The legitimacy of secret evidence in EU actions for annulment of targeted sanctions

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Introduction

Introduction to the research question

The General Court (EU) recently amended its Rules of Procedure. The amended version of the procedural rules will enter into force on 23 July 2015.[1] One of the most notable changes is the addition of a new article, Article 105, in which a 'procedure for treatment of information or material pertaining to the security of the Union or of its Member States or to the conduct of their international relations' is laid down. The procedure enables the General Court to take evidence into account that is submitted by one party but that cannot be disclosed to the other main party. While assessing the secret evidence on its secrecy and relevance for the outcome of the case the General Court should take into account that the other main party is not fully able to make his views known. At first sight and in theory the procedure could apply in all kinds of direct actions before the EU Court, but the Explanatory Notes make clear that the procedure is introduced for the use of secret evidence in targeted sanctions cases against individuals at EU level.

The abstract description of 'targeted sanctions cases against individuals at EU level' may best be illustrated by recent newspaper headlines like 'EU strengthens sanctions against the Syrian regime and its supporters'; and 'EU imposes Ukraine sanctions after deadly Kiev clashes'. The latter illustrates one of the most recent political conflicts to which the European Union responded by imposing sanctions. Since Russia's annexation of Crimea in March 2014 the EU has blacklisted a large number of senior Russian officials, separatist commanders and Russian firms and state banks accused of undermining Ukrainian sovereignty.[2] Sanctions referred to in this regard are known as 'targeted' or 'smart' sanctions. In contrast to 'general' trade sanctions and embargoes targeted sanctions imply asset freezes or travel bans on certain individuals, entities or groups and/or embargoes on certain economic sectors or products in order to fight terrorism, to prevent the proliferation of weapons of mass destruction, and to uphold respect for human rights, democracy, the rule of law and good governance.

The system of targeted sanctions against individuals[3] works by identifying individuals as targets which are subsequently placed on a so-called blacklist. Individuals were originally often government

[1] Rules of Procedure of the General Court of 4 March 2015 (*OJ* 2015, L 105/01). According to Article 227 the rules shall enter into force on the first day of the third month following their publication. The rules were published in the OJ on 23 April 2015. Therefore, on 23 July 2015 the rules shall enter into force.
[2] 'How far do EU-US sanctions on Russia go?, *BBC* 15 September 2014, available at: http://www.bbc.com/news/world-europe-28400218 (last visited: 16 June 2015).
[3] In this thesis the term 'individuals' refers to both natural persons and legal entities.

representatives or state owned companies. However, especially since 9/11 the rise of inter-state activities of non-state actors has led to targeted sanctions being imposed against terrorist suspects and financers by the UN Security Council, the EU and the United States. In this regard it should be noted that the EU has intensified its fight against terrorism after the attacks of 9/11. The Council of the EU (Council) has adopted two Framework Decisions that constitute the basis of the EU's counter-terrorist policy. The framework not only addresses the need for effectively prosecuting terrorist offences by all EU Member States but also the rapid use of new technologies. In particular the internet is used for inspiring and mobilising local terrorist networks and individuals in Europe, the promotion of committing terrorist offences, and for recruitment and (virtual) training for terrorism.[4] At the same time the EU is an area of increasing openness in which free movement of people, ideas, technology and resources is highly valued, which is specifically emphasized in the European Union Counter-Terrorism Strategy of 30 November 2005.[5] Taking in mind that terrorism is mainly spread via the internet, the Union is particularly vulnerable for terrorists abusive to pursue their objectives, which makes fighting terrorism indispensable. Imposing targeted sanctions against terrorist aspects is one way of doing so.

However, this trend has caused a number of serious problems within the EU. In the words of Cameron: 'It is one thing to direct a sanction against government ministers. It is another to direct a sanction towards a person or entity suspected of belonging to, or supporting, a terrorist group.'[6] Senior officials may be well known, but identifying individuals in the inter-state and isolated terrorism network might require the use of different types of sensitive intelligence, which triggers the problems of effective and fundamental human rights protection and fair trial. Such sensitive intelligence by which terrorist suspects are identified in order to blacklist them enables the Council of the EU (Council) to actually impose sanctions on individuals. Main problem in this regard is that intelligence often cannot be publicly disclosed to the targeted individual. Indeed, the EU would rather support than fight terrorism if suspected terrorists would know in detail the source of intelligence and the way in which the information was gathered, which might be damageable for activities and operations in the fight against terrorism.[7] That would in other words jeopardize an effective fight against terrorism and the effectiveness of sanctions.

Research question & sub questions

The issue of secrecy of intelligence in preparing targeted sanctions got attention in Article 105 of the amended Rules of Procedure of the General Court, referred to above. The General Court is now able to

[4] Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism , Preamble at 3 and 4.
[5] Council document 14469/4/05 REV 4 of 30 November 2005, The European Union Counter-Terrorism Strategy.
[6] Cameron (ed.) 2013, p. 5.
[7] Turner & Schulhofer 2005 and Chinen, *Quinnipac Law Review* 2009/1, p. 112-128.

assess secret intelligence that is submitted by the Council without disclosure to the targeted individual that is challenging the imposed sanction. By considering the lawfulness of the procedure some alarm bells start to rankle. Indeed, effective judicial protection indicates that both parties should have an equal contribution in legal proceedings and should equally be able to know the case against them and to respond to the presented evidence. Furthermore, to what extent is a court impartial and objective if it has seen evidence from one party that is not challenged by the other main party? This issue of the legality of the procedure at issue has resulted in the research question for this thesis by focusing on one particular aspect of a fair trial:

Is the procedure of Article 105 of the recently amended and adopted Rules of Procedure of the General Court, in which the Court is enabled to consider secret evidence submitted by one party without disclosure to the other main party, in accordance with Article 6(1) ECHR and in particular the adversarial principle when this procedure is applied in actions for annulment of targeted sanctions?

In order to answer this research question the following sub-questions are formulated:

1.) What is the current role and status of intelligence information in the preparation of targeted sanctions at EU level?
2.) In what way should the General Court deal with undisclosed evidence in targeted sanctions cases according to Article 105 of the draft Rules of Procedure?
3.) What is standard and scope of judicial review carried out by the General Court in actions for annulment of targeted sanctions?
4.) In what way is the assessment of undisclosed evidence by domestic courts in civil proceedings regulated in the UK and to what extent is this procedure similar to the one proposed by the GC? What can we learn from the UK procedure and what are its shortcomings?
5.) Is the derogation from the adversarial principle in the procedure laid down in Article 105 in accordance with Article 6(1) ECHR?
6.) What is meant by procedural justice and procedural efficiency and what does the balance between these principles say about the fairness of the procedure of Article 105?

Research methods & overview of the chapters

This thesis is a legal research in which an analytical, comparative and legal philosophical method is used. On the basis of literature the practice of the use of intelligence in the preparation of targeted sanctions will be discussed in *chapter 1*.
Chapter 2 discusses into detail the procedure of Article 105 of the new Draft Rules of Procedure of the

General Court, using the General Court's Explanatory Notes and a variety of official Council documents.
In chapter 3 the standard and scope of judicial review in targeted sanctions cases before EU courts will be researched, using mainly case law from the European Court of Justice and the General Court. The standard and scope of judicial review in this regard will determine whether it is necessary for the General Court to take secret evidence into account in the first place.
In anticipation of core chapter 5, *chapter 4* will discuss the so-called Closed Material Procedure for the treatment of secret evidence in civil proceedings in the United Kingdom by focusing on the first case in which the United Kingdom Supreme Court initiated a Closed Material Procedure: the case *Bank Mellat v. Treasury (No. 1)*. Subsequently, chapter 4 will compare this UK procedure with the procedure of Article 105. This chapter is built on literature, official documents of the UK Government and case law of the United Kingdom Supreme Court.
On the basis of case law of the European Court of Human Rights with regard to Article 6(1) ECHR and the right to an adversarial procedure it will be scrutinized in *chapter 5* whether the General Court has correctly understood the Strasbourg Court with regard to lawfully abrogating from this principle.
Chapter 6 exchanges the legal analytic perspective on the procedure of Article 105 for a normative view of procedural justice. In this chapter the fairness of the procedure will be discussed on the basis of the relationship between procedural justice and procedural efficiency. John Rawls' 'A Theory of Justice' constitutes the basis of this chapter.
Lastly, a conclusion will follow in which an answer to the research question will be formulated.

Chapter 1: 'Intelligence based' targeted sanctions

1.1 Introduction

Almost implicit to the system of targeted sanctions is the use of intelligence. Experience from the US blacklisting system has shown that the formal basis for 'listing proposals' made by EU Member States is mostly a public source, like company registers or newspapers reports. However, intelligence, such as embassy reports, can be the underlying source of the formal report. Intelligence, defined as information collected, analysed and disseminated by intelligence agencies to provide assistance to policymakers and administrative authorities in taking measures relevant to the protection of national security has thus become of crucial importance in the context of targeted sanctions especially in the context of counter-terrorism.[8] *Main problem in this regard is that intelligence is often of such sensitive nature that it cannot be publicly disclosed to the targeted individual. While secret intelligence actually enables the Union and its Member States to fulfil its positive obligation to protect 'their people' and 'their human rights' by adopting targeted sanctions on individuals posing a threat, the use of intelligence is a threat to the norms of a fair trial and the human rights of the targeted individual. Specifically, practice has shown that the General Court is unable to carry out effective judicial review of targeted sanctions regulations since the Council relied on evidence that as such and the way by which it was gathered is secret. This chapter focusses on the current practice of targeted sanctions and the use of secret intelligence. Paragraph 2 sets out the current framework for targeted sanctions within the EU. Paragraphs 3 and 4 discuss the status and role of transnational secret intelligence in the preparation of sanctions regarding EU autonomous sanctions. The last paragraph will provide insight into the current legitimacy of secret intelligence before national courts of EU Member States.*

1.2 Targeted sanctions within the EU legal order

Within the EU legal order two types of targeted sanctions, or sanctions regimes, can be distinguished. Both regimes can be distinguished using the regulatory level on which sanctions are prepared. First of all, the Union implements targeted sanctions that are adopted by the UN Security Council (UNSC). These sanctions are either directed against third country regimes or against the Al-Qaeda or Taliban terrorism regimes. The other sanctions regime within the Union is EU autonomous sanctions. EU autonomous sanctions are not an automatic copy of UNSC resolutions but contain the Unions own list of targeted individuals. They come into play either in case the EU decides to apply sanctions that are more restrictive

[8] Ojanen 2013, p. 258.

than UN sanctions or in case the UNSC disagrees, for example in the situations of Syria and Ukraine. It should be noted that the term 'autonomous' does not honour its initial meaning, since EU autonomous sanctions mostly follow simultaneously with or after the UN or the US or both have imposed sanctions, by Portela noted as: 'UN legitimation and US backing.'[9] By illustration, EU sanctions regarding Belarus, Zimbabwe, Ukraine and Russia were imposed almost simultaneously with US sanctions and EU sanctions against Iran and North Korea were only imposed by the EU after not only the US but also the UNSC had targeted these regimes. Furthermore, the EU still mostly refers to (previous) UNSC resolutions for political legitimation in its autonomous sanctions. Along similar lines and already mentioned, in adopting autonomous sanctions the Union is heavily dependent on security and intelligence services of the US.[10] However, this does not preclude that the two regimes differ regarding the listing procedure, which is of particular importance for the sake of this thesis.

In literature it is noted that the EU prefers UN implementing sanctions regimes, because they do not require EU unilateral political decision-making procedures. The fact that EU autonomous sanctions are more flexible with regard to substantive modifications than UN sanctions, which can hardly be changed by EU Member States, is taken for granted.[11] In order to benefit from 'the best of both', the EU more often implements UN sanctions that are autonomously complemented by the Union instead of taking a separate decision for sanctions that go beyond UN sanctions lists. For the sake of completeness, EU Member States could also composite national targeted sanctions lists. By illustration, both the Netherlands and Sweden have adopted national targeted sanctions. In that event national sanctions lists can be complementary but not an alternative to EU sanctions lists.[12] In contrast to UN implementing and EU autonomous sanctions which can be challenged before the Union Courts[13], national targeted sanctions can solely be challenged before national courts.[14]

1.3 Composite listing procedure of EU autonomous sanctions

1.3.1 Legal framework for adopting EU autonomous sanctions

[9] Portela 2014. See also: De Baere & Wimmer, *SEW* 2014/119, p. 323.
[10] See next paragraph.
[11] Beaucillon 2013.
[12] Cameron 2013, p. 37.
[13] By emphasizing the rule of law the ECJ stated in *Kadi I* that the European Courts' jurisdiction 'covers all Community acts, even if they are designed merely to give effect to resolutions adopted by the UN Security Council', see: ECJ 3 September 2008, Joined Cases C/402 & 415/05P, (*Kadi I*), par. 326.
[14] In the situation in which a national decision from a national authority forms the basis of a Council Decision it is of great importance that national administrative law provides for the possibility of full national review, whereas the EU courts will not assess the lawfulness of such decision. In the absence of new facts or changes circumstances the Council is allowed to blindly follow the national decision regarding including a person on the (EU) list at issue. See: ECJ 15 November 2012, joined cases C-539/10 & 550/10 P, (*Stichting Al-Aqsa/Council)*. See also Cameron 2013, p. 22, in which the issue of 'composite decision-making' is pointed out.

The use of intelligence with regard to targeted sanctions regimes comes into play during the listing procedure at both UN and EU level. In other words, intelligence is the source for listing proposals made before both the relevant UN Sanctions Committee as the responsible body for composing UN sanctions lists and before the relevant Working Party of the Council as the responsible body for composing EU autonomous sanctions lists. In order to expose in greater detail the role of intelligence in the drawing up of sanctions lists the composite listing procedure for EU autonomous sanctions will be set out, since the listing decision procedure for this type of sanctions regime is more transparent compared to UN sanctions regimes.

EU autonomous sanctions are adopted within the Common Foreign and Security Policy (CFSP) of the EU in consistency with the CFSP objectives (Article 21 TEU). Since the entry into force of the Lisbon Treaty (2009) targeted sanctions are adopted on the legal basis of Article 215 TFEU. Paragraph 1 covers trade restrictions against third States and paragraph 2 (all) 'restrictive measures against natural and legal persons.' It must be noted that the distinction between the two paragraphs is not based on the kind of regime ('third country' or 'terrorism'). A referral to Article 215(2) TFEU only implies the absence of an automatic link between the targeted individual and the third country regime, but can be applied to 'both measures where persons are listed in the framework of measures against […] third states, as well as where measures target individuals in their own right'.[15] The EU's targeted sanctions policy is laid down in four internal documents: '*Basic Principles* on the Use of Restrictive Measures'[16], 'EU *Guidelines* on implementation and evaluation of restrictive measures in the framework of the EU CFSP'[17], in which '*Recommendations* for [particularly] working methods for EU autonomous sanctions are included', and lastly the 'EU *Best Practices* for the Effective Implementation of Restrictive measures'.[18]

1.3.2 Listing procedure

The Union's composite listing procedure for autonomous sanctions can be briefly described as follows:

1. As soon as the Union has exposed its 'political intention' to adopt EU autonomous sanctions in a Common Position, first, a decision needs to be taken by a 'national authority'[19] of an EU Member

[15] In practice the Council usually refers to Article 215(2) TFEU regarding terrorism sanctions regulations and to Article 215 TFEU as such regarding third country sanctions. This is largely due to the fact that third country sanctions regulations consist of a so-called 'objective part', which refers to embargoes and an 'individual or personalized part', which refers to economic restrictions against individuals or entities. See: Van Elsuwege, *Contemporary European Research* 2011/7, p. 488-499.
[16] Council document 10198/1/04 REV of 7 June 2004, Basic Principles on the Use of Restrictive Measures (Sanctions) (*EU Basic Principles).*
[17] Council document 15579/03 of 3 December 2003, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common foreign and Security Policy *(EU Guidelines).*
[18] Council document 11679/07of 9 July 2007, EU Best Practices for the effective implementation of restrictive measures *(EU Best Practices).*
[19] In principle the 'national authority' should be a judicial authority, but this is not always the case: Eckes & Mendes, *European Law Review* 2011, p. 651-670.

State in which the individual at issue is deemed as targeted.[20] Proposals for listings should be clear, unequivocal, and they should include individual and specific details (including name, place and date of birth resp. registration etc.) for each listing set out in the Common Position.[21]

2. The relevant regional Working Party of the Council discusses made proposals, which means that, most importantly, the information underlying the proposals is being evaluated and assessed. Within this phase is decided by consensus whom is to be listed and on the basis of what reasons. Furthermore, regular review is being prepared and recommendations for listings or de-listings are being made.[22] Before approval by the Council specific and concrete terms for each sanction will be negotiated in the Foreign Counsellors Working Group (RELEX). After being submitted to the Committee of Permanent Representatives (COREPER), the listings are finally agreed upon in a unanimous decision of the Council.
3. Lastly, sanctions are legally finalized in legal acts adopted by the Council.[23] The procedure for adoption by the Council firstly requires a CFSP decision (a former Common Position) containing the Union's(political) intention to adopt restrictive measures.[24] Sanctions, such as arms embargoes or restrictions on admission, are implemented directly by national authorities, whereas these areas go beyond the supranational competence of the Union. In case of economic or financial sanctions affecting the EU internal market, like the freezing of funds, these sanctions are then adopted by a Council regulation.[25] Such Council regulation, adopted by qualified majority, on a joint proposal from the high Representative of the Union for Foreign Affairs and Security Policy and the Commission, is binding and directly applicable throughout the EU.[26]

Adopted Council decisions and regulations are subject to review, monitoring and evaluation. The latter two should ensure effective and prompt implementation and enforcement of targeted sanctions in all EU Member States.[27] Exchange of information and experience between EU Member States and the relevant EU bodies is indispensable in this regard. Review of targeted sanctions can have different reasons. First of all, the expiration or review date requires review within an appropriate period of time.[28] In addition to these 'regular review moments', de-listing requests, made by targeted individuals or entities may require

[20] Article 29 TEU. With regard to the EU's autonomous counter-terrorist sanctions the procedure is set out in Common Position 931/2001/CFSP of 27 December 2001 on the application of specific measures to combat terrorism. According to Article 1(4) a 'competent national authority' takes a 'decision' entailing that the individual is a terrorist suspect. It should be noted that listing proposals could also come from the EU's External Action Service (EEAS).
[21] EU Guidelines, paras. 5-8.
[22] See for example the mandate of the 'Common Position 931 Working Party' established for the fight against terrorism (Council Document 10826/07). See also in this regard: Council Regulation (EC) No. 2580/2001 and Common Position 2001/931/CFSP and also Eckes 2012, p. 179.
[23] EU Best Practices, paras. 1-4.
[24] Article 29 TEU.
[25] EU Guidelines, par. B7.
[26] Idem. See also: Eckes 2000, p. 27.
[27] EU Guidelines, Chapter IV.
[28] EU Guidelines, par. 34.

(at least) reconsideration of listings. Lastly, in case a targeted sanction is successfully challenged, the Council may review and adapt the sanctions in order to comply with the legal requirements ordered by the EU courts. Since the General Court (GC) has ruled in *Othman* that judgments declaring the nullity of a targeted sanction only take effect after the 2 months and 10-days appeal period[29], the Council is allowed time to 'rewrite' the measures at issue.

