

# The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?

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## Introduction

The right to be heard in administrative procedures made its entrance into European Union (EU) law<sup>1</sup> as a “general rule” of law drawing inspiration from Member States’ national legal systems, in particular from the common law principle of natural justice – *audi alteram partem*.<sup>2</sup> Shaped and refined by the Courts’ case law, this is today a securely anchored general principle of EU law that cuts across the whole EU legal system. In particular, it “cannot be excluded or restricted by any legislative provision [... and] must therefore be ensured both where there is no specific legislation and also where legislation exists which does not itself take account of that principle”.<sup>3</sup> Or, as has been repeatedly stated by the Courts, “observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question”.<sup>4</sup>

Despite its fundamental nature, the effectiveness of this rule under EU law is challenged by the composite nature of many of the EU administrative procedures. In fact because of the multilevel nature of the EU composite procedures are common

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<sup>1</sup> The Union has replaced and succeeded the Community (Article 1 (3) TEU). This article will use the terms ‘EU’ and ‘Union’ including where it refers to what was pre-Lisbon the Community; except where the historical context requires otherwise.

<sup>2</sup> Case 17/74, *Transocean Marine Paint Association v Commission* [1974] ECR 1063, paragraph 15. Opinion by Advocate General Warner, delivered on 19 September 1974 [1974] ECR 1082-1092, at 1088.

<sup>3</sup> Case T-260/94, *Air Inter v Commission* [1997] ECR II-997, paragraph 60 (a strong assertion that was not as such repeated in later judgments).

<sup>4</sup> Earlier, among others, Case 234/84, *Belgium v Commission* [1986] ECR 2263, paragraph 27; Case C-135/92, *Fiskano v Commission* [1994] ECR I-2885, paragraph 39. More recently, Joined Cases T-309/04, T-317/04, T-329/04, T-336/04, *TV 2/Danmark A/S and others v Commission* [2008] ECR II-2935, paragraph 136 (though referring broadly to the “rights of the defence”); Case T-170/06, *Alrosa Company Ltd v Commission* [2007] ECR II-2601, paragraph 91; Case T-189/02, *Ente per le Ville vesuviane v Commission* [2007] ECR II-89, paragraph 88.

and will continue to be one of the particularities of EU administrative law. Composite administrative procedures combine decisions of national and EU administrative bodies or entities in a unitary outcome. As such, they include one or more intertwined sub-procedures that are functional to the adoption of the final decision.<sup>5</sup> Often, they fail to be considered as unitary procedures for purposes of procedural protection. The complex interaction between national and EU interventions in given procedures is therefore likely to lead to gaps in procedural protection, in particular with regard to the exercise of the right to be heard. It may for instance prevent at the due moment the procedural intervention of persons concerned, possibly hindering the effectiveness of their participation. Further, in composite procedures both information and assessments of the situation may be artificially split.

This is particularly relevant where the assessments made by national administrations and the European actors differ. This could be for example the case where facts are interpreted differently or different relevance is attributed to certain facts or documents. Any defects occurring at the first stage of the procedure, whether it takes place at the national or at the EU level, are not easily cured at the second stage. These problems are aggravated when not all information is fully shared between the national and EU level, and when discretion is exercised at a level different from the level where the relevant information is available and assessed. Furthermore, problems in defining the competent jurisdiction may compromise the judicial protection of individual rights. An example would be the case of *Borelli*.<sup>6</sup> This makes procedural protection through the exercise of the right to be heard during the administrative procedure even more important. These potential gaps in procedural protection are particularly problematic from the perspective of the right's holder, whose rights and legally protected interests are affected by *one* uniform act, regulated by different procedural rules, and managed by national administrations and by EU bodies at the same time.

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<sup>5</sup> On complex administrative procedures and the ensuing legal problems in EU law, see Giancinto della Cananea (2004), "The European Union's mixed administrative proceedings", *Law and Contemporary Problems*, vol. 68, pp. 197-217 and Herwig C.H. Hofmann (2009), "Composite decision making procedures in EU administrative law" in Hofmann and Türk (eds.), *Legal Challenges in EU administrative law towards an Integrated Administration*, Edward Elgar, pp. 168-176.

<sup>6</sup> Case C-97/91, *Oleificio Borelli SpA v Commission* [1992] ECR I-6313.

Problems of procedural protection in composite administrative procedures have been at the core of the cases on the listing procedures that culminate in the adoption of autonomous EU counter-terrorist sanctions. Arguably, they are also one of the most extreme examples of these problems in that few other administrative measures restrict fundamental rights to the same extent. In this article, we will examine the listing procedure that culminates in the adoption of *autonomous* EU sanctions.<sup>7</sup> In this procedure, the listing suggestion originates at the national level and not at the UN level.<sup>8</sup> Even though individual sanctions have been the subject of research for some time, the latest ruling of the General Court on autonomous sanctions in the case of *Al Aqsa* demonstrates that the protection of the procedural rights of terrorist suspects is still controversial.<sup>9</sup>

While the case of counter-terrorist sanctions is particularly salient and problematic from a rule of law point of view, given the fundamental rights at stake, many other cases of composite procedures raise issues regarding the exercise of the right to be heard. The consideration of different procedures will provide broader and farther reaching insights about the right to be heard in composite procedures. The other examples addressed in this article pertain to market regulation. They are procedures for the remission of import duties, for the reduction of financial assistance provided by the European Social Fund, for the definition of geographical indications and designations of origin, for placing plant protection products on the market and fixing maximum residue levels of pesticides, as well as procedures for obtaining a permit for the use of alien species in aquaculture.

In this article we will in particular examine and question the rule developed by the judiciary according to which, in composite EU administrative procedures, the right to be heard must in the first place be ensured in the relationships between the

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<sup>7</sup> Autonomous EU sanctions have to be distinguished from EU sanctions based on United Nations (UN) lists. The most well-known case concerning sanctions based on UN list is the case of *Kadi*: Case T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649 and Cases C-402/05 P and C-415/05 P, *Kadi and al Barakaat International Foundation v Council and Commission*, [2008] ECR I-6351: see also: Christina Eckes, 'Judicial review of European anti-terrorism measures - The Yusuf and Kadi judgments of the Court of First Instance', *European Law Journal* 2008, pages 74–92; on the ECJ's ruling in *Kadi*: Eckes, 'International Sanctions against Individuals: A Test Case for the Resilience of the European Union's Constitutional Foundations', *European Public Law* (2009).

<sup>8</sup> As is the case for the other UN sanctions regime based on Security Council Resolution 1267 (S/RES/1267 (1999), of 15 October 1999).

<sup>9</sup> Case T-348/07, *Stichting Al Aqsa*, judgment of 9 September 2010; see for repeated annulments: Case T-341/07, *Jose Maria Sison v Council (Sison II)*, judgment of 30 September 2009, not yet reported.

affected person and the competent national administrative authority. Ensuring the possibility to be heard at the national level might be logically coherent with the institutional principles of EU law, namely with the principles of procedural autonomy and of loyal cooperation. However, we will argue, such principles neither ensure the procedural protection of the legal sphere of the persons affected nor the due consideration of the public interests voiced by the participants. The rule mentioned cannot be a general rule applicable irrespective of the concrete division of procedural competences between the national and EU authorities. We will further argue that, despite the fundamental nature of the right to be heard, the EU legislator has taken insufficient account of the consequences of the divided nature of composite administrative procedures for participation rights.

This article is structured as follows. Section One sets out the Courts' approach to the problem of ensuring compliance with the right to be heard in composite administrative procedures. This has been defined essentially in procedures regarding the remission of import duties and the reduction of financial assistance provided by structural funds, and was later reflected in the Court's interpretation of the right to be heard in the adoption procedure of EU counter-terrorist sanctions. Section Two, on the basis of a number of examples, examines how the EU legislator has conceived the procedural protection of the persons affected by composite administrative procedures. Section Three presents our views on how to ensure effective compliance with the right to be heard in composite administrative procedures.

