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European Union Committee

11th Report of Session 2016–17

The legality of EU sanctions

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Evidence is published online at <http://www.parliament.uk/legality-eu-sanctions-listing-process> and available for inspection at the Parliamentary Archives (020 7129 3074).

Q in footnotes refers to a question in oral evidence.

SUMMARY

This report is the result of a short inquiry into the legality of the EU sanctions listing process, conducted by the Justice Sub-Committee of the European Union Committee. The purpose of the inquiry was to understand better why EU sanctions were being struck down by the EU courts, and to investigate whether improvements could be made to the sanctions listing process.

EU sanctions serve an important foreign policy objective in persuading States and regimes to change behaviour. They also need to respect the due process rights of those who are sanctioned, as guaranteed by the EU Charter of Fundamental Rights. There is a tension between these two principles, and the large number of listings that have been annulled by the General Court to date attests to this difficulty.

That said, the sanctions listing process has improved considerably. In the past, targeted individuals or companies were neither informed that they had been listed nor provided with a statement of reasons for their listing. Since the *Kadi II* judgment of the Court of Justice of the EU in 2013, the Council secretariat, and Member States within the Council, have placed far greater emphasis on improving the quality of evidence supporting sanctions listings. The UK has led in achieving this. Further improvements include greater reliance on open-source evidence, which can be disclosed to the listed individual or company, annual reviews of all EU sanctions, and a greater willingness to lift sanctions once substantial progress in their objectives has become evident.

But, as the Government told us, there is still a way to go.

It is particularly important that the Council codifies the standard of proof it applies when it adopts sanctions listings. This would bring much-needed transparency to the listing process, as well as public assurance that the same standard of proof is applied by all Member States in the Council, which is not currently the case.

We conclude that the Council should be less willing to re-list on amended reasons those individuals and companies who have succeeded in having their original listings struck down by the EU courts for lack of evidence. We are concerned that this practice gives rise to a perception of injustice, namely that there is no effective judicial remedy against sanctions listings.

The EU courts should have a procedure for considering confidential evidence supporting sanctions listings. We are concerned that the newly introduced ‘closed material procedure’ may not be taken up by many Member States.

An Ombudsperson for EU sanctions, similar to the role of the UN Ombudsperson for the Al Qaida Sanctions Committee, could help to improve the fairness of the sanctions listing procedure. We ask the Government and the Council to give their views.

We conclude that parliamentary scrutiny of EU sanctions can perform a valuable role in illuminating the sanctions listing process, even though in most cases it takes place after sanctions listings are adopted by the Council. Parliament’s role will be enhanced by confirmation by the EU Council’s Legal Service that open-source information can be made public, and so can be made available to Parliament. This contradicts the Government’s stance, and we

ask the Government to make available to Parliament all open-source evidence supporting new listings and re-listings in future.

Finally, we note the importance of the UK continuing to be able to engage with and align itself with EU sanctions post-Brexit.

The legality of EU sanctions

CHAPTER 1: INTRODUCTION

1. On 11 October 2016 the Justice Sub-Committee of the European Union Committee took evidence on the legality of the EU sanctions listing-process. Our aim was to establish the reasons for the high number of EU sanctions cases being annulled (struck down) by the General Court of the EU, and to investigate what measures were being taken to address this by the EU Member States and the Council of the European Union (the Council). In addition, the sessions followed up on points that the Justice Sub-Committee had raised in correspondence with the Government on EU sanctions listings over the previous 18 months.
2. Our first panel comprised three witnesses from the Foreign and Commonwealth Office: Paul Williams, Director of Multilateral Policy Department; Andrew Murdoch, Legal Adviser, and Matthew Findlay, Deputy Head of Multilateral Policy Department. Our second session comprised Maya Lester QC, of Brick Court Chambers, and Mr Michael Bishop, Senior Legal Adviser, EU Council Legal Service. Ms Lester also provided written evidence. We are very grateful to our witnesses for the evidence they provided.
3. The report has four chapters. This chapter introduces the inquiry; Chapter 2 sets out the background to EU sanctions policy and procedure; Chapter 3 outlines the evidence we received; and in Chapter 4 we draw conclusions and make recommendations to the Government and the Council.
4. **We make this report for information.**

CHAPTER 2: EU SANCTIONS POLICY AND PROCEDURE

Overview

5. Sanctions—also referred to as restrictive measures—against ‘third’ (non-EU) countries, and individuals or companies in third countries, are an essential foreign policy tool, which the EU uses to pursue objectives under the Common Foreign and Security Policy (CFSP).
6. EU sanctions come in two forms. The first is sanctions that the EU Member States are obliged to implement in EU law by virtue of Resolutions of the United Nations (UN) Security Council under Chapter VII of the UN Charter. The second is autonomous sanctions, which the EU adopts in the absence of, or in addition to, UN sanctions.
7. Sanctions are intended to bring about a change in policy or activity in the target country, region, government, companies or individuals. The measures should target the policies or actions that have prompted the decision to impose sanctions, and those identified as responsible for those policies or actions. There should, therefore, be a link between the target of the sanction and the overall foreign policy objective.
8. Under EU law, sanctions should respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy, all of which are safeguarded by the EU Charter of Fundamental Rights. The EU Charter legally binds the EU institutions and Member States when they implement EU sanctions.¹
9. The crises in the Middle East, North Africa and Ukraine have led to a marked increase in the use of sanctions by the EU. There are now EU sanctions regimes against approximately 35 countries, regimes and terrorist organisations.²

Procedure for listing

10. The Council imposes EU sanctions through a CFSP Council Decision adopted by the Member States by unanimity. Certain types of sanctions, such as arms embargoes and travel bans, are implemented directly by Member States, and such measures require only a Decision by the Council, which is directly binding on Member States. By contrast, economic measures such as asset freezes and export bans affect wider EU legal principles on free movement, and require additional implementing legislation in the form of a Council Regulation, which is directly binding on individuals and companies in the EU. The Regulation sets out the precise scope of the measures decided upon by the Council and the means of their implementation.

Types of sanction

Arms embargo

11. An arms embargo normally covers the sale, supply and transport of goods included in the EU’s ‘Common Military List’.³ Related technical and

1 Article 51(1) of the EU Charter of Fundamental Rights, [OJ C 202](#) (7 June 2016)

2 European Commission, *Restrictive measures (sanctions) in force*, 11 October 2016: https://eeas.europa.eu/sites/eeas/files/restrictive_measures-2016-10-11-clean.pdf [accessed 13 January 2017]

3 Common Military List of the European Union adopted by the Council on 9 February 2015, [OJ C 129](#) (21 April 2015)

financial assistance is normally also included in the ban. In addition, the export of equipment used for internal repression, and dual-use goods (those that can be used for both civil and military purposes) may be prohibited.

Asset freeze

12. An asset freeze concerns funds and economic resources owned or controlled by targeted individuals or companies. It means that funds, such as cash, cheques, bank deposits, stocks, and shares may not be accessed, moved or sold. Neither can other tangible or intangible assets be sold or rented, including real estate. An asset freeze also includes a ban on providing resources to the targeted individuals or companies. This means that EU citizens and companies must not make payments or supply goods and other assets to them. In effect, business transactions with targeted individuals or companies cannot be carried out. In certain cases, national authorities can permit derogations from the asset freeze under specific exemptions, for instance to cover basic needs (such as foodstuffs, rent, medicines or taxes) or reasonable legal fees.

Visa or travel ban

13. Individuals targeted by a travel ban will be denied entry to the EU at its external borders. If visas are required for entering the EU, they will not be granted to people subject to such restrictions on admission. EU sanctions do not, however, oblige a Member State to refuse entry to its own nationals.

Scope

14. By their very nature, EU sanctions are designed to have political effect in third countries. Nevertheless, they only apply within the jurisdiction of the EU, which is to say:
 - within EU territory, including its airspace;
 - to EU nationals, whether or not they are in the EU;
 - to companies incorporated under the law of a Member State, whether or not they are in the EU (this therefore includes branches of EU companies in third countries);
 - to any business done in whole or in part within the EU; and
 - on board aircrafts or vessels under the jurisdiction of a Member State.
15. The five EU Candidate Countries⁴ are encouraged to align themselves with EU sanctions.

