about a legislative framework of general application, more of a preventive nature, while when concrete measures shall be adopted in order to implement the established general administrative framework, then the Council remains the only decision-maker even under Article 75 TFEU'.

The CJEU pronounced on the issue in the July 2012 judgment in case [C-130/10](#) brought by the EP against the Council. The EP introduced an action for annulment of a Council Regulation imposing UNSC-based sanctions, arguing that the Council had based the regulation wrongly on Article 215 TFEU instead of Article 75 TFEU. The Court ruled that insofar as Articles 75 TFEU and 215 TFEU related to different Union policies that pursued objectives that, although complementary, did not have the same scope, Article 215(2) TFEU was the correct legal basis. However, although this case has brought clarification that CFSP-based sanctions must be implemented by means of Article 215 TFEU and not Article 75 TFEU, for some [authors](#) it is still unclear whether the judgment would serve to argue that the adoption of *any* targeted sanction instrument with an external dimension should be based on Article 215 and not Article 75 TFEU.

EU restrictive measures against suspected terrorists: legal framework and procedures

Until recently, the correspondence between the two UNSC counter-terrorist sanctions regimes and their implementation by the EU was fairly clear. Two common positions and their corresponding regulations were adopted in 2001 and 2002 to constitute the

basis for EU autonomous sanctions against individuals, groups and entities suspected of involvement in terrorist activities based on the 1373 UNSC regime, and to transpose the UNSC 1267 sanctions regime into the EU legal order. On 20 September 2016, however, the Council [modified](#) this legal framework, to improve the response to the specific threat posed by members and associates of ISIL/Da'esh, including the foreign fighter phenomenon. The new changes – a Council Decision and a Regulation – are best understood in the light of the EU's implementation of the two UNSC regimes to date.

EU implementation of the UNSC 1267 sanctions regime

The EU gave effect to the UNSC 1267 sanctions regime by means of Common Position [2002/402/CFSP](#), implemented by Council Regulation (EC) No [881/2002](#), both adopted on 27 May 2002. The Annex to Regulation 881/2002 includes all the names on the 1267 Sanctions List to which EU restrictive measures will apply. The EU has [amended](#) the Regulation each time the UNSC or the Sanctions Committee has modified its sanctions list. In addition, Council Common Position [2003/140/CFSP](#) of 27 February 2003 incorporates UNSC Resolution 1452(2002) allowing for humanitarian exceptions.

In 2011, when the UNSC created a separate sanctions regime for the Taliban, Council Common Position 2002/402/CFSP was amended accordingly to apply only to the individuals/entities associated with Al-Qaeda (Council Decision [2011/487/CFSP](#)). Following the adoption of UNSCR [2253\(2015\)](#), the Council adopted Decision [\(CFSP\) 2016/368](#) on 14 March 2016 amending the Common Position 2002/402/CFSP to extend the scope of application of restrictive measures to certain persons, groups, undertakings and entities associated with ISIL/Da'esh. Regulation 881/2002 was amended by [Council Regulation \(EU\) 2016/363](#) accordingly.

EU autonomous sanctions

In the aftermath of the attacks of 11 September 2001, in the United States, and following the adoption of UNSCR 1373 on 28 September 2001, the EU adopted Common Position [2001/931/CFSP](#) of 27 December 2001 on the application of specific measures to combat terrorism. Common Position 2001/931/CFSP gives effect to UNSCR 1373 in the EU legal order and forms the basis for [EU autonomous restrictive measures](#) against individuals, groups and entities suspected of involvement in terrorist activities.¹⁴ The common position is based on both Article 15 of the Treaty on European Union (TEU) (CFSP, now Article 29 TEU) and Article 34 TEU (part of police and judicial cooperation in criminal matters, giving it a 'Third Pillar' legal base); the latter was necessary to cover individuals and groups active in the EU (e.g. in Northern Ireland or the Basque country). The annex to the common position contains the list of EU designated 'persons, groups and entities involved in terrorist acts', amended several times and which currently [includes](#)¹⁵ groups such as the PKK, Hamas, ETA, and Hezbollah's military wing. Council [Regulation \(EC\) 2580/2001](#) (as [amended](#)) implements the common position and is directly applicable in the Member States.

