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EGLĖ KANARSKAITĖ
EUROPEAN UNION LAW AND GOVERNANCE PROGRAMME

RESTRICTIVE MEASURES

Master Thesis

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VILNIUS 2012

CONTENTS

ABBREVIATIONS

EU – the European Union

UN – the United Nations

Council – the Council of the European Union

CFSP – Common Foreign and Security Policy

TEU – the Treaty on European Union

TFEU – the Treaty on the Functioning of the European Union

CJEU – the Court of Justice of the European Union

GC – the General Court

Guidelines – the Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy

Basic Principles – the Basic Principles on the Use of Restrictive measures

Best Practices – the EU Best Practices for the Effective Implementation of Restrictive Measures

CP 931 WP – the Working Party on the implementation of the Common Position 2001/931/CFSP on the application of specific measures to combat terrorism

INTRODUCTION

Relevance and problematic issues. Since the EU frequently uses sanctioning, the practice has raised numbers of challenges in the EU Courts. According to the Committee of Legal Advisers on Public International Law, restrictive measures imposition is persistently challengeable in the EU Courts and there were more than 120 cases concerning restrictive measures pending in the CJEU in the middle of March 2012[1]. What is more, the Council officially agreed on new round of EU sanctions in the meeting held in Luxembourg 15 of October 2012[2]. It is agreed to fight with Iran nuclear programme by imposing "additional restrictive measures in the financial, trade, energy and transport sectors, as well as additional designations, notably of entities active in the oil and gas industry[3]". Whereas new round of sanction is foreseen, new challenges can be foreseen as well. Besides huge number of cases in the EU Courts, the issue became highly debated among EU institutions, non-governmental organisations and lawyers of international and EU law[4]. Discussion focuses on Council's settled restrictive measures imposition and removal procedures, raising the major problem – restrictive measures' regime inconsistence with fundamental rights of parties included in the lists of targeted subjects. Some debates came up with conclusion that the compromise between security and fundamental rights protection is impossible[5], but solution of the problem must be found.

Strong disrespect of rights of those parties listed is undeniable because the CJEU and the GC found, that the Council does not observe fundamental right to be heard and right to effective judicial review[6]. What is more, the EU Courts acknowledged that the right to be notified about including in the list, the right to be informed about the evidence used against party and make observation were disrespected. Nevertheless, these findings were made only in particular well-known cases (*Kadi* cases in 2005, 2008 and 2010[7] or *People's Majuhedeen Organisation of Iran* cases in 2008, 2009 and 2010[8]) and did not mean the inappropriateness of the whole sanctioning system. However, the EU Courts'

[1] Committee of Legal Advisers Public International Law. European Union, 2012. p. 1-2.
[2] Foreign affairs developement in 3191st Council meeting in Luxembourg//14763/1/12, 15 October 2012.
[3] Ibid. Iran, part 4.
[4] T. Pick. Report from Europe. EU export controls in light of EU santions and embargoes imposed in the middle east and Africa /Thomson Reuters 19AJCCL150, 2011. p. 2.
[5] Chatham House. Discussion group summary: UN and EU sanstions: Human Rights and the Fight against Terorrism – The Kadi case, 2009.
[6] Joined Cases C-402/05 P and C-415/05 P//Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Union, 2008; Case T-85/09 Yassin Abdullah Kadi v European Commission, 2010.
[7] Case T-315/01 Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities 2005; Joined Cases C-402/05 P and C-415/05 P//Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Union, 2008; Case T-85/09 Yassin Abdullah Kadi v European Commission, 2010.
[8] Case T-256/07 People's Mojahedin Organization of Iran v Council of the European Union, 2008; Case C-27/09 France v Organisation des Modjahedines du peuple d'Iran, 2009; Case T-228/02 Organisation des Modjahedines du peuple d'Iran v Council of the European Union, 2010.

finding was the reason for growing criticism of not only Council's fulfilment of the requirements for sanctioning procedure, but also criticism of sanctioning procedures as such. It is to be emphasized that scholars' criticism encompasses more than the EU Courts' findings, because scholars focus on the whole sanctioning procedures and Council's working methods. However, currently used EU sanctioning procedures are to be analysed before acknowledging that Council's working methods are inappropriate and have to be changed. Nevertheless, the fact that the last time EU sanctioning system was changed in 2007 when the Council declassified its sanctioning working methods for fight against the financing of terrorism is unquestionable. Despite the growing criticism and public awareness, the EU sanctioning system stands still.

Even there are scientific articles analysing the EU sanctioning system, but thesis will provide the analyses from new perspective – firstly defining due process criteria, then focusing on the question of whether the EU sanctioning system complies with defined due process criteria and finally suggesting ideas for necessary future changes.

The purpose of the master thesis. The purpose of the master thesis is to evaluate recently used EU sanctioning procedures in the light of due process criteria.

The tasks of master thesis. In order to achieve purpose of the thesis, these tasks have to be carried out:

1. To determine due process criteria for sanctioning system by analyzing relevant case law and scholars' opinions.
2. To find out if recently used listing and delisting procedures are in compliance with due process criteria.
3. To propose recommendations on how the EU sanctioning procedures can be changed in order to ensure their compliance with due process requirements.

Hypothesis. The EU's recently used sanctioning procedures do not comply with fundamental rights of restricted subjects.

Object of master thesis. Analysis of imposition and removal procedures of restrictive measures in the light of fundamental rights of parties included in the list of targeted subjects.

Subject-matter. EU Courts' jurisprudence, the UN Charter, EU primary and secondary law that regulates sanctioning system.

Methods of master thesis. Research is based on analysis, logical, systematic, historical and comparison methods.

Analysis method is to be used when analysing case law, legal acts and scholars' articles.

Logical method is to be used in order to comprehend the relevant issues arising from sanctioning procedures and to find out possible future changes.

Systematic method is to be used when systemizing particular problematic issues in order to compound them to a general view of the main problem.

Historical method is to be used when focusing on procedural changes from the earlier sanctioning system.

Comparison methods is to be used when comparing legal acts, EU Courts' findings in relevant jurisprudence, as well as comparing the EU recently used sanctioning procedures with due process.

Linguistic method is to be used when analysing wording of legal acts provisions.

Sources of the master thesis. The main groups of sources of the work are EU Courts' jurisprudence, international and EU legal acts, and scientific literature. EU Courts' jurisprudence as a group of sources is comprised of most significant CJEU's and GC's judgements related to restrictive measures. International and EU legal acts used in the analysis includes the UN Charter, the TEU, the TFEU, the Guidelines, the Basic Principles, the Best Practices, the Council's regulations, decisions, common positions and Council's document declassifying sanctioning procedures while fighting against financing terrorism, etc. Scientific literature includes scholarly articles of well-known international and EU legal scholars such as Ch. Eckes, T. J. Biersteker, S. E. Eckert, F. Giumelli, P. Mariani, D. Cortright, E. De Wet, M. Heupel, G. A. Lopez, and others.

Structure. The work consists of three parts, divided into sections.

The first part determines UN Charter's impact on the EU sanctioning system and focuses on the analysis of the basic EU restrictive measures regulation including the regulation at national level. This part also includes determination of issues concerning restrictive measures concept, subjects and objectives.

The second part provides the concept of criteria to be met in case of achieving due process requirements. The analysis is divided in two sections – the criteria developed in the jurisprudence and scholarly literature.

The third part evaluates recently used listing and delisting procedures and reveals if they comply with due process requirements. This part also answers the question of what are prompt and suppressive matters for making sanctioning system changes and provides the recommendations how currently used procedures are to be changed in order to protect fundamental rights to the highest possible extent.

1. INTERNATIONAL, EU AND NATIONAL EFFORTS TO CREATE A UNIFORM SYSTEM OF RESTRICTIVE MEASURES

1.1. UN sanctioning system's impact to the EU

Legal issues regarding restrictive measures are regulated in international, EU and national levels. This section will focus on the problematic issue of UN impact on the EU sanctioning system. Since the EU sanctioning system is multilateral, there is a question of how the UN affects the EU sanctioning system and what powers remain for the EU.

EU member states began to impose restrictive measures collectively and autonomously already in early eighties[9]. Considering this, it is said that EU itself, without impact of UN Security Council, has a quite long history of restrictive measures imposition[10]. Sanctioning practise especially increased in early nineties, when CFSP was created, consequently it now can be treated as EU sanctions policy[11]. Hence, the question remains, what makes EU and UN sanctioning systems so relative that these two points cannot be separated when analysing restrictive measures.

The UN and, of course, the UN Charter make a big impact on the implementation of EU restrictive measures. European Commission acknowledges that the basic element of EU external actions is "effective multilateralism, with the UN at its core[12]". Furthermore, a guiding statement of EU policy is settled in the Basic Principles[13]. According to this Council's document, restrictive measures implementation has to consist with the basic principles of the UN Charter and principles of EU CFSP as well. The Council emphasizes the role of UN Charter promising to "further intensify […] efforts within the UN, in line with Article 19 TEU (what is now Article 34 TEU), to coordinate […] actions on sanctions [,] […] ensure full, effective and timely implementation by the EU of measures agreed by the UN Security Council [,] […] establish a dialogue with the UN to this effect[14]". This Council's statement is based on 34 TEU provision, which declares that "Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the UN

[9] F. Giumelli. Bringing Effectiveness into Debate: A Guideline to Evaluating the Success of EU Targeted Sanctions//Central European Journal of International & Security Studies. Volume 4. Issue 1, 2010 p. 84.
[10] Ibid.
[11] Ibid.
[12]The EU's Relations with the United Nations// European Commission – Restrictive measures//European Union External Action website//http://eeas.europa.eu/organisations/un/index_en.htm connected 2012-09-10
[13] Ibid.
[14] Basic Principles on the Use of Restrictive Measures (Sanctions)//Council document 10198/1/04, 2004. Annex I, Article 2.

Charter"[15]. Under this TEU provisions, EU Member States has a strong obligation to comply with UN Charter. Paola Mariani, professor researching in the fields of Public International law and EU law, notes, that "any legal effect of UN Security Council resolutions in the European legal system derives from the transfer of competence from its Member States to the EU[16]". Taking into account mentioned statements, the finding is to be made that the EU absorbs the international undertakings from its member states and becomes also obliged under the UN Charter. Therefore, even if the EU is not a member of the UN as the UN Charter does not admit membership of the subjects other than singular states[17], the EU is still obliged under UN Security Council resolutions accordingly to its members states obligations. What is more, the Council promises that its "integrated, comprehensive policy will include political dialogue, inventiveness, conditionality, and could even involve, as a last resort, the use of coercive measures, of course, in accordance with the UN Charter[18]".

According to the statements mentioned above, the UN Charter has an undoubtedly significant meaning for the imposition of EU restrictive measures. Therefore, the EU must respect the UN main purpose, which is: "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace[19]". Besides, the EU has to respect the UN Charter requirement to uphold close relations among its members "based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace[20]". According to the UN Charter, the EU shall also uphold international cooperation and observe human rights and fundamental freedoms in case of solving diverse problems[21].

All these requirements are to be met by the Council when implementing restrictive measures, but the UN even makes its impact for EU bigger when acting through UN Security Council, because implementing UN Security Council's resolutions is one of the two ways of imposing restrictive measures by the Council. The EU has to impose sanctions taking into account UN Security Council's resolutions and UN Security Council is the main body deciding on sanctions and making the impact to

[15] Consolidated Version of Treaty of European Union//Official Journal of European Union. C115/12, Article 34, part 2.
[16] P. Mariani. The implementation of UN Security Council Resolution Imposing Economic Sanctions in the EU/EC Legal System: Interpillar Issues and Judicial review//Bocconi Legal Studies Researching Paper No. 1354568. 2009. p. 2.
[17] Ibid.
[18] Basic principles on the Use of Restrictive Measures, Official document of Council of the European Union, Brussels, 2004, 10198/1/04, Article 8.
[19] Charter of the United Nations, 1973, Chapter I Purposes and Principles, Article 1, part 1.
[20] Ibid. Article 1, part 2.
[21] Ibid. Article 1, part 3.

the EU sanctioning system. UN Security Council's decisions on what measures are to be imposed "in order to maintain or restore international peace and security[22]" are binding for the UN members[23].

The statements mentioned above reveal strong UN impact on EU sanctioning system. Nevertheless, there are points, which keep the EU separate and irrespective. As it has already been mentioned above, after the creation of CFSP, the EU frequently implements its autonomous sanctions, which are completely separate from UN regulation. Only the Council has discretion to implement EU autonomous sanctions. Therefore, the EU has its own recommendations designed for autonomous sanctions[24], which provides the EU own methods of listing and delisting. The matter, which also makes the EU sanctioning separate and independent is the EU Courts' possibility to annul Council's decisions implementing UN Security Council's resolutions.

To sum up, either the TEU and EU advisory legal acts reveal Council's admission of strong UN impact on the EU sanctioning regulation. Even though the UN does not directly bind the EU, the EU absorbs its member states' obligations under the UN Charter. Therefore, Council admits that the EU is obliged to respect the UN Charter, its purpose to uphold peace and security in a way of implementing UN Security Council resolutions. However, the EU is still self-sustaining in perspective of sanctioning system.

