The freezing of terrorists’ assets: preventive purposes with a punitive effect

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1. Introduction

Traditionally, serious crime has been a domain where the legislator used to adopt criminal law measures but it is now becoming a field where recourse to administrative law or administrative measures is more commonplace. The significance, purpose and role of administrative law and measures change with respect to the type of serious crime concerned.

So what is the reason for this increasing use of administrative measures, either as an addition or as an alternative to criminal law, to counter terrorism?

There has, first and foremost, been a general shift in the criminal justice approach towards serious crime (including terrorism) towards prevention. Policymaking and crime-fighting strategies are increasingly concerned with predicting and preventing future risks (in order, at least, to minimise their consequences) rather than prosecuting past offences. There is thus a shift towards a society “in which the possibility of forestalling risks competes with and even takes precedence over responding to

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wrongs done” and where “the post-crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security”

In order to explain the shift toward prevention, authors have described the emergence of: a “risk society” where risks and damage control modify the means and legitimisation of state intervention; a “new penology” paradigm for the administration of criminal justice targeting and classifying a suspect group of individuals and making assessments about how likely they are to offend in particular circumstances or when exposed to certain opportunities; and a “culture of control” counterbalancing the expansion of personal freedom with a reconfiguration of the response to crime and the sense of criminal justice.

Counter-terrorism legislation enacted since 9/11 has certainly expanded all previous trends towards anticipating risks. The risk in terms of mass casualties resulting from a terrorist attack is thought to be so high that the traditional due process safeguards are deemed unreasonable or unaffordable and prevention is becoming a political imperative. Thus, the aim of current counter-terrorism measures is mostly that of preventive identification, isolation and control of individuals and groups who are regarded as dangerous and allegedly represent a threat to society.

The shift is all the more important given the catalysing effect of terrorism on criminal justice systems and the normalisation of extraordinary means. Terrorist incidents have often been used as a catalyst for the implementation of other measures relating to security at large (including means for the prevention, investigation and prosecution of minor offences), which would have not been accepted otherwise. In addition, the subsequent introduction of extraordinary anti-terrorism measures has been regarded as exceptional and legitimised by the fact that such measures are temporary and targeting only terrorism-related activities and specific groups of people. The problem is that, via the so-called “normalisation of extraordinary means”, the powers that are introduced are unlikely to remain limited to the context of the fight against terrorism or they have a tendency to be applied beyond their original scope.

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and, thus, become part of, and impact upon, the “ordinary” criminal justice system and law enforcement policies in a broad sense 11.

The shift towards prevention may be best understood with reference to the development of a number of trends in criminal justice, which are further influenced by the evolving terrorist threat (i.e. the parallel phenomena of home-grown terrorism and lone wolf terrorist actors) 12. Two major trends have already been subject to in-depth analysis: the introduction of inchoate offences and the development of anticipative criminal investigations.

Firstly, subsequent reforms led to the introduction of inchoate offences and the (over)criminalisation of preparatory activities – even where these stand several steps away from the actual perpetration of the harm – which are often coupled with a shift of the burden of proof onto the defendant. The boundaries of what constitutes dangerous behaviour are highly contentious and problems arise with the assessment of future harm. Not only do inchoate offences expand criminal liability but they also allow the use of enhanced preventive powers and police interventions before the commission of any substantive crime 13.

Secondly, counter-terrorism policies have fostered the development of anticipative criminal investigations (criminal investigations with a preventive focus and function) as a consequence of approaches that combine the objective of the prevention of terrorism with the objective of prosecuting and punishing terrorists at some point in the future. “Suspicion” has replaced an objective “reasonable belief” in most cases

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in order to justify police intervention at an early stage in terrorism cases without the need to envisage evidence gathering with a view to a prosecution. Because of the attribution of a preventive function to criminal investigations, the role of the criminal justice system in providing security has been repositioned. This entails new forms of cooperation and a new division of responsibilities between law enforcement and intelligence authorities.\textsuperscript{14}

The two trends are often overlapping and intertwined and tend to mutually reinforce each other. They thus foster the centrality of (a poorly defined level of) risk in threat assessment and the key role of suspicion as justification and rationale for the intervention of law enforcement authorities to protect the public from (anticipated) future harm.\textsuperscript{15} The paradigm shift towards preventive action exemplified by the two trends poses critical challenges for the protection of individual rights.\textsuperscript{16}

This contribution addresses a third major trend, namely the extensive use of administrative measures for terrorism prevention purposes. After a brief overview of the characteristics and reasons allegedly justifying such extensive use (2), the contribution will specifically tackle the (proactive) nature of terrorist blacklisting (3). Reference will be made to the use of security service information as a basis for listing decisions (A) and the punitive effect of administrative measures (B). The question will then be whether elements of blacklisting witness a blur of boundaries between administrative and criminal law (4); the issue will be explored through the analysis of the scope of intervention of the two frameworks (A); the division of functions between the actors involved (B); the contamination between the set of applicable rules (C). Further analysis will be devoted to subsequent reforms introduced both at the EU and the international level as a consequence of various factors including the need to comply with the requirements of the Luxembourg courts’ case law in terms of procedural rights (5). In particular, the contribution will evaluate the impact on the existing framework of the new legal bases introduced by the Lisbon Treaty (6). In the end, an assessment of such reforms aims, \textit{inter alia}, at establishing whether they can be seen as attempts to frame the blur between administrative and criminal law or rather contribute to deepening such blur and foster the overlap and intertwining of the two frameworks (5).\textsuperscript{17}

2. Administrative measures for terrorism prevention purposes

In the last few years, there has been an increase in the number of measures with a prospective value, designed to prevent individuals who may represent a threat to


society from committing terrorist offences rather than to enable them to be punished for having done so. These include the introduction of new measures – or the enhancement of already existing measures – to allow more flexibility in the detention, expulsion and deportation of immigrants, administrative detention, control orders and listing.\textsuperscript{18}

The use of administrative measures may be explained by the need to identify a quick (although at times only short term) solution to the issues at stake whereas the criminal law option would involve the cumbersome complexity of a lengthy criminal justice process. Besides, they are often justified by an alleged shortage of evidence, which could hold up in court in support of the prosecution case, particularly in the context of preparatory activities.\textsuperscript{19} Governments can thus act on the lower standard of “possibility of future harm” rather than the higher standard of “proof of past criminal activities” that is required for a criminal prosecution. Often based on intelligence information that the law does not permit to be used in criminal proceedings or that cannot be disclosed to the public, it seems that well-established and more onerous evidentiary requirements are being to some extent bypassed by a network of procedures found in administrative law. In ordinary criminal cases, suspects and defendants would have an opportunity to identify and possibly challenge the evidence against them, to report on any wrongdoing by the authorities and then to have an impartial authority adjudicate any contradictory claims. By contrast, where administrative measures are used in terrorism cases, there is a limited possibility for judicial review and a restricted amount of information available to detainees and their lawyers to effectively challenge administrative measures. Hence terrorist suspects’ rights are affected as a result of an administrative process assessing the dangerousness of an individual, often on the basis of closed evidence, rather than of a public hearing and trial.\textsuperscript{20}

