Decision-making in the Dark? Autonomous EU Sanctions and National Classification

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Amsterdam Centre for European Law and Governance
Working Paper Series 2012 - 02

Available for download at www.jur.uva.nl/acelg under the section Publications or at the author’s SSRN page
I would like to thank Vigjilenca Abazi for her insightful comments and Margot de Vries for her research assistance.

May 2012

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1. Introduction

In the past decade, the European Union (EU) has taken an active role in counter-terrorism. It has adopted a broad range of measures, including a comprehensive European Union Counter-Terrorist Strategy as well as a common definition of what is a ‘terrorist offence’. Amongst the EU’s counter-terrorist policies, sanctions (asset freezing) remain the cornerstone. The EU runs two different regimes of counter-terrorist sanctions: autonomous EU sanctions and EU sanctions implementing UN lists of terrorist suspects. The latter became very well known in EU law circles through the abundant discussion of the case of Kadi. The former have attracted less attention but have very similar effects on the human rights of those sanctioned. The core problem under both regimes remains that the high level of secrecy makes fair procedures impossible. The inability or unwillingness of the Council and ultimately of the Member States to share the relevant information even with the EU judiciary – let alone with those sanctioned – remains the main reason why the EU courts cannot offer judicial review of the merits.

This paper focuses on the problems resulting from the current treatment of sensitive information under the composite procedure leading to the adoption of autonomous EU counter-terrorist sanctions. It considers changes that could make it possible to offer substantive judicial review while ensuring the confidentiality of certain information. The reason for the choice to focus on autonomous sanctions rather than sanctions implementing UN lists of terrorist suspects is that the EU and its Member States should have full control over the listing procedure and should have

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3 The UN list of terrorist suspects, originally containing those ‘associated with Al-Qaida’ and those ‘associated with the Taliban’, is now separated into two different regimes (UN Security Council Resolutions 1988 and 1989 (2011)).
4 Case T-85/09 Kadi II [2010] ECR 00000; Joined Cases C-402/05 P and C-415/05 P Kadi I [2008] ECR I-6351; Case T-315/01 Kadi v Council and Commission [2005] ECR I-3649; see also the pending appeal at: Case C-584/10 P Commission v Kadi (Application OJ C 72, 5.3.2011, p. 9); Case C-593/10 P Council v Kadi (Application OJ C 72, 5.3.2011, p. 9); Case C-595/10 P UK v Kadi (Application OJ C 72, 5.3.2011, p. 10).
all the relevant information, while in the case of sanctions giving effect to UN lists the information appears simply not accessible, either for the EU or its Member States. Hence, even though both types of sanctions are adopted in a similar secretive manner and even though both types of sanctions are equally invasive when it comes to human rights, under the autonomous listing procedure the EU should have the means and the relevant information to adopt counter-terrorist sanctions lawfully - if that is possible. This paper focuses on the problems resulting from the current treatment of sensitive information under the composite procedure leading to the adoption of autonomous EU counter-terrorist sanctions. It explores how substantive judicial review could be offered while ensuring the confidentiality of certain information.

The paper is structured as follows. Section Two introduces the autonomous listing procedure and examines the treatment of sensitive information under this procedure. The Council’s inability or unwillingness to share information with the EU judiciary and with those sanctioned is the main reason for the procedural flaws that have led time and again to the annulment of autonomous EU sanctions. The core question that arises from the discussion and that connects Section Two with the following Section Three is whether the Council is or should be obliged to share with the EU Courts all the relevant information that constitutes the basis of the listing decision. Section Three turns to the Council’s attempt to justify the refusal to share information with a reference to classification under national law. It discusses inter alia the ‘originator controls’ principle. Sharing information is a basic requirement for cooperation between the EU and its Member States. If Member States are unable to exclude further dissemination of information that they make available to the EU institution, this might negatively affect their willingness to share that information. Section Four examines potential procedural mechanisms that might allow the Court of Justice to consider sensitive information, on which the sanction is based while at the same time ensuring the applicant’s rights to a fair trial. The very last section brings together the conclusions.
2. Adopting Autonomous EU Sanctions in Secret?

2.1 Information Flow Under the Adoption Procedure

Under the autonomous EU regime of counter-terrorist sanctions suspects are listed pursuant to a composite procedure set out in Common Position 931/2001/CFSP.\(^5\) The composite listing procedure takes place in two phases. First at the national level, a ‘competent national authority’ takes a ‘decision’ within the meaning of Article 1(4) of Common Position 2001/931/CFSP. The ‘competent national authority’ should in principle be a judicial authority but often is not.\(^6\) The ‘decision’ must entail that the individual is a terrorist suspect. Second, the Council decides to sanction an individual or organisation on the basis of the ‘precise information or material in the relevant file’, which indicates that a decision has been taken at the national level.\(^7\) The sanction is then imposed on those listed in a directly applicable regulation (Council Regulation 2580/2001\(^8\) ) implementing Common Position 931/2001/CFSP.

Lists of terrorist suspects are prepared and maintained in a permanent CP 931 Working Party.\(^9\) A competent national authority proposes a specific name to the other members of the CP 931 Working Party. After this proposal, the representatives have two weeks to consult other governmental officials. Pursuant to its mandate, the permanent CP 931 Working Party is in charge of (i) examining and evaluating information with a view to listing; (ii) assessing whether the information meets ‘the criteria in Common Position 2001/931/CFSP and in the Council’s statement agreed when the Common Position was adopted’; (iii) preparing the regular review; and (iv) making recommendations for listings and de-listings.\(^10\) Any listing is finally agreed

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\(^6\) Eckes and Mendes, 2011, pp. 651-670.