1.2. EU and national legal acts regulating restrictive measures

There are primary and secondary EU legal acts, which regulate restrictive measures. Therefore, the EU sanctioning system is quite vague because of numbers of provisions split in different legal acts. Further analysis will comprise basic and most significant regulation on sanctioning system settled in binding or advisory legal acts.

To begin with primary binding EU legal acts, the TEU and the TFEU are undoubtedly significant. Article 215 of the TFEU (Title IV) is specially designed for restrictive measures. First part of the article is linked to restrictive measures, imposed to third countries. According to this part, "where a decision, adopted in accordance with Chapter 2 of Title V of the [TEU], provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more

[22] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 2009, 17464/09, Article 36.
[23] According to the Chapter VII, Article 39 of UN Charter, UNSC Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken [...] to maintain or restore international peace and security.
[24] European Union autonomous sanctions: Recommendations for working methods for EU autonomous sanctions, Official document of Council, 2011, 18920/11.

third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures[25]". It is noteworthy, that Council shall act on a qualified majority and the proposal of High Representative of the Union for Foreign Affairs and Security Policy and Commission is obligatory. The second part of the same article makes it possible to target "natural and legal persons or groups of them and non-state entities under the same procedure as referred in part 1 of the article[26]".

As it is already noted, Article 215 of TFEU makes a direct link to TEU to the Title V, Chapter 2, which is called "Specific Provisions on the [CFSP]". This means that restrictive measures has to be implemented in the framework of CFSP, which defines the role and cooperation between EU institutions in implementing CFSP, the EU member states political solidarity, the EU actions and procedures for adopting legal acts in the field of CFSP etc. All the regulation of CFSP is to be applied for sanctioning system as well.

What is also very significant, Article 275 of TFEU explicitly confers on the EU Courts jurisdiction to review restrictive measures against natural and legal persons[27]. However, this jurisdiction includes only review of legality of decisions to impose restrictive measure against natural or legal persons[28]. Therefore, it is possible to challenge if the Council fulfilled procedures of listing and delisting but the EU Courts do not adjudicate whether those procedures are in compliance with fundamental rights.

The sanctioning system has attracted a lot of interest, consequently the Council adopted three legal acts to improve the mechanisms for restrictive measures implementation[29]. It is important to emphasize that these acts are non-binding for the EU and it's member states, but, despite this fact, are very important and have a significant meaning for implementation of restrictive measures.

The first edition of the Guidelines[30], the earliest non-binding legal act was adopted in 2003 and the document was updated in 2005, 2009 and recently in 2012. Guidelines provide "principles on how to design restrictive measures, important information in regards to the different types of restrictions

[25] Consolidated Version of the Treaty on the Functioning of the European Union//Official Journal of the European Union, C115/47. 2008. Article 215, part 1.
[26] Ibid. Article 215, part 2.
[27] Ch. Eckes. Sanctions against Individuals – Fighting Terrorism within European Legal Order. European Constitutional Law Review, Volume 4/Issue 02, 2008 p. 220.
[28] Consolidated Version of the Treaty on the Functioning of the European Union//Official Journal of the European Union, C115/47. 2008. Article 275.
[29] F. Giumelli. Bringing Effectiveness into Debate: A Guideline to Evaluating the Success of EU Targeted Sanctions//Central European Journal of International & Security Studies. 2010, Volume 4. Issue 1. p. 87.
[30] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 11205/12, Brussels, 2012.

that can be imposed and how to measure their effectiveness[31]". The Guidelines "contains a number of general issues and presents standard wording and common definitions that may be used in the legal instruments implementing restrictive measures[32]". Updated version of the Guidelines in 2012 provided recommendations for working methods for EU autonomous sanctions, which contain designation proposals, working party deliberations, review issues, matters for delisting request[33]. Unfortunately, provided recommendations are only advisory for the Council when implementing EU autonomous restrictive measures.

The Guidelines strongly refers to the implementation of the UN Security Council's resolutions. The document allows the EU to implement stricter restrictive measures than is determined in the UN Security Council's resolutions but insists on implementing them "as quickly as possible[34]". According to the Guidelines, the EU should have mechanism created of how to have the necessary implementing legislation without any delay "within 30 days of adoption of UN Security Council Resolution[35]". In fact, speedy implementation of UN Security Council resolutions is especially important in the situation when freezing funds must be settled, because the assets can be transferred quickly until they are frozen. The Guidelines provide the statement that if the EU adopts a legal act imposing the restrictive measures, it should provide that EU Member States lay down "rules on penalties applicable to infringements of the provisions of the regulation and take all measures necessary to ensure that they are implemented[36]". To be more precise, the EU institutions assume the responsibility for appropriate implementation of the restrictive measures by Member States. If regulation is not implemented properly, the EU institutions should take the action against particular Member State, in order to coerce right implementation.

The Guidelines set forth the requirement to respect human rights. Basic human right protection can be found in Article 17 of the Guidelines, which provides that "listing of targeted persons and entities must respect fundamental rights, as stipulated by the TEU. In particular, due process rights of the persons and entities to be listed must be guaranteed in full conformity with the jurisprudence of the CJEU, *inter alia* with regard to the rights of defence and the principle of effective judicial

[31] F. Giumelli. Bringing Effectiveness into Debate: A Guideline to Evaluating the Success of EU Targeted Sanctions//Central European Journal of International & Security Studies. 2010, Volume 4. Issue 1. p. 87.
[32] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 17464/09, Brussels 2009. Introduction.
[33] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 11205/12, Brussels, 2012. Annex 1, Recommendations for working methods for EU autonomous sanctions.
[34] Ibid. Article 38.
[35] Ibid.
[36] Ibid. Article 50.

protection[37]". Guidelines also lead to possible exemptions of restrictive measures regarding basic humanitarian needs[38]. Indeed, Guidelines were the first step towards due process as it determined the necessity to comply with fundamental rights.

The other non-binding legal act is Basic Principles[39], adopted by the Council in 2004. The Basic Principles strongly refers to human rights as well as the Guidelines. The Council undertakes to work in accordance with the CFSP, fulfilling international legal obligations[40]. The document provides autonomous EU restrictive measures, which are to be implemented, in case of supporting the counterterrorism and observation of human rights[41]. Dr. Clara Portela, researching EU foreign policy, points out that "while Guidelines deal with technicalities and the design and implementation of sanctions, the Basic Principles are concerned with the political decision by the Council to impose sanctions, i.e. with when and to which aims sanctions should be employed[42]". Indeed, it is a well-directed remark because the Basic Principles contain the dialogue between the UN and the EU as well as their partners in support of restrictive measures implementation, what seems to be political matters. Basic Principles is a brief document, composed only of 10 articles[43], unlike the Guidelines or the Best Practices. The document also lays down the additional EU's obligation to impose autonomous restrictive measures on its own initiative in absence of UN Security Council initiative. Talking in the Council's words „If necessary, the Council will impose autonomous EU sanctions of efforts to fight terrorism and the proliferation of weapons of mass destruction as a restrictive measure to uphold respect for human rights, democracy, the rule of law and goods governance[44]".

The third significant EU legal act on restrictive measures is the Best Practices[45] adopted in 2006. The document itself states that it is kept under permanent review, consequently it was updated in 2007 and later in 2008. It establishes recommended guidance for questions arising during implementation of restrictive measures[46]. The Best practices mostly focus on freezing measures as it

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37 Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 11205/12, Brussels, 2012. Article 15.
38 Ibid. Article 25.
39 Basic principles on the Use of Restrictive Measures, Official document of Council of the European Union, Brussels, 2004, 10198/1/04.
40 Ibid.
41 R. Druláková, et al. Assesing the Effectiveness of the EU Sanctions Policy// European Journal of International & Security Studies. Volume 4. Issue 1., 2010, p. 112.
42 C. Portela. Where and why does the EU impose sanctions?// L'Harmattan//Politique européenne, 2005/3 no.17. p. 90.
43 R. Druláková et al.. Assessing the Effectiveness of the EU Sanctions Policy// European Journal of International & Security Studies. 2010, Volume 4. Issue 1.p. 112.
44 Basic principles on the Use of Restrictive Measures, Official document of Council of the European Union, Brussels, 2004, 10198/1/04, Article 3.
45 Update of the EU Best Practices for the effective implementation of restrictive measures. 2008, 8666/1/08. III De-listing. Article 17.
46 R. Druláková, et al. Assessing the Effectiveness of the EU Sanctions Policy// European Journal of International & Security Studies. 2010, Volume 4. Issue 1.p. 113.

provides more detailed regulation for "freezing of funds and economic recourses[47]". Nevertheless, it provides only recommendations. The Best Practices brought a novelty when determined possibility of mistaken identity and opportunity to challenge it before a competent authority. Besides, the Best Practices acknowledges the necessity of transparency and effectiveness[48]. The document also determines consideration of request for delisting what strongly refers to protection of human rights.

To sum up, all the legal acts referred above are differently extended and have a different legal effect as well. The TEU and the TFEU focus more on the mandatory procedures of implementation while the Basic Principles, the Guidelines and the Best Practices are comprised of a number of recommendations, which on the one hand are advisory but on the other hand provide broad and vague perception of sanctioning system. Even if secondary legal acts focus on more or less the same sanctioning fundamental principles, each of them provides also new provisions as their content is differently elaborated. Basic Principles regulate sanction laconically, while Guidelines and the Best Practices are more detailed. Secondary legal acts are quite well harmonised because none of them oppose each other, but they frequently repeat each other as well. Considering this, uniform document regulating sanctioning system for all types of restrictive measures would be an advantage.

National law is undoubtedly important with regard to restrictive measures implementation. According to the Guidelines, "The Council first adopts a CFSP Decision under Article 29 of the TEU[49]". The restrictive measures settled in the Council decisions are to be implemented at either EU level, or national level[50]. It depends on the type of restrictive measure to be imposed. According to the Guidelines, "measures such as arms embargoes or restrictions on admission are implemented directly by the EU member states, which are legally bound to act in conformity with CFSP Council Decisions[51]". To be precise, the decision is not directly applicable, but has to be implemented in national law. A Member State does not have discretion to select type of measure to be taken because Council's decision provides the precise type of the imposed measure. For example, the Council adopted Decision 2012/642/CFSP concerning restrictive measures against Belarus on 15th of October 2012. Decision clearly required: "All funds and economic resources belonging to, owned, held or controlled by [parties] listed in the Annex shall be frozen[52]". Consequently to this requirement, the Council did not provide any possibility to implement other type of restriction. Member states are obliged to obey and implement Council's provided type of restrictive measures, but they are free to

[47] Update of the EU Best Practices for the effective implementation of restrictive measures. 2008, 8666/1/08.
[48] Ibid. III De-listing. Article 17.
[49] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 11205/12, Brussels, 2012. Article 7.
[50] Ibid.
[51] Ibid.
[52] Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measure against Belarus, Official Journal of the European Union, 2012. Article 4.

choose type of national legal instruments to implement it. Consequently, Lithuania implements Council's decisions by adopting Government's decrees[53]. According to the Guidelines, "other measures interrupting or reducing, in part or completely, economic relations with a third country, including measures freezing funds and economic resources, are implemented by means of a Council regulation[54]". Those regulations are directly applicable to all EU member states[55]. Therefore, Member States must make their national policies consist with EU requirements[56].

To sum up, binding legal acts such as TEU and TFEU provide general regulation empowering the Council to act by mandatory procedure, involving other EU bodies in sanctioning system especially the EU Courts to review legality of decisions to impose measure. Adoption of the secondary advisory legal act such as the Guidelines, the Basic Principles and the Best Practices, was a big step towards compliance with the due process requirements as the legal acts provide not only more detailed procedural steps for measures' implementation, but underscore the system's compliance with fundamental rights. However, the sanctioning system is vague because regulation is split into a number of various legal acts having different legal power. Even if those legal acts are quite harmonised, do not contradict each other and provide some new provisions, they mostly repeat each other. Consequently, the number of advisory norms, which regulate sanctioning system, is too high. Therefore, the necessity to create even an advisory but a uniform legal act codifying the whole sanctioning system is undoubted. Procedural system regulation would be improved if all recommendations could be found in one legal act.

1.3. Concept, subjects and types of restrictive measures

Concept of restrictive measures is quite vague as well as measures' subjects. There is no legal act, providing the official definition of restrictive measures, nor EU sanctions. Even the basic legal acts, designed especially for sanctioning system, i.e. neither the Guidelines, nor the Best Practices, nor the Basic Principles provide the definition. Even subjects of restrictive measures are precisely named in the Guidelines, it is still not clear if third state can be restricted subjects.

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[53] Tarptautinių sankcijų įgyvendinimas Lietuvos Respublikoje//Official webside of Ministry of Foreign Affairs of Republic of Lithuania http://www.urm.lt/index.php?140440836, connected 2012-10-01.

[54] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council 11205/12, Brussels 2012, Article 7.

[55] Ibid.

[56] Consolidated Version of Treaty of European Union//Official Journal of European Union. C115/12, Article 29.

