



Terrorist designation in the European Union

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Background

The European Union applies sanctions, or restrictive measures, in various forms within the framework of its Common Foreign and Security Policy, CFSP. Sanctions such as arms embargoes or travel restrictions are applied in response to violations of international law and human rights, as well as policies that do not respect the rule of law and democratic principles, with the stated aim to change such activities or policies, as well as to maintain or restore peace and security¹. Sanctions can be applied either in order to implement specific decisions adopted by the United Nations Security Council, or as what is referred to as ‘autonomous’ EU measures. They can be applied on any subject, regardless of whether they are states, state agents or politicians, other individuals, or, as the case may be, armed groups which have been designated as terrorists, as well as individuals who are suspected of terrorist activities.

The EU operates two lists of terrorist organisations. One of these lists was introduced upon the adoption of UNSC resolution 1267 (1999) concerning certain sanctions against the Taliban. Subsequent resolutions have introduced additional sanctions and expanded the list to also include Usama bin Laden and his associates, as well as the Al Qaeda network. The sanctions and designations that follow from these resolutions have been incorporated into EU law through Regulations and Common Positions, most recently following the adoption of UNSC resolution 1390 (2002) through Council Regulation (EC) No 881/2002 of 27 May 2002 and Common Position 2002/402/CFSP of 27 May 2002 and their subsequent amendments. Given that this list is directly linked to the operation of the UN 1267 list, and that the discussion on it is mostly the same as we encounter in the UN context, this paper will focus on the second, or ‘autonomous’, EU list of terrorists except when discussion of the 1267-inspired list is required for presentational purposes..

This second list followed the adoption of UN Security Council Resolution 1373 (2001). With the adoption of Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, the Union introduced a list of 29 individuals and 13 groups or entities ‘involved in terrorist acts’ according to the

¹ For a general overview of the objectives, principles and forms of EU sanctions, see http://ec.europa.eu/comm/external_relations/cfsp/sanctions/index.htm. At the time of writing, the Union applied some form of sanctions against 22 countries, as well as against Al Qaeda, Usama bin Laden and the Taliban on the one hand, and other Terrorist groups on the other. The list is available at http://ec.europa.eu/comm/external_relations/cfsp/sanctions/measures.htm.

Common Position's Article 1(1). The list incorporates both European and 'non-EU' groups and individuals. The list was last updated on 20 March 2006, and now includes 45 individuals and 47 groups or entities.

While the Union is concerned with only two lists of designated terrorist actors, with their respective sanctions, it has also put in place other provisions on combating terrorism. Perhaps the most significant in the current context is Common Position 930², adopted on 27 December 2001 to follow, like the EU autonomous list, on the adoption of UNSC Resolution 1373 (2001) and the Union's stated determination to 'strengthen the coalition of the international community to combat terrorism in every shape and form'. The Common Position requires Member States to make it illegal for EU citizens or within EU territory to wilfully provide funds intended for use in carrying out terrorist acts, or in the knowledge that this might happen. The position also provides for asset-freezing, a ban on provision of financial services, suppression of active or passive support for individuals or groups involved in terrorist acts, denial of safe haven for such persons, and requires judicial cooperation between Member States. To assist in achieving these objectives, the EU is currently implementing an Action Plan on Terrorism, with regular updates on progress provided by Member States and compiled by the European Commission.

Designation procedure – EU autonomous list

With regard to the autonomous EU list, there are no clear criteria for designation included in the text of Common Position 931/2001 and Council Regulation 2580/2001. Nevertheless, we can discern one criterion on the basis of the text of the Common Position³: a decision taken by a competent authority, whether or not it involves instigation of investigations or prosecution for terrorist acts. It has to be assumed that the 'decision' concerned could for example be a decision to proscribe an organisation under domestic law. One interviewee also suggested that an asset-freezing order based on national anti-terrorism legislation might be sufficient. It is worth noting that the term 'competent authority' means a judicial or equivalent authority. Our interviewees indicate that this excludes intelligence services.