\(^9\) Council Document 10826/07 on the fight against the financing of terrorism - implementation of Common Position 2001/931/CFSP, of 21 June 2007, Annex II. Until the establishment of the permanent working party in 2007, the listings were prepared in an ad hoc forum.

in a unanimous decision of the Council, usually, if there are no objections, in written procedure (A-point).\textsuperscript{11}

The procedure, as it is set out in Common Position 2001/931 and in the working methods of the CP 931 Working Party, appears to require that Member States share the relevant information with the Council and the permanent CP 931 Working Party. ‘Relevant information’ refers to the facts and the national law that in the view of the competent national authority justifies a listing at the EU level. However, the specific level of scrutiny that the Council and its CP 931 Working Party exercise over the listing proposed by a Member States remains ambiguous. Many details of the adoption procedures of autonomous EU sanctions, including the precise listing requirements remain blurry. This is partially due to the formulation of Common Position 2001/931 and partially due to the fact that national judicial systems differ considerably and deal very differently with terrorist suspects.

So far, the Court of Justice has not ruled directly on the legality of the autonomous sanctions procedure. Its involvement has been limited to preliminary references\textsuperscript{12} and appeals\textsuperscript{13} on very particular issues. In \textit{France v PMOI}, Advocate-General Sharpston discussed the listing requirements. It would further contribute to legal clarity and would therefore be desirable if the Court specified and interpreted the conditions for a listing at the EU level. Unfortunately and contrary to the explicit suggestion of Advocate-General Sharpston,\textsuperscript{14} the Court of Justice limited in \textit{France v PMOI} its observations to this very point and did not seize the opportunity to also rule on the interpretation of the listing requirements set out in Article 1(4) and (6) of Common Position 2001/931 and Article 2(3) of Regulation 2580/2001. However, further cases against autonomous EU sanctions are pending in Luxembourg, which might require the Court of Justice to interpret the different requirements of the listing procedure. An appeal by the Netherlands is pending against the decision of the

\textsuperscript{14} AG Sharpston, Opinion in C-27/09 P France v OMPI/PMOI [2011] ECR 00000, paras. 118-120.
General Court in the case of Al Aqsa.\textsuperscript{15} The General Court had held that an order of a national court hearing the application for interim measures could no longer serve as the basis for a listing after the 2003 Netherlands regulation on sanctions for the suppression of terrorism\textsuperscript{16} was repealed. Al Aqsa brought a second appeal against the same ruling,\textsuperscript{17} challenging that ‘the Sanctieregeling’, in conjunction with the order of the court hearing the application for interim measures, can be regarded as a decision of a competent national authority meeting the definition contained in Article 1(4)’ Common Position 2001/931. Further, the latter appeal challenged the General Court’s interpretation of ‘knowledge’ within the meaning of Article 1(3)(k) Common Position 2001/931, and Article 1(4) Regulation 2580/2001. Rulings in these cases will at least incrementally shed more light on the precise listing requirements.

Article 2(3) of Regulation 2580/2001 stipulates that the Council shall ‘establish, review and amend the list of persons, groups and entities’. For the grounds and procedures for listing Article 2(3) of Regulation 2580/2001 refers to Article 1(4), (5) and (6) of Common Position 2001/931/CFSP. ‘[T]he 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’\textsuperscript{18} in particular ‘the assessment of the considerations of appropriateness on which such decisions are based’.\textsuperscript{19} Indeed, the CP 931 Working Party has pursuant to its working methods the mandate to ensure that ‘the information provided meets the criteria in Articles 1(3) and 1(4)’ of Common Position 2001/931/CFSP.\textsuperscript{20} Article 1(3) defines the meaning of ‘terrorist act’ and ‘terrorist group’. Article 1(4) stipulates that listings are based on ‘precise information or material in the relevant file which indicates that a decision has been taken by a competent [usually judicial] authority in respect of the persons, groups and entities concerned (...)’. Furthermore, the working methods

\textsuperscript{15} Case C-550/10 P Al-Aqsa v. Council (OJ C 46, 12.2.2011, p. 3) appeal brought on 24 November 2010 by the Netherlands against the judgment delivered by the General Court on 9 September 2010 in Case T-348/07 Al-Aqsa v Council.

\textsuperscript{16} Regeling van 3 april 2003, nr. DJZ/BR/219-03 houdende beperkende maatregelen tegen de Stichting Al Aqsa met het oog op de strijd tegen het terrorisme (Sanctieregeling terrorisme 2003), Staatscourant 7 april 2003, nr. 68, p. 11.

\textsuperscript{17} Case C-539/10 P Al-Aqsa v. Council (OJ C 46, 12.2.2011, p. 2) appeal brought on 22 November 2010 by Stichting Al-Aqsa against the judgment delivered by the General Court on 9 September 2010 in Case T-348/07 Al-Aqsa v Council.

\textsuperscript{18} See Case T-49/07 Sofiane Fahas (n 7 above), para. 57, referring also to Case T-228/02 People’s Mojahedin Organization of Iran v Council (OMPI/PMOI I) [2006] ECR II-4665, para. 159, and Case T-341/07 Jose Maria Sison v Council [2009] ECR II-3625, paras. 65 and 66.

\textsuperscript{19} See Case T-49/07 Sofiane Fahas (n 7 above), para. 83.

\textsuperscript{20} Council Document 10826/07, see (n 9 above), Annex II, para. 2.
provide for the possibility ‘to invite a representative from EUROPOL or the Situation Centre to attend the meeting of the [CP 931] Working Party to make a presentation of background information in order to facilitate discussion on a particular subject.’ 21 The wording of the working methods reveals that the CP 931 Working Party does indeed discuss the substance of the information that supports the proposal. Moreover, the working methods stipulate that the CP 931 Working Party ‘will check in particular whether the proposal complies with the fundamental principles and the rule of law’ when the proposal was submitted by a third country (a state that is not a Member State of the EU). 22 ‘In particular’ implies that the CP 931 Working Party will also check the proposals of Member States.