However, there are several informal definitions provided by scholars or official bodies of EU or its member states. The EU external actions official website defines restrictive measures as "the instruments of a diplomatic or economic nature, which seek to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles[57]". Francesco Giumelli, the Professor researching in the field of international and EU sanctions, defines restrictive measures accordingly to the TEU, simply as "foreign policy decisions that need to be approved unanimously by the Council as established by Chapter 2 Title V of TEU"[58]. Unfortunately, this definition does not reveal the essence of restrictive measures, because it encompasses only decision-making procedures. The Ministry of Foreign Affairs of Slovenia defines restrictive measure more informative: "Restrictive measures and/or sanctions are measures, by which the [the EU] tries to achieve, that certain states and/or other entities (persons), presenting a threat to international peace and security, change their conduct, without use of force, so that this does not threaten international peace and security[59]". In the author's concern, this is most relevant definition because it strongly refers to subjects and objectives of restrictive measures.

The terms "restrictive measures" and "sanctions" are used interchangeably in this thesis as well as in the scholarly articles related this topic. In fact, the EU prefers the term „restrictive measures", but in most cases it is simply called sanctions. According to Assistant Professor J. Kreutz, researching international conflicts, the EU has its own reason for preferring the term "restrictive measures". J. Kreutz states that some of the EU terms impel to relate EU with a "soft power[60]". Indeed, impression of "soft power" is related with legal terms, used by the EU. J. Kreutz considers that generally the EU statements on CFSP "focus on incentives and a multilateral approach[61]". According to the professor, the practice is the same in the sanctioning regulation. Even if the EU prefers using a term of "restrictive measures", concept of both term is identical[62].

The type of measures, to be imposed against certain individual or entity, depends on the objectives pursued by restrictive measures and their expected effectiveness[63]. Therefore, Council's decides what type of measure is better to select in case to achieve the desired impact on individual or

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[57] The EU's Relations with the United Nations European Commission – Restrictive measures//European Union External Action webside.http://eeas.europa.eu/organisations/un/index_en.htm, connected 2012-10-03.
[58] Giumelli. Bringing Effectiveness into Debate: A Guideline to Evaluating the Success of EU Targeted Sanctions//Central European Journal of International & Security Studies. 2010, Volume 4. Issue 1. p. 86.
[59] Restrictive measures in Slovenia//Official website of Ministry of Foreign Affairs or Slovenia. http://www.mzz.gov.si/en/foreign_policy/foreign_policy/international_security/restrictive_measures/ connected 2012-10-04.
[60] J. Kreutz. Hard Measures by a soft power? Sanctions policy in the European Union//Bonn International Center for Conversion, 2005, p. 5.
[61] Ibid.
[62] Ibid.
[63] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 2009, 17464/09, Article 15.

entity. It is important, how accused behaviour is to be changed, what impact is planned to particular subject and what effectiveness is supposed to be in every particular occasion. When selecting the type of sanction, it is essential to consider, which sanction is the most appropriate in order to achieve the desired outcome[64]. According to the Guidelines, types of sanctions[65] encompass "freezing of funds and economic recourses, restrictions on admission, arms embargoes, embargoes on equipment that might be used for internal repression, other export restrictions, import restrictions and flight bans[66]". The Guidelines also supplement this list with "a ban on provision of financial services, including in connection with bans on the export of certain products as well as investment bans[67]".

Type of sanctions also depends on a subject because not every type of measure can be imposed on all subjects. For example, freezing of funds are more intended for individuals or entities, export restrictions can be imposed on an entity or even a state, while restrictions on admission can be imposed on individuals. Flight bans can be imposed on entities but usually those entities are from group of several third states. For example, the European Commission implemented Regulation 1146/2012 of 3 December 2012[68] providing a "List of air carriers of which all operations are subject to a ban within the EU"[69]. The list shows that even the flight ban is directly addressed to air carrier entity, but most of those entities are registered in groups of states. For instance, the air carriers Aero Service, Canadian Airways Congo, Emereude, Equaflight Service and 48 others, mentioned in the implementing measure are registered in Democratic Republic of Congo[70]. Thus, even if formal subjects are entities, the flight ban can considered to be a measure against a state.

Furthermore, it is noteworthy, that the Guidelines allows the Council to decide whether to impose sanctions on individuals, entities or third countries[71]. Nowadays most of the sanctions imposed by the Council are against individuals or entities, however the classical sanctions used until nineties were sanctions against countries. From the early ages of sanctioning system, classical subject was simple state or region, which was suspected of taking terrorism actions. It was started to target

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[64] Sanctions or restrictive measures European Union External Action website. http://eeas.europa.eu/cfsp/sanctions/index_en.htm, time of connection 19:56, 25th of October, 2012.

[65] Research in types of restrictive measures is not included in the purpose of this thesis so it is not going to analyse them and it suffice just to present types. However, the most common restrictive measure, which receives growing attention, is definitely freezing of funds.

[66] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 11205/12, Brussels, 2012. Article 14.

[67] Ibid.

[68] Commission implementing regulation (EU) No 1146/2012 of 3 December 2012 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community, Official Journal of the European Union, L333/7, 2012.

[69] Ibid. Annex 1

[70] Commission implementing regulation (EU) No 1146/2012 of 3 December 2012 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community, Official Journal of the European Union, L333/7, 2012 Annex.1.

[71] Ibid. Article 2.

individuals, groups or entities in nineties, when demerits of targeting state of region appeared[72]. The aim of moving to so called "smart sanctions" was not to affect large number of people in targeted country, what, indeed, was the biggest demerit of classical targeting[73]. In the way of new developed targeting, a sanction hits straight to the individuals or groups, which are suspect of violent actions. It has to be noted, that freezing funds are targeted "in their very nature[74]". However, "smart sanctions" aim is to make also other types of restrictive measures as embargoes and boycotts to be targeted straight to or individuals, certain entities or groups. Territorial point is also to be founded. Implementation of smart sanctions does not require to impose restrictive measure on a whole country or region; it is sufficient to target only certain groups or persons no matter where do they are[75]. Daniel W. Drezner, Professor of International Politics, also clarifies that smart sanctions are supposed "to hurt elite supporters of the targeted regime, while imposing minimal hardship on the mass public"[76]. The basic merit of smart sanctions is the impact only to those who are suspected of terrorism actions.

Moving from classical sanctions to smart sanctions by changing the subject from a state or region to an individual or entity raised the question of how to create a uniform sanctioning system respecting fundamental rights. Undoubtedly, new targets were much more sensitive than states. Therefore, it was essential to create listing and delisting methods respecting fundamental rights. This issue will be analysed in the third section.

Although in practice, the sanctioning system moved from imposing classical sanctions to "smart" sanctions, the Guidelines indicate third states as possible subjects of restrictive measures as well as individuals and entities. Even if "smart" sanctions changed the classical sanctions as they are formally imposed against individuals or entities, but the subject can still be a state as the practical example of flight ban against Democratic Republic of Congo showed.

1.4. Objectives of restrictive measures

When talking about restrictive measures objectives, the Council and scholars point out two different aspects, but do not distinct them precisely. Consequently, there is a confusion between

[72] R. Druláková, et al. Assessing the Effectiveness of the EU Sanctions Policy// European Journal of International & Security Studies. 2010, Volume 4. Issue 1.p. 106.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] D. W. Drezner. Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice// The Fletcher School, Tufts University// International Studies Review (2011) 13, p. 96.

objectives of restrictive measures as instruments of the EU CFSP and objectives of exact sanctions imposed for certain subject. It is essential to make a distinction between these two different concepts.

The wording *General restrictive measures objective*[77] is found in the Basic Principles. By laying down the very first article of this document the Council acknowledges sanctions to be "important way to maintain and restore international peace and security in accordance with the principles of the UN Charter and of […] [CFSP][78]". Referring to CFSP and UN Charter the Council reveals strong relations between the EU and the UN regarding sanctioning objectives. According to the Council, restrictive measures should seek:

1) "To safeguard the common values, fundamental interest, independence and integrity of the EU in conformity with the principles of the UN Charter;
2) To strengthen the security of EU in all ways;
3) To preserve peace and strengthen international security;
4) To promote international cooperation;
5) To develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms[79]".

The objectives enumerated above are to be understood as objectives of restrictive measures as an instrument of the EU CFSP. It is to be clarified that above-mentioned objectives are general purposes of any restrictive measures imposed for any subject. The type of sanction and subject do not matter because the aim of whole sanctioning system is to achieve all the objectives named above. These objective can be called "general objectives" in order to distinct them from objectives analysed below.

The Guidelines provides the other kind of objectives - the purpose of a restrictive measure imposed in a particular case. Certain objectives must be stated in a Council's legal document imposing a sanction to an individual or entity. These objectives are related only with the party concerned as well as desired impact for behaviour of those listed. The particular objectives are significantly important in listing and delisting procedures. They have some characterising elements as follows:

1) objectives provide the guidance for selecting type of measure;
2) the Council should remove restrictive measure as soon as the objectives are attained[80];
3) objectives cannot have economic motivation[81];

[77] Basic principles on the Use of Restrictive Measures, Official document of Council of the European Union, Brussels, 2004, 10198/1/04.
[78] Ibid. Article 1.
[79] Sanctions or restrictive measures//European Commission – Restrictive measures//European Union External Action website, connected 2012-10-16.
[80] Ibid.
[81] Ibid.

4) objectives has to be provided in the legal instrument imposing a restrictive measure[82].

Clarifying the second element, it has to be noted that the Guidelines provide that "when the objectives of the sanctions have not been achieved, the imposition should continue[83]". If the objectives are reached – there is no need for sanctions imposition to continue. Clarifying the fourth element it has to be noted that the Guidelines provided the requirement to state the particular objectives in the Council's decision imposing a particular measure[84]. Considering the fact that the Guidelines are advisory legal act, it is believed that the absence of objectives statement in the decision cannot be the basis for decision's annulment. In order to distinct these particular case-by-case objectives from "general objectives" of restrictive measures, it would be useful to call them "specific objectives".

In order to clarify the perception of specific objectives an example has to be provided. Council adopted Decision 2012/167/CFSP concerning restrictive measures to be imposed on some individuals and entities of Afghanistan[85]. Particularly one of individuals listed was Abdul Qadeer Abdul Baseer. The particular objective of listing this individual was to stop him giving a financial support for Taliban groups[86]. Another individual listed by the Council was Amir Abdullah. Listing the individual the Council sought to stop Amir Abdullah helping Taliban members to flee from Afghanistan[87]. The general objectives even in these particular restrictions remain the same – to safeguard security and preserve peace.

To sum up, sanctions' objectives are dual nature. Firstly, in one perspective sanctions objectives are the aims of sanctioning system as safeguarding and strengthening security, preserving peace and common values. Secondly, objectives include particularly imposed sanctions on a case-by-case basis. In order not to confuse between two separate perceptions, it is essential to know the difference. What is more, it would be clearer to indicate two term "general objectives" and "specific objectives" instead of general term "objectives".

The analysis of the EU and the UN relations shows that the Council admits UN impact on EU sanctioning system and EU absorbs international obligations from its member states. Nevertheless, the EU has a separate sanctioning system not depending on UN regulation. The EU lacks of a uniform

[82] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 11205/12, Brussels, 2012, Article 5.
[83] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 2009, 17464/09, Article 32.
[84] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 11205/12, Brussels, 2012, Article 5.
[85] Council implementing decision 2012/167/CFSP of 23 March 2012 implementing Decision 2011/486/CFSP concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan, 2012.
[86] Ibid. Annex, Article 1, part A.
[87] Ibid.

legal act, codifying all the restrictive measures regulation, which seems is without it. Either subjects and objectives of restrictive measures are ambiguous. Even EU sanctioning system seems to be changed from imposing classical sanctions to “smart” sanctions, the practice shows that third state can still be a subject of restrictive measures. The issue of restrictive measures’ objectives is complicated because objectives have a dual nature, which has to be separate accordingly to essential distinction between them. They should be called differently as well.

2. DUE PROCESS CRITERIA

2.1. Due process criteria developed in jurisprudence

As it was mentioned above, listing and delisting procedures are mostly criticised because of lack of due process. Generally due process is understood as fair and right procedures for sanction's imposition. However, it is still unclear what really due process is and what elements it includes. As it is crucial to provide a clear concept of due process, this section will focus on the analysis of the EU Courts' most significant cases on restrictive measures - *Kadi* case and the case of the People's Majuhedeen Organisation of Iran (hereinafter OMPI) where due process criteria were discussed.

Kadi case made a substantial contribution in raising a question of how human rights are protected during the procedure of including subjects to lists of targeted individuals and entities. The CJEU overruled the judgement of the GC in the *Kadi* case[88] and annulled the Council's Regulation 881/2002, which had imposed sanctions against individuals, groups or entities associated with Osama bin Laden, Al-Qaeda, or Taliban[89]. Dr. Albert Posch, researching EU law, points out, that Kadi case is "special due to adoption of the annulled regulation by the Council of the EU pursuant to resolution of the UN Security Council[90]". In fact, the CJEU adjudicated on imposition of the sanctions by UN Security Council resolutions and the restrictive measures imposition at the EU level. The CJEU held that fundamental rights bind EU when implementing UN Security Council's sanctioning[91].

