

PROOF

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4 Combating the Financing of  
5 Terrorism Together? The Influence of  
6 the United Nations on the European  
7 Union's Financial Sanctions Regime  
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15 **7.1 Introduction**  
16

17 Since the devastating attacks of 11 September 2001 on the World Trade  
18 Center, international co-operation to combat terrorism has developed sig-  
19 nificantly both at the global and regional levels within bodies such as the  
20 United Nations (UN) and the European Union (EU) respectively (Cortright  
21 and Lopez, 2007; Spence, 2007; Weiss and Boulden, 2004). One of the most  
22 important dimensions of counter-terrorism is combating terrorist financing  
23 (CTF) (Acharya, 2009; Biersteker, Eckert and Romaniuk, 2008). While it has  
24 often been observed that the conduct of terrorist attacks does not necessar-  
25 ily require large amounts of money, it is generally acknowledged that the  
26 preparation of attacks and the other activities of terrorist groups – such as  
27 recruitment, training, propaganda, and the promotion of terrorist causes –  
28 necessitate higher levels of funding (Acharya, 2009; Clunan, 2007; Richard,  
29 2005, 5–6). Preventing would-be terrorists from accessing funds is there-  
30 fore a way to disrupt their activities and prevent future attacks (Gardner,  
31 2007, 157). Focusing on the money trail left by terrorists also allows inves-  
32 tigators to gather evidence against terrorists and to generate intelligence  
33 concerning terrorist groups (Bures, 2010, 419).

34 Terrorism can be funded legally or illegally (Acharya, 2009). Lawful or  
35 legitimate funds include money raised by charities, donations and the pro-  
36 ceeds of other forms of fund-raising, whereas illegal funds refer to proceeds  
37 of criminal activities such as money-laundering, drug trafficking, and illegal  
38 arms trade. Such proceedings would be frozen or seized even if they were not  
39 destined to finance terrorism, in contrast to legal funds that can only be fro-  
40 zen or seized if it is intended that they should finance terrorism (Bantekas,  
41 2003, 316).<sup>1</sup> In addition, terrorism can be funded by states or private actors.  
42 As there has been a significant decrease in the number of states financing  
43 terrorism over the last few years, the role of private actors in the financing of  
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1 terrorism has become increasingly important (Bantekas, 2003, 316; Clunan,  
2 2007, 264). Terrorist financing can therefore be defined in broad terms, as it  
3 has been by the EU in the Third Anti-Money Laundering Directive<sup>2</sup> as ‘the  
4 provision or collection of funds, by any means, directly or indirectly, with  
5 the intention that they should be used or in the knowledge that they are to  
6 be used, in full or in part, in order to carry out any of the offences’ that have  
7 been defined as terrorism.<sup>3</sup> The diversity of the actors and activities involved  
8 in terrorism is also reflected in the range of CTF measures, which address  
9 one or several phases(s) of the terrorist financing process (‘raising funds,  
10 holding funds, moving or transferring funds, and dispersing funds to com-  
11 mit terrorist acts’) (Biersteker, 2004, 64; see also Acharya, 2009; European **AQ1**  
12 Parliament, 2009).

13 In the EU, the terrorist attacks on 11 September 2001 have been a major  
14 catalyst for the development of the EU’s CTF policy, although some CTF  
15 measures had already been adopted previously, such as sanctions against  
16 Usama Bin Laden. Several scholars have commented that the EU’s CTF policy  
17 has been influenced to a significant degree by standards developed outside  
18 the EU (Bures, 2010; Heng and McDonagh, 2008). This chapter examines  
19 how the development of a major aspect of the EU’s CTF policy, namely  
20 financial sanctions (or asset freezing) measures against suspected terrorists,  
21 has been influenced by the UN. Financial sanctions against individuals are  
22 measures that oblige states to (1) freeze the funds and other financial assets  
23 or economic resources of the targeted persons and (2) ensure that these  
24 persons do not have any direct or indirect access to other funds, financial  
25 assets or economic resources.<sup>4</sup> They are a category of the so-called targeted  
26 or smart sanctions, which have been developed since the 1990s in response  
27 to the acknowledgement that comprehensive sanctions placed upon states  
28 generally cause high levels of suffering among the population of the tar-  
29 geted country, often without achieving their main aims (van Thiel, 2008).  
30 However, the move from collective sanctions (against states) to targeted  
31 sanctions (against individuals) has caused specific problems, such as the  
32 difficulty for the targeted private entities or individuals to express their dis-  
33 agreement with the imposition of sanctions (see Almqvist, 2008; Draghici,  
34 2009; Eeckhout, 2007; Flynn, 2007; Foot, 2007; Guild, 2008; Heupel, 2009;  
35 van den Herik, 2007; van den Herik and Schrijver, 2008; Vlcek, 2009).

36 The focus will now be on this specific component of the EU’s CTF policy  
37 because of its importance in the overall EU’s CTF policy, as well as the con-  
38 troversies that have surrounded it.<sup>5</sup> Also, as the present book seeks to explore  
39 various issues pertaining to the influence of international institutions over  
40 the EU as explained in the introductory chapter, this case was identified as an  
41 interesting case after a review of the existing literature, because of the likely  
42 existence of at least some degree of influence of the UN over the EU.<sup>6</sup>

43 This chapter is divided into four main sections. The first presents the  
44 development of the EU’s financial sanctions regime, while the second shows

1 how it has been influenced by the UN, in particular the UN Security Council  
2 (UNSC). The third section examines the two main factors accounting for  
3 the influence of the UN over the EU in this policy area, namely a process of  
4 'path-dependency' from previous sanctions regimes and the EU's declared  
5 commitment to multilateralism and international law. The next section  
6 highlights that, while the European Commission and the Council have  
7 appeared comfortable with the influence of the UN over the development  
8 of the EU's financial sanctions regime, the European Court of Justice (ECJ)  
9 has attempted to reduce such influence in a recent landmark ruling. Finally,  
10 the chapter offers some conclusions on the issue of the influence of the UN  
11 over the EU.  
12

## 13 7.2 The EU's financial sanctions regime 14

15 Prior to the terrorist attacks on 11 September 2001, the EU had not adopted  
16 any specific provisions concerning the financing of terrorism. To a large  
17 extent, this only reflected the lack of development of its counter-terror-  
18 ism policy more generally, which 'was more political than operational'  
19 (Romaniuk, 2010, 113). In that respect, the terrorist attacks on 11 September  
20 2001 can be seen as a 'critical juncture' that led to a significant increase in  
21 EU co-operation on counterterrorism (Argomaniz, 2009; see also Kaunert,  
22 2007; 2010a; 2010b; Kaunert and Della Giovanna, 2010; Peers, 2003). At  
23 the extraordinary European Council of 21 September 2001, terrorism was  
24 identified as one of the main challenges facing Europe and the world and,  
25 conversely, the fight against terrorism was defined as one of the EU's prior-  
26 ity objectives. The action plan adopted on that occasion defined combating  
27 the funding of terrorism as a 'decisive aspect' and one of the five priorities  
28 of the EU's counterterrorism policy (European Council, 2001a, 2). More  
29 precisely, it called upon the ECOFIN and Justice and Home Affairs Councils  
30 to adopt the measures necessary to combat terrorist financing (European  
31 Council, 2001a, 2). The Action Plan also highlighted the importance  
32 for all member states to sign and ratify 'as a matter of urgency' the UN  
33 Convention for the Suppression of the Financing of Terrorism. Among the  
34 46 measures identified in the Anti-Terrorism Roadmap that was adopted on  
35 26 September 2001, two concerned terrorist financing (European Council,  
36 2001b).<sup>7</sup> Combating terrorist financing ('to reduce the access of terrorists to  
37 financial and economic resources') was also identified as one of the seven  
38 'New Strategic Objectives' in the combat against terrorism endorsed by the  
39 European Council and annexed to the Declaration on Terrorism adopted  
40 on 25 March 2004 (European Council, 2004). The 2004 EU Action Plan  
41 on Combating Terrorism also identified reducing the access of terrorists to  
42 financial and other economic resources as one of seven objectives of the  
43 EU's counter-terrorism policy (Council, 2004b). In order to organize more  
44 systematically activities in this policy area, a Strategy on combating the