\section*{3. Preventive and proactive nature of blacklisting and asset freezing}

As highlighted above, administrative measures, which are predominantly proactive in nature, are valuable methods for preventing terrorism and are in fact the cornerstone of existing counter-terrorism policies both at the national, European and international levels. Within the general prioritisation of pre-emptive security strategies and techniques in the so-called “war on terror”, blacklisting and preventative asset freezing have been widely used but not without significant controversy.\textsuperscript{21} They

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  \item \textsuperscript{19} E.g. intercept evidence in the United Kingdom or material covered by state secrecy.
  \item \textsuperscript{20} M. De Goede, “The Politics of Preemption and the War on Terror in Europe”, EJIR, 2008, 14, p. 16.
are perceived by policymakers and legislators as a cutting-edge method of tracing, intervening and disabling terrorist networks at an early stage.

The legal framework for freezing terrorist assets involves a complex combination of UN Security Council Resolutions, Common Positions taken by the Council of the EU, EC Regulations and national authorities’ decisions and enforcement actions against the assets of terrorist organisations and those suspected of having connections with such groups. Whereas certain European and national blacklisting measures are autonomous, others are adopted for the purpose of implementing sanctions under international law. This has led to the interweaving and at times simultaneous intervention of different legal frameworks (international, European and national). The institutional and procedural complexity poses difficult questions with regard to the integrity and the coherence of the system and, in a broader sense, creates a situation of legal uncertainty and thus a potential fragmentation of legal protection.\(^\text{22}\)

In addition, sanctions’ regimes engage a range of human rights but the protection of such rights is often rather weak. With regard to designating terrorists (\textit{i.e.} listing and de-listing procedures) and due process rights, the issue to be explored is two-fold: the use of sensitive and undisclosable security service information as a basis for listing decisions and the punitive effect of administrative measures.

\textbf{A. The use of security service information}

Human rights concerns surrounding sanctions regimes are intensified by the extensive use of secret intelligence gathered by security services.

Listing is adopted on the basis of a proposal by the competent national authority; legal provisions stipulate that “a decision should be based on serious and credible evidence or clues or condemnation”\(^\text{23}\). As prior communication would jeopardise the effectiveness of the freezing of funds and resources, it is allegedly neither possible to communicate grounds nor hear the appellant before the names are included in the list for the first time.\(^\text{24}\)

However, the right to effective judicial protection implies that judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances used to adopt the contested decision and of the information on which the assessment is based. In principle, the statement of reasons – provided at the

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\(^{24}\) As confirmed by the General Court of the EU in Judgments T-174/12 and T-80/13, \textit{Syrian Lebanese Commercial Bank v. Council}, 4 February 2014, nyr.
very least as swiftly as possible after that decision\textsuperscript{25} – should not consist merely of a general, stereotypical formulation but authorities should rather state the matters of fact and law which led to the adoption of the decision\textsuperscript{26}.

Nevertheless, defence rights are observed in the most superficial sense and the information provided to the listed individual or entity often takes the form of general assertions and does not include the real fundamental reasons leading to the inclusion in a list. In fact, proposals for listing do not need to include evidence itself if inclusion would potentially threaten national security concerns.

Besides, even in case of an appeal, the State responsible for the initial designation is reluctant to fully disclose and share with the suspect and his/her lawyer or with the court valuable intelligence on which the blacklisting decision is based. With a view to protecting the public interest, secrecy often allows the authorities to shield sources and methods used to collect intelligence. Failure to disclose all the relevant information to the judiciary and those sanctioned has repeatedly led to the annulment of sanctions’ decisions by the Council of the EU\textsuperscript{27}.

As highlighted later in this contribution, the Luxembourg courts have ruled on the necessary disclosure of the grounds for a blacklisting decision but have been more circumspect in relation to the disclosure of the evidence that supports those grounds\textsuperscript{28}. Interestingly, in his recent Opinion in the 2013 \textit{Kadi} case, Advocate General Bot has suggested that courts should afford much discretion to EU institutions in making blacklisting decisions\textsuperscript{29}. However, the Court disregarded the advice of the Advocate General and ruled that secrecy and confidentiality of the material cannot serve as a general excuse for the Member States or institutions to withhold it from the Court\textsuperscript{30}. It would be the task of the Court to apply, in the course of judicial review, techniques to accommodate legitimate security concerns and the respect of individual rights. Ultimately the Court will have to decide whether the information may be disclosed to the person concerned.


\textsuperscript{27} See \textit{e.g.} CJ, 21 December 2011, \textit{France v. OMPI/PMOI}, C-27/09 P.

\textsuperscript{28} By analogy, in a recent request for preliminary ruling in the context of UK immigration law, the CJ had to rule on the use of secret evidence in the Special Immigration Appeals Commission. The Court considered that it is for national courts to strike an appropriate balance in relation to disclosure when this may prejudice security by exposing particular persons involved in operations or by revealing the methods that those operations use. CJ, 4 June 2013, \textit{ZZ v. Secretary of State for the Home Department}.


In this context, with reference to desirable reforms, it would be interesting to study whether the UK Special Advocate, a security cleared lawyer involved in the UK in terrorist cases, could be a desirable model to solve the issue of access to sensitive information grounding a listing decision.\(^{31}\)

As the situation currently stands, there is as yet very little openness and transparency about the origin of relevant information, which is not designed to hold up in court and is often gathered for other purposes than criminal investigation and prosecution. Thus, methods for collecting intelligence are not directed by the same evidentiary standards and standard of proof as the collection of evidence for criminal proceedings.

Due to this problem of secrecy, the use of intelligence information to ground listing decisions poses specific challenges in terms of people’s rights to a fair trial.\(^{32}\) On the one hand, the reliance on intelligence makes it more difficult for an individual to contest the administrative measure. On the other hand, the ability of the court to adjudicate on whether intelligence information is factually accurate and reliable is also crucially limited.\(^{33}\)

In addition, the use of intelligence as the basis of blacklisting decisions may raise the issue of illegally obtained evidence, e.g. through torture or other forms of ill treatment. This feature can only intensify the human rights concerns with regard to the use of intelligence as a basis for sanctions.