At the same time, the General Court explicitly held that the Council could not examine whether the decision of the national authority is well-founded 23 because this would undermine the principle of sincere cooperation. 24 In the light of the wording of Common Position 2001/931 referring to ‘judicial authorities’ this argument might appear to have merit in order to safeguard the separation of powers. However, Advocate-General Sharpston argued in France v PMOI that a decision of a ‘judicial authority’ must be interpreted to mean not only ‘a finding of guilt by a court’ but also ‘include the investigating and prosecuting authorities of the Member State(s)’. 25 Indeed, judging from the case law this appears to be common practice. In this light, the principle of separation of powers does not stand in the way of a substantive assessment. On the contrary, the additional adverse effects that a listing in an autonomous EU list of terrorist suspects imposes on individuals 26 warrant that the Council checks that the requirements for a listing are met at the EU level. This must include that the relevant information provided sufficiently supports the assessment that the person is a terrorist suspect.

Both the General Court 27 and the Court of Justice 28 ruled that there is a distinction between the initial listing decision and subsequent listing decisions. The

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22 Council document 10826/07 (n 8 above), Annex II, para. 4 (emphasis added).
24 Case T-256/07 OMPI/PMOI II (n 23 above), para. 133; Case T-228/02 OMPI/PMOI I (n 18 above), para. 122.
25 AG Sharpston, Opinion in C-27/09 P France v OMPI/PMOI (n 14 above), para. 133.
26 See below Section 4 on the adverse effects.
verification by the Council of a decision by a national authority for the adoption of the initial decision to freeze funds is an essential precondition. After the initial sanctioning decision, the Council must ensure at least every six months that there are sufficient grounds for keeping an organisation on the list.²⁹ The General Court ruled in Sofiane Fahas that the verification the consequences of the national decision is ‘imperative in the context of the adoption of a subsequent decision to freeze funds.’³⁰ At the same time, the Council remains obliged ‘to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority [...].’³¹ In the Al Aqsa case, the General Court ruled that when at national level police or security enquiries are closed without giving rise to any judicial consequences, the Council is bound to take that into account.³² In the Sison case, the Court also explicitly stated that ‘a decision to prosecute may end in the abandoning of the prosecution or in acquittal in the criminal proceedings. It would be unacceptable for the Council not to take account of such matters, which form part of the body of information having to be taken into account in order to assess the situation (...). To decide otherwise would be tantamount to giving the Council and the Member States the excessive power to freeze a person’s funds indefinitely, beyond review by any court and whatever the result of any judicial proceedings taken.’³³ This indicates scrutiny of the further development of the substantive allegations and not only the existence of a proposal as such.

However, irrespective of the level of actual scrutiny at the EU level the Council needs to possess the relevant information simply because in the event of a legal challenge both the General Court³⁴ and the Court of Justice³⁵ require the Council to submit the relevant information to the EU judiciary. Neither court accepts the legality of listing decisions based on information that cannot be shared with the

²⁹ See Case T-49/07 Sofiane Fahas (n 7 above), para. 81. See also Art. 1 (4) and (5) of Council Regulation (EC) No 2580/2001 (n 2 above), p. 70.
³⁰ See Case T-49/07 Sofiane Fahas (n 7 above), para. 81.
³¹ See Case T-49/07 Sofiane Fahas (n 7 above), para. 86. See also para. 69.
³³ Case T-341/07 Jose Maria Sison (n 18 above), para. 116.
³⁴ Case T-284/08 People’s Mojahedin Organization of Iran v Council (OMPI/PMOI III) [2008] ECR II-3487, para. 71-73.
³⁵ Case C-27/09 P France v OMPI/PMOI (n 28 above).
judiciary. With the large number of judicial challenges pending, the CP 931 Working Party will have to verify that the Council is in the position to submit the relevant information to the Court.

2.2 Failure to Disclose Relevant Information

The General Court has repeatedly annulled sanctions decisions of the Council. The core problem is the Council’s failure to disclose the relevant information to the judiciary and to those sanctioned.

Most recently, the failure to disclose relevant information was demonstrated in the appeal case of France v PMOI. The PMOI was subject of a subsequent listing, after a national quasi-judicial body had annulled the reason for the initial listing. The EU Courts distinguish between the initial (first) listing of a person and subsequent (following) listings. In the case of the former the reason for the listing and the relevant information may be communicated at the same time as the actual sanctioning decision. The General Court justified this with considerations of effectiveness: the effect of the surprise is necessary when the assets are frozen for the first time. In the case of the latter, those already listed must be provided with the information beforehand for a legally valid subsequent listing. In France v PMOI, the new information on which the subsequent listing was based was not communicated to the applicant before the listing or even the legal challenge. Only reluctantly, part of the relevant information was communicated to the Court. On 26 September 2008, the General Court had ordered the Council to provide the relevant information that had led to the subsequent EU listing of PMOI.40 The Council responded in two stages. On 10 October 2008, the Council first provided eight documents. Seven were not confidential and were also shared with PMOI. One document was confidential. It