1.4 (Transnational) cooperation and intelligence sharing

As is shown in the previous paragraph, the composite listing procedure of EU autonomous sanctions, in particular phase II, requires information sharing between the Council's Working Party and national authorities of EU Member States. Specifically, he transnational nature of terrorism means that inter-state coordination and intelligence sharing between Member States or between Member States and third countries has become more and more important. However, disclosure of the shared information is 'another story' with the following associated consequences.

Both UN and EU autonomous sanctions adopted in the context of counterterrorism are particularly based on intelligence that is possessed by the US.[30] Condition for cooperation and intelligence sharing with (in particular) the US is therefore often 'a promise of confidentiality'. Thus, France may refuse to disclose information, not because it considers it as secret, but solely because the US has shared intelligence on the condition that France will also treat it as secret.

This so-called 'tied hands' argument, often made by EU Member States, is also brought forward if solely 'national intelligence' is at stake. It is indeed frequently the case that information is nationally classified which precludes disclosure of intelligence. In June 2011 the Council adopted 'Security rules for protecting EU classified information'[31], which basically regulates that the (national) author has full control over disclosure by the EU of the relevant information. Hence, information can only be disclosed, de- or re-classified with the content of the author. In any case the ECJ determined that the latter exception does not give EU Member States 'a general and unconditional veto right' to obtain disclosure.

What's more, the information referred to *in phase II* of the listing procedure must be understood as facts and the relevant (national) law on which the national authority based its listing proposal.[32] Along similar

[29] GC 11 June 2009, Case T-318/01 *(Omar Mohammed Othman/Council and Commission),* par. 98.
[30] Fabbrini 2013, p. 294 and Curtin 2013, p. 316. See also: Chesterman, *Journal of International Law* 2006, p. 1118.
[31] Decision 2011/292/EU of the Council of 31 March 2011 on the security rules for protecting EU classified information. In July 2011 EU Member States adopted within the Council but not officially as the Council the 'Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union' of 8 July 2011 which is drafted along the same lines.
[32] Eckes 2012, p. 180, referring to the procedure set out in Council Common Position 2001/931/CFSP and in the working methods of the CP 931 Working Party.

lines, a 'national assessment' of the term 'relevant information' implies that the extent to which information will be shared due to its relevance is member state dependent. Apart from national law and politics that might complicate disclosure, it seems that, overall, EU Member States are reluctant to share information with the Union since it is questionable whether they will receive similar information in return and will actually benefit from it.[33] The 'what's in it for me?' mind-set of the 'big, intelligence producing EU states' seems to have resulted in a practice of providing low grade intelligence information which only consist of details to the extent necessary.[34]

Abovementioned reasons for secrecy of intelligence and the reluctance of EU Member States to submit their 'actual' reasons for listing proposals to the Council mean that the Council is in such case not able to check the source and reliability of intelligence although they are bound to adopt targeted sanctions on the basis of it.[35] Subsequently, intelligence cannot be released to both EU courts and the targeted individuals in the case of litigation. Consequently, EU courts are not able to carry out sufficient judicial review and the applicant is not provided with sufficient information in order to make his views known about the allegations against him. These issues will be further discussed in the next chapter.

1.5 Conclusion

The reason for proposing a procedure for the treatment of secret evidence by the GC is the confidentiality claim which is ‘attached to’ intelligence on which listing proposals are made. Indeed, the country of which intelligence is originating from often requests confidentiality in return. However, intelligence is indispensable for the preparation of both UN and EU autonomous sanctions. Especially in preparing EU autonomous sanctions it is of great importance that EU Member States that are making listing proposals submit underlying evidence to the Council's Working Party. Without such accessible evidence the Council is unable to verify the reasons for a listing proposal. Furthermore, in case of judicial review of targeted sanctions the Council cannot release the underlying evidence of listing decisions to the EU courts. The next chapter will show that since effective judicial protection requires a sufficient statement of reasons for listing decisions, fundamental rights protection of the targeted individual becomes ‘vulnerable’ with the use of secret intelligence. The extent to which secret evidence is allowed in national court proceedings differs per Member State. Whereas some EU Member States have regulated the use of secret intelligence, practice is often that national judges allow second hand information that is not revealed in court.

[33] Wetzling 2006.
[34] Cameron 2013, p. 24.
[35] Ojanen 2013, p. 258.

Chapter 2: Judicial review of targeted sanctions at EU level

2.1 Introduction

The number of targeted sanctions has significantly increased in the past two decades. As a result, more and more individuals whose financial assets have been frozen and whose names have been blacklisted used their right of effective judicial protection in requesting the GC to review the respective Council decision. Expressed in numbers, from 2010 to 2011 the number of targeted sanctions decisions within the CFSP framework more than trebled, jumping from 22 to 69.[36] *In 2012, 2013 and 2014 resp. 73, 80 and 94 cases were pending before the GC with regard to targeted sanctions.*[37] *Without access to essential evidence the GC often did not have any other option than declaring the sanctions as void. According to the GC the recently adopted procedure is mainly an implementation of the judgment of the ECJ in Kadi II. In this case the ECJ determined that legal protection afforded to targeted individuals and entities should not depend on the legal framework in which these measures have been adopted (UN or EU), or on the margin of discretion left to the EU Member States by the Security Council. This overall ground-breaking thought cleared the path for a new and unified standard of effective judicial review for targeted sanctions. In formulating the appropriate standard of review the ECJ urged for a court procedure for the treatment of secret evidence in which security reasons are taken into account and procedural rights are guaranteed at the same time. Without touching upon the lawfulness of the Article105-procedure itself, the standard and scope of judicial review determine to what extent the GC will assess the facts and reasons for listing and therefore the secret evidence. This chapter is devoted to effective judicial review in targeted sanctions cases. Before analysing the specific standard and scope of review in the context of targeted sanctions (paragraph 3), first the framework for review of EU actions for annulment is discussed (paragraph 2). The last paragraph comments on the evidence requirements implied in the Kadi II standard of review.*

2.2 Judicial review in EU actions for annulment

The action for annulment allows direct review of the legality of binding EU measures before the Union courts. Article 263 TFEU provides for the possibility for EU institutions, Member States, and natural and legal persons to request for annulment of binding acts of EU institutions, bodies, offices,

[36] Lehne 2012.
[37] An overview of cases pending before the GC in the respective periods can be found on: http://curia.europa.eu. See also: Council document 7795/14 of 14 March 2014, Draft Rules of Procedure of the General Court, p. 102.

or agencies (hereafter referred to as: author of the act).[38] Since the entry into force of the Lisbon Treaty institutional changes regarding the elimination of the pillar structure and the replacement of the European Community with the Union have impacted the action for annulment. Under the old EU treaty, the jurisdiction of the EU courts was confined to review of acts adopted within the 'Community pillar' and did not extend to acts adopted within the second pillar of CFSP or the third pillar of Police and Judicial Cooperation in Criminal Matters (PJCCM).[39] According to Van Elsuwege 'the sensitive nature of CFSP decisions and the need to respond quickly to changing circumstances arguably inspired the Member States to keep this area out of the judicial sphere.'[40]

Since the extended jurisdiction for the EU courts is formulated as an exception to the general rule mentioned earlier, it could be argued that fundamental rights protection of targeted individuals should be applied restrictively. However, in the Lisbon Declaration on Articles 215 and 75 TFEU is recalled that 'respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned.'[41] A similar line of reasoning applies in the context of UN sanctions, whereas the ECJ held in *Kadi I* that Community Courts must ensure the review of the lawfulness of all Community acts in the light of fundamental rights protected by the EU legal order as general principles of Community law, including the review of the Community measures designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[42]

The extent and intensity of review by EU courts of regulatory acts of EU institutions is depending on the scope and standard of judicial review. The *scope* or intensity of review defines which (underlying) parts of a contested act may be taken into consideration by the EU courts. The scope of review in actions for annulment is not mentioned in Article 263 TFEU. However, the ECJ stated, on the basis of Article 6(1) TEU, that the lawfulness of all community measures should in principle be fully reviewed in the light of EU fundamental rights.[43] Full review in this regard refers not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in that measure are based.[44] The *standard* of review defines certain quality or elements that determine the lawfulness of a regulatory act, which should be checked by the EU courts, with respect for the

[38] Article 263(1) TFEU.
[39] Regarding the former second pillar: GC 12 December 2006, Case T-228/02 (*PMO II*), paras. 56-59. Regarding the former third pillar: ECJ 13 September 2005, Case C-176/0, 2005 I-07879 *(Environmental crimes),* paras. 38-40 and ECJ 23 October 2007, Case C-440/05, 2007 I-09097 *(Ship-source pollution),* paras. 52-54.
[40] Van Elsuwege 2010, p. 5.
[41] Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, Declaration 25 on Articles 75 and 215 of the Treaty on the Functioning of the European Union (*OJ* 2012, C 326/13), p. 439.
[42] ECJ Kadi I, paras. 283-285, 299, 303-304, 306-308, 326.
[43] Idem, par. 326.
[44] Opinion A-G Bot in Joined Cases C‑584/10 P, C‑593/10 P and C‑595/10 *(Kadi II),* par. 34.

discretion that is left for the 'author' of the contested act. Both the scope and standard of judicial review might be restricted due to the circumstances of the case.

It should be noted that the terms *scope* and *standard* of judicial review are used interchangeably in literature, despite the (slightly) difference in meaning. The following paragraph discusses the standard and scope of judicial review in actions for annulment of targeted sanctions.

2.3 Standard setting in targeted sanctions cases

Whereas the ECJ determined in the case *Kadi I* that the constitutional foundations of the Union require judicial review in targeted sanctions cases, the scope and standard of review are established in its judgment in *Kadi II*. Even though the *Kadi saga* concerned UN sanctions implemented by the Union, the '*Kadi*-standard of review' is developed for both UN and EU autonomous sanctions. However, the application of the standard or review to either UN sanctions or EU autonomous may vary due to the different features of both proceedings. Therefore the second part of this paragraph will focus specifically on (the application of) the standard of review in EU autonomous sanctions.

In actions for annulment of targeted sanctions, the relevant EC regulations are challenged *in so far as they concern the applicant*. In other words, the applicant is solely challenging the decision to add or maintain his name on the sanctions list and not the regulation in general. As soon as the latter measures are individualized and determine that a specific individual is blacklisted, the Court intensifies its review from marginal to *full review* 'in the light of the fundamental rights forming an integral part of the European Union.'[45] The standard of full review is ensured for *all Union measures*, including UN sanctions.[46] Again, whether sanctions are UN or EU autonomous based, targeting third country regimes or individuals or entities, the same standard of review applies.[47] The review does not contest the primacy of the Security Council resolution at the international level though; only the lawfulness of the EU implementing measure will be reviewed.[48] Furthermore, the Court's full review relates to the specific circumstances of each particular case.[49]

According to the established standard the EU courts' review extends to procedural rules and rules of competence, including review of the legal basis for listing. Regarding procedural requirements, the

[45] GC 7 December 2001, Case T-562/10, HTTS, 2011 II-08087 *(HTTS/Council),* paras. 45-46, GC 6 September 2013, Joined Cases T-4212 and T-181-12, ECLI:EU:T:2013:409 *(Bateni/Council),* paras. 42-43. See also: ECJ Kadi I, paras. 326-327 and ECJ Kadi II, par. 97.
[46] ECJ Kadi II, par. 97.
[47] Eckes rightly mentioned that the ECJ did not follow AG Bot, nor did it explicitly confirm the standard is the same as in autonomous sanctions, as was assumed by the GC in Kadi II. However, the references to the case law concerning autonomous sanctions seem to imply such conclusion. Eckes 2014, *CMLR* 2014/51, p. 898. See also De Baere and Wimmer, *SEW* 2014/119, p. 324.
[48] ECJ Kadi II, par. 67.
[49] Idem, par. 102. See also ECJ 15 November 2012, Joined Cases C‑539/10 P and C‑550/10 P, *(Stichting Al-Aqsa*), paras. 139 and 140, and ECJ 15 November 2012, Case C‑417/11 P, *(Council/Bamba),* par. 53.

adequate standard of review can be described as follows. First of all, the EU courts review whether the procedural requirements during the national administrative phase of placing names of individuals or entities on the list are met. In this regard the ECJ requires that the Council discloses the evidence 'available to that authority and relied on as the basis of its decision, which is to say, at the very least, the summary of reasons provided by the Sanctions Committee.'[50] Furthermore, any listing decision must state the 'individual, specific and concrete reasons' for imposing restrictive measures.[51] Secondly, the EU courts review the substantive basis for the listing by a three-steps test.[52] As summarized by Cuyvers: 'First, at least one of the reasons given to justify listing must be sufficiently detailed and specific. Second, at least one such sufficiently specific ground must be substantiated. Third, at least one specific and substantiated ground must provide "in itself" a sufficient basis to support the listing decision. As long as at least one ground for listing meets this standard, the listing will be upheld.'[53] Under this standard, the *scope* of review extends not only to the decision of the Council but also to the underlying facts supporting the listing decision.[54]

In order for the EU courts to carry out the examination described above it is up to the Council to provide the necessary information. The ECJ explicitly mentioned in this regard that 'sometimes overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may justify non-disclosure of the evidence to the applicant.'[55] The ECJ itself prescribed the procedure which should then be followed, which is currently implemented in Article 105 of the recently amended procedural rules of the GC. Whereas Article105 will be extensively analysed in the next chapter, only a closer look to the evidence requirements according to the standard of review is provided in the next paragraph.

2.4 Kadi II evidence requirements

The previous chapter showed the standard and scope of judicial review in targeted sanctions cases before the GC, which requires (secret) evidence sharing between the GC and the Council and in turn the Council and national authorities of EU Member States. This state of affairs seems problematic for the following reasons.

[50] ECJ Kadi II, par. 111.
[51] Idem, par. 116.
[52] Cuyvers, *CMLR* 2014/51, p. 1766.
[53] Idem. The three tests are mentioned in ECJ Kadi II, par. 130.
[54] ECJ Kadi II, paras. 119 and 221.
[55] ECJ Kadi II, paras. 125-129.

With regard to EU autonomous sanctions, the GC has ruled that the principle of sincere cooperation, an internal EU principle that governs the relationship between the EU institutions and the Member States, excludes review by the Council of the decision from the national authority containing a listing proposal.[56] Therefore, since the EU courts will not provide for a substantive assessment of the 'national decision' its legality check will depend on possibilities for review provided for in national administrative law. At the same time, it is the Council that should check whether all requirements for listings are met at EU level, which implies that all relevant information should be submitted from national to EU level anyways. It can therefore be argued that the principle of sincere cooperation restricts the possibility of the Council to verify whether a national listing decision that is based on confidential evidence is justified. In that regard the Council, for example, has argued in *Fulmen* that it may decide to adopt listing decisions on the basis only of the explanatory memorandum submitted by an EU Member State.[57] The ECJ did not elaborate on this point, but decided that the Council had not obtained sufficient evidence for listing *Fulmen* for his involvement in proliferation.

Furthermore, as explained above the substantive grounds for listing are reviewed by the EU courts in three steps. Only if sufficient evidence is provided to support at least one sufficiently substantiated ground for listing, the EU courts will proceed to the third step: 'Do the reasons for listing justify imposing or maintaining a sanction?' It should be taking into account that targeted sanctions have a *preventive nature*. Therefore grounds for listing should establish that a sufficient present or future threat exists. Since this is a highly complex factual question the EU courts may tend to offer the Council a wide margin of appreciation here. As a consequence of that, it may be attractive to shift the emphasis of review to this third step. Elaborately, the Council will provide more general and easily provable grounds for listing an individual. The emphasis of review will then shift towards the third step in which the discretion for the EU authority is most probably in its favour.[58]

Lastly, application of the standard of review in EU autonomous sanctions cases might be more limited than in UN sanctions. It has been made clear by the ECJ in *Kadi II* that full review is offered, because the UN procedure did not guarantee full judicial protection.[59] As to EU autonomous sanctions the standard of review will apply in a more restricted way since the actual decision for listing is a reviewable national decision.[60] Questions concerning whether the national decision is well-founded and appropriate or whether individual rights are infringed should exclusively be brought before the

[56] GC 12 December 2006, Case T-228/02, 2006 II-04665 *(PMOI I)* and GC 23 October 2008, Case T-256/07, 2008 II-03019 *(PMOI II)*, par. 122.
[57] Joined Cases T-439/10 and T-440/10 *(Fulmen)*, par. 44.
[58] Cuyvers, *CMLR* 2014/51, p. 1773.
[59] Despite improvements at UN level such as the focal points that were established for de-listing requests (2007) - in the meanwhile replaced by an independent Ombudsperson (2010).
[60] GC PMOI I.

national courts.[61] Even though the standard of review remains the same for both UN and EU autonomous sanctions, the submitted evidence by the EU competent authority might be assessed with more deference in the latter case.

2.5 Conclusion

Judicial review of targeted sanctions cannot be 'wished away' from the GC's agenda anymore. Since the number of targeted sanctions has increased significantly in the past two decades the number of annulment cases has also raised. Actions for annulment of targeted sanctions are brought before the GC on the basis of Article 263 TFEU. Particularly, according to this article all acts of EU authorities should be adopted in respect of procedural rules and based on an adequate statement of reasons. In reviewing acts of EU authorities the GC thus reviews both procedural and substantive requirements. In the context of targeted sanctions the ECJ has formulated a standard of review that contains procedural and substantive requirements to which targeted sanctions have to comply and that will be reviewed by the GC in actions for annulment. This standard of review applies to both UN and EU autonomous sanctions. The ECJ determined in *Kadi II* that targeted sanctions will be upheld as long as at least one reason for listing is sufficiently detailed, specific and therefore substantiated. And, at least one reason for listing should in itself sufficiently support the listing. In reviewing whether this standard is met, the GC should not only consider the Council's decision for listing but also the underlying facts supporting the alleged conduct. In other words, the factual information for which secrecy is often claimed is necessary for carrying out judicial review in actions for annulment of targeted sanctions.

[61] Eckes 2014, *CMLR.* 2014/51, p. 94.