## **The Framework of Participation in Composite Administrative Procedures: Judicial Origins of the Right to Be Heard**

The right to be heard in composite administrative procedures is not governed by legislation. The applicable rules emerge as a patch-work construction created by the EU courts on a case by case basis. In this section we will retrace the origins and emerging principles in the case-law of the General Court and exceptionally of the ECJ. As mentioned, the position of the General Court on the right to be heard in composite administrative procedures was defined essentially in cases regarding the remission of import duties and the reduction of financial assistance provided by the

European Social Fund. The legal rules applicable to the first example require the applicant to submit an application for the remission of import duties to the relevant national administration. In certain cases, defined in the applicable regulation, the competent national administrative body must send the application to the Commission. The Commission then decides whether the application is justified, after consulting a group of experts.<sup>10</sup> In the case of financial assistance provided by the European Social Fund, the Commission determines the reduction after giving the Member State concerned an opportunity to be heard. The sums to be repaid are requested by the Member States from the beneficiaries of the financial assistance.<sup>11</sup>

In the case of *France Aviation*, the General Court was faced with one of the potential problems that the composite procedure for the remission of import duties might entail. Procedural defects imputed to the national administrations – in this case, the failure of the French administration to share all the relevant documents with the Commission – hindered the persons concerned to fully enjoy their right to be heard. The Court maintained that “the applicants’ right to be heard *in a procedure such as that to which these proceedings relate* must actually be secured in the first place in the relations between the person concerned and the national administration”.<sup>12</sup> Apparently, only the fact that the procedure does not provide for direct contact between the Commission and the person concerned could justify this position.<sup>13</sup> However, given the Commission’s power of appraisal and the fact that, in this specific case, it deviated from the assessment of the national administration of the behaviour of the applicant, the General Court held that the Commission “had a duty to arrange for the applicant to be heard *by the French authorities*”.<sup>14</sup> Only the focus on the legislative formalities of the procedure, which, as mentioned, did not envisage any direct contact between the Commission and the person concerned,

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<sup>10</sup> See Articles 899, and 905 to 909 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253/1, 11.10.1993), as amended.

<sup>11</sup> Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund (OJ L 289/1, 22.10.1983, repealed), in force at the time the judgments analysed below were issued.

<sup>12</sup> Case T-346/94, *France Aviation v Commission* [1995] ECR II-284, para 30, emphasis added.

<sup>13</sup> This was stressed by the Court at para 30.

<sup>14</sup> Case T-346/94, *France Aviation*, *ibid*, para 36, emphasis added. See also para 34 and 35.

could explain the “bureaucratic detour”<sup>15</sup> endorsed by the General Court, denying a right to be heard directly before the Commission. At the same time, the Court sought to avoid the problems resulting from the composite nature of the procedure and protect the effectiveness of the right to be heard by conferring on the Commission a duty to control the conduct of the national administration in this respect. The Court specifically highlighted the Commission’s duty under the applicable rules to require additional information from the national administration.<sup>16</sup> The Court held that the Commission should have used the right to inquire in order to ensure respect for the applicant’s right to be heard.<sup>17</sup>

In the cases of *Eyckeler* and *Primex Produkte* by contrast, the General Court relied on *France Aviation* but decided that the right to be heard should be ensured directly before the Commission. The reason for this decision was not new. It had already been present in *France Aviation*: the Commission diverged from the decision of the national administration.<sup>18</sup> This constituted a difference in the assessment of the applicant’s behaviour. The applicant should therefore be able to present his views directly before the Commission. Despite the similarity of these cases with *France Aviation*, the different outcome could be explained because the Court relied on one particular aspect of the *audi alteram partem* principle that, apparently, it did not consider in its reasoning in *France Aviation*. The Court pointed out that the right to be heard must be guaranteed “even in the absence of any rules governing the procedure in question”.<sup>19</sup>

It follows from this case law that in instances in which the Commission does *not* limit itself to approving the decision of the national authority, it is obliged to hear directly the persons concerned.<sup>20</sup> This is because it exercises discretion and may have a different assessment of the facts of the case. In all other cases, it needs at least to ensure that the file transmitted to it by the national administrations was

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<sup>15</sup> The expression is Nehl’s: Hanns Peter Nehl (1999), *Principles of Administrative Procedure in EC Law*, Oxford: Hart Publishing p. 79.

<sup>16</sup> According to the current rules, the Commission *may* request that additional information be supplied (see Art. 905 (3) and (5) of Commission Regulation (EEC) No 2454/93, n 10 above).

<sup>17</sup> *France Aviation* (n 15 above), para 30.

<sup>18</sup> Case T-42/96, *Eyckeler & Malt AG v Commission* [1998] ECR II-401, para 84-86; Case T-50/96, *Primex Produkte Import-Export GmbH & Co and others v Commission* [1998] ECR II-377, para 65-67.

<sup>19</sup> *Eyckeler*, para 77; *Primex Produkte*, para 59.

<sup>20</sup> See also below, the General Court interpretation of its ruling in *France Aviation* (n 15 above).

complete and that the person concerned was properly heard on the facts and evidence of the file.

This was taken a step further in the case of *Mehibas Dordtselaan*.<sup>21</sup> After *France Aviation*, the Commission started requiring in procedures governing the repayment of import duties that the file transmitted to it by the national authorities is accompanied by a statement by the person concerned certifying that she has read the file and that either she has nothing to add or submitting the documents that she considers pertinent.<sup>22</sup> In *Mehibas Dordtselaan*, the Court was called to assess the Commission's procedural conduct under these new rules. Surprisingly in view of the wording of *France Aviation*, but in line with the *Eyckeler* and *Primex Produkte* judgments, the General Court ruled that such a statement did not fully meet the requirements of *France Aviation*. The General Court argued that this "enables the person concerned to exercise his right to be heard during the first stage of the administrative procedure, which takes place at national level". However, "it *in no way guarantees* his rights of defence during the second stage of the procedure", since "the statement is made at a stage when the Commission has not yet had an opportunity to consider the position of the person concerned, let alone come to a provisional view on his application for repayment".<sup>23</sup>

Hence, in the General Court's interpretation of *France Aviation*, this requires that the right to be heard is guaranteed at both stages of the procedure, in particular given the Commission's discretion in adopting a decision in these cases.<sup>24</sup> According to the General Court, the Commission's powers of assessment make compliance with the right to be heard "all the more important". Yet the main reason why the right to

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<sup>21</sup> Case T-290/97, *Mehibas Dordtselaan BV v Commission* ECR [2000] II-15.

<sup>22</sup> This requirement was introduced by the Commission Regulation n. 12/97 of 18 December 1996 amending Commission Regulation n. 2454/93 (OJ L 9/1, 13/01/1997) and is maintained in the current version of Article 905 (3) of Commission Regulation n. 2454/93 (last amended by Commission Regulation n. 1335/2003 of 25 July 2003 (OJ L 187/16, 26.7.2003).

<sup>23</sup> *Mehibas Dordtselaan*, n 21 above, para 44 (emphasis added). See also Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97, T-217/97, T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, *Kaufring AG and Others v Commission* ECR [2001] II-1337, para 160 and para 188. This seems to apply also to cases in which the Commission does not intend to deviate from the position of the national authority, but intends in any case to issue a decision that is unfavourable towards the applicant. At least, the wording of the judgment clearly favours the interpretation that the right to be heard needs to be ensured at both levels as long as it is capable of adversely affecting the person concerned. This is confirmed by the Court's reasoning in *Kaufring*, para 151 to 155.

<sup>24</sup> *Mehibas Dordtselaan* (n 21 above), para 45 and 46.

be heard needs to be ensured also in the second stage of the procedure relates to the status of this right as a fundamental principle of EU law which needs to be ensured even in the absence of any rules governing the procedure. One could add: irrespective of the rules governing the procedure the Commission must give the person concerned the opportunity to make her views known on all the evidence and the legal analysis on which it bases its decision. Even if some of the documents that form part of the evidence only confirm facts that were already included in the national administrative procedure, the Commission is still obliged to disclose them for the purpose of the hearing.<sup>25</sup>

By way of conclusion, it would seem that EU law reached a degree of maturity on this issue capable of addressing some of the main problems posed by EU composite administrative procedures in the customs sector. The mere control of the Commission over the way the procedure is conducted at the national level is no longer considered enough to ensure compliance with the right to be heard in procedures regarding the remission of import duties.<sup>26</sup> Furthermore, the General Court's starting point in *France Aviation* – ie. the assumption that, in composite procedures the right to be heard needs to be ensured in the first place in the relations between the person concerned and the national administration – was abandoned in subsequent judgments. Indeed, the General Court corrected this in *Mehibas Dordtselaan*.

However, the case law on the procedures on the reduction of financial assistance granted under the European Social Fund appears to contradict this first conclusion; or, at least, it appears to reveal that these rules are only applicable to the procedure on remission of import duties and not to composite administrative procedures in general. While the General Court, subsequently supported by the ECJ, seems to have endorsed a unitary conception of the procedure, it did not fully consider the consequences this conception would have with regard to the right to be heard. In view of the actual adverse effects on the beneficiary of the reduction of financial assistance, the General Court and the ECJ held that a direct link is in fact established between the latter and the Commission. This is the case despite the fact that the Commission interacts in these procedures only with the national

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<sup>25</sup> *Kaufring*, n 23 above, para 185-187.

