Who is really affected by European Union terrorist sanctions? A CRITICAL STUDY ON 'PROXIMITY' IN EU CASE LAW

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The European Union (EU) adopts restrictive measures – or sanctions – as part of its counter-terrorism strategy. These measures restrict the fundamental rights of the natural or legal persons they target and can be challenged in front of the General Court or the European Court of Justice (the CJEU).

Drawing from both legal scholarship and security studies, this article refines an analytical framework that enables an original analysis of the case law of the CJEU: we focus on 'proximity', an element so far neglected in the analysis of counter-terrorism sanctions. Proximity is the variable measuring the distance between the addressee of a measure from the actual commission of a terrorist act. Such a variable provides the analytical framework through which to test the hypotheses and findings proposed in the last decade by previous studies.

Such findings are mostly confirmed by our interdisciplinary analysis, but nuanced. While it is true that sanctions lead to a process of othering and stigmatization, the Court has introduced some meaningful procedural safeguards that contribute to protecting the fundamental rights of individuals, especially in the case of family members of suspected terrorists. Not dissimilarly from what was noted about judicial protection in other sanctions regimes, however, tensions remain in how to ensure effective substantive, as opposed to merely procedural, protection to sanctions addressees.

Keywords: Terrorism, EU restrictive measures, Court of Justice of the European Union, fundamental rights, judicial protection

1 INTRODUCTION

The 9/11 attacks firmly placed terrorism at the top of the international security agenda of the European Union (EU) for several years. Perhaps the most visible counter-terrorism instrument adopted by the EU are restrictive measures, i.e.,

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sanctions, which constitute the object of inquiry of this article. But rather than focusing on their genesis or on their effectiveness, we analyse the case law on sanctions to scrutinize who is really affected by them, as a matter of law and as a matter of fact: those who commit an act of terrorism, those who help with its commission, or also (innocent) family members of the terrorists?[1]

These questions matter because sanctions affect fundamental rights. Unsurprisingly, there has been a significant amount of litigation on them, and measures adopted by the EU nearly twenty years ago still affect the human rights of the suspected terrorists they targeted, and, in some cases, of people close to them. The Court of Justice of the European Union ('CJEU' or 'the Court') has in fact been delivering judgments for the past two decades, which justifies continued interest in the topic.

Section 2 summarizes the findings of the two strands of literatures that inform our interdisciplinary analysis. The (legal) literature on EU sanctions to fight terrorism has provided an extensive assessment of the (negative) impact of restrictive measures on the fundamental rights of individuals (most notably, related to due process and the right of defence). Another strand of literature (mostly deriving from critical security studies) has criticized the negative repercussions of such measures on the human rights of the targets. Authors have highlighted the political as well as stigmatizing functions of terrorist listing. Constitutive processes of self-identification, othering and marginalization have also been scrutinized, both on their own as well as in relation to the normative dimension of European identity.

In section 3, this article bridges those two strands of literature, by focusing on an analysis of the *case law of the CJEU* to re-examine the findings of previous *critical contributions* through the notion of *proximity*. Proximity is the abstract name we give to the variable measuring the distance between the addressee of a measure and the actual commission of a terrorist act. More concretely, this article identifies three 'layers of proximity' to the material commission of a terrorist act. These can be visualized as three concentric circles: there is least proximity when the target of a

[1] Similar questions have been asked in the context of other sanctions regimes: C. Beaucillon, *Opening up the Horizon: The ECJ's New Take on Country Sanctions*, 55(2), Com. Mkt. L. Rev. 2018, doi: 10.54648/COLA2018031; G. Butler, *Of Rulers, Relatives, and Businesspersons: The Imposition of Sanctions on Family Members*, Legal Issues Eur. Integ. (2023); F. Filpo, *Evidence Standards in the Judicial Review of Restrictive Measures*, 20 ERA Forum 615, 621 (2020), doi: 10.1007/s12027-019-00583-9; L. Lonardo, *Challenging EU Sanctions Against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy*, Cambridge YB. Eur. Legal Stud. (forthcoming 2023). We focus only terrorist sanctions. As Eckes put it, 'Individual sanctions and state sanctions are so dissimilar that they should be considered distinct in nature': terrorist sanctions are much more easily agreed upon, as they do 'not usually create a conflict of interest or raise the same foreign policy concerns. Furthermore they are much less able to create rents if targeted, the adoption procedures differ, and the linking of a sanctioned individual to the targeted organisations differs strongly'. C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights* 18 ss. (Oxford University Press 2009).

sanctions is merely a family member of a suspected terrorist; the middle layer is when the target of the sanction has provided financial or material help to the terrorists, but did not materially commit the terrorist act; there is closest proximity when the target of a sanction is the material perpetrator of a terrorist act. The focus of this article is on the notion of proximity as an important indicator to ascertain the effects of restrictive measures against (suspected) terrorists: the effects of sanctions are felt by the target of measures, who may or may not be the actual perpetrator of a terrorist act. The notion of proximity to which this article is dedicated is the one appearing in the case law of the Court. It has been conceptualized in an abstract way especially in opinions of Advocates General (members of the CJEU who deliver an advisory opinion to inform the court's judgment) – but has received less attention in the security studies literature. Legal scholars such as Beaucillon have consider this in relation to country sanctions, but not to terrorist sanctions.[2]

Section 4 re-considers the criticisms through the lens of the three layers as described and ascertained in the previous sections. Such findings are mostly confirmed by our interdisciplinary analysis, but nuanced. While it is true that sanctions lead to a process of othering and stigmatization, the Court has introduced some meaningful procedural safeguards that contribute to protecting the fundamental rights of individuals.