Council Regulation 2580/2001 further establishes that decisions regarding the list shall be taken unanimously by the Council, ie all EU Member States⁴. The list thus contains names of:

² Council Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism, OJ L 344/90, 28.12.2001.

³ The Common Position indicates that the list shall be drawn up '...on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.' Article 1(4), Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), OJ L344/93 28.12.2001

⁴ Article 2 (3), Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344/70 28.12.2001.

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- natural or legal persons, groups or entities for committing or attempting to commit, participating in or facilitating the commission of any act of terrorism;
- legal persons, groups or entities owned or controlled by such individuals or entities; or
- natural or legal persons, groups or entities acting on behalf of or at the direction of such individuals or entities.

Like the Common Position, the Regulation gives no criteria, except the provisions on ‘committing or attempting to commit, participating in or facilitating the commission of any act of terrorism’. Taken in conjunction with the criterion we have identified from the Common Position, it would seem that listing is **based on decisions taken by competent national authorities regarding natural or legal persons, groups or entities who are deemed to be committing or attempting to commit, participating in or facilitating the commission of terrorist acts.**

Designations can be proposed by EU Member States or third states, bringing forth the information they have to support such a proposal. Information coming from third countries has to be provided on the same basis as that provided by Member States. Third countries are, however, not taking part in the meeting where the proposal is put forward.

The proposed designation is brought to a closed meeting of Member State and EU civil servants, where the information collected in support of the proposal is reviewed. It seems that hesitation with regard to a decision on designation on the part of any Member State will lead to deferral of the issue rather swiftly. Intriguingly, this suggests that there will be no weighing of any information or a decision not to list an individual or group on the basis of existing information. Rather, it must be assumed that additional information would be provided at a later stage, and/or that there will be subsequent discussions pertaining to the provided information and the designation issue. Realistically, we cannot expect such discussions to only take place within the framework of the clearing house, but also through regular contacts between national authorities.

There does not seem to be any agreement as to what is considered as ‘sufficient’ information for a designation. Interestingly, however, several interviewees were of the opinion that the Common Position and/or the Council Regulation provided clear or at least sufficient, criteria for the listings. Reportedly, there are agreed rules of procedure, which might have provided further guidance on criteria, but these are not publicly available.

Sanctions resulting from EU designation

The two EU lists provide for different sanctions for the two targeted groups. The sanctions following on the EU’s implementation of the UN **1267 regime** are identical to those provided for in that and subsequent related UN resolutions. Thus, in relation to Al-Qaida, Usama bin Laden, the Taliban and their associates, Common Position 402 (2002) provides for

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- a prohibition of sale or transfer of arms and related materiel of any type from the territory of EU Member States, or using their flag vessels or aircraft, or by nationals of EU Member States outside their territories;⁵
- the freezing of funds and other financial assets or resources by steps undertaken and ensured by the European Community;⁶
- the prevention of entry onto or transit through the territories of Member States through measures put in place by the same;⁷ and
- a prohibition on provision of technical assistance or training in military matters or in the manufacture or maintenance of arms and related materiel.⁸

Some of the sanctions, like asset-freezing, clearly indicate one or other primary actor which is to implement the sanction in question. The arms ban, however, imposes obligations not only on Member States, but also on the European Community (EC) within the limits of its powers⁹. This would imply that the Commission might act as a guardian on Member States' implementation of the ban, provided there was a relevant EC Regulation to that effect in force.

For groups and individuals included on the **autonomous** list, the sanctions measures provided are more limited. The only measures provided for are

- the freezing of all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list; and¹⁰
- a ban on directly or indirectly making funds, other financial assets and economic resources available;¹¹

It is important to note that **the sanctions following a designation on the EU autonomous list are only applicable to EU-external groups and individuals**. It has been seen as impossible for the European Community to impose limits on the free movement of capital for EU-internal individuals and groups, such as ETA or Real IRA. This means that out of the list created by the Council Common Position, today numbering 45 individuals and 47 groups and entities, asset-freezing on a community level applies to only 26 individuals and 27 organisations¹². Any sanctions against the EU-internal groups and individuals will be dependent on such national legislation where such is in force.