<sup>26</sup> See current Articles 905 and 906a of Regulation 2454/93, n 10 above.

administrations and not with the beneficiaries themselves. In other words, the national administrative entities are formally the sole actor that is in direct contact with the person concerned.<sup>27</sup> The Courts' position is grounded in three main reasons. Firstly, the Commission is legally fully liable for its decisions.<sup>28</sup> Secondly, national administrations, despite their formal role, do not have a formal power to make an assessment of their own.<sup>29</sup> Thirdly, the Commission's decisions directly concern the beneficiaries of the financial assistance, who assume primary liability for the repayment of the sums at issue.<sup>30</sup> On this basis, the General Court` concluded that the Commission itself must ensure compliance with the right to be heard. According to the Court, this meant that the Commission is obliged either to hear directly the persons concerned or to ensure "*that they had had the possibility of effectively setting forth their views on the proposed reduction in assistance*".<sup>31</sup> This was reiterated in subsequent case law, where the ECJ endorsed the view that, the right to be heard needs to be ensured "by or on behalf of the Commission", namely by submitting a draft Commission decision to the person concerned to enable him or her to submit any observations.<sup>32</sup> Accordingly, the procedural protection of the person concerned needs to be either way ensured at the second stage of the procedure that takes place at the EU level. However, the rule allows the right to be heard to be ensured by the national administration on behalf of the Commission. This flexibility would seem to favour the economy of the procedure while at the same time respecting the way the latter was structured by the legislator. Nevertheless, the Commission has to carry the burden of controlling the administrative conduct of national administrations and of correcting procedural

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<sup>27</sup> Case T-450/93, *Lisrestal - Organização Gestão de Restaurantes Colectivos Lda and others v Commission* [1994] ECR II-1177, para. 47, Case C-32/95 P, *Commission v Lisrestal – Organização Gestão de Restaurantes Colectivos Lda* [1996] ECR I-5393 para. 28.

<sup>28</sup> *Lisrestal*, ECJ, para 29; *Lisrestal*, General Court, para 47, 49.

<sup>29</sup> *Lisrestal*, General Court, para 44. The ECJ admitted that the Commission's decision "may sometimes reflect an assessment and evaluation by the competent national authorities" (para. 29). However, this is merely a choice of the Commission, who is formally the competent body to decide.

<sup>30</sup> *Lisrestal*, ECJ para 24, 26, 33; *Lisrestal*, General Court, para 43, 45, 48. See also Case T-102/00, *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap v Commission* [2003] ECR II-2433, para 61.

<sup>31</sup> *Lisrestal*, General Court, para 49, emphasis added.

<sup>32</sup> Case C-462/98 P, *Mediocruso v Commission* ECR [2000] I-7183, para 42 and 43. Similarly, *Vlaams Fonds*, para 61; Case T-158/07, *Cofac v Commission* [2009] ECR II-237 para 39.

irregularities that do not allow the person concerned to effectively put forth her views.

In the case of *Mediocrurso* for example, the failure to respect the right to be heard arose because the national administration did not give the person concerned a reasonable time to be heard. The Court found, in essence, that the Commission had the duty to correct this.<sup>33</sup> Thus, contrary to what could initially be assumed, the rule according to which the right to be heard needs to be ensured “by or on behalf of the Commission” may ultimately lead to duplication of procedures. Moreover, it favours situations, such as those in *Vlaams Fonds*, where the decision to reduce the financial assistance was taken without giving the person concerned notice of all the information on which it was based. More specifically, in *Vlaams Fonds*, the right to be heard was exercised before the Member State concerned. At the end, the decision was based on documents of the Commission of which the beneficiary was not informed.<sup>34</sup> Naturally, this may also occur when the Commission has the sole responsibility for ensuring the procedural protection of those concerned. However, if the hearing is organised by the Member State at a stage of the procedure in which the Commission is still entitled to continue its investigations, the likelihood increases that breaches of the right to be heard similar to the one in *Vlaams Fonds* occur. Furthermore, the possibility that the national administration is in charge of the hearing on behalf of the Commission opens the way to the *Cofac* type of litigation. In this case, the applicant claimed that it should have been heard directly by the Commission regarding the decision to reduce its financial assistance on the basis of alleged failures of the national administration that, in its view, would have infringed its right to be heard. Yet, the allegations were clearly not founded. The applicant took advantage of the division of tasks between the Commission and the national administration – and of the possibility to be heard either by one or the other. As in *Cofac*, this type of claims may ultimately force the Court to assess the procedural conduct of the national administration, namely to assess whether it took into account the observation submitted by the beneficiary of the assistance; whether it

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<sup>33</sup> *Mediocrurso*, para. 37 to 43.

<sup>34</sup> *Vlaams Fonds* (n. 30 above), para 66, 67, and 83.

was negligent with respect to the file; or whether a national criminal procedure had consequences for the case at issue.<sup>35</sup>

It follows from these considerations that the persons concerned would be better protected if the right to be heard was exercised directly before the authority that effectively defines the content of the act. Furthermore, a hearing directly before the Commission would also contribute to a better administration of the procedure. Offering a possibility to be heard exclusively at the national level is not in tune with the rule according to which a direct link is established between the Commission and the beneficiary of the financial assistance where received subsidies are reduced. At any rate, the discussed case law, while allowing that the right to be heard is ensured through the Commission's control over national administrative procedures, does not amount to re-stating the rule according to which the right to be heard needs to be ensured first and foremost before the national administration. *Lisrestal*, *Mediocurso*, and *Cofac* do not establish a preference for either the national or the EU level, so long as the right to be heard is effectively complied with. In the following section, we will see that this is an insight that seems to be disregarded in the case law on counter-terrorist sanctions, where the General Court gave hearings at the national level preference.

## Individual Sanctions

### ***The General Court's Case-Law***

The General Court developed the specific content of the right to be heard in the context of individual sanctions in its rulings in the saga of *Organisation des Modjahedines du Peuple d'Iran (OMPI)*<sup>36</sup> and in the case of *Sison*.<sup>37</sup> The General Court annulled the listing of *OMPI* three times before it was finally taken off the list.<sup>38</sup> The Court found the rights of the defence, the duty to state reasons in Article 253 EC [now Article 296(2) TFEU], and the right to a fair trial, *fully applicable* to EU

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<sup>35</sup> *Cofac* (n. 32 above), para 32, 44, 48. 49.

<sup>36</sup> Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council and UK (OMPI I)* [2006] ECR II-4665; Case T-256/07, *People's Mojahedin Organization of Iran v Council (OMPI II)* [2008] ECR II-3019; appeal pending: Case C-576/08 P *People's Mojahedin Organization of Iran*; Case T-284/08, *People's Mojahedin Organization of Iran v Council (OMPI III)* [2008] ECR II-3487.

<sup>37</sup> See in particular Case T-228/02, *OMPI I* (n 39 above); Case T-47/03, *Sison* (n 41 above).

<sup>38</sup> See for a more detailed account of this case: Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights - The Case of Individual Sanctions* (Oxford: Oxford University Press, 2009), Chapter 6.

sanctions against individuals<sup>39</sup> and held that the listing procedure failed to comply with all three.<sup>40</sup> Essentially, the breach resulted from the fact that the Council had not made any attempt to notify the relevant evidence to the applicant. Furthermore, and equally resulting from the failure to share any information, even with the Court, the General Court found the right to judicial protection infringed. It expressly stated that it did not feel, 'even at this stage of the procedure, in a position to review the lawfulness of [...] [the contested] decision.'<sup>41</sup>

The right to be heard in the procedure culminating in the adoption of individual sanctions differs depending on whether the person is listed for the first time (*initial listing*) or whether a decision is taken to maintain her name on the list (*subsequent listing*).<sup>42</sup> One essential difference is the general limitation that a hearing *before* the initial decision 'would be liable to jeopardise the effectiveness of the listing'.<sup>43</sup> Hence, the applicant can be heard *after* the initial listing, while the hearing for a subsequent listing must in principle take place in advance.<sup>44</sup>

According to the General Court, both in the context of initial and subsequent listings '[t]he rights of the defence of the person concerned must be effectively safeguarded *in the first place* as part of the national procedure.'<sup>45</sup> Further, even *if* there is a hearing at the Union level, it is subject to significant limitations. As a consequence of the limited competences of the Council, it is limited to the narrow legal question whether a decision existed that meets the definition of the Community regulation.<sup>46</sup> Based on the understanding of the General Court, the

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<sup>39</sup> Case T-228/02, *OMPI I* (n 39 above), paras 108-113; see also: Case T-47/03, *Jose Maria Sison v Council and Commission* [2007] ECR II-73 (summ.pub.), para. 138-160 surprisingly the General Court did not in this section directly refer to its judgment in *OMPI I* in which it had already made a similar argument.

<sup>40</sup> Case T-228/02, *OMPI I* (n 39 above), para. 218 (duty to state reasons); para. 214 (rights of the defence); and para. 225 (right to a fair trial).

<sup>41</sup> *Ibid*, para 173.

<sup>42</sup> Article 2(3) of EC Regulation 2580/2001 read in conjunction with Article 1(4) and Article 1(6) of Common Position 2001/931/CFSP respectively. Case T-228/02, *OMPI I* (n 39 above), para. 161; this becomes obvious in the word 'whereas' in para. 164. The General Court continues to apply the distinction between the initial and the subsequent procedure in its most recent judgments: T 348/07, *Stichting Al Aqsa*, judgment of 9 September 2010.