This article will use a narrow focus, by studying the Court's judgments as opposed to the 'statements of reason', i.e., the Council's formal motivation for sanctioning a natural or legal person. We do so for several reasons. First, analysing the statements of reasons would not add substantial information, since they are often conceived in such an abstract way as to circumvent the publication of the 'real reason' for blacklisting, that is, the piece of intelligence on which the decision is made. The Court draws in fact a distinction between the Council's statement of reasons (which is a procedural matter) on the one hand, and the evidence used to substantiate those reasons on the other hand.[3] Second, it is safe to assume that the cases object of EU litigation represents a pool of the most controversial listings (in fact, in a sense the Court acts as constitutional interlocutor in so far as it sends a signal to the Council: it establishes which listing criteria stand judicial scrutiny and may therefore lawfully base *future* blacklisting). Third, this article only considers proximity in a personal sense (how close is the addressee of a measure to the person committing the act), and not, for example, in the temporal sense (how close is the addressee of a measure to the moment of committing – or having committed an act of terrorism).

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2 Beaucillon, *supra* n. 1, at 387 ss.

3 *See* e.g., Case T-262/15 *Kiselev v. Council of the European Union* EU:T:2017:392 para. 52 where the General Court held that the obligation to state reasons on which an EU sanction is based is an essential *procedural* requirement, to be distinguished from the question whether the reasons given are well founded, the latter question pertaining instead to the *substantive* legality of the contested act.

2 EU TERRORIST SANCTIONS: A POOR HUMAN RIGHTS RECORD?

2.1 Before and after kadi: From zero to some procedural safeguards?

Defining terrorism is an inherently political choice. In EU law, such a choice was first made in Council Common Position 2001/931, and later broadened.[4] Although this choice is amenable to criticism (discussed in section 2.3), it is not challenged as a matter of law.

When deciding who to target, and when, and with what, however, EU institutions do not enjoy full discretion, and their choices are subject to judicial review. This was by no means obvious before the landmark *Kadi* judgment of 2008,[5] discussed below. One of the most exhaustive assessments of the human-right violations tied to the terrorist sanctions regime has been provided by Sullivan and Hayes in their extensive account of how due process guarantees such as the right to a fair trial, the right to be informed and to be heard, the right to independent judicial review and effective remedy, as well as the right to property were breached on a recurring basis.[6] Eckes adopted a similar human rights perspective as she found that 'finding a way to fighting terrorism without negating the most basic values of our societies is the greatest challenge'.[7] Both the insufficient human rights protection ensured during listing and de-listing procedures,[8] as well as the expansion of executive powers like those of the Council, have found a prominent place within the academic debate on terrorist sanctions.[9] Attention was drawn to the circumvention of the traditional criminal justice system as a result of grounding the decision for listing on restricted

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4 *Council Common Position 2001/931 of 27 December 2001 on the application of specific measures to combat terrorism*, OJ L 344, 93–96 (28 Dec. 2001). *See also Council Framework Decision of 13 June. 2002 on combating terrorism*, O.J. L 164, 3–7 (22 Jun. 2002). Then extended by *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, OJ L 88, 6–21 (31 Mar. 2017).

5 C-402/05 P – *Kadi and Al Barakaat International Foundation v. Council and Commission* ECLI:EU:C:2008:461.

6 G. Sullivan & B. Hayes, *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights* (ECCHR 2011).

7 Eckes, *supra* n. 1, at 76.

8 Sullivan & Hayes, *supra* n. 6, at 201; P. Schneider, *Sanctioned Until Proven Innocent – Reviewing the UN and EU Smart Sanctions Regime for Blacklisted Terror Suspects*, in *European Peace and Security Policy: Transnational Risks of Violence* 261 ss. (M. Brzoska ed., Nomos 2014).

9 M. Vermeulen, *Assessing Counter-Terrorism as a Matter of Human Rights*, in *The Impact Legitimacy and Effectiveness of EU Counter-Terrorism* 188 (F. De Londras, J. Doody eds, Oxford 2015); L. Jarvis & T. Legrand, *The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons*, 30(2) Terrorism & Pol. Violence 199 ss (2018), doi: 10.1080/09546553.2018.1432199.

intelligence information, unavailable to the listed individual and to the courts.[10] The impossibility of an independent review of intelligence information constitutes one of the main obstacles to the safeguard of human rights in the context of terrorist listing.[11] This has led some authors to talk about the overcriminalization of terrorism.[12]

However, procedural safeguards have not been unchanged over the last twenty years. Many authors have come to acknowledge the evolution of procedural safeguards as a result of court rulings. The key turning point was the seminal abovementioned *Kadi* decision, in which the CJEU invalidated EU sanctions against suspected members of Al Qaeda – transposing those adopted by the UN Security Council – as they violated fundamental procedural rights of the target. Heupel suggested that the role of court proceedings and of the law was what prompted EU institutions 'to reform the listing and delisting procedures',[13] an argument also maintained on a later occasion with regards to the 'gradual, albeit incomplete, improvement of due process safeguards in EU sanctions regimes against terror suspects'.[14] The case law on terrorist sanctions discussed in the present article, which has done much to advance procedural safeguards for people included in terrorist sanctions, derives its rationale from the principles of judicial protection that, in the case of sanctions, were first established in *Kadi*.[15]