⁵ Art 2(1) of Council Common Position 2002/402/CFSP of 27 May 2002, OJ L 139/4, 29.5.2002.

⁶ Art 3 of Council Common Position 2002/402/CFSP of 27 May 2002, OJ L 139/4, 29.5.2002. ; see also specific provisions of Art 2, Council Regulation (EC) 881/2002, cited *infra* note 9.

⁷ Art 4 of Council Common Position 2002/402/CFSP of 27 May 2002, OJ L 139/4, 29.5.2002.

⁸ Art 3 of Council Regulation (EC) 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban of 27 May 2002, OJ L139/9 29.5.2002.

⁹ Art 2(2) of Council Common Position 2002/402/CFSP of 27 May 2002, OJ L 139/4, 29.5.2002.

¹⁰ Art 2(1)a of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism of 27 December 2001, OJ L 344/70 28.12.2001.

¹¹ Art 2(1) b of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism of 27 December 2001, OJ L 344/70 28.12.2001

¹² As per Council Decision 2005/930/EC implementing Article 2(3) of Regulation (EC) No 2580/2001, of 21 December 2005, OJ L 340/64, 23.12.2005.

Even if Member States are left to apply whatever sanctions their national legislation provides for with regard to EU-internal groups, States do have an obligation to assist each other in preventing and combating terrorist acts. This means that police and judicial authorities will cooperate in criminal matters ‘with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, group and entities [on the list], fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States’¹³. This cooperation applies to both EU-internal and external individuals and entities, but is the **only result that follows from designation for an EU-internal subject**.

Potential for gradation of sanctions

As explained in the introductory part above, the EU applies sanctions with the clear objective of achieving changes in certain policies or activities. When it comes to implementing UN decisions on sanctions, the relevant EU measures will need to correspond to these. While nothing impedes the EU from imposing more restrictive measures than those of the UN, potential easing of sanctions dependant on the behaviour of the group would therefore also need to correspond to the UN process.

For the EU’s autonomous measures, the Union would obviously be in a position to decide independently on any easing of sanctions linked to behaviour. No such gradation is, however, provided for in the relevant documents with regard to designated groups or individuals, and is reportedly not included in any other sanctions implemented by the Union. For sanctions against States, though, there is an expectation that the EU might ‘repeal/adapt the restrictive measures as a function of positive developments in light of [the Union’s] objectives’¹⁴. Whether we might expect the Union to contemplate a similar gradation with regard to terrorist activities is unclear. Given the other provisions in place, as described in the introductory part, any kind of leniency with regard to what is strictly regarded as criminal behaviour would, however, be difficult to envisage.

Exceptions and exemptions to the sanctions on Al Qaeda and the Taliban

As far as the Al Qaida and Taliban-related regime is concerned, the EU provides the same exceptions to the implementation of the relevant asset-freezing sanctions as does the UN in resolution 1452 (2002)¹⁵. A procedure has been sketched out to allow for the release of funds or assets as set out in Council Regulation (EC) No 881/2002.

¹³ Art 4 of Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism of 27 December 2001, OJ L 344/93 28.12.2001.

¹⁴ Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Council of the European Union document 15114/05, 2 December 2005, para 4.

¹⁵ Art 1, Council Common Position 2003/140/CFSP of 27 February 2003.

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Upon request by an interested natural or legal person, a competent national authority¹⁶ may thus determine that funds are

- necessary to cover basic expenses, or intended for the payment of professional fees for legal services or for the payment of fees or services in relation to the maintenance of frozen funds or assets; or
- necessary for extraordinary expenses.¹⁷

Such a determination must also have been notified to the UN Sanctions Committee, which must either have failed to object to it within the time limit provided for, or explicitly approved it, depending on the reason for determination.