Chapter 3: Draft Rules of Procedure of the General Court

3.1 Introduction

From the outset the GC has adopted Rules of Procedure (RoP) 'to establish the essential rules relating to its organization and function and to specify, in detail, the rules governing the conduct of proceedings before it'.[62] *Particularly in order to deal with the enlargement of the European Union and new types of procedure the RoP have successfully been amended several times.*[63] *Noticeably, it were the increase of cases and the diversification of proceedings that gave reason to the GC to review its current RoP. A rather more efficient and cost-saving way of dealing with different cases is now reflected in the several amendments proposed by the General Court. Paragraph 1 discusses more into detail the background and objectives of the draft RoP (DRoP*[64]*). The procedure for 'the treatment of secret evidence' of Article105 DRoP will be discussed in paragraph 2. Since its publication in March 2014 the DRoP had extensively been discussed within the Council. Due to objections from EU Member States the GC amended its proposal twice. Eventually, the (reviewed) proposal is approved by the Council in February of this year. The procedure of review within the Council is contained in paragraph 3. During the review procedure the question had been raised by a number of prominent organisations in the UK whether the GC should have facilitated a public consultation in order to comment on Article 105 by applicants or (representatives of) the public interest. The possible need for public consultation will also be dealt with in the last paragraph of this chapter.*

3.2 Background and objectives of the Draft Rules of Procedure

Since its creation in 1988 the jurisdiction of the GC (at that time the Court of First Instance[65]) has continually been expanded. Initially, the jurisdiction of the GC was restricted to mainly competition cases, Community civil service cases and actions for damages. Since the entry into force of the Treaty of Nice[66] the GC has jurisdiction over all direct actions, 'with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice'[67] and 'actions or proceedings brought

[62] Council document 7795/14 of 14 March 2014, Draft Rules of Procedure of the General Court, p. 2 *(DRoP).*
[63] As at 1 November 2014, the Rules of Procedure had been amended 18 times.
[64] Even though the version at issue is already adopted by the Council and published in the Official journal, the term 'Draft Rules of Procedure' is still used to distinguish from the current Rules of Procedure in force and the current situation in which the EU procedure for the treatment of secret evidence has not yet entered into force.
[65] Council Decision 88/591 of 24 October 1988 establishing a Court of First Instance of the European Communities.
[66] Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts of 10 March 2001 (*OJ* 2001, C 80/01). Since the entry into force of the Treaty of Lisbon so-called 'special courts': Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community of 13 December 2007 (*OJ* 2007, C 306/01).
[67] Article 225(1) TEC.

against decisions of the judicial panels at first instance'.[68] The European Union Civil Services Tribunal, introduced by the same Treaty, is the first and until now only established special court in this regard.[69] Since the enacting of the Treaty of Lisbon the GC also holds full jurisdiction over targeted sanctions according to Article 275(2) TFEU.[70]

The extended jurisdiction of the GC has resulted in both an increasing number of new cases that have been brought before the court and an 'ever-greater' diversification of proceedings.[71] After 617 resp. 790 new cases in 2012 and 2013, the number of new cases brought reached an unprecedented level of 912 cases in 2014. Therefore the number of pending cases rose to 1423 last year (after 1237 in 2012 and 1325 in 2013). More than 50 percent of these cases consist of direct actions, another one third of trade mark cases and the 'rest' of appeals against the decisions of the Civil Service Tribunal, interim measures and other special forms of procedure.[72] Despite the increase in completed cases (688, 702, 814 in resp. 2013, 2013, 2014) the 'gap' between incoming and completed cases remains significant. Furthermore, it is not unusual that the average duration of proceedings (24.8, 26.9 and 23.4 in resp. 2012, 2013 and 2014) exceeds a reasonable time in criminal law cases.[73] Against this background of a workload that is beyond its capacity, the GC introduced the current draft. The effectiveness of the GC should increase with minimum resources by new inserted provisions, such as: the possibility of assigning intellectual property cases to a single judge; the power to adjudicate by judgment without a hearing; the framework for the system of intervention; and rules on the treatment of secret evidence.[74]

3.3 The procedure for the treatment of secret evidence (Article 105 DRoP)

Chapter 7 (that solely consist of Article 105) gives meaning to the objective of providing rules for situations that are not yet addressed in the current rules of procedure. It should be noted that the proposal for Article 105 initially consisted of 9 paragraphs. However, after examination of the initial proposal within the Council's Working Party for the Court of Justice the GC added two new paragraphs.[75] In the eleven paragraphs of the current draft of Article 105 the GC describes the Court's 'working method' as soon as confidential information or material (also: confidential evidence) constitutes the basis for a claim.

[68] Article 255(2) TEC. The competence of the GC is summarized by Turk as follows: 'The GC now has jurisdiction, as the court of first instance, over (all) direct actions brought by natural and legal persons, and member states, actions based on contract clauses which give the GC jurisdiction, actions relating to Community trade marks and, as appeal Court, over appeals against decisions of the Civil Service Tribunal in: Turk 2010, p. 5.
[69] In a declaration annexed to Treaty of Nice the Court of Justice and the Commission were called upon 'to prepare as swiftly as possible a draft decision establishing a judicial panel which has jurisdiction do deliver judgments at first instance on disputes between the Community and its servants': Declaration (No.16) annexed to the Treaty of Nice. The Union Civil Service Tribunal was established by adoption of Council Decision 2004/752/EC.
[70] See for an examination and the justification for the constitutional exclusion of judicial review in the area of CFSP: Van Elsuwege 2010.
[71] DRoP, p. 5.
[72] DRoP, p. 3-5.
[73] Van der Woude, *NJB* 2013/720, p. 880.
[74] Idem.
[75] Council document 16724/14 of 8 December 2014, Draft Rules of Procedure of the General Court (consolidated version).

Next subparagraph is devoted to describing the Court's intention towards the procedure of treatment of confidential evidence by means of Party A that is submitting evidence and party B to which communication of such evidence is restricted.

3.3.1 Submitting secret evidence

Paragraphs 105(1) and (2) contain the two 'triggers' and the way evidence should be submitted to the Court for application of the 'procedure for special treatment'. Evidence will be treated as confidential in case either on the request of party A (paragraph 1) or by following a measure of inquiry ordered by the GC (paragraph 2).[76] A voluntarily request should be based on the claim that disclosure of evidence 'would harm the security of the Union or of its Member States or the conduct of their international relations'.[77] In such case Party A has to apply for confidentiality by producing a separate document, in which are clearly set out the reasons for objection to communication of the evidence to the other main party, which does not contain the confidential evidence itself.[78] After review within the Council's Working Party, the GC implemented a safeguard regarding confidential evidence that is obtained from (one or more) other EU Member State(s) than the one that is submitting the evidence.[79] A confidentiality claim from Party A regarding such evidence may rely on overriding reasons provided by those EU Member States concerned. Noticeably, paragraph 1 does not elaborate on the circumstances in which security interests may require secrecy. Paragraph 2 applies if the confidential evidence is ordered in the form of a measure of inquiry.[80] In such case the general framework for secret documents by means of Article 103 DRoP does not apply. The crucial difference between the procedures of Articles 103 and 105 DRoP is the interests against which confidentiality is weighted. Where in Article 103 the GC weighs confidentiality against effective judicial protection, Article 105 requires a balance between effective judicial protection and security interests in order to determine in which form and to what extent evidence will be disclosed. It will not surprise that the 'Article 105-balance' against security interests might result in a different outcome, which is also the reason for its 'very [own] specific regime'.[81]

3.3.2 Assessment of secret evidence by the General Court

After receiving evidence of which confidentiality is claimed in according with paragraph 1 or 2, paragraph 3 seems to indicate that the GC will examine both the relevance of the evidence in the

[76] DRoP, p. 102.
[77] Article 105(1) DRoP.
[78] This can be derived from the word 'also' in the current draft of Article 105(1): 'The application for confidential treatment shall "also" be submitted by a separate document (…)'.
[79] See Draft Article 105(1) in Council document 16522/14 of 4 December 2014, Amendments to the draft Rules of Procedure of the General Court.
[80] Article 103(1) DRoP.
[81] DRoP, p. 99.

particular case and the confidential nature of the submitted evidence by party A at that stage. In doing so, the GC will not communicate the evidence to party B. Depending on the outcome of the examination described in the previous paragraph, alternative paragraphs 4 and 5 can be considered as the following stage. In case the GC has determined that the submitted evidence is relevant *but not* confidential for the procedure before the Court, the GC notifies party A its intention of communicating the evidence to party B according to Paragraph 4. If Party A objects to communication to party B, the GC will not take the confidential evidence into account. Contradictory, paragraph 5 is applicable in case the GC has determined that the submitted evidence is relevant *and* confidential vis-a-vis party B. Without communicating anything to any party yet, the GC will seek to strike a balance between effective judicial protection on the one hand (particularly taking the adversarial principle into mind) and the security interests of the EU or its Member States. According to paragraph 6 the GC sets out in a reasoned order the procedure to be adopted that will respect and safeguard the outcome of the balance referred to in paragraph 5. This includes a non-confidential summary that should enable Party B, to the greatest extent possible, to make his views known.

In case the GC considers the relevant and confidential evidence that is left at this stage also *essential* in order to give a verdict, it may base its judgment on the evidence at stake here to the extent of what is strictly necessary according to paragraph 8. The possibility of legitimately derogating from the adversarial principal is a 'significant innovation' compared to the current RoP. With the purpose of 'providing that confidential evidence can be examined by the GC in a way that preserves its confidentiality without the rights of the other main party being unduly prejudiced', derogation from the adversarial principle is justified if:

- (i) the information or material is that which *could not be brought to the attention of the other party* according to the procedure set in motion after the weighing-up exercise provided for in paragraph 5;
- (ii) the GC considers it *essential* to take account of that information or material in order to rule in the case;
- (iii) derogation is confined to what is *strictly necessary*;
- (iv) in assessing the confidential material, the GC *takes account of the fact that the other main party has not been fully able to exercise his rights of defence.*[82]

3.3.3 Legal safeguards for secrecy

Paragraph 7 is introduced by the GC after review by the Council's Working Party. It leaves the option

[82] DRoP, p. 104.

open for Party A to withdraw within 2 weeks the evidence covered by the confidentiality claim, also after the GC has affirmed its relevance and confidentiality. Paragraph 9, introduced after review of the proposal by the Council's Working party, is another safeguard to ensure that what is confidential will stay confidential. It regulates that the secret evidence will not be disclosed in both the order communicated to Party B or the final judgment of the GC. Paragraph 10 ensures that confidential evidence will be returned to Party A after the GC has taken a final decision. This paragraph is also introduced after review by the Council's Working party. Lastly in Paragraph 11 the GC has obliged itself to determine so-called 'security rules' according to which confidential evidence should be treated during the different stages described above.

3.4 Procedure of review

According to Article 254 TFEU both the ECJ and the Council are involved in the establishment (and as a consequence of that also the review) of the GC's RoP.[83] This means that both institutions have to approve the proposal of the GC in order to legally amend the procedural rules. Furthermore, approval by the Council implies that the proposal will be subject of national parliamentary surveys. Therefore the proposal did not only have to withstand the test of legal soundness but must also not go against national interests of EU Member States. To be adopted within the Council the revised proposal needed a simple majority of the votes.[84]

3.4.1 The review procedure within the Council

The review procedure in the Council of the DRoP had almost taken a year. On 10 February 2015 the Council of the European Union adopted the Draft Rules of Procedure of the General Court, which were approved by the ECJ before review in the Council on 17 March 2014. In turn, it also took the ECJ almost a year to consider and eventually approve the proposal.[85]

It bears noting that the President of the GC refers in his accompanying letter by the second revised proposal to the parallel procedure of reform of the Statute of the Court of Justice, by mentioning that the DRoP might be amended again.[86] In the reformed version of the Statute is proposed to increase the number of judges for the GC with twelve. After approval by the European Parliament, the Council, by

[83] Article 254(5) TFEU.
[84] Article 1(5) Rules of Procedure of the Council of the European Union of 11 December 2009.
[85] M. Lester, 'Proposals for rule changes in the European Court to permit use of classified evidence', *European Sanctions Blog* 21 May 2013., available at: http://europeansanctions.com/2013/05/10/proposals-for-rule-changes-in-the-european-court-to-permit-use-of-classified-evidence/ (last visited: 15 June 2015).
[86] Regulation (EU, EURATOM) No 741/2012 of the European Parliament and of The Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, p. 3.

contrast, could not reach agreement upon enlargement.[87] Therefore the President of the Court of Justice, on invitation by the Council, submitted a new proposal on gradually increasing the number of judges to two of each EU Member State in the coming four years.[88] As long as the security rules are not finalized, Article 105 DRoP will not enter into force.[89]

After approval of the DRoP by COREPER the rules were adopted by the Council on 15 February of this year by 27 of the 28 EU Member States. [90] Interestingly, the UK abstained from voting since the procedure does neither provide the possibility for the Council to withdraw the secret evidence at any stage of the proceeding nor does the procedure guarantees order to prevent accidental disclosure.[91]

In parallel to the review of the RoP, the Council Security Committee has examined the draft Security Rules on which the GC has to determine according to Article105(11). These Security Rules should protect the secret information submitted by one of the main parties. Although the Security Rules do not need approval from the Council, the General Court nevertheless sought for the Council's advice.[92] After rejecting the General Court's first version[93], the Security Committee gave a positive opinion about the revised one.[94] The final version is not yet submitted to the Committee, but the President of the GC has assured that it will continue to seek technical advice from experts in finalizing the Security Rules.[95]

3.4.2 Need for public consultation?

During the review procedure the question had been raised whether the public should be consulted about the DRoP. Even before the draft had been published several prominent British (bar) associations in this regard sent a letter to the President of the ECJ, in which they argued the need for public consultation.[96] Even though President Skouris rightly replied that the legislation regarding the adoption of amendments to the RoP does not provide for public consultation, he did not touch upon the arguments raised by a.o. the Bar Council of England and Wales (the Bar Council a.o.).[97] Nevertheless, the arguments of the Bar

[87] Council document 14448/1/14 of 17 October 2014, Response of the Court of Justice to the Presidency's invitation to present new proposals on the procedures for increasing the number of Judges at the General Court of the European Union, p. 2.
[88] Idem, p. 4.
[89] Article 227(3) DRoP.
[90] Council document 6085/15 of 10 February 2015, Outcome of the 3368th General Affairs Council meeting.
[91] M. Lester, EU Member States approve new European Court rules', *European Sanctions Blog* February 2015, available at: http://europeansanctions.com/2015/02/12/eu-governments-approve-the-use-of-secret-evidence-in-sanctions-cases/ (last visited: 18 June 2015).
[92] Council document 16651/14, p. 2.
[93] Council Document 14024/14 of 7 October 2014, Opinion of the Council Security Committee on the draft Security Rules of the General Court.
[94] Council Document 16597/14 of 5 December 2014, Opinion of the Council Security Committee on the revised draft Security Rules of the General Court.
[95] Council document 16551/14, p. 2.
[96] Letter to the President of the Court of Justice of the European Union, 21 May 2013, available via M. Lester, 'Organisations call on European Court to consult on classified evidence rule change', *European Sanctions Blog* 27 July 2013, available at: http://europeansanctions.com/2013/07/27/organisations-call-on-european-court-to-consult-on-classified-evidence-rule-change/ (last visited: 20 June 2015).
[97] Letter to the Chairman of the Bar Council of England and Wales, 18 June 2013, available via M. Lester, 'Organisations call on European Court to consult on classified evidence rule change', *European Sanctions Blog* 27 July 2013, available at:

Council a.o. can be summarized as follows. First of all, the substantive impact of Article 105 on EU law and fundamental rights of applicants requires a public consultation for stakeholders. More specifically, the procedure may have a serious impact on the rule of law, natural justice and rights of defence, and may raise serious issues of constitutional and public importance for fundamental rights in the European Union. Secondly, defendants of the proposal (*i.e.* EU Member States) have been enabled to express their comments but not applicants or the public interests. Thirdly, the introduction of a similar procedure within the UK had been subjected to full (national) public consultation. In addition to the question whether the absence of public consultation is lawful, it is questionable whether public consultation would have been effective and the appropriate instrument in this regard. Since these questions go beyond the scope of this thesis I restrict myself by addressing the review of the Rules of Procedure for the (EU) Unified Patent Court, which were open for consultation for stakeholders. However, this court is clearly established with the ambition 'to establish a patent court that meets users and practitioners' demands'. Therefore the Committee attaches great importance to receiving input from stakeholders. Also input of expert judges, lawyers and industry representatives could be used to improve the procedure before the Court. It seems here that the technical knowledge and experience of stakeholders were decisive for the Patent Court to initiate a public consultation instead of their opinion about the lawfulness of the proposed rules. By contrast, violation of rights and in particular EU law is pre-eminently the Court's expertise. From this point of perspective it might be argued that public consultation in the current case is at least not comparable with the public consultation initiated by the Patent Court and is therefore at least not obvious.

3.5 Conclusion

Since the GC has jurisdiction over all direct actions and is the appeal court for decisions of the Civil Service Tribunal not only the court's caseload but also the diversification of proceedings has increased. Modernisation of the GC's proceedings should gain productivity and therefore increase effectiveness. The procedure for the treatment of secret evidence, contained in Article 105 DRoP, is one of the major changes compared to the current procedural rules of the GC. In implementing the case law of the ECJ (which is discussed in the previous chapter) the GC fills a 'judicial gap' regarding the status and use of secret evidence in EU court proceedings.

The analysis of the different paragraphs of Article 105 DRoP shows that the GC tries to find a balance between safeguarding the confidential nature of the submitted evidence by the main party on the one hand, and the fundamental rights of defence of the other main party on the other hand. The original proposal of the GC for Article 105 DRoP had been amended during the review procedure in the Council,

http://europeansanctions.com/2013/07/27/organisations-call-on-european-court-to-consult-on-classified-evidence-rule-change/ (last visited: 20 June 2015).

which resulted in additional safeguards regarding secrecy and withdraw possibilities for the Member States. Eventually it can be assumed that both the EU courts as well as at least the majority of the Council consider the balance between security interests and fundamental rights of defence that the GC has found in Article 105 DRoP as fair for both parties, whereas the proposal is approved at European level in February of this year. With regard to the review procedure of the GC's procedural rules it remains questionable whether the general public should had been consulted at some stage.

Chapter 4: The United Kingdom's Closed Material Procedure

4.1 Introduction

While the EU still has to experiment with the procedure for the treatment of secret evidence in targeted sanctions cases, the UK (as the only EU Member State) has already gained experience with secret hearings to consider sensitive and confidential material that is presented by the Government in such cases. The media attention that secret hearing attracted in the UK shows – not least – its controversy. The so-called 'Closed Material Procedure' (CMP) enables UK domestic courts to consider material that would be 'damaging to the interests of national security' without disclosure to the other (non-governmental) party. Involvement of Special Advocates is required. Up to now CMP has been applied only a few times in judicial review cases regarding (national) financial restriction decisions. Also Strasbourg judges have expressed themselves regarding CMP and its conformity with Article 6 ECHR.

Even though the European procedure for the treatment of secret evidence is all set and ready to go, it's ECHR-legality and practicality has still to be proven (see the following chapter). Therefore this chapter therefore explores what can already be learned from its UK counterpart. Paragraph 1 discusses CMP as such (Paragraph 2) and UK legislation in which is provided for this procedure (paragraph 2). Paragraph 4 focusses on the case of Bank Mellat v. Treasury (No. 1) in which the UK Supreme Court elaborated on the use of CMP in civil proceedings. The last paragraph compares the guidelines for the use of CMP formulated in the Bank Mellat case with the procedure of Article 105 DRoP.

4.2 Closed Material Procedure

Since the introduction of CMP in the UK Immigration Appeal Cases in 1997[98], the permissibility of secret hearings has yet been extended to the context of employment and anti-terrorism. As mentioned in the introduction, a CMP enables domestic courts to consider sensitive material, of which the disclosure would be contrary to the public interest, without it being openly disclosed to the other main

[98] The CMP was introduced after the ECtHR-judgment in *Chahal v. United Kingdom*. For national security reasons the UK government made a deportation order to remove Mr. Chahal from its territory. The law at that time did not provide for a right of appeal but only for a reviewed order by an advisory panel without legal representation. The Panel's advice to the Government remained secret. With reference to 'a more effective' Canadian system, which included intelligence in deportation cases regarding national security, the Court considered that 'there could be procedures that would both accommodate legitimate security concerns about the nature and source of intelligence and yet accord the individual a substantial measure of procedural justice (par. 182).' The UK government got the hint and decided to replace the advisory panel by the Special Immigration appeals Commission, including the use of CMP and Special Advocates. *See:* ECtHR 15 November 1996, No. 22414/93 *(Chahal v. United Kingdom).*

party. Starting point remains that as much material as possible will be disclosed. Only a (minor) part of the case will be heard in closed setting without attendance of the other main party.