<sup>43</sup> Case T-47/03, *Sison* (n 41 above), para 175, see also: Case T-228/02, *OMPI I* (n 39 above), para. 128; restricting hearing right in 'emergency situations' is well accepted, see also: Case T-372/00 *Campolargo v Commission* [2002] ECR II-223, para 32.

<sup>44</sup> Case T-228/02, *OMPI I* (n 39 above), para 137.

<sup>45</sup> Case T-228/02, *OMPI I* (n 39 above), para 119 [emphasis added]; nearly identical: Case T-47/03, *Sison* (n 41 above), para. 166.

<sup>46</sup> Case T-228/02, *OMPI I* (n 39 above), para 120.

hearing does not extend to the substance of that decision: the appropriateness or well-foundedness of the decision cannot be questioned at the EU level.<sup>47</sup> Further, since in view of the principle of sincere cooperation it is not for the Council to examine whether the fundamental rights of the party concerned were respected by the national authorities, the hearing does not cover the fairness of the procedure at the national level either.<sup>48</sup> Only where the Member State submits to the Council evidence that has not been assessed by the competent national authority, this newly-adduced evidence must be subject of the hearing before the Council.<sup>49</sup>

In the course of the *initial listing* the General Court found that the Council is only competent to verify ‘*that there exists a decision of a national authority*’ meeting the ‘definition’ in Article 1(4) of Common Position 2001/931/CFSP.<sup>50</sup> Furthermore, the principle of sincere cooperation<sup>51</sup> ‘entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the national authority, at least where it is a judicial authority.’<sup>52</sup> ‘[I]t is not for the Council to decide whether the [national] proceedings opened against the party concerned and resulting in th[e relevant] decision [...] was conducted correctly, or whether the fundamental rights of the party concerned were respected.’<sup>53</sup> However the listing in the case at hand, *OMPI I*, was based on a decision of the Home Secretary which at the time of the initial listing had not yet been examined in substance by a judicial authority.<sup>54</sup> Moreover, although the existence of ‘serious and credible evidence or clues’ is a legal condition for the application of EU sanctions,<sup>55</sup> establishing the existence of such evidence falls within the competence of the national authorities and the principle of sincere cooperation excludes that this could be made subject to the

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<sup>47</sup> Case T-228/02, *OMPI I* (n 39 above), para 121.

<sup>48</sup> *Ibid.*

<sup>49</sup> Case T-228/02, *OMPI I* (n 39 above), para 125.

<sup>50</sup> Case T-228/02, *OMPI I* (n 39 above), para. 117 (emphasis added); Case T-47/03, *Sison* (n 41 above), para. 164.

<sup>51</sup> Article 4(3) TEU.

<sup>52</sup> Case T-256/07, *OMPI II* (n 39 above), para 133; see also: Case T-228/02, *OMPI I* (n 39 above), para 122.

<sup>53</sup> Case T-228/02, *OMPI I* (n 39 above), para 121.

<sup>54</sup> The High Court had ruled that the British Proscribed Organisations Appeal Commission (POAC) was the correct (quasi-)judicial authority to carry out the applicant’s examination (see further n. 64 below). The appeal was pending when *OMPI* was listed for the first time on 2 May 2002 (*OMPI I*, paras 1-17).

<sup>55</sup> Article 1(4) of Common Position 2001/931.

scrutiny or a hearing at the EU level.<sup>56</sup> At the same time however, the General Court held that ‘the Council enjoys broad discretion in its assessment’.<sup>57</sup> The Council needs the decision of a competent national authority to list anyone but even if a decision of a national authority exists (and the Member State proposes listing) the Council is not obliged to list the person. This demonstrates that the Council bases its decisions on additional substantive considerations, presumably on issues such as whether the applicant can be linked to terrorism. Therefore, it is submitted that any hearing at the EU level would have to extend to these substantive considerations.

The Court resumed *France Aviation*<sup>58</sup> when it ruled that the right to be heard must in the first place be safeguarded at the national level. However, contrary to *France Aviation*, the General Court did not associate this split of the right to be heard with a duty on the part of the EU institution to control the procedural conduct of the national authorities. The Court’s reluctance to let EU institutions review national procedural conduct could be due to the fact that it assumed – in line with Common Position 931/2001/CFSP<sup>59</sup> – that the competent national authority should in principle be a *judicial* authority.<sup>60</sup> Yet, the *OMPI* case, the list of competent authorities, and later amendments to it, demonstrates that none of the competent authorities is actually part of the judiciary. They are in fact part of the home department, ministries of finance or economics, or national banks.<sup>61</sup>

With regard to the *subsequent decisions*, those listed have slightly more extensive rights at the Union level to make their views known. This is due to the greater competences of the Council. Here, the General Court considered it necessary that the Council verified ‘the consequences [of the decision of the competent authority] at the national level.’<sup>62</sup> The General Court explicitly stated that ‘[a]ny subsequent decision to freeze funds must accordingly be preceded by the possibility of a further hearing and, where appropriate, notification of any new incriminating

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<sup>56</sup> Case T-228/02, *OMPI I* (n 39 above), para 122.

<sup>57</sup> Case T-228/02, *OMPI I* (n 39 above), para 159.

<sup>58</sup> See section above.

<sup>59</sup> Article 1(4) of Common Position 931/2001/CFSP: ‘... For the purposes of this paragraph ‘competent authority’ shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.’.

<sup>60</sup> Case T-228/02, *OMPI I* (n 39 above), para 116.

<sup>61</sup> Regulation (EC) No 745/2003, O.J. L 106 of 29.4.2003; Regulation (EC) No 1207/2005, O.J. L 197 of 28.7.2005; Regulation (EC) No 1957/2005, O.J. L 314 of 30.11.2005; Regulation (EC) No 1461/2006, O.J. L 272 of 3.10.2006; Regulation (EC) No 1791/2006, O.J. L 363 of 20.12.2006.

<sup>62</sup> Case T-47/03, *Sison* (n 41 above), para 164.

evidence.<sup>63</sup> In *OMPI II* and *OMPI III*, the General Court examined in detail the rights of the defence at the Union level where the Council takes a subsequent listing decision to continue sanctions against a specific person. The right to be heard extends here to all the information that the Council is obliged to consider in the subsequent decision. This includes appeal decisions at the national level and if applicable the Member State's omission to take further substantive measures after the first decision, such as further investigations into the applicant's link with terrorism. In *OMPI II*, the General Court annulled the listing because the Council failed to give sufficient reasons as to why it had not taken into account the appeal decision of a national quasi-judicial body (the British Proscribed Organisations Appeal Commission (POAC)) ordering the removal of the applicant from the list.<sup>64</sup> This was confirmed in the case of *Al-Aqsa*, where the General Court annulled the Council's listing decision because the national decision that had served as a basis for the listing had been repealed in the meantime. The General Court argued that 'there was no longer any "substratum" in national law that justified to the required legal standard keeping the equivalent Community measure.'<sup>65</sup>

### ***Possible Reasoning Behind the General Court's position***

The General Court's decision to require first and foremost the competent national authorities to ensure compliance with the right to be heard when a person is listed as a terrorist suspect<sup>66</sup> raises many questions: Why did the Court focus on the national level? Is this focus justified? What are the consequences for the procedural protection of those sanctioned that compliance with the right to be heard must in the first place be ensured at the national level?

To explain its focus on the national level, the General Court referred to an earlier case on *state sanctions* against the then Federal Republic of Yugoslavia (the '*Invest Import und Export* case').<sup>67</sup> '*Invest Import Export* concerned a regulation

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<sup>63</sup> Ibid, para. 178.

<sup>64</sup> The POAC is the specialist body set up by the Parliament of the United Kingdom to hear and determine appeals brought against decisions proscribing, or refusing to lift the proscription of, organisations regarded as terrorist by the Home Secretary; see Case T-256/07, *OMPI II* (n 39 above), paras 155 *et seq*, this section concerned the listing in Council Decision 2007/868/EC of 20 December 2007.

<sup>65</sup> T-348/07, *Stichting Al Aqsa*, judgment of 9 September 2010, para 178.

<sup>66</sup> Case T-228/02, *OMPI I* (n 39 above), para 119.