Certain exceptions to the travel restrictions were incorporated in this regime when it was drawn up. Thus, states are not obliged to deny entry or require the departure of their own citizens. Travel for fulfilling judicial procedures is also permitted. The UN sanctions committee may otherwise grant exemptions on a case-by-case basis. For the autonomous list, which includes no travel restrictions, our interviewees indicate that a procedure could be devised which could make it possible for a Member State to permit travel on an ad hoc basis after consultation with and agreement of the other Member States. We would have to assume that this might be the case also for the 1267 regime.

Exceptions and exemptions to the sanctions on persons and groups included in the EU autonomous list

For the EU's autonomous list, exemptions were already envisaged in the documents establishing the implementation mechanism for the sanctions following on designation. With State authorisation, frozen funds can thus be used for essential 'human needs' of the targeted individual or a member of his family under condition that such need is met within the Community, or for the payment of taxes, public utility services, account management fees or contractual payments to other designated individuals or entities provided that such obligations arose before 28 December 2001 and that they are paid into frozen accounts within the Community¹⁸. Under certain specified circumstances, Member States may upon request also grant authorisation for any of the financial sanctions not to be applied to a specific transaction¹⁹. Other Member States, the Commission and the Council must be consulted before the

¹⁶ Member States designate competent authorities to handle issues relating to the sanctions. The names of competent authorities have been published as annexes to amendments to Council Regulation 881/2002, most recently amended in this regard on 30 November 2005.

¹⁷ Article 1 of Council Regulation (EC) No 561/2003 of 27 March 2003 amending, as regards the freezing of funds and economic resources, Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L 82/1, 29.3.2003.

¹⁸ Art 5(2) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism of 27 December 2001, OJ L 344/70 28.12.2001

¹⁹ Art 6 of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism of 27 December 2001, OJ L 344/70 28.12.2001

authorisation can be granted, but do not seem to be able to veto a decision by the State reviewing the exception request.

While an ongoing peace process or negotiations are not, as such, included in the relevant provisions as potential reasons for exemptions to be granted, several interviewees seemed to consider them to be at least a possible factor in the discussions between States. Some proposals for listings have reportedly been opposed on the grounds that a peace process was ongoing. Some interviewees also suggested that their countries might find it problematic if an ongoing peace process would be disturbed by the application of sanctions. There seem, however, to be different opinions among Member States on what should be influencing decisions, and, in this regard, how far a peace process should have progressed before it might become relevant in the designation process.

In this context, we need to remind ourselves once again that the sanctions envisaged only touch on financial issues. Activities that might otherwise be associated with mediation, like negotiation training for or travel by the parties are not impacted, which makes the necessity for exceptions or exemptions less relevant. Several interviewees saw no reason for political dialogue not to continue, despite the existence of sanctions, but conceded that if there were to be or had been a travel ban in place within the autonomous mechanism, mediation could become more difficult in purely practical terms. It is also beyond doubt that, whatever sanctions follow, the designation itself carries political implications, which may or may not have a further impact on the process.

Effectiveness of the sanctions

When assessing the potential impact the existence of the various lists and the corresponding sanctions might have on peace processes, and also when discussing potential solutions if there should be negative results flowing from proscription or designation, it is important to also assess the effectiveness of the sanctions as they stand. Similarly, it is impossible to judge the need for exceptions and exemptions if the sanctions provided for in reality do not affect mediation activities. Especially within the UN, there is an ongoing discussion about the effectiveness of sanctions in general. Specifically on the Al Qaeda/Taliban process, there have also been attempts by the sanctions committee and its monitoring team to assess and improve the regime on the basis of responses received from the UN membership.