Legal remedies

16. The Council notifies individuals and companies listed under an EU sanction of the measures taken against them, once they have been taken. At the same time, it brings the available legal remedies to their attention: they can ask the Council to reconsider its decision, by providing observations on the listing; or they can challenge the measures before the General Court of the EU

⁴ Albania, the former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey.

(the General Court)⁵ within two months and 10 days of being notified. If the General Court ‘annuls’ (strikes down) the sanction, the judgment only comes into effect two months and 10 days after the date of delivery. Within this time, the Council can, and often does, re-list the same individual or company, but on amended statements of reasons.

⁵ The General Court is the first-instance EU court, which hears all applications to annul sanctions listings. Appeals from the General Court are heard by the EU’s apex court, the Court of Justice of the EU.

CHAPTER 3: THE LEGALITY OF THE EU'S SANCTIONS LISTING PROCEDURE

The purpose of EU sanctions

17. Mr Paul Williams, of the Foreign and Commonwealth Office (FCO), explained that sanctions were used “as a foreign and security policy tool to try to coerce a change of behaviour, to restrict the movement of certain goods or money or to restrict the proliferation of materials, such as nuclear materials”. Sanctions fitted into “the armoury of tools” that Governments and international organisations can use in conducting foreign policy. They were “more than a political statement and significantly less than a military action”.⁶
18. Mr Williams cited the recently-lifted sanctions on Iran as an example of sanctions that changed State behaviour:

“The Iranian sanctions regime is a recent example of a regime that had a significant effect. It was well known, and publicly known, that that was a significant factor in the eventual deal that the E3+3 got with Iran. The credibility of sanctions as a tool in that context got a boost from that particular example.”⁷

The evidence-gathering process

19. Mr Matthew Findlay, of the FCO, told us that the evidence-gathering process was difficult. It was important to understand that the organisations which were being targeted were often engaged in clandestine activity, like nuclear proliferation or terrorism. They were:

“Not always organisations that leave a heavy footprint on the internet. Often, the evidence gathering process is quite difficult. The Council faces difficult judgments on whether it is appropriate to go ahead with a listing, for security reasons, or whether it needs to weigh more heavily the requirements of due process. That balancing act will remain difficult, but the Council is handling the balance better now than it used to.”⁸

20. Mr Findlay said that the balance between the “security drivers for taking action and the demands and the requirements of due process ... [is] often the crux of a debate in the Council”.⁹

Reasons for sanctions listings being annulled

21. Mr Michael Bishop, of the Council Legal Service, told us that, in most cases, the reason for annulment by the General Court was a failure either to specify in sufficient detail the reasons for the listing or to substantiate them. There could be annulments on procedural grounds—for example, a failure to give the listed individual access to the file—but normally the General Court would examine procedural and substantive grounds together.¹⁰
22. Mr Bishop told us that the Council’s record before the courts had improved considerably: “In 2012, 2013 and 2014 the Council was still losing twice as

6 [Q 1](#)

7 [Q 3](#)

8 [Q 1](#)

9 [Q 10](#)

10 [Q 12](#)

many cases as it won ... In 2015 that trend was reversed; the Council won more than twice as many cases as it lost. The same applies for 2016.”¹¹

- 23. The EU courts, which is to say the General Court and the Court of Justice of the EU, were also “more comfortable with a broader-based listing criterion, such as providing support to the Government of Iran, than with a criterion such as involvement in nuclear proliferation, which is more difficult to prove.” Part of the reason for the Council winning more cases now was “that more use has been made of those other status-based, broader-based criteria”. That said, in Mr Bishop’s view “at least half of the reason for the improved success rate is definitely an improvement in the quality of the listing proposal and the information that accompanies it. I have seen that. It is clear.”¹²
- 24. Maya Lester QC, who has acted as counsel for listed individuals and companies in annulment proceedings before the EU courts, told us that the most common reason for sanctions listings being annulled over the past few years had been insufficient evidence from the Council to substantiate the reason for listing an individual or company.¹³ She listed 41 cases as a representative sample of cases in which sanctions had been annulled by the EU courts.¹⁴
- 25. She agreed with Mr Bishop that another common reason for annulment had been a failure to give clear reasons for the listing. In the early days of EU targeted sanctions individuals and companies were regularly listed on the basis of no reasons. The Council now gave reasons for sanctions listings. The General Court sometimes found those reasons to be insufficiently precise, detailed and specific, although it had held more recently that only one adequate reason to justify a sanctions designation was needed.¹⁵
- 26. A third reason for annulments concerned the EU’s counter-terrorism sanctions, which had a different legal basis and procedure from its other sanctions regimes. Counter-terrorism sanctions followed a two-stage process. First, the competent national authority in a Member State had to make a decision, based on precise evidence that an individual or company had participated in, facilitated, or attempted to perpetrate a terrorist act. Second, the Council had to review the decision of the national competent authority to ensure that it was “based on serious and credible evidence and complied with the rule of law”.¹⁶ Once that decision had been made, the Council could impose EU-wide sanctions. The General Court annulled listings where the Council had not followed that process.
- 27. Ms Lester disagreed, however, with Mr Bishop’s suggestion that the reduction in the number of cases being lost by the Council was in part a consequence of more robust evidence gathering:

“It seems to me that one reason why the Council is now winning more cases than before is that it has made the criteria easier to satisfy. It is therefore much more difficult to say that someone is not, for example, connected with providing support to the Government, rather than engaging in misconduct of one kind or another. That is not to say that

11 [Q.12](#)

12 [Q.17](#)

13 Written evidence from Maya Lester QC ([EUS0001](#))

14 Written evidence from Maya Lester QC, Appendix 1 ([EUS0001](#))

15 Written evidence from Maya Lester QC ([EUS0001](#))

16 Written evidence from Maya Lester QC ([EUS0001](#))

the Council is not fully entitled to make that judgment as a matter of policy, but it is why, as a matter of law, the Council has been winning those cases. It is not a sign that a more rigorous standard of evidence gathering or of due process being followed.”¹⁷

Are the reasons for annulment justified?

28. In Ms Lester’s view, the reasons for annulments were sound. She believed that “singling out individuals for restrictive measures required justification”, and quoted the Opinion of the UK’s Advocate General at the Court of Justice of the European Union, Eleanor Sharpston QC, in a case on the listing of the Tamil Tigers:¹⁸

“It is worth recalling that the consequences of listing are very serious. Funds and other financial assets of economic resources are frozen ... for a person, company or group that is named in the ... list, normal economic life is suspended. It does not seem unreasonable to insist that, where such are the consequences, the procedures followed should be rigorous and should respect fundamental rights of defence and effective judicial protection.”¹⁹

29. In a number of cases:

“The Council presented no evidence at all to the Court to justify the published reasons, often disclosing only a redacted listing proposal from a member state containing the person’s name and the wording of the ‘reasons’ column. Where the Council has disclosed material from its file during the court process, it often consists only of the results of internet searches and press articles whose provenance, reliability and relevance are not explained.”²⁰

That said, the General Court regularly upheld sanctions listings; they were by no means always annulled, and applicants failed as often as they won.²¹

Standard of proof for the adoption of listings

30. Mr Andrew Murdoch, of the FCO, told us that the UK adopted “a reasonable grounds for suspicion test” as the standard of proof for adopting sanctions listings.²² That test had been approved by the UK Supreme Court in the case of *Youssef*,²³ which concerned sanctions adopted by the UK as a member of the UN sanctions committee.
31. He explained that the Court of Justice of the EU’s landmark decision in the case of *Kadi II*,²⁴ in 2013, set out the broad test for the standard of proof for EU sanctions listings: “There has to be a sufficiently solid factual basis to substantiate the reasons for listing.”²⁵