The discrepancy between the GC's and CJEU's judgements is obvious. Firstly, the GC and CJEU had a different position on the "relationship between international legal order under UN and the EU legal order[92]". According to the GC, the obligations which EU Member States have under UN Charter prevail over other obligations, i.e. obligations, which they have under domestic law, international treaties and even EU law (TEU, TFEU)[93]. As the GC pointed out, "this primacy is derived from the principles of customary international law declared in Article 27 of the Vienna Convention on the Law of Treaties of 23 May 1969[94]". Furthermore, primacy includes Security

[88] Joined Cases C-402/05 P and C-415/05 P// Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Union
[89] A.Posch. The Kadi case:Rethinking the relationship between EU and International Law. //The Columbia Journal of European Law Online// 15 Colum. J. Eur. L.F. 1,2009 p 1.
[90] Ibid.
[91] T. Biertseker and S.Ecker. Addressing Challenges to Targeted Sanction: An update of „Watson report"//Watson Institute, 2009, p 8.
[92] Case T-315/01 Yassin Abdullah Kadi v Council of the European Union and Commission of the European Union
[93] Ibid. 181.
[94] Ibid. part 182.

Council resolutions, because UN members undertake to implement all Security Council's decisions under Article 25 of UN Charter[95]. In fact, UN Charter does not directly bind EU because it is neither a UN member, nor addressee of Security Council's resolutions, nor successor of "rights and obligations of the UN members for the purposes of public international law[96]". Nevertheless, the EU is considered to be bound by the obligations under the UN Charter in the same way as its Member States are[97].

The CJEU overruled this GC's finding. The CJEU referred to Advocate General Maduro Opinion[98], which observed that "relationship between international law and the EU legal order is governed by the EU legal order itself, and international law can permeate that legal order only under the conditions said by the constitutional principles of EU[99]". Considering this, the CJEU rules that the EU is obliged to fully review lawfulness of EU legal acts in the light of general principles of EU law[100], which requires respecting fundamental rights as well. This review definitely contains the review of EU measures which, "like the regulation at issue, are designed to give effect to the resolutions adopted by the UN Security Council under Chapter VII of the UN Charter[101]". The CJEU came up with statement that EU Courts' review of restrictive measures validity in the light of fundamental rights must include also the rule of law principle, guaranteed by EU Treaties as an autonomous legal system, which is not prejudiced by an international agreement[102].

It has to be noted that the CJEU elaborated EU law, rather than international law. In fact, the CJEU based its decision solely on EU law, not even referring to International law. David Cortright, researching International Peace Studies, also points out that "CJEU based Kadi findings on fundamental principles of EU law and did not elaborate on the extent to which similar protection can or must be derived from international human rights instruments such as International Covenant of Civil and Political Rights or the European Convention on Human Rights[103]". Tomas Biersteker also sticks to the opinion that "International law really was not respected by stating that the reality of reasoning entailed the disregard of pre-eminence of the UN Charter and in particular of Article 103, which was not even mentioned in the judgement[104]". It is found that in *Kadi* case, the CJEU based the judgement

[95] Case T-315/01 Yassin Abdullah Kadi v Council of the European Union and Commission of the European Union. part184.
[96] Ibid. part 193
[97] Ibid.
[98] Joined Cases C-402/05 P and C-415/05 P// Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Union
[99] Ibid.
[100] Elspeth Guild. A Fault line between law and politics//CEPS, Liberty and Security in Europe/2010, p.4.
[101] Ibid. part 326.
[102] Ibid. part 316
[103] D. Cortright. Human Right Standarts for Targeted Sanctions//Sanctions of Security Research Program //Policy brief SSRP 1001-01, 2010, p 5.
[104] T. Biertseker and S.Ecker. Addressing Challenges to Targeted Sanction: An update of „Watson report"//Watson Institute, 2009, p. 39.

on EU law explicitly, while the GC focused more on international law and obligations of EU Member States under UN Charter.

In the *Kadi* case he most essential question was if plaintiffs' fundamental human rights were violated or not. Plaintiffs alleged that the Council did not observe the right to be heard and the right to fair hearing[105]. What is interesting, the GC limited its own powers by acknowledging that the GC is empowered only to check, indirectly, the lawfulness of UN Security Council's resolutions whether they consist with *jus cogens* - "body of higher rules of public international law binding on all subjects of international law, including the bodies of the UN, and from which no derogation is possible"[106]. What is more, the GC even found the reasons to state that there was no violation of *jus cogens* and "consequently dismissed the action in their entirely[107]". However, the CJEU briefly and clearly stated that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EU law, which include the principle that all EU legal acts must respect fundamental rights. That respect constituting a condition of their lawfulness, which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty[108]".

Unlike the GC, the CJEU found that human rights were not respected. The CJEU held that the right to be heard was not respected because the Council neither informed parties concerned about evidence against them nor gave them the right to be informed of evidence against party concerned, therefore appellants could not provide their observation on given information[109]. It has to be added that the right to be informed of the listing reasons is strongly linked to the right to be heard because the party concerned has the possibility to make its own statement concerning actions, which are believed to be wrongful, only after receiving the information about the reasons.

Furthermore, the CJEU held that the right to an effective legal remedy was not respected either. The reason was the Council's failure to provide the evidence used against them, therefore they were unable to exercise their rights with regard to that submitted information before the EU judicature[110]. Indeed the Council is bound to submit reasons to the party concerned to the possible extent, as soon as possible after the decision is taken in order to make a possibility to party concerned to exercise right to

[105] A.Posch. The Kadi case:Rethinking the relationship between EU and International Law//The Columbia Journal of European Law Online// 15 Colum. J. Eur. L.F. 1,2009 p. 2.
[106] Case T-315/01 Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, 2005. Part 226
[107] A.Posch. The Kadi case:Rethinking the relationship between EU and International Law//The Columbia Journal of European Law Online// 15 Colum. J. Eur. L.F. 1,2009, p. 2.
[108] Joined Cases C-402/05 P and C-415/05 P// Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Union
[109] Ibid. part 348.
[110] Ibid. part 349.

be heard[111]. What is more, fulfilling the obligation to submit the grounds is essential to enable parties concerned to exercise their rights in the best possible extent, with knowledge of all the relevant facts, whether there are points to challenge listening[112]. The CJEU held that the principle of effective judicial protection was infringed because sanction had been imposed without any information about evidence against party concerned, therefore they were not heard regarding, so the right to defend were disrespected[113].

After Kadi being listed by Regulation 1190/2008 again in 2008, Kadi brought action before the GC to decide whether his fundamental rights were infringed again or not. What is interesting, Kadi was listed again, even though it was disrespect of the CJEU decision annulling previous sanction imposition[114]. Despite the fact that the GC admitted the possibility to challenge only *jus cogens* violation in 2005[115], this time GC's position was much more closer to the CJEU ruling when it found fundamental rights to be disrespect in 2008[116]. As well as the CJEU, the GC found the right to be heard disrespected because the inclusion of Kadi in the list in Annex I of Regulation 881/2002 was made without guarantees being given to the party concerned as to informing about evidence against him, or as to his actually being properly heard in that regard, it concluded that Regulation 1190/2008 was adopted without observance the rights of the defence[117]. The GC also held that "by given the lack of any proper access to the information and evidence used against accused and having regard to the relationship between the rights of the defence and the right to effective judicial review, that person has also been unable to defend his rights with regard to that evidence in satisfactory conditions before the [EU] judicature, with the result that it must be held that his right to effective judicial review has also been infringed[118]". The GC finally annulled Commission Regulation 1190/2008.

However, the most significant and first real impact on the EU sanctioning system was made by the CJEU. The GC did not develop any new criteria of due process comparing with novelties made by the CJEU in 2008 judgement. Considering all the CJEU acknowledgments in *Kadi* case, the elements of due process, is to be founded as follows:

1) The right to be heard (including the right to be informed of the evidence within a reasonable time);

[111] Joined Cases C-402/05 P and C-415/05 P// Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Union//part 336.
[112] Ibid. part 337.
[113] Ibid. part 352.
[114] Case T-85/09 Yassin Abdullah Kadi v European Commission, part 121.
[115] Case T-315/01 Yassin Abdullah Kadi v Council of the European Union and Commission of the European Union
[116] Joined Cases C-402/05 P and C-415/05 P// Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Union.
[117] Ibid. part 3.
[118] Case T-85/09 Yassin Abdullah Kadi v European Commission, part 3.

2) the right to an effective legal remedy (including defending of rights with regard to submitted evidence before the EU judicature);
3) the right to effective judicial protection (including the right to submit observation on evidence).

This list of elements of due process was the first significant and visible result of challenging listing procedures in the judicial body. The CJEU judgment in the *Kadi* case was only the beginning of struggling with undue process of listing and delisting, the sequel of events is found in further cases.

The other highly discussed case was *OMPI*[119]. In 2002 OMPI was included in EU autonomous list for funds freezing by designation of United Kingdom[120]. In *OMPI* cases the GC focused on the right to a fair hearing and the right to effective judicial protection. The main questions were of how to protect the right to fair hearing, to what extent the Council is obliged to inform the party concerned about the reasons of including in the list. The GC also adjudicated on the question of what are the limits of judicial review and how the Council should periodically review the list in order to remove restrictive measure if there is no grounds for restriction left. The GC acknowledged that listing procedures must observe the right to a fair hearing, therefore the obligation to state reasons is to be fulfilled and the right to effective judicial protection must be possible to exercise[121]. The most significant findings related to due process will further be analysed focusing on particular rights.

First of all, the GC adjudicated on the right to fair hearing. It cannot be forgotten that the right to be informed about the reasons of listing is considered to be a part of the right of fair hearing, since accused can be heard when giving the observations and comments about the received information with reasons of the listing. It has to be noted that the GC found that there are two main points for safeguarding the right to be heard: firstly, the parties concerned must be provided with evidence used against them for justifying restrictive measure; secondly, opportunity must be given for the party concerned to make observations and points of their view about the evidence submitted[122]. This means that it is not enough to inform accused about the evidence, but it is obligatory to give the party concerned the voice to observe the evidences. The GC founded that "in principle, the statement of reasons for a measure to freeze funds must refer not only to the statutory conditions of application of that regulation, but also to the reasons why the Council considers, in the exercise of its discretion, that

[119] M. Wahlisch. EU Terrorist Listing. An Overview about Listing and Delisting Procedures//Berghof Pease Support, 2010, p. 11.
[120] Ibid.
[121] M. Heupel "Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards"//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 318.
[122] European Commission Legal Servise, Summaries of Imporatant judgements//T-228/02 Organisation des Modjahedines du peuple d'Iran v Council, judgment of 12 December 2006//Common foreign and security policy – Right to a fair hearing//2007. http://ec.europa.eu/dgas/legal_service/arrets/02t228_en.pdf connected 2012-11-23.

such a measure must be adopted in respect of the party concerned[123]". To be precise, the party concerned has the right to know why the Council considers submitted reasons to be sufficient for including in the list.

What is more, the GC held that the right to fair hearing has to be observed at two levels – national level and EU level. Regarding the observation at national level, the court ruled that a fair hearing must be provided as significant part of the national procedure, because national procedure is the first step, which leads to restrictive measures imposition[124]. Talking in the GC words, "it is essentially in that national context that the party concerned must be placed in a position, in which he can effectively make known his view of the matters on which the decision is based, subject to possible restrictions on the right to a fair hearing, which are legally justified in national law, particularly on grounds of public policy, public security or the maintenance of international relations[125]". Dr. Christina Eckes, professor of EU law at the University of Amsterdam, notes that the national level refers to gathering of substantive information[126]. Talking about the EU level, the right to be heard must be observed in the EU procedure especially in the adoption of Council's decision to include or maintain accused in the list[127]. The EU level is for the Council to make a discretionary decision whether to include party on the list or not[128]. The possibility for affected parties to make known observations on the legal matters of application must be given[129].

Regarding the right to be informed about the reasons of listing, it has to be emphasized that the CJEU also adjudicated on the limits of the right to be heard. It was found that the right is not absolute and depends on every particular case. The GC found that "disclosure of specific and complete reasons to the party concerned may preclude the evidence adduced against those parties from being communicated to them during the administrative procedure in case to security of EU and its members[130]". The matter of public interest is to be respected in every particular case and even the CJEU held that this can be a reason for informing the party concerned about the listing reasons not completely but this cannot be misused or abused.

[123] Case T-228/02 Organisation des Modjahedines du peuple d'Iran v Council of the European Union, 12 December 2006, part 8
[124] Ibid. part 5
[125] Ibid.
[126] Ch.Ecker. The Legal Framework of the European Union's Counter Terrorist Policies, Full or Good Intentions?//Amsterdam Centre of European Law and Governance Working Paper Series 2010-01, 2010, p. 17.
[127] Ibid.
[128] Ibid.
[129] Case T-228/02 Organisation des Modjahedines du peuple d'Iran v Council of the European Union, 12 December 2006, part 5.
[130] Ibid. part 148

Morevoer, the GC made a visible contribution in clarifying the right to judicial review regarding procedures imposing restrictive measures. The GC clarified that the right to judicial review is not absolute. This right is limited to judicial review of the "lawfulness of the contested decision[131]". The GC ascertained, that the "EU Courts may not, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power[132]". This review limitation refers, especially, to the evaluation of appropriateness of the Council's evidence leading to the adoption of particular decisions[133]. This means that the GC admitted the limits of review as they are set in TFEU Article 275.