**B. Administrative in nature, punitive in effect**

Although blacklisting and asset freezing are adopted under the label of mere preventive administrative measures, the consequences of the sanctions attached to the listing (and the additional “collateral damages” which they may engender) are clearly punitive in effect.\(^{34}\)

The aim of asset freezing is to deny the listed individuals or entities the means to support terrorism by ensuring that no funds are available to them as long as they remain on the blacklists. Because of the preventive aim, it is not necessary to be the suspect of a crime or for the authorities to have started a criminal procedure against the individual or entity. Indications that one may be a terrorist, or that there are links...

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32 It must be highlighted, however, that the entitlement to disclosure of relevant evidence is not an absolute right. See ECtHR, 27 October 2004, Edwards and Lewis v. UK, App. nos. 39647/98 and 40461/98.


34 See e.g. K. Nuotio, “How, if at all, do anti-terrorist blacklisting sanctions fit into (EU) criminal law?”, in I. Cameron, EU sanctions, p. 117; P. Asp, “Blacklisting sanctions and principles of criminal law”, ibid., p. 131.
to suspected terrorist organisations or individual terrorists may be sufficient to include a person or entity on the blacklist and have his/her assets frozen 35.

The consequences of listing can, however, often be more severe and far-reaching than those of traditional criminal sanctions. Such consequences may be legal, social, reputational, and financial. They have specific, restrictive and far-reaching effects on the life and livelihood of those listed, those associated with a listed organisation and those related to someone listed. Listed individuals – who are never formally accused or charged beforehand – cannot work or have a job, they cannot receive financial support from friends, they cannot travel and the impact on their family life is substantial 36.

Sanctions may constitute a disproportionate interference with property rights although the Sanctions Committee has argued that freezing funds is a temporary and precautionary measure which does not amount to the deprivation of a person’s property (which is instead the consequence of confiscation measures) 37. Yet, in the absence of an independent and impartial tribunal, the existing procedures do not entail an effective remedy against sanctions, de-listing is by no means an automatic process and de facto blacklisting is not a temporary measure as there is no limit to available renewals 38.

4. Blurring boundaries between administrative and criminal law?

The question is whether the increased recourse to administrative measures in this context leads to a blurring of the boundary between administrative and criminal law. The analysis may be conducted with reference to: the scope of intervention; the division of functions between the actors involved; and contamination between the set of applicable rules.

A. Scope of intervention: are administrative measures akin to criminal charges?

Firstly, in relation to the scope of intervention, it has been discussed whether blacklists amount to a criminal charge 39 within the meaning of Article 6 ECHR, becoming de facto punitive sanctions because of the devastating effect on those listed.

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35 See, for example, Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and associated individuals and entities, Guidelines of the Committee for the Conduct of its Work, 22 July 2010, which states [at Article 6(c)] that “A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature”.


39 The concept of charge has to be defined within the meaning of the Convention. In several cases the Court held that it 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”. See for instance: ECtHR, 27 February 1980, Deweer v. Belgium, App. no. 6903/75, at paras. 42 and 46; ECtHR, 15 July 1982, Eckle v. Germany, App. no. 8130/78, at para. 73.
Does the punitive effect prevail over the preventive aim? Scholars’ opinions differ widely in their assessments. According to the case law of the Strasbourg Court, there are three criteria to determine the nature of a criminal charge ("Engel Test"): the domestic classification of the proceedings (does the adoption of a sanction follow the ordinary process of a conviction?), the nature of the offence (who is the target of the sanction?), and the severity of the sanction (how can one assess the length and intensity of the interference with the rights of the charged person?).

On the basis of these criteria it is as yet unclear whether asset freezing can be qualified as a criminal charge within the meaning of Article 6 ECHR. The severity of the sanction argues in favour of considering targeted sanctions as a criminal charge. Although they do not entail imprisonment, sanctions impose far-reaching restrictions on personal freedom, such as constraints on private and professional life. Besides, these sanctions intervene paradoxically prior to any condemnation, where a conviction is normally the point distinguishing a preventive/administrative measure from a repressive/criminal sanction. Finding a standard of procedural safeguards for an entirely atypical kind of sanctions is a challenge.

Finally, in the case law of the European Court of Human Rights (ECtHR) there seems to be no indication of qualification of blacklisting and asset freezing as a criminal charge. A relevant parallel may be established with the ECtHR case law on seizure and confiscation: the ECtHR has held, on different occasions, that preventive measures such as confiscation do not constitute a criminal charge. Since asset freezing is a comparable instrument, it is unlikely that the assessment of the ECtHR would be altered.

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41 ECtHR, 8 June 1976, Engel and Others v. the Netherlands, App. nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, at paras. 82, 83.

42 This criterion is of a relative weight: even if national law does not classify an offence as criminal, it may still be regarded as to fall under the notion of a criminal charge.

43 ECtHR, 23 November 2006, Jussila v. Finland, App. no. 73053/00, at para. 38.

44 ECtHR, 28 June 1984, Campbell and Fell v. the United Kingdom, App. no. 7819/77 and 7878/77, at para. 72; ECtHR, 27 August 1991, Demicoli v. Malta, App. no. 13057/87, at para. 34.

45 See e.g. I. Cameron, The ECHR, Due Process and UN Security Council Counter-Terrorism Sanctions, Strasbourg, Council of Europe, 2006.

46 See e.g. ECtHR, 22 February 1994, Raimondo v. Italy, App. no. 12954/87; ECtHR, 24 October 1986, Agosti v. United Kingdom, App. no. 9118/80.

47 See I. Cameron, Report to the Swedish Foreign Office.
When adjudicating on terrorist smart sanctions and the rights of a listed individual, the CFI and CJ have never made reference to the term “criminal charge” but rather used the concept of “criminal sanction” 48.

It emerges from the case law of the Luxembourg courts that effective judicial protection must apply in cases regarding smart sanctions. This was made explicit by the Court of Justice in *Kadi*, which states that authorities are obliged to communicate the grounds on which the inclusion is based 49. Even though, for reasons of effectiveness, this authority cannot be required to communicate these grounds before inclusion on a list, a “sufficient measure of procedural justice” must be accorded to the individual, including a right to be heard 50. In the *OMPI* cases, the Court of First Instance developed the question of procedural rights in relation to asset freezing more thoroughly for the purpose of defining the elements of an effective judicial review 51.