Recent modifications of the legal framework for counter-terrorist sanctions in the EU

On 20 September 2016, the Council adopted [Council Decision \(CFSP\) 2016/1693](#) concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them, and repealing Common Position 2002/402/CFSP. Since the Council decision establishes additional restrictive measures, a new [Council Regulation \(EU\) 2016/1686](#) was adopted, instituting an asset freeze against the persons and entities to be listed in its Annex I.

The new Council decision (based on Article 29 TEU) fulfils two objectives. The first is to continue to implement/transpose the sanctions against ISIL (Da'esh) and Al-Qaeda associates and supporters as designated on the UNSC Sanctions List. Secondly, it institutes the possibility of **'autonomous' restrictive measures against persons associated with ISIL (Da'esh) and Al-Qaeda** or any group deriving thereof, in addition to those listed by the UNSC, to be designated in an annex to the Council decision. The Council will decide unanimously on the composition of the list and modifications to it on a proposal from any Member State or from the HR/VP.

Why the Council chose this legal solution over the existing Common Position [2001/931/CFSP](#) is not entirely clear. One explanation would be the definition contained in Common Position (CP) 2001/931/CFSP of 'persons, groups and entities involved in terrorist acts' to be considered the target of EU autonomous sanctions. The scope of the new decision is broader. The [Council](#) may target individuals and entities who have participated in the planning of or perpetrated terrorist attacks or have provided ISIL (Da'esh)/Al-Qaeda with financing, oil or arms, or have received terrorist training from them. The definition also includes those who have taken part in activities such as recruiting, inciting or publicly provoking acts and activities in support of these organisations, or being involved in serious abuses of human rights outside the EU, including abduction, rape, sexual violence, forced marriage and enslavement of persons. The EU will also be able to impose restrictive measures on individuals travelling or seeking to travel both outside the EU, and into the EU, with the aim of supporting ISIL (Da'esh)/Al-Qaeda or receiving training from them (particularly 'foreign fighters').¹⁶ The EU will be able to list any person meeting the criteria, including EU nationals.

Another point is the difference in the listing procedures, with the new Council decision not including the requirement found in CP 2001/931/CFSP that Member States base their listing proposals on decisions of 'competent national authorities' (see below). Finally, in implementing [Council Decision \(CFSP\) 2016/1693](#), the new Council Regulation (EU) 2016/1693 will operate alongside Regulation 881/2002 (amended): while the latter will continue to apply the asset freeze to those designated by the UNSC, the former will apply the asset freeze to individuals and entities included in a new list (Annex I) decided by the Council. The list will be identical to the annex of the Council Decision.

Procedural aspects

As regards EU sanctions implementing the UNSC Sanctions List, each time the UNSC list is modified, the regulation implementing the asset freeze at EU level – its annex listing the individuals and entities – is amended accordingly. The Commission was given the power to amend the annexes, 'for reasons of expediency'.

The Council's [CP 931 Working Party](#) (WP) prepares and maintains the list of terrorist suspects for the purposes of EU autonomous sanctions under CP [2001/931/CFSP](#). Names for the list are based on [decisions](#) of 'competent national authorities', which could mean judicial authorities or an 'equivalent competent authority in that area'. Then, the Council decides to sanction the individual/entity based on 'precise information or material in the relevant file'. In practice, the CP 931 WP has the mandate to examine the information with a view to listing. The Council takes the final listing decision unanimously. Moreover, CP 931 WP prepares the regular review and makes recommendations for listings and delistings. Since 2003, the Council has adopted guidelines on the implementation and evaluation of restrictive measures in the framework of CFSP ([updated](#) in June 2012, followed by new [elements](#) in February 2013)

which apply to all EU restrictive measures. Moreover, since 2004, a series of best practices were identified with regard to the implementation of (all) EU restrictive measures ([updated](#) in June 2015). With respect to the EU autonomous sanctions, the guidelines mention that listing must respect fundamental rights and due process, and that proposals for listing (and delisting) should be based on clear criteria and accompanied by accurate statements of reasons.