This argument has nevertheless been contrasted by Portela's accusation that the extension of procedural safeguards has been conductive to a situation in which 'listing criteria are less vulnerable to legal challenges than in the past, but not necessarily fairer or targeted with more precision'.[16] Striking a similar chord, De Goede argued that the *Kadi* case has contributed to 'solidify and normalize the deployment of targeted sanctions as a legitimate and permanent emergency

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[10] F. Galli, *The Freezing of Terrorists' Assets: Preventive Purposes with a Punitive Effect*, in *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU* 43 ss. (F. Galli & A. Weyembergh eds, Editions de l'Université de Bruxelles 2014); I. Cameron, *Respecting Human Rights and Fundamental Freedoms and EU / UN Sanctions: State of Play* Directorate General External Policies of the Union, European Parliament (2008); M. De Goede, *Blacklisting and the ban: Contesting Targeted Sanctions in Europe* 42(6) Security Dialogue 499 ss. (2011).

[11] Sullivan & Hayes, *supra* n. 6.

[12] V. Mitsilegas, *European Criminal Law and the Dangerous Citizen*, 25(6), Maastricht J. Eur. & Comp. L. 733 ss. (2018), doi: 10.1093/oso/9780198787433.003.0007.

[13] M. Heupel, *Multilateral Sanctions Against Terror Suspects and the Violation of due Process Standards,* 85(2), Int'l Aff. 308 (2009), doi: 10.1111/j.1468-2346.2009.00795.x.

[14] M. Heupel, *Judicial Policymaking in the EU Courts: Safeguarding Due Process in EU Sanctions Policy Against Terror Suspects*, 18(4), Eur. J. Crim. Pol'y & Res. 325 ss. (2012), doi: 10.1007/s10610-012-9185-z.

[15] T. Tridimas, *Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments*, Cambridge YB. Eur. Legal Stud. 455–490 (2010), doi: 10.5235/152888712802636229.

[16] C. Portela, *Are European Union Sanctions 'targeted'?*, 29(3) Cambridge Rev. Int'l Aff. 912, 920 (2016), doi: 10.1080/09557571.2016.1231660.

measure in Europe and beyond'.[17] Similarly, Nanopoulos drew attention to how the 'juridification' of sanctions masked its implication 'in the fabrication and management of the capitalist order in its present post-colonial and neo-liberal form. The figure of the blacklisted is thus best conceived, not as law-breaker or classical enemy, but as an "enemy of order"'.[18] Both the *Kadi I* and the *Kadi II*[19] rulings have been interpreted as proof of the ECJ's prioritization of procedural issues over the real protection of fundamental rights.[20] As such, European courts (including the European Court of Human Rights) have been accused of putting excessive focus on the short-term negative impact of counter terrorism measures while disregarding the long-term negative impact of listing such as the gradual weakening of particular rights, or individual as well as group stigmatization. As Vermeulen put it: 'Instead of assessing the effectiveness of a particular counter-terrorism measure, the Court assesses the effectiveness of the safeguards that accompany extraordinary counter-terrorism powers'.[21]

2.2 The effectiveness of terrorist sanctions: How to target financial support to terrorism?

When discussing the effectiveness of the measures, scholars have also cast doubts on the opportunity to target alleged financial supporters. Cameron has highlighted the mismatch between using anti-money laundering methods against terrorist financing, because 'the motive behind most terrorism is not profit, and the money used is not, or not necessarily, illegal money'.[22] Despite the bank's legal requirement to signal suspicion transactions, terrorists are rarely identified this way. Rather, they are identified because of intelligence information, whereupon banks are informed, suspicious patterns are seen, and then accounts are frozen. The unquestioned assumption that terrorist organizations are by definition financed at least in part through laundered money can foster a form of 'criminalization by association',[23] affecting all the charities and social organizations surrounding the actual terrorist group. As Cameron put it, the effect of asset freezing to counter terrorism 'it is most likely zero'.[24]

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17 De Goede, *supra* n. 10, at 510.
18 E. Nanopoulos, *The Juridification of Individual Sanctions and the Politics of EU Law* 5 (Hart 2019).
19 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P European Commission and Others *v.* Yassin Abdullah Kadi ECLI:EU:C:2013:518.
20 Mitsilegas, *supra* n. 12, at 733 ss.
21 Vermeulen, *supra* n. 9, at 92.
22 Cameron, *supra* n. 10, at 34.
23 Sullivan & Hayes, *supra* n. 11, at 89.
24 Cameron, *supra* n. 10, at 34.

2.3 Constructivist and critical approaches: The process of othering and of marginalization

The symbolic function of proscription regimes has also been granted a substantial amount of attention by constructivist and critical scholars.[25] The role played by national political preferences and priorities has been at the core of this debate.[26] Even after *Kadi*, it was emphasized that 'depending on the context, proscription can be variously or even simultaneously [be] instrumental, political, and symbolic'.[27] De Goede advances an understanding of proscription as 'a form of modern ban', which 'seeks to render its targets politically mute' by placing them 'beyond the boundaries of political participation'.[28] Reminiscent of the work of Agamben, this line of argument present in the work of De Goede and Nanopoulos sees blacklisting as carrying a symbolic effect of societal exclusion and banishment, placing the target 'outside the boundaries of society and the political order' and operating 'through a discourse of "otherness", that performatively constitutes the liberal, rational Self and its terrorist, violent Other'.[29] The European sanctions regime is thus conceptualized by some as embodying the perceived normative superiority of the EU as it underlines the opposition between the 'liberal' self and the 'illiberal' other[30]: through sanctions and other counterterrorism policy, the EU act as a normative power, a 'human rights advocate' that has to punish and pursue the illiberal other in order to consolidate its own identity.[31]