Instead, the material will be disclosed to Special Advocates, appointed by the Attorney General, representing the other or excluded party's interests. The Special Advocate may take instructions beforehand from the party excluded from the hearing and, with permission from the court, may also communicate with that party after he has attended the hearing or has seen the secret material. It should be taken in mind that the Special Advocate is not representing that party's interests, but that he is acting in his interest when it comes to secret evidence and disclosure. During the hearing, the Special Advocate basically has two functions: a disclosure function and a representation function.[99] The disclosure function enables the Special Advocate to scrutinize the Governments case for non-disclosure. He will ascertain whether disclosure of the material would cause real harm or whether the material has already been leaked for example.[100] The representation function requires from the Special Advocate that he represents the appellants interests to the best extent possible.[101]

At the same time, a CMP enables the Government to submit evidence to the court that would otherwise be excluded from the proceedings without the risk of public exposure or adversarial challenge.[102] This can be considered as an alternative to the common law principle of Public Interest Immunity (PII).[103] PII accepts that government's sensitive material is immune from disclosure if it would be causing damage to the public interest. At this moment only documents containing information that would cause real damage or harm to national security, international relations, and the prevention or detection of crimes might not be disclosed in litigation. A CMP enables the court to take relevant material into account that might otherwise be excluded from consideration altogether by the operation of PII.[104]

The last feature of CMP that is worth mentioning here is the so-called gisting (or disclosure) requirement. Gisting goes further than an ordinary summary of the closed material. Gisting requires the Government to give the individual sufficient information about the allegations against him, which means that the Special Advocate can be provided with effective instructions even if disclosure of that information is damaging to the public interest. It is not yet certain under which specific circumstances gisting might *not* be required.

[99] The Special Advocate system as operated under SIAC, Select Committee on Constitutional Affairs Seventh Report, 3 April 2005 par. 58.
[100] Idem, par. 59.
[101] Idem, par. 60. See also: Bonner 2007, p. 281.
[102] T. Hickman, 'Turning out the lights? The Justice and Security Act 2013', *UK Constitutional Law Blog* 11 June 213.
[103] Tomkins, *Israel Law Review* 2014, p. 307-308.
[104] JS Green Paper p. 10.

Eventually, the court may decide to deliver a closed judgment in addition to its open judgment. A closed judgment contains (a part of) the reasoning of the court and includes highly sensitive material of which the disclosure would be damageable for national security.[105] The remaining part of the court's reasoning will be delivered in an open judgment.

In the *Bank Mellat* case one of the fundamental questions that raised was whether or not the UK Supreme Court (UKSC) had the power to confer a CMP. Indeed, in the CTA 2008 is not referred to the procedural rules of the Supreme Court. Six days after the Supreme Court's judgment in the case at issue, Part 6 of the Justice and Security Act 2013 (JSA 2013) was amended. As a result, the UKSC now has the statutory power to adopt CMP.[106] Simultaneously, the use of CMP has been extended by Part 6 JSA 2013 to include not only judicial review cases but all civil proceedings. The next paragraph will discuss the case and these developments into detail. In the report covering the first reporting period since the entry into force of the JSA 2013[107], the Government revealed that the Treasury applied 6 times for CMP in that period. Two of these applications were granted: resulting in a closed and a not closed judgment.[108]

4.3 Bank Mellat v. Treasury (No.1))[109]

4.3.1 Background of the case

Bank Mellat (the Bank) is a large Iranian bank. It has some 1800 branches and nearly 20 million customers, mostly in Iran, but also in the UK and other countries. It has a 60 percent owned subsidiary bank incorporated and carrying on business in the UK, regulated by the Financial Services Authority. In 2009 the bank was issuing letters of credit in an aggregate sum of over US 11 billion dollars, of which 25 percent arose out of business transacted in the UK. The government had concerns that the Bank was involved in the financing of nuclear proliferation activities by Iran's government. Consequently, Parliament adopted the 'Financial Restrictions Iran Order 2009' (Order 2009), which required that from 12 October 2009 no relevant person operating in the financial sector could enter into or continue to participate into, any transaction of business relationship with Bank Mellat or its

[105] Idem, p. 56. See also with regard to the case of Bank Mellat v Treasury No 1 Lord Neuberger's statement in open court of 21 March 2013: "The closed judgment is, we have been told, much briefer than the main open judgment of Mitting J, but it may just conceivably contain relevant material for the purpose of disposing of this appeal. It is closed because it contains material which he decided should not be made public on the grounds of public interest and national security.' Available at: https://www.supremecourt.uk/news/bank-mellat-v-hm-treasury.html (last visited: 15 June 2015). It should be mentioned that according to Murphy the secret evidence is excluded from the closed judgment: Murphy 2013, p. 276.
[106] Section 6(11)(d) JSA 2013.
[107] 25 June 2013 (when the JSA came into force) to 24 June 2014.
[108] L. McNamara & D. Lock, 'Closed material procedures under the Justice and Security Act 2013: A review of the first report by the secretary of state', *Bingham Centre Working Paper* 2014/03, August 2014.
[109] Bank Mellat v HM Treasury [2013] UKSC 38 *(Bank Mellat UKSC).* The case will only be discussed as far as it concerns CMP.

representatives. The legal basis for the Order was Schedule 7 of the CTA 2008, which permits the Treasury to give direction to any credit or financial institution involved in (supporting development of) nuclear proliferation posing a significant risk to national interests of the UK. In practice, the Order 2009 shut down the UK activities of the bank and its subsidiaries. It also damaged the Bank's reputation and goodwill in both the UK and abroad.

The Bank immediately made an application to set aside the Order 2009 before the High Court.[110] During the hearing the Government applied for CMP because 'some evidence relied on by the Treasury to justify the Order 2009 was of such sensitivity that it could not be shown to the Bank or its representatives.'[111] Mitting J, Judge of the High Court, accepted the application and adopted a CMP. The Bank's interest were said to be protected by both a gist of the closed material that was provided to the Bank and the presence of the Special Advocate.[112] The High Court dismissed the bank's appeal. Mitting J handed down an open judgment and a shorter closed judgment. It was assumed that the evidence discussed during the CMP has not been determinative[113], since Mitting J referred in his open judgment only two times, at least explicitly, to the closed judgment.[114] The bank subsequently appealed to the Court of Appeal (CoA).[115] Again a CMP was initiated in order for the CoA to consider the closed judgment of Mitting J.[116] Remarkably, the CoA did not deliver a closed judgment but referred in general terms to the closed material in the open judgment. Kay LJ stated that 'although the Court had held a brief closed hearing in the course of the appeal, [it was not] necessary to refer to it or to the closed judgment of Mitting J.'[117] Following the High Court, the appeal was also dismissed by the CoA.

4.3.2 Procedure before the UK Supreme Court

Before the highest domestic court the Bank's appeal was divided into two issues, which resulted eventually in two separated judgments. *Bank Mellat v. Treasury (No 1)* deals with disclosure of evidence and *Bank Mellat v. Treasury (No 2)* concerns the legality of the Order 2009. For the purpose of this thesis only the first judgment is subjected to an analysis. In appeal Bank Mellat asked the judges to look at the closed judgment of Mitting J, even though the CoA did not refer to it.[118] The UKSC decided that it had the power to conduct a CMP and that it should have done so in this case. As

[110] Bank Mellat v HM Treasury [2010] EWHC 1332 *(Bank Mellat EWHC).*
[111] Bank Mellat UKSC, par. 13 (Lord Neuberger).
[112] Bank Mellat UKSC, par. 14 (Lord Neuberger).
[113] Idem, par. 66 (Lord Neuberger).
[114] In paras. 16 and 18 *Bank Mellat EWHC* Mitting J referred to the closed judgment.
[115] Bank Mellat v HM Treasury [2011] EWCA 1 *(Bank Mellat EWCA).*
[116] Bank Mellat UKSC, par. 17 (Lord Neuberger).
[117] Bank Mellat EWCA, par. 83 (Kay LJ).
[118] Bank Mellat UKSC, par. 18 (Lord Neuberger).

a result, the Treasury got 20 minutes to defend its case in a closed setting.[119] In its open judgment that has been discussed in this regard the UKSC (I) explained why it has the power to have a closed material hearing and why it adopted a CMP in this appeal and (II) provided some guidance for the future in relation to the closed material hearing procedure on appeals.[120]

The first aspect is a national constitutional issue, whereas the question needed to be answered whether Parliament had empowered the UKSC to adopt CMP. Indeed, the CTA 2008 was silent about such power for the UKSC. Majority of the UKSC derived from the Constitutional Reform Act 2005 that it had the power to adopt CMP. Even though it would be preferable if the majority could have relied on clear legislation in which the power to adopt a CMP was conferred to the UKSC, six days after the judgment the JSA 2013 entered into force. This act provides the possibility for the UKSC to adopt a CMP in any civil proceeding, which made the statutory interpretation of the majority Judges less relevant.

What might be more relevant for the European procedure is the status and balance of fundamental constitutional principles that underlay the 'statutory power issue'. Indeed, majority was of the opinion that it could lawfully abrogate from the fundamental principle of natural justice and a fair trial. Otherwise Parliament would have made expressly clear that it could not.[121] Lord Hope, however, expressed that only from choices that do not raise fair trial issues can be abrogated from by any inherent power.[122] This was also the leading opinion a year ago in *Al Rawi*.[123] Lord Neuberger's response now was that such basic principle 'should not be applied without regard to the purpose and context of the statutory provision at issue.' Furthermore he emphasised that the need for natural justice and the need to maintain confidentiality must be resolved in the national interest. Moreover, even if section 40(2) CRA 2005 indicates sufficient power for the UKSC to adopt CMP, it is questionable whether such general power to hear appeals should overrule the fundamental right to confront one's own accusers.[124] It shows that one cannot easily say where the balance lay between the principles of open justice, fairness and the demands of national security. The (majority and minority) Judges in this case show that a difference in balancing these fundamental principles results in outcomes that unfortunately cannot be reconciled with each other.

[119] Idem, par. 19 (Lord Neuberger).
[120] Idem, par. 20 (Lord Neuberger).
[121] Idem, par. 59 (Lord Neuberger).
[122] Idem, par. 81 (Lord Hope).
[123] *Al Rawi v. Security Servies* [2012] A.C. 531.
[124] Sargeant, *CJICL* 201/3 p. 118.

Subsequently, the UKSC needed to decide whether it was necessary to adopt a CMP in the current case. A majority of 5 to 4 gave 'a go'. However, also the majority had serious doubts whether it was necessary to consider Mitting J's closed judgment, since most probably nothing in the closed judgment 'would have effect on the outcome of the [substantive] appeal'.[125] Eventually these doubts seemed justified.[126] The minority clearly stated that the Treasury failed in showing that a CMP was necessary in this case.[127] However, in avoiding the risk of 'justice not being done' by not considering the closed judgment and by therefore not facilitating an opportunity for the Treasury to present its secret material, the UKSC still adopted a CMP.[128] For this purpose Lord Neuberger already anticipated on the real possibility that it would allow the appeal in contrast to the judgments of Mitting J and the CoA. It therefore could be said that 'doing justice' is approached from the perspective of the Treasury, by facilitating a case in which they could defend themselves to the greatest extent possible. Doing justice to the excluded party by respecting the right to confront one's own accuser had to give way in this case, even though the serious doubts of all Judges. These doubts and the bear majority of 5 Judges for the decision show again that balancing the underlying fundamental common law principles is far from straightforward. Subsequently, it should be noted that the Treasury was obligated to submit a summary to the Special Advocate before the closed hearing took place.[129] In other words, the UKSC held on to the 'gisting' requirement, mentioned in paragraph 2.

Secondly, the majority had drawn some conclusions from the experience with CMP in this case for future appeals, which will be extensively discussed in the next paragraph:[130:]

- The Judge has to make as clear as possible in the open judgment what has been done in the closed judgment and that he identifies which drawn conclusions in the open judgment were reached in light of the material considered in the closed judgment.
- The Judge has to say as much as possible about the closed judgment in the open judgment.
- The Judge should consider whether it is strictly necessary for fairly determining the appeal to adopt a CMP.
- If it would be possible to consider the closed material without a closed hearing a CMP may not be adopted.
- In case a CMP is unavoidable the involved parties should try to minimising the extent of the closed hearing.

[125] Bank Mellat UKSC, par. 64 (Lord Neuberger).
[126] Idem, paras. 65-66 (Lord Neuberger).
[127] Idem, paras. 90, 130 (Lord Hope), 139 (Lord Reed, 145 (Lord Dyson).
[128] Idem, par. 64 (Lord Neuberger).
[129] Idem.
[130] Idem, paras. 68-74 (Lord Neuberger).

- The (legal representatives of the) excluded party is given as much information as possible about any closed documents relied on well in advance of the hearing, and the Special Advocates are given as much information as possible about the nature of the passages relied on in the closed documents and the related arguments.
- Appellate courts should be reluctant in accepting applications for CMP or in even considering closed materials.

The conclusions drawn by the majority for future use of CMP reflect a very reluctant approach towards the practice of CMP and the cases in which a CMP may be adopted at all. Even though the use of CMP is by the judgment at issue expended to the UKSC, it seemed that it could only lead to reduced use. This is confirmed by the solely handful applications for CMP in the first reporting period. Interestingly, the guidance not only shows that a CMP should only be adopted in very exceptional cases, but also that Judges should be very careful towards the kind of evidence that is allowed in a closed setting and placed in a closed judgment. It could be assumed that the strict guidelines eventually lead to more open and transparent proceedings in which a CMP is adopted and more proceedings ultimately heard and judged in an open setting.

4.4 CMP v. Article 105 DRoP: similarities and differences

On the basis of the above-mentioned Guidance for the use of CMP in UK civil proceedings, formulated by the UKSC in the judgment at issue, it is worth comparing its similar and different aspects with the procedure of Article 105 DRoP. What can we learn from the judgment at issue and the opinions of the ECtHR with regard to CMP in procedures?[131]

The first stage concerns the question whether a CMP should be adopted. The UK as well as the EU procedure require that secret evidence should be considered for a fair outcome of the case. Nevertheless, in assessing the necessity of a CMP, the UKSC considers whether alternatives are present. The GC solely assesses whether the secret evidence is relevant and essential without considering alternative possibilities for a closed hearing. It could therefore be said that the threshold for reaching necessity that justifies a closed hearing is higher in the UK procedure since in addition to the relevance of the secret evidence for (fairly) determining the case, a closed hearing must also be the

[131] It should be noted that the Guidelines provided by the UKSC concern CMP in appeal cases. Therefore the Guidelines start with considering the judgment delivered in the procedure at first instance. Since a CMP is available in all stages of a procedure and the GC is the Court of First Instance regarding review of targeted sanctions the discussion of the Guidance is provided here is chronologic from the viewpoint of a first instance procedure. The Guidelines with regard to appeal cases will not discussed as such but only if this is necessary to understand the UKSC's reasoning in general.

only option for considering the evidence at issue. Additionally, both procedures require that the extent to which secret evidence is considered is minimized to the extent necessary.

The second stage provides guidelines that should be respected during the closed hearing. Surely, the role of Special Advocates comes into play with regard to the UK procedure, which is the most obvious difference compared to the EU procedure. However, the guidance firstly mentioned the abovementioned gisting requirement: the excluded party and its legal representative should receive as much information as possible. Additionally, the Special Advocate should receive as much information as possible about the secret evidence as such and also about the '*nature* of the passages relied on.' In practice this would mean that the excluded party is able, based on the disclosed allegations against him, to provide the Special Advocate with effective instructions to challenge the undisclosed evidence. According to the ECtHR the involvement of Special Advocates is a possible system by which security interests and the limited procedural rights of the applicant are counterbalanced by testing the evidence and submitting arguments on behalf of him.[132] The ECtHR argued that even if the allegations are mainly based on secret evidence but they are sufficiently specific the applicant would still be able to instruct the Special Advocate with counterarguments or exonerating evidence without seeing the undisclosed evidence himself. This scenario is reflected in the guidance of the UKSC, whereas the gisting requirement enables the applicant to provide sufficient instructions to the Special Advocate and with the additional information disclosed to the latter it is possible to challenge the secret evidence.

It should, however, be noted that the system of Special Advocates is not entirely satisfying and suffers from certain shortcomings.[133] First, the role of Special Advocates is not clear. It has been argued that Special Advocates act in a grey area between the legal representative of the applicant and an *amicus curiae*.[134] Implicit to the Special Advocate's role is that he cannot be held accountable to the applicant, by contrast to a lawyer.[135] The problem could therefore arise that the Special Advocate is not acting according to the preferred strategy of the applicant and its lawyer. Second, the Special Advocates is not allowed to communicate with the applicant after the secret evidence is disclosed to him. This precludes the possibility to receive sufficient instructions by the applicant. Even though the Special Advocate may request for communication with the applicant, the Government mostly successfully objects such request. Third, Special Advocates get limited support by means of interpreters or (technical) experts helping them to assess the secret evidence, which makes it almost

[132] ECtHR 19 February 2009, No. 3455/05 *(A. and others v. the United Kingdom).*
[133] Murphy 2014, p. 8-12, Tomkins 2014, p. 217-218, Shah, *Human Rights Law Review* 2009/9, p. 485.
[134] Murphy 2014, p. 274.
[135] UK Justice, *Secret Evidence*, June 2009, available at: http://justice.org.uk/secret-evidence/ (last visited: 15 June 2015).

impossible for Special Advocates to successfully argue that Government material, which cannot also be found on the internet, should be disclosed.[136]

Since the system of Special Advocates is, first of all, not required by the ECtHR and, secondly, highly criticized for its shortcomings, it would nog be advisable and a 'step back' in this regard to implement a similar system by the Union.[137] However, since the EU procedure does not provide for any techniques by which the applicant is indirectly able to test the secret evidence, which is indeed required by the ECtHR in addition to a gist, it would have been recommendable for the Union to implement at least certain guarantees within Article 105 DRoP.

The third stage of the Guidance recommends that, in case both an open and a closed judgment have been delivered, the court provide as much information about the closed judgment and the considered secret evidence as possible. It seems that the UKSC seeks to ensure a sufficiently detailed and specific motivation in which the secrecy of the considered material cannot serve as an excuse and which should enable the applicant to know the case against him. Even though a closed judgment is not required in the EU procedure, the UK procedure may serve as example when it comes to specifically indicating which role the secret evidence has played. Hereby the applicant is not only better able to know the case against him but it could therefore also be considered whether secret evidence has played a determinative role in the GC's judgment or not. The latter situation is not 'ECHR proof', which will be shown in the next chapter.