<sup>67</sup> Case T-189/00 R *Invest Import und Export and Invest Commerce v Commission* [2000] ECR II-2993.

ordering the freezing of all assets of Yugoslav companies in the EU. The Commission drew up the list of companies to whom the regulation applied based on proposals by the competent national authorities of Germany and France – hence, in a composite administrative procedure consisting of a national and a European stage. The regulation contained a cursory reference to the possibility of defence, stipulating that persons could request the competent national authorities to be de-listed.<sup>68</sup> The Commission however had listed the applicants in the *‘Invest’ Import und Export* case without giving them the opportunity to be heard. The applicants brought an action for breach of their hearing rights arguing that ‘in the end it is the Commission which is responsible for ensuring that the undertakings concerned receive a lawful hearing.’<sup>69</sup> The General Court found the applicant’s claim unsubstantiated. Not denying that the Commission had not given the applicants the opportunity to be heard, the Court turned to the national level. The Court held that ‘the right to be heard must actually be secured *in the first place* in the relations between that undertaking and the competent national administrative authority.’<sup>70</sup> This justified certain limitations imposed on the right to be heard at the EU level. The General Court pointed out that the applicants had made no submissions as to any breach by the national authorities of their right to be heard, but that on the contrary they had been heard at the national level.<sup>71</sup> The Court explained that ‘Community law itself recognises the lawfulness of such procedural adaptations in the context of economic sanctions against individuals.’<sup>72</sup> With ‘procedural adaptations’ the General Court meant the possibility that procedural rights at one level substitute for the rights at another level. The General Court drew in its reasoning in *‘Invest’ Import und Export* on the earlier case of *France Aviation* that was discussed in detail in Section One above.<sup>73</sup> Yet, as has also been discussed above the General Court had ruled in this case that *the Commission was under an obligation to control whether the applicant*

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<sup>68</sup> Article 8(4) of Council Regulation (EC) No 1059/2000 of 18 May 2000 amending Regulation No 723/2000, O.J. 2000 L 119/1.

<sup>69</sup> Case T-189/00 R, *‘Invest’ Import und Export* (n 69 above), para 26.

<sup>70</sup> *Ibid*, para 40, emphasis added. The order was approved on appeal with no reference to the question of the right to be heard, see: Case C-317/00 P(R) *‘Invest’ Import und Export and Invest Commerce v Commission* [2000] ECR I-9541.

<sup>71</sup> Case T-189/00 R, *‘Invest’ Import und Export* (n 69 above), para 40-41.

<sup>72</sup> *Ibid*.

<sup>73</sup> Case T-346/94, *France Aviation* (n 15 above); see also: Case T-42/96, *Eyckeler&Malt AG v. Commission*, [1998] ECR II-401.

*had been duly heard at the national level*, even though ‘in the first place’ this was the obligation of the national authorities.

Two important conclusions can be drawn from the *‘Invest’ Import und Export* case. First, even though in this case the Commission was not obliged to grant the opportunity for a hearing, such an obligation is not excluded as a matter of principle. The General Court found that the right has to be guaranteed *‘in the first place’* at the national level. It did not argue that the right must exclusively be guaranteed at the national level. Secondly in *‘Invest’ Import und Export*, the General Court was not in principle unwilling to review whether the applicants had the opportunity to be heard at the national level. Indeed, it discussed that the applicants had been heard by the national authorities, even though this had not directly been raised as an issue by either of the parties. The General Court appears to have interpreted the specific outcome in *‘Invest’ Import and Export* and herewith indirectly in *France Aviation* as a general rule and applied it to the sanctions cases without taking into account that the procedure for sanctioning individuals is different and requires therefore different measures to comply with the right to be heard. The next section will analyse in detail why the right to be heard must lead to different conclusions in the case of counter-terrorist sanctions.

### ***Why is the General Court’s Reasoning Flawed?***

The assessment of the General Court’s interpretation and application of the right to be heard in the sanctions cases requires a more detailed understanding of the sanctioning procedure and of the effects attached to the measures taken at the different levels. The autonomous EU sanctioning regime was set up to give effect to the international obligations of the Member States under Resolution 1373.<sup>74</sup> Under Resolution 1373 UN Member States are obliged to draw up lists of alleged terrorists and freeze their financial funds. For the EU Member States it is the EU that gives effect to these UN obligations in the autonomous sanctioning regime based on Common Position 2001/931/CFSP<sup>75</sup> and EC Regulation 2580/2001.<sup>76</sup> These latter instruments draw up a list of private individuals who are made subject to EU counter-terrorist sanctions following proposals from the Member States and third

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<sup>74</sup> S/RES/1373 (2001), of 28 September 2001.

<sup>75</sup> OJ 2001, L 344/93, of 27 December 2001.

<sup>76</sup> OJ 2001, L 344/ 70, of 27 December 2001.

countries. As was explained above, different from what the wording of Common Position 2001/931/CFSP suggests, the competent national authorities do not form part of the judiciary but are part of the executive.

Under the Treaty of Lisbon, the EU is given explicit competence for the adoption of sanctions against private individuals (see Articles 75 and 215 TFEU). However, it is still controversial which of the two legislative procedures is applicable to which type of sanctions.<sup>77</sup> Both Articles 215 and 75 TFEU state explicitly that '[t]he acts referred to in this Article shall include necessary provisions on legal safeguards'<sup>78</sup> and the Court was given jurisdiction to review individual sanctions (Article 275(2) TFEU). Yet, the general reference to legal safeguards has not so far led to the adoption of more specific rules setting out at what level those sanctioned can exercise their right to be heard.

In the listing procedure, names are added by the Council based on a proposal from one of the Member States.<sup>79</sup> The listing is prepared in a permanent Working Party.<sup>80</sup> Usually, the competent national authorities conduct an investigation and decide whether to propose a specific name to the other members of the Working Party. After a proposal is made the representatives have two weeks to consult other governmental officials. Pursuant to its mandate, the permanent Council Working Party is in charge of (i) examining and evaluating information with a view to listing; (ii) assessing whether the information meets 'the criteria in Common Position 2001/931/CFSP and in the Council's statement agreed when the Common Position was adopted'; (iii) preparing the regular review; and (iv) making recommendations for listings and de-listings.<sup>81</sup> Any listing is finally agreed in a unanimous decision of the Council, usually, if there are no objections, in written procedure (A-point).<sup>82</sup>

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<sup>77</sup> Two different EU sanctions must be distinguished: a) autonomous EU sanctions (lists of terrorist suspects are drawn up at the EU level following proposals from the Member States – these sanctions are the subject of this article) and b) EU sanctions that give effect to lists of terrorist suspects drawn up at the UN level (see for more detail: Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights - The Case of Individual Sanctions* (Oxford: Oxford University Press, 2009)).

<sup>78</sup> Articles 215(3) and 75(3) TFEU.

<sup>79</sup> Member States are divided over how to go about adding a name proposed by a third country ([http://www.europarl.eu.int/comparl/libe/elsj/newsletter/2002\\_06/default\\_en.htm](http://www.europarl.eu.int/comparl/libe/elsj/newsletter/2002_06/default_en.htm)).

<sup>80</sup> Council Document 10826/07 on the fight against the financing of terrorism - implementation of Common Position 2001/931/CFSP, of 21 June 2007, Annex II. Until the establishment of the permanent working party in 2007, the listings were prepared in an ad hoc forum.

<sup>81</sup> See the Working Party's mandate at: Council doc. 10826/07, *ibid*, Annex I, page 4.

<sup>82</sup> The Ministry of Foreign Affairs: Finland and Terrorism: <http://formin.finland.fi/doc/eng/policies/repterro.htm>.

Article 1(6) of Common Position 2001/931/CFSP provides every six months for a revision of the list. The process of removing a specific name is not explicitly set out. This means that, according to the general amendment rules, removal also requires unanimity, which gives any one Member State the power to keep the sanction system indefinitely in place with regard to a specific person.

In June 2007, the Council introduced some basic procedural safeguards, presumably in order to ensure compliance with the guidelines laid down by the General Court in *OMPI I*. Every listed person is now provided with a statement of reasons.<sup>83</sup> They are notified (i) of their listing,<sup>84</sup> (ii) of the possibilities to submit a request for de-listing, and (iii) of the possibilities to bring a legal action before the General Court. The new statement of reasons must be ‘sufficiently detailed to allow those listed to understand the reasons for their listing and to allow the Community Courts to exercise their power of review’.<sup>85</sup> It is discussed by the Working Party on a case-by-case basis,<sup>86</sup> and must contain information about the acts committed, the competent national authority, and the type of decision that was taken.<sup>87</sup>

Pursuant to its working methods, the Working Party ensures that ‘the information provided meets the criteria in Articles 1(3) and 1(4)’ of Common Position 2001/931/CFSP.<sup>88</sup> Article 1(3) defines the meaning of ‘terrorist act’ and ‘terrorist group’. Article 1(4) stipulates that listings are based on ‘precise information or material in the relevant file which indicates that a decision has been taken by a competent [usually judicial] authority in respect of the persons, groups and entities concerned (...)’. Furthermore in *OMPI III*, the General Court annulled the listing of the same organisation because the Council was unwilling or unable to submit the relevant information on which it had based its decision to the EU Courts.<sup>89</sup> Hence, the Working Party will have to verify that the Council is in the position to submit the relevant information to the Court in the event of a legal challenge. Moreover, the working methods provide for the possibility ‘to invite a representative from EUROPOL or the Situation Centre to attend the meeting of the Working Party to

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<sup>83</sup> Council Doc. 10826/07 (n 82 above), Annex II, paras. 17-19.