36 More than 40 cases are pending against different EU sanctions (including country regimes), see in particular: Case C-130/10, Parliament v Council, joined by the Commission, the Czech Republic, Sweden, and France as interveners (order of 10 August 2010); C-584/10 P Commission v Kadi (n 4 above); C-593/10 P Council v Kadi (n 4 above); C-595/10 P United Kingdom v Kadi (n 4 above).
37 T-228/02 OMPI/PMOI I (n 18 above); Case T-256/07 OMPI/PMOI II (n 23 above); appeal pending: Case C-576/08 P People’s Mojahedin Organization of Iran (OJ C 55, 7.3.2009, p. 15-16); Case T-284/08 OMPI/PMOI III (n 34 above); Case T-47/03 Jose Maria Sison v Council and Commission [2007] ECR II-73 (summ.pub.).
38 Case C-27/09 P France v OMPI/PMOI (n 28 above).
39 Case C-27/09 P France v OMPI/PMOI (n 28 above), para. 62.
40 Case C-27/09 P France v OMPI/PMOI (n 28 above), para. 40.
was not provided to PMOI. The Council further informed the Court ‘that it was unable to produce, at that stage, certain further documents setting out the proposed new basis for listing PMOI and explaining the reasons for its proposal, since these were classified as confidential by the French Republic and could not be made available at the time the response was submitted.’ On 6 November 2008, the Council then provided three further documents: two in full and a third in part.

Most interesting with regard to this communication between the Court and the Council is that the Council delayed or refused submission to the Court of documents that were classified by France as confidential for that reason only. It did not make an assessment of the need of confidentiality itself. In this regard, the General Court made clear that ‘the Council’s contention that it is bound by the French authorities’ claim for confidentiality […] does not explain why the production of the relevant information or material in the file to the Court would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, did not.’ This is in line with the General Court’s basic position that ‘the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision.’

All documents were considered by the General Court as insufficient to support the Council’s contention. The obstacle to informing the EU institutions of all the evidence lay in French national law. Further evidence relating to the judicial inquiry ‘must, under French law, remain confidential during the course of the inquiry.’ As a consequence, the Council did not receive all the evidence either. The Council was not informed of the identity of the alleged members of PMOI that were under investigation in France. Nor was the Council informed about the future steps of the inquiry’. The General Court specifically related the lack of information to the

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41 Case C-27/09 P France v OMPI/PMOI (n 28 above), para. 41.
42 Case C-27/09 P France v OMPI/PMOI (n 28 above), para. 42.
43 Case T-284/08 OMPI/PMOI III (n 34 above), para. 72.
44 Case T-284/08 OMPI/PMOI III (n 34 above), para. 73.
45 Case T-284/08 OMPI/PMOI III (n 34 above).
47 Ibid.
refusal of the Council and the French authorities to provide part of the third document mentioned above.\textsuperscript{48} This stands in contrast with the Council’s assertion that it did not possess any information beyond what was supplied in the statement of reasons.\textsuperscript{49} It remains unclear whether the part of the third document would have been sufficient to support the listing.

3. Can Secrecy Remain a National Choice?

3.1 Implications of National Classification

In the case of France v PMOI,\textsuperscript{50} the Council’s justification for not submitting part of the relevant information to the EU judiciary was that France had classified this information as confidential under national law. Hence, the Council possessed the information but felt its hands bound by national classification rules. National declassification laws prevented France to declassify the documents in time for the Council to provide the information to the General Court.

The Court of Justice did not specifically address this point, but Advocate-General Sharpston did. She was not very sympathetic towards the Council’s reference to national classification as justification for the refusal to share the relevant information with the EU judiciary:

‘As regards the Council’s contention that it is bound by the French authorities’ claim for confidentiality, this does not explain why the production of the relevant information or material in the file to the Court would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, did not.’\textsuperscript{51}

This clashes not only with the principle of openness\textsuperscript{52} and right of access to documents,\textsuperscript{53} as they are given expression in Regulation 1049/2001 (the so-called

\textsuperscript{48} Case T-284/08 OMPI/PMOI III (n 34 above), para. 76.
\textsuperscript{49} Para. 11 of the Council’s first response to the court order of 26 September 2008, at para. 58 of AG Sharpston, Opinion in C-27/09 P France v OMPI/PMOI (n 14 above).
\textsuperscript{50} Ibid.
\textsuperscript{51} AG Sharpston, Opinion in C-27/09 P France v OMPI/PMOI (n 14 above), para. 72.
\textsuperscript{52} Article 15(1) TFEU.
\textsuperscript{53} Article 42 of the Charter of Fundamental Rights.
transparency regulation), but also with the applicant’s right of access to justice and fair trial. The Council was ‘unable to comply with the [General] Court’s Order in relation to [the classified] documents as it does not have the authorisation to provide them to the Court, even on a confidential basis. Under French law, evidence must remain confidential during the course of a judicial inquiry. The Council had ‘not been informed of the specific identity of the persons under investigation’ but only that they ‘are alleged members of the applicant’. Nor was the Council informed about the future steps of the inquiry.

Member States may have a legitimate interest in keeping confidential (part of) the relevant information that supports that someone is terrorist suspect. If Member States could not trust in the confidential treatment of information that might threaten their national interests they might very well become less cooperative in sharing this information. The consequences for the accuracy of autonomous EU sanctions might be very negative. In the adoption procedure that culminates in EU counter-terrorist sanctions (as well as potentially in other composite procedures, where national and EU authorities cooperate) the relevance of national classification at the EU level is crucial to the applicant’s right to fair trial. What does the national classification of documents mean for the EU level? Can the EU authorities share information that has been classified as confidential under national law with the Court? Or even with the applicant?