4.5 Conclusion

Despite the fact that only a handful of applications for CMP are made by the UK Government in the past decade, practice has already provided some meaningful 'do's and don'ts'. CMP enable UK domestic courts to take secret evidence into account with only the UK Government and Special Advocates present during the hearing. It could be said that both legislative and judicial developments have resulted in a legal basis for adopting CMP in any UK civil proceedings by domestic courts. The main legislative development was the amendment of the JSA 2013, which, first of all, conferred power to the SC to adopt CMP and secondly, which extended the use of CMP to any civil proceedings, including judicial review proceedings. The main judicial development was the judgment of the UKSC in the case of *Bank Mellat v.Treasury (No. 1)* in which the UKSC determined that it had the power to conduct CMP and that it could do so in the case at issue. The discussion within the UKSC showed the difficulty in balancing the principles of open justice, fairness and the demands of national security.

[136] Chamberlain, *Civil Justice Quarterly* 2009, p. 318-320. De Boer 2014, *CMLR* 2014/3, p. 1252.
[137] Murphy 2014, p. 281, De Boer 2014, *CMLR* 2014/3, p. 1252.

The guidelines formulated by the SC with regard to appropriate use of CMP in UK proceedings reflect a reluctant approach. A comparison between the EU and UK procedure shows that the system of Special Advocates is not advisable to be implemented as such within the Union. However, since at least some techniques that reconcile security interests and the limited procedural rights of the applicant to the greatest extent possible are required by the ECtHR, lessons can be learned from the UK CMP. Most importantly, Article 105 DRoP does not provide for a possibility for the applicant to challenge or test the secret evidence submitted by the Council, which seems requested by the ECtHR. With regard to the judgment delivered by the GC it is recommendable to indicate as specifically as possible where and to which extent is relied on secret evidence.

Chapter 5: Article 105 DRoP and the right to an adversarial proceeding

5.1 Introduction

Whereas it were the EU courts themselves that proposed resp. approved the procedure of Article 105 DRoP, the legitimacy with reference to the EU Charter (Article 47) and the ECHR (Article 6) is given from the perspective of the EU judges. However, with regard to compliance with Article 6 ECHR the Strasbourg Court may be of another opinion. Therefore it remains to be seen whether the Strasbourg Court will join in the satisfaction of the EU Council and courts. Compliance of EU acts and proceedings with the ECHR becomes relevant since it has been agreed that the EU will accede to the ECHR. The negotiations for the accession agreement are still pending. A 'near future' accession seems rather optimistic though, whereas the most recent update about the negotiation process between the two organizations is that the ECJ has argued that accession of the EU to the ECHR is not compatible with EU law.[138] *However, it is already of importance to anticipate on the conventional agreed accession. This means a.o. that the ECtHR will have power to examine whether EU court proceedings, such as actions for annulment of targeted sanctions, are 'Convention proof'.*
Chapter 5 is devoted to the 'future situation' in which Article 105 DRoP can be subject to ECtHR scrutiny. Paragraph 2 discusses the 'future role' of the ECtHR in assessing the procedural fairness of proceedings that include application of Article 105 DRoP in light of the Convention. The third paragraph sets out to which extent Article 6(1) ECHR is applicable to targeted sanctions. Paragraph 4 discusses ECtHR case law concerning lawful derogation from the adversarial principle and introduces the so-called 'strict necessity test'. This test is subject to paragraph 5, in which is scrutinized to which extent the procedure of Article 105 DRoP meets the requirements for lawful derogation from the adversarial principle.

5.2 The ECtHR's assessment of fairness of proceedings

At this moment EU courts are bound by the ECHR under Article 6(1) TEU, but the Strasbourg Court has currently no power to assess the legitimacy of EU proceedings and acts. However, since Article 6(2) TEU

[138] Opinion 2/13 of the Court (full court), 18 December 2014, available at: http://curia.europa.eu (last visited 18 June 2015). See also: Press release Court of Justice of the European Union, The Court of Justice delivers its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law, 18 December 2014, no. 180/14. Reitemeyer and Pirker summarized that: '[t]he general reaction by the doctrine to Opinion 2/13 has been overwhelmingly negative. As a representative remark, it has been stated that in light of the overall objective of submitting the EU to an external system of judicial fundamental rights review, the Court's findings seem to overemphasize the autonomy of the EU legal system and do not ask sufficiently what could be acceptable losses of autonomy indispensable to achieve the stated objective', in S. Reitemeyer & B. Pirker, 'Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One step ahead and two steps back', *European Law Blog* 31 March 2015, available at: http://europeanlawblog.eu/?p=2731#sthash.Odolxmoy.dpuf (last visited: 20 June 2015).

provides for the accession of the EU to the ECHR this situation might change in the future. Nevertheless, it is established by conventional agreement that the ECtHR will get jurisdiction within the EU legal order. This means concretely that acts of EU institutions and EU court proceedings can be subjected to control of the ECtHR. Notably, the procedure of Article 105 DRoP in general will not be subject to the Strasbourg Court's scrutiny, but only the application of the procedure at issue in a particular case. Therefore, before considering the use of secret evidence in light of the adversarial principle within the meaning of Article 6(1) ECHR, it should be clear what the role of the ECtHR is and what it is not in case of applications under Article 6(1) ECHR regarding non-disclosure of secret evidence in actions for annulment of targeted sanctions before the GC.

One of the main misconceptions with regard to the ECtHR is that it is the 'court of fourth instance'. However, it is *not* the role of the Court to substitute itself for the domestic court. The power of the Court is limited to verifying whether the Contracting States[139] comply with the obligations flowing from their accession to the Convention.[140] This means, in principle, that the ECtHR does not have power to deal with errors of fact or law committed by a domestic court. In a similar vein, it is solely a matter for the domestic court to assess in what way the evidence should be assessed on the merits and to weigh the evidence before them.[141] With regard to the use of secret evidence in proceedings the Court has specified its role in greater detail. In cases in which an application for the use of secret evidence is accepted it is not the task of the ECtHR to decide whether or not such non-disclosure was strictly necessary.[142] By illustration, in *Botmeh and Alami* the ECtHR directly relied on the assessment of the UK Court of Appeal with regard to the significance of the secret evidence.[143] In any event, when secret evidence is never revealed, the ECtHR does not have the possibility 'to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material.'[144] In such case it is the role of the ECtHR to 'scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.'[145] These considerations of the Court applied to the procedure of Article 105 DRoP suggest that the GC has a broad margin of discretion to decide on the disclosure of secret evidence but that the ECtHR has power to assess the decision making procedure with regard to non-disclosure. In other words, the ECtHR will assess the fairness of the disclosure procedure under Article 6(1) ECHR.

[139] The term 'Contracting States' refers to the Member States of the ECHR.
[140] ECHR, *Practical guide Article 6 ECHR: Right to a Fair Trial-Civil limb*, p. 38.
[141] ECtHR 21 January 1999, No. 30544/96 *(Garcia Ruiz v. Spain)*, par. 28, ECtHR 13 July 2006, No. 77575/01*(Farange S.A. v. France)*, and ECtHR 27 October 2004, Nos. 39647/98 and 40461/98 *(Edwards and Lewis v. the United Kingdom)*, paras. 34-35.
[142] Edwards and Lewis v. the United Kingdom, paras. 34-35.
[143] ECtHR 7 June 2007, No. 15187/03 *(Botmeh and Alami v. the United Kingdom).*
[144] ECtHR 6 March 2012, No. 59577/08 *(Leas v. Estonia)*, par. 79.
[145] ECtHR 16 February 2002, No. 29777/96 *(Fitt v. the United Kingdom)*, par. 46 and Jasper v. United Kingdom par. 53.

Fairness in the sense of Article 6(1) ECHR refers to 'procedural fairness' and not to 'substantive fairness'.[146] Since the right to a fair trial is highly significant in democratic societies, the ECtHR clearly stated that the requirement of fairness should not be interpreted restrictively.[147] However, it should be noted that fairness applies to proceedings in their entirety and is not confined to hearings between the parties.[148] This could mean that any shortcomings with regard to the fairness of proceedings may be remedied at a later state, either at the same level of the judicial system or by a higher (appellate) court.[149]. Whereas the GC has explicitly mentioned that the procedure of Article 105 DRoP justifies derogation from the adversarial principle, the analysis of compliance with Article 6(1) ECHR will be specified to this fair trial right. The questions whether the principles of equality of arms and access to an independent and impartial court are sufficiently safeguarded are relevant as well, but exceed the scope of this thesis. However, before turning to the adversarial principle it should first be determined whether Article 6(1) ECHR is applicable at all to targeted sanctions cases.

5.3 Applicability of Article 6(1) ECHR to actions for annulment of targeted sanctions

Article 6 ECHR provides certain procedural rights and guarantees to individuals. The procedural rights guaranteed in Paragraph 1 apply to the 'determination of civil rights and obligations' and 'criminal charge'. The relevance of the qualification as either civil rights or obligations or criminal charge is laid down in the fact that Article 6(2) and (3) provide additional procedural safeguards in criminal proceedings. Before focussing on both 'criminal charge' and 'civil rights or obligations', it should be noted in this regard that blacklisting and the actual sanctions should be considered together, since blacklisting as such is not considered to be a sanction. It is the measure imposed after an individual is blacklisted that constitutes effects.[150]

In only one relevant case, *Segi and others*[151], the ECtHR has expressed itself about judicial protection to individuals targeted by EU autonomous sanctions in the context of combatting terrorism. With regard to the blacklisting of Basque youth organisation *Segi* the ECtHR stated that: '[t]he mere fact that the names of two of the applicants […] appear in the list referred to in that provision as 'groups or entities involved in terrorist acts' may be embarrassing, but the link is much too tenuous to justify application of the

[146] ECHR, *Practical guide Article 6 ECHR: Right to a Fair Trial-Civil limb*, May 2013, p. 39.
[147] ECtHR 23 October 1990, No. 11296/84 *(Moreira de Azvedo v. Portugal)*, par. 66.
[148] ECtHR 9 December 1994, No. 13427/87, *(Strans Greek Refineries and Stratis Andreadis v. Greece).*
[149] ECtHR 19 December 1997, No. 20772/92 *(Helle v. Finland)*, par. 54 and Schuler-Zgraggen v. Switserland, par. 52 and ECtHR 2 March 1987, Nos. 9562/81 9818/82 *(Monnell and Morris v. the United Kingdom)*, paras. 55-70.
[150] GC 30 September 2009, joined Cases T-37/07 and T-323-07, ECR I-000 *(Sision v Council).*
[151] ECtHR 30 June 2005, Case 45036/98, ECHR 2002-V *(Segi and Gestoras Pro-Amnistía and Others v. Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the United Kingdom and Sweden).*

Convention.' Even though the ECtHR did not rule on the merits, this case shows that the application of Article 6 ECHR with regard to targeted sanctions is at least not self-evident.

5.3.1 'Criminal charge'

In several cases the ECtHR held that 'criminal charge' may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.'[152] The ECtHR applies three criteria in determining whether the qualification of criminal charge applies.[153] Starting point is the *classification of the offence under domestic law*. This criterion is only of relative weight but if a legal rule is classified as criminal under national law then this will be decisive.[154] The *nature of the offence* is the second, and decisive, criterion. In considering the nature of the offence the Court assesses a.o. the target and purpose of the charge and whether the charge is enforced by a public body. Thirdly, the Court considers the severity of the potential penalty for which the relevant law provides, also referred to as the *aim and effect of the offence*.[155] The third criterion is an alternative to the second one. Only in cases that the ECtHR is not able to reach clear conclusions after a separated analysis of each criterion it may apply a cumulative approach.[156] Under these criteria an administrative fine and a tax surcharge are qualified as criminal charge.

Without reliance on Strasbourg case law, Van den Broek, Hazelhorst & De Zanger rightly mention that it is difficult to determine the domestic classification as well as the nature of targeted sanctions because of their composite character. While the legal basis can surely be found in UN or EU law, the proposal and reasons for listing are based on the different national laws of EU Member States. The problem here is that the underlying offence will most likely be qualified as a criminal offence at national level, while sanctions are qualified as administrative measures at UN or EU level. Therefore the third criteria, effect and aim of the offence, should solve the issue.[157] The UN Sanctions Committees and the Council have always clearly referred to targeted sanctions as preventive measures instead of punitive measures.[158] Therefore the measures are temporary and periodically reviewed. Furthermore, blacklisting and the actual adoption of

[152] See for example: ECtHR 27 February 1980, No. 6903/75 *(Deweer v. Belgium),* paras. 42 and 46, ECtHR 14 October 2010, No. 1466/07 *(Brusco v. France),* paras. 46-50, ECtHR 4 November 2004, No. 59244/00 *(Ozturk v. Germany),* par. 49.
[153] ECtHR 8 June 1976, Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 *(Engel and Others v. the Netherlands),* paras. 82-83.
[154] Otherwise the ECtHR will look behind the national classification and will examine the substantive reality of the offence or procedure in question. See: C. Eckes 2009, p. 154 and ECHR, *Guide on Article 6 Right To A Fair Trial-Criminal limb,* January 2014, p. 6.
[155] ECtHR 28 June 1984, Nos. 7819/77, 7878/77 *(Campbell and Fell v. the United Kingdom),* par. 72 and ECtHR 27 August 1981, No. 13057/87 *(Demicoli v. Malta),* par. 34.
[156] ECtHR 24 February 1994, No. 12547/86 *(Bendenoun v. France),* par. 47.
[157] As indicated above, the effect of the offence can also be considered under the second criteria in order to determine the nature of the offence.
[158] Eckes 2009, p. 156. For example: The Analytical Support and Sanctions Monitoring Team established pursuant to Security Council Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities (1267 Monitoring Team) has consistently held that the sanctions are "designed to prevent terrorist acts, rather than provide a compendium of convicted criminals" and that the sanctions cannot be characterized as being criminal in nature: UN Document S/2005/572 9 September 2005, par. 40.

targeted sanctions have not been made dependent of a finding of guilt.[159] However, even though targeted sanctions may be preventive in nature, their effect can still be punitive. In this respect, many authors have emphasized the severity and impact of asset freezing on (the reputation of) the targeted individual and its inability to function in society.[160] Additionally, Eckes mentions that publication of EU blacklists is not necessary, which may indicate a punitive intention. Publication of EU autonomous sanctions is necessary to facilitate cooperation between enforcement authorities of EU Member States, but the list of names as such does not serve any additional purpose.[161]

It remains debatable whether the severity of targeted sanctions results in a punitive effect and, if so, whether the punitive effect should prevail the preventive effect. In contrast to the severity of targeted sanctions, authors vary on the latter point. In general it can therefore not be concluded that it is likely that the ECtHR will qualify targeted sanctions as criminal charge. In the specific context of asset freezing the ECtHR has held that similar asset confiscation (proceedings) were preventive measures and did not constitute a criminal charge.[162] It is again not impossible, but unlikely, that the ECtHR will conclude differently in the specific context of asset freezing cases.

5.3.2 'determining civil rights or obligations'

Equally to the concept of criminal charge 'civil rights and obligations' are determined autonomously within the meaning of the Convention. The term 'civil rights' does not prevent Paragraph 1 from being applicable to proceedings which in themselves have a public character. However, in determining whether rights are 'civil' reference should be made to the substantive content and effects under (substantive) domestic law of the Contracting State concerned, on a case by case basis.[163] In principle, freezing measures directly interfere with property rights (either 'deprivation of possessions or 'control or property'), which are acknowledged in the European legal order, as well as in the national legal orders of all EU Member States.[164] Travel bans, however, are a different story. Since travel bans affect primarily the rights of freedom of movement and private and family life, it is rather unlikely that the qualification of 'determining civil rights' applies. In this regard it should be noted that the ECtHR determined that measures taken for the purpose of immigration control fall outside the scope of civil rights protected by Article 6(1) ECHR.[165] It can be concluded that it will depend on the type of sanctions whether targeted

[159] Biersteker &Eckert 2006, p. 18, and Cameron 2006, p. 8.
[160] Ojanen 2013, p. 256. Eckes 2009, p. 151, Fodor, *Acta Universitatis Danubius. Juridica* 2011/2.
[161] Eckes 2009, p. 165.
[162] ECtHR 26 November 2013, No. 5809/08 *(Al-Dulimi and Montana Management Inc. v. Switzerland).*
[163] ECtHR 28 June 1987, No. 6232/73 *(Konig v. Germany),* par. 89. See also: Biersteker & Eckert 2006, p. 13.
[164] Eckes 2009, p. 167.
[165] ECtHR 5 October 2000, No. 39652/98 *(Maaouia v. France),* par. 38.

sanctions can alternatively fall within the scope of 'determining civil rights or obligations' within the meaning of Article 6(1) ECHR.

5.4 Derogation from the adversarial principle

In principle civil proceedings should be adversarial, meaning that both parties should have the knowledge of and comment on all evidence with a view to influencing the court's decision.[166] 'Adversarial' in essence means that the evidence is made available to both parties. However, *fully adversarial proceedings* are not required, the right to an adversarial hearing is not absolute and its scope may vary depending on the specific features of the case in question.[167] Security reasons may justify a restriction to the adversarial principle. Specifically, the fight against terrorism can 'safely be considered as a matter of 'national security'.[168] For instance, the ECtHR determined that telephone tapping could be justified as national security interest in the fight against terrorism.[169] Therefore, the security interests of the Union and its Member States may justify derogation from the adversarial principle. Strictly speaking, Article 105 DRoP does not serve national but rather EU security interests. However, it can be assumed that 'national security' should be interpreted extensively so that it incorporates the common security interests of EU Member States.

Any restriction to the right for an adversarial proceeding in national security cases has to be strictly necessary. The ECtHR determined in *Van Mechelen and others* resp. *Doorson* that the so-called '*strict necessity test*' should be applied; entailing that if a less restrictive measure can suffice then that measure should be applied.[170] Whether or not the use of secret evidence is strictly necessary will depend on the circumstances of the case. However, it can be derived from the Court's case law that the 'strict necessity test' consists of two criteria: I) restrictions on the fair trial rights of the defence should be sufficiently counterbalanced by the procedures followed by the judicial authorities so that the applicant still has the possibility effectively to challenge the allegations against him[171], and II) the secret evidence should not be solely or to a decisive extent determining for the court's judgment.[172] Importantly, the criteria are cumulative. Both conditions will be discussed in greater detail below.

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[166] ECtHR 23 June 1993, No. 12952/87 *(Ruiz-Mateos v. Spain)*, par. 63.
[167] ECtHR 27 April 2014, No. 23083/05 *(Hudakova and others v. Slovakia)*, paras. 26-27.
[168] Eckes 2009, p. 196.
[169] ECtHR 6 September 1978, No. 5029/7 *(Klass v. Germany)*, par. 48. See also: ECtHR 25 November 1997, No. 18954/91 *(Zana v. Turkey)*, paras. 48-50 and Article IX.3 of the Guidelines on Human rights and the fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002.
[170] ECtHR 23 April 1997, Nos. 21363/93, 21364/9,3 21427/93, 22056/93 *(Van Mechelen and others v. the Netherlands*), par. 58.
[171] The ECtHR often refers to and discusses criminal proceedings in this regard and subsequently considers that a similar approach is taken in civil proceedings. See in this regard: ECtHR 18 May 2010, No. 26839/05 *(Kennedy v. the United Kingdom)*, par. 184 and ECtHR 29 April 2014, No. 33637/02 *(Ternovskis v. Latvia)*, par. 67.
[172] Van Mechelen and others v. the Netherlands, paras. 54-55 and ECtHR 26 March 1996, No. 20524/92 *(Doorson v. the Netherlands)*, paras. 73-75.