One of the main due process elements i.e. the review of an imposed restrictive measure every 6 months was also adjudicated in *OMPI* case. The GC clarified, the meaning of the wording "this Common Position shall be kept under constant review[134]" provided in Article 6 of the contested Common Position 2001/931. The GC acknowledged that individuals and entities included in the list have to be reviewed regularly, but at least once in six months in order to ensure that the aim to maintain them in the list still exists[135]. According to the GC the reason for regular review is to check if party concerned can be still remained in the list, especially on the grounds of new evidence[136]. Since listing is based on restrictive measure objectives, it is crucial to find whether there are still any reasons to maintain party concerned in the list.

To sum up, in *OMPI* cases the *GC* found such elements of due process:

1) the right to fair hearing including submitting information of evidence against the party concerned and opportunity for party to make it own observations;
2) The right to fair hearing at national and EU level;
3) the right to judicial review of the lawfulness of the contested decision;
4) the review of an imposed restrictive measure every 6 months.

Even though these elements are still not achieved, but the GC made a significant contribution to recent procedure of listing and delisting as it will be seen a bit further.

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[131] Ibid. part 113
[132] Case T-228/02 Organisation des Modjahedines du peuple d'Iran v Council of the European Union, 12 December 2006//part 159.
[133] Ibid.
[134] Council Common Position//27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), Article 6.
[135] Case T-256/07 People's Mojahedin Organization of Iran v Council of the European Union//part 5
[136] Ibid. part 4

After all, the GC annulled decisions to include and maintain the entity in the list in three judgements[137], one of them made in 2006, and two subsequent in 2008[138]. The Council finally removed *OMPI* from the list in 2009. While elaborating on the issue of nearly the same as in *Kadi* case in 2005, the GC were stepped towards due process of listing in *OMPI* judgements.

Criteria developed in *Kadi* case and *OMPI* case were also acknowledged in one of the most prominent cases regarding restrictive measures *Sison* case [139]. It is suffice to notice that the procedure of listing Mr. Sison's, Philippine resident in the Netherlands, strongly disrespected his fundamental rights because he was neither informed about any imposition of sanctions, neither given designating state explanations why he had to be listed[140]. Mr. Sison noticed bankcard rejection in the supermarket. In 2007, the GC found that the Council had unlawfully included Mr. Sison in the list because of the Council's failure to inform him about the reasons and to make it possible for him to submit allegations[141].

The judgement brought in *Sison* case was not a novelty after *Kadi* and *OMPI* judgements. It re-confirmed EU courts positions for respect of information about reasoning and possibility to speak – the right to be heard. The GC annulled the decision to include Mr. Sison in the list, but the situation went the same direction as in the *Kadi* case. After annulment of decision to include him in the list, the new decision sanctioning Mr. Sison was adopted. In parallel to the GC decision in *Kadi* case in 2010[142], this action of the Council is considered to be the disrespect of the GC judgement, because it had already annulled the decision to impose measure[143]. The Council imposes measure for the second time considering the reasons of previous decision annulment. This practice is misleading because measure should be imposed fulfilling all the procedural requirements properly at first time, not waiting for any challenges in order to observe rights during further listing procedures. Indeed, the Council fulfilled the criteria to inform the party concerned about the imposed measure and reasons of making the particular decision for the second time. A small step towards due process with regard to Mr. Sison was made.

All in all, the EU Courts' jurisprudence in *Kadi* and *OMPI* cases is considered to be a big step forward determining fair and clear sanctioning procedures. The EU Courts' position is clear, they

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[137] G. De Burca. The EU, The European Court of Justice and International Legal Order after Kadi// New York University (NYU) - Law School// Harvard International Law Journal, Vol. 1, No. 51, 2009// Fordham Law Legal Studies Research Paper No. 1321313 p. 3.

[138] T. Biertseker and S.Ecker. Addressing Challenges to Targeted Sanction: An update of „Watson report"//Watson Institute, 2009, p. 38

[139] Case C-266/05 P Jose Maria Sison v Council of the European Union, 2007.

[140] M. Wahlisch. EU Terrorist Listing//Berghof Peace Support, 2010. P. 11

[141] The slow road to justice: Sison case returns to Court in ongoing challenge to EU terrorist blacklist//European center for Constitutional and Human Rights// ECCHR media communication, 27 April 2009. p. 1.

[142] Case T-85/09 Yassin Abdullah Kadi v European Commission.

[143] Ibid. Article 121.

strictly stand for fulfilling all the procedural listing stages and annul Council's decision to impose restrictive measure if sanctioning procedures are infringed. Even though the EU Courts' competence in judicial review of particular sanctioning is very limited, they developed a perception of basic elements to be met in case-by-case basis. The analysis of the CJEU's and GC's most significant findings shows that in order to guarantee transparency of a listing procedure and the respect for fundamental rights of listed parties', the following due process requirements have to be fulfilled:

1) The right to fair hearing exercised in national and EU level:
    - The right to be informed about evidence within reasonable time,
    - The right to submit observations on evidence;
2) the right to effective judicial review of the lawfulness of the contested decision;
3) Periodical review of not challenged restrictive measures in every 6 months.

2.2. Due Process criteria developed in doctrine

Even if the biggest contribution creating essential legal conditions for achieving due process[144] was developed by jurisprudence, contribution to moving towards due process of listing and delisting was also made by scholar's research, shaping the doctrine of restrictive measures. Indeed, the EU Courts carry their own weight, but they have challenged only the Council's actions after the claims were given. This matter has basic disadvantage – challenging only particular cases regarding to submitted claims, but not challenging sanctioning procedure per se[145]. Researchers provide opinions of not only particular cases, but of problem as such. Consequently, researchers' analyse the courts' judgements and criticise the whole sanctioning system. Therefore, scholars also have their weight for moving towards better sanctioning procedures.

Eminent Jurist Panel, which focuses on compromise between effective counter-terrorism and fundamental rights[146], developed due process elements as follows:

1) "The criteria leading to listing should be clear, publicly available and non-discriminatory;
2) the listings must be strictly time-limited and subject to limited renewal;
3) there must be sufficient notification to the affected parties;

[144] G.A.Lopez, D. Cortright, et al. Overdue Process. Protecting Human Rights whille Sanctioning Alleged Terrorists//A Report Cordaid from the Fourth Forum and Kroc Institute for International Peace Studies at the University of Notre Dame, 2009 p. 6.
[145] M. Heupel "Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards"//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 313.
[146]ICJ Eminent Jurist Panel "Terrorism, Counter-Terrorism and Human Rights"//International Commission of Jurist, 2004, p 3.

4) opportunities must be accorded to rectify errors;
5) there must be an effective remedy to allow decisions to be contested;
6) there must be independent review mechanisms[147]".

Some of the elements need to be clarified. It can be understood that first criterion directly requires listing transparency. In author's concern, element "publicly available and non-discriminatory[148]" has to ensure that party concerned will not be accused of actions for which the Council would not impose any measures against other subjects. This also ensures that measure taken against such a party will not be stricter than measure that would have been taken against others. It is thought that perception and critics of public is needed in case of transparency too.

According to the second criterion, which refers to time limits, is has to be noted that measure is usually taken without any time limits, but it is necessary to set sanctions' expiry terms in advance. In author's opinion, the reason of such a requirement is to ensure that ground of restrictive measure imposition will not be a penalty, but the real aim – restrictive measure objectives are to be achieved.

It is thought that requirement of "sufficient notification to effected party[149]" means that party concerned should be informed about reasons sufficiently that he or she could exercise the right to defend properly by responding to the given information. The exception of rightful possibility not to disclose some facts in case of public interest cannot be forgotten.

The fourth criterion referring to rectifying errors possibility is foreseen due to a mistaken identity. The mistakes have to be rectified as soon as it is possible and wrongfully accused probably must have possibility to reimbursement.

The last element, the necessity of independent review mechanism, refers to UN, EU and national level as well. While is fulfilled in the EU level with the right to challenge restrictive measure imposition before the EU Courts, the UN does not have any judicial body for challenging if sanctions are imposed legitimately. Judicial review of national level requires an explanation in order to be clear. Hence, even if national judicial bodies cannot annul restrictive measures imposition, there is possibility to challenge national authorities' actions concerning restrictive measure in national level. Therefore, national judicial bodies' decisions can be basis for Council or EU Courts to repeal sanction. It is necessary to point the case Vladimir Peftijev, ZAO "Beltechexport", ZAO "Sport – Pari" and PUE "BT Telecommunications" versus the Ministry of Foreign Affair of the Republic of Lithuania and the

[147] Assessing Damage, Urging Action//Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights//International Commission of Jurist, p.122.
[148] ICJ Eminent Jurist Panel. Terrorism, Counter-Terrorism and Human Rights//International Commission of Jurist, 2004, p. 3
[149] Ibid.

Financial Crime Investigation Service Under the Ministry of Interior of the Republic of Lithuania recently held in Vilnius Regional Administrative Court[150]. In this case, the plaintiffs defended their right to judicial review, because after their funds freezing imposition[151] national authorities of Lithuania rejected the request to impose exemption – to unfreeze part of funds in order to pay for advocacy services necessary to challenge listing before GC. Vilnius Regional Administrative Court acknowledged disrespect of right to judicial review[152]. Indeed, the claim was satisfied[153].

G. A. Lopez, Professor researching Peace Studies, working together with already known David Cortright, called above-mentioned Eminent Jurist Panel's developed criteria as "gold standard for due process rights[154]". In addition to elements developed by EU Courts and Eminent Jurist Panel, the named scholars developed one additional element. They supplemented the criteria with right of an accused to "examine and challenge the information upon which charges and punitive actions are based[155]". G. A. Lopez and others developed this condition when strongly criticising narrative summaries that are to be submitted to the party concerned by informing about the reasons of listing. Scholars raised the problem of the narrative summaries – even though there is requirement to inform the reasons upon which decision of listing is made, but it cannot be challenged in a judicial review, because it is possible only to challenge if the Council fulfilled procedural stage i.e. if the Council submitted narrative summary for listed party, but not the question if relevant information were included in narrative summaries[156]. It is to be emphasized that this idea means that the obligatory reasons submitting for person or entity accused is the formal requirement but it does not solve the problem of information insufficiency, vagueness, ambiguity or even falseness. The EU Courts clearly stated in above analysed judgements, that party concerned had the right to be informed about the reasoning of listing and even maintaining in the list. The EU Courts also ruled that the Council was obliged to point its view of why it concerned that given reasons had to lead to restriction. What is more, the EU Courts declared the legitimate annulment of decision to impose sanction but they never

[150] Administracinė byla Nr. I-2182-561/2012 V. P. (V. P.), ZAO „Beltechexport", ZAO „Sport – Pari" ir PUE „BT Telecommunications" prieš Lietuvos Respublikos užsienio reikalų ministeriją ir Finansinių nusikaltimų tyrimo tarnybą prie Vidaus reikalų ministerijos//Vilniaus apygardos administracinis teismas, 2012.
[151] Council Regulation No. 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus and Council Regulation No. 999/2011 of 10 October 2011amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus
[152] Vilnius Regional Administrative Court found the Ministry's of Foreign Affair of the Republic of Lithuania decision to reject the request for exemption unjustified and not providing any ground for appeal what unobserved the right to effective judicial review.
[153] Administracinė byla Nr. I-2182-561/2012 V. P. (V. P.), ZAO „Beltechexport", ZAO „Sport – Pari" ir PUE „BT Telecommunications" prieš Lietuvos Respublikos užsienio reikalų ministeriją ir Finansinių nusikaltimų tyrimo tarnybą prie Vidaus reikalų ministerijos//Vilniaus apygardos administracinis teismas, 2012.
[154] G.A.Lopez, D. Cortright, et al. „Overdue Process. Protecting Human Rights while Sanctioning Alleged Terrorists"//A Report Cordaid from the Fourth Forum and Kroc Institute for International Peace Studies at the University of Notre Dame, 2009 p. 7
[155] Ibid. p. 6.
[156] Ibid. p. 1.

ruled that the party concerned could challenge the submitted information as such, whether the reasons stated refered to fair, impartial, non-mistaken and objective information. Proving the fact that given information, which urged the Council to impose measure is insufficient or misleading would definitely be a strong basis for restrictive measure annulment.

Thomas J. Biersteker and Sue E. Eckert made a big impact when number of suggested improvement, which were presented in their written report "Strengthening Targeted Sanction of Fair and Clear Procedures[157]" published by Brown University in 2006, were taken up. After great success of first edition of report, Thomas J. Biersteker and Sue E. Eckert updated document in 2009 with more suggestions and recommendations towards listing and delisting procedures. Due process elements were proposed as well. Scholars divided due process into two categories: "procedural fairness and an effective remedy[158]". According to scholars, procedural fairness consists of "notification, accessibility and fair hearing[159]", while effective remedy entails "independence, impartiality and ability to grant relief[160]". This time so called Watson report raised an actual question: what could be effective remedy in the case of potentially wrongful imposition of targeted sanction. In fact, this is the same issue as was pointed by Eminent Jurist Panel when stating the requirement to possibility to rectify errors. When talking about the right to fair hearing, authors of report also suggested meaningful novelties: time limits for responding delisting and exemptions request consideration[161], because the problem of indefinite terms for request is unquestioned. The report focused mostly on international level, but consequently to UN's impact for the EU sanctioning system, the criteria designed for UN sanctioning system are useful for the Council's working methods.