17 [Q 14](#)

18 *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)* , Opinion of Advocate General Sharpston, (22 September 2016) [C-599/14](#)

19 Written evidence from Maya Lester QC ([EUS0001](#))

20 Written evidence from Maya Lester QC ([EUS0001](#))

21 Written evidence from Maya Lester QC ([EUS0001](#))

22 [Q 1](#)

23 *Youssef (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2016] [UKSC 3](#)

24 Joined cases [C-584/10, C-593/10 and C-595/10](#): *European Commission and Others v Yassin Abdullah Kadi*, 18 July 2013

25 [Q 1](#)

32. That said, Mr Findlay told us that there was no “agreed formula” for the standard of proof set down in any Council Decisions:

“Essentially, the Council has been responsive to the court’s jurisprudence. That is the limit of what has been explicitly agreed by the Council ... When it comes to decision-making in the Council, it is for each Member State to make its own decision in the vote on adopting a listing.”²⁶

33. The Government, Mr Murdoch told us, applied the national standard of proof every time it put forward a listing in the Council: “If we do not think there are reasonable grounds to suspect, based on the evidence we have, we will not support the listing.” It also advocated that standard of proof “strongly, but ultimately other Member States have to speak for themselves ... Typically, you have a Member State that, for political reasons, is particularly keen on a listing, and often you have others that are much more cautious. That is the typical dynamic in the Council.”²⁷

34. Mr Findlay thought that a further decision of the Court of Justice of the EU might be necessary in order for the Council to codify a standard of proof:

“It is relatively easy to get consensus that we should follow the court’s jurisprudence. Something like the *Kadi II* judgment—a further judgment of that level of importance—is probably the trigger that it would take for the Council to develop its policy in a more explicit way.”²⁸

35. Mr Bishop, of the Council Legal Service, also referred to *Kadi II*. The standard of proof set out in that case required, first, that the reasons for listing came within the listing criteria, and, second, that the reasons were substantiated. He gave the following example:

“Let us take the example of providing financial support to the Government of Iran. That is an easy one to satisfy. You can take a state-owned company and say, ‘This provides financial support to the Government of Iran’. It is not enough to say that it is state owned; you would probably have to find the provisions in its articles of association that say, ‘Yes, the dividends are paid to it’. You would also have to go to the accounts and show that significant amounts of money were paid. On the basis of those facts, which are impossible to controvert, you can say, ‘This is a sufficiently solid basis to consider that the company is supporting the Government of Iran’, because it reaches the threshold of providing sufficiently substantial support.”²⁹

36. Mr Bishop described the purpose of the targeted sanctions as “precautionary and preventive”: they were not criminal measures, and there was “no implication that the person targeted has necessarily been guilty of a crime”.³⁰ By implication they did not, therefore, require a criminal standard of proof.

37. When pressed on why the standard of proof had not been more fully codified, Mr Bishop said: “The EU system is that the legislation tends to be rather general and the court then interprets it. That is a fact of life in the EU.”³¹

26 [Q.2](#)

27 [Q.2](#)

28 [Q.2](#)

29 [Q.12](#)

30 [Q.12](#)

31 [Q.12](#)

38. Ms Lester was not aware of any fixed standard of proof being applied by the Council in adopting sanctions listings, except in the case of counter-terrorism sanctions. It was, in her view, a serious shortcoming of the case law of the EU courts that they had not required an evidential threshold or standard of proof in non-terrorist sanctions cases, beyond saying that there must be a “sufficiently solid factual basis” for a listing and that “mere unsubstantiated allegations” would not suffice.³² Her concern, however, was “not so much that there is not a written-down standard of proof, although one might expect that, but the way in which the standard of proof, or lack of it, has been applied by the Council in a number of cases.”³³ Two types of sanctions listings concerned her the most: status-based sanctions and sanctions for misappropriation of State funds.

Status-based sanctions

39. Status-based listings are those where the Council relies on an individual’s status, for example as a leading businessman or a member of the family of a ruling elite, as evidence of his or her support for the regime being targeted.
40. We corresponded with the Government on the annulment of one such listing under the EU’s sanctions regime against Belarus—the case of *Yury Chyzh*.³⁴ In March 2012 the Council added Yury Chyzh to the list of individuals whose funds were to be frozen because he provided financial support to the Lukashenko regime through his company, to which that regime had awarded numerous concessions/contracts. In addition, the positions held by Mr Chyzh as chair of the board of the football club FC Dynamo Minsk, and chair of the Belarusian Federation of Wrestling, were alleged to confirm his association to the regime. The General Court found that the Council had failed to provide any reliable evidence that the award of concessions/contracts to his company or his chairmanship of the two sporting organisations demonstrated that Mr Chyzh supported the Lukashenko regime.³⁵
41. Ms Lester was concerned that presumptions underpinning status-based sanctions should not equate to evidence:

“If you are going to allege that all successful businesspeople in a particular country must be corrupt, that is a very significant allegation. If that is to be used as a presumption across the board, not only does it have to result in equal treatment of all those people, but there has to be serious substantiation for its being the case.

“The way in which the presumptions are offered by the Council is simply by asserting that they must be correct in that country. That is what the court has been objecting to. If what one is doing is offering a presumption instead of evidence, which is the Council’s case—‘We do not need evidence. Your company must have got these contracts as a result of corruption’—that is the bit that most troubles me.”³⁶

32 Written evidence from Maya Lester QC ([EUS0001](#))

33 [Q 12](#)

34 *Yuri Chyzh and others v the Council of the European Union*, 6 October 2015, [T-276/12](#); see also correspondence between Lord Boswell of Aynho and David Lidington MP, 6 November 2015–23 February 2016: <http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Scrutiny%20work%20correspondence/Correspondence-on-BelarusNovember2015-February2016.pdf>

35 *Yuri Chyzh and others v the Council of the European Union*, 6 October 2015, [T-276/12](#)

36 [Q 12](#)

42. Mr Bishop took a different view:

“The starting point is to recall that the purpose of targeting prominent or leading businessmen, which is the criterion—not any businessmen—in countries such as Belarus and Syria is that the regime depends on the support of those people in order to survive. If the business class in Syria had made it clear to Assad some time ago that it would withdraw its support from him as a class, I think he would have been out of power by now. The same can be said for Belarus. The purpose is to target the influential businessmen, not because they are necessarily doing bad things or because we are accusing them of anything, but because the policy idea is that the Governments in those countries depend on those people’s support. If they have the impression that the regime is no longer working in their interests or in their favour, they will think twice. They will hedge their bets and look at something else.”³⁷

Sanctions listings for misappropriation of State funds

43. Ms Lester explained that asset freezes had been imposed on members of former regimes in Ukraine, Tunisia and Egypt (the Yanukovych, Ben Ali and Mubarak regimes) on the basis of the fact that the targeted individuals were under criminal investigation in those countries for having misappropriated State funds. She had never seen any evidence to suggest that the EU had made an assessment of the allegations against those people before agreeing to list them. As a consequence, there was “an obvious risk of measures of this kind being used to target political opponents”.³⁸
44. Ms Lester was particularly concerned by the sanctions against members of the former regime in Tunisia, which appeared to have been requested by the EU, rather than by the Tunisian Government, and without any prior assessment of the proceedings against them.³⁹ She referred to a *note verbale* dated 25 January 2011 from the EU delegation in Tunisia, asking the Tunisian Ministry of Foreign Affairs to provide it urgently with “a list of persons known or suspected of having acted against the interests of the Tunisian state and/or its people and whom Tunisia wishes to punish.”⁴⁰ The Tunisian Government sent a list of names on 29 January 2011, and on 31 January, the next business day, EU-wide asset freezes had been imposed on the names listed.⁴¹
45. She acknowledged, however, that the General Court had upheld the lawfulness of sanctions listings for misappropriation of State funds, and had rejected submissions that there should be adequate safeguards to ensure that there was a *prima facie* case, and a fair trial, in the countries concerned.⁴²
46. Mr Bishop did not share Ms Lester’s concerns:

“In those three countries, it was perfectly obvious that there was a huge degree of nepotism in the regimes in question—Mubarak, Ben Ali and his wife Leila Trabelsi and her family in Tunisia, and in Ukraine. Okay, the information is open source, but there were television pictures of

³⁷ Q.12

³⁸ Supplementary written evidence from Maya Lester QC ([EUS0002](#))

³⁹ Supplementary written evidence from Maya Lester QC ([EUS0002](#))

⁴⁰ Supplementary written evidence from Maya Lester QC, appendix 1 ([EUS0002](#))

⁴¹ Supplementary written evidence from Maya Lester QC ([EUS0002](#))

⁴² Written evidence from Maya Lester QC ([EUS0001](#))

palaces, helicopters and large properties. It was a question of recovering all the theft that had been going on for so long by those people, in order for the funds to be returned to their rightful owners—the peoples of Egypt, Tunisia and Ukraine.”⁴³

47. The intention was for the EU asset freezes to apply immediately, in order to prevent asset flight. It was “very easy for these people to dispose of their money outside the EU”. In addition, the General Court had set a high bar for designation:

“The court ruled in the recent cases concerning the ex-President of Ukraine that EU action is justified not by any misappropriation of public funds, but only by misappropriations where, either because of the amounts involved or because of the context—in other words, where the inner cadre of a regime has long been misappropriating state funds in a context of corruption—it is necessary to recover those funds and to support the processes for prosecuting and punishing people, in order to support the rule of law in Ukraine.”⁴⁴

Re-listing individuals or companies on amended statements of reasons

48. Mr Bishop told us that the Council was obliged to “take full account of the reasons for the annulment” when considering whether to re-list an individual or company that had successfully challenged their listing before the General Court. This meant that, if the Council wished to re-list, not only could it not just repeat the same statement of reasons on the same information, but it could not adopt a listing that would be affected by the same kind of illegality that the court had already ruled on.⁴⁵ As a consequence, in most re-listing cases, the new listing had taken place on the basis of a new criterion:

“That is what you find in the case of Iran. The initial listings cited involvement in nuclear proliferation. That was difficult to prove. Then in 2012, for policy reasons, the Council decided to broaden the scope of those measures and agreed a listing criterion of ‘providing support to the Government of Iran’. Most of the relistings were agreed on the basis of the second criterion.”⁴⁶

49. A re-listing did not always follow a successful legal challenge, and Mr Bishop could think of “two or three cases in recent times” where the Council had not re-listed after an annulment of the original listing.⁴⁷ In some cases, the illegality that the General Court had identified could mean that the information available to the Council did not support a re-listing.
50. Ms Lester accepted that there were cases in which the Council should be permitted to re-list individuals or companies that had successfully challenged their listings, in particular where there was a genuine concern that funds would be used for purposes such as terrorism or proliferation.⁴⁸ However, where a listing had been annulled for lack of evidence, Ms Lester believed it was:

⁴³ [Q 16](#)

⁴⁴ [Q 16](#)

⁴⁵ [Q 18](#)

⁴⁶ [Q 13](#)

⁴⁷ [Q 18](#)

⁴⁸ Written evidence from Maya Lester QC ([EUS0001](#))

“Not compatible with the right to an effective remedy or due process for the Council then to rely on the same facts to found an immediate re-listing, by expressing them differently (either by means of a slightly amended statement of reasons or a different listing criterion that it could have relied on at the time of the original listing), or on facts that it could have relied on for the original listing but did not.”⁴⁹

She also thought that in all re-listing cases the Council should also explain why there was a continued need for that individual or company to be re-listed.

51. Ms Lester referred to a case concerning the re-listing of the National Iranian Tanker Company (NITC),⁵⁰ a significant carrier of Iranian crude oil, for whom she acted. The General Court had annulled NITC’s original listing because there was no evidence that it provided “financial support” to the Government of Iran. NITC had been re-listed on the basis that it provided “logistical support” for the Government of Iran. The President of the General Court, in an interim hearing,⁵¹ stated that re-listing NITC on this basis might jeopardise its right to an effective remedy. He thought the right to an effective remedy might require the Council:
 - to deploy all reasons and evidence available to it in its initial listing of an individual or company; and
 - only to re-list a company where new and relevant facts or evidence have emerged which were not previously available to the Council at the time of the original listing.⁵²
52. This would mean that a re-listing could be envisaged “only where new and relevant facts or evidence have emerged, while the Council would be prohibited from using, during future re-listings, evidence that it had admittedly not yet invoked, but which could already have been invoked on the date of the first listing.”⁵³
53. Notwithstanding the President’s remarks, the General Court upheld NITC’s re-listing. There were other pending cases on the practice of re-listing, but in the light of this judgment Ms Lester concluded that the General Court was likely to uphold the lawfulness of the Council’s re-listing practice.⁵⁴

Recent improvements in the fairness of the listing and re-listing process

54. Mr Findlay, of the FCO, told us that the big change over the last two or three years had been “embedding” the *Kadi II* judgment as standard practice in the Council:

“We have had to do it in some very politically charged negotiations, such as following Russia’s action in Ukraine, when we had very strong political reasons for wanting to do some listings, but the Council Legal Service reminded us that we had to be able to find the appropriate

49 Written evidence from Maya Lester QC ([EUS0001](#))

50 *National Iranian Tanker Company v Council of the European Union*, interim measures judgment, (14 September 2016) [T-207/15](#):

51 [Interim measures judgment](#), 16 July 2015

52 Written evidence from Maya Lester QC ([EUS0001](#))

53 Written evidence from Maya Lester QC ([EUS0001](#))

54 Written evidence from Maya Lester QC ([EUS0001](#))

- evidence before we could go ahead. That kind of dynamic has really embedded itself in the last two or three years.”⁵⁵
55. He was clear, however, that there was “still … some way to go across the whole of the Council—all 28 Member States—in embedding some of the process changes”.⁵⁶ This was a priority for the UK.
56. Mr Findlay said it had become standard practice for every EU sanctions regime, and every listing under that regime, to be reviewed at least once a year, which forced a review of all the evidence. That put pressure on each Member State to satisfy itself that there was evidence to continue the listing. This was an important development.⁵⁷
57. Mr Findlay also told us that there had been renewed focus on when to lift sanctions, which was important for their credibility:

“Some of the examples where we think that there has been success and effectiveness are when, ultimately, we have been able to lift the sanctions because we think that we have seen behavioural change. Iran is one case, but quite recently we lifted UN sanctions against Côte d’Ivoire. Following the regime change, we lifted them from Liberia. Recently, the EU quite substantially relaxed measures against Belarus.”⁵⁸

He explained that mechanisms had been introduced to allow assets that had been frozen to be partially unfrozen to pay for the legal defence of those who want to bring cases against their listing, or in cases of humanitarian need.⁵⁹

58. Ms Lester, in contrast, was “not aware of any changes made by the Council over the last two to three years to improve the fairness or the listing or re-listing process”.⁶⁰ She was concerned that the procedures followed by the Council for listing and re-listing were for the most part not transparent.