In the light of the far-reaching legal and social consequences of the sanctions, the Court itself has recognized 'the opprobrium and suspicion that accompany the public designation of the persons covered as being associated with, for example, a terrorist organization'.[32] This reasoning led the Court to establish, in addition to other

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[25] E. Guild, *EU Counter-Terrorism Action: A Fault Line Between Law and Politics?* (Centre for European Policy Studies 2010); S. Hapeslagh, *Listing Terrorists: The Impact of Proscription on Third-Party Efforts to Engage Armed Groups in Peace Processes – a Practitioner's Perspective* 6(1) Critical Studies on Terrorism, 189 ss. (2013); Schneider, *supra* n. 8, at 261 ss.; M. De Goede, *Proscription's Futures* Terrorism and Political Violence, 336 ss. (2018); Jarvis & Legrand, *supra* n. 9, at 199 ff.

[26] Schneider, *supra* n. 8, at 276 ff.

[27] Jarvis & Legrand, *supra* n. 9, at 207.

[28] De Goede, *supra* n. 25, at 337; and De Goede, *supra* n. 10, at 501.

[29] De Goede, *supra* n. 25, at 337.

[30] I. Manners, *Normative Power Europe: A Contradiction in Terms?*, 40(2), J. Com. Mkt. Stud. 235 ss. (2002); I. Manners, *Normative Power Europe Reconsidered: Beyond the Crossroad,* 13(2), J. Eur. Public Policy, 182 ss. (2006); T. Diez, *Constructing the Self and Changing Others: Reconsidering 'Normative Power Europe'*, 33(3), J. Intl. Stud. 613 (2005), doi: 10.1177/03058298050330031701; T. Diez & M. Pace, *Normative Power Europe and Conflict Transformation*, in *Normative Power Europe. Palgrave Studies in European Union Politics* 210 ss (R. G. Whitman ed., Palgrave 2011); G. Joffé, *The European Union, Democracy and Counter-Terrorism in the Maghreb*, 46(1), J. Com. Mkt. Stud. 147 ss (2008), doi: 10.1111/j.1468-5965.2007.00771.x; E. Hellquist, *Ostracism and the EU's Contradictory Approach to Sanctions at home and Abroad* Contemporary Politics, 394 (2019).

[31] C. Portela, *Targeted Sanctions Against Individuals on Ground of Grave Human Rights Violations – Impact, Trends and Prospects at EU Level* 27 (European Parliament publication 2018).

[32] C-239/12 P *Abdelrahman* EU:C:2013:331 para. 70.

procedural safeguards, the rule that an applicant has a (retroactive) interest to annul a restrictive measure targeting him/her, even when that measure is no longer in force.

3 THREE LAYERS OF PROXIMITY IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

In the context of her analysis of *country* sanctions, Beaucillon argued that, in contrast to rules for the establishment of international responsibility of states, 'international sanctions are content with a semblance or with reasonable suspicion'.[33] Understanding the logic on which this suspicion operates thus becomes key in the study of country sanctions, and that author proposed five criteria used by the EU institutions to ascertain the links between real and formal targets of country sanctions'.[34] The five criteria relate essentially to the degree of support that the real target provides to the formal target of the sanctions. This is not dissimilar to what Advocate General Mengozzi had proposed in his opinion in *Pye Phyo Tay Za*,[35] a case involving restrictive measures against Myanmar (hence country sanctions, not terrorist sanctions). AG Mengozzi used the expression 'concentric circles' to map out the addresses of the EU measures. In his words:

> The first circle comprises the rulers themselves, that is to say the members of the government or the other persons who have real decision-making power and therefore hold preeminent political responsibility for the situation which the EU aims to combat … . The second circle comprises persons associated directly or indirectly with the rulers belonging to the first circle; these may be members of the rulers' families but also persons who benefit from the economic policies. The third circle then comprises the family members of persons who benefit from the economic policies, in connection with whom the Council does not take account of any direct or indirect responsibility in the decision-making process, or even in the enjoyment of benefits by the members of the second circle.[36]

With reference the Court's case law on *terrorist* sanctions, we draw three concentric circles. They identify the level of proximity that the victim of restrictive measures had with the actual terrorist act. The first concentric circle entails maximum proximity (when the target of the sanction has materially committed an act). The second is a middle ground (when the target offered financial or material support to terrorism). The third entails minimal, or contingent, or even involuntary proximity (a mere association to terrorists by social or family ties). This analytical distinction is what informs our original analysis of the case law of the Court with the aim of testing the critical findings summarized above, namely that

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33 Beaucillon, *supra* n. 1, at 406.
34 *Ibid*.
35 Advocate General Opinion in C-376/10 P *Pye Phyo Tay Za* ECLI:EU:C:2011:786.
36 *Ibid*., para. 40.

terrorist sanctions impose a (disproportionate) stigma through procedures not easy to reconcile with the rule of law.

These circles do not reflect the categorization found in the legal instruments. EU law (but not the case law) merges the first two layers, in so far as it considers a terrorist act both the material commission as well as the financial or material support to the perpetrators (Article 1(3) of Council Common Position 2001/931[37]; in 2017 the list of acts constituting a terrorist within EU law was extended by Directive 2017/541[38] to include the mere 'travel for terrorist purpose'[39]).