For the same reasons Bardo Fassbender, professor of International and EU law, suggested to include in due process the right of party concerned "to be advised and represented in communication with the Council[162]". This element was intended to the UN but can definitely be used in the EU sanctioning system. As will be seen further, a big step is already done when decided to grant a right to request for delisting not only through his resident state but also by accused himself. This is far from fulfilling aforementioned criteria and the fact that further big steps must be done after granting the element of right to be advised and represented. The problem is much bigger than it seems, because the right to be advised and represented must be granted during the whole process beginning from notifications about evidence and listing and ending even with the rejections of delisting request.

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[157] T. Biertseker and S.Ecker. Addressing Challenges to Targeted Sanction: An update of „Watson report"//Watson Institute, 2009
[158] Ibid. p. 20.
[159] Ibid. p. 21.
[160] Ibid.
[161] Ibid. p. 22.
[162] Bardo Fassbender. Targeted Sanction and Due Process//Humbold-Universitat zu Berlin, 2006, p. 28.

All in all, scholars have supplemented due process criteria developed by the EU Courts. Indeed, doctrine can suggest more proposals of how to create fair and impartial sanctioning procedure because it analyses procedures focusing on overall sanctioning system, not the particular claims as the EU Courts do. Doctrine divided due process criteria as following comprising elements:

1) information leading to listing:
    - should be clear, public, non-discriminatory;
    - the possibility to challenge if information is sufficient, precise, non-mistaken
2) time limits:
    - restrictive measure should be time-limited;
    - time limits for responding to request for delisting or exemption imposition;
3) notification sufficiency;
4) effective remedy in order to rectify errors concerning mistaken identity;
5) effective remedy to challenge decisions (UN, EU and national level);
6) possibility for affected party to be "advised and represented[163]";
7) independent review mechanism, able to grant relief.

The first step towards due process is done, i.e. the EU Courts and doctrine already perceived the main problem that sanctioning system do not observe fundamental rights. The sanctioning system is too complicated that simply granting right to fair hearing and right to effective judicial review would solve the lack of due process. That is why these rights were detailed by creating perception of due process and its consisting elements. After analysis of the case law and the doctrine, it is essential to sum up the criteria developed by both of them.

Listing. **EU Courts developed criteria:** the right to fair hearing in national and EU level including the right to be informed about evidence within reasonable time and to submit observations on evidence.

Doctrine developed criteria: 1) clear, public, and non-discriminatory information on which the listing is based; 2) time-limited measure; 3) sufficient notification about measure imposition.

Remedy. **EU Courts developed criteria:** the right to effective judicial review of the lawfulness of the contested decision.

Doctrine developed criteria: 1) possibility for affected party to be "advised and represented[164]"; 2) the possibility to challenge if information on which the measure is based is

[163] Bardo Fassbender. Targeted Sanction and Due Process//Humbold-Universitat zu Berlin, 2006, p. 28.

sufficient, precise, non-mistaken; 3) effective remedy in order to rectify errors concerning mistaken identity; 4) time limits for responding to request for delisting or exemption imposition 5) effective remedy to challenge decisions (UN, EU and national level); 6) independent review mechanism, able to grant relief.

Periodical review. **EU Courts developed criteria:** periodical review of not challenged restrictive measures in every 6 months.

It is believed that the criteria developed in the doctrine will become mandatory in the future, if the CJEU or GC will give the essential judgement requiring to fulfil them. What is more, the above mentioned criteria has to be taken into account when creating a uniform legal act regulating EU sanctioning system.

Determining these elements was only the beginning of solving the problem, next step is to explore current procedures of listing and delisting and evaluate if they are far away from due process. If yes – the recommendations and solutions for reform must be found.

[164] Bardo Fassbender. Targeted Sanction and Due Process//Humbold-Universitat zu Berlin, 2006, p. 28..

3. LISTING AND DELISTING PROCEDURES OF THE EU AND THE NEED FOR THEIR IMPROVEMENT

3.1. Recently used procedures

Sanctions against terrorism actions are most common since 2001, when the EU list was extremely extended accordingly to UN list extension, because of 9/11 attack in USA[165]. Council still continues imposing assets freeze frequently. According to Annual report on the implementation of the EU Counter-Terrorism Strategy[166], from January to October 2012 the fund freezing was imposed for more than 300 individuals or entities associated with Al-Qaida[167]. Therefore, the total number of funds freezing is much higher. Consequently, sanctioning procedures for fight against financing terrorism is to be analysed.

When the problem arose in 2001, many of accused individuals or entities did not even know the basis for including in the list, but some improvement to listing and delisting procedures were made[168]. However, the current procedures still do not guarantee that parties, which are only suspected about terrorist activities, are treated in an impartial and fair manner[169]. George A. Lopez and David Cortright state that procedures of listing and delisting are simply flawed and they definitely do not respect fundamental human rights[170]. This section will focus on the question whether recent procedures of listing and relisting are really inconsistent with due process, taking into consideration not only weak points, but also strong points of current procedures.

Council Common Position 2001/931/CFSP (adopted in case to implement UN Security Council Resolution 1373(2001)) is essential legal act, which brings kind of framework for sanctioning system in the EU. However, it is questionable if provisions of the document are reasonable. Common Position 2001/931/CFSP clarifies the meaning of the terms "terrorist acts", "persons, groups and entities involved in terrorist acts", "terrorist group". In fact, the document provides quite wide explanation, which allowed Council to include in the list more and more people without serious reasons. Besides,

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[165] Xiana Barros. The Decision-Making of the International Dimension of EU counter-terrorism since 11 September, 2001//AXA Fellow, European University Institute, 2010.
[166] Council of the European Union. Annual report on the implementation of the EU Counter-Terrorism Strategy// 16471/12,7 December 2012. p. 50.
[167] Ibid.
[168] M. Heupel "Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards"//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 307.
[169] Ibid.
[170] G.A.Lopez, D. Cortright, et al. Overdue Process. Protecting Human Rights while Sanctioning Alleged Terrorists//A Report Cordaid from the Fourth Forum and Kroc Institute for International Peace Studies at the University of Notre Dame, 2009 p. 1.

the Council declared that "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 the 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"[171]. It can be thought that this declaration intends to achieve transparency. However, the requirement of credible evidence or clues is not intended for strong evidence. Indeed, it pursues precautionary principle, which "enables rapid response in the face of a possible danger[172]". This also allows the Council to include more and more individuals or entities to the list without strong evidence. However, this document made a big positive contribution to sanctioning system because it directly provided the requirement for the list to be reviewed periodically, at least once in a six months[173].

Having regards to Common Position 2001/931/CFSP, Council adopted Regulation 2580/2001, which provided, that the Council should act unanimously, when making, reviewing and amending the list[174]. As it is going to be revealed later, the unanimity is one of the matters, which indeed stops moving towards reforms of sanctioning system and unfortunately leads to standstill. Document provided the list of national authorities liable for their listed residents and the possibility to grant humanitarian exceptions to those listed. The important step, made already at 2001, what the requirement of Council that Commission would represent the report on the impact of the adopted regulation or even proposals to approve the document within 1 year of validity[175]. Considering both documents (Common Position 2001/931/CFSP and Regulation 2580/2001) and their positive and negative impact made on EU sanctioning system, it can be found that, in 2001 sanctioning system was really in its early age, but some efforts towards respect of accused rights, were already seen.

After the adoption of Common Position 2001/931/CFSP and Regulation 2580/2001, the Council came up with the Guidelines of listing and delisting procedure while fighting with financing of terrorism. Those guidelines were consolidated in a separate document in 2002, but this document was declassified only in 2007[176]. During all these years from 2001 until 2007 there was a lack of public information of the listing and delisting procedures and methods of Council's work on this

[171] Council Common Position//27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), Article 1, part 4.
[172] The precausionary principle//Europe. Summaries of EU legislation. http://europa.eu/legislation_summaries/consumers/consumer_safety/l32042_en.htm connected on 2012-12-13.
[173] Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), Article 1, part 6.
[174] 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, Article 2, part 3.
[175] Ibid. Article 11, part 2.
[176] M. Heupel. Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards"//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 316 p.

issue[177]. However, the question why the information was classified during the period remains unanswered. Updates of declassified document were done already in the same year of declassification, 2007. It is important to note that some provisions of this declassified document were transferred to the Guidelines' update of 2012 annex 1 called "Recommendations for working methods for EU autonomous sanctions[178]". Unfortunately, only general provisions, which define the requirement to state the reasons of listing and submitting notifications, were transferred[179]. Consequently, there is still no consolidated document regulating all procedural working methods for all types of sanctions. Therefore, the working methods for fighting against financing terrorism are to be analysed.

By declassifying the document providing procedural working methods for fight against financing terrorism in 2007[180], Council admitted that accordingly to raised discussions about procedures, it was crucial to make procedural improvement, especially to upgrade the requirement for reasons statement and strengthening review procedure. Consequently, the document comprises improvements concerning these issues:

1) "assessment of new proposals for listing and de-listing;
2) motivation: the need for a statement of reasons;
3) notification and requests for de-listing
4) the six-monthly review[181]".

Firstly, the basic novelty referring all above mentioned issues is the establishment of new body in addition to already existing Foreign Relations Counsellors Working Party[182] and Permanent Representatives Committee[183]. In Council's words, the new established body was "a formal Council working party charged with implementation of Council Common Position 2001/931/CFSP on the application to specific measures to combat terrorism and to adapt the working methods of the clearing house[184]". Declassified document, which publicly announced competent authorities working methods, can be considered as a reform, made only after 5 years stagnation.

In fact, the Council's position seemed to be positive, because of settled requirement for CP 931 WP, while considering designation proposals, to check "whether the proposal complies with

[177] Ibid.
[178] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Official document of Council , 11205/12, Brussels, 2012, annex 1.
[179] Ibid.
[180] Council of the European Union. Declassification of Document 10826/07, dated on 21 June 2007//Fight against the financing of terrorism - implementation of Common Position 2001/931/ 2007, CFSP.
[181] Ibid. part 2.
[182] Council of the European Union. Monitoring and evaluation of restrictive measures (sanctions) in the framework of CFSP 5603/04. 22 January 2004.
[183] Council of the European Union. Evaluation of European Union agencies//7727/12, Brussels, 16 March 2012.
[184] Council of the European Union. Declassification of Document 10826/07, dated on 21 June 2007//Fight against the financing of terrorism - implementation of Common Position 2001/931/ 2007, CFSP, part 6.

fundamental principles and procedures of the rule of law and respect human rights, inter alia the right to an effective remedy and to a fair trial, the presumption of innocence and the right not to be judged or punished twice for the same offence[185]". The above analysed case law points out the problem of fundamental rights disrespect, therefore it proves that declassified document failed to solve the problem in practise. Unfortunately, establishing CP 931 WP seemed to be not enough to solve the problem of lack of due process. The problem related fundamental rights of parties suspected of terrorism actions can be solved and procedural improvement can be suggested only after analysing the above-mentioned novelties brought by declassified document, which considered providing the recently used procedure.

A proposal for designations is a sensitive issue. When national authority is the mostly aware of terrorist actions in its territory, it can propose individual or entity to include in the list. Martin Wahlisch, a well-known lawyer of International Law researching International Conflicts, observes that "decision of national authority is an essential precondition for the adoption by the Council[186]". National authority's proposal for designation is highly appreciated by the Council, but it is very delicate to objectively evaluate proposal and not to rely on it unduly. One of the main reasons, why CP 931 WP was established is the aim to examine, whether the information included in the proposals for listing meets the requirements laid down in the Common Position 2001/931/CFSP. First requirement is that the actions of the party fall under "terrorist act" definition, which is, unfortunately, very wide. The second requirement for information provided in proposals for listing to be precise and based on credible evidence or clues[187]. It has already been pointed out, that these two requirements lead only to extension of list without a real basis. Therefore, the Council did not provide fair and impartial CP 931 WP proposals checking method. In addition, it has to be noted, that Dr. Monika Heupel, researching in fields of internationalization of the rule of law as well as global right policy and security studies, alleges that the Council really infringed due process rights[188], because of "vagueness of the requirements for listing [...] in terms of which parties were to be added to the list[189]". According to Dr. Monica Heupel, "there were definitions as to which parties qualified for inclusion in the list, yet wording such as 'attempt to commit [...] or facilitate the commission of terrorist acts' left room for

[185] Council of the European Union. Declassification of Document 10826/07, dated on 21 June 2007//Fight against the financing of terrorism - implementation of Common Position 2001/931/ 2007, CFSP, Annex II, part 4.
[186] M. Wahlisch. EU Terrorist Listing. An Overview about Listing and Delisting Procedures//Berghof Pease Support, 2010, p. 6.
[187] Council Common Position// 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), Article 1, part 3 and 4.
[188] M. Heupel. Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 316.
[189] M. Heupel. Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 316.

interpretation[190]". Vagueness and unduly brought terms may lead to unreasonably extended list, which includes the parties, which are not responsible for actions that they are suspected for.