Regarding the autonomous sanctions based on the new Council Decision (CFSP) 2016/1693 and the corresponding regulation, it can be assumed that procedures will resemble the autonomous sanctions regime based on CP [2001/931/CFSP](#). In this sense, CP 931 WP could be mandated to deal with the listing of terrorist suspects under this legal framework too. The Commission can no longer amend the annex to Council Regulation (EU) 2016/1693, only the Council has implementing powers in this respect.

On **delisting procedures**, for the UN-imposed sanctions there is no mention of a procedure other than that foreseen at UN level: Focal Point or Ombudsperson. As for the autonomous EU restrictive measures, delisting should occur when the criteria for listing are no longer valid (mistaken listing, change in facts, death of listed person or liquidation of listed entity). Requests for delisting can be sent to the Council's General Secretariat. Also regular reviews are carried out to check whether the grounds for listing are still valid. Importantly, under EU autonomous sanctions, listed persons and entities may initiate proceedings for delisting before the EU courts.

Terrorist sanctions lists and fundamental rights concerns

Targeted sanctions adopted at UN and EU level against individuals and entities suspected of terrorism have been severely criticised for infringing key fundamental rights, in particular basic due process rights: the right to be informed about the accusations, the right to a fair hearing, the right to an effective legal remedy, and the right to property. Opponents emphasise the arbitrary way in which names are selected and placed on UN and EU blacklists and the difficult delisting procedures, but also the broader impact of these lists (e.g. public trust in institutions and the rule of law) and the lack of an international definition of terrorism.

Due process standards and the right to an effective remedy

A 2006 [study on targeted sanctions and due process](#) underlined the problems that listed individuals or entities had in challenging their placement on the **1267 regime's terrorist list**, amounting to a 'denial of legal remedies', in contradiction with the principles of international human rights law, which provides for 'a universal minimum standard of due process'. This includes, firstly, 'the right of every person to be heard before an individual governmental or administrative measure affecting him or her adversely is taken, and secondly the right of a person claiming a violation of his or her rights and freedoms by a state organ to an effective remedy before an impartial tribunal or authority'. The study argues that there is no effective opportunity to challenge a listing under the 1267 regime before a national court, as UN member states must comply with UNSC Chapter VII resolutions ([Article 103](#)); on the other hand, even if there was the possibility of individual court action against a UNSC resolution, the UN enjoys immunity from legal proceedings before national courts. Moreover, the individual or entity can contest a restrictive measure only if it affects them directly, so the right to an effective remedy does not cover the UNSC resolution instituting the restrictive measures. The study proposed a number of principles that should guarantee minimum standards of due process, most of which were taken up in the subsequent reforms.

In EU law, the right to an effective legal remedy found its expression in Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights. Prior to the Lisbon Treaty, the jurisprudence of the CJEU placed the right to an [effective remedy](#) within the general principles of Community law, based on the common constitutional traditions of the Member States and on Articles 6 (fair trial) and 13 (effective remedy) of the [European Convention on Human Rights](#) (ECHR). With regard to EU autonomous measures, the **EU Courts have found that EU institutions are in principle bound to respect certain rights**, such as the right to a fair hearing and the obligation to state reasons for the accusations. This pressure from the [EU judiciary](#), consistently annulling listing decisions thought to infringe the procedural and judicial rights of the listed individuals/entities, led to improved procedures in the EU for adding and removing individuals and entities from the autonomous list, but also with respect to the implementation of the UN list.

Administrative versus criminal nature of sanctions

The emphasis on the [administrative nature](#) of sanctions as opposed to the understanding of restrictive measures as criminal sanctions corresponds to their interpretation as attempts to influence conduct and not as penalties following a criminal offence. Otherwise, the higher standards relating to criminal offences would have to apply. However, the administrative or 'preventative' nature of restrictive measures has been widely questioned, as asset freezes (and travel bans) lasting for many years have imposed far-reaching human rights restrictions on those targeted. According to some [experts](#), these measures amount to 'preventive de facto detention' obstructing the autonomy of the targeted individuals, but not creating adequate legal protections. Not being accused of a criminal act, listed individuals cannot expect a criminal trial in which their rights are respected, while restrictions might be imposed for years. Therefore, critics of targeted sanctions argue that proof is needed that the individual has committed a criminal act. Restrictions against suspected individuals may be imposed during investigations, similarly to criminal law standards, but at some point a criminal charge must be brought otherwise the constraints should be lifted.