Reliance on ‘open-source’ information

59. Mr Findlay and Mr Bishop both said that intelligence services’ information was relevant to clandestine activities, such as those linked to terrorism or nuclear proliferation.⁶¹ Such information had never been disclosed in listing proposals. But intelligence information was often not needed for matters such as whether a businessman was prominent in a third country and, therefore, whether he satisfied the criteria for listing.⁶² This evidence could be obtained “simply by ordinary internet searches and reading press articles”, in other words through open-source evidence which could be disclosed to the General Court.⁶³ Paul Williams said that the FCO had “a particular emphasis on open-source material and trying to be as good as we can be in providing it” to support sanctions listings.⁶⁴

55 [Q 5](#)

56 [Q 5](#)

57 [Q 5](#)

58 [Q 4](#)

59 [Q 5](#)

60 Written evidence from Maya Lester QC ([EUS0001](#))

61 [QQ 1, 17](#)

62 [Q 17](#) (Mr Bishop)

63 [Q 17](#) (Mr Bishop)

64 [Q 5](#)

60. Ms Lester believed that the use of open-source material was “fairer”, at least in the sense that “some public material justifying a designation was better than none”.⁶⁵ Sometimes the EU courts considered open-source material to be sufficient to uphold a listing: “For example, if a company was listed because it was owned or controlled by a listed company, and if the open-source material contained information on corporate ownership structure suggesting that this was the case, the court might well uphold the designation.”⁶⁶
61. The fact that material was open-source, however, did not, in Ms Lester’s view, mean the process was more “robust”. In particular, the EU courts accepted as evidence material that a UK court “would not regard as meeting any appropriate evidential threshold”. Open-source material often consisted of opinions expressed in press articles, sometimes from a non-objective source, or internet pages whose source and reliability were unknown and untested. It was doubtful that presentation of this material made the process fairer. Ms Lester again quoted the Opinion of Advocate General Sharpston in the Tamil Tigers case:⁶⁷

“The Council cannot include a person or group in the … list because it has a press report stating ‘he did it’ or ‘he said he did it’. Such a decision cannot satisfy the conditions of Common Position 2001/931. Nor is it reconcilable with the rule of law.”⁶⁸

The closed material procedure

Objective

62. The closed material procedure is intended to allow confidential information (such as intelligence) from one party in proceedings before the General Court to be considered by the General Court without it being disclosed to the other party. The introduction of a mechanism for the General Court (and for the Court of Justice on appeals from the General Court) to be able to consider confidential information was considered particularly important for sanctions cases, where listings had often been overturned because the Council had been unable to disclose the confidential evidence on which they were based. The rules are set out in Article 105 of the General Court’s Rules of Procedure,⁶⁹ which entered into force on 1 July 2016.

The procedure

63. Article 105 lays down the following procedure:
- The EU institution or individual Member State seeking to rely on confidential information must make an “application for confidential treatment”.
 - The General Court can also ask to see confidential information of its own volition, which the Institution or Member State concerned can refuse.

65 Written evidence from Maya Lester QC ([EUS0001](#))

66 Written evidence from Maya Lester QC ([EUS0001](#))

67 *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)* , Opinion of Advocate General Sharpston (22 September 2016), [C-599/14](#):

68 Written evidence from Maya Lester QC ([EUS0001](#))

69 Rules of Procedure of the General Court of 4 March 2015: http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rp_en.pdf (accessed on 9 January 2017)

- “Confidential” information means information whose publication “would harm the security of the Union or that of one or more of its Member States or the conduct of their international relations.”
- If the Court decides that the information is not confidential, it will ask the party seeking to rely on it to share it with the other party. If that party refuses, the General Court will not take the confidential information into account in the determination of the merits of the substantive case.
- If the General Court agrees that the information is “relevant in order for it to rule in the case and is confidential *vis-à-vis* the other main party”, the Court will take it into consideration in forming its judgment and will not disclose it to the individual concerned.
- In taking the confidential information into account, the General Court will “weigh the requirements linked to the right to effective judicial protection … against the requirements flowing from the security of the Union or … its Member States or the conduct of their international relations”.
- Having weighed these concerns, the General Court will then make an order setting out the manner in which a non-confidential summary of the information can be shared with the other party.
- The confidential information may be withdrawn by the party relying on it within two weeks of the General Court’s decision as to its confidentiality (but not after). Where the information is withdrawn, it shall not be taken into account in determining the merits of the substantive case.

The assessment of our witnesses

64. Witnesses agreed that it was too early to tell what effect the introduction of the closed material procedure would have on sanctions litigation. Mr Findlay, of the FCO, thought that applications to annul listings would continue, but the closed material procedure did open up another avenue for the Council to try to defend those cases where no open-source information was available. It was up to the Member State that had the intelligence substantiating the listing to decide whether it trusted the closed material procedure.⁷⁰
65. Mr Williams, of the FCO, reminded us that the UK had concerns about using that procedure, which was why it placed “particular emphasis on open-source material”.⁷¹
66. Ms Lester shared the Government’s reservations, doubting that the new procedure would have a significant impact on the level of litigation, because it did not provide “sufficient safeguards for some Member States to make wide use of it”.⁷² She noted that the UK had abstained in the Council vote on the new rules because of concerns that the originator of the confidential information could not withdraw the information from the General Court or Court of Justice after a certain stage, and because there was no mechanism for checking inadvertent disclosure in court orders and judgments. The

70 Q5

71 Q5

72 Written evidence from Maya Lester QC ([EUS0001](#))

absence of these safeguards would limit the types of information some Member States would be willing to submit to the courts.

67. She had more fundamental concerns, however, with the closed material procedure:

“The new procedure is, in my view, of serious concern as regards the rule of law because (contrary to the case law of the European Court of Human Rights and the House of Lords) it does not require an ‘irreducible minimum’ level of disclosure to applicants. Those courts have interpreted Article 6 ECHR (the right to a fair hearing) as requiring that individuals are given sufficient information to enable them to give effective instructions in order to refute allegations against them, even where it would be damaging to national security to disclose that ‘irreducible minimum’. Article 105 does not provide any protections such as Special Advocates to represent the interests of listed parties (which even the UK Justice & Security Act 2013 does).”⁷³

Access to open-source information

Previous scrutiny by the EU Justice Sub-Committee

68. Between January and March 2015 we scrutinised the re-listing of the National Iranian Tanker Company (NITC), and an individual, Mr Gholam Golparvar, under the EU-Iran sanctions regime. In a letter to the European Scrutiny Committee in the House of Commons, the then Government said of the open-source evidence supporting the re-listing: “Whilst the Council is permitted to share this information with the individual/company concerned, this information is not for public consumption. This is why the underlying evidence for these relistings cannot be shared with either the ESC or the House of Lords Select Committee.”⁷⁴ We asked the Government “to explain the basis (legal or otherwise) on which the Council is permitted to share the information with the individual or companies concerned, and the basis (legal or otherwise) on which it is not for public consumption”.⁷⁵ The Government replied:

“A listing proposal, including any analysis and evidence provided in support, is usually only shared on a ‘privileged’ basis, even where it includes open-source information. Where there is additional open-source information, which does not form an integral part of the listing

73 Written evidence from Maya Lester QC ([EUS0001](#)). See also footnote 1 of her written evidence: “The Bar Councils of England and Wales, the General Council of the Bar of Ireland and Northern Ireland, the Scottish Faculty of Advocates, the Law Societies of England, Wales, Scotland and Northern Ireland, Justice, Liberty, the Bingham Centre for the Rule of Law, and a number of Specialist Bar Associations, wrote to the President of the Court of Justice suggesting a consultation on the rule change given that ‘an amendment to the Court’s rules to permit exceptions to the principle that a person should know the case against him or her may have a serious impact on the rule of law, natural justice and rights of defence, and may raise serious issues of constitutional and public importance for fundamental rights in the European Union, upon which our organisations (and others) may wish to comment’. A consultation was declined.”

74 Letter from Rt Hon David Lidington MP to Sir William Cash, dated 14 January 2015: [http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Scrutiny%20work%20correspondence/Correspondence-on-NITCGolparvar\(Iran\)January-March2015.pdf](http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Scrutiny%20work%20correspondence/Correspondence-on-NITCGolparvar(Iran)January-March2015.pdf)

75 Letter from Lord Boswell of Aynho to Rt Hon David Lidington MP, dated 22 January 2015: [http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Scrutiny%20work%20correspondence/Correspondence-on-NITCGolparvar\(Iran\)January-March2015.pdf](http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Scrutiny%20work%20correspondence/Correspondence-on-NITCGolparvar(Iran)January-March2015.pdf)

proposal then it may be disclosed to a listed person without any caveat. Such information may be shared more widely.”⁷⁶

69. In the light of this exchange, we asked the witnesses to give their views on whether open-source material supporting sanctions listings could be shared with Parliament.