By distinguishing between criminal and administrative sanctions, the CJ acknowledges that this difference has consequences for the procedural rights of the subject. However, it has long been ambiguous whether the courts are of the opinion that targeted sanctions are criminal or administrative in nature.

In its 2005 judgement in the *Kadi* case, for instance, the CFI held that asset freezing does not affect the very substance of the right (right to property in their financial assets) but only the temporary use of assets. It is thus to be considered a temporary precautionary measure (unlike confiscation) that is administrative in scope rather than a more permanent punitive measure akin to a criminal charge 52.

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49 As underlined above, a slight difference can be made between grounds, which must be communicated, and evidence on which those grounds are based, upon which there is not yet an obligation of disclosure. An important distinction is also to be done between an obligation to disclose to the court and an obligation to disclose to the concerned individual or group.


The distinction was made more explicit in the CFI judgment in *El Morabit* (2009). Asset freezing was viewed as a precautionary measure imposed within an administrative procedure with a preventive aim. It is not considered a sanction, as it does not entail a statement of guilt for an infringement that has taken place but is merely imposed within an administrative procedure, which is purely preventive.

At first it was unclear whether the CJ viewed blacklisting as a straightforward administrative measure or as a measure equivalent to criminal sanctions because, in its 2008 judgement in *Kadi*, the Court did not qualify the targeted sanctions at stake but merely referred to them as “restrictive measures”.

On the occasion of the 2010 *Kadi II* judgement, the General Court noted that the description of blacklisting as “temporary” may need to be revised and that the question remains open as to the classification of these measures as preventative or punitive, protective or confiscatory, administrative or criminal.

However, in *Fahas* (2010), the General Court has returned to the refrain that the sanctions are precautionary and do not imply any accusation of a criminal nature. Similarly, in his Opinion on the *Kadi II* case (2013), Advocate General Yves Bot observes that fund freezing measures constitute temporary precautionary measures in that funds are frozen but not confiscated. In addition, those measures do not constitute criminal sanctions but were adopted in order to maintain peace and security at the global level. It is, however, interesting that the Court, when explaining why judicial review is indispensable, highlights in its judgement that “[n]otwithstanding their preventive nature, the restrictive measures at issue have, as regards those rights and freedoms, a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of their application, and, on the other, the public opprobrium and suspicion of that person which those measures provoke.” Although the Court still considers blacklisting as a preventive measure, it acknowledges how far-reaching its consequences are.

The position that considers asset freezing as a temporary precautionary measure is very difficult to sustain. In the absence of an independent and impartial tribunal, the existing procedure does not entail an effective remedy against sanctions, de-listing is by no means an automatic process and de facto blacklisting is not a temporary measure as there is no limit to available renewals or termination clauses. Individuals have

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59 A number of states have urged over time the UN Security Council to improve its procedure by introducing a “sunset clause” of 36 months for all listing. See Improving fair and
been listed for periods of up to over ten years. A clarification of the CJ’s assessment of the nature of the regime has become urgent. The classification as an administrative measure or criminal sanction has a significant effect on the degree of rights protection that is appropriate. While the inclusion on a list of terrorist suspects is not considered a criminal charge, the standard of protection may be lower than that required under criminal law. Nevertheless, despite an eventual assessment of the Court, as long as the nature of such measures remains uncertain, the existence of a blur between administrative and criminal law is clear!

B. Distribution of functions between actors: towards greater governmental discretion?

The blurring boundaries between administrative and criminal law may also be assessed with reference to the distribution of functions between the actors involved. In fact, the increasing use of administrative measures allows a shift towards greater governmental discretion on national security grounds at the expense of judicial scrutiny, a fundamental element in a criminal justice system. No precise substantive criteria are defined a priori to identify entities and individuals that should be listed and there is no need for individualised proof of wrongdoing. The critical decision is left to the discretion of administrative authorities (as the “competent authority” in charge of the decision need not be judicial). The government can thus exercise control over suspicious individuals through a general weakening of judicial scrutiny. By circumventing the normal setting of criminal procedure, the power to designate an individual or group as “terrorist” is in the hands of the executive and national courts are prevented from fully exercising judicial review of those designations. Terrorist blacklisting regimes have thus created structural mechanisms for the production of both increasing executive (and effectively unaccountable) powers over individuals and novel means of bypassing domestic fundamental rights protection mechanisms.

Government representatives stress the need to take effective measures where intelligence sources show that an individual represents a risk to national security but this information is not admissible in criminal proceedings. In this context, the executive has accrued more discretionary powers in its alleged duty to protect the public. This trend side-lines the criminal justice system in cases involving national security and weakens the judiciary in its scrutiny role against abuses of power. From a civil libertarians’ perspective, the strongest argument in favour of maintaining the primacy of criminal prosecution is that it requires formal proof before clear procedures for a more effective UN sanction system, 30 March 2011.

60 Such is, for instance, the view of the UN Monitoring Team. See 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, S/2005/572, 9 September 2005.

61 It is remarkable that the role of the judiciary in times of emergency evolves dynamically over time. F. Fabbrini, “The role of the judiciaries in times of emergency: Judicial review of counter-terrorism measures in the US Supreme Court and the European Court of Justice”, Yearbook of European Law, 2010, 28/1, p. 664.
an individual can be charged and sanctioned for any offence. By contrast, for risk-averse home secretaries, the avoidance of the “problems” of obtaining evidence and formal proof are the strongest argument in favour of replacing criminal justice with a system of administrative sanctions. The use of administrative measures allows the government to incapacitate allegedly dangerous individuals on the basis of mere suspicions or risks.

In relation to preventive measures, further practical questions arise. Do governments really have any means to assess whether an individual poses a risk to the public? Are they able to appraise the likelihood that an (otherwise only potential) harmful act will occur?

C. Contamination between sets of applicable rules: the influence of blacklisting on national criminal investigations, prosecutions and trials

A third element which may witness the blurring of boundaries between administrative and criminal law in the context of terrorist blacklisting is its impact on national criminal investigations, prosecutions and trials.

In fact, a particularly controversial matter has been the tendency to use, as evidence in support of pre-trial measures (or in relation to a charge of “association de malfaiteurs for terrorist purposes”), the fact of a group’s appearance on a list of terrorist groups published by international organisations or other governments. In Italy, for instance, the use of such lists has been considered acceptable to encourage further investigations into the activities of a certain group deemed as terrorist.