It should, however, be bear in mind that the relevant judgments discussed below concern criminal proceedings. While in general Contracting States enjoy a 'greater latitude' with regard to the fair hearing requirements in civil cases than in criminal cases[173], the adversarial principle applies in principle similarly in both types of cases.[174] Therefore the balance between fair trial requirements and public interest or national security is of particular importance and likely leading for the ECtHR's potential assessment of the fairness of proceedings in which Article 105 DRoP is applied.

5.5 The 'strict necessity test'

The ECtHR has formulated different *factors* that it takes into account in balancing (in particular) the adversarial principle and national security interests.

5.5.1. Balancing factors

The first factor is the provision of reasons by the Government for denying the applicant access to secret evidence. If it is necessary to use secret evidence the Government should at least explain why access is denied to the applicant and whether less restrictive measures were not sufficient. [175] Noteworthy, the procedure of Article 105 DRoP does not entail the requirement for the GC to communicate the reasons for non-disclosure, including that less restrictive measures were not sufficient. Paragraph 6 requires a 'reasoned order specifying the procedures to be adopted', which, however, does not refer to the reasons for non-disclosure. Furthermore, it is made clear in Paragraph 9 that this 'reasoned order' does not contain the overriding reasons that justify secrecy of the submitted evidence by the Council.

The second factor is the participation of the applicant in the decision-making process. This includes whether the applicant was informed about the secret evidence and whether he was permitted to make submissions during the proceeding.[176] It bears noting that the Court does not refer here to the 'stand-alone' right to be informed, laid down in Article 6(3) ECHR, but a 'fair trial obligation' under Article 6(1) ECHR. In that regard the Court took into account that the applicant in *Leas* needed to hear from the Prosecutor that the County Court had considered surveillance material instead from the Court itself. He was neither informed of the reasons for non-disclosure nor of the nature of the secret material. Nevertheless, not knowing the reasons of the Judge's decision regarding non-disclosure does not mean that the applicant is not sufficiently informed. In such case it is essential that the applicant is at least notified that the Government has applied *ex parte* for non-disclosure so that a request for disclosure can

[173] ECtHR 16 October 1993,No. 14448/88 *(Dombo Beheer B.V. v. the Netherlands)*, par. 32 and ECtHR 23 October 1996, No. 21920/93 *(Levages Prestations Services v. France*), par. 46.
[174] ECtHR 24 November 1999, No. 21835/93 *(Werner v. Austria),* par. 66
[175] Van Mechelen and Others v. the Netherlands, par. 60. Leas v. Estonia, paras. 87 and 88.
[176] Jasper v. United Kingdom, par. 55, Fitt v. United Kingdom, par. 48, and Leas v. Estonia, par. 88.

be made.[177] Notably, Article 105 DRoP does not contain a notification obligation in case of an *ex parte* application for secrecy by the Council. The applicant would in such case not be able to challenge for example bias of the Court since the latter has considered evidence which might not have even be referred to in the final judgment.

What's more, the information communicated to the applicant should be sufficiently detailed. It can be derived from *A. and others*, as rightly mentioned by Bigo a.o., that the factor of whether the applicant is provided with sufficiently detailed information is a decisive factor in the Court's balancing exercise.[178] In mentioned case, the applicants were alleged of being involved in fundraising for terrorist groups linked to Al-Qaeda or with membership of Al-Qaeda-linked extremist Islamist groups. The evidence on which the linking between the money raised and terrorism was based was not disclosed to the applicants. Therefore they were not in a position to effectively make their views known. Importantly, the fact that the applicant is provided with a summary of the closed material indicates that he is sufficiently informed and able to submit during the proceedings before the trial judge.[179] In Article 105(6) DRoP, already mentioned earlier, the GC has obligated itself to provide the applicant with a 'reasoned order' in case of non-disclosure. A non-confidential summary containing the essential content of the secret evidence is mentioned as one of the elements that should be included in the reasoned order in order to ensure that the applicant is able, to the greatest extent possible, to make its views known. However, De Boer and Lester raised the concern that it is not clear whether the applicant is entitled to see the essence of the allegations made against him.[180] Irrespective of the fact that such requirement stems from the *Kadi II* judgment and not from the ECtHR case-law, their concern was based on the wording of Article 105 DRoP in the original draft. In that version the Council was 'invited' to submit a summary, which implies a voluntarily character. It remains a fair point that also the adopted wording could be more clear and imperative, but the adopted wording implies that a summary is part of the reasoned order.

Thirdly, the ECtHR considers whether the need for disclosure was at all times under the assessment of the trial judge.[181] Indeed, the trial judge is better placed than the appeal judges to decide whether or not the secret material should be disclosed.[182] However, it should be noted that it is not an absolute requirement that the trial judge has seen all the evidence. Non-disclosure to the trial judge can be compensated by full disclosure in appeal, since the Court of Appeal is then still able to assess the impact of the earlier non-

[177] Jasper v. the United Kingdom, par. 53.
[178] Bigo a.o. 2015, p. 32.
[179] Botmeh and Alami v. the United Kingdom, par. 43.
[180] De Boer, *CMLR* 2014/3, p. 1255 and M. Lester, 'Draft European Court rules propose secret hearings', *European Sanctions Blog* 6 April 2014, available at: http://europeansanctions.com/2014/04/06/draft-european-court-rules-for-secret-hearings/ (last visited: 24 June 2015).
[181] Leas v. Estonia, par. 88, Fitt v. the United Kingdom, par. 59, Jasper v. the United Kingdom, par. 56, ECtHR 23 June 2006, No. 39482/98 *(Dowsett v. the United Kingdom)*, par. 50.
[182] ECtHR 16 February 2002, No. 28901/95 *(Rowe and Davis v. the United Kingdom).*

disclosure in the light of the previous participation factor.[183] However, in case secret material has not even been disclosed to the Court of Appeal, mostly for state immunity reasons, the Court indicates that Article 6(1) ECHR was violated. On top of that, non-disclosure issues in final and non-appealable decisions suggest all the more that the fair trial rights of the applicant are not well balanced.[184] In the context of actions for annulment of EU autonomous targeted sanctions the GC, as the 'trial judge', is the court that will consider the procedural and substantive lawfulness of the sanctions at issue, which include an assessment of the facts. Paragraph 1 requires that (if needed) the Council's claim is accompanied with an application for secret evidence, it can be assumed that the issue of secrecy has been sufficiently and in an early stage brought under the attention of the 'trial judge'.

The fourth and last factor is the quality and impact (assessment) of the secret evidence. While, as a general rule, it is not the role of the ECtHR to provide a substantive assessment of the secret material to assess the necessity of its disclosure[185] it does, at the same time, take into account whether the evidence adds anything of significance to what has already been disclosed according to the domestic courts.[186] Additionally, the Court takes into account the domestic court's assessment of the impact of the secret material on the safety of the applicant's conviction (in criminal proceedings).[187] For example, in *Botmeh and Alami* the ECtHR was of the opinion that the terms of the secret document containing information about the bombing attack at stake were also properly reflected in the information that was disclosed. For this purpose the Strasbourg Court directly refers to the reasoning of the Court of Appeal in this regard. [188] It seems here that to a certain extent procedural and substantive assessments collide in the examination of the ECtHR. With regard to the latter the GC does not have to be 'scared' for the 'Strasbourg boss', since the ECtHR aligned itself with the substantive assessment of the domestic court out of respect for the autonomous legal systems of the Contracting States. However, a statement of reasons by the GC for non-disclosure is indispensable.

5.5.2 Secret evidence as decisive evidence

As mentioned earlier, irrespective of the outcome of the balancing exercise of the relevant competing interests, secret evidence can only be justified if the conviction has not been based solely or to a decisive extent on that evidence.[189] This implies that secret evidence is mostly not decisive if the open material

[183] Edwards and Lewis v. United Kingdom, Botmeh and Alami v. the United Kingdom, par. 44.
[184] Ternovskis v. Latvia, par. 72.
[185] Edwards and Lewis v.the United Kingdom, par 34. See also under the heading: The Role of the ECtHR.
[186] Botmeh and Alami v. the United Kingdom, par. 43.
[187] Idem, par. 44.
[188] Idem, par. 43 referring to the Court of Appeal's judgment summarized in par. 18.
[189] Van Doorson v. the Netherlands, par. 75. See also: ECHR Research Division, *National Security and European Case law*, p. 33.

available to the applicant was sufficiently detailed to permit the applicant to defend himself.[190] Indeed, it is often the case that open allegations are of a general nature that cannot upheld the conviction or listing decision which is why the domestic authorities or courts rely on what has been found in the closed material.[191] Furthermore and not surprisingly, the secret evidence will also be decisive if the domestic court has not taken other material into account for its reasoning. By illustration, in both *Jasper* and *Edwards* the UK Government applied *ex parte* for non-disclosure before the trial judge. The determining difference between the cases was that the secret evidence in *Jaspe*r was not relied upon while the secret evidence in *Edwards* might have been of decisive importance.[192] The ECtHR found for this reason a violation of Article 6(1) ECHR in *Edwards*. Furthermore, in *A. and Others* Article 5(4) ECHR was violated since the evidence the UK Government relied on was *largely* to be found in the closed material.[193]

It seems that the ECtHR applies a rather low threshold for determining whether secret evidence is at least to a great extent determinative. Indeed, *Edwards* shows that even solely *the possibility* that secret evidence may be relevant for the court's decision and, in addition, probably decisive, can be fatal. Remarkably, Article 105(8) does not require that secret evidence cannot be decisive if it is taken into account by the GC. It clearly states that the GC may only base its judgment on secret evidence to 'what is strictly necessary.' However, paragraph 8 does not rule out the option that it is strictly necessary for the GC to base its judgment solely or to a decisive extent on secret evidence. Therefore the GC is enabled to rely on secret evidence as 'the central element' of its decision.[194]

5.5.3 *Concluding remarks*

In sum, the following concluding remarks can be made. The GC has not regulated that the overriding reasons from the Council for applying for secrecy are communicated to the applicant, which indicates that the GC has not sufficiently balanced the fair trial rights of the applicant (factor 1). Subsequently, it seems that the procedure ensures that the applicant is informed of the essence of the secret material in case of non-disclosure. However, Article 105 DRoP does not entail a notification-obligation as soon as the Council applies for secrecy (factor 2). Therefore the lack of a notification obligation seems to indicate that the GC has not counterbalanced the fair trial rights of the applicant sufficiently. The fact that the secret evidence should be received by the GC as soon as the Council submits its claim and that it is able to anticipate on the difficulties for the applicant (factor 3) indicates the opposite though. If the GC is able

[190] A. and others v. United Kingdom, par. 223.
[191] Idem.
[192] Edwards and Lewis v. the United Kingdom, paras. 46 and 48. See for a description of both cases: A. and Others v. the United Kingdom, par. 206.
[193] A. and Others v. the United Kingdom, par. 224.
[194] See in this regard: Bigo a.o. 2015.

to state clearly whether the secret evidence has been of added value for its decision in ECtHR proceedings remains to be seen (factor 4). Considering the procedure of Article 105 DRoP in its entirety it can be concluded that the GC has not sufficiently counter-balanced the restriction of the fair trial rights of the targeted individual fair trial against the security interests of the Union and its Member States. A notification obligation and an obligation to communicate at least to a certain extent the overriding reasons for non-disclosure seem to be lacking.

5.6 Conclusion

With the accession of the EU to the ECHR the ECtHR will enjoy the power to examine whether an action for annulment of a targeted sanction, in which Article 105 DRoP is applied, is carried out in accordance with Article 6(1) of the Convention. Mentioned article is applicable in this regard since at least asset freezes fall within the scope of the 'determination of civil rights or obligations.' Whereas qualification as 'criminal charge' is not applicable here, although not unthinkable, the additional procedural rights of Article 6(3) ECHR do not have to be guaranteed. The fair trial rights laid down in Article 6(1) ECHR, specifically the adversarial principle, are not absolute and may be restricted under certain circumstances. In order to lawfully derogate from the adversarial principle within the meaning of Article 6(1) ECHR the 'strict necessity test' is applied by the ECtHR. The test requires, first of all, that derogation from the adversarial principle in the name of security interests is sufficiently counterbalanced and secondly, that the court's decision is not based solely or to a decisive extent on the secret evidence. With regard to the first part of the test, Article 105 DRoP does not provide sufficient guarantees that should enable the targeted individual to know and prepare the case against him. Importantly, the targeted individual is neither informed about the application of Article 105 DRoP nor about the reasons for secrecy. With regard to the latter part of the test, the GC did not safeguard that its judgment is not solely or to a decisive extent based on the submitted secret evidence. Therefore application of the EU procedure for the treatment of secret evidence raises some serious concerns with regard to compliance with the adversarial principle of Article 6(1) ECHR.

Chapter 6: Procedural fairness and efficiency

6.1 Introduction

From a legal point of view the derogation from the adversarial principle cannot be considered as fair due to the violation of Article 6(1) ECHR. Interesting question in this regard is whether the procedure of Article 105 DRoP can be considered as fair according to normative theories. It should therefore, first of all, be decided what fairness actually means within a normative framework. In generally the question could be asked 'When are proceedings fair?' In order to provide any comments – let alone an answer – to this question the concept of procedural justice, introduced by John Rawls in 'A Theory of Justice', is discussed. Depending on the form of procedural justice that is at stake John Rawls has provided some guidelines in order to assess under which circumstances legal proceedings could be considered as fair. It is obvious that security interests of the Union and its Member States are the justifying substantive reasons for secrecy. However, the procedural justification must be found in terms of efficiency. Indeed, with access for the GC to the most essential part of the evidence for a listing decision, the chance reduces that targeted sanctions will be annulled due to the Court's inability to carry out judicial review. Since both procedural fairness and efficiency are values of judicial systems emphasize is often given to fairness. In this chapter the opposite view is recommended. Emphasize is given to efficiency but it is argued that efficiency does not jeopardize procedural fairness of Article 105 DRoP from a normative perspective. Paragraph 2 discusses the different approaches to procedural justice according to Rawls' 'A Theory of Justice.' In Paragraph 3 the concept of efficiency is set out and applied to the current context. The fourth paragraph scrutinizes the procedural fairness of Article 105 DRoP using Rawls' balancing model.

6.2 Procedural fairness: Rawls' Theory of Justice

Because of questions like 'what is just?' or 'what is fair?' many philosophers have been inspired to developing ideas, theories and critiques about the concepts of justice and fairness in history. However, as of today, it has been impossible to provide an either philosophical or legal agreed-upon definition of these concepts.[195] Without discussing all relevant theories and well-known scholars in this regard, it is generally accepted in literature that, as a starting point, justice could be divided in distributive justice, corrective justice, and procedural justice.[196] Shortly speaking, distributive justice is concerned with the

[195] Procedural justice can be considered from different perspectives. Underlying theories can be found in moral and political philosophy. See for an overview of categorization of such theories: Murphy & Coleman 1990.
[196] Posner 1990, p. 313-314 and Ehrenberg, *Albany Law Review* 2003, p. 181 in which Aristoteles' idea of distributive and corrective justice is presented. Rawls added the concept of procedural justice in A Theory of Justice: Rawls 1971.

fairness of the division of shares in social benefits and burdens, thus for example, tax related topics. Corrective justice refers to the fairness of available remedies for violations of rights, which includes a.o. criminal law and torts related topics. Procedural justice focuses on the fairness of proceedings that has led to certain outcomes.[197]

The idea of procedural justice is often illustrated by the procedure for slicing a pie: the one who slices the pie picks last.[198] What makes this a fair procedure? One answer could be that in order to guarantee an outcome, equal slices, the slicer has to pick last. In other words, the procedure is fair because it guarantees accuracy in cutting equal slices. However, an even more accurate way to slice equal slices would be to use a compass for example. But this way is very time consuming and maybe not worth going through for slicing a pie. It could also be that it is believed that the 'slicer-picks-last rule is fair because it strikes a balance between 'the importance of the outcome and the cost of getting there': almost equal shares at a reasonable price. Lastly, the rule may also be believed as fair because the slicer the slicer's participation in the cutting validates the outcome even if the slicer ends up with a bigger or smaller slice. All in all, the slicer-picks-last-rule could be fair because of the cutting process independent of the outcome of the size of all the slices.

In 'A Theory of Justice' John Rawls sets out a general framework for analysing the concept of procedural justice, based on mentioned example and related questions. Rawls distinguishes between three forms of procedural justice: pure, perfect and imperfect. Each of these forms can be linked to a model, or families of ideas, about procedural justice that are implicit in current legal practice.[199]
First of all, a case of *perfect procedural justice* applies if an independent criterion for a just outcome in a certain situation is present and it is possible to initiate a procedure that will automatically guarantee that independently just outcome. Similarly, in terms of the 'slicing pie example': an equal share for everyone is the independent criterion for a fair division of the pie and the 'slicer-picks-last rule' facilitates that outcome.[200] The corresponding model – the accuracy model - reflects the idea that the aim of a procedure is seeking the truth and accuracy. On the surface it is beyond doubt that legal proceedings are initiated and strive for correct outcomes based on substantive law by focussing on accuracy: correctly applying the law to the facts.[201] It would indeed be 'perfect' if all judicial proceedings were structured according to the concept of perfect procedural justice, but it cannot be said that all current proceedings value and prefer the

[197] Summarized by for example Barbier de la Serre in Barbier de La Serre, *European Public Law* 2006/2, p. 226-250 and Solum in Solum, *Southern California Law Review* 2004/181, p. 238.
[198] Rawls 1971, p. 85.
[199] Similar distinctions with different terminology are discussed by, for example: Tribe 1987 ('instrumental' and intrinsic' values of due process), Bone, *Vanderbilt Law Review* 1993/561 (outcome-oriented and 'process oriented' participation of theories). See also in this regard: Solum 2004, p. 242.
[200] Rawls 1971, p. 85.
[201] Johnston, *Fordham Law Review* 1994/62, p. 882, applied by Solum in: Solum 2004.

smallest gain in accuracy over the real costs and investment recourses that go along with it. At a sudden point the price for justice is not worth paying.[202] Rawls seemed to be aware of this himself since he mentioned that: perfect procedural justice is rare, if not impossible, in cases of much practical interest.'[203] Therefore current legal proceedings could not be satisfyingly understood from the perspective of perfect procedural justice.

Of particular importance for this thesis is imperfect procedural justice. Like perfect procedural justice, an independent criterion for a just outcome is present. However, there is no procedure capable for guaranteeing that outcome. Rawls mentioned the example of criminal trial in this regard. In this example the independent criterion for a fair outcome is that the defendant is found guilty if he has committed the acts he has been accused of committing. It is however impossible to guarantee that trials always guarantee such outcome. In such case an injustice outcome can still be considered as fair because of the just system that has the aim of coming as close as possible to the just outcome. The related model – the balancing model – accepts that perfect accuracy is impossible and therefore proposes a balance between benefits and costs in different variations.[204]

Unlike perfect and imperfect procedural justice, *pure procedural justice* has no independent criterion for determining the correct result. By contrast, it proposes the sole standard that a fair procedure should guarantee equal participation for both parties irrespective of the outcome. Only a fair procedure is guaranteed, which, if followed, leads to a fair outcome.[205] In other words, the right of participation is a condition for procedural fairness. Support for this model can be found in Habermas' *discourse theory* suggesting that ideal communication with equal participation by both parties is required to discover truth.[206] Conversely, 'a procedure that does not afford rights of equal protection cannot claim to produce correct outcomes.'[207]. Classic example in this regard is the game of gambling. There is no independent criterion determining the fair distribution of money to the people undertaking a series of bets. However, what makes the bets just is the fairness of the procedure and its application. Since substantive law provides indeed always for an independent criterion for the fairness of outcomes, the participation model is of particular importance for the question whether participation in legal proceedings has an autonomous meaning independent from matters for reasons other than cost and accuracy.