The assessment of our witnesses

70. Mr Findlay explained why the Government had decided not to share open-source information supporting sanctions listings with Parliament:

“It is our view that Article 6 of the Council Rules of Procedure means that we have a duty of professional secrecy about the deliberations of the Council. When a sanctions proposal is put forward, typically you get a restricted COREU—an EU telegram, in effect—with a set of underlying evidence supporting it, which might include a confidential UN panel of experts report or something like that, as well as open internet searches. That becomes a case file that sits on the Council’s file. It has not been our practice to share any of that externally.”⁷⁷

71. Mr Bishop told us that when an individual was listed, the first thing that their lawyers normally did was to apply to have access to the Council’s file. The Council’s response would be to give the individual so-called ‘privileged access’ to the documents on the file that were not public, but were not confidential. These documents were typically the listing proposal and the internal Council documents inviting the Council to adopt the listing. Privileged access meant that the documents could be disclosed to the listed individual and their advisers, but could not be made public.⁷⁸
72. The Council would also give the listed individual access to the open-source information which supported the listing—“photocopies of press articles or the screenshots of internet searches”—but without the same caveat.⁷⁹
73. Mr Bishop did not agree with the Government’s interpretation of the Council’s rules on confidentiality. While Article 6(1) of the Council’s Rules of Procedure stated that the Council’s “deliberations” were covered by “the obligation of professional secrecy”, he confirmed that this did not include documents that were public anyway, such as open-source material. The mere fact that there was a Council stamp on them saying ‘Meeting document of the working party’ did not make them confidential. There was, therefore, no Council rule prohibiting or preventing public disclosure of information that had been obtained from open sources: “There is no reason to refuse that, either to the listed person or—but that is a matter for the Member States—within the Member States’ own parliamentary scrutiny.”⁸⁰
74. Ms Lester agreed with Mr Bishop that “deliberations” of the Council in Article 6(1) did not include open-source material relating to, and sent to, a listed individual or company. She therefore disagreed with the view expressed by the Government in correspondence with us on the NITC re-listing that

76 Letter from Rt Hon David Lidington MP to Lord Boswell of Aynho, dated 4 March 2015: [http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Scrutiny%20work%20correspondence/Correspondence-on-NITCGolparvar\(Iran\)January-March2015.pdf](http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Scrutiny%20work%20correspondence/Correspondence-on-NITCGolparvar(Iran)January-March2015.pdf)

77 Q 8

78 Q 18

79 Q 18

80 Q 18

obligation of secrecy covered all information “shared with the Council”. She could “think of no good reason” why open-source material should not be disclosed to scrutiny committees.⁸¹

The value of parliamentary scrutiny of sanctions listings

75. The great majority of sanctions listings are submitted for scrutiny after adoption by the Council, based on evidence which is not shared with Parliament. Scrutiny is thus limited to reviewing sanctions listings once they have been adopted. Mr Williams, of the FCO, said:

“We recognise that there are difficulties with sanctions and we want to work with you and other Committees to try to do as much as we can. For example, we have sought to improve scrutiny around what Mr Findlay referred to earlier—the renewal and rollover of sanctions. That is less sensitive, because it is about people or companies that have already been listed. We would be very willing to talk to the Committee or the Committee’s clerks in an informal way about sanctions regimes … We are committed to doing everything that we can on scrutiny, within the limits that we have on the confidentiality of some information.”⁸²

76. The concerns raised by this Committee and by the House of Commons European Scrutiny Committee were, in Ms Lester’s view, of considerable importance. From the perspective of listed individuals and companies, these committees may indeed have been “the only bodies that had raised with the relevant public authorities concerns that arose in many listing and re-listing cases.” In her experience, applicants had “greatly appreciated the detailed and persistent scrutiny provided (or attempted) by the Parliamentary committees.”⁸³

The Council’s administrative processes

77. Mr Williams told us that the Council “corresponded with people and companies that have been listed”.⁸⁴ In particular, there was a system in place to inform listed individuals and companies of the consequences of annual reviews of sanctions regimes. Sometimes, however, when people wrote in between the renewal points, there was “an issue around the pace of reply. We do what we can on that. We have made representations to people in the Council about the pace of reply on an in-year basis.” Mr Findlay added that the Council’s draft replies had to be considered by the 28 Member States’ representatives in a Council working group, which added to the time taken.⁸⁵
78. Mr Bishop gave us a further insight into the Council processes. When a sanctioned individual or company wrote to request a delisting, the letter and supporting documents were sent to the Council working group responsible for that particular sanctions regime. That working group would look at the letter and consider whether or not the listing should be maintained:

“If the working party decides that the listing should be maintained, on that basis, officials in the External Action Service will draft a letter of response to explain to the listed person why the Council does not agree

⁸¹ Written evidence from Maya Lester QC ([EUS0001](#))

⁸² [Q.7](#)

⁸³ Written evidence from Maya Lester QC ([EUS0001](#))

⁸⁴ [Q.9](#)

⁸⁵ [Q.9](#)

with their request for delisting. That letter of response is submitted for approval to a co-ordinating working party called the foreign relations working party ... Then it is submitted for approval to Permanent Representatives and the Council. Since it is the Council that decides to put someone on the list, only the Council can decide to remove the person from the list or maintain them on it.”⁸⁶

79. He added that, according to the case law of the EU courts, it was not necessary for the Council to respond in detail to every observation that a listed individual or company made. Sometimes the letters were presented by lawyers who did a summary, or simply copied, their application for annulment to the court, which could be 50 pages long: “It would not be appropriate for the Council, as a political body, to enter into that level of detail.”⁸⁷
80. Mr Bishop was sceptical that an administrative procedure could be introduced to allow a listed individual to make urgent representations to the Council:

“Can you imagine the Council, which is made up of 28 members, inviting a listed person—even a terrorist—to come in to explain, negotiate and speak about their situation? How could that be done? This room has 10 people in it. Can you imagine the Council, with 28 member states, conducting such a negotiation? I think it would be impossible.”⁸⁸

81. Ms Lester, on the other hand, told us that the Council was not generally effective in corresponding with individuals or companies subject to listings. This was “one of the principal causes of frustration among those subject to sanctions listings”. It was unusual for the Council to engage with the substance of observations in correspondence, even though, were it to do so, it might “obviate the need for applicants to bring expensive and slow court proceedings”. Moreover, the Council almost never responded before the deadline for an annulment application had passed, which meant that an individual or company had to bring proceedings in any event.⁸⁹
82. She referred to a case of mistaken identity, in which her client in Syria had been mistaken for a member of President Bashar Al Assad’s family. Representations were made to the Council explaining that “our client’s physical safety is in danger as a result of the Council’s false allegations and representations that he is financing Shabiha. The danger is serious and may be imminent”.⁹⁰ The Council took six weeks to confirm that Ms Lester’s client was not the intended target of the listing, by which time a warehouse belonging to him had been attacked, a security guard assaulted, and a death threat issued: “As a result of the Council’s actions, our client is, accordingly, now living under the spectre of a direct and express threat to his life”.⁹¹ The delay had also meant that Ms Lester’s client had had to lodge an application with the General Court seeking annulment of the listing.⁹²

86 [Q 19](#)

87 [Q 19](#)

88 [Q 17](#)

89 Written evidence from Maya Lester QC ([EUS0001](#))

90 Annexed to supplementary written evidence from Maya Lester QC ([EUS0002](#)) but not published as evidence. Copy available on request from the Committee.

91 Annexed to supplementary written evidence from Maya Lester QC ([EUS0002](#)) but not published as evidence. Copy available on request from the Committee.