The CJEU and judicial review of the legality of counter-terrorist sanctions

Increasingly, judicial and political challenges have [shed doubt](#) on the legality of designations and the fairness of the listing and delisting procedures. It was mainly judicial challenges and court judgments that led to reforms of the procedures, at EU and UN level. Quantitatively at least, the EU courts are the leading jurisdiction reviewing sanctions measures and emphasising the principle of judicial protection.

While judicial review of sanctions imposed in implementation of UNSC decisions is still contested, particularly from the perspective of having a regional court reviewing obligatory UNSC Chapter VII decisions, the EU courts have confirmed that sanctions imposed under the EU autonomous regime are subject to a [full judicial review](#). Also all EU **regulations** imposing sanctions against individuals, groups or entities, irrespective of whether they implement EU autonomous sanctions or UN resolutions, are subject to full judicial review. They can be the subject of [actions for annulment](#) or [actions for damages](#), or [requests for a preliminary ruling](#) from a national court.¹⁷ **Infringement actions** brought by the Commission against Member States in the context of terrorist listings are less likely, but not unimaginable. While pre-Lisbon **CFSP instruments** can be only the subject of preliminary rulings, after the Lisbon Treaty, CFSP decisions providing for sanctions against natural or legal persons are subject to CJEU review; in particular the Court can rule on actions on annulment of such CFSP decisions. This is however

considered to be of limited practical importance, as counter-terrorism sanctions are expected not to be based exclusively on a CFSP decision.

The high level of secrecy surrounding listings has however impeded EU courts from offering a judicial review on the merits, restricting them to procedural aspects. Still, EU courts have in several cases annulled the sanctions decisions of the Council on account of the Council's failure to share information with the judiciary and with the persons/entities sanctioned. In fact, under the 1267 regime, the EU institutions do not have the necessary information, while under the autonomous sanctions regime the Council is reluctant to disclose the relevant information to the judiciary.

Autonomous restrictive measures

Listed individuals, groups and entities can initiate procedures for [delisting](#) before the EU courts in the framework of EU autonomous sanctions. The CJEU observed in these cases that since the Community was exercising its own powers and discretionary appreciation when identifying those to be placed on the list and subsequently freezing their assets, then the EU institutions were in principle obliged to respect the right to a fair hearing and the obligation to state reasons. Moreover, the courts found that EU listing decisions cannot be based on secret information that cannot be the object of judicial scrutiny.¹⁸ The 2006 judgment in [OMPI v. Council](#), the first successful challenge to the EU's autonomous sanctions, prompted the Council to reform its procedures to satisfy the requirement of a statement of reasons. In another related challenge, the Court reaffirmed that Member States could not avoid judicial scrutiny by basing the listings on classified intelligence or confidential information. Also, in case of subsequent relisting, that decision must be preceded by notification of the incriminating evidence and by giving those concerned the opportunity to be heard.¹⁹ In the appeals to *Segi* and *Gestoras pro Amnistía* ([C-355/04 P](#) and [C-354/04 P](#)), the CJEU reaffirmed its lack of jurisdiction to hear claims for damages under Third Pillar measures (on which the contested CP 2001/931/CFSP was partly based) but also stated that a right to make a request for a preliminary ruling to the Court must exist in respect to all measures adopted by the Council and intended to have legal effects in relation to third parties.

Recently, Advocate General Eleanor Sharpston's [opinion](#) recommending that the measures maintaining Hamas and the Liberation Tigers of Tamil Eelam (LTTE) on the EU list be annulled on procedural grounds, stated that, the Council cannot rely on facts and evidence found in the press and on the internet, rather than on decisions of competent authorities, to support a decision to maintain a listing; and that the Council is duty bound to verify that a decision of a third state competent authority (i.e. the USA on listing Hamas) is subject to a level of fundamental rights protection at least equivalent to that guaranteed by EU law. The CJEU has yet to pronounce its judgment.