1 financing of terrorism was adopted by the European Council in December  
2 2004, before being substantially revised in July 2008 (Council, 2005a;  
3 Council, 2008). The EU instruments aiming to limit terrorists' access to  
4 financial and other economic resources are an important component of the  
5 so-called 'Pursue' strand of the EU's Counter-Terrorism Strategy of December  
6 2005 (Council, 2005b).<sup>8</sup>

7 As previously mentioned, this chapter focuses on one of the main dimen-  
8 sions of the EU's CTF policy, namely financial sanctions against individuals  
9 suspected of involvement in terrorist activities. Before examining the evolu-  
10 tion of the EU's financial sanctions regime, it is important to note that one of  
11 its main characteristics is its legal complexity. Until the Treaty of Lisbon came  
12 into force on 1 December 2009, one could have referred to the 'cross-pillar'  
13 character of this regime, as it involved various measures in the three pillars of  
14 the EU.<sup>9</sup> First of all, a common position was adopted under Articles 15 and 34  
15 of the Treaty on European Union (TEU) to set the EU's general approach on  
16 the matter. It contained measures relating to foreign policy – such as the 'stra-  
17 tegic decision' to adopt individual sanctions (Eckes, 2009, 44) – and police  
18 and judicial criminal matters – such as assistance in preventing and combat-  
19 ting terrorist acts – that is, measures in the (now former) second and third  
20 pillars. Subsequently, a regulation instructing the European Community (EC)  
21 to implement the necessary operational measures was adopted in the (now  
22 former) first (EC) pillar. The measures discussed in this chapter were adopted  
23 under this institutional arrangement. As the Treaty of Lisbon has now abol-  
24 ished the three-pillar structure of the EU, it is no longer correct to describe  
25 EU asset freezing measures as 'cross-pillar' instruments, although those have  
26 remained rather complex from a legal standpoint.

27 With regard to its content, the EU's financial sanctions regime has two  
28 main components. The first comprises the measures that have been adopted  
29 to freeze the assets of the Taliban, Usama Bin Laden and his associates (i.e.,  
30 Al Qaeda) in particular. The second relates to broader measures that provide  
31 for the freezing of the assets of individual terrorists and entities in general.  
32 The first asset freezing measures adopted by the EU were of the first type;  
33 they targeted the Taliban (Council Common Position 1999/727/CFSP of 15  
34 November 1999) and Usama Bin Laden and the persons and entities associ-  
35 ated with him (Council Common Position 2001/154/CFSP of 26 February  
36 2001, repealed by Council Common Position 2002/402/CFSP of 27 May  
37 2002) (Tappeiner, 2005, 103). As explained earlier, the EU asset freezing  
38 measures were two-tiered as they were based on both common positions and  
39 regulations. Thus, regarding the restrictive measures against the Taliban,  
40 Council Common Position 1999/727/CFSP was supplemented by Council  
41 Regulation EC 337/2000. The latter was replaced by Regulation EC 467/2001  
42 once Common Position 2001/154/CFSP was adopted.

43 After adopting measures targeting the Taliban, Bin Laden and his  
44 associates in particular, the EU later adopted broader financial sanctions

1 targeting terrorists in general. In December 2001, the Council adopted a  
2 major package of four items, comprising two common positions, a regula-  
3 tion implementing the Community law aspects of the foreign policy part  
4 of one of the common positions, as well as a decision further implement-  
5 ing that regulation. Council Common Position on combating terrorism  
6 (2001/930/CFSP) outlined a series of actions to be taken by the EU to com-  
7 bat terrorism, including the freezing of the funds and other financial assets  
8 and economic resources of individuals and groups facilitating, attempting  
9 to commit or committing terrorist acts on the territory of the EU. Council  
10 Common Position 2001/931/CFSP contained more specific measures to  
11 combat terrorism. More precisely, it provided that, pursuant to Community  
12 law, the EC should order the freezing of the funds and other financial assets  
13 or economic resources of 'international' (i.e., non-EU) terrorists and ensure  
14 that those would not have access to alternative funds, financial assets, eco-  
15 nomic resources or financial or related services. This instrument also con-  
16 tained a definition of 'persons, groups and entities involved in terrorist acts',  
17 which was identical to that outlined in the Council Framework Decision of  
18 13 June 2002 on combating terrorism, although the latter instrument had  
19 not been adopted following parliamentary reservations. In addition, Council  
20 Common Position 2001/931/CFSP required member states to strengthen  
21 judicial and police co-operation with respect to both 'international' and  
22 'domestic' (i.e., EU) terrorists. There was an annex to this common position,  
23 which listed the persons, groups and entities 'involved in terrorist acts' who  
24 were targeted. This first version contained 29 persons and 13 groups and  
25 entities. This common position indicated that the list would be reviewed  
26 regularly and at least once every six months. As for the connected regulation  
27 (Council Regulation EC 2580/2001), it defined the 'funds' and assets to be  
28 frozen and laid down a detailed freezing procedure, while the decision con-  
29 nected to this regulation (Council Decision 2001/927/EC of 27 December  
30 2001) listed the persons, groups and entities to which the aforementioned  
31 regulation applied. This first version of the list contained ten entries (eight  
32 individuals and two groups). Since then, it has been amended several times.  
33 Its most recent version at the time of writing contained 25 individuals and  
34 29 groups and entities.<sup>10</sup>

35 It is important to note that the question of whether the Council had the  
36 competence to adopt these regulations – and thereby to develop and imple-  
37 ment the EC policy against the financing of terrorism in practice – has been  
38 highly controversial. The Council based the regulations on Articles 60, 301  
39 and 308 of the Treaty establishing the European Community (TEC). In the  
40 past, the Council had already adopted regulations containing sanctions tar-  
41 geting individual persons and entities on the basis of Articles 60 and 301.  
42 However, these sanctions only targeted persons holding official positions  
43 within the structure of a specific state, as well as their associates, such as the  
44 sanctions imposed by the EU upon Slobodan Milosevič and his family in the

1 late 1990s. Article 301 stipulated that the Council could ‘take the necessary  
2 urgent measures’ when ‘it [was] provided, in a Common Position (...) for  
3 an action by the Community to interrupt or reduce (...) economic relations  
4 with one or more third countries’. Article 60 stated that ‘in cases envisaged  
5 in Article 301 (...) the Council may in accordance with the procedure pro-  
6 vided for in Article 301, take the necessary urgent measures in the move-  
7 ment of capital and in payments as regards the third countries concerned’.  
8 In the case of the asset freezing regulations under scrutiny in this chapter,  
9 the Council decided to supplement Articles 60 and 301 with Article 308 in  
10 order to be able to adopt sanctions against ‘ordinary’ individuals who did  
11 not necessarily hold any official position in a given country. Article 308 en-  
12 abled the Council to take the appropriate measures to ‘attain, in the course of  
13 the common market, one of the objectives of the Community’ in any case  
14 where ‘the Treaty [had] not provided the necessary powers’.