While there may be convincing reasons of effectiveness to treat those two categories in the same way *as a matter of law*, the structure in three concentric layers captures important aspects of the functioning of sanctions *as a matter of fact*.

3.1 Material Commission of an act

The target of a sanction can be the natural or legal person (that is, the individual or the organization) committing a terrorist act. The EU's definition of terrorist act includes also a list of conducts (including financial and material support), and not only the material commission of an act.

The notion of terrorism has an autonomous meaning under EU law. This, in particular, means that a conduct may be a terrorist act for the purposes of EU law, independently from the characterization that the same act might have under international or national law. This autonomous definition means that it is for the EU to determine whether a conduct falls under one of the criteria in Article 1(3) Common Position 2001/931. In the Liberation Tigers of Tamil Eelam (*LTTE*) judgment, for example, the Court held that it was immaterial that the action of Tamil Tigers – designated as terrorists by the Dutch authorities – took place during armed conflict (a fact which might have affected their classification under international law).[40]

The material commission of a terrorist act must be proved by the Council with reference to the decision of a national authority for the decision to include an individual or a group on a list (the first time sanctions are drafted); but can also use other sources for the decision to maintain that target (when sanctions are merely updated, which is usually every six months). Thus, the real legal challenge for the

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37 *See supra* n. 4.

38 *See supra* n. 4.

39 Despite clear risks of stigmatization deriving from the listing of someone for having 'travelled for terrorist purpose', we decided not to include this dimension in the analysis as, to the best of our knowledge, there is no case law on it in EU courts. For some factual scenarios analysed by other courts, *see* the UK Supreme Court decision in Secretary of State for the Home Department *v.* Al -Jedda [2013] UKSC 62; or the ECtHR decision in, Johansen *v.* Denmark ECLI:CE: ECHR:2022:0201DEC002780119.

40 Joined Cases T-208/11 and T-508/11 *LTTE v. Council* ECLI:EU:T:2014:885 para. 82.

EU institution is not whether a certain conduct constitutes terrorism, but rather whether it can be proved that the addressee of the sanction has engaged in it.

In the *Hamas* judgment,[41] the ECJ held that the Council is bound to rely on a national decision only for the first inclusion of persons in restrictive measures, whereas later decisions to maintain the addressee could be based also on other sources, such as the press and other media.[42]

A decision of a national authority is a necessary and sufficient condition for the Council's initial choice to include a target in a blacklist. It is necessary because, the Court stated,[43] the EU does not have its own resources to conduct operations: Member States, instead, are better placed to gather intelligence. It shall be noted, however, that the Council may not request such a decision to be adopted. It is sufficient because once there is a national decision, the Council may act without notifying the intended target in advance. The target has no right to challenge or discuss the evidence before a decision is adopted, but the Court found this is not an unlawful breach the right of defence of suspected terrorists. The procedure is necessary to safeguard the effectiveness of EU law: terrorist sanctions rely on a 'surprise effect', and so the Council is authorized not 'to inform the person or entity concerned beforehand of the grounds on which that institution intends to rely in order to include that person or entity's name in the list'.[44] The Court has nonetheless drawn a distinction with subsequent decisions to maintain the target on the list. Since there is no more urgency, the requirement to notify the act is reinstated.[45]

The national authority may belong to a Member State or to a third country,[46] but while for the former the Council presumes that such decision complies with the fundamental rights of the target, in the latter case the Court requires the Council to check that such fundamental rights are actually observed.[47]

3.2 Financial and material support

As a matter of fact, a degree of separation may exist between people offering material or financial support to a terrorist organization on the one hand, and the perpetrator of an act on the other hand. Not as a matter of EU law, for which the

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41 Case C-79/15 *Hamas* ECLI:EU:C:2017:584.
42 *Ibid.*, para. 50.
43 C-539/10 P and C-550/10 P *Al-Aqsa v. Council and Netherlands v. Al-Aqsa* EU:C:2012:711 para. 69.
44 C-27/09 P *OMPI v. Council* ECLI:EU:C:2011:853 para. 61.
45 *Ibid.*, para. 62.
46 T-208/11 and T-508/11 LTTE *v.* Council, ECLI:EU:T:2014:885 para. 129; T-256/07 People's Mojahedin Organization of Iran *v.* Council, ECLI:EU:T:2008:461, para. 131.
47 T-208/11 and T-508/11 LTTE *v.* Council, ECLI:EU:T:2014:885 para. 139; on this point, *see* C. Challet & D. C Grumaz, *EU Restrictive Measures and Third Countries' Evidence*, 28(1) Eur. Foreign Aff. Rev. 9–29 (2023), doi: 10.54648/EERR2023002.

threat, financing, travelling for the purposes of, or the commission of, say, kidnapping or hostage taking are all terrorist acts.