EU counter-terrorist restrictive measures implementing the UN sanctions

The CJEU has also taken on a leading role in exercising judicial control of counter-terrorism sanctions based on UNSC decisions. In the landmark [Kadi](#) case, the CJEU had to rule upon the validity of EU acts implementing UNSC decisions and thus to consider the status of UN law in the EU's legal order. The Kadi I judgment of the Court of Justice (2008) has been [considered](#) 'the most significant legal development to affect the [1267] regime since its inception'. In the judgment, which emphasised both the importance of human rights and the autonomy of EU legal order, the CJEU insisted on its competence to ensure the full judicial review of all Community acts, including those based on UNSC Chapter VII measures. Moreover, the CJEU considered the UN sanctions system and

concluded that despite reforms, the re-examination procedure still fell short of necessary guarantees of judicial protection. Before the asset freezing measures against Kadi were annulled, the Commission sent a statement of reasons and re-listed him. The Kadi II cases challenged this re-listing. The 2013 judgment of the CJEU annulled the measures and endorsed the principle 'disclose or delist' – imposing the burden of proof on EU institutions to provide the Court with the necessary information, classified or not. In practice, the CJEU judgment in 2013 had little impact on the individual situation of Mr Kadi, who was actually delisted in 2012 through the UN non-judicial procedure. Soon after, the EU removed him from its list. Also, the EU institutions and Member States never found themselves in breach of international law and UNSC measures, as Kadi was never taken off the EU list while still present on the UNSC list.

Nevertheless, the Kadi case law will continue to influence decisions. The principles established by the CJEU, while having avoided a conflict between EU and international law in this case, will arguably lead to similar difficulties, unless, as advocated, 'a genuine and effective mechanism of judicial control by an independent tribunal' is created at UN level. Also, the [question](#) of what will happen if the EU refrains from re-listing persons on the UNSC list is still valid. As Member States are bound by their obligations under the UN Charter, some wonder if Member States could implement national measures without infringing EU law. According to [others](#), 'the powers of the EU to undertake UN-based or unilateral sanctions do not necessarily exclude all Member State competence if the Union abstains from taking the necessary measures'. That some EU Member States still maintain national terrorist lists is an indication in this sense.

The European Parliament

Some aspects relative to the EP's role in counter-terrorist sanctions policy have been underlined in the section on the legal basis for EU sanctions. Despite some inter-institutional arguments, [experts](#) assess that democratic control by the EP over EU external actions and Council decision-making in the context of fighting international terrorism is well established and works well.²⁰ As they point out, based on EEAS documents, the EP has not tried to overstep its powers with regard to terrorist listing-delisting, but has made recommendations for strengthening the institutional structures dealing with the issue. In its resolutions, the EP has taken [the view](#) that the sanctions regime should be 'fully in line with international human rights standards and the rule of law', while those targeted 'should be given the information that substantiates their targeting and be entitled to effective judicial remedy'. Finally, with regard to ISIL/Da'esh and foreign fighters, the EP [called](#) on Member States for measures to prevent FTFs from travelling from their territories and for international cooperation to bring individuals suspected of involvement in acts of terrorism to justice.

Main references

Rosas, A., [Terrorist Listings and the Rule of Law: The Role of the EU Courts](#), European University Institute, 2011.

Sullivan, G., Hayes, B., [Blacklisted: Targeted sanctions, preemptive security and fundamental rights](#), European Centre for Constitutional and Human Rights, December 2010.

Endnotes

- ¹ Since 1966, the UNSC has established 26 [sanctions regimes](#). There are currently 14 sanctions regimes in support of political settlement of conflicts, human rights, democracy, nuclear non-proliferation and counter-terrorism.
- ² Since 1994, to reduce their [unintended humanitarian impact](#), all UN sanctions have been targeted. Targets range from entire governments to terrorist and rebel groups, individuals and various entities.