[202] Bone, *Vanderbilt Law Review* 1993, Volume 46, Issue 561, p. 599. The balance between accuracy and costs will be further discussed in the third paragraph. Bones raises the concern that if under all circumstances society would invest in in perfectly accurate outcomes such a system could easily find itself morally committed to a disastrous level of financing for adjudication.
[203] Rawls 1971, p. 74.
[204] Solum 2004, *Southern California Law Review* 2004/181, p. 243.
[205] See: W. Nelson, 'The Very Idea of Pure Procedural Justice, *Ethics* 1980, Volume 90, Issue 4, p. 502-511, p. 503.
[206] Rosenfeld, *Cardozo Law Review* 1996/17, p. 804.
[207] Cho 2009.

It has been argued in literature that EU administrative law can be best understood from the perspective of imperfect procedural justice.[208] Paragraph 3 will therefore consider the fairness of Article 105 DRoP from the initial idea of the balancing model that 'a fair procedure is one which reflects a fair balance between the costs of the procedure and the benefits that it produces.'

6.3 Procedural efficiency: EU Competition law

For assessing the fairness as such, efficiency has been playing a role in accepting imperfect procedural justice. However, it remains questionable whether and if so, to which extent procedural fairness and efficiency are reconciled by allowing non-disclosure of secret evidence in annulment actions of targeted sanctions. Whereas the next paragraph discusses the balancing model into detail, the paragraph at stake firstly sets out what should be understood under efficiency.

The form of efficiency that is relevant for the context of this thesis is procedural efficiency. Indeed, legal systems might have developed very appropriate laws that guarantee individuals substantive rights but without certain convenient and efficient enforcement these rights are of little value.[209] This includes efficient court procedures and a judicial process that is not unreasonably slow, and which is furthermore accessible for a reasonable cost. In this regard tools are required that 'lowering costs' in terms of not only saving money, but also time, and which are able to reduce the risk of bias and inaccurate decisions.[210] Challenges that have been mentioned in this regard that are able to improve procedural efficiency are: saving recourses, reducing the number of cases by decriminalization or by no-fault liability in specific cases, increasing the budget of the courts and appointing additional judges.[211] Barents mentioned in this regard that most procedural amendments to Rules of Procedure of the EU courts are implemented out of efficiency considerations rather than a reference to effective legal protection for example.[212]

EU Competition Law is perhaps the most obvious area of EU law in which the role of efficiency is debated. Since the rationale behind EU competition policy is underpinned by consumer welfare, the extent to which importance should be given to *economic efficiency* components of EU competition law has been considered as a key issue. Equal concerns have risen with regard *to* procedural efficiency in *EU competition law proceedings*; in particular *cartel proceedings*. Within the debate amongst scholars and practitioners on weather a separation between the prosecutorial and the adjudicative functions of the European Commission (now acting as 'prosecutor and judge') could be beneficial for both fairness and

[208] Schebesta 2014, p. 854 and Barbier de La Serre, *European Public Law* 2006/2, p, 227.
[209] Shetreet, *European Business Law Review* 2012/23, p. 62.
[210] Usai, *ECLR* 2014/11, p. 549.
[211] Shetreet, *European Business Law Review* 2012/23, p. 63.
[212] Barents, *CMLR* 2014/6, p. 1450.

efficiency in enforcing Article 101 TFEU, the role of the Hearing Officer (HO) has been analysed. Elaborately, it has been argued that a.o. the right to be heard and checks and balances during the internal procedure before the European Commission are not sufficiently safeguarded due to procedural efficiency considerations. In short, after having received the so-called Statement of Objections (SO) which exposes the facts and legal arguments of an alleged cartel the concerned undertakings may request for an oral hearing before the HO. Remarkably, the HO does not decide the case and the EC officials whom draft the final decision do not attend the hearing. The task of the HO has been summed up as 'safeguarding the right to be heard throughout the whole procedure and to contribute to the objectivity, transparency and efficiency of those proceedings.'[213] Hearings mainly take place in writing for reasons of administrative or procedural economy, which could specifically be considered as procedural efficiency considerations. It has therefore been argued that, with regard to the role of the HO and the internal checks and balances system before the EC, that a prosecutorial system would be more efficient. [214] Without touching upon this debate, it shows that procedural efficiency is expressed in terms of the extent to which the rights of the defence are respected; the length of proceeding; and the number of (appeal) cases.

To a certain extent procedural efficiency considerations apply similarly in the context of the EU procedure for the treatment of secret evidence. It could be said that in the situation that the GC is not able to take into account the factual information on which listing proposals are based, the number of annulment cases and eventual annulment decisions would be relatively high. Consequently, targeted sanctions , would be annulled due to either lack of ability to carry out sufficient judicial review or insufficient statement of reasons. In such cases the Council has to rewrite targeted sanctions, which takes time and money, but without any change in the factual situation. In other words, the targeted individual will again be targeted but now in a rather transparent and explanatory way. Since the Council is now able to present the essential evidence for listing to the GC it could be assumed that it is able to prepare a much stronger case which would have a smaller change of annulment due to insufficient statement of reasons. It is therefore argued that the procedure of Article 105 DRoP increases procedural efficiency within the EU judicial system.

6.4 Balancing benefits and costs

As already mentioned, the balancing model comes closest to the 'real world' of EU administrative law proceedings. The fairness of the procedure of Article 105 will therefore be considered on the basis of the balancing model as starting point. According to Solum the balancing model accepts a compromise

[213] Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, par. 5.
[214] Usai, *ECLR* 2014/11, p. 550.

between accuracy and costs seeking to answer two questions: 'Under what conditions will accuracy be sacrificed?' and 'How should the costs of procedural justice be distributed?' These questions could be answered by utilitarianism: weighing the costs of procedure against the benefits and then the procedure that maximizes utility can be regarded as fair.[215] A pure economic analysis would be slightly different; suggesting that a procedure would be fair if the greatest balance of benefits over costs is achieved.[216]

Accuracy in this regard is interpreted as correctly applying the law to the facts. As is already set out in the previous paragraph, the procedure of Article 105 DRoP could increase accuracy since the GC is now able to consider the underlying facts of a listing proposal. In other words, procedural efficiency considerations from the previous paragraph are reduced here to accuracy. In that situation it could be assumed that the GC is in a better position to review whether the reasons for listing could be derived from the underlying facts. As a result, targeted sanctions will not easily be annulled due to the GC's inability to review with all the efficient consequences that will entail.[217]

In general, procedural costs are expressed as economic costs according to the model of Posner: costs of operating the procedural system (court fees etc.) and costs of erroneous judicial decisions.[218] However, an assumption in these regards should be that all costs could be expressed in terms of prices.[219] With regard to the procedure here at issue it is not impossible but rather unthinkable to 'price label' the costs of secrecy for security reasons. In other words, the economic costs of not disclosing classified material to the other main party cannot easily be estimated. Costs at issue could be better understood in terms of deprivation of procedural rights, which means that a fair distribution of procedural burdens on the involved parties, for instance the burden of proof or the correction of procedural injustice, should be indicative for the fairness of proceedings. By illustration, legal discovery, which increases accuracy, might be limited due to violation of the right to privacy of the (third) parties. Importantly, in such case a procedure can still be regarded as fair not by assessing whether the costs of privacy are fairly balanced against the benefits of accuracy, but rather by considering whether the right to privacy has been waived and, if so, whether that right is more fundamental than the parties' interests in accuracy.[220]

It could be said that with the procedure of Article 105 DRoP a balance is struck between the benefits of accuracy and the procedural costs of adjudication. Accuracy requires procedural rules that 'would achieve the highest possible level of accurate outcomes despite costs or other elements of procedure.[221] Since the

[215] Mill 1863, p. 288-289, Solum, *California Law Review* 2004/181, p. 252.
[216] Cooter & Rubinfeld 1990, p. 1070.
[217] See paragraph 2.
[218] Posner 1992, p. 549.
[219] Solum, *California Law Review* 2004/181, p. 254.
[220] Idem, p. 258-259.
[221] Idem, p. 246 and Cho, p. 43.

GC is now able to assess the underlying evidence for listing decisions, according to the formulated standard of review in Chapter 3, it can be assumed that the chance increases that only lawfully imposed sanctions will be upheld, which would be of the interest of both parties. However, whereas the other party is not able to challenge the evidence, accuracy is not to the greatest extent achieved. Along similar lines, the value of participation is not fully respected since the other party cannot consider the secret evidence. However, unlike gambling games for which the outcome cannot be determined ex-ante, a fair outcome of annulment actions can be determined on the basis of substantive targeted sanctions regulations. Consequently, participation cannot be considered as a 'stand-alone' value but should be related to a fair outcome of annulment actions. What's more, fairness does not require that procedural costs of participations are equally distributed to both parties. Therefore, from the normative viewpoint of imperfect procedural justice it DRoP it does not seem an unsuitable compromise to allow non-disclosure of secret evidence submitted by the Council despite limited participation for the applicant, which implies a fair procedure according to the balancing model. The question remains whether efficiency is maximized though. Indeed, are the procedural costs of limited participation reduced to a minimum level?

6.5 Conclusion

The previous chapter showed that the procedure of Article 105 DRoP does not contain sufficient guarantees for the targeted individual that would justify a derogation from the adversarial principle contained in Article 6(1) ECHR. Current chapter exchanged a legal perspective for a normative 'pair of glasses' for discussing the fairness of the procedure at issue, using John Rawls' 'A Theory of Justice'. Against this background procedural efficiency, the counter-interest of procedural fairness, is emphasized. It is argued that imperfect procedural justice and the corresponding balancing model is best capable of understanding EU administrative law proceedings and therefore also the procedure for annulments of targeted sanctions. The balancing model considers proceedings as fair when the benefits of accuracy are reasonably balanced against the procedural costs of adjudication. Since the Council would now be able to take the factual information on which listings are based into account, a higher possible level of accurate outcomes might be achieved. Efficient consequences hereof are that assumedly less targeted sanctions will be annulled, whereas the Council is able to present a stronger case that allows effective judicial review and a sufficient statement of reasons. Costs in this regard could be understood as procedural burdens or errors. Specifically, limited participation for the targeted individual in the procedure before the GC is the biggest cost at issue. By accepting that I) neither full accurate proceedings nor fair participation as such can determine the fairness of proceedings which implies a reasonable balance between benefits and (procedural) costs and II) that it is not required that procedural burdens are equally distributed, it cannot be said that the benefits of accuracy and the costs of limited participation are unreasonable

balanced in the procedure of Article 105 DRoP. This means that by emphasizing and allowing efficiency considerations, procedural fairness is not ruled out.

Conclusion

This thesis shows that nothing could be further from the truth than the words of Cameron, also mentioned in the introduction: 'It is one thing to direct a sanction against government ministers. It is another to direct a sanction towards a person or entity suspected of belonging to, or supporting, a terrorist group.' Since intelligence by which these individuals whom supporting terrorism, nuclear proliferation or 'rouge states' are identified is often secret, the Council faces difficulties with presenting evidence for listing decisions in open court during proceedings in which targeted sanctions are challenged. Specified to the procedure for the preparation of EU autonomous targeted sanctions, proposals for listings are made by EU Member States and subsequently assessed by the Council. Often, the factual information on which national authorities base the listing proposal is not submitted to the Council. Indeed, EU Member States mostly respect the confidentiality claim that accompanies the intelligence information received from other countries, in particular the US. As a result of the limited information that is submitted to the Council, the Council, in turn, is not able to submit sufficient factual information to the GC in actions for annulment of targeted sanctions.

In these cases the GC reviews the listing decision by which the individual at issue is targeted. With regard to the specific standard and scope of judicial review in targeted sanctions cases, the ECJ set a specific standard and scope for judicial review in actions for annulment of targeted sanctions. In order for the targeted individual to know and challenge the case against him and in order to enable the GC to carry out effective judicial review, the ECJ determined in *Kadi II* that targeted sanctions will only be upheld as long as at least one reason for listing is sufficiently detailed, specific and therefore substantiated. And, at least one reason for listing should in itself sufficiently support the listing. In carrying out its review, the GC not only considers the Council's decision for listing but also the underlying facts supporting the alleged conduct. In other words, the standard and scope for judicial review require that intelligence is shared with the GC and therefore also with the Council.

The EU procedure for the treatment of secret evidence, discussed in this thesis, should tackle this problem. The procedure facilitates the possibility for the Council to submit secret intelligence underlying the reasons for a particular listing without disclosure to the targeted individual. When the GC is of the opinion that the submitted evidence is confidential, relevant and essential for its final decision, it takes into account that the targeted individual is unable to make his views known. Therefore the GC will order the Council to communicate to the individual both the procedure to be

adopted that will respect and safeguard the rights of the defence to the greatest extent possible and a non-confidential summary of the secret evidence. Notwithstanding the question to which extent the GC is able to think for the targeted individual and to which extent the impartiality and objectivity of the GC would be sufficiently safeguarded in doing so, is a discussion as such. Derogation from the right to an adversarial proceeding seems to be the biggest worry.

Even though the EU courts and (at least majority of) the Council are of the opinion that the EU procedure for the treatment of secret evidence is in accordance with Article 6(1) ECHR, it might be possible that the ECtHR is of a different opinion. In anticipation on the accession of the EU to the ECHR, the ECtHR has jurisdiction to consider the lawfulness of a particular action for annulment of a targeted sanctions in which the procedure of Article 105 is applied. Indeed, in that future situation targeted individuals may challenge EU acts before the ECtHR with regard to violation of Convention rights. The Strasbourg court's jurisdiction might be restricted to asset freezes, since these sanctions fall within the scope of 'civil rights' within the meaning of Article 6(1) ECHR. By contrast, travel bans fall assumedly outside the scope of mentioned article.

Derogation from the adversarial principle should be strictly necessary to meet the requirements set out by the ECtHR. This means that the Strasbourg Court requires a procedure in which the limited rights of the targeted individual would be sufficiently counterbalanced against the security interests of the Union and its Member States. Furthermore, the secret evidence should not be solely or to a decisive extent considered by the GC. While Article 105 DRoP ensures that secret evidence will only be taken into account if it is confidential, relevant and essential for his ruling, and that a non-confidential summary will be communicated to the targeted individual on the one hand, a notification as soon as the Council submits secret evidence as well as the reasons for secrecy are lacking. Therefore it is questionable whether the GC has sufficiently balanced the interests at stake. Where the balance found between fair trial guarantees and security might be appropriate, the GC did at least not regulate that the secret evidence should not be decisive for the GC's judgment. In other words, Article 105 DRoP does not meet the 'strict necessity test' regarding derogation from the adversarial principle. Therefore, at this moment the derogation from the adversarial principle is not in accordance with the requirements set out by the ECtHR.

Where the case law of the ECtHR show certain shortcomings of the EU procedure for the treatment of secret evidence in the context of the adversarial principle of Article 6(1) ECHR, the use of secret hearings in the UK has 'forced' the UKSC as well as the ECtHR to specifically consider the issue of secret evidence in national court proceedings. The UK government responded to the Strasbourg

Court's notion that Contracting States should find techniques that both accommodate legitimate security concerns about intelligence and procedural justice for the applicant with a system of Special Advocates. While the targeted individual's interests with regard to disclosure of the secret evidence are now presented by a Special Advocate, this 'technique' chosen by the UK has proved its shortcomings and is therefore not recommendable to be implemented as such within the EU. However, it cannot be concluded otherwise than that the EU procedure does not provide for a possibility for the applicant to challenge or test the secret evidence submitted by the Council, which is requested by the ECtHR. It can therefore be learned from UK practice that the GC should include additional guarantees to the non-confidential summary that protect the fair trial rights to a greater extent. Subsequently, the UKSC advised to mention as clear as possible for which arguments and to which extent in general the secret evidence is considered. Since the ECtHR requires that secret evidence should not be decisive for the court's judgment, the ECtHR would be better able to asses this, if the GC clearly indicates the role that the secret evidence has played.

Since it is beyond doubt that the adversarial principle is undermined and derogation does not seem to be in accordance with Article 6(1) ECHR, considerations of procedural efficiency and reasonableness shine a different light on this conclusion. The use of secret intelligence is inherent to the system of targeted sanctions. Since it cannot be said that the latter has already had its best day, it is unlikely that the lawsuit industry is going out of business soon. EU sanctions against Russia will be extended this week for example. Similarly, even though Iranian sanctions against nuclear proliferation should be lifted at the end of this months by Western powers, the US already warned that they could 'snap back' sanctions in case of 'misconduct' by the Iranians. And since the US is characterized as 'leader of the crowd' the rest of the world assumedly follows. Therefore the procedure of Article 105 DRoP is indispensable, since it enables the Council to prepare a strong case. It is expected that the GC is in a better position to assess whether reasons for listing could be derived from the facts, which should increase accuracy of targeted sanctions. However, the cost that needs to be paid is limited participation for the targeted individual.

Current research shows that equal accuracy could be reached by the procedure of Article 105 DRoP for less procedural costs or sacrifices on the side of the targeted individual. Or in appropriate legal terms: in order to increase the lawfulness of the procedure of Article 105 DRoP with regard to compliance with Article 6(1) ECR and in particular the adversarial principle, the procedure could reconcile the limited procedural rights for the targeted individual with the security interests of the Union and its Member States to a greater extent by implementing the following recommendations:

- The GC should notify the targeted individual of the application of the procedure of Article 105 DRoP as soon as the court receives an application for secrecy from the Council.
- The GC should communicate the reasons for secrecy to the targeted individual.
- The GC should facilitate a possibility for the targeted individual to challenge the secret evidence either directly in written form or indirectly via legal representation.
- The GC should guarantee that it will not base its decision solely or to a decisive extent on the submitted secret evidence.
- The GC should clarify to the greatest extent possible the role the submitted evidence has played with regard to the specific arguments of its final decision and with regard to the overall assessment of the case at issue.

Bibliography

UN Resolutions

Resolution 1526 of the Security Council of the United Nations (30 January 2004), UN Doc S/RES/152.

EU Treaties & Rules of Procedure

Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts of 10 March 2001 – Final act and declarations (*OJ* 2001, C 80/01); entry into force 1 February 2003.

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community of 13 December 2007 (*OJ* 2007 C 306/01); entry into force 1 December 2009.

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences (*OJ* 2012, C 326/13).

Rules of Procedure of the Council of the European Union of 11 December 2009 (*OJ* 2009, L 315/52).

Rules of Procedure of the General Court of 4 March 2015 (*OJ* 2015, L 105/01).

EU Legislation

Council Decision 88/591 of 24 October 1988 establishing a Court of First Instance of the European Communities (*OJ* 1994 L 66/29).

Common Position 931/2001/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (*OJ* 2001, L 344/93).

Commission Decision 2001/462/EC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (*OJ* 2001, L162/21).

Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (*OJ* 2001, L 344/70).

Council Decision 2004/752/EC of 2 November 2004 establishing the European Union Civil Service Tribunal (*OJ 2004*, L 333/9).

Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism (*OJ* 2008, L 330/23).

Council Decision 2011/292/EU of the Council of 31 March 2011 on the security rules for protecting EU classified information (*OJ* 2011, L 141/17).

Regulation (EU, EURATOM) 741/2012 of the European Parliament and of The Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto (*OJ* 2012, L 228/01).

Official documents

UN
United Nations Security Council, document S/2005/572, Letter dated 2 September 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council.

Council of Europe
Council of Europe, Guidelines on Human rights and the fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002.

Council of the European Union
Council of the European Union, document, document 15579/03 of 3 December 2003, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common foreign and Security Policy, latest update: 2012.

Council of the European Union, document 10198/1/04 REV of 7 June 2004, Basic Principles on the Use of Restrictive Measures (Sanctions).

Council of the European Union, document 14469/4/05 REV 4 of 30 November 2005, The European Union Counter-Terrorism Strategy.

Council of the European Union, document 11679/07 of 9 July 2007, EU Best Practices for the effective implementation of restrictive measures.

Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union of 8 July 2011 (*OJ* 2011, C 202/05).

Council of the European Union, document 7795/14 of 14 March 2014, Draft Rules of Procedure of the General Court.

Council of the European Union, document 14448/1/14 of 17 October 2014, Response of the Court of Justice to the Presidency's invitation to present new proposals on the procedures for increasing the number of Judges at the General Court of the European Union.

Council of the European Union, document 16522/14 of 4 December 2014, Amendments to the draft Rules of Procedure of the General Court.

Council of the European Union, document 16724/14 of 8 December 2014, Draft Rules of Procedure of the General Court (consolidated version).

Council of the European Union, document 6085/15 of 10 February 2015, Outcome of the 3368th General Affairs Council meeting.

Other

Council of Europe
ECHR, *Practical guide Article 6 ECHR: Right to a Fair Trial-Civil limb*, May 2013.

ECHR Research Division, *National Security and European Case law*, November 2013.

EU
Opinion 2/13 of the Court (full court), 18 December 2014.

Letter to the President of the Court of Justice of the European Union, 21 May 2013, available at: http://www.icj.org/wp-content/uploads/2013/09/letter-to-ECJ-1.docx (last visited 15 June 2015).

United Kingdom
UK House of Commons Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, Seventh Report of Session 2004–05, 22 March 2005.

UK Government, *Justice and Security Green paper*, October 2011.

UK Justice, *Secret Evidence*, June 2009.

Jurisprudence

European Court of Human Rights and Fundamental Freedoms
ECtHR 8 June 1976, Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, A22, *(Engel and Others v the Netherlands).*

ECtHR 6 September 1978, No. 5029/7, A28 *(Klass and others v. Germany).*

ECtHR 27 February 1980, No. 6903/75, A35 (*Deweer v. Belgium).*

ECtHR 27 August 1981, No. 13057/87, A210 *(Demicoli v. Malta).*

ECtHR 28 June 1984, Nos. 7819/77, 7878/77, A80 *(Campbell and Fell v. the United Kingdom).*

ECtHR 2 March 1987, Nos. 9562/81 9818/82, A115 *(Monnell and Morris v. the United Kingdom).*

ECtHR 28 June 1987, No. 6232/73, A27 *(Konig v. Germany).*

ECtHR 23 October 1990, No. 11296/84, A189 *(Moreria de Azvedo v. Portugal).*

ECtHR 23 June 1993, No. 12952/87, A262 *(Ruiz-Mateos v. Spain).*

ECtHR 24 June 1993, No. 14518/89, A263 *(Schuler-Zgraggen v. Switserland).*

ECtHR 16 October 1993,No. 14448/88, A274 *(Dombo Beheer B.V. v. the Netherlands).*

ECtHR 24 February 1994, No. 12547/86, A284 *(Bendenoun v. France).*

ECtHR 9 December 1994, No. 13427/87, A301-B *(Strans Greek Refineries and Stratis Andreadis v. Greece*).

ECtHR 26 March 1996, No. 20524/92, 1996-II *(Doorson v. the Netherlands).*

ECtHR 23 October 1996, No. 21920/93, Reports 1996-V *(Levages Prestations Services v. France).*

ECtHR 15 November 1996, No. 22414/93, (1996) EHRR 413 *(Chahal v. United Kingdom).*

ECtHR 23 April 1997, Nos. 21363/93, 21364/9,3 21427/93, 22056/93, 1997-III *(Van Mechelen and others v. the Netherlands).*

ECtHR 25 November 1997, No. 18954/91, Reports 1997-VII *(Zana v. Turkey).*

ECtHR 19 December 1997 No. 20772/92, 1997-VIII *(Helle v. Finland).*

ECtHR 21 January 1999, No. 30544/96, 1999-I (*Garcia Ruiz v. Spain).*

ECtHR 24 November 1999, No. 21835/93, Reports 1997-VII *(Werner v. Austria).*

ECtHR 5 October 2000, No. 39652/98, 2000-X *(Maaouia v. France).*

ECtHR 16 February 2002, No. 27052/95 *(Jasper v. United Kingdom).*

ECtHR 16 February 2002, No. 28901/95, 2000-II *(Rowe and Davis v. the United Kingdom).*

ECtHR 16 February 2002, No. 29777/96, 2000-II *(Fitt v. United Kingdom).*

ECtHR 27 October 2004, Nos. 39647/98 and 40461/98, Series A no. 247-B *(Edwards and Lewis v. the United Kingdom).*

ECtHR 4 November 2004, No. 59244/00, A73 *(Ozturk v Germany).*

ECtHR 30 June 2005, No. 45036/98, ECHR 2002-V *(Segi and Gestoras Pro-Amnistía and Others v. Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the United Kingdom and Sweden).*

ECtHR 23 June 2006, No. 39482/98, 2003-VII *(Dowsett v. the United Kingdom).*

ECtHR 13 July 2006, No. 77575/01, *(Farange S.A. v. France).*

ECtHR 7 June 2007, No. 15187/03 *(Botmeh and Alami v. the United Kingdom).*

ECtHR 19 February 2009, No. 3455/05, Reports 2009 *(A. and others v. the United Kingdom).*

ECtHR 18 May 2010, No. 26839/05 *(Kennedy v. the United Kingdom).*

ECtHR 14 October 2010, No. 1466/07 *(Brusco v France).*

ECtHR 6 March 2012, No. 59577/08 *(Leas v. Estonia).*

ECtHR 26 November 2013, No. 5809/08 *(Al-Dulimi and Montana Management Inc. v. Switzerland).*

ECtHR 27 April 2014, No. 23083/05 *(Hudakova and others v. Slovakia).*

ECtHR 29 April 2014, No. 33637/02 *(Ternovskis v. Latvia).*

European Court of Justice
ECJ 13 September 2005, Case C-176/03, 2005 I-07879 *(Environmental crimes).*

ECJ 23 October 2007, Case C-440/05, 2007 I-09097 *(Ship-source pollution).*

ECJ 3 September 2008, Joined Cases C/402 & 415/05P, 2008 I-06351 (*Kadi I*)

ECJ 15 November 2012, joined cases C-539/ & 550/10 P, ECLI:EU:C:2012:711 (*Stichting Al-Aqsa/Council).*

ECJ 15 November 2012, Case C-417/11 P, ECLI:EU:C:2012:718 *(Council/Bamba)*

ECJ 18 July 2013, Joined Cases C-584/10, P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518 *(Kadi II),*

General Court
GC 7 December 2001, Case T-562/10, HTTS, 2011 II-08087 *(HTTS/Council)*

GC 12 December 2006, Case T-228/02, ECLI:EU:T:2008:7 *(PMOI I).*

GC 23 October 2008, Case T-256/07, 2008 II-03019 *(PMOI II).*

GC 11 June 2009, Case T-318/01, 2009 II-01627 *(Omar Mohammed Othman/Council and Commission).*

GC 30 September 2009, joined Cases T-37/07 and T-323-07, ECR I-000 *(Sision v Council).*

GC 21 March 2012, Joined Cases T-439/10 and T-440/10, ECLI:EU:T:2012:142 *(Fulmen).*

GC 6 September 2013, Joined Cases T-4212 and T-181-12, ECLI:EU:T:2013:409 *(Bateni/Council).*

Opinion Advocate Generals
Opinion A-G Bot in Joined Cases C-584/10 P, C-593/10 P and C-595/10, ECLI:EU:C:2013:176 *(Kadi II).*

United Kingdom domestic courts
UK High Court of Justice 6 June 2010, Bank Mellat v HM Treasury [2010] EWHC 1332 *(Bank Mellat EWHC).*

UK Court of Appeal 13 January 2011, Bank Mellat v HM Treasury [2011] EWCA 1 *(Bank Mellat EWCA).*

UK Supreme Court 13 July 2011, Al Rawi v. Security Services [2012] A.C. 531*(Al Rawi v. Security Services UKSC).*

UK Supreme Court 19 June 2013, Bank Mellat v HM Treasury [2013] UKSC 38 *(Bank Mellat UKSC).*

Literature

Barbier de La Serre 2006
E. Barbier de La Serre, 'Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends', *European Public Law* 2006, Volume 12, Issue 2, p. 226-250.

De Bare & Wimmer 2014

G. De Baere & M. Wimmer, 'EU-sancties tussen rechtsbescherming en effectiviteit: een typologie van beperkende maatregelen in het extern optreden van de Unie', *SEW* 2014, Issue 7/8, p. 320-334.

Barents 2014
R. Barents, 'EU Procedural Law and Effective Legal Protection', *CMLR* 2014, Volume 51, p. 1437–1462.

Beaucillon 2013
C. Beaucillon, *Les mesures restrictives de l'Union* européenne *[The restrictive measures of the European Union]*, Brussels: Bruylant 2013.

Cooter & Rubinfeld 1990
R.D. Cooter & D.L. Rubinfeld, 'Economic Analysis of Legal Disputes and Their Resolution', *Economic Literature* 1990, Volume 27, p. 1067-1097.

De Boer 2014
N. De Boer, 'Secret evidence and due process rights under EU law: ZZ', *CMLR* 2014, Volume 51, Issue 3, p. 1235-1262.

Bone 1993
R.G. Bone, *'Statistical Adjudication: Rights, Justice and utility in a World of Process Scarcity', Vanderbilt Law Review* 1993, Volume 46, p. 561-663.

Bonner 2007
D. Bonner, *Executive Measures, Terrorism, and National Security: Have the Rules of the Game Changed?*, Hampshire: Ashgate Publishing Limited 2007.

Cameron 2013
I. Cameron (ed.), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Cambridge: Intersentia 2013.

Chamberlain 2009
M. Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings', *Civil Justice Quarterly* 2009, Volume 28, Issue 3, p. 314-327.

Chesterman 2006
S. Chesterman, 'The Spy Who Came in from the Cold War: Intelligence and International Law', *Michigan Journal of International Law* 2006, p. 1071-1130.

Chinen 2009
M.A. Chinen, 'Secrecy and Democratic Decisions', *Quinnipac Law Review* 2009-1, p. 112-128.

Cho 2009
S. H. Cho, *International Commercial Online Dispute Resolution: Just Procedure Through the Internet*, Dissertation University of Illinois 2009.

Cole, Fabbrini & Vedaschi 2013
D. Cole, F. Fabbrini & A. Vedaschi (ed.), *Secrecy, National Security and the Vindication of Constitutional Law*, Cheltenham: Edward Elgar Publishing Limited 2013.

Curtin 2013
D. Curtin, 'Secrecy regulation by the European Union inside out' in D. Cole, F. Fabbrini & A. Vedaschi

(ed.), *Secrecy, National Security and the Vindication of Constitutional Law*, Cheltenham: Edward Elgar Publishing Limited 2013.

Cuyvers 2014
A Cuyvers, 'Give me one good reason: The unified standard of review for sanctions after Kadi II', *C.M.L.R.* 2014, Volume 51, p. 1759-1788.

Eckes 2000
C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford : Oxford University Press 2000.

Eckes & Mendes 2011
C. Eckes & J. Mendes, 'The right to be Heard in Composite Administrative Procedures: Lost in between Protection?', *European Law Review* 2011, p. 651-670.

Eckes 2014
C. Eckes, 'EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions', *C.M.L.R.* 2014, Volume 51, No. 3, p. 869-906.

Ehrenberg 2003
K.M. Ehrenberg, 'Procedural Justice and Information in Conflict-Resolving Institutions', *Albany Law Review* 2003, Volume 67, p. 167-209.

Van Elsuwege 2010
P. van Elsuwege, 'Law versus Politics: The Limits of Judicial Review in EU External Relations', *Annual Legal Research Network Conference* Working Paper 2010.

Van Elsuwege 2011
P. van Elsuwege, 'The Adoption of 'Targeted Sanctions' and the Potential for Inter-institutional Litigation after Lisbon', *Journal of Contemporary European Research* 2011, Volume 7, Issue 4, p. 488-499.

Ehrenberg 2003
K.M. Ehrenberg, 'Procedural Justice and Information in Conflict-Resolving Institutions', *Albany Law Review* 2003, Volume 67, p. 167-209.

Fabbrini 2013
Fabbrini, 'Global sanctions, state secrets and supranational review' in D. Cole, F. Fabbrini & A. Vedaschi (ed.), *Secrecy, national security and the vindication of constitutional law*, Cheltenham: Edward Elgar Publishing Limited 2013.

Fodor 2011
E.M. Fodor, 'Administrative Sanctions and the Concept of Criminal Charge: Romanian Perspective in a Comparative Law Study', *Acta Universitatis Danubius. Juridica* 2011, Volume 7, Issue 2, p. 16-30.

Hughes 2014
K. Hughes, 'Judicial review and Closed Material Procedure in the Supreme Court', *The Cambridge Law Journal* 2014, Volume 72, Issue 3, p. 491-494.

Johnston 1994
P. Johnston, 'Civil Justice Reform: Juggling Between Politics and Perfection', *Fordham Law Review* 1994, Volume 62, p. 833-882.

Kuijer 2006
M. Kuijer, *The Blindfold of Lady Justice - Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, Nijmegen: Wolf Legal Publishers 2004.

Mill 1863
J.S. Mill, *Utilitarianism*, London: Parker, Son, and Bourn 1863.

Murphy & Coleman 1990
J. G. Murphy & J.L. Coleman, *Philosophy of Law*: *an Introduction to Jurisprudence*, San Francisco and London: Westview Press 1990.

Murphy 2013
C. C. Murphy, 'Secret evidence in EU security law: special advocates before the Court of Justice?', in D. Cole, F. Fabbrini & A. Vedaschi (ed.), *Secrecy, national security and the vindication of constitutional law*, Cheltenham: Edward Elgar Publishing Limited 2013.

Nelson 1980
W. Nelson, 'The Very Idea of Pure Procedural Justice, *Ethics* 1980, Volume 90, Issue 4, p. 502-511.

Ojanen 2013
T. Ojanen, 'Administrative Counter-Terrorism Measures – A Strategy to Circumvent Human Rights in the Fight Against Terrorism?', in D. Cole, F. Fabbrini & A. Vedaschi (ed.), *Secrecy, National Security and the Vindication of Constitutional Law*, Cheltenham: Edward Elgar Publishing Limited 2013.

Posner 1990
R.A. Posner, *The Problems of Jurisprudence*, Boston: Harvard University Press 1990.

Posner 1992
R.A. Posner, *Economic Analysis of Law* (4rth ed.), Boston: Little, Brown and Company 1992.

Rawls 1971
J. Rawls, *A Theory of Justice*, Boston: Harvard University Press 1971.

Rosenfeld 1996
M. Rosenfeld, 'Can Rights, Democracy, and Justice Be Reconciled through Discourse Theory? Reflections on Habermas's Procedural Paradigm of Law, *Cardozo Law Review* 1996, Volume 17, p. 791-825.

Sargeant 2014
C. Sargeant, 'Two steps backward, one step forward – The cautionary tale of Bank Mellat (NO 1)', *Cambridge Journal of International and Comparative Law* 2014, Volume 3, Issue 1, p. 111-123.

Schebesta 2014
H. Schebesta, 'Procedural Theory in EU Law', in K. Purnhagen, P. Rott (eds.), *Varieties of European Economic Law and Regulation, Studies in European Economic Law and Regulation* , Switzerland: Springer International Publishing 2014, p. 851-862.

Shah 2009
Shah, 'From Westminster to Strasbourg: A and Others v. United Kingdom', *Human Rights Law Review* 2009, Volume 9, Issue 3, p. 485.

Shetreet 2012
S. Shetreet, 'Fundamental values of the Judicial System', *European Business Law Review* 2012, Volume 23, p. 61-76.

Solum 2004
L.B. Solum, 'Procedural Justice', *Southern California Law Review* 2004, Volume 78, p. 181-320.

Tomkins 2014
A. Tomkins, 'Justice and security in the United Kingdom' ,*Israel Law Review* 2014, Volume 37, Issue 4, p 305-329.

Tribe 1987
L.H. Tribe, *American Constitutional Law (*2nd ed), St. Paul: West Academic Publishing, 1987.

Turk 2010
A.H. Turk, *Judicial Review in EU Law,* Cheltenham: Edward Elgar Publishing Limited 2010.

Usai 2014
A. Usai, 'How switching towards an adversarial system might make fairness and efficiency bedfellows in cartels enforcement', *ECLR* 2014, Volume 35, Issue 11, p. 542-554.

Van der Woude 2013
M. van der Woude, 'Het Gerecht van de Europese Unie', *NJB* 2013/720.

Wetzling 2006
T. Wetzling, *Containing Secret Power in Europe? A study on oversight and accountability*, Geneva Graduate Institute of International Studies, 2006.

Research papers & studies

Bierstecker & Eckert 2006
T. Biersteker & S.E. Eckert, 'Strengthening Targeted Sanctions Through Fair and Clear Procedures', *White Paper Watson Institute Targeted Sanctions Project Brown University,* 30 March 2006.

Bigo a.o. 2015
D. Bigo a.o., 'National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges', *CEPS Paper* No. 78, January 2015.

Cameron 2006
I. Cameron, 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions', *Report Prepared for 32nd meeting of CAHDI,* CAHDI (206) 22, 17 August 2006.

Eckes 2012
C. Eckes, 'Decision-Making in the Dark?', Amsterdam Centre for European Law and Governance Research Paper No. 2012-02, June 2012.

Lehne 2012
S. Lehne, 'The role of sanctions in EU foreign policy', *Carnegie Endowment for International Peace*, 14 December 2012. Available at: www.http://carnegieeurope.eu/publications/?fa=50378.

Portela 2014
C. Portela, 'The EU's Use of "Targeted' Sanctions: Evaluating Effectiveness', *Centre for European Policy Studies (CEPS)* Working Document no. 391, March 2014.

Turner & Schulhofer 2005
J. Turner & S. Schulhofer, *The Secrecy Problem in Terrorism Trials,* New York: Brennan Centre for Justice at NYU School of Law 2005.

Press releases

Press release Court of Justice of the European Union, The Court of Justice delivers its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law, 18 December 2014, no. 180/14.

Online resources

European sanctions blog
http://europeansanctions.com/

UK Constitutional Law Association
http://ukconstitutionallaw.org/

European Law Blog
http://europeanlawblog.eu/

UK Supreme Court
https://www.supremecourt.uk/index.html

UK Supreme Court Blog
http://ukscblog.com/