15 However, several scholars have criticized this reasoning and have argued  
16 that even a combined reading of these three articles did not give the EC the  
17 competence to adopt these asset freezing regulations. It is generally agreed  
18 that Articles 301 TEC and 60 TEC did not constitute an adequate legal basis  
19 for the adoption of sanctions against individuals (Andersson et al., 2003, **AQ2**  
20 120; Eckes, 2009; Tridimas and Gutierrez-Fons, 2008–9). Supplementing  
21 Articles 60 and 301 with Article 308 was not sufficient to allow the EC to  
22 adopt the regulations either, because Article 308 only concerned situations  
23 where an objective of the Community was at stake. There was no objective  
24 of the Community at stake in the case of these asset freezing regulations, as  
25 their main objective – the attainment of international peace and security –  
26 was, technically, not an objective of the Community, but one of the EU  
27 (Andersson et al., 2003, 120; Eckes, 2008, 79). Thus, it is important to note  
28 that, for several scholars, the EC did *not* have the competence to adopt these  
29 regulations organizing asset freezing. This has been implicitly confirmed by  
30 the drafters of the Treaty of Lisbon. Indeed, this treaty contains two articles  
31 that have, for the first time, explicitly granted the EU the competence to  
32 adopt asset freezing measures against individuals (Eckes, 2009, 121–4).<sup>11</sup>

### 34 **7.3 The influence of the UN over the EU’s financial sanctions** 35 **regime**

36  
37 Having examined the development of the EU’s financial sanctions regime  
38 for counter-terrorism purposes, it is now possible to examine the extent  
39 to and the ways in which it has been influenced by the UN. One can start  
40 by observing that, as for the EU, the UN’s role in countering terrorism had  
41 traditionally been limited prior to the terrorist attacks on 11 September  
42 2001, mainly as the result of the absence of international consensus on  
43 a definition of terrorism (Boulden, 2008). The most significant develop-  
44 ment in that period had arguably been the establishment of the ad hoc

1 Committee on Terrorism by the General Assembly in 1996, whose work  
2 led to the adoption of several terrorism-related Conventions, including the  
3 International Convention for the Suppression of the Financing of Terrorism  
4 in 1999 (Rosand, 2003, 333). Nevertheless, such international instruments  
5 did not have any significant impact because of the slow pace at which UN  
6 member states have tended to ratify and implement them (Acharya, 2009;  
7 Ward, 2003).<sup>12</sup> However, this considerably changed in the aftermath of the  
8 terrorist attacks on 11 September 2001 when 'the Security Council became  
9 the focal point of discussions and the forum for the adoption of measures  
10 against terrorism' (Bantekas, 2003, 315; see also Dhanapala, 2005). The fol-  
11 lowing analysis of the UN's influence on the EU's policy therefore focuses on  
12 the role of the Security Council in this process. Before proceeding further, it  
13 is worth recalling that the EU itself is not a member of the UN, while all its  
14 member states are. In addition, two EU member states, namely France and  
15 the United Kingdom, belong to the five permanent members of the UNSC,  
16 where they are joined by other EU member states on a non-permanent,  
17 rotating basis.

18 It can be argued that the influence of the UN on the development of the  
19 EU's asset freezing regime has been high. The duality of the EU's financial  
20 sanctions regime, which can be divided between the measures that spe-  
21 cifically target the Taliban, Usama Bin Laden and his associates on the one  
22 hand and the measures targeting terrorists in general on the other, find  
23 its very origin in and perfectly mirrors the duality of the UN's financial  
24 sanctions regime.

### 25 7.3.1 The influence of UNSC Resolution 1333<sup>13</sup>

26 With regard to the first dimension of the EU's asset freezing regime that  
27 concerns the measures targeting the Taliban and Bin Laden and his associ-  
28 ates (i.e., Al Qaeda), it can be argued that the influence of the UN on the  
29 EU policy has been particularly high and far-reaching. Indeed, Common  
30 Position 2001/154/CFSP,<sup>14</sup> which provides for the freezing of the funds and  
31 financial assets of Bin Laden and his associates, has been mainly adopted by  
32 the EU in order to ensure the implementation of UNSC Resolution (UNSCR)  
33 1333, which notably decided that all UN member states should freeze the  
34 funds of Usama Bin Laden and individuals and entities associated with  
35 him and should ensure that no other funds or financial resources should  
36 be made available to them. This resolution was adopted under Chapter VII  
37 of the UN Charter, which meant that its provisions were binding on all UN  
38 member states.<sup>15</sup> Council Common Position 2001/154/CFSP makes numer-  
39 ous references to UNSCR 1333, as well as to the UN Sanctions Committee.  
40 Article 4 states that '[funds] and other financial assets of Usama Bin Laden  
41 and individuals and entities associated with him *as designated by the UN*  
42 *Sanctions Committee* will be frozen, and funds or other financial resources  
43 will not be made available to Usama Bin Laden and individuals or entities  
44

1 associated with him *as designated by the UN Sanctions Committee, under the*  
2 *conditions set out in UNSCR 1333 (2000)*' (emphasis added). Thus, it is remark-  
3 able that the EU asset freezing measures concerning Bin Laden and his asso-  
4 ciates are directly and entirely based on a list drawn up by the UN Sanctions  
5 Committee, which is accepted by the EU without any amendment. This is a  
6 case of far-reaching influence of the UN over the EU in the development of  
7 the financial sanctions that target Bin Laden and his associates.

8 Given the importance of the list drawn up by the Sanctions Committee  
9 for the EU's financial sanction measures targeting Bin Laden and Al Qaeda,  
10 it is worthwhile briefly examining this committee and its activities. The  
11 Sanctions Committee – also known as the '1267 Committee'<sup>16</sup> – was initially  
12 established by UNSCR 1267 in 1999. This resolution was a front-runner to  
13 UNSCR 1333, as it imposed sanctions on Taliban-controlled Afghanistan for  
14 supporting Bin Laden and Al Qaeda, namely a flight ban and asset freezing  
15 measures (Rosand, 2004, 747). The committee comprises the 15 members  
16 of the Security Council (Stromseth, 2003, 41). It was initially tasked with  
17 monitoring the implementation of the sanctions by UN member states.  
18 Following the adoption of UNSCR 1333, the committee was also asked to  
19 draw up and subsequently update the list of individuals and groups associ-  
20 ated with the Taliban, Bin Laden and Al Qaeda, whose assets were to be  
21 frozen. However, in particular at the beginning, the work of the commit-  
22 tee was characterized by a high level of '*ad hoc-ism*', since it 'did not even  
23 have specific standards to guide states in proposing names for designation'  
24 (Mendelsohn, 2009, 115). According to Rosand (2004, 748–9),

25  
26 During the committee's initial period of work, the creation of the list was  
27 based largely on political trust (...). [In] practice, submissions of names  
28 to the 1267 Committee often contained minimal personal information  
29 and did not generally include explanations of the connection between  
30 the individual or entity and Osama bin Laden, or members of Al Qaeda  
31 and the Taliban. This approach was justified by the need to protect secret  
32 intelligence material and sources, from which the names are usually  
33 derived, and by the desire to include suspected bad actors on the list as  
34 soon as possible.