However, as argued by the Italian Corte di Cassazione, any further use is inadmissible and certainly the inclusion on a banned list cannot constitute evidence of terrorist purposes as required by Article 270bis of the Italian Codice Penale. The Court has highlighted that blacklisting merely has an administrative value and is only meant to legitimise targeted sanctions without having any further impact on evidence. If it became evidence in criminal proceedings, listing decisions grounded on intelligence information gathered in the absence of any form of judicial scrutiny would thus bypass the higher standard of proof requirements of criminal investigations and prosecutions. In addition, how could a defendant challenge such evidence where little or no access is provided to the secret service information grounding the listing decision?

The reliance on listing in this framework would introduce an anomalous piece of evidence and lead to a violation of the separation of powers, questioning the freedom of the judge in the assessment of evidence. The risk is also that, if it is interpreted too broadly, Article 270bis becomes a blanket criminal law provision violating the principle of legality and legal certainty.


\[64\] A. Pioletti, “Terrorismo, quelle black list di ONU e UE. Stop al rischio di prove legali anomale”, Diritto e Giustizia, 2006, 37, p. 82.
From a different perspective, it is noteworthy that the CJ has also considered
the question of the interaction between blacklisting and criminal proceedings. It
established that a criminal conviction as terrorist or member of a terrorist group
should be taken into consideration for the purpose of listing. According to the Court,
the association with a blacklisted organisation cannot ground a criminal prosecution
where the listing is unlawful. Yet the court has not excluded that where the inclusion
of an individual/group in a terrorist list is lawful, it could constitute evidence for the
purpose of criminal proceedings.

5. Reform attempts for the purpose of establishing clearer and more
transparent procedures

A. Reforms introduced at the EU level to comply with judgements’ requirements

As already mentioned, through a series of major judgements, the Court of First
Instance and the Court of Justice of the European Union have pinpointed significant
weaknesses in the listing procedure and paved the way for an improvement in the
protection of the rights of targeted individuals. The establishment of a clearer and
more transparent procedure has sought to reduce the level of governmental discretion
in listing and de-listing procedures with a view to increasing judicial scrutiny and
transparency within the process.

Two waves of reforms are worth mentioning: the first one (2007) concerns the
EU autonomous regime of blacklisting, whereas the second one (2009) dealt with the
framework implementing UN listing measures.

In June 2007, the Council of the EU conducted a thorough review of its
procedures for the listing and de-listing of persons, groups and entities pursuant
to Common Position 2001/931/CFSP and Council Regulation 2580/2001 (EU
autonomous regime).

2001/931/CFSP” was established, replacing the “clearing house” that had previously
been used to evaluate potential nominations for the autonomous EU blacklist.
The functions of the Working Party include: examining and evaluating information used
to list and delist individuals and groups; assessing whether that information meets
the relevant criteria; preparing regular reviews of the EU blacklist; and making
recommendations for listings and delisting.

65 CJ, 29 June 2010, C-550/09, E and F. For a comment see C. Murphy, “Case C-117/06,
Proceedings brought by Gerda Möllendorf and Christiane Möllendorf-Niehuus, Judgment of the
European Court of Justice (Second Chamber) of 11 October 2007, [2007] ECR I-8361; Case
C-340/08, M & Others v. Her Majesty’s Treasury, Judgment of the European Court of Justice
(Fourth Chamber) of 29 April 2010, nyr; Case C-550/09, Criminal Proceedings Against E & F,
Judgment of the European Court of Justice (Grand Chamber) of 29 June 2010, nyr”, Common


67 Council Regulation 2580/2001 of 27 December 2001 on specific restrictive measures
directed against certain persons and entities with a view to combating terrorism, OJ, no. L 344,
28 December 2001, p. 70.
The Working Party also operates as a Focal Point for delisting applications as those included in the autonomous EU blacklist can now submit a request to the Council at any time asking for their designation to be reconsidered.

Member States have to share information on listing decisions and this improves the degree of reciprocal scrutiny. The existence of a specialised committee examining and evaluating the information leading to a listing decision on the basis of criteria (in relation with the involvement in terrorist activities)\(^\text{68}\) introduces a certain degree of objective assessment in the process and limits governmental discretion slightly\(^\text{69}\). The Working Party is also meant to check whether the proposal complies with fundamental rights and the rule of law. Although the decisions adopted are not binding, regular reviews and recommendations on delisting challenge the *de facto* permanent nature that blacklisting decisions have acquired.

However, in order to safeguard the confidentiality of the information provided by intelligence services, the Working Party’s meetings are held in a “secure environment” where the date, agenda, organisational details and all of the proceedings are kept completely secret. In addition, and contrary to the principle of legality, listing criteria remain blurry and the level of scrutiny is ambiguous\(^\text{70}\).

Secondly, following the decision of the CFI in the 2006 *OMPI* judgement, for each person, group and entity subject to targeted sanctions, the Council provides a statement of reasons which is sufficiently detailed to allow those listed to understand the reasons for their listing and to allow the Luxembourg courts to exercise their power of review where a formal challenge is brought against the listing. The statement of reasons, made available as soon as reasonably possible, must clarify how the listing requirements have been met, *i.e.* how the listed individual or group has been involved in terrorist activities (terrorist acts committed; nature or identification of the competent authority which took a decision, type of decision taken).

In the 2008 *OMPI* judgment, the CFI, after having established a clear requirement for a statement of reasons in 2006, defined and specified what is entailed by this obligation. In particular, an EU listing decision cannot be based on secret information which cannot be placed before a court for judicial scrutiny and review\(^\text{71}\).

The statement is essential as those reasons alone form the basis for a right to effective judicial review and thus offer an opportunity to respond to allegations. For this purpose it should be sufficiently detailed. If the Council believes that there is new evidence justifying the maintenance of individuals or entities on the list, then the parties have the right to be notified and heard before any further decision is taken.

Thirdly, after a listing decision has been taken by the Council, the Secretariat informs each person, group and entity subject to restrictive measures by sending a letter of notification to their address wherever this is practicably possible.

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\(^\text{68}\) Common Position 2001/931/CFSP lays down the criteria for listing persons, groups or entities involved in terrorist acts and identifies the actions that constitute terrorist acts.

\(^\text{69}\) The CP 931 Working Party replaces the informal consultation mechanism among Member States that has been in place since 2001.

\(^\text{70}\) For a critical assessment of the listing requirements see Advocate General Sharpston, Opinion in C-27/09 P, *France v. OMPI/PMOI*, 14 July 2011, paras. 118-120.

\(^\text{71}\) *OMPI II* (2008).
includes, *inter alia*: a description of the restrictive measures taken and a mention of the humanitarian exemptions available.