The Al Qaeda/Taliban process provides for two particular sanctions which are not included in the EU autonomous mechanism. With regard to the travel and visa restrictions, it is interesting to note that out of the two thirds of UN Member States that had sent in reports to the UN's 1267 Committee on their implementation of sanctions against the Taliban, Al-Qaida and their associates by late 2004, not one reported ever having stopped or held any designated individuals at their borders.²⁰ However, at the same point in time, 122 States reported that they had the necessary legal means to implement the ban²¹. Potentially, the ban has prevented travel by the

²⁰ S/2004/1037 of 31 December 2004, p 4.

²¹ S/2004/1037 of 31 December 2004, p 15, para 36.

designated individuals, as hopefully expressed by the 1267 Committee while recognising that there might be room for improving the design and implementation of the ban. It might, on the other hand be a question of unease about the designation itself which prevents action. In 2004, Sweden, the United States, Pakistan, Ireland, Iran and Turkey had expressed concern over potential action in domestic courts due to the lack of clear justification for the designation should they take action against designated individuals²². This reinforces information received during our interviews that some States are reluctant to implement certain sanctions due to concerns about potential domestic litigation.

In 2004, the 1267 Committee also noted that no reports had come in of enforcement of the arms embargo provided for in the resolution. Its conclusion in 2005 was that the international community had become a 'victim of its own success' in that it had prevented terrorists from obtaining military-style weapons and arms²³. Nevertheless, attacks using other materiel had not stopped, and there have been subsequent reports of violations of the arms embargo²⁴ in one UN Member State (Somalia).

There seems to be no conclusive data regarding the effectiveness of asset-freezing to prevent terrorism. In 2004, the UN's High-Level Panel on Threats, Challenges and Change noted, however, that 'many terrorist funds have a legal origin and are hard to regulate'²⁵, and that seized funds constitute only a fraction of funds available to terrorist organisations. It is hoped that an adoption on the national level of the nine Special Recommendations on Terrorist Financing and other recommendations issued by the Financial Action Task Force on Money-Laundering (FATF)²⁶ might make the situation better. Any measures adopted by States would in any event have to build on the basic assumption that designated groups will not be likely to maintain property or bank accounts in their own name. Any asset-freezing should therefore be targeted mainly against individuals. So far, though, the lists have been criticised for not providing enough details to allow for positive identification of several individuals concerned to permit for this measure to be applied reliably. In the EU, efforts are underway to develop best practices in this regard²⁷, with procedures envisaged for correcting cases of mistaken identity that would lead to the freezing of funds or refusal of admission of the wrong individual.

Especially with regard to the EU autonomous list, the effectiveness of asset-freezing is also questionable, as it only targets EU-external actors. If there is no domestic legislation in place permitting the freezing of assets of 'internal' individuals and groups, it would seem that the mechanism is, at best, only partially effective. Furthermore, even with regard to the external actors, an asset-freezing decision will obviously only be useful if the actors concerned maintain assets within the Union.

²² S/2004/1037 of 31 December 2004, p 11, para 19.

²³ S/2005/83, p 5 para 6.

²⁴ S/2005/572, Annex VI.

²⁵ A/59/565, p 46, para 149.

²⁶ The FATF, which has 33 member states and several organisations and one government with observer status, provide these recommendations and also monitor States' compliance with them. It also publishes mutual evaluation reports on implementation of the recommendations in selected countries. The recommendations are available at http://www.fatf-gafi.org/document/9/0_2340.en_32250379_32236920_34032073_1_1_1_1.00.html.

²⁷ EU Best Practices for the effective implementation of restrictive measures, Council document 15115/05, not available at the time of writing but cited in document 11514/05, *supra* note 14.