35  
36 Following the terrorist attacks on 11 September 2001, the willingness of  
37 many governments to show their support to the United States in the face  
38 of the terrorist threat (Rees, 2004, 176; Wilkinson, 2008, 8) led to the inclu-  
39 sion of more than 200 names on the list, most of them following submis-  
40 sions from the United States (Rosand, 2004, p. 749). Among those were  
41 three Somali-born Swedish citizens, who were allegedly involved with the  
42 Al Barakaat financing network. After becoming convinced that the men  
43 had been wrongly listed, the Swedish government managed to negotiate  
44 the removal of two of them from the 1267 Committee list (Heupel, 2009,



1 310). Following this episode, which had highlighted the serious shortcomings  
2 stemming from the lack of clear listing and delisting procedures, the  
3 1267 Committee adopted a set of written guidelines regarding the inclusion  
4 and removal from the committee's list in November 2002 (Tappeiner, 2005,  
5 102). However, although the introduction of written guidelines represented  
6 an improvement, it is widely considered that the blacklisting procedures  
7 applied within the 1267 Committee are still affected by several shortcomings,  
8 most notably with regard to the respect of human rights standards  
9 (Almqvist, 2008; Draghici, 2009; Rosand, 2004).

10 As explained earlier, these controversies have not prevented the EU from  
11 taking swift action in order to implement UNSCR 1333. Any subsequent  
12 changes to the 1267 Committee list of suspected terrorists have been faithfully  
13 transcribed into Community law. Thus, it has been tacitly accepted  
14 that the EU should impose sanctions against individuals and entities that  
15 have been listed by another body, namely the 1267 Committee, in non-  
16 transparent conditions. Given the controversies surrounding the work of  
17 the 1267 Committee, this high degree of influence of the UN over this component  
18 of the EU's financial sanctions regime is particularly striking.

### 19 7.3.2 The influence of UNSCR 1373

20 Council Common Position 2001/931/CFSP of 27 December 2001 has also  
21 been adopted by the EU with the specific aim of implementing a UN  
22 Security Council Resolution, namely UNSCR 1373, which was passed on  
23 28 September 2001. This resolution, described by Rosand (2003, 333) as the  
24 'cornerstone of the United Nations' counterterrorism effort', requires all UN  
25 member states to strengthen various aspects of their counterterrorism policies,  
26 although it actually does not define 'terrorism' (Stromseth, 2003, 43).  
27 As it has been adopted under Chapter VII of the UN Charter, the counter-  
28 terrorism measures that it contains, including CTF measures, are binding  
29 on all the UN member states. UNSCR 1373 notably declares that all states  
30 should prevent and suppress the financing of terrorist acts, criminalize activities  
31 aiming to fund terrorism, freeze the resources of terrorists and prevent  
32 funds being made available to them. It also decided that all member states  
33 should assist each other in criminal investigations and criminal proceedings  
34 relating to the financing of terrorism. Thus, the resolution comprises  
35 various measures that were hitherto only part of international conventions  
36 and protocols, such as the Terrorism Financing Convention, which thereby  
37 became binding on all the members of the UN – rather than just on those  
38 that had chosen to become parties to these international instruments (Eling,  
39 2007, 107; Rosand, 2003).<sup>17</sup>

40 According to Talmon (2005, 175), this resolution was 'hailed as a "ground-  
41 breaking resolution", a "landmark decision", a "historic event" and even  
42 "one of the most important resolutions in [the] history [of the Council]"  
43 by several state representatives on the UNSC. What was remarkable about  
44

1 this resolution was the general and abstract character of the requirements  
2 imposed upon member states, which has been interpreted by observers as  
3 a rare example of international law-making by the UNSC. Rather than tak-  
4 ing discrete action targeting a specific state, the Security Council adopted  
5 requirements that were placed on states for an indefinite number of cases  
6 and for an indefinite period of time, which is the hallmark of international  
7 legislation (Talmon, 2005). While some considered this development to  
8 be positive in the fight against terrorism (see, for example, Szasz, 2002),  
9 other observers were more circumspect or even critical. They considered  
10 that the UNSC should not act as a 'world legislator' and that its activities  
11 under Chapter VII should be limited to specific situations (see Alvarez, 2003;  
12 Olivier, 2004).

13 The strong character of the obligations placed upon UN member states was  
14 also reinforced by the fact that UNSCR 1373 established a Committee tasked  
15 with the monitoring of the progress of UN member states in implementing  
16 the resolution (Cortright et al., 2007). This Committee, which is known as  
17 the Counter-Terrorism Committee (CTC), comprises the 15 members of the  
18 Security Council and has come to be seen as the 'core of the Council's broad  
19 based counter terrorism strategy' (Boulden, 2008, 614). The Committee has  
20 three sub-committees, each of which monitors the progress accomplished by  
21 a specific group of states in the implementation of their counter-terrorism  
22 obligations. It is important to note that the main roles of the CTC are to  
23 monitor the implementation of UNSCR 1373 and to increase the capabili-  
24 ties of states to fight terrorism. It is not a sanctions committee (Dhanapala,  
25 2005, 19) in the sense that it does not compile lists of terrorist persons or  
26 entities itself (Tappeiner, 2005, 101). UNSCR 1373 called upon states to  
27 report on their implementation of the resolution to the CTC within 90 days  
28 and thereafter according to a timetable to be set by the Committee. In order  
29 to emphasize the political importance of UNSCR 1373, the EU presented a  
30 common report on its implementation, alongside the national reports of all  
31 the EU member states. The report was drafted jointly by the Council and the  
32 Commission, before being submitted by the Presidency of the Council to the  
33 Chairman of the CTC in December 2001 (Eling, 2007, 111–12). A second  
34 joint report was presented to the CTC in August 2002. The EU had no obliga-  
35 tion to do so, as it not a member of the UN, but it aimed to demonstrate its  
36 commitment to multilateralism and the importance of the role of the UN in  
37 the 'War on Terror', as will be further explained later.

38 The fact that the UN was laying down the requirement for all UN member  
39 states to impose financial sanctions upon suspected terrorists without provid-  
40 ing any lists identifying such individuals presented a significant challenge to  
41 the EU. Rather than taking over a list of suspected terrorists such as that estab-  
42 lished by the 1267 Committee, it had to autonomously list those that would  
43 be the target of the financial sanctions (Cameron, 2003; Eling, 2007, 108).  
44 A new body, described as an '*ad hoc* forum' (Council, 2007, 1), was established

1 for that purpose, the so-called 'Clearing House'. It comprised representatives  
2 of the Council Secretariat, the Commission and the member states (Heupel,  
3 2009, 316) and handled all the preparatory work concerning the listing and  
4 delisting of individuals, while formal decisions on listing and delisting were  
5 unanimously adopted by the Council (Heupel, 2009, 316–17). In 2007, it was  
6 decided to replace the 'Clearing House' with a formal Council Working Party,  
7 namely the 'Working Party on the implementation of Common Position  
8 2001/931/CFSP on the application of specific measures to combat terrorism'  
9 (also known under the acronym 'CP 931 WP') (Council, 2007).