The *Kadi* saga related to financial and material support to terrorism (in this case, Bin Laden and Al Qaeda). In 1995, the foundation of which Kadi was director provided logistical and financial support for a mujahidin battalion in Bosnia and Herzegovina, and for other activities. He was also a major shareholder of a bank 'where planning an attack against a United States facility in Saudi Arabia may have taken place'.[48] Further, he owned several firms in Albania which funnelled money to extremists or employed extremists in positions where they controlled the firm's funds.[49] The Court found that the allegations against him were sufficiently specific: '[they identified] the financial institution through which Mr Kadi allegedly contributed to terrorist activities and the nature of the alleged terrorist project concerned'.[50]

In later judgments, the Court has been equally deferential to the choices of the Council. In *E and F*,[51] the listed organization was the Revolutionary People's Liberation Party/Front (DHKP-C), which had as an objective to overthrow the Turkish political order by means of armed struggle. E and F were individuals indicted under German law on the grounds that they were responsible for running cells of the organization in Germany, and fundraizing for it, including by conducting events and selling publications.[52] In view of the structure of the DHKP-C, the Court concluded, E and F were necessary elements to enable that terrorist organization 'to obtain full power of disposal in respect of those funds – which, up till then, it did not have – for the attainment of its objectives'.[53]

The decision of the national authority on which the Council's listing is based does not need to follow any formal requirements. The Court has held, for example, that it may be adopted by a government authority or by a judicial one, and that it is not necessary for it to be published or notified to the target for it to validly base the inclusion of a person on the list of restrictive measures.[54] This means that the decision may be one adopted by a public prosecutor in the course of investigations (as opposed to a final judgment delivered by an independent court), as well as a decision taken at political level.[55] Thus, the Court confirmed that the Council could validly freeze the assets of Al Aqsa, a Netherlands-based organization that allegedly transferred funds to organizations which support terrorism, based on a decision by the Dutch Minister of foreign affairs.[56]

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48 *Kadi II*, para. 28.
49 *Ibid.*, para. 29.
50 *Ibid.*, paras 144–148.
51 Case C-550/09 *E and F* ECLI:EU:C:2010:382.
52 Case C-550/09 *E and F* AG Opinion para. 34.
53 Case C-550/09 *E and F* para. 76.
54 C-539/10 P and C-550/10 P *Al Aqsa* ECLI:EU:C:2012:711 para. 71.
55 But *see* previous paragraph concerning decisions by third countries.
56 C-539/10 P and C-550/10 P *Al Aqsa* ECLI:EU:C:2012:711.

Individuals may support terrorist organizations also by providing space for the meeting, logistic support, etc. This is usually linked to financing.

In *Kadi II*, the Court held that the uncertainty on whether the planning sessions for the terrorist attack took place in Kadi's bank did not make the linking of Kadi to terrorism invalid in the abstract, even though the Council would have to justify with concrete evidence its suspicions.[57]

Even though not a judgment about EU restrictive measures, the *HT* case sheds light on what activities, instead, do not constitute material support to terrorism.[58] HT had refugee status in Germany but was suspected of taking part in terrorist activities because he had collected donations on behalf of the Kurdistan Workers Party (PKK) and, on occasion, distributed a periodical published by the PKK. The Court found that, with regard to his participation in legal meetings and manifestations such as the celebration of the Kurdish New Year and the collection of funds for that organization, 'the fact that he carried out such acts does not necessarily mean that he supported the legitimacy of terrorist activities' (nor these are terrorist acts in themselves).[59] For that reason it was not obvious that this individual constituted a threat to Germany's national security.

3.3 Association by family ties

Occasionally, as a matter of facts victims of sanctions suffer consequences by way of (sometimes involuntary) association with the target of measure: this is the case, for example, of their spouses.

This entails a form of 'objective responsibility', whereby someone is de facto punished not for something they have caused, but for someone else's (alleged) actions. The wives and children of Mr Yusuf and of Mr Ali (the bank accounts of the two men were frozen by a sanction) were made dependent, for their subsistence, on the Swedish welfare system as they could not access money[60] (the sanctions would be definitely annulled only several years later, that is with the *Kadi II* judgment).

This situation, however, is redressed by judicial intervention. This was the case for example of Ms M, A and MM, spouses of persons targeted by EU sanctions (as a result of UN Security Council listing).[61] Bar the technicalities, in the case litigated before the House of Lords and the CJEU, an essential question was whether EU law allowed to freeze social security and assistance benefits due to

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57 *Kadi II*, para. 149. The Court stated that the General Court had been correct in annulling the sanctions.

58 Case C-373/13 *HT v. Land Baden-Württemberg* ECLI:EU:C:2015:413.

59 *Ibid.*, para. 91.

60 T-306/01 ECLI:EU:T:2005:331.

61 In case C-340/08 M and Others *v.* HM Treasury ECLI:EU:C:2010:232.

the spouse of a person included in the list. The CJEU held that the freezing of social benefits was not allowed. The reasoning was predicated, essentially, on functional grounds: the money due to the spouses was not sufficient (in abstracto) and was not used (in the specific circumstances of the case) to finance terrorism, and, for this reason, it did not benefit the intended target of the restrictive measures.

4 AN ANALYSIS OF THE CASE LAW

4.1 The material commission of a terrorist act: A matter of evidence

The first concentric circle displays a maximal degree of 'proximity': the supposed material perpetrator of a terrorist act is, the person, group or entity affected by the terrorist sanctions. This is not to say that the link between the act and the supposed terrorist is always clear. Despite the legal definition of what constitutes a terrorist act and hence a terrorist offender provided by the EU, the decision to establish this link is largely imbued with the subjectivity of political interest and contextual factors, as mentioned in section 2.

The question the Court is called to answer is not whether something is terrorism,[62] but rather how – i.e., by which procedures, based on what evidence, provided by whom – the Council can prove the commission of the alleged terrorist act. Most of the court's assessments have in fact focussed on procedural aspects.[63] As highlighted by the literature, both the *Kadi* saga[64] as well as the *Hamas* case[65] illustrate this.