This notice is important to inform the person/group of the possibility for them to ask for their listing to be reconsidered and also makes reference to the possibility of an appeal to the Court of First Instance.

Fourthly, the Council reviews and updates the EU blacklist at regular intervals (at least every six months) in order to determine whether the grounds for blacklisting are still valid.

The review procedure also allows the targeted individuals or groups to make their views known. In addition, it requires the Council to carry out a thorough assessment as to whether the grounds for each listing are still valid. It takes into account all relevant considerations, including the person’s, group’s or entity’s past record of involvement in terrorist acts, the current status of the group or entity and the perceived future intentions of the person, group or entity.

Further procedural and due process reforms were introduced in April 2009. Most importantly, following the 2008 *Kadi* case, European institutions could no longer automatically implement UN blacklists but have to consider their compatibility with fundamental rights.

This shift from automatic compliance to controlled compliance is significant also because, before the final decision is taken, individuals or groups to be blacklisted are informed and requested to express a view. An Advisory Committee of experts must also be consulted at this stage.

**B. Additional factors which have led to reforms of the existing framework**

Although the role of the CJ has been remarkable in pursuing a more balanced approach in the EU’s fight against terrorism with a view to better complying with due process rights and limit governmental discretion, other factors have also influenced changes in the terrorist blacklisting regime.

1) **UN Level**

The UN do not yet offer legal guarantees to the blacklisted individuals and groups. However, proposals that States have presented to the UN General Assembly as well as EU courts decisions have encouraged the Security Council to modify the targeted sanctions regimes substantially in order to overcome the current human rights deficits.

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For instance, the introduction of an Ombudsperson by Resolution 1904 (2009)\(^{74}\) has been welcomed as a significant reform in this context, at least in terms of transparency\(^{75}\). However it does not amount to an independent and impartial review. The Ombudsperson can independently collect and provide information but can neither decide nor even recommend delisting. In the end, as first introduced, it failed to address the two fundamental problems of the blacklisting regime: the lack of an independent and effective judicial remedy and the non-disclosure of confidential information to the individual concerned.\(^{76}\)

On 6 May 2011 (and then again in November 2012), a “Group of Like-Minded States” – including Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland – addressed a letter to the Security Council to launch their proposals for reforming the UN blacklisting system. The reforms proposed include, *inter alia*: the introduction of a sunset clause and time limit for all terrorist listings (*e.g.* three years); access to information on the grounds for listing to the individuals concerned so that they can effectively challenge the listing decision; the Ombudsperson’s power to recommend delisting – if states do not object in 30 days to a de-listing recommendation by the Ombudsperson then the listing would automatically expire; Ombudsperson’s access to all relevant information “regarding the listing” (the proposal does not investigate how this could be done); Sanctions Committee’s de-listing decisions by majority vote, rather than consensus\(^{77}\).

Remarkably, in 2011 the Ombudsperson’s mandate was enhanced and its recommendations strengthened making them final and automatic in 60 days unless overturned unanimously by the Sanctions Committee or a vote by the Security Council\(^{78}\). However, Ben Emmerson, the UN Special Rapporteur on Counter-terrorism and Human Rights, considered that the mandate still fell short of due process requirements and urged reforms, including making the Ombudsperson’s recommendations binding and increasing the transparency of the process\(^{79}\).

Further reforms in 2012 addressed concerns about adequate due process and human rights protections and urged states to provide relevant evidence and information, even

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the freezing of terrorists’ assets

2) European level

Also of great significance has been the case law of the Strasbourg Court regarding due process rights in the context of targeted sanctions and particularly *Nada v. Switzerland*. In September 2012, the Grand Chamber of the ECtHR addressed the legality of measures implementing targeted sanctions stemming from the UN Security Council and, relying on the *Kadi II* decision of the CJ, found a violation of the rights enshrined in the ECHR. Most importantly, the Strasbourg Court affirmed that the requirement for judicial review is not removed by the fact that contested measures are implementing UN Security Council resolutions. Nothing prevented Swiss authorities from introducing mechanisms to verify whether the measures introduced at the national level managed to strike a fair balance between the protection of fundamental rights on the one side and national security on the other side.

3) National level

Another case is worth mentioning as an example of how some national courts, in order to protect fundamental rights, exercised tighter jurisdictional control than the community courts over EU measures taken to implement UN SC Resolutions. In *Ahmed et al. v. HM Treasury* case, defendants challenged executive orders enabling the fast-track implementation of UN Security Council resolutions concerning the financing of terrorism. They allowed the indefinite freezing of a person’s assets on the basis of executive suspicion alone. Such orders were made without parliamentary scrutiny; they were laid before parliament for its information only, not for scrutiny of their merits or for debate. The UK Supreme Court ruled that the orders were ultra vires, among other things because those affected were not permitted to see – and hence unable to challenge – the evidence supporting that suspicion, violating their right to a fair hearing. In the end, the Court has stated that restrictions upon individual rights always need parliament’s express consent; while parliament can choose to legislate contrary to fundamental rights, it can also decide that certain measures required by a UN SC Resolution are too onerous to be given effect in the UK.

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6. A more comprehensive and substantial reform of the existing EU framework?

Having mentioned the reforms introduced to comply with the requirements of the CFI and CJ case-law, it is now appropriate to assess what the impact of a recourse to the new legal bases introduced by the Lisbon Treaty would be on the existing framework.

The Lisbon Treaty has introduced two new legal bases, Articles 75 and 215(2) TFUE, which give the EU the competence to adopt sanctions against private individuals and legal entities for the first time.

The existence of two legal bases may, however, be problematic.

Yet the choice between the two provisions should not be underestimated as they differ significantly in terms of the applicable legislative procedure. On the one hand, Article 75 TFEU requires the ordinary legislative procedure, according to which the Council and the European Parliament are co-legislators. On the other hand, under Article 215(2) TFEU, the European Parliament only has the right to be informed.

In practice it is unclear which article should be used under which circumstances and this is likely to lead to much inter-institutional litigation.

The European Parliament has already brought a case before the CJ challenging EU Regulation 1286/2009 with a view that it was adopted on the wrong legal basis (i.e. Article 215(2) TFEU, rather than under Article 75 TFEU) given the counter-terrorism objective of the measure at stake. The EP argued, inter alia, that in the Area of Freedom Security and Justice (AFSJ) there is a need for stronger protection of

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83 Article 75 – “Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph. The acts referred to in this Article shall include necessary provisions on legal safeguards”.