Appeal against designation and review procedure

There is no specific provision for appeal against designation in either basic document establishing the two EU lists. For the Al Qaeda/Taliban list, a designated individual or organisation would be expected to petition their government to engage in an appeal on their behalf in accordance with the procedure set forth in the relevant UN mechanism. We have been told that perhaps contrary to expectation, a large percentage of listings take place on proposals made by third states (ie not states of nationality or residence of the subject), increasing the probability that a government might be willing to engage in such an appeals process on behalf of their citizens or listed organisations. There are, however, no specified justifications that might support a de-listing²⁸, making it difficult to discern what kind of information might be necessary for the process to be successful.

The names of individuals and organisations on the EU autonomous list are reviewed by the Council at least every six months. The appeals and review procedure is by and large the same as for designation. Information needs to come from Member States or third countries, and will be discussed and decided upon by the Council, acting unanimously. Either the designated subject or potentially even a third party might thus be able to petition a State to submit information to the Council. As discussed in the section on exceptions and exemptions, however, it seems that there is no unanimity as to what information is relevant to the process. With that in mind, it is difficult to discern in which way this kind of process can return a successful de-listing. De-listings have, however, taken place. In March 2006, the Greek organisation Epanastatikos Laikos Agonas (ELA) was no longer designated in the latest revised version of the autonomous list. We have not been able to establish the circumstances surrounding the delisting.

Designated subjects can also appeal their designation in the EU courts, both at European and national level. On the European level, appeals have to be launched within two months of publication of the designation, with a potential extension of the time limit possible under certain circumstances. Appeals have, indeed, been launched in the European Court of First Instance with regard to both the EU's implementation of UNSC resolution 1267 and the autonomous list. Challenges have been made not only against a particular designation, but also against the legality of the designation process itself. Case law shows that as the autonomous list stems from action falling outside the jurisdiction of these courts²⁹, making further attempts in this regard seem futile. The only possible challenge would be for an applicant to attempt to demonstrate that the Member States have encroached on European Community powers in adopting articles of Common Position 2001/931³⁰, which has so far not

²⁸ S/2005/83, p 17 para 53.

²⁹ See for example the Order of the Court of First Instance in case T-299/04 between Abdelghani Selmani and the Council of the European Union and the Commission of the European Communities of 18 November 2005, paras 53-55.

³⁰ Order of the Court of First Instance in case T-299/04 of 18 November 2005 between Abdelghani Selmani and the Council of the European Union and the Commission of the European Communities, paras 56-57. The EU-internal division of powers is strict, giving exclusive competence to the European Community in certain areas.

been the case. There is, however, a case on appeal to the European Court of Justice concerning the legal basis for the EU's implementation of the 1267 mechanism³¹. A decision is expected in the latter half of 2006.

As far as we have been able to discern, appeals in national courts with regard to the implementation of UNSC resolution 1267 have been launched at least in Italy³², Belgium and the Netherlands³³. The plaintiffs in the Belgian case succeeded in requiring the government to seek their delisting with the UN Sanctions Committee, whereas the rulings in both the Italian and Dutch cases went against the claimant.

Due process concerns and other challenges to designation

Due process concerns have been raised with regard to both mechanisms. Indeed, even the UN's High-Level Panel on Threats, Challenges and Change points out that 'the way entities are added to the terrorist list maintained by the [Security] Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions'³⁴. Similar concerns have also been voiced regarding the EU autonomous list, as well.

As an illustration, the arguments voiced in the Al Yusuf/Al Barakaat case referred to in note 32 are quite revealing as to the contents of the concerns³⁵. The claimants argued that their right to a fair hearing had been breached since

- the evidence and facts relied on against them were not communicated to them;
- they had no opportunity to explain themselves;
- they were entered into the EU list only because they had been previously entered into the list drawn up by the 1267 Committee;
- the source of the information submitted to that Committee is obscure;
- the reasons for inclusion in the 1267 list are not clear.