3.2 ORCON, Authorship Rule, or?

The core problem of the adoption procedure of autonomous EU sanctions is the use of secret information. This raises the question of who decides which information is secret. Does the rule of originator control (ORCON) apply? Under the ORCON rule, the party that provides information retains (nearly) complete control over the dissemination of that information by the EU body that receives it. This is highly relevant in the case of autonomous EU sanctions, since as we have seen

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55 AG Sharpston, Opinion in C-27/09 P France v OMPI/PMOI (n 14 above), para. 6.
56 AG Sharpston, Opinion in C-27/09 P France v OMPI/PMOI (n 14 above), para. 12.
57 AG Sharpston, Opinion in C-27/09 P France v OMPI/PMOI (n 14 above).
above, all relevant information that leads to a listing at the EU level originates from national authorities. ORCON also means that if the information has been classified under national procedures, it cannot be reclassified or declassified by the EU, unless the originator consents. Further, information provided by a Member State cannot be passed on to any other institution or body without the consent of that Member State. If ORCON applied the national control over shared information would be nearly absolute. Particularly, if there is no requirement for the designating Member State to justify on the merits (!) its choice to classify or refuse to declassify or consent to the release of information which it has provided to the Council. If a simple reference to national rules on classification sufficed, the Council would be prevented from making an independent judgment about the wisdom of releasing the relevant information that has informed the listing decision, only because it has been classified by a Member State.

The concept of originator control is well entrenched in the handling and sharing of sensitive information. In March 2011, the Council adopted the decision on the security rules for protecting EU classified information.59 It applies the ORCON rule to all EU classified information (EUCI).60 Additionally in July 2011, the Member States meeting within the Council (but not acting as the Council) adopted an agreement on ‘the protection of classified information exchanged in the interests of the European Union’, in which the Member States agreed to apply the ORCON rule.61 Previously, the EU institutions applied the so-called "authorship rule" which followed essentially the same rules as ORCON.62 The authorship rule ‘meant that, where the author of a document held by an institution was a natural or legal person, a Member State, another [Union] institution or body, or any other national or international organisation, the request for access to the document had to be made directly to the author of the document.’63 The terminology changed with the Council decision on the security of EUCI.

60 See Article 3(2) on downgrading or declassifying of EUCI; see Article 12(4) on exchange of EUCI with third states or international organisations.
61 Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union (OJ C 202, 8.7.2011, p. 5), see in particular Article 4.
63 Case C-64/05 P Sweden v Commission [2007] ECR I-11389, para. 56.
Both the Council decision and the agreement between the Member States express that they respect existing transparency rules. The Decision for instance states that it is ‘taken without prejudice the existing practices in Member States with regard to informing their national Parliaments’. 64 The agreement sets out that ‘[n]othing in this [a]greement shall cause prejudice to the national laws and regulations of the [Member States] regarding public access to documents [...]’. 65 Neither the decision nor the agreement specifically mentions the EU Courts or court proceedings.

The legal regime on classified information should be contrasted with the transparency regulation, which aims to give the fullest possible effect to the right of public access to documents held by an institution, including not only documents drawn up by an institution but also documents received from third parties, including the Member States (expressly stated in Article 3(b)). Article 4(4) of the latter extends access to documents originating with third parties. It sets out: ‘As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.’ The latter should be read as a reference to classified information. Yet, it applies to ‘third parties’ and hence not to Member States. Article 4(5) of Regulation 1049/2001 stipulates: ‘A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.’ Neither paragraph 4 nor 5 unambiguously express an ORCON principle. Paragraph 5 seems to be slightly more nuanced in that they make clear that the Member State needs to request the institutions to treat the document confidential and that this is not an automatic consequence of the fact that it originates from a Member State. This raises the question how nationally classified information should be treated. Under Article 4(4) (applicable to third parties) it might fall under the ‘unless’ exception. Under Article 4(5) national classification might constitute an automatic ‘request’. However, while paragraph 4 speaks of an obligation to consult the originator before taking a decision to release information (the final decision lies with the EU institutions), paragraph 5 requires agreement. Hence, under Article 4(5) the institutions are not free to share information without the agreement of the Member States. However, the Court of Justice interpreted Article 4(5) of Regulation 1049/2001 not to give Member States ‘a general and unconditional right of veto, so

64 Council decision (n 59 above), recital 10.
65 Agreement (n 61 above), Article 3(2).
that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by a [Union] institution simply because it originates from that Member State, is not compatible with the objectives [...] of the Regulation. The Court made clear that Member States’ power to oppose disclosure is limited by the exceptions set out in Article 4(1) to (3) of Regulation 1049/2001. This does not, at least not directly, answer the question of who should be in charge of taking the final decision whether or not a document can be released. However, it places the decision firmly within the EU law context and does not grant a general exception for information classified under national law.

In the IFAW ruling in January 2011, the General Court applied and specified the Court of Justice’s earlier ruling. It clarified the conditions under which it is possible for the Commission to refuse access to documents originating from Member States. It made clear that first, it is for the EU institutions to decide whether a document can be shared and not for the Member States (the EU institution is responsible that one of the Article 4 exceptions applies). Second, the Court emphasised that the EU judicature will carry out a full review of the grounds for opposition invoked by the Member States. At the same time, the exceptions can require an assessment of the interests of the Member States (as distinguished from the interest of the Union). In particular, Article 4(1)(a) of Regulation 1049/2001 refers to the ‘[…] the protection of the public interest as regards public security, defence and military matters, international relations […] of a Member State’. Member States do have broad discretion in determining their interest within the meaning of this exception under EU law. However, any decision to conceal information based on any of the exceptions in Article 4 falls within the jurisdiction and control of the Court of Justice. This implies of course disclosure to the Court.