10 Thus, in the case of the EU's general financial sanctions regime, one  
11 can also identify a high degree of influence exercised by the UN. The EU  
12 has adopted a legislative arsenal and has established new institutional  
13 structures – the 'Clearing House', later replaced by the CP 931 WP – in order  
14 to implement UNSCR 1373.  
15

#### 16 **7.4 Explaining the influence of the UN over the EU's financial** 17 **sanctions regime** 18

19 As the EU is not a member of the UN and is therefore not itself subject  
20 to the UNSCRs, from the standpoint of international law, the EU was not  
21 required to adopt the various common positions and regulations pertaining  
22 to CFT that have been discussed earlier (Eckes, 2009; Lavranos, 2006, 479).  
23 In addition, although the European treaties contain some references to the  
24 UN, it is generally agreed that those are not sufficient to argue that UNSCRs  
25 have binding force on the EU from the standpoint of European law either  
26 (Eckes, 2009).<sup>18</sup> Even more importantly, as argued earlier, and although the  
27 European Courts have construed a Community competence for political  
28 and pragmatic reasons (Eckes, 2009; De Sena and Vitucci, 2009), some legal  
29 experts have convincingly argued that the Community did not even have  
30 the legal competence to adopt sanctions against individuals (see, for exam-  
31 ple, Eckes, 2009; Tridimas and Gutierrez-Fons, 2008–9). In other words, the  
32 EU was neither required nor legally enabled to adopt asset freezing measures  
33 in order to implement the UNSCRs.

34 However, in practice, the Commission and the Council<sup>19</sup> showed their  
35 commitment to implement the UNSCRs at the EU level and efficiently  
36 worked together to rapidly adopt EU financial sanctions against terrorist  
37 suspects. In adopting such measures, they enabled the UN to exercise a very  
38 significant degree of influence over the EU's own asset freezing policy. There  
39 are two main factors that account for that outcome: (1) 'path-dependency'  
40 from more traditional sanction measures that had been previously adopted  
41 by the EU against states and (2) the EU's declared commitment to multi-  
42 lateralism and international law, which led it to attempt to appear as an  
43 'exemplary implementer' of the UNSCRs concerning sanctions against  
44 individuals.

1 First of all, it can be argued that ‘path-dependency’ from previous EU  
2 sanction regimes against states can account to a significant extent for the  
3 EU’s eagerness to adopt the financial sanctions against terrorist suspects  
4 that have been previously examined in order to implement UNSCRs. ‘Path-  
5 dependency’ refers to the idea that ‘there are self-reinforcing processes in  
6 institutions that make institutional configurations, and hence their policies,  
7 difficult to change once a pattern has been established’ (Peters, Pierre and **AQ3**  
8 King, 2005, 1276; see also Pierson, 2000). In other words, there tends to be  
9 a replication of institutional configurations, and thereby policy outputs,  
10 over time (although during ‘formative moments’ new priorities may emerge,  
11 which will lead to institutional and policy changes). With regard to the case  
12 examined here, as mentioned before, the EU had developed the practice of  
13 systematically ‘transcribing’ UNSCRs establishing sanction measures into  
14 EU instruments (as well as EC instruments for economic sanctions). As Eling  
15 puts it (2007, 114), ‘[for] the EU, effective implementation of UN Security  
16 Council resolutions imposing restrictive measures is an article of faith,  
17 predating 9/11 and, indeed, independent of whether a resolution targets  
18 terrorist suspects or, say, individuals impeding the peace process in Côte  
19 d’Ivoire’. In addition to its commitment to multilateralism, one of the main  
20 reasons for which the EC has consistently implemented the UNSCRs impos-  
21 ing economic and financial sanctions, which traditionally targeted states, is  
22 the fact that it has exclusive competence with regard to external trade mat-  
23 ters (former Article 133 TEC) (Eling, 2007, 108; Lavranos, 2006, 472). This  
24 implementation process was even formalized by the Treaty of Maastricht,  
25 which entered into force in 1993. It introduced a two step-procedure – first,  
26 the adoption of a common position or joint action on the basis of Article 14  
27 TEU or Article 15 TEU within the framework of the Common Foreign and  
28 Security Policy (CFSP), before the adoption of operational measures, usually  
29 in the form of a regulation, on the basis of Article 301 TEC, as well as Article  
30 60 TEC in the case of financial sanctions (Lavranos, 2006, 472).

31 As previously mentioned, institutionalist scholars have argued that policy-  
32 making systems tend to replicate institutional configurations, which leads  
33 to ‘path-dependencies’. From that viewpoint, although the sanctions estab-  
34 lished by UNSCR 1333 and UNSCR 1373 were qualitatively different in that  
35 they targeted individuals, rather than states, the EU approached them in the  
36 same manner as it had approached previous sanction measures adopted by  
37 the UN and set to implement them in an almost identical fashion. It fol-  
38 lowed the aforementioned two-step procedure that had been established for  
39 the implementation of UN sanctions against states, with a slight change that  
40 has been mentioned before, namely the addition of ‘residual competence’  
41 Article 308 as a legal basis. In the case of the sanctions against the Taliban,  
42 Bin Laden and Al Qaeda, path-dependency was strongly facilitated by the  
43 fact that these sanction measures were initially ‘traditional’ sanction meas-  
44 ures taken against the state of Afghanistan when the Taliban were still in

1 government. Indeed, Common Position 2001/154/CFSP builds upon a series  
2 of Common Positions, including Common Position 96/746/CFSP concerning  
3 the imposition of an embargo on arms, munitions and military equipment  
4 on Afghanistan, which were themselves adopted to implement UNSCRs.

5 In addition to path-dependency from previous sanction measures against  
6 states, another important factor accounting for the eagerness of the EU  
7 to adopt financial sanctions against terrorist suspects in order to imple-  
8 ment the UNSCRs is the EU's declared commitment to multilateralism and  
9 international law. This has been stated by the EU on numerous occasions,  
10 including in the Commission Communication on 'The European Union  
11 and the United Nations: The choice of multilateralism' (Commission, 2003),  
12 which was endorsed by the European Council in December 2003 (Council,  
13 2004a). The European Security Strategy (European Union, 2003, 9) – a  
14 highly visible and politically important document – also emphasized the  
15 commitment of the EU to 'effective multilateralism' and 'to upholding and  
16 developing international law', while identifying the 'strengthening of the  
17 United Nations' as a 'European priority'. Therefore, it was important for the  
18 EU to support the United Nations' actions against terrorism to reinforce the  
19 multilateral dimension of the 'War on Terror', especially once the United  
20 States showed increasing signs of unilateralism, in particular with regard to  
21 military counter-terrorist activities. Also, as a preference for multilateralism  
22 and a commitment to international law are important elements of the iden-  
23 tity that the EU seeks to project on the international stage (de Búrca, 2010,  
24 45; Manners, 2002; Manners and Whitman, 1998; Manners and Whitman,  
25 2003), it was important for the EU to appear as a 'good implementer' of  
26 the UNSCRs concerning the freezing of the assets of terrorist suspects. This  
27 concern was heightened by the fact that UNSCR 1373 had also established  
28 the CTC in order to scrutinize the actions taken by UN member states in  
29 order to implement it. As emphasized by Eling (2007, p. 112), '[in] the early  
30 days of the CTC (...) the possibility of some form of enforcement action by  
31 the Security Council aiming at those states that did not implement crucial  
32 provisions of the resolution did not seem entirely far-fetched', such were the  
33 political significance and the priority given to UNSCR 1373 by the United  
34 States and its allies, such as the EU. From that standpoint, the adoption of  
35 EU financial sanctions in application of the UNSCRs can also be seen as an  
36 attempt by the EU to assist those member states that did not have any asset  
37 freezing arrangements in place to ensure that they would meet their obliga-  
38 tions under the UNSCRs (Eling, 2007, 108; Howell and Co, 2007, 28).