<sup>84</sup> *Ibid.*, paras. 20-21.

<sup>85</sup> *Ibid.*, para 17.

<sup>86</sup> *Ibid.*, para 19.

<sup>87</sup> *Ibid.*, paras 17-18.

<sup>88</sup> *Ibid.*, Annex II, para. 2.

<sup>89</sup> Case T-284/08, *OMPI III* (n 39 above), para 71-73.

make a presentation of background information in order to facilitate discussion on a particular subject.<sup>90</sup> Consequently, the working methods appear to assume that the Working Party does indeed discuss the informational basis of the proposal. Moreover, the working methods stipulate that the Working Party ‘will check *in particular* whether the proposal complies with the fundamental principles and the rule of law’ when the proposal was submitted by a third state.<sup>91</sup> This implies that it will also check compliance when Member States propose a listing. However, the General Court held in *OMPI II* explicitly that the Council cannot examine whether the decision of the national authority is well-founded.<sup>92</sup> The Court explained that any such scrutiny by the Council would be contrary to the principle of sincere cooperation.<sup>93</sup> This argument might have merit if the national authorities were indeed judicial authorities. Considering that the Council consists of national representatives from the executive such scrutiny would go contrary the separation of powers. Yet as was shown above, the competent national authorities are part of the executive and in line with *France Aviation* such scrutiny should not be excluded. By way of conclusion, it is submitted that the Council’s actual tasks stand in clear contrast with the limitations introduced by the General Court to the right to a fair hearing at the EU level and that limitations cannot be justified by the principle of separation of powers. It follows from the working methods that the Council Working Party assesses the factual situation before it, including background information provided by Europol and compliance of the national proposal with the rule of law. This justifies that those listed have a right to be heard on the assessment at the EU level. Hence, both the assessment of the evidence or clues that led to the listing and compliance with procedural rights at the national level should be subject to the right to a fair hearing at the EU level. However, at present - based on a false understanding of the Council’s role as merely rubberstamping national proposals assessed by a judicial authority, the General Court does not grant applicants this right to a fair hearing on the substantial foundation of the Council’s decision. This effectively leads to an artificial limitation of the hearing requirements at the EU level.

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<sup>90</sup> Council doc. 10826/07 (n 82 above), Annex II, paras 13-14.

<sup>91</sup> Council doc. 10826/07 (n 82 above), Annex II, para 4 (emphasis added).

<sup>92</sup> Case T-256/07, *OMPI II* (n 39 above), para 147, this section concerned the listing in Council Decision 2007/445/EC of 28 June 2007, OJ 2007 L 169/58.

<sup>93</sup> Case T-257/07, *OMPI II* (n 39 above), para 133; Case T-228/02, *OMPI I* (n 39 above), para 122.

Admittedly, if the bulk of the decision is formed at the national level it is reasonable that the responsibility to hear those listed lies in the first place with the national authorities, as the General Court held already in *'Invest' Import und Export*. Besides striking a balance between the rights of the affected individual and interests of security, the principle of subsidiarity, the sovereignty of the Member States, as well as the principle of sincere cooperation<sup>94</sup> must be taken into account when the right level for a hearing is determined. The EU institutions can only offer the opportunity to be heard to the extent that they do not interfere with the rights of the Member States to conduct their own procedures of criminal investigations. Nevertheless, we argue that the EU institutions are procedurally responsible because of first the additional adverse effects that they attach to the national decision and second the substantive assessment they (may) carry out. As to the substantive assessment of the Council, it was shown above that the Council does not only 'approve of the decision' within the meaning of the Court's understanding in *France Aviation*.<sup>95</sup> As to the additional adverse effects, the great negative consequences of counter-terrorist measures should be recalled. The General Court<sup>96</sup> labelled individual sanctions 'particularly draconian' and questioned whether they must not be considered criminal rather than administrative in nature.<sup>97</sup> The UK Supreme Court went as far as calling those sanctioned 'prisoners' of the State.<sup>98</sup> As was also explained above by reference to the European Social Fund case law, the intensity of the interference with the person's legal sphere should be matched by the procedural protection that is granted to the individual.<sup>99</sup>

This is the core of our argument. The Council lists individuals in a procedure building upon but separate from the procedure at the national level. The procedure at the EU level results in a different outcome (being listed as a terrorist suspect

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<sup>94</sup> See also the General Court at: Case T-47/03, *Sison* (n 41 above), paras 170-1.

<sup>95</sup> See Section One above.

<sup>96</sup> The former Court of First Instance (CFI) was renamed into General Court by the Treaty of Lisbon. This article will throughout refer to the lower EU Court as General Court.

<sup>97</sup> Case T-85/09, *Kadi II*, judgment of 30 September 2010.

<sup>98</sup> UK Supreme Court, *Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant)*, judgment of 27 January 2010, [2010] UKSC 2, paras 60 and 192.

<sup>99</sup> Joana Mendes, 'Participation an participation right in EU law and governance', in Herwig Hofmann and Alexander Türk (eds), *The Move to an Integrated Administration – Legal Challenges in EU Administrative Law*, (Cheltenham: Edward Elgar, 2009), p. 270, 273.

rather than being subject to usually criminal procedures; potentially facing criminal charges) and pursues a different objective (containing terrorism rather than addressing criminal behaviour).<sup>100</sup> The differences in outcome and objective are admittedly limited by the General Court's ruling that '...the purpose of the national proceedings in question must none the less be to combat terrorism in the broadest sense'<sup>101</sup> and that 'a decision of a national judicial authority' does not suffice if it rules 'only incidentally and indirectly on the possible involvement of the person concerned in such activity in relation to a dispute concerning, for example, rights and duties of a civil nature.'<sup>102</sup> However, even if national decisions are limited to decisions governed by criminal law, such as the case of *El Morabit*,<sup>103</sup> and even if the crime is more than just incidentally linked to terrorist activities, fundamental differences remain and the additional adverse effect of being Europe-wide labelled as a terrorist and having all one's assets frozen is 'draconian'.

Furthermore, and as acknowledged by the General Court, there are additional effects of listing, which lead to a circular logic of adopting a national decision 'pending the adoption' of an EU measure, justifying the adoption of the EU measure by the existence of the national measure, which is then immediately repealed when the EU measure comes into force.<sup>104</sup> In cases where the EU law measure is then used to justify a criminal conviction or the prohibition of an organisation at the national level<sup>105</sup> the 'circular logic' closes. In the Netherlands for instance, all legal persons listed by the EU pursuant to Common Position 2001/931/CFSP are prohibited ipso jure and cannot take legal acts.<sup>106</sup> In Sweden and in Italy, national courts consider the listing on the UN list of terrorist suspects as a relevant fact when they determine in the course of criminal proceeding whether the accused is connected with terrorism.<sup>107</sup>

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<sup>100</sup> See for more detail: Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights - The Case of Individual Sanctions*, Chapter 6, pp. 316 et seq.

<sup>101</sup> T-348/07, *Stichting Al Aqsa*, judgment of 9 September 2010, para 100.

<sup>102</sup> T-348/07, *Stichting Al Aqsa*, judgment of 9 September 2010, para 101 referring to Case T-341/07, *Sison II* (n 12 above), para 111.

<sup>103</sup> Joined Cases T 37/07 and T 323/07 *El Morabit v Council*, not published in the ECR.

<sup>104</sup> T-348/07, *Stichting Al Aqsa*, judgment of 9 September 2010, para 177.

<sup>105</sup> Case C-550/09, E and F, judgment of 29 June 2010.

<sup>106</sup> 'Van rechtswege verboden', Art 2:20 Section 3 of the civil code (Burgerlijk Wetboek).

<sup>107</sup> See Sixth report of the Analytical Support and Sanctions Monitoring Team, UN S/2007/132 (8 March 2007), box 1, p 14.

At the same time, the quality and accuracy of the Union decision depends largely on the quality and accuracy of the national decision. Because of the particular division of responsibility a defect of the national procedure is not easily healed at the Union level. As was explained above in composite procedures, the decision at the EU level may be tainted with any irregularities occurring at the national level. This can be seen in the case of *OMPI II*.<sup>108</sup> On appeal before a quasi-judicial authority the decision of the competent national authority was found to be unreasonable and perverse. The authority had failed to take the more recent information on the activity of OMPI into account. Yet, the Council had listed and sanctioned OMPI exclusively based on this national decision and consequently attached additional adverse effect to a flawed decision.

We argue that hearing rights must be granted at any particular level corresponding to the detrimental effect on the rights of the individual of the decision taken at that level.<sup>109</sup> This leads to the conclusion that because of the far-reaching rights' restrictions flowing from the listing decision and not from the decision of the competent national authority, those listed must also be given an opportunity to be heard at the EU level. Furthermore, this reflects the competences of the Council to carry out a substantive assessment.