92 Written evidence from Maya Lester QC ([EUS0001](#))

83. Ms Lester was also concerned about the costs of bringing annulment proceedings, which were never recovered other than a tiny proportion,⁹³ as well as the absence of injunctive relief:

“At the moment the European Court process is slow and expensive, and in practice does not provide either injunctive relief (i.e. suspending the effect of sanctions pending the outcome of a case), or expedition even in urgent cases, or damages for wrongful listings or realistic recovery of legal costs.”⁹⁴

Making the process fairer

84. Ms Lester recommended a number of reforms to make the listings process fairer:⁹⁵
- A more rigorous evidence gathering capability in the Council.
 - A more responsive Council secretariat, in terms both of the speed and of the substance of its replies to correspondence.
 - A swift, responsive, and effective system for requesting de-listings.
 - A re-think of EU regimes that had the potential for political misuse, in particular those relating to the ‘misappropriation of State funds’ in Ukraine, Tunisia and Egypt.
85. She thought that the most obvious model for some of these reforms was the UN Ombudsperson for the Al Qaida Sanctions Committee.⁹⁶ Although there were 198 Member States of the United Nations, and decisions were made by a Sanctions Committee, the Ombudsperson assisted that Committee in making determinations. She underlined the following features of the role:⁹⁷

“The UN Ombudsperson sets out her approach, methodology, and standards in writing in a number of documents. For example, the Ombudsperson’s ‘approach and standards’ document ... includes the following points that may be relevant to the Sub-Committee’s analysis:

“a. The Ombudsperson’s role includes ‘providing an analysis of, and observations on, all information available to the Ombudsperson relevant to the delisting request’. She gives ‘clear guidance as to the nature of the analysis and the observations expected’ and provides a recommendation’.

“b. The Ombudsperson applies a defined, consistent standard to deciding ‘whether today the continued listing of the individual or company is justified based on all of the information now available’. ‘In aid of coherent analysis ... the information gathered and the reasoning applied to it, must be assessed to a consistent standard’. The standard applied is ‘whether there is a sufficient information to provide a reasonable and credible basis for listing’, which ‘recognizes a lower threshold appropriate to preventative measures, but sets a sufficient level of protection for the rights of individuals and companies in this context’.

⁹³ [Q.17](#)

⁹⁴ Written evidence from Maya Lester QC ([EUS0001](#))

⁹⁵ Written evidence from Maya Lester QC ([EUS0001](#))

⁹⁶ Supplementary written evidence from Maya Lester QC ([EUS0002](#))

⁹⁷ Supplementary written evidence from Maya Lester QC ([EUS0002](#))

- “c. The Ombudsperson notes that ‘special caution’ is needed ‘when reviewing press articles and reports because of the potential for inaccuracy in the recounting of information. In most instances, the original source of the information will be unknown and not subject to assessment, leaving unanswered questions as to its credibility, and thus, the reliability of such reporting ... The Ombudsperson pays special attention to the question of reliability and credibility of such information.’”⁹⁸
86. Ms Lester thought that the likelihood of any of the above recommendations being implemented was, however, “close to zero at this time. There is no political or legal impetus to do so of which I am aware.”⁹⁹
- The impact of the UK’s withdrawal from the EU**
87. Mr Williams said that:
- “The future relationship that the UK will have with the EU on sanctions is one of a range of issues that will need to be considered. It is worth saying that, after we leave the EU, the UK will still be a permanent member of the UN Security Council, so I am sure that sanctions will remain a significant foreign and security policy tool for us in that context. Of course, that will involve working with like-minded partners.”¹⁰⁰
88. Mr Findlay added:
- “The Prime Minister has said that the European Communities Act will be repealed. It is fair to say that our current basis for doing sanctions rests on powers in the European Communities Act, so we will need to adapt our systems, but precisely how we do that is still to be decided.”¹⁰¹
89. Mr Bishop noted that the UK had “contributed enormously to the substance and quality of improvements in the sanctions process” over the last few years. He added that a “very valuable input, as regards quality, could be lost, unless other ways are found of preserving it. That will be part of the negotiations.” There might also be fewer listings after the UK left.¹⁰²
90. This was underscored by Ms Lester’s anecdotal evidence, which suggested that the UK had significant influence over EU sanctions policy and processes, and took greater care to ensure the due process and evidential support for targeted listings than a number of other Member States. Brexit, she noted, might “have implications for the credibility and effectiveness of EU sanctions”.¹⁰³
91. Ms Lester thought that, once the UK ceased to be a Member State of the EU, it would not be under any obligation to align itself with autonomous EU sanctions. The UK would continue to be obliged to implement UN Security Council sanctions. If the UK decided to impose sanctions itself, whether aligned with the EU’s autonomous sanctions regimes or not, “it will I assume have to enact primary legislation. At the moment the UK has

98 Supplementary written evidence from Maya Lester QC ([EUS0002](#))

99 Written evidence from Maya Lester QC ([EUS0001](#))

100 [Q 11](#)

101 [Q 11](#)

102 [Q 20](#)

103 Written evidence from Maya Lester QC ([EUS0001](#))

autonomous terrorist asset freezing powers in the Terrorist Asset-Freezing etc. Act 2010, but does not (as far as I am aware) at the moment have powers to impose restrictive measures where the UK is not implementing UN or EU measures.”¹⁰⁴

¹⁰⁴ Written evidence from Maya Lester QC ([EUS0001](#))

CHAPTER 4: OUR ANALYSIS

The purpose of EU sanctions

92. Sanctions are an important tool of foreign policy, which seek to influence through indirect means the behaviour of an offending State or organisation by impacting on their economy. They are also applied to individuals and companies in the belief that the punitive effects will encourage them to make or press for policy changes in their own State. The EU-Iran sanctions are an example of sanctions that changed State behaviour. EU counter-terrorism sanctions are an example of well-evidenced sanctions which limit the scope of activity of terrorist organisations.

The evidence-gathering process

93. Balancing the foreign policy objective of sanctions against the rights of sanctioned individuals and companies is inherently difficult. We note that this is often the crux of the debate within the Council. The large number of listings that have been annulled by the General Court attests to this difficulty.
94. All witnesses agreed that the quality of sanctions listings has improved, with reasons for listings being better defined and substantiated. It is clear that the UK has played a leading role in the Council in implementing these improvements. The number of cases being lost by the Council has reduced dramatically in the last year, although one of the reasons for this may be the greater use of more general, and more status-based, criteria for listing which are harder legally to challenge.
95. The renewed focus on when to lift sanctions, and on the annual reviews of sanctions regimes, are further improvements in the sanctions-listing process.

Reasons for sanctions listings being annulled

96. The most common reason for sanctions listings being annulled over the past few years has been insufficient evidence from the Council to substantiate the reason for listing an individual or company.

Are the reasons for annulment justified?

97. While we agree that sanctions serve foreign policy objectives and should not be subject to the same procedural safeguards as criminal proceedings, the consequences of a listing are nonetheless very serious. Funds and other financial assets are frozen and normal economic life is suspended. In such circumstances, it is reasonable to insist that sanctions listings should be based on evidence that can be reviewed by a court, and should respect the rights to due process and to an effective judicial remedy of targeted individuals and companies, as guaranteed by the EU Charter of Fundamental Rights.
98. **Where the Council has been unable to adduce evidence supporting the statement of reasons for a listing, we conclude that the EU courts have been right to annul the listing.**

Standard of proof

99. The Court of Justice of the EU's landmark decision in the case of *Kadi II* in 2013 set out the broad test for the standard of proof for sanctions listings: "There has to be a sufficiently solid factual basis to substantiate the reasons for listing." There is no agreed, publicly stated formula, however, as to what a

“sufficiently solid factual basis” means. We were told that each Member State applies its own standard in the vote in the Council on adopting a listing. The consequence is that there is no assurance that a similar standard of proof is applied across all EU sanctions regimes.