By focussing on the abstract, procedural dimension (as opposed to the substantive question of what evidence is sufficient to prove the commission of an act), two areas of tension can be identified. The first relates to the acquisition of evidence. The fact that a decision by a national authority is 'sufficient' becomes problematic. The Council does not have the power to demand insight or to review the grounds, the evidence, and hence the 'proximity' criteria on which the listing proposition is based upon. The intelligence information is held by national intelligence agencies (as opposed to a European agency such as Europol), and it is rarely shared, even when it comes from a Member State and when the restrictive measures result in litigation in front of Courts.[66] *This implies that the link between*

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62 Galli, *supra* n. 10, at 43 ss; Cameron, *supra* n. 10; Sullivan & Hayes, *supra* n. 6; De Goede, *supra* n. 10, at 499 ss.

63 Sullivan & Hayes, *supra* n. 6; Mitsilegas, *supra* n. 12; Vermeulen, *supra* n. 9, at 188.

64 Mitsilegas, *supra* n. 12, at 733 ff.

65 De Goede, *supra* n. 25, at 336 ss.

66 V. Abazi & C. Eckes, *Closed Evidence in EU courts: Security, secrets and access to justice* Com. Mkt. L. Rev. 753 ss. (2018), doi: 10.54648/COLA2018069.

the commission of the act and the subject of terrorist sanctions is not established by the Council itself, and that the quality of this link cannot always be verified. As the scholarly literature has extensively noted, and despite the evolution in procedural safeguards,[67] this process is marked by evidentiary 'secrecy and the predominance of the executive'.[68] Coupled with the generally deferential approach of the Court on the Council's assessment of evidence *in concreto*, it contributes to the expansion of executive powers,[69] perhaps at the expense of substantive, as opposed to merely procedural, protection.[70]

The second area of tension relates to the diverging requirement for evidentiary standards when it comes to a first inclusion on the list as opposed to the decision to *maintain* a target on the EU list. It shall be recalled that reliance on the decision of a competent national authority is a prerequisite only for the first inclusion on the EU list, not for the decision to renew the same decision. As such, the Court has diluted the quality of the evidence required.

4.2 Financial and material support

The second concentric circle includes actors that are linked to terrorist organizations by (allegedly) financially and or materially supporting them. The fight against terrorist financing and against material support to terrorist organizations can be considered central to counter-terrorism strategies. However, in this circle, a degree of separation between the addressee of a sanction and the actual perpetrator of a terrorist act exists. At times, such a separation can be very significant indeed, as in the case of an individual distributing periodicals or organizing events in Germany for the benefit of a Kurdish (terrorist) organization (the facts giving rise to the judgment in *E and F*). The resulting distance from the 'centre' of the circle reveals problematic implications for the targeted individuals, of the kind highlighted by previous scholarship on the topic (in addition, the same procedural issues discussed for the previous circle remain).

This second concentric circle notably leads to stigmatization of a wide group of people that is detached from the 'centre' of the circle. By 'criminalizing by association' and too broadly labelling individuals, exclusion and discrimination of particular societal groups is exacerbated.[71] By the stigma of the label terrorist,

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67 As mentioned, e.g., for decisions issued by third countries' authorities.
68 Mitsilegas, *supra* n. 12, at 735.
69 Jarvis & Legrand, *supra* n. 9, at 199 ss; Schneider, *supra* n. 8, at 261 ss.
70 *See* Lonardo, *supra* n. 1; contra S. Poli, *The Right To Effective Judicial Protection With Respect To Acts Imposing Restrictive Measures And Its Transformative Force For The Common Foreign And Security Policy*, 59 Com. Mkt. L. Rev. 1045, 1079 (2022), doi: 10.54648/COLA2022072.
71 Sullivan & Hayes, *supra* n. 6, at 88.

groups are not only politically and financially but also societally and personally cut off. In addition, international NGOs and charities, and particularly smaller organizations are heavily impacted by listing based on association through financial or material support.[72]

It is inevitable that the notion of terrorism – already inherently political rather than factual – is stretched when supporters or aids are considered equal to material perpetrators of terrorist acts, leading to the risk of 'overcriminalization' of terrorism.[73] One may argue that targeting material and financial supporters of terrorism guarantees so much discretion to competent authorities as to give EU institutions too much leeway to adopt restrictive measures. It has been maintained that one of the consequences of the *Kadi* saga was the legitimization, in principle, of the targeting based on accusations of financially or materially aiding terrorism.[74]

In the second concentric circle, the influence of the UN terrorism regime on the EU has been particularly strong. Sanctions against financial and material aides follow a design agreed upon outside EU structures, which in practice 'enabled the UN to exercise a very significant degree of influence over the EU's own asset freezing policy'.[75]

Furthermore, in the second concentric circle, targets might be too distant from the 'centre' for the EU to assess if they actually support a terrorist organization. We enter here the domain of 'speculative security'.[76] This raises a practical issue: how to collect the intelligence collection necessary to prove the link, as it is not something for which competent authorities can simply rely on spontaneous information provided, for example, by banks. There is also a conceptual issue: the difficulty to neatly separate between terrorist and non-terrorist acts in this grey area might offer backing to the view that restrictive measures operate a shift from targeted criminalization to 'generalized surveillance'.[77]

Hence, individuals that are targeted by reasons of financially or materially aiding a terrorist organization are affected by substantial othering, i.e., the exclusion from society and labelling as subordinate to society/ alternatively.[78] Even if the allegations are proven wrong and the sanctions annulled or repealed,