More specifically with regard to the sanctioning procedure we should turn to the CP 931 Working Party. It forms part of the Council. Its working methods declare with regard to confidentiality that:

- meetings will be held in a secured environment so as to enable discussion up to SECRET UE, and will be held as and when necessary;

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66 Case C-64/05 P Sweden v Commission (n 61 above), para. 58.
68 Ibid, paras. 73-88.
- adequate steps will be taken to ensure the confidentiality of the proceedings of the CP 931 [Working Party];
- the date of the meeting, agenda and organisational details will be classified CONFIDENTIEL UE;
- the Council Secretariat will hold any documents relevant for the listing or de-listing of persons, groups or entities. Such documents will, if appropriate, bear an EU or national classification marking. The rules on public access to Council documents apply.⁶⁹

The reference to the Council’s rules on public access to documents confirms that the rules applicable to the Council, including Regulation 1049/2001 directly apply to the information held by the Working Party. This requires that the decision to refuse or allow access to sensitive documents, is justified within the legal framework of EU law. Neither the Council nor the Member States can simply invoke national rules of classification as justification to refuse access. Classifying rules under national law before submitting them to the WP cannot be a way to circumvent rules of access to information. These are of course for the public not for the Court. Yet, what applies within the framework of public access to information under Regulation 1049/2001, applies a fortiori to the information that is shared with the EU judiciary. Again the Court has full jurisdiction, which is only possible if it is given access to the concealed information.

### 3.3 How Much Secrecy Is Needed?

In principle, Member States are under an obligation to cooperate and provide relevant information supporting listing under the sanctions regime set up by Common Position 2001/931 and Regulation 2580/2001.⁷⁰ They are equally obliged to keep the Council and each other informed about developments in the cases of those that are already listed by the EU. However for the adoption of autonomous sanctions the Council depends on the willingness of the competent national authority to submit its decision and the relevant information. Assuming that autonomous EU

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⁶⁹ Council Document 10826/07(n 9 above), Annex I. The EU works with four levels of classification: très secret UE/EU top secret; secret UE/EU secret; confidential UE/EU confidential; restraint UE/EU restricted.

⁷⁰ See Article 4 Common Position 2001/931/CFSP (n 2 above) and Article 8 Council Regulation (EC) No 2580/2001 (n 2 above).
sanctions do make a contribution to reducing the threat of terrorism, failure to provide the Council with the necessary information to make listings diminishes the EU’s capacity to take action in order to keep the EU safe. Excluding the sensitive information will further in many cases make it impossible for the Council to keep the measures up in Court.

At the same time, some secrecy might have to be guaranteed to the Member State to ensure cooperation. A comparison with Europol could be useful. Europol is a well-established EU agency whose core task is receiving, examining and providing (often sensitive) information. It can only carry out its task if Member States are willing to provide it with information. Europol has a legal framework that specifically determines how sensitive information that it receives from Member States should be handled.\textsuperscript{71} In principle the choice of classification of any information that a Member State provides to Europol lies with that Member State.\textsuperscript{72} However, the assessment should take place pursuant to the rules of EU law.\textsuperscript{73} This does not exclude re-classification by Europol, but it requires Europol to ‘inform the Member State concerned and seek to agree on an appropriate classification level. Europol shall not specify, change, add or remove a classification level without such agreement.’\textsuperscript{74} Hence, Member States’ appear to possess a ‘veto right’ as regards the information that they share with Europol.

One option could be to require the Council or its CP 931 Working Party to determine the classification of the relevant information, after they have collected all the information relevant to any one particular listing and given it their own interpretation. This assessment would have to take place within the EU law framework and give particular attention to the interest that the providing Member State claims to have in classifying the document. This would also ensure that the appropriate level of classification to protect the interests of the EU and its individual Member States is applied after all the information is compiled and assessed in the light of the question of the person’s ability to contribute terrorist activities. The necessary classification might change as a result of new assessments or of a more

\textsuperscript{72} Council Decision 2009/968/JHA (n 71 above), Article 11(1).
\textsuperscript{73} Council Decision 2009/968/JHA (n 71 above), Article 11(1) and (2) in combination with Article 10.
\textsuperscript{74} Council Decision 2009/968/JHA (n 71 above), Article 11(3).
extensive contextualisation. This would place the responsibility with the EU institutions and bodies. It would result in greater coherency, break the link with national classification, and allows to consider the adverse effects of EU sanctions. At the same time, it offers the possibility to ensure confidentiality where needed.

Finally, this would also allow the EU institutions to share the relevant information with the EU Courts. The following section will examine what procedural mechanisms could be employed to ensure a fair trial and confidentiality to the extent strictly needed.

4. Secret Information in Courts: Lessons That Could Be Taken from National Law

The main reason for annulment of autonomous EU sanctions is the infringement of the procedural and judicial right of those sanctioned resulting from the Council’s failure to share the relevant information with the EU Courts. The EU Courts have unambiguously ruled that the Council cannot impose sanctions without sharing the relevant information that has led to the sanctions decision. If we accept that parts of the relevant information are indeed sensitive and that dissemination could harm the interests of the EU and its Member States, the EU Courts will need to be able to ensure confidentiality.

Counter-terrorist sanctions exemplify the problem that the EU judiciary does not have a procedural framework on how to deal with sensitive information. The Statutes of the Court of Justice do not provide for mechanisms to offer judicial review of the merits while protecting confidentiality.75 The Court of Justice’s Rules of Procedure generally state that ‘[t]he Judge-Rapporteur and the Advocate General may request the parties to submit within a specified period all such information relating to the facts, and all such documents or other particulars, as they may consider relevant. The information and/or documents provided shall be

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communicated to the other parties.’ The rules only address the specific point of limiting the access of interveners to ‘secret or confidential documents’.77

The obvious places to look for inspiration are national legal systems. Particularly in the UK, discussion has recently focussed on the treatment of sensitive information in courts.78 One option, currently under discussion in the UK for civil procedures, could be closed material procedures.79 However, it is in order to start with the clarification that the following examination aims to evaluate and assess the implications of the closed material procedures without presupposing that such measures are necessary in all legal challenges against sanctions.80 National procedural mechanism should not be blindly copied but must be carefully examined as to their consequences on fair trial.