- ³ 'Security Council [Committee](#) pursuant to resolutions 1267(1999), 1989(2011) and 2253(2015) concerning ISIL (Da'esh), Al-Qaida, and associated individuals, groups, undertakings and entities'.
- ⁴ 'The United Nations Security Council, terrorism and the rule of law', C.H. Powell, in [Global anti-terrorism law and policy](#), Second edition, V. Ramraj, M. Hor, K. Roach, G. Williams (Eds.), Cambridge University Press, 2012, pp. 19-43.
- ⁵ Resolution 2253(2015) (re)defines '[association](#)' and encourages states to put forward new listing requests, in particular of individuals and entities supporting ISIL/Da'esh.
- ⁶ C.H. Powell, op. cit.
- ⁷ The Ombudsperson has entered into [arrangements](#) with willing states on access to confidential or classified information: one formal agreement with Austria and 16 arrangements with other states, including the USA.
- ⁸ Other [proposals](#) have included extending the ombudsperson process to other regimes; enabling the ombudsperson to take delisting decisions; enhancing transparency; and clarifying listing criteria and conducting regular reviews.
- ⁹ C.H. Powell, op. cit.
- ¹⁰ The CTC was also mandated by [UNSCR 2178](#) (2014) to identify gaps in UN member states' implementation of measures under UNSCR 1373 that may hinder their ability to stem the flow of foreign terrorist fighters (FTF).
- ¹¹ Some Member States continue to maintain [lists](#) at national level (e.g. UK, France).
- ¹² Before Lisbon, there were no [provisions](#) for counter-terrorism sanctions against individuals and entities, only provisions on economic sanctions against third countries (Articles [60](#) and [301](#), and ([controversially](#)) Article [308](#) TEC.
- ¹³ Previously, listed individuals and entities could challenge the regulation instituting the asset freeze but not the CFSP instrument under which they were listed, creating a legal vacuum for those listed only under a CP ([Seqi case](#)).
- ¹⁴ CP 2001/931 establishes its scope of application and defines the 'persons, groups and entities involved in terrorist acts', as well as what constitutes a 'terrorist act'.
- ¹⁵ Council Decision (CFSP) [2015/2430](#) of 21.12.2015. On 27.9.2016, after the deal with the Colombian government, FARC were delisted: [Council Decision \(CFSP\) 2016/1711](#) and [Council Regulation \(EU\) 2016/1710](#).
- ¹⁶ These elements are more or less in line with the new [draft directive](#) on combatting terrorism.
- ¹⁷ Requests for preliminary rulings cases have dealt with both UN-based sanctions and autonomous measures, but with questions of interpretation rather than of the validity of EU acts providing for restrictive measures.
- ¹⁸ [Sison v Council](#), [Al-Aqsa v Council](#), [Kongra-Gel and Others v Council](#), [Seqi and Others v Council](#), [Gestoras Pro Amnistía and Others v Council](#), etc.
- ¹⁹ Cases [T-228/02 OMPI](#), [T-256/07 People's Mojahedin Organization of Iran](#), [T-284/08 People's Mojahedin Organization of Iran v Council](#), and [C-27/09 P France v People's Mojahedin Organization of Iran](#). Eventually, in 2009, the organisation was removed from the EU list. The appeal lodged by France was [unsuccessful](#).
- ²⁰ 'The development of a single counter-terrorism policy in the external action of the EU: the role of the Council – some legal aspects after Lisbon', J. Czuczaj, in [External dimension of the EU counter-terrorism policy](#), E. Herlin-Karnell, C. Matera, (Eds.), CLEER Working Papers 2014/2, pp. 47-59.

Disclaimer and Copyright

The content of this document is the sole responsibility of the author and any opinions expressed therein do not necessarily represent the official position of the European Parliament. It is addressed to the Members and staff of the EP for their parliamentary work. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2016.

Photo credits: © Argus / Fotolia.

eprs@ep.europa.eu

<http://www.eprs.ep.parl.union.eu> (intranet)

<http://www.europarl.europa.eu/thinktank> (internet)

<http://epthinktank.eu> (blog)