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72 *Ibid*., at 101.
73 Mitsilegas, *supra* n. 12, at 733 ff.
74 De Goede, *supra* n. 10, at 499 ff.
75 S. Leonard & C. Kaunert, *Combating the Financing of Terrorism together? The Influence of the United Nations on the European Union's Financial Sanctions Regime,* in *The Influence of International Institutions on the EU : When Multilateralism Hits Brussels* 111-134, at 121 (O. Costa & K. Jorgensen eds, Palgrave Macmillan 2012).
76 M. De Goede, *Speculative Security: The Politics of Pursuing Terrorist Monies* (University of Minnesota Press 2012).
77 Mitsilegas, *supra* n. 12, at 733 ff.
78 De Goede, *supra* n. 25, at 338.

individuals are stigmatized and, one might venture to say, pushed to the periphery of society. Here, othering 'affects a large group of individuals. As revealed in the *Abdelrahman* decision, the sanctioning of alleged financial or material supporters of terrorism can also lead to detrimental effects of othering through suspicion that accompany the public designation of the persons covered as being associated with, for example, a terrorist organization'.[79] Because the real targets in the second concentric circle rarely ever have large financial capacities which would render sanctioning them effective, 'the objective of such listing orders cannot be so much the prevention of the financing of acts of terrorism as it is the societal exclusion and symbolic banishment'.[80]

4.3 Association by family ties

In the third – and furthest from the centre – concentric circle, the proximity is so tenuous that the imposition of sanctions would be arguably unfair (for a similar point, related to country sanctions, *see* AG Mengozzi opinion in *Pye Phyo Tay Za*[81]). A natural child does not choose the parents, siblings do not choose each other.[82] Yet sanctions, albeit not imposed directly on (for example) children, do have negative effects for them as a matter of fact. As far as terrorist sanctions are concerned, in this circle there are not the addressee of restrictive measures in a technical sense, but rather 'victims': people who suffers the ill-consequences of a measure despite not being formally targeted.

The case law shows that there is a gendered dimensions of terrorist listing. The Court recognized that the freezing of funds 'seriously disrupts both the working and the *family* life of the persons covered',[83] thus affecting not only the targets, but also those with a level of proximity/dependence on them. Sullivan and Hayes claim that by 'criminalizing the most basic of activities (such as sharing of food and other material resources) between family members [...] the asset-freezing regime severely interfered with and disrupted the lives of spouses and other family members of blacklisted individuals'.[84] The criticism is certainly valid and remains true, even though the case law has offered a form of judicial redress. Thus, in *M and Others* the Court has taken a pro-individual, restrictive interpretation of what a sanction actually can entail. It confirmed that social assistance,

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79 C-239/12 P *Abdelrahman* EU:C:2013:331, para. 70.
80 De Goede, *supra* n. 10, at 501.
81 Case C-376/10 P para. 40.
82 An adoptive child might. Spouses often choose whom to marry. So a distinction ought to be drawn between cases where the family link is chosen and when it is not.
83 C-340/08 M and Others *v.* HM Treasury (emphasis added).
84 Sullivan & Hayes, *supra* n. 6, at 93.

for example, must not be affected by sanctions. This is not to suggest that families of individuals subject to terrorist sanctions are no longer subject to stigmatization and other effects of sanctions, but simply that the case law of the CJEU has tried to limit some of the practical effects of such sanctions. Moreover, the social stigma of terrorist sanctions is so strong that the Court's case law makes it clear that an applicant may annul the sanctions even when the name has been removed from the list. In a sense, removal of a wrongfully included name in a blacklist is a right 'as a matter of principle', that remains even when those sanctions do not apply anymore.[85] Similar to the stigmatization through the second concentric circle, this 'might contribute to stigmatization and the creation of suspect communities'.[86]

5 CONCLUSION

It is correct that, '[b]lacklisting must be understood and analysed in terms of its symbolic function of banishment and exclusion, which simultaneously redraws the boundaries around normal, valued, ways of life',[87] but while a close scrutiny of the case law of the CJEU and of its evolution confirms some of the findings of earlier literature, others are put into perspective.

When it comes to evidentiary standards, the Court tries to strike an appropriate balance between the need to ensure the effectiveness of EU sanctions and the protection of fundamental rights. This is done by imposing a muscular duty, upon the Council, to check that evidence is not obtained in violation of EU fundamental rights (especially when such evidence comes from a third country authority), all while not exceedingly or formalistically constraining the sources from which the Council can obtain evidence. Whether it succeeds in doing so remains open to debate, particularly in light of the frequently undisclosed nature of intelligence information as well as the divergent national evidentiary standards from which said information emerges.

The further we move from this first concentric circle, the more we move toward 'speculative security' and the more, the issues with fundamental rights become pressing.[88] In the second concentric circle, the link between commission of a terrorist act and de-facto targets starts loosening up, and it becomes purely abstract in the third concentric circle. This is how the EU has decided to pursue its counterterrorism policy, and the Court has been, by and large, deferential to this choice. In the case of the third concentric circle (negative effects felt by family

[85] Vermeulen, *supra* n. 9, at 67.
[86] Jarvis & Legrand, *supra* n. 9, at 202.
[87] De Goede, *supra* n. 10, at 500.
[88] De Goede, *supra* n. 76.

members), however, the criticisms moved by previous commentators could be nuanced, by considering that the Court has significant judicial redress to limit the practical negative impact of sanctions over people who have simply social and family ties with terrorists and are heavily stigmatized under the current regime. As in other sanctions regimes, the Court has also imposed significant constraint on the Council, by requiring that evidence from third country can only be relied upon if it complies with EU fundamental rights.[89]

[89] Poli, *supra* n. 70, at 1079.