## The legislator's approach

In general, it is fair to say that the EU legislator does not pay enough attention to the procedural protection of the persons affected by composite procedures, and, in particular, the *effet utile* of the right to be heard. In EU legislation, the procedures tend to focus on the coordination between the different entities operating at the national and EU level. Often, the intricacies of EU composite procedures are neglected; possible problems are considered a matter to be solved by resort to the general principles of law. The possibilities to participate in the procedure of the persons affected are not conceived to address the problems

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<sup>108</sup> Case T-256/07, *OMPI II* (n 39 above); see also: Case T-346/94 *France Aviation* (n 15 above) and Case T-198/01 *Technische Glaswerke Ilmenau* (n 32 above), paras 145, 153-160 and 183. In this case, the receiver of a state aid complained that confusion between the Commission and the responsible Member State denied it the opportunity to comment on important documents. This problem would have been avoided had the applicant had direct access to the Commission's file.

<sup>109</sup> Joana Mendes, *Participation in EU rulemaking. A rights-based approach*, OUP, forthcoming, Chapter 4, Section 4.1.3.

resulting from the fact that the procedure is split between national and EU authorities. Furthermore, beyond the scope of application of the *audi alteram partem* principle (limited to adverse individual decisions), the provision of participation rights in composite procedures, as in other EU procedures, tends to depend on policy choices, determined to large extent by the substantive matter at stake, as is exemplified bellow. The analysis of three different types of composite procedures demonstrates the fragmentary approach that results from the factors just presented. The examples below do not provide an exhaustive analysis of composite procedures. The types identified are illustrative of different possible structures of composite procedures and of the problems in conceiving the place of the right to be heard in each case.

### ***Member States, Agencies and the Commission***

First, composite procedures arise in areas where the scientific assessment of the risks of certain products is entrusted to a EU agency, but where, nevertheless, national administrative authorities have an important say. This is the case of the procedure for placing plant protection products on the market.<sup>110</sup> In order to obtain the approval of an active substance, the market operator will have to deal directly with the Member State where it chooses to file the application. The latter will act as a rapporteur for the Union. A three-step procedure will follow. The application is first assessed by the Member State rapporteur, possibly together with other Member States and with the support of the European Food and Safety Authority (EFSA).<sup>111</sup> The rapporteur makes a first scientific and technical assessment of the application, preparing a 'draft assessment report'.<sup>112</sup> This draft report is the basis of the procedure that will continue at the EU level. In a second phase, the report is communicated to the applicant by the EFSA, which also organizes a public and an expert consultation of the draft report.<sup>113</sup> The EFSA adopts a 'conclusion', on the basis of the current scientific and technical knowledge, presumably taking into

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<sup>110</sup> Regulation (EC) No 1107/2009, of the European Parliament and the Council, of 21 October 2009 (OJ L 309/1, 24.11.2009).

<sup>111</sup> Article 7(1), (2) and (5) of Regulation 1107/2009.

<sup>112</sup> Article 11 of Regulation 1107/2009.

<sup>113</sup> Article 12(1) and (2) of Regulation 1107/2009.

account the observations it received from the public and from the experts.<sup>114</sup> In a third step, the Commission presents a 'review report' and a draft regulation to the Standing Committee on the Food Chain and Animal Health on the basis both of the Member State's draft report and the EFSA's conclusions.<sup>115</sup> The Commission's report must take into account the draft assessment report of the Member State rapporteur and the EFSA's conclusions, in line with the general food law rules.<sup>116</sup> The final act – a decision in case the application is rejected, a regulation in case the authorisation is approved – is adopted following a regulatory committee procedure. While as a matter of principle, under current EU law the right to be heard is only applicable to procedures leading to the adoption of individual adverse decisions, the legislator is free to define participation rights in other cases. The following observations will focus on how the intervention of the applicant has been conceived by the legislator in this instance.<sup>117</sup>

The applicant can only comment on the Commission's 'review report'. At the first two stages, no formal opportunity is given to her to comment either on the draft report of the Member State rapporteur or on the EFSA's 'conclusion'. The formal contacts with the applicant are essentially restricted to possible requests to complete the file and communications regarding the status of the application.<sup>118</sup> Admittedly, these allow the applicant to be continuously informed about the state of the procedure – either because she is requested to present additional information, or because she is informed that the procedure is continuing. Nevertheless, this does not amount to having an input into the procedure equivalent to the input that would result from the opportunity to submit comments on the first two assessments of the application. This case illustrates the difficulties not only of ensuring the effectiveness of the right to be heard in composite procedures, but also of our claim that the right to be heard should be ensured at the level at which the decision is formed. Formally, there is no doubt that this is the case. It is the Commission's review report that will

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<sup>114</sup> Article 12(2) of Regulation 1107/2009. There is no explicit duty of the EFSA to take the comments received into account.

<sup>115</sup> Article 13 (1) of Regulation 1107/2009.

<sup>116</sup> Articles 6(3), 22(6) and (8) of Regulation 178/2002.

<sup>117</sup> For a criticism of the fact that the recognition of participation rights is based on the nature of the act at issue, in particular in cases such as this, when the outcome of the procedure may either be an individual decision or a general act depending on whether the authorisation is denied or approved, see Mendes, *Participation in EU rulemaking...* (n. 109 above), Chapter 7, Sub-section 7.3.1.

<sup>118</sup> Article 9(2) and (3), Article 11(3), Article 12(1) and (3) of the same Regulation.

set the basis for the final decision to be adopted. However, it is questionable how much the Commission will in practice deviate from the assessments previously carried out by the Member State and by the EFSA. If, in practice, the Commission tends to follow the latter, the applicant's observations at this stage are unlikely to have much impact on the final decision. This might be different if the Commission is willing to refer back to the Member State and the EFSA or, indeed, review their assessments in the light of the comments received. The applicant's right to be heard may (or may not) be depleted as a result.

A similar three-step procedure is followed for the definition of maximum residue levels of pesticides in or on food and feed.<sup>119</sup> Similar to the procedure above described, the applicant may here be requested throughout the procedure to provide additional information.<sup>120</sup> However, there is no provision that grants her a right to be heard at any stage of the procedure, even if the final decision may produce adverse effects in the legal sphere of the persons concerned (e.g. impact on the conditions under which a product may be marketed with a view to protect public health). This can only be ensured by resorting to the general *audi alteram partem* principle - applicable only where the final act will be a decision, i.e., when the Commission rejects the application<sup>121</sup> - the consequences of which in composite procedures are still not fully established, as seen above. One should nevertheless note that one possibility of defence may result from triggering the administrative review procedure that may be initiated by any person directly and individually concerned.<sup>122</sup> Yet, this only covers decisions or omissions of the EFSA (Article 13).

### ***Coordination of Member States***

In a second type of situations, composite procedures can support decision-making by a network of Member States' administrative authorities, coordinated by the Commission. In these cases, an EU institution adopts the final decision. This occurs in the procedure for obtaining a permit for the use of alien species in

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<sup>119</sup> Articles 6(1), 8(1), 9(1), 10 and 14(1) of Regulation (EC) No 396/2005, of the European Parliament and the Council, of 23 February 2005 (OJ L 70/1, 16.3.2005).

<sup>120</sup> Articles 7(2), 11(2) and 14(3) of Regulation 396/2005.

<sup>121</sup> Article 14 (1) of Regulation 396/2005.

<sup>122</sup> On the possibility of administrative review procedures having equivalent effects to the right to be heard, see Mendes, *Participation in EU rulemaking...*, *cit.*, Chapter 7, Sub-section 7.2.2

aquaculture with cross-border environmental effects.<sup>123</sup> In these cases, the Member State that would be competent to issue an authorisation in the absence of cross-border effects needs to notify the Member States concerned and the Commission of its intention to grant a permit and to send them the draft decision. The Member States concerned submit their comments to the Commission, which confirms, rejects or amends the Member State draft decision after consulting the relevant EU advisory and expert committees. The Member States concerned may then refer this decision to the Council, which may adopt a different decision on the matter.<sup>124</sup> At no point, there is a reference in Regulation 708/2007 to the applicant's right to be heard. The same is true for the procedures for placing novel foods on the market, which have in essence a similar, albeit more complex, procedural structure.<sup>125</sup> In these cases the right to be heard cannot possibly be effectively ensured at the national level, given that the national decisions may be overturned at the EU level. Again here, procedural protection can only be ensured by resort to the general principle of EU law according to which the right to be heard needs to be ensured before the adoption of decisions that have adverse effects, with the respective uncertainties that were pointed out above.