#### 40 **7.5 A brake on the UN's influence over the EU's financial** 41 **sanction regime: the role of the European courts**

42  
43 While the Commission and the Council – which had successfully pushed  
44 for the implementation of the UNSCRs at the EU level (see also Kaunert

1 and Della Giovanna, 2010), were priding themselves for the swift develop-  
2 ment of the EU's financial sanctions for counter-terrorism purposes, the  
3 European Court of Justice (ECJ) adopted a more critical stance. The most  
4 important of its rulings in that respect is that in the appeal decision in *Kadi*  
5 (Case C-402/05) and *al Barakaat* (Case C-415/05) in 2008,<sup>20</sup> which followed  
6 the controversial ruling by the Court of First Instance (CFI)<sup>21</sup> in the cases  
7 of *Yusuf* and *Al Barakaat International Foundation* (Case T-306/01) and *Kadi*  
8 (T-315/01) in 2005. Mr Kadi and Al Barakaat International Foundation were  
9 among the persons and entities who had been placed on one of the EU lists  
10 of terrorist suspects whose assets should be frozen by the EU member states  
11 without delay, as a result of their being included in the 1267 Committee  
12 list of suspected terrorists. It is outside the scope of this chapter to consider  
13 these various rulings in detail, as they deal with various complex legal issues.  
14 They have also proved controversial and have given rise to vigorous scholar-  
15 ly debates, in particular among law specialists.<sup>22</sup> This section only aims to  
16 examine briefly what the European judicial courts ruled in relation to the  
17 matter that concerns us in this chapter, namely the influence of the UN over  
18 the EU in the field of financial sanctions against individuals.

19 The first point to consider is that both the CFI and the ECJ found the  
20 Community competent to adopt financial sanctions against individuals  
21 suspected of involvement in terrorist activities.<sup>23</sup> This is significant as, had  
22 the courts found that the EU did not have the competence to adopt the  
23 asset freezing regulations examined before, they would have been annulled.  
24 The UNSCRs would then have had to be implemented by the EU member  
25 states without any measures being taken at the EU level. This would have  
26 meant that the UN would no longer have exercised the influence over the  
27 EU's financial sanction measures that it has to date. It is interesting to note  
28 that the CFI and the ECJ 'construed a Community competence for indi-  
29 vidual sanctions' in '(very) different ways' (Eckes, 2009, 125). While several  
30 observers found the reasoning of both European courts on this point rather  
31 unsound from a legal point of view, it was also acknowledged by some that  
32 this 'pragmatism' had 'avoided much tension' and had allowed 'the [EU]  
33 political institutions (...) to comply with the necessities of the international  
34 co-operation in the fight against terrorism' (Eckes, 2009, 125; see also De  
35 Sena and Vitucci, 2009).

36 In contrast, the rulings reveal that both courts were not in agreement on  
37 the issue of the extent to which the UN should be able to exercise influence  
38 over the EU. Evidently, the question was not phrased in those terms by the  
39 CFI and the ECJ, but rather in terms of the relationship between the UN's  
40 legal order and the Community's legal order. While the applicants were  
41 requesting the annulment of the EC regulations on the freezing of assets  
42 in so far as they concerned them on the grounds that those breached their  
43 fundamental rights, the CFI considered that such financial sanction mea-  
44 sures fall outside the scope of judicial review for the most part when they are

1 required by UNSCRs. This was a remarkable stance given that the Court was  
2 asked to examine a regulation, which is clearly an act of the institutions that  
3 it is competent to review (Eeckhout, 2007, 184–5). The CFI mainly justified  
4 its position by arguing that any examination of the internal lawfulness of  
5 the instruments adopted by the EU to give effect to UNSCRs would amount  
6 to an evaluation of the UN lists of terrorist suspects, which evidently falls  
7 outside the scope of the CFI's jurisdiction. In other words, the CFI affirmed  
8 that obligations under the UN Charter prevail over European law and that,  
9 as a matter of principle, Community acts implementing obligations under  
10 the UN Charter fall outside the scope of the CFI's jurisdiction.<sup>24</sup> Thus, this  
11 ruling of the CFI confirmed the strong influence of the UN over the EU with  
12 respect to financial sanctions against individuals. According to the Court,  
13 the EU does not have any latitude in adopting sanctions against those  
14 previously identified as suspected terrorists by the 1267 Committee. This  
15 ruling by the CFI was sharply criticized by legal experts on several grounds,  
16 including the limitations that it put on the protection of human rights (see  
17 notably Wessel, 2006).

18 It therefore came as no surprise that the ECJ set aside the CFI's ruling on  
19 appeal in September 2008. It is not the place to consider in detail the various  
20 legal points examined in the ruling. The most important point with regard  
21 to the topic examined in this chapter is that the ECJ ruled that the European  
22 courts have jurisdiction to review the measures adopted by the Community  
23 in order to give effect to UNSCRs, such as the regulations concerning finan-  
24 cial sanctions against suspected terrorists. The ECJ emphasized that the  
25 European courts are competent to review whether any Community measure  
26 respects fundamental rights. In particular, the ECJ stated in paragraph 285  
27 of its judgment that

28  
29 the obligations imposed by an international agreement cannot have the  
30 effect of prejudicing the constitutional principles of the EC Treaty, which  
31 include the principle that all Community acts must respect fundamental  
32 rights, that respect constituting a condition of their lawfulness which it is  
33 for the Court to review in the framework of the complete system of legal  
34 remedies established by the Treaty.

35  
36 Thus, the ECJ decided to highlight the autonomy of the Community's legal  
37 order *vis-à-vis* the international order. As Nollkaemper (2009, 863) put it, **AQ4**  
38 '[the] ECJ positioned itself as a court of a quasi-domestic legal order auton-  
39 omous from the international legal order, and prioritized its constitutional  
40 rights over the commands of the Security Council'. With regard to the mat-  
41 ter of the influence of the UN over the EU, this ruling evidently aimed to  
42 limit the UN's influence by emphasizing that all the instruments adopted to  
43 implement UNSCRs can be subjected to full review under the human rights  
44 standards of Community law. This means that, if the European courts find

1 that some of the fundamental rights of a person included in the EU lists  
2 have been breached, they may<sup>25</sup> be removed from these lists. In the case  
3 of the financial sanctions regime against the Taliban, Usama Bin Laden  
4 and Al Qaeda, this would therefore lead to a divergence between the 1267  
5 Committee list of suspected terrorists and that used by the EU. Such a sce-  
6 nario shows that the ECJ ruling has limited the influence that the UN can  
7 exercise over the EU in the case of the financial sanctions against suspected  
8 terrorists.