Talking about the obligation to state reasons, there is main general requirement "to provide statement of reasons, which will be sufficiently detailed to allow those listed to understand the reasons of their listing[191]". It can be said that this is insufficient requirement, because there is no stipulated obligation for competent authorities to provide any requested for additional reasons. There has to be a possibility given for listed party to request additional information if submitted reasons are not clear. In fact, there is no provision, which allows party concerned to ask to clarify the reasons if necessary. It can be found that the Council failed to provide proper methods to exercise the principle of stating reasons.

Notification for those listed is highly questionable issue, which is strongly challenged in the courts as is already known from previous section. The improvement in this issue is undoubted, since in 2001 parties still did not even know that they are listed until for example face the problem use the credit card in the *Sison* case[192]. A big step towards due process is obvious because notifying those listed is one of procedural stages stipulated in declassified document 10826/07, which provides working methods for fight against the financing of terrorism[193].

Besides, requirement to submit notification provides not only formal notification with concise information about restriction's imposition, but requires to include information about the rights of affected party – right to humanitarian exemptions, right to ask for listing reconsideration, the possibility to appeal to the GC. Indeed, giving this information for listed parties is great advantageous for those who do not know their rights. Consequently, it can be founded that the Council successfully settled notification requirements, which observed fundamental rights of affected parties. However, other procedural stages remain problematic.

Proper review procedure is one of the basic elements of due process. The biggest step towards was made already in 2001 when the requirement of the periodical review at least once in 6 months was settled. Talking about this element of due process it is important is to answer a question, whether the objectives of restrictive measure is already achieved or not, and whether the party concerned still

[190] Ibid. p. 316-317.
[191] Council of the European Union. Declassification of Document 10826/07, dated on 21 June 2007//Fight against the financing of terrorism - implementation of Common Position 2001/931/ 2007, CFSP, annex II, part 17.
[192] Case C-266/05 P Jose Maria Sison v Council of the European Union, 2007.
[193] Council of the European Union. Declassification of Document 10826/07, dated on 21 June 2007//Fight against the financing of terrorism - implementation of Common Position 2001/931/ 2007, CFSP, annex II, part 20.

meets the necessary criteria to be included in the list[194]. What is more, new facts can appear after the imposition of a measure and it is very important to review it. New information can be presented by EU member state, a third state or accused individual or entity[195]. The voice of CP 931 WP is only advisory, but if it considers the list to be amended after a periodical review, it makes the recommendation containing the new list of individuals and entities. Nevertheless, these recommendations have to be endorsed by the Permanent Representative Committee and adopted by the Council[196]. What is more, there is a requirement to amend reasons statement if new information was presented[197].

Listed individuals or entities have a right to submit a request for delisting. The greatest move forward due process was made when parties concerned were granted with the right to submit the request addressed to the Council by themselves, not through the state of their residency. Before declassification of the document in 2007, there was only possibility to challenge listing before the CJEU or national competent authority, but it was not clear, whether the CJEU will consider itself to be competent to review UN Security Council resolution forcing to include party in the list[198]. Talking about recent possibility for submitting a request there is no term for exercising this right, so it can be submitted at any time when party concerned provides information to propose the listing in question[199]. In principle, it seems that Council do really makes it possible to submit a request available, but there are still matters, which cause obstacles to use the right without any limits. Indeed, the declared CP 931 WP's discussion of request of delisting in a priority order does not even mean that it will be done within a reasonable period of time. There is no settled term for consideration of request for delisting. T. Biertseker and S. Eckers also endorse that establishing terms for responding to requests is the element of fair hearing to be taken up[200]. Non-existence of certain time limits inevitably leads to procrastination.

There is also strong criticism of the right to effective judicial review. Dr. Christina Eckes, has brought up the issue that there is lack of information given not only to those listed, but also to the EU

[194] Council of the European Union. Declassification of Document 10826/07, dated on 21 June 2007//Fight against the financing of terrorism - implementation of Common Position 2001/931/ 2007, CFSP, annex II, part 25.
[195] Ibid.
[196] Ibid. part 26.
[197] Ibid.
[198] M. Heupel "Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards"//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 317.
[199] Council of the European Union Declassification of Document 10826/07, dated on 21 June 2007//Fight against the financing of terrorism - implementation of Common Position 2001/931/ 2007, CFSP, annex II, part 29.
[200] T. Biertseker and S.Ecker. Addressing Challenges to Targeted Sanction: An update of „Watson report"//Watson Institute, 2009, p. 22.

Courts[201]. Dr. Christina Eckes considers this issue to be obstacle for the EU Courts "to rule on the merits and provide effective judicial protection[202]". What is more, the Council is also reluctant to disclose the relevant information to a party concerned and the Courts[203]. Dr. Chrtistina Eckes notifies that "the main reason for annulment of autonomous EU sanctions is the infringement of the procedural and judicial rights of those sanctioned resulting from the Council's failure to share the relevant information with the EU Courts[204]". The *OMPI* case[205] was a good example of how the Council was reluctant to share relevant information with courts. In this case the Council did not share the new information, which led to measure imposition, with the affected party[206]. Hence, the Council gave only part of relevant information to the GC with reluctance after the CG had ordered the Council to submit information needed[207]. The Council submitted information in two stages, firstly it provided eight documents (only one of them was confidential), and secondly it provided two documents and part of third document[208]. This s example of how the Council is reluctant to share relevant information even with the court. The fact that not all the relevant information is disclosed to the EU Courts, definitely leads to heavy obstacle to exercise the right to effective judicial review.

To sum up, current procedures of imposing or removal restrictive measure still lack due process elements. The right to judicial review as well as the right to be heard cannot be exercised without obstacles. Since there are no certain requirement for evidences against party concerned to be clear and sufficient and no possibility to challenge the stated reasons, those listed cannot be fairly heard. An affected party cannot exercise the right to effective judicial review because of lack of information given for them and for the EU Courts either. The CP 931 WP establishment has not solved the problem, because advisory voice is not sufficient to improve sanctioning system. Besides, the methods of evaluation if designation proposals are to be taken up are not proper since the proposals has to be evaluated accordingly to vague wording of Common Position 2001/931/CFSP. The last reform changing the sanctioning system for fighting against financing of terrorism was made in 2007. Therefore, it is crucial to arrange further changes in order not only to solve the remaining problems, but also to make substantial improvements of sanctioning system. It leads to the next section about the recommendation and possible solutions towards due process.

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[201] Ch.Ecker. The Legal Framework of the European Union's Counter Terrorist Policies, Full or Good Intentions?//Amsterdam Centre of European Law and Governance Working Paper Series 2010-01, 2010, p. 16.
[202] Ibid.
[203]C. Eckes. Decision Making in the n Dark? – Autonomous EU sanctions and National Classification//Amsterdam Center for European Law and Governance Working Paper Series 2012-02//2012, p. 3.
[204] Ibid. p 19.
[205] Case C-27/09 France v Organisation des Modjahedines du peuple d'Iran, 2009
[206] C. Eckes. Decision Making in the n Dark? – Autonomous EU sanctions and National Classification//Amsterdam Center for European Law and Governance Working Paper Series 2012-02//2012, p. 10.
[207] Ibid.
[208] Ibid. p. 10.

3.2. Motivation for reform and obstacles preventing from changing current sanctioning system

Since there is high criticism of current listing and delisting procedures and number of arguments, which prove the lack of due process, the reform in sanctioning system is crucial. Moreover, Council provided the recently used sanctioning procedures in 2007. The matters motivating to reform sanctioning system and obstacles, which prevent from doing any changes, has to be founded before giving suggestion to solve raised problems.

Firstly, the growing number of applications to the EU courts challenging restrictive measures imposition and removal, made the biggest impact for raising an issue of sanctioning system reform necessity. The EU Courts judgements let to admit the fact that that even there were settled methods for listing and delisting procedure, the Council's actions are far from being legitimate. Dr. Monica Heupel points out: "Pressure from courts increased over time and did raise awareness among EU member states that the Council's listing and delisting procedures might infringe the due process rights of affected parties and violate international law[209]". According to Dr. Monica Heupel, the changes, made in 2007, was the result of the CJEU judgement in *OMPI* case. When the Council declassified listing methods, it wished to avoid the CJEU judgement of *OMPI* case to be considered as a precedent in future judgements[210]. Consequently, this time, there is need of essential the EU Courts judgement to make a pressure to the Council to change the sanctioning system. According to current competence of the EU Courts regarding reviewing restrictive measures, Council's actions are legitimate if it fulfils all the required stages of listing and delisting procedures. Nevertheless, there is still need to make improvement of those methods settled, in case they would fully observe fundamental right of accused parties.

Support from EU Member States or third states is essential because the Council cooperates with national authorities, especially in the early stage of listing (proposal to designate). The support of member states of the EU and third states significantly reduced when the issue of lack of due process was raised in public. Talking in the words of G. A. Lopez „criticism of blacklisting procedures have eroded political support in some European states[211]". According to the scholar, unless the lack of due

[209] M. Heupel. Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 318.
[210] Ibid.
[211] G.A.Lopez, D. Cortright, et al. Overdue Process. Protecting Human Rights whille Sanctioning Alleged Terrorists//A Report Cordaid from the Fourth Forum and Kroc Institute for International Peace Studies at the University of Notre Dame, 2009 p. 4.

process is remedied, the sanctioning system will fade[212]. Support of national authorities is crucial for sanctioning system. Consequently, the EU member states' and thirds states' awareness of undue process coerce Council to improve sanctioning system.

There are some important reasons, which prevented from procedural changes since 2007. One of the most significant obstacles to moving toward reform is power of the Council. There is similar situation both at EU or UN level. The Council has exclusive power for imposing and removal of restrictive measure in the EU, while Security Council is exclusively responsible for sanctioning system within the UN. Indeed, institutions having an exclusive right to act, are reluctant to reforms, because they do not want to lose their power. When the Council is the only one institution within the EU, which has the right to include and exclude parties from the list, it is extremely difficult for member states, third states or even EU bodies to influence the major power[213].

Talking about the Council, there is one more issue preventing from reform – requirement of unanimity**.** Each EU member state will have veto right until unanimity will continue to be the general rule for the Council to adopt decisions concerning restrictive measures[214]. As G. A. Lopez noticed, many proposals were given "from governments and independent analytics for fulfilling requirements for international human rights and assuming full due process rights in listing and delisting procedures[215]", but they were refused because veto right prevented from making any changes. The EU can be compared with the UN again, because the one of the main obstacles for UN sanctioning system reform is the veto right of permanent members of Security Council.

There is one more significant matter preventing from making any changes is sanctioning system. As already noted above, the EU Courts play a big role in making the positive impact for moving towards sanctions. There is also negative impact in the sense of challenging procedures of listing and delisting only in respect of particular application. There was no judgement that challenged Council's listing and delisting procedures not in a particular case, but per se[216]. Of course, the EU competence in CFSP is very limited as they can challenge only procedural legitimate, but still it would be great positive impact if court while deciding on particular matter, would bring fateful judgement inclusive critical findings on listing and delisting procedures, but not their implementation.

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[212] Ibid.

[213] M. Heupel "Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards"//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 309.

[214] Common Foreign and Security Policy http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0025_en.htm connected 2012-11-05.

[215] G.A.Lopez, D. Cortright, et al. Overdue Process. Protecting Human Rights whille Sanctioning Alleged Terrorists//A Report Cordaid from the Fourth Forum and Kroc Institute for International Peace Studies at the University of Notre Dame, 2009 p. 2.

[216] M. Heupel. Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards"//The Royal Institute of International Affairs//International Affairs, Volume 85, Issue 2, 2009, p. 313.

3.3. Recommendations for achieving due process

The actions taken for counterterrorism purposes should be consistent with fundament rights to the highest extent. It is going to be suggested, what steps can be done in order to achieve better process. It is obvious that scholars cannot affect Council directly, but raising problems and criticism of working methods in public definitely makes the impact on Council even indirectly. Scholars suggest their own proposals. In fact, Watson report 2006 proved that scholars made a big impact since some recommended reforms, for example "minimal standards for statement of case[217]" or "public release of information[218]", were taken up. What is more, Watson report of 2006 also suggested creating an ombudsman body "independent recommendations about delisting request[219]" in the UN and this proposal was currently used in practise. Security Council resolution 1904 established ombudsperson office for consideration delisting request[220]. Indeed, this is great example for the EU, but at the meantime it is only a proof that scholars definitely can make the impact on competent authorities. If the impact is made at the UN level, scholars writing about the EU restrictive measures can bring some changes as well. Therefore, some suggestions are laid down below.

Novelties, which could change the sanctioning system in order to protect fundamental rights of parties concerned, are going to be proposed. After analysing the case law, researchers' opinions and prompt and suppressive matters for making sanctioning system changes, it is found that the new body, focusing on respect of fundamental rights, has to be established. There is Permanent Representatives Committee or CP 931 WP, but it seems to be depended on the Council.

In author's opinion, a new body, which plays the role of fundamental right protecting supervisor, definitely has to be established. It would not stand neither for the Council nor for individual or entity accused of terrorism actions. In fact, it would stand for fundamental right protection. The body could even be called *the Due Process Committee*, herewith making an impression from the very beginning of something right, fair and legitimate.

The competence of suggested body has to be foreseen. The Due Process Committee would work entirely on the goal to protect fundamental rights. The main task for the body is likely to be checking, whether Council and of course CP 931 WP fulfil all the listing and delisting requirements.