Closed material procedure can be divided into two stages. A key procedural component is the use of special advocates with high security clearance, who are given access to sensitive information that will not be disclosed to those whom these advocates represent (in line with the terminology of the EU Courts this would be the applicant). At the first stage, the decision must be made whether the material is indeed confidential and cannot be revealed to the applicant. The claim of necessary confidentiality must be made by the public authority and assessed by the Court. The Court must hence be placed in the position to judge whether a closed material procedure is necessary. This obviously implies that the Court must see the confidential material in order to make the necessity assessment. Already at this stage the involvement of the special advocate is of essence in order to represent and argue the case not only from the particular interests of the applicant but also more generally for openness and transparency. The Court should make the assessment helped by the argument of the special advocate. At the second stage, the case is argued on the merits. Here, the special advocate represents the applicant and can

77 Consolidated Version of Rules of Procedure of the Court of Justice (n 76 above), Article 93(3).
79 UK Government Green Paper (n 77 above); consider also the existing procedures in the Special Immigration Appeals Commission.
80 The argument that discussing the details of the closed materials procedure presupposes the acceptance of the need for secrecy was eloquently made by: Murphy, 2011.
access all relevant information, including the confidential part that is not provided to the applicant. In this procedure it is necessary for the special advocate to communicate with the applicant not only before but also after he or she has reviewed the confidential material. The latter requires the special advocate to make an assessment about how much of the confidential information (and in what detail) he or she can discuss with the applicant. This might appear to place too much responsibility on the special advocate. However, first of all, strict rules should apply at the first stage that ensure that only the absolute minimum of sensitive information stays secret in the first place. This information can also be revealed to the special advocate with explicit instructions what could be discussed with the applicant.

Second, we should not think of special advocates as ordinary lawyers. They should be highly screened and trained individuals that are employed by and responsible to public authority (the EU) for contesting the ‘prosecution’ and arguing for the side of the applicant. They should not be dependent on the applicant. Finally, the Court of Justice would possibly have to render part of its ruling in secret. The latter entails further difficulties concerning the transparency of judicial dialogue, the accountability of the judiciary, and the ability of future parties to argue their case. In any event, a summary of the reasons and the ruling must be available both to the applicant and to the general public. The Court of Justice has an inquisitorial role also in ordinary proceedings. This should be emphasized in closed evidence procedures. Beyond this it would be desirable that judges are given training on how to handle sensitive information, evaluate disclosure decisions, and give closed judgment.

In order to make use of a closed material procedure at the EU level, it would be indispensable to establish a sophisticated legal framework that reasons on the basis of a general presumption that all information is open and accessible and sets out minimum rules on communication with the applicant, support of the special advocate, and minimum openness requirements. If these standards cannot be met public action against any ‘terrorist suspect’ must be excluded. Any exception from the general presumption of openness would have to be specifically justified and compatible with EU law. The difficulties arising from a closed material procedure would have to be studied in detail and rules to anticipate any illegitimate restrictions would have to be put in place. The legal framework would have to ensure as a

81 See on the summary: UK Government Green Paper (n 78 above), p 69.
minimum that the standards required by the ECHR as interpreted by the ECtHR are met despite the fact that (part of the) relevant information is not shared with the applicant. Interesting in this context is the ruling of the ECtHR in the case of A and Others v UK. 82 Although A and Others concerned preventive detention and therefore dealt with the special provision of Article 5(4) ECHR, the case is a recent illustrative example of the requirements that the ECtHR imposes on the use of confidential information in court proceedings. The Court referred to its own case law concerning the right to a fair trial and explained that it was significant that the trial judge had ‘full knowledge of the issues in the trial’ and can ‘carr[y] out the balancing exercise and that steps had been taken to ensure that the defence were kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without disclosing the material which the prosecution sought to keep secret’.84 The Court explained that competing public interest can restrict the rights of the defendant; yet if the defendant ‘has had no opportunity to examine or to have examined […] the rights of the defence would be restricted to an extent incompatible with the guarantees provided by Article 6 ECHR.85 The Strasbourg Court, while it had referred to special advocates in earlier rulings, endorsed in A and Others for the first time ‘the possibility of using special advocates to counterbalance procedural unfairness caused by lack of full disclosure […]’.86 It came to the conclusion that in the cases of five of the applicants87 Article 5(4) ECHR had not been violated because ‘the special advocate could provide an important, additional safeguard though questioning the State’s witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure.’88 “[T]he special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence

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82 ECtHR, A and Others v UK (Application no. 3455/05), [2009] ECHR 301; see also earlier: ECtHR, Chahal v UK (1997) 23 EHRR 413.
83 ECtHR, A and Others is a sequel of: House of Lords, A (FC) and others; X (FC) and others v Secretary of State for the Home Department (Belmarsh detainees case), judgment of 16 December 2004, [2004] UKHL 56, [2005] 2 AC 68, [2005] 2 WLR 87, [2005] HRLR 1. Article 5(4) ECHR is lex specialis to Article 13 ECHR and requires less stringent procedural safeguards as Article 6 ECHR.
84 ECtHR, A and Others v UK (n 82 above), para. 206.
85 ECtHR, A and Others v UK (n 82 above), para. 207.
86 ECtHR, A and Others v UK (n 82 above), para. 209-224.
87 ECtHR, A and Others v UK (n 82 above), para. 222.
88 ECtHR, A and Others v UK (n 82 above), para. 219.
and putting arguments on behalf of the detainee during the closed hearings.’89 The ECtHR found a violation of Article 5(4) ECHR in the case of four applicants because they did not have contact with the special advocate after she had seen the confidential material and because the open allegations (that the applicants had seen) were too general in nature to allow them to provide the special advocate with information to effectively challenge the charges.90