### ***Union procedures, local knowledge***

A third group encompasses certification procedures of Union relevance that are intrinsically rooted in local knowledge, such as the procedures for registration of protected geographical indications and protected designations of origin for agricultural products and foodstuffs.<sup>126</sup> These procedures are essentially developed in two stages. Member States receive registration applications and assess them following the national rules of procedure, subject to the specifications defined in the EU regulation.<sup>127</sup> This entails a national objection procedure, in which those persons who are established or have residence in the Member State that is conducting the procedure, and who are concerned by the registration and can demonstrate a

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<sup>123</sup> Article 11 of Council Regulation (EC) No 708/2007 of 11 June 2007 (OJ L 168/1, 28.6.2007).

<sup>124</sup> These steps are established in Article 11 of Regulation 708/2007.

<sup>125</sup> Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients. On this, see Mendes, *Participation in EU rulemaking...*, *cit.*, Chapter 7, Sub-section 7.2.1

<sup>126</sup> Council Regulation (EC) No 510/2006 of 20 March 2006 (OJ L 93/12, 31.3.2006).

<sup>127</sup> Article 5 of Regulation 510/2006.

legitimate interest in the procedure, can voice their views and interests.<sup>128</sup> Their access is limited by specific criteria. In particular, they need to show that the registration does not comply with specific requirements defined by EU regulation.<sup>129</sup> These criteria reveal that their intervention is geared towards the achievement of a sound decision that takes duly into account all the relevant facts. There is no provision regarding the right to be heard of the applicant (who is necessarily a group, in the sense of Article 5(1) of the EU regulation). In this case, the general national rules of procedure will apply, and most likely, will ensure the right to be heard when a negative decision is envisaged.<sup>130</sup> The regulation does however establish the Member State's duty to ensure that holders of legitimate interest have means to appeal the decision adopted. The favourable decision needs to be made public and transmitted to the Commission.

From this point onwards the procedure develops at the Union level. The Commission will scrutinise the application, and presumably the Member State's decision 'to check that it is justified and meets the conditions laid down in [the regulation]'.<sup>131</sup> In effect, the application turns into an application of the assessing Member State.<sup>132</sup> The Commission may reject the application, thereby reversing the Member State's decision. In this case, in the absence of any legislative provision ensuring the right to be heard, the general *audi alteram partem* principle applies, since the act adopted as a decision.<sup>133</sup> Given the structure of the procedure, the issue may arise whether the right to be heard should be recognised for the Member State – formally the addressee of the decision – or for the group who originally applied for the registration. From the perspective of the effective procedural protection of the persons concerned, and in line with *Lisrestal*, the latter also needs to be heard.

Presumably, the Member State's care in conducting the procedure is decisive for the final decision adopted by the Commission. Both the Member State and the Commission perform exactly the same role: both need to check that the application

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<sup>128</sup> Article 5(5) of Regulation 510/2006.

<sup>129</sup> Article 5(5), second paragraph, and Article 7(3) of Regulation 510/2006.

<sup>130</sup> See further Mendes, *Participation in EU rulemaking...*, *cit.*, Chapter 2, Section 2.4.

<sup>131</sup> Article 6(1) of Regulation 510/2006.

<sup>132</sup> Article 7(2) refers to 'the Member State ... *applying* for the registration' (emphasis added).

<sup>133</sup> Article 7(5), paragraph 3, of Regulation 510/2006.

is justified and meets the conditions of the EU regulation.<sup>134</sup> At the end, the Commission's assessment amounts to controlling the procedural conduct and the substantive decision of the Member State. In these circumstances, the exercise of the right to be heard will need to encompass the factual basis of both the Member State's and the Commission's decision. This may be problematic in view of the composite nature of the procedure.<sup>135</sup>

However, when the Commission is favourable to the registration, it needs to initiate, upon publication of its decision, an EU objection procedure very similar to the one conducted at the national level. This time this will be extended to Member States, third countries, and natural or legal persons established or resident in a Member State other than that applying for the registration, or in a third country.<sup>136</sup> The access requirements for natural and legal persons are the same as the ones defined for the national objection procedure.<sup>137</sup> If the procedure has reached this stage, its most likely outcome is the registration of the geographical indication or designation of origin, adopted in form of a regulation.<sup>138</sup> According to Article 7(5) of the EU regulation, the Commission will seek to reach an agreement between the interested parties. If this is not possible, it will ultimately, take a decision pursuant to the regulatory comitology procedure. The right to be heard of the applicant – as mentioned, the Member State who forwarded the application to the Commission – is ensured by the fact that its opinions need to be considered in the agreement sought. In this case, this follows from the explicit legislative provisions, it is independent of the fact that the final act is adopted in the form of a regulation.

In this procedure, parallel participation opportunities are ensured both at the national and at the EU level, although targeting different groups of interested persons in each case. This is in principle desirable, even if it still does not solve all the problems that might flow from the composite nature of the procedure. The same analysis and conclusion applies *mutatis mutandis* to the procedure for the

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<sup>134</sup> Article 4(1), second paragraph, and Article 6(1) of Regulation 510/2006.

<sup>135</sup> See above Section 1.

<sup>136</sup> Article 7(1) and (2) of Regulation 510/2006.

<sup>137</sup> See note Article 5(5), second paragraph, and Article 7(3) of Regulation 510/2006.

<sup>138</sup> Article 7(4) of Regulation 510/2006 does not explicitly indicate that the registration will be adopted as a regulation (it merely indicates that it needs to be published in the Official Journal, which could be interpreted as an indication in this sense). In practice, entering a designation in the register of protected designations of origin and protected geographical indications has been done by the adoption of regulations.

registration of agricultural products and foodstuffs as traditional specialities guaranteed.<sup>139</sup>

## Suggestions for a Conceptual Approach

Composite procedures differ fundamentally in how they divide competences and combine the contributions and intervention of national and EU administrations. This makes it impossible to defend one universal rule defining the level at which the right to be heard should be ensured. The above analysis of the way the Courts have approached the right to be heard in the procedure leading to the adoption of autonomous EU sanctions has illustrated the shortcomings of the Courts' approach. These lie, in particular, in the rule according to which the right to be heard must be ensured in the first place in the relations between the person concerned and the national administration. This rule originated in the realm of customs procedures (*France Aviation*) and was already overcome in customs cases when the Court applied it in procedures leading to the adoption of counter-terrorist sanctions. The cases on procedures regarding the reduction of financial assistance granted by the European Social Fund indicate that this rule is limited to one specific sector and give indications on other ways of approaching participation in composite procedures. Indeed, in particular since *Lisrestal*, the Court has been especially mindful of the consequences that follow from the design of the procedure when assessing the place of the right to be heard in these composite procedures. Admittedly, some aspects of the autonomous sanctions procedures - such as the fact that the listing proposal results from a separate national criminal procedure; that criminal law is not generally an EU competence but is close to the core of national sovereignty; and that the competent national authority forms part of the judiciary (if this was the case) - could justify the applicability of the rule according to which the right to be heard needs to be ensured in the first place at the national level. However, in particular the great adverse effects that the EU listing has for the individual and also the fact that the Council has the task to carry out a substantive analysis would require a hearing at the EU level which extends to the factual grounds that justify the listing, as well as to the compliance with procedural rights in the national procedure.

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<sup>139</sup> Articles 7 to 9 of Council Regulation (EC) No 509/2006 of 20 March 2006 (OJ L 93/1, 31.3.2006).

We argue that, as a matter of principle, in accordance with the fundamental nature of the right to be heard, this should be ensured at the level at which the decision is formed, taking into account the effects that decisions produce at each level. This requires considering composite administrative procedure as unitary procedures that lead to unitary outcomes, including possible adverse effects in the legal sphere of private persons. Only this way the position of those affected can be duly protected. This is, however, a difficult rule to apply, given the complexity and intricate inter-dependence of the intervention of national and EU administrations in each case. Thus, it might be quite difficult to determine beforehand where the decision is effectively formed in cases where, for example, the Commission adopts the substantive and final decision, on the basis of previous assessments made by national administrations, when both have a power of appraisal (i.e., are not bounded by the assessments of the other intervening administrative bodies). The procedure for placing plant protection products on the market is a case in point. At the end, determining where the decision was effectively formed may be very much dependent on the way the procedure develops in each case. One alternative could be to ensure parallel participation opportunities at the different stages of the procedure. This might, however, imply excessive procedural costs in certain cases (e.g. double participation on the same substantive issues).

In any event, implicit or explicit reliance on the general *audi alteram partem* principle, without a unitary conception of the procedure, is incapable of ensuring the procedural protection of the persons affected. In fact, its application is very likely hindered by the composite nature of the procedure, as results from the case law analysed in Section One.

The analysis of selected procedures enshrined in EU legislation has demonstrated that the legislator has not given enough attention to procedural protection. This may be due to a variety of factors, such as the fact that the design of procedures tends to focus on the coordination between different administrative entities situated at different levels of government. For this reason, it would be up to the EU Courts to ensure a unitary conception of the procedure in order to ensure effective compliance with the right to be heard. In doing so, however, they will need to take into account the specificity of each procedure, and in the light of the

problems that these have raised, refine the principle according to which the right to be heard should be ensured at the level in which the decision is formed.