The Court establishes a division between the applicants' right to a fair hearing before the Sanctions Committee and before the Community Institutions. With regard to the former, it concludes that there clearly is no provision in the relevant resolution in this regard, but also that there is no mandatory rule of public international law requiring such a hearing under the circumstances in question. It also establishes that the Institutions were under no obligation to hear the applicants before adoption of the

³¹ Two judgments on similar cases were rendered on 21 September 2005 by the Court of First Instance, in identical compositions. We have not been able to establish which of the cases has been appealed, or whether both of them have, however, they are sufficiently similar to be likely to produce the same effect. See Judgments of the Court of First Instance in cases T-306/01 and T-315/01 of 21 September 2005, between 1) Ahmed Ali Yusuf and Al Barakaat International Foundation on the one hand and the Council of the European Union and the Commission of the European Communities, supported by the United Kingdom of Great Britain and Northern Ireland, and 2) Yassin Abdullah Kadi on the one hand and the Council of the European Union and the Commission of the European Communities, supported by the United Kingdom of Great Britain and Northern Ireland.

³² S/2005/83, Annex II on pp 52-55.

³³ S/2005/572, Annex II.

³⁴ A/59/565, p 47 para 152.

³⁵ See especially paragraphs 191-194 and 304-347.

regulations in question. In the Kadi case in particular³⁶, as referred to in note 32, the Court states clearly that ‘the Community institutions were required to transpose into the Community legal order resolutions of the Security Council and decisions of the Sanctions Committee that in no way authorised them [...] to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations’.

Our interviews indicate that the due process issue is very actively present in the minds of those who work with terrorist designations. The EU autonomous list is perceived as providing better human rights safeguards than does the UN one, if only because there are perceived to be clearer criteria present in the process. We have to assume that the increased State-level transparency present in the EU process would also make officials more inclined to regarding it more positively.

Conclusion

There has been a good deal of speculation regarding the political nature of what is understood to be a legal process. Many of our interviewees were quite frank in conceding that the designation of organisations is a political measure, first and foremost. In itself, and because of the issues raised in the section on efficiency of the sanctions, the designation does not amount to much more than a gesture. It is perceived, though, as sending a signal about the way in which the Union perceives a certain organisation, which is in itself sufficient. We can understand this argumentation against the background of how the European Union applies sanctions in the first place, where the objective is to seek a change in behaviour.

Designation in itself is not a legal measure. There are some indications of designations taking place or being opposed on the basis of politically motivated preferences. Despite insistence to the contrary by many of our interviewees, the main problem seems to be the lack of unified criteria, which would make it possible to easily discern what would constitute sufficient information to merit a designation or delisting. Such criteria, if published, might help to lift some of the veil of secrecy surrounding the process.

The process in itself seems to be in somewhat of a state of ambivalence. It is clear that some of the critique of the listing mechanisms, especially regarding due process issues, has been acknowledged, and indeed there are efforts underway to address some of the contentious issues. Nevertheless, none of our interviewees expressed any doubts as to the usefulness of the designation mechanisms as one of several weapons in the fight against terrorism. The potential of a negative judgment from the European Court of Justice in the cases referred to on page 9 (note 30) is, however, also a factor in the process. If the Court should reverse the First Instance judgment, some interviewees were expressing their worry that the whole implementation regime might have to be redesigned. For that eventuality, one interviewee expressed the hope that there would be sufficient national mechanisms in place. Others assumed the Court could not possibly reverse the first judgment, as the implementation mechanism has a

³⁶ See especially para 258.

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clear basis in international law. The discussion is likely to be ongoing until the final judgment is passed later this year.

Whatever happens in the short term to the designation process, the impact of the autonomous list and the ensuing financial sanctions on peace processes seems fairly limited. Other EU measures on combating terrorism, like travel restrictions applied separately, are more likely to have an impact, as are any measures potentially taken in implementation of Common Position 2001/930/CFSP on combating terrorism. As a comparison, the 1267 list also applies a greater number of sanctions, and as a consequence might have a greater impact on any peace process involving associates of Al-Qaida or the Taliban.