Autonomous EU counter-terrorist sanctions differ from preventative detention. However, open-ended asset freezes that last for more than a decade impose so far-reaching human rights restrictions that their ‘preventative’ or ‘administrative’ nature is widely questioned.91 Yet so far neither the Court of Justice nor the ECtHR has settled whether they should be considered of a criminal nature. Even though the criminal nature of autonomous EU sanctions is not uncontroversial it is desirable that the legal framework provides for procedural safeguards that meet the required level of Article 6 ECHR for proceedings determining a criminal charge. Not only would this place the EU on the safe side in the event of a future determination that indeed counter-terrorist sanctions are a criminal charge. It would also contribute to the trust and confidence of EU citizens in the Union’s commitment to the rule of law. It is worth recalling: In the UK, special advocates originate in immigration proceedings.92 More recently, they have been used in counter-terrorist procedures.93 The UK Government in its Justice and Security Green Paper discusses the transfer to criminal law.94 They have not actually been used in criminal procedures.

89 ECtHR, A and Others v UK (n 82 above), para. 220.
90 ECtHR, A and Others v UK (n 82 above), paras. 223-224.
93 Before the Proscribed Organisation Appeals Commission.
94 UK Government Green Paper (n 78 above).
5. Conclusions

The effective sharing of information between the EU and its Member States is crucial to the quality of the decisions under the autonomous EU sanctions procedure where the Council lists a person as a terrorist based on the decision of a competent national authority. The Council cannot simply rubberstamp a national decision that someone is a terrorist without independently assessing the situation. This can be supported by three observations. First, the national decision is taken in a completely different procedure that culminates in a different outcome (e.g. conviction for a crime under national law as opposed to the freezing of assets). Second, the Council exercises discretion when it takes the listing decision. Discretion implies assessment. Hence, the Council cannot exercise discretion without having a basis for assessment. Third, the Council’s decision to list someone as terrorist and freeze that person’s assets might be reviewed in court. Indeed, a large number of legal actions against different types of sanctions, including autonomous counter-terrorist sanctions are pending. In the event of a judicial challenge, the Court will not accept to be kept out of the loop. National classification as confidential will not be enough to refuse informing the Court.95

Finally, there is a public dimension that should not be underestimated in the EU context. EU citizens must be able to have confidence that the EU institutions and bodies do not act outside of the law but that they are subject to independent judicial scrutiny. The EU must not only be a Union of law but also be able to rely on the trust and confidence of its citizens that this is the case. It is risky for the EU project to enter into contentious areas of restrictive policy-making, such as counter-terrorism and the prevention of crime, if this public confidence is not ensured. The EU is in this regard in a special place. It does not possess either the same ‘natural’ legitimacy to impose human rights restrictions or the same enforcement mechanisms as a state. Indeed, the Union’s case to argue that it is a Union of law is more difficult and should be made with great care – even avoiding the appearance of arbitrariness.

Setting up a legal framework that enables the Council to list individuals based on confidential information without infringing the applicant’s procedural rights does not appear impossible – even in the light of the far-reaching human rights

95 This justification came up in: Case C-27/09 P France v OMPI/PMOI (n 14 above). However, the Court of Justice did not mention the issue in its appeal decision.
restrictions imposed by counter-terrorist sanctions. A closed materials procedure would require a clear set of rules for the disclosure process, including rules on the participation of a trained special advocate not only in the main proceedings but also in the disclosure process, rules on the communication between the special advocate and the applicant (in particular after the former has seen the closed material), and rules on giving – if necessary – even a partially closed judgment. The disclosure rules would have to start from the basic assumption that all material is open to the applicant and that any exception to this assumption must be justified to the EU Courts within the framework of EU law.

Arguing the case for closed material procedures at the EU level is a difficult one. It accepts the necessity of an exceptional need for secrecy under the autonomous sanctions procedure. However, the need for a careful case-by-case assessment of whether some of the relevant information cannot be revealed to the applicant can be argued. There should be an option to consider closed material procedures. In an area as sensitive as counter-terrorism this might be the only way to ensure Member State’s willingness to share information. Particularly, if they are not permitted to simply exclude any access at all by classifying the information before providing it to the Council – and they should not be. Only if comprehensive information is provided to the Council the quality of sanctions decisions can be ensured. The same is true for the Court. Only, if the Court of Justice is in the position to consider comprehensively all relevant information it is in the position to render a well-founded decision. The issue of whether those sanctioned can be allowed to access all relevant information is a separate matter and should be considered separately. As a general rule, individuals who are subject to public decisions that (may) have adverse effects on their legal position have the right to be heard during the administrative procedure and the right to challenge such decision in court. For the exercise of both rights access to the relevant information that has led to the decision of the public authority is of the essence. Only if the affected person is confronted with the allegations he or she can effectively rebut these allegations. Only then the applicant is able to actively participate in the judicial proceedings rather than being made subject to the proceedings. A careful and differentiated approach to a strictly limited need for secrecy might make a greater contribution to individual rights than a blunt claim for total transparency – particularly in the complex interaction between EU institutions and Member States in the autonomous sanctions procedure.