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[217] T. Biertseker and S.Ecker „Addressing Challenges to Targeted Sanction: An update of „Watson report""//Watson Institute, 2009, p. 14.
[218] Ibid.
[219] Ibid. 45.
[220] Security Council SC/9825 „Security Council amends United Nations Al-Qaida/Taliban Sanction Regime Authorizes appointment of ombudsperson to handle delisting issues" 2009, preamble.

Checking may include proposals for designation revision, checking whether clear and strong evidences is provided and evaluated properly, checking whether those listed are well notified about including in the list and finally evaluating, how the parties concerned are capable to submit the request and get the legitimate, rightful and impartial decision. The significant merit of this supervision is protecting fundamental rights of accused not only in particular case when the claim is submitted by the party concerned, but on the case-by-case basis. Only in this way the rights of restricted subjects, who did not challenge listing, can be protected. It is noted in the previous section, that the demerit of current sanctioning system is that the attention is paid only to legitimacy of procedure when it is challenged, but not procedures of listing and delisting as such. Establishing the Due Process Committee would surely solve this problem. The parties concerned could make the observation not only to the Council, but also to the committee in order to improve possibility to exercise the right to be heard.

The cooperation between the Council and suggested body is essential. In author's view, the possible working method may be that the Council submits information of how it fulfils the procedural requirements for the Due Process Committee, which decides if all the needed criteria are met. The certain term for the committee to give the answer is necessary in order to ensure transparency and avoid protraction. Furthermore, the time is essential in case of fund freezing. Consequently, the Council should be allowed to act and impose restrictive measure, which would be only preliminary until confirmation of the Due Process Committee.

The issue of current exclusive competence of the Council is already noted. It is said that as long as the Council plays the main role and has exclusive competence in listing as delisting, it is reluctant to lose its powers. Therefore, it is essential to come up with compromise between the Council's ambition to keep power and the necessity of the new body, which would have sufficient power to improve the sanctioning system. In case the Council to keep its powers, the new suggested body could be accountable for the Council. The requirement to submit the annual report for the Council can be set in case of accountability. What is more, the Council could appoint members for the Due Process Committee, what also leaves the Council's position quite strong. In this way, the Council still keeps its powers.

The question arises inevitably, whether the committee's decision would be binding for the Council or not. In case of improving sanctioning system significantly, the binding power is really needed, but since the Council should keep as much power as possible, the solution can be that the Committee has a binding power unless the majority of the Council members does not deem opposite to the committee's decision. To be precise, the committee's decision should be binding, but the final word would still belong to the Council, if majority of it objects to the committee's decision.

The Due Process Committee shall have a right to submit proposals for the Council for further changes in order to continue making improvements in sanctioning system. Of course, the Council would not be bound to adopt the changes proposed by the committee, but the Council should be obliged to consider committee's proposals. The consideration should be public in order to coerce the Council not to abuse the right to reject well-reasoned proposals. Therefore, public awareness also has the influence.

All in all, it is believed that the suggested body could ensure due process and thus the respect for fundamental rights. Proposed novelty is undoubtedly useful not only for the listed parties, but also for the Council, as it would help to reduce public awareness that the Council working methods do not properly respect fundamental rights. In this way, the Council would attain the support from the EU member states, third states and public institutions.

CONCLUSIONS

1. The analysis of EU legal acts shows that the Council admits itself to be bound by UN Charter when implementing UN Security Council's resolutions. Even if UN Charter does not directly bind the EU, not being a member of the UN, the EU absorbs its Member States' obligations under UN Charted because of their membership in the UN. Nevertheless, there are strong arguments, which keep the EU sanctioning system independent from the UN Security Council: the EU ability to impose autonomous sanctions, the EU's own methods for sanctions' implementation and the EU Courts' power to annul Council's decisions, which implement UN Security Council's resolutions.
2. Restrictive measures' regulation is vague because the same issues are regulated in a number of different acts, which have a different legal power and provide differently detailed sanctioning regulation. The number of provisions regulating the same issue is too high and provisions not only supplement, but also repeat each other. Therefore, adoption of a uniform legal act for all types of restrictive measures is the way to highly improve and clarify the EU sanctioning regulation.
3. Dual nature of term "restrictive measures objectives" inevitably brings ambiguity because it means two different matters. Firstly it means the general aims of the whole sanctioning system as upholding international security, common values and preserving peace. Secondly, the term "restrictive measures objectives" means an objective of a particular restrictive measure. It would be useful to divide common term in two different terms: "general objectives" and "specific objectives".
4. The EU Courts developed three main criteria of due process: the right to fair hearing at national and EU level including the right to be informed about evidence within reasonable time and to submit observations on those evidence, the right to effective judicial review of the lawfulness of the contested decision and periodical review of not challenged restrictive measures in every 6 months. However, these criteria are not sufficiently detailed to protect fundamental rights of affected parties. Consequently, they should be officially supplemented by criteria developed in doctrine: 1) clear, public, and non-discriminatory information on which the listing is based; 2) time-limited measure; 3) sufficient notification about measure imposition; 1) possibility to be "advised and represented[221]"; 2) possibility to challenge if information on which the measure is

[221] T. Biertseker and S.Ecker. Addressing Challenges to Targeted Sanction: An update of „Watson report"//Watson Institute, 2009, p. 22.

based is sufficient, precise, non-mistaken; 3) effective remedy in order to rectify errors concerning mistaken identity; 4) time limits for responding to request for delisting or exemption imposition; 5) effective remedy to challenge decisions in UN, EU and national level; 6) independent review mechanism, able to grant relief.

5. The analysis of the recent sanctioning procedures, signalises that by establishing CP 931 WP the Council has not solved the problem of fundamental rights inobservance. Advisory power of CP 931 WP was insufficient to improve sanctioning system. It is considered that the right to be heard is not fairly observed because there is no possibility to challenge Council's submitted sanctioning reason. Besides, the right to effective judicial review cannot be properly exercised because the Council is reluctant to give information to the EU Courts as well as for the affected party. What is more, the methods of evaluating designations' proposals do not ensure fundamental right respect due to vague wording of Common Position 2001/931/CFSP. Consequently, in order to ensure due process it is essential to make changes in EU sanctioning procedures.
6. It is believed that establishing the new committee whose competence is to supervise fundamental right protection in every stage of listing and delisting procedures could help to achieve due process. The committee would provide protection not only of rights of those who challenged listing procedures, but fundamental right protection on a case-by-case basis. In order Council to keep its strong powers, the new body should be accountable for the Council. What is more, the committee should be empowered to bind the Council by its decisions, unless majority of the Council's members objects. The committee would be useful not only for listed parties but also for the Council, because the Council would gain the public support after reducing awareness that sanctioning system lacks due process.

Kanarskaitė E. Ribojančios priemonės / Europos Sąjungos teisės ir valdymo magistro baigiamasis darbas. Vadovė: Doc. Dr. Regina Valutytė. - Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2012. - 58 p.

SANTRAUKA

Magistro baigiamasis darbas tiria plačiai diskutuojamą Europos Sąjungos ribojančių priemonių skyrimą ir pašalinimą, siekiant įgyvendinti asmenų, kuriems yra skiriamos ribojančios priemonės, pagrindines teises. Sancionavimo procedūros turi vieną pagrindinę problemą – jos neatitinka asmenų, kuriems skirtos ribojančios priemonės, teisių.

Visuomenės susidomėjimas sancionavimo procedūra auga nuo tada, kai Europos Sąjungos teismai nustatė, kad Europos Sąjungos Taryba, naudodamasi savo kometencija skirti ribojančias priemones, nepagrįstai riboja asmenų teisę būti išklausytam ir teisę į teisingą bylos nagrinėjimą teisme. Todėl pragrįstai didėja Europos Sąjungos Tarybos veiksmų kritika, bei apskritai keliamas klausimas, ar pačios sancionavimo procedūros yra tinkamos.

Magistro baigiamasis darbas kelia hipotezę, kad Europos Sąjungos naudojamos sankcionavimio procedūros pažeidžia pagrindines asmenų, kuriems skiriamos ribojančios priemonės, teises. Kad hipotezė būtų patvirtinta arba atmesta, darbas skirstomas į tris dalis. Pirmoji darbo dalis nustato Jungtinių Tautų Chartijos poveikį Europos Sąjungos sankcionavimo sistemai, tiria Europos Sąjungos teisės aktus reguliuojančius ribojančias priemones bei jų įgyvendinimą nacionalinėje teisėje. Šioje dalyje atskleidžiama ribojančių priemonių sąvoka, tipai, subjektai bei tikslai. Antroje dalyje analizuojama “tinkamo proceso” sąvoka ir kriterijai. Analizuojamas “tinkamo proceso” elementų, tokių kaip teisė būti informuotam apie skirtą ribojančią priemonę, teisė per protingą terminą būti supažindindam su įrodymais panaudotais prieš, teisė į bylos nagrinėjimą teisme tiek Europos Sąjungos, tiek nacionaliniu lygiu, turinys. “Tinkamu procesu” taip pat reikalaujama, kad asmenų, kuriems skirtos ribojančios priemonės sąrašas būtų periodiškai svarstomas, klaidos skiriant robojančią priemonę ne tam asmeniui būtų ištaisytos. Taip pat kompetentingos institucijos turėtų atsakyti į asmens, kuriam skirta sankcija, užklausas per nustatytus terminus, o tuo tarpu jam turėtų būti suteikta teisė būti atstovaujamam. Pateikus “tinkamo proceso” kriterijus, analizuojamos sancionavimo procedūros siekiant atsakyti į klausimą, ar Europos Sąjungos Tarybos sancionavimo metodai tikrai pažeidžia asmenų teises. Ši dalis patvirtina iškeltą hipotezę. Europos Sąjungos Tarybos naudojamos ribojančių priemonių skyrimo ir šalinimo procedūros pažeidžia asmenų teises. Suinteresuotam asmeniui nėra sudaroma galimybė ginčyti panaudotus prieš jį įrodymus. Teisė į efektyvų teisminį nagrinėjimą yra ribojama, kadangi nėra suteikiama pakankamai informacijos nei patiems ribojančių priemonių

subjektams nei teismams. Įrodžius Europos Sąjungos sankcionavimo procedūrų netinkamamą, trečia dalis pateikia pasiūlymus, pasiekti “tinkamą procesą” ir apginti suinteresuotų asmenų teises. Siuloma įsteigti naują instituciją, kurios kompetencija būtų prižiūrėti kaip Europos Sąjungos Taryba įgyvendina sankcionavimo procedūras kontroliuojant asmenų teisių įgyvendimimą. Siūloma nauja institucija apsaugotų asmenų teises ne tik ribojančios priemonės skyrimo ginčijimo atveju, bet taip pat kiekvienu neginčijamu atveju. Įsteigti tokią instituciją būtų naudinga ne tik asmenims, kuriems skiriamos ribojančios priemonės, bet ir Europos Sąjungos Tarybai.

Kanarskaitė E. Restrictive Measures / European Union Law and Governance Master Thesis. Supervisor Assoc. prof. Dr. Regina Valutytė. – Vilnius: Mykolas Romeris university, Faculty of Law, 2012. – p. 58.

SUMMARY

Research analysis the highly debated issue of EU restrictive measures imposition and removal procedures raising the major problem – disrespect of fundamental rights of those included in the lists of targeted subjects. There is growing public awareness of sanctioning system since EU Courts found that the Council does not observe fundamental right to be heard and right to effective judicial review. Consequently, EU Courts reasoned growing criticism of not only Council's fulfilment of procedural requirements, but also criticism of sanctioning procedures as such.

Master thesis raises hypothesis, that EU recently used sanctioning procedures do not observe fundamental rights of parties included in the lists. In case to confirm or refuse hypothesis, research is divided in three parts. First part determines the UN Charter impact for EU sanctioning system as well as analysis of the basic EU restrictive measures regulation including national level as well. This part also includes determination of issues concerning restrictive measures concept, types, subjects and dual nature objectives. Second part provides the perception of criteria to be met in case of achieving due process, which means fair and right sanctioning procedures. This part provides clear perception of due process and clarifies its elements such as: the right to be notified about including in the list, the right to be informed about the evidence within reasonable time, the right to fair hearing in EU and national level. The elements also includes periodical list's review, rectifying errors concerning mistaken identity, time limits to respond to given request, and the right to be advised and represented. This part also analysis currently used sanctioning procedures in order to find out if Councils working methods really do not comply with due process. Therefore, the part evaluates recently used listing and delisting procedures and indeed confirms above-mentioned hypothesis. Current procedures do not meet due process criteria. Listed parties cannot exercise the right to be heard and right to effective judicial review. There is no opportunity to challenge stated reasons. What is more, there is obstacle to exercise the right to effective judicial review because the lack of information given either for the EU Courts either for party concerned. Consequently to found sanctioning system inappropriateness, third part, after answering to the question of what are prompt and suppressive matters for making sanctioning system changes, suggests the way to achieve due process by establishing new body whose competence is to supervise fundamental right protection in every stage of listing and delisting procedures. Suggested body would provide protection not only of rights of those who challenged

listing procedures, but fundamental right protection in every particular case. Indeed, it would be useful not only for listed by party, but for the Council as well.

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