9 This ECJ judgment has been received with mixed reactions. Some observers  
10 have welcomed the argument made by the ECJ that a violation of fundamen-  
11 tal rights cannot be justified by the fact that it is caused by measures adopted  
12 in a wider security context, such as UNSCRs (Halberstam and Stein, 2009;  
13 Kunoy and Dawes, 2009; Tridimas, 2009). Some have positively received the  
14 emphasis put by the ECJ on the autonomy and the constitutional character  
15 of the EC legal order (d'Aspremont and Dopagne, 2008). However, others  
16 have been more critical of the ruling. Some have criticized the ECJ for, in  
17 their view, disregarding international law and the UN Charter in particular  
18 (Goldsmith and Posner, 2008; Hinojosa Martínez, 2008), or at least 'indulg-  
19 ing in (...) *ad hoc*, instrumentalist engagement with international law'  
20 (de Búrca, 2009, 862). According to de Búrca (2009), in recent years, the  
21 ECJ has increasingly emphasized the autonomy of the EC's legal order in  
22 rulings relating to international relations. In her view (de Búrca, 2010, 49),  
23 this emphasis on the constitutional nature of the Community's legal order  
24 and its separation from the international legal order, including the UN, 'has  
25 potentially significant implications for the image the EU has long cultivated  
26 of itself as an actor which is committed to "effective multilateralism", pro-  
27 fessing a distinctive allegiance to international law and institutions and seek-  
28 ing to carve out a global role for itself as a normative power'.

29 There is little doubt that there will be further judgments by the European  
30 courts concerning the EU's financial sanctions against suspected terrorists.  
31 Those are likely to address some of the doubts that have been expressed as  
32 to the consistency of the ECJ's ruling in the *Kadi* and *Al Barakaat* cases with  
33 international law and the European treaties. It is interesting to observe at the  
34 moment that the ECJ has rejected the idea of allowing the UN to exercise a  
35 high degree of influence over the EU – as it would have done if it had accepted  
36 that measures adopted to implement UNSCRs cannot be reviewed in the light  
37 of fundamental rights. However, this emphasis on judicial review and the  
38 respect of fundamental rights, which has been welcomed by some, has been  
39 criticized by others for putting the role of the EU as a 'good implementer' of  
40 UNSCRs into question. Thus, while the Commission and the Council have  
41 agreed to let the UN exercise a high degree of influence over the EU's finan-  
42 cial sanctions regime, mainly because of the EU's pro-multilateralism stance,  
43 the ECJ has sought to limit the influence of the UN over the EU by reaffirm-  
44 ing the autonomous character of the Community's legal order.



## 7.6 Conclusion

This chapter has examined the influence exercised by the UN over the development of the EU's financial sanctions against suspected terrorists. It has shown that the UN has exercised a high degree of influence over the EU in this policy area, especially with regard to the financial sanctions that have been imposed upon the Taliban, Bin Laden and Al Qaeda. This is particularly remarkable given that the UNSCRs concerning financial sanctions against suspected terrorists are not directly binding on the EU, as it is not a member of the UN, but only on the EU member states. Referring to the theoretical framework developed earlier in this book, this can be identified, overall, as a case of *transformation*. This is evidenced by the adoption of a substantial number of EU instruments setting up financial sanctions, as well as the emergence of new institutional structures, such as the 'Common Position 931 Working Party', which has replaced the more informal 'Clearing House'. This chapter has argued that there have been two main factors accounting for the UN's influence: (1) a path-dependency process from previous state sanctions and (2) the EU's declared commitment to international law and multilateralism. It has also been noted that, while the efficient co-operation between the Commission and the Council to implement the relevant UNSCRs has shown their broad acceptance of the UN's influence in this policy area, the ECJ has proved to be significantly less amenable to it. In a landmark ruling in the *Kadi* and *Al Barakaat* cases, the ECJ has sought to limit the influence of the UN over the EU by reaffirming the autonomy of the Community's legal order from the UN's legal order. From that standpoint, and again with reference to the theoretical framework underpinning this book, it can therefore be argued that the ECJ is engaged in a process of *retrenchment*. Thus, in contrast with the literature that argues that the institutions enabled to significantly constrain behaviour are able to exercise a greater degree of influence, as explained in the introductory chapter, the present case has shown that strong constraints can actually provoke a backlash and a certain degree of resistance to what is perceived as too high an influence from an international institution. However, it is important to emphasize that the issue of the influence of the UN over the EU's financial sanctions regime is not settled yet and is still characterized by a significant level of controversy and uncertainty. It is highly likely that there will be other judgments by the European courts regarding the EU's financial sanction measures against suspected terrorists. In turn, those will have a significant impact on the broader issue of the influence of the UN over the EU.

## Notes

1. Money laundering activities and the financing of terrorism are linked, which explains why some measures target both challenges at the same time.

- 1 2. Directive 2005/60/EC of the European Parliament and of the Council of 26  
2 October 2005 on the prevention of the use of the financial system for the purpose  
3 of money-laundering and terrorist financing.
- 4 3. The EU has defined 'terrorism' in Council Framework Decision 2002/475/JHA of  
5 13 June 2002 on combating terrorism.
- 6 4. Actually, from a technical point of view, the freezing of funds is not a sanction,  
7 as it is a preventive measure that does not rely upon criminal standards (della  
8 Cananea, 2009, 514). However, since their inception, asset freezing measures  
9 have been widely referred to as 'sanctions' by national governments, the EU, the  
10 UN and scholars alike. Therefore, this chapter adopts the same approach and uses  
11 the term 'sanction'.
- 12 5. This chapter is strictly concerned with the freezing of assets, which should be  
13 distinguished from the confiscation of assets. With regard to the confiscation of  
14 assets, the European Union has adopted two main Framework Decisions. The first  
15 was Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related  
16 Proceeds, Instrumentalities and Property, which was adopted on 24 February  
17 2005 and which stipulates that member states should confiscate 'either wholly  
18 or in part, property belonging to a person convicted of an offence (...) which is  
19 covered by the Council Framework Decision 2002/475/JHA of 13 June 2002 on  
20 combating terrorism'. The second significant Framework Decision was Council  
21 Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the  
22 Principle of Mutual Recognition to Confiscation Orders, which included provi-  
23 sions concerning the execution by a member state of a confiscation order issued  
24 by a Court of another member state.
- 25 6. It is fully acknowledged that the activities of the Financial Action Task Force  
26 (FATF) have also influenced the development of the EU's CTF policy (see Bures,  
27 2010). However, it is not possible to include them in the present analysis due to  
28 space constraints.
- 29 7. The first of these measures called EU member states to sign and ratify the UN  
30 Convention on the financing of terrorism urgently (measure 26). The second  
31 called a Joint JHA/ECOFIN Council to rapidly take measures against non-  
32 cooperative countries and territories identified by the FATF in the light of the  
33 fight against terrorism (measure 31) (European Council, 2001b).
- 34 8. The EU's Counter-Terrorism Strategy is based on four pillars: 'prevent', 'protect',  
35 'pursue' and 'respond'. 'Prevent' refers to activities aiming to tackle the root  
36 causes of terrorism, while 'protect' concerns activities aiming to decrease the  
37 vulnerability of people and infrastructures to terrorist attacks. 'Pursue' refers to  
38 the investigation of terrorist activities, while 'respond' concerns the reactions to  
39 terrorist attacks (Council of the European Union, 2005b).
- 40 9. Following the entry into force of the Treaty of Maastricht in 1993, which  
41 established the EU, there used to be three so-called pillars, namely the EC or  
42 'Community' pillar for matters related to the single market, the Common Foreign  
43 and Security Policy (CFSP) pillar for foreign and external security matters, and the  
44 Justice and Home Affairs (JHA) pillar for internal security matters. The EC had  
legal personality, whereas the EU did not. The Treaty of Lisbon abolished the  
three-pillar structure of the EU (and thereby the EC). Only the EU remains now,  
which has also been granted legal personality. For the sake of simplicity, this  
chapter generally refers to the EU, unless it is necessary to distinguish between  
the EC and the EU for technical reasons.
10. Council Implementing Regulation (EU) No 1285/2009 of 22 December 2009  
implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive

- 1 measures directed against certain persons and entities with a view to combating  
 2 terrorism and repealing Regulation (EC) No. 501/2009.
- 3 11. Article 215 of the Treaty on the Functioning of the European Union (TFEU) (which  
 4 replaces Article 301 TEC) constitutes the legal basis for the financial sanctions against  
 5 individuals that have been placed on UN lists, such as the list drawn up by the 1267  
 6 Committee, while Article 75 TFEU (which replaces Article 60 TEC) provides a legal  
 7 basis for the sanctions against individuals that are autonomously listed by the EU.
- 8 12. For example, according to Ward (2003), only two states – Botswana and the  
 9 United Kingdom – had ratified all 12 international instruments aiming to combat  
 10 terrorism by the time of the terrorist attacks on 11 September 2001.
- 11 13. Other UNSCRs, such as UNSCRs 1390 and 1455, subsequently confirmed that the  
 12 freezing of the assets of the Taliban, Bin Laden and Al Qaeda should be contin-  
 13 ued. However, UNSCR 1333 is the most important as it established the financial  
 14 sanction measures against Bin Laden and Al Qaeda.
- 15 14. This common position complements previous common positions setting out  
 16 restrictive measures against the Taliban, such as Common Position 96/746/CFSP  
 17 and Common Position 1999/727/CFSP.
- 18 15. UNSCRs adopted under Chapter VII of the UN Charter are binding on all mem-  
 19 bers of the UN. States are able to determine how to implement the measures  
 20 adopted by the Security Council, but are not free to determine whether (or not)  
 21 they implement such measures according to Article 25 of the UN Charter.
- 22 16. Its full name is ‘the UN Security Council Committee established pursuant to  
 23 Resolution 1267 (1999) concerning Al-Qaeda and the Taliban and associated  
 24 individuals and entities’.
- 25 17. However, it is interesting to note that, while this resolution reiterated some of the  
 26 provisions that were part of the previously adopted United Nations International  
 27 Convention for the Suppression of the Financing of Terrorism, it ‘omitted other  
 28 portions of the Convention (such as the explicit reference to other requirements  
 29 of international law, including the rights due to persons charged with terrorism-  
 30 related offences, the rights of extradited persons, the requisites of international  
 31 humanitarian law, and the provisions on judicial dispute settlement)’ (Alvarez,  
 32 2003, 875).
- 33 18. However, some scholars disagree on that point. For example, Wessel (2006, 2)  
 34 claims that ‘irrespective of the fact that the Community is not a member of the  
 35 United Nations and, hence, not directly bound by the UN Charter, it is ‘indi-  
 36 rectly’ bound by the UN law as in its constituting treaty it has taken over some of  
 37 its Member States’ international competences’. See also Hinojosa Martínez (2008,  
 38 340) and Halberstam and Stein (2009).
- 39 19. The European Parliament did not play any significant role in the development of  
 40 the EU’s financial sanctions regime, which reflected its marginal position in the  
 41 CFSP pillar at the time (Eling, 2007; Peers, 2003).
- 42 20. Judgment of the Court of Justice in Joined Cases C-402/05 and C-415/05, 3  
 43 September 2008.
- 44 21. Since the entry into force of the Treaty of Lisbon, the EU’s judicial authority has  
 been called the ‘Court of Justice of the European Union’ and consists of the Court  
 of Justice and the General Court. However, prior to 1 December 2009, the Court  
 of Justice was officially called the ‘Court of Justice of the European Communities’  
 (or the ‘Court of Justice’), but was often referred to as the ‘European Court of  
 Justice’ (ECJ), while the General Court was known as the ‘Court of First Instance’  
 (CFI). The Court of Justice was responsible for considering the appeals against  
 judgments of the CFI. As the overwhelming majority of the literature on the EU’s

- 1 financial sanctions regime refers to the ECJ and the CFI, this chapter also uses  
 2 these acronyms for the sake of clarity.
- 3 22. See notably Eeckhout, 2007; Curtin and Eckes, 2008; Hinojosa Martínez, 2008;  
 4 d'Aspremont and Dopagne, 2008; de Búrca, 2010; della Cananea, 2008–9; De **AQ5**  
 5 Sena and Vitucci, 2009; Eckes, 2008, 2009; Halberstam and Stein, 2009; Kunoy  
 6 and Dawes, 2009; Nettesheim, 2007; Tridimas, 2009; Tridimas and Gutierrez-  
 7 Fons, 2008–9; van den Herik and Schrijver, 2008; Wessel, 2008; and Vlcek, **AQ6**  
 2007.
- 8 23. For its part, the European Commission submitted that it was necessary to adopt  
 9 EU instruments to ensure a consistent application of the targeted sanctions  
 10 across the EU territory in order to preserve the free movement of capital within  
 11 the Community and to avoid distortions of competition. This reasoning was  
 12 also strongly supported by some member states, such as the United Kingdom,  
 13 which feared that differences in the application of the freezing of assets among  
 14 member states would have an impact on free movement of capital in the EU,  
 15 therefore leading to a risk of distortion of competition (see Judgment of the Court  
 16 of First Instance, in Case T-315/01, 21 September 2005, paragraphs 73 and 80 in  
 17 particular).
- 18 24. Nevertheless, in paragraph 277 of the judgment, the Court softened this strong  
 19 stance by declaring itself 'empowered to check, indirectly, the lawfulness of the  
 20 resolution of the Security Council in question with regard to jus cogens, under-  
 21 stood as a body of higher rules of public international law binding on all subjects  
 22 of international law, including the bodies of the United Nations, and from which  
 23 no derogation is possible'.
- 24 25. 'May' is used on the basis of Mr Kadi's practical experience. Following the ECJ rul-  
 25 ing in September 2008, which had annulled the regulation freezing his funds, the  
 26 European Commission informed Mr Kadi of the reasons for which he had been  
 27 listed by the UN 1267 Committee and subsequently adopted a new regulation  
 28 maintaining the freezing of his funds. The Commission stated that it had com-  
 29 plied with the judgment of the ECJ by communicating to Mr Kadi the reasons for  
 30 his listing and granting him an opportunity to comment on these reasons.

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