100. We share Maya Lester QC’s concern that there is a risk that status-based sanctions may rely on presumption at the expense of evidence. The case of *Yuri Chyzh*,¹⁰⁵ whose listings were annulled by the General Court, and on which we corresponded in detail with the Government, is an example of this.
101. We agree with the evidence we received that sanctions for misappropriation of State funds in Egypt, Tunisia and Ukraine appear to rely on the existence of criminal proceedings rather than any assessment by the Council of the validity of those proceedings.
102. **We recommend that the Council codify the standard of proof it applies to sanctions listings as soon as possible. This would provide transparency to the listing process as well as public assurance that the same standard of proof is applied by all Member States in the Council. The Council may wish to consider applying the test, which the UK applies in adopting sanctions listings, of reasonable grounds for suspicion.**

Listing and re-listing

103. **We recognise that the General Court has upheld the practice of re-listing individuals or companies on amended statements of reasons after the annulment of the original listing, but conclude that this practice gives rise to a perception of significant injustice, namely that there is no effective judicial remedy against sanctions listings. Put in non-legal language, the judgment of the General Court is of no consequence because further sanctions are imposed before it comes into effect. The Council should bear this in mind when considering whether to re-list a targeted individual or company after the original listing has been annulled.**
104. **Were listings to be better substantiated in the first place, there would be less need for re-listing. A codified standard of proof would help to ensure that listings are better substantiated in the future.**

Reliance on open-source information

105. While intelligence information may be relevant to clandestine activities, such as involvement in terrorism or nuclear proliferation, Mr Bishop told us that evidence supporting many other sanctions listings can be obtained through open-source information, for example internet searches and press articles.
106. We welcome the greater reliance on open-source information that can be disclosed to listed individuals and companies because it makes the listing process fairer and more transparent. There are, however, limitations to its use, and we note the comment of Advocate General Sharpston in the *Tamil Tigers* case,¹⁰⁶ cited by Ms Lester, that the Council cannot list an individual

¹⁰⁵ *Yuri Chyzh and others v the Council of the European Union*, 6 October 2015, [T-276/12](#)

¹⁰⁶ *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)*, Opinion of Advocate General Sharpston (22 September 2016), [C-599/14](#)

or company simply on the basis of a press report stating “he did it” or “he said he did it”.

The closed material procedure

107. Although it is too early to tell the extent to which Member States will be willing to use the closed-material procedure to share confidential evidence with the General Court, the indications are that some may not. The UK, for example, abstained in the vote on the adoption of the new rules, concerned that they contained insufficient safeguards to protect confidentiality. The closed-material procedure, even if there were sufficient trust in it, is unlikely to provide satisfaction to sanctioned individuals and companies, as they will not have sight of the evidence provided on which judgements are made.
108. **It would be concerning if the closed-material procedure were not to be used, given the number of listings that have been annulled by the General Court because the Council has been unable to adduce confidential evidence in support of them. It is incumbent on the EU to ensure that it has sufficiently robust procedures to allow the EU courts to assess confidential evidence underpinning sanctions listings. Should the current closed material procedure not be adequate to achieve this, the EU should consider an alternative approach.**

Application of the Council’s rules on confidentiality to open-source information

109. Both Mr Bishop and Maya Lester QC agreed that Article 6(1) of the Council’s Rules of Procedure could not be interpreted as requiring open-source information to be kept confidential.
110. **Open-source material can be made available to Parliament. We call on the Government to revise its interpretation of Article 6(1) of the Council’s Rules of Procedure, and in future to disclose the open-source information substantiating new sanctions listings and re-listings to the scrutiny committees.**

The value of parliamentary scrutiny

111. We were told by Maya Lester QC that, from the perspective of people and companies targeted by EU sanctions, parliamentary committees may be the only bodies that raise concerns over listing and re-listing decisions with the relevant authorities. We think the value of such parliamentary scrutiny will be increased if the Government provides the open-source information justifying sanctions listings to committees in future.

The Council’s administrative processes

112. Although the Council responds to correspondence from listed individuals, companies, and their legal representatives, the evidence suggests that its responses are both slow and often do not engage with the substance of the concern being raised. The procedure by which a letter from the Council is agreed requires consideration in three separate committees—the working group responsible for the sanctions regime, the Foreign Relations Working Group, and the Committee of Permanent Representatives (COREPER)—and slows the process down considerably.

113. We call on the Council urgently to reduce the time taken to respond to correspondence from targeted individuals and companies.
114. We recommend that the Council examines as a matter of urgency whether an expedited procedure could be put in place for responding to correspondence concerning mistaken identities.

Making the process fairer

115. We call on both the Government and the Council to consider the appointment of a sanctions ombudsman, analogous to the UN Ombudsperson for the Al Qaida Sanctions Committee, or if such consideration has previously been given to provide the arguments for and against it.

The impact of the UK's withdrawal from the EU

116. The UK has contributed greatly to the substance and quality of improvements in the sanctions process over the last few years. It is, therefore, particularly important that the UK should remain able to align itself with EU sanctions post-Brexit. National legislation to achieve this must be put in place.

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Cromwell
 Baroness Hughes of Stretford
 Lord Judd
 Baroness Kennedy of The Shaws (Chairman)
 Earl of Kinnoull
 Baroness Ludford
 Baroness Neuberger
 Baroness Newlove
 Lord Oates
 Lord Richard
 Lord Polak
 Baroness Shackleton of Belgravia

Declarations of Interest

Lord Cromwell
Some contact with sanctioned countries such as Belarus and Russia as Director of the British East-West Centre; and with Iran as a member of the APPG. No sanctions-related involvement in these countries

Baroness Hughes of Stretford
No relevant interests declared

Lord Judd
Member of the Advisory Board of the LSE Centre for the Study of Human Rights
Life member of Court at Lancaster and Newcastle Universities
Emeritus Governor of LSE

Baroness Kennedy of The Shaws (Chairman)
No relevant interests declared

Earl of Kinnoull
No relevant interests declared

Baroness Ludford
No relevant interests declared

Baroness Neuberger
No relevant interests declared

Baroness Newlove
No relevant interests declared

Lord Oates
No relevant interests declared

Lord Polak
Chairman, TWC Associates Ltd

Lord Richard
No relevant interests declared

Baroness Shackleton of Belgravia
Practising Solicitor specialising in matrimonial law

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Baroness Armstrong of Hill Top
Lord Boswell of Aynho (Chairman)
Lord Green of Hurstpierpoint
Lord Jay of Ewelme
Baroness Kennedy of The Shaws
Earl of Kinnoull
Lord Liddle
Baroness Suttie
Lord Teverson
Lord Whitty
Baroness Wilcox

During consideration of the report the following Member declared an interest:

Lord Jay of Ewelme
Trustee (Non-Executive Director) Thomson Reuters Founders Share Company
Chairman, Positive Planet (UK)
Member, European Policy Forum Advisory Council
Member, Senior European Experts Group
Patron, Fair Trials International

A full list of Members' interests can be found in the Register of Lords Interests
[http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/
register-of-lords-interests/](http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/)

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at <http://www.parliament.uk/legality-eu-sanctions-listing-process> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with a ** gave both oral and written evidence. Those marked with * gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

- * Mr Paul Williams, Director Multilateral Policy, Foreign and Commonwealth Office [QQ 1-20](#)
- * Mr Andrew Murdoch, Foreign and Commonwealth Office Legal Adviser [QQ 1-20](#)
- * Mr Mathew Findlay, Deputy Head of International Organisations Department, Foreign and Commonwealth Office [QQ 1-20](#)
- ** Ms Maya Lester QC, Brick Court Chambers [QQ 1-20](#)
- * Mr Michael Bishop, Senior Legal Adviser, EU Council Legal Service, Council of the European Union [QQ 1-20](#)

Alphabetical list of all witnesses

- * Mr Michael Bishop, Senior Legal Adviser, EU Council Legal Service, Council of the European Union (QQ 1-20) [EUS0001](#)
[EUS0002](#)
- ** Ms Maya Lester QC, Brick Court Chambers (QQ 1-20)
- * Mr Mathew Findlay, Deputy Head of International Organisations Department, Foreign and Commonwealth Office (QQ 1-20)
- * Mr Andrew Murdoch, Foreign and Commonwealth Office Legal Adviser (QQ 1-20)
- * Mr Paul Williams, Director Multilateral Policy, Foreign and Commonwealth Office (QQ 1-20)