84 Article 215(2) – “Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities”.


86 The European Parliament would not be involved in the adoption of operational measures against specific individuals, it would however have a considerable role in establishing the overarching framework for the adoption of targeted sanctions.

individual rights, which could be guaranteed only thanks to an improved democratic legitimacy involving parliamentary scrutiny.\textsuperscript{88}

Since the enactment of the Treaty of Lisbon, the provisions belonging to the AFSJ are, in principle (although subject to a number of restrictions), subject to the jurisdiction of the CJ. Yet, one restriction is still in force. Pursuant to Article 75, the Court holds full jurisdiction: measures adopted under this legal basis are subjected to judicial review (ex Article 253 TFEU). In addition, Article 263(4) TFEU grants the right of appeal to any natural or legal person and this represents a considerable improvement – together with the extension of the CJ jurisdiction within the AFSJ – for the protection of individual rights.

The TFEU retains the former exclusion of the Court’s jurisdiction over the Common Foreign and Security Policy (CFSP); yet there are significant exceptions to this general rule. Pursuant to Article 40 TEU, the CJ can rule on proceedings relating to institutional conflicts concerning CFSP measures. Moreover, Article 275 TFEU explicitly gives the Court the power to rule on proceedings brought against decisions providing for restrictive measures adopted by the Council on the basis of Chapter 2 of Title V of the TEU. Thus, the Court of Justice of the European Union can now review the legality of legislative acts and decisions, imposing restrictive measures against natural or legal persons.

In October 2012, the EU Commission adopted an initiative entitled: “Framework for administrative measures for the freezing of funds, financial assets and economic gains of persons and entities suspected of terrorist activities inside the EU”. Building on the new legal basis introduced by Article 75 TFEU, the initiative aimed at allowing for the freezing of assets of persons/entities related to terrorist activities inside the EU, supplementing Regulation 2580/2001, which covers terrorist activities outside the EU and thereby closing the current legislative gap.\textsuperscript{89} Although it was listed as a Commission priority for 2013\textsuperscript{90} and an impact assessment had been planned, the initiative was not introduced in the end.

7. The impact of the reforms

From a human rights perspective, the adequacy of the reforms introduced at the EU level before the entry into force of the Lisbon Treaty and in order to comply with the requirements of the Luxembourg courts’ judgements is as yet questionable and a more comprehensive and substantial reform is desirable. The most important flaw remains the failure to fully disclose relevant information to the defence, which makes it impossible to properly exercise the right of effective judicial review before EU courts. In the 2010 \textit{Kadi} decision, the CJ confirmed that defence rights were only


\textsuperscript{89} The initial roadmap may be found at the following link: http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2011_home_002_asset_freezing_en.pdf

observed in the most superficial manner. On the one hand, the Commission strictly adhered to the UN Sanctions Committee finding and never questioned them in the light of the applicant’s observations. On the other, it did not provide the applicant with any access to the evidence against him. In this respect, it will be particularly interesting to see what reforms will be introduced in order to satisfy the most recent 2013 ruling in Kadi on the need to disclose to the court (although not to the concerned individual) security information providing the basis for a listing decision.

The reforms at the UN level also constitute a partially successful attempt to improve suspects’ rights to an effective remedy as well as to introduce a certain form of impartial assessment of the sensitive information, which cannot be disclosed to the individual concerned.

Both the Strasbourg and the UK Supreme Court cases are significant as they reassert the need for full judicial scrutiny and parliamentary control against extended governmental discretion in the context of terrorists’ blacklisting. Courts affirm their function of preventing abuses of executive authority. Yet such assertiveness may itself have implications for the delicate constitutional balance between the EC legal order and its implementation at the national level.

Before the drafting of the Lisbon Treaty, with reference to the institutional structure of the EU and in the context of blacklisting, a number of flaws clearly emerged: the lack of a clear legal basis, the exclusion of the European Parliament from decisions affecting individual rights (whereas the Council was attributed a major role) and the limited competences of judicial review attributed to the CJ. Remarkably, autonomous sanctions based on pre-Lisbon instruments could only be challenged in preliminary rulings and not in direct actions. The blur between administrative and criminal law was clearly demonstrated for instance by the little democratic control and judicial scrutiny over decisions adopted by the Council.

The introduction of unambiguous legal bases is, *per se*, a crucial development in terms of legal certainty considering the difficulties encountered under the TEU to find an adequate legal basis for individual restrictive measures. In addition, the new provisions clearly constitute an improvement with regard to the existing deficiencies in terms of protection of fundamental rights, enhancements in relation both to the jurisdiction of the CJ and to the law-making powers of the European Parliament. Besides, the Treaty of Lisbon makes the Charter of Fundamental Rights legally binding.

The establishment of a fully autonomous EU blacklisting legal regime is in principle highly desirable. The question is whether, over time, it will guarantee sufficient procedural rights at the EU level. This will very much depend on the interpretation of the new Treaty provisions. In particular, as argued above, it will depend on which provision is used as legal basis as the degree of democratic control and judicial scrutiny changes accordingly (this is clearly the case with reference to the new role attributed to the EP).

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A number of further developments are also desirable. Firstly, the objective of each measure should be clearly stated and recalled in the introductory paragraphs of specific legislation. Secondly, the legal safeguards for individuals listed and sanctioned need to be determined in legally binding form. Thirdly, listing criteria must ensure a sufficient level of precision and predictability as well as flexibility.

The impact of subsequent reforms on the blur between administrative and criminal law is the most relevant issue for the purpose of this contribution.

A higher level of legal protection of individual rights is required if formally administrative measures are de facto punitive sanctions. In addition the existing shift towards governmental discretion can be countered only thanks to greater democratic control and judicial scrutiny. The reforms introduced seem to provide major improvements in relation to both elements.

Nevertheless, the abovementioned reforms do not contribute to frame the blur between the two legal frameworks and to re-establish firm boundaries between the respective scopes of intervention. They do not exclude recourse to administrative measures, imposing the pursuit of criminal investigations and prosecutions instead, in cases where it would be traditionally considered more appropriate. On the contrary, they lead to a further deepening of the blur. For example, the use of administrative measures requires higher standards of fundamental rights protection and a greater level of judicial scrutiny, which are typical features of criminal law. Thus, some measures are still qualified as administrative although their impact are similar to the consequences of a criminal sanction and the applicable legal framework (including individual rights protection) is that of criminal law.

The contamination of administrative law by criminal law standards is not a negative development as such and is, in fact, rather to be welcomed. However, the feeling than the two frameworks are alike may lead to dangerous misunderstandings. Such misunderstandings could entail the application of preventive measures in a broader range of cases whereas the scope of their use should remain specifically limited to certain circumstances only. In fact the applicable legal framework is not yet alike (particularly in terms of individual rights protection).

For instance, the application – to a certain extent – of criminal law standards to the use of administrative measures in the context of terrorist blacklisting has been the result of a long and challenging development and is not to be taken for granted.

The use of administrative measures instead of criminal law measures would not lead to the automatic implementation of equivalent features. There is not yet a standard set of procedural rights available to persons subject to preventive coercive measures. As argued in the contribution, preventive measures tend to be, in many cases, akin to criminal charges and thus difficult to distinguish in terms of their impact from a criminal law measure. They impose substantial constraints and detriments to those subject to them. And yet substantive limitations and procedural safeguards tend not to apply. Although the safeguards and thresholds may be lower in respect of purely preventive measures, the burdens imposed are not necessarily less punitive. Would it instead be desirable that all safeguards applicable in criminal cases apply? What if the right to liberty, a right of a fundamental nature, is at stake as a consequence of the imposition of a preventive administrative measure?
In addition, the blur raises further questions: are there intelligible distinctions between punishment and prevention? And what limits might properly be placed on the pursuit of prevention?

The problem is also that the issue has largely become a political one and the assessment of which preventive measures are necessary is often the consequence of a political judgement and influenced by public demand for increased protection.

8. Conclusion

As a modern form of indefinite banishment on the basis of largely secret evidence and in a pre-crime logic, targeted sanctions are not followed by criminal trials but operate in advance of potential wrongdoing and on the basis of secret evidence and political decisions. They act on a present or future threat rather than by reference to past conduct. Targeted sanctions shift the temporal perspective to anticipate and forestall that which has not yet occurred and may never do so.

The creation of this “shadow system” of criminal justice is taking place together with the introduction of far-reaching police powers designed to prevent attacks. There appears to be greater reliance on preventive administrative measures instead of their being seen as exceptional and temporary and necessarily linked to a genuine emergency. Preventive measures encompass a larger number of activities and affect a broader range of people. Such trend is not limited to the terrorist context but, for instance, civil orders against individuals for harm or crime prevention purposes exist in different fields to address anti-social behaviours, sexual offences, etc.  

The concern arises as to whether it is justifiable in any circumstance for the state to incapacitate an individual ahead of any wrongdoing and hence by definition in the absence of prosecution and conviction. If so, then long-established principles of criminal justice and individual rights would have to be side-lined in the interest of public protection.

The most obvious conclusion would then be that it is necessary to re-establish the primacy of the criminal justice system. The use of preventative measures might be justified as an extraordinary measure to address current major threats. However, as for the future, surely criminal prosecution should remain the primary response to serious offences, including terrorism. States should make minimal use of administrative measures at the discretion of the executive.

First, the criminal justice system allows legitimate restrictions on individual rights only where necessary, in specific circumstances and for legitimate purposes (i.e. protection of the public from future harm and deterrence of further offences).

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Secondly, it minimises the risk of abuses and of “slippery slopes” as its functioning is mostly transparent. Detailed provisions on due process rights allow the individual whose rights have been limited to defend him/herself against the charges and to challenge the decision taken by the public authority (for example through a more or less developed appeal or judicial review system). In ordinary cases, any limitation of individual rights has to be supported by a reasoned ruling from the judicial authority; the individual (suspect or defendant) has the right to be informed of the charges and of the evidence supporting the prosecution case and to be brought promptly before a judge. Thirdly, judicial authorities cannot normally pursue a fight in the name of a right to security for the neutralisation of dangerous individuals. In fact, judicial discretion is limited by the continuous necessity to justify any decision taken on the basis of reasonable grounds. Finally, a charge will be applied in relation to a specific offence and not because of an individual belonging to a specific category of people. Thorough investigations allow the gathering and selection of appropriate evidence to support the prosecution’s case at trial.

An alternative but deeply questionable approach is that of Zedner. She points out that the recourse to preventive administrative measures is not at all uncommon: in reality it has now become a central feature of the legal landscape, which could not be readily removed. In her view, insisting on the conventional tool of prosecution and punishment within the criminal justice system would only lead to a further expansion of inchoate offences (with the consequent expansion of the scope of criminal law beyond the borders of what is harmful behaviour) and a distortion of due process rights. Instead of attempting to re-establish the primacy of prosecution, legal writers should develop appropriate principles and values to frame the continuing expansion of preventive measures.

There is no doubt that the state has a duty to protect the people from harm and such duty might justify an array of preventive measures. However, while the rationales and justifications for state punishment have been extensively explored, the scope, limits, and principles of preventive justice have not received the same attention. What are, then, the legal or moral limits the legislator has to place upon the use (and possible abuse) of preventive measures? It is difficult to provide clear guidance on what may justly be done in the name of prevention and how to calibrate proportionality. In sum, if preventive measures are in effect penal in character and thus better understood as forms of pre-punishment, their use would require the application of higher standards of proof than “suspicion” even where there is a threat of serious harm.

In the case of terrorist blacklisting and asset freezing, we are witnessing the development of a similar approach. Firstly, from a law enforcement perspective, the recourse in itself to preventive measures is not challenged. It seems unlikely that blacklisting and asset freezing will be replaced by criminal investigations and prosecutions. Secondly, no principles have been developed to frame the expansion as such of preventive administrative measures. However, as a consequence of

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Case studies on the intervention of administrative law subsequent reforms, the characteristic features of such measures are changing and the conditions for their use become closer to what would be required for the application of a criminal law measure. In the context of an ever deepening blur between the two legal frameworks, the trend is that of a positive and welcome contamination of administrative law by criminal law. On the one hand the level of fundamental rights protection is increasing, including the gradual development of an effective remedy to challenge inclusion on a list. On the other hand, the level of judicial scrutiny is growing, thus reducing the danger of a large amount of governmental discretion. As a consequence, from the point of view of the available safeguards the blur between administrative and criminal law is desirable.

Two approaches are thus available in theory: re-establishing the primacy of the criminal justice system or framing the expansion of preventative measures. The problem is that, as argued in the introduction, the danger of using preventive justice as an acceptable feature of a modern criminal justice system could be that it becomes the norm. In that line of thinking, preventive administrative measures will no longer constitute an extraordinary way of dealing with potential criminals/terrorists but a permanent one. Given the downfalls of preventive measures and pre-punishment (despite the present significant change in features) highlighted in this contribution, should legal writers continue to oppose their expansion? The worst case scenario is, in any case, the present one where there is a parallel development and dangerous overlap of inchoate offences, anticipative criminal investigations and preventive administrative measures.