

Webb appendix:

**“In Search of a Due Process
– Listing and Delisting Practices
of the European Union”**

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National Sanctions Practices in 11 European Countries

- Work in Progress

By Mikael Eriksson (2009)

This section provides an overview of national sanctions practices in 11 European countries.¹

It is possible to divide national practices generally into the categories of those countries that have a national mechanism, those that lack a particular freezing mechanism but have the ability to list and delist countries separately from their national criminal-law procedures, and those that have no mechanism, in which the situation remains unclear, or are yet to improve their systems. The list is not complete, nor is the full scope of practices of these countries but gives good pamphlet of European practices.

Finland

Finland has no independent administrative procedure for listing and delisting, which means it has no freezing mechanism for either national purposes or the EU's autonomous lists. The Finnish government relies instead on the procedures the EU provides in regard to its obligations to implement UNSCR 1373 and Council Regulation 2580/2001.² Finland does not have an independent national terrorism list.

In general, Finland meets all its obligations resulting from the EU and UN treaties with legislation called the Act on the Enforcement of Certain Obligations of Finland as Member of the United Nations and of the European Union (no. 659/1967).³ It implements asset freezes by having its Ministry of Foreign Affairs direct the EU's updates of the particular terrorism list to the relevant ministry. Its security police's money-laundering and financial-intelligence unit investigates cases involving suspicious money transfers. If this unit finds evidence that the suspicions or allegations contain some truth, the cases then goes through normal court procedures in which the accused has the right to a fair and independent trial.

Following a review by the Financial Action Task Force

on Money Laundering the Finnish government established an internal working group to review current and future implementation practices and procedures for the EU and UN lists. Such ministries as the Ministry for Foreign Affairs, the Finance Supervisory Authority, the Finance Ministry, the Ministry for Interior Affairs, and the Security Policy Ministry and its terrorism-financing unit formed part of the working group. More specifically, the group's goal was to review the need for adopting independent national listing and delisting procedures and freezing mechanisms, and concluded that Finland has no need to do so, noting that if Finland were to establish a national mechanism to freeze assets it would need to meet all the legal-protection standards that the ECJ has stipulated. This means meeting all aspects of basic human rights to which Finnish law subscribes, such as the Convention for the Protection of Human Rights and Fundamental Freedoms.

The working group recognised and noted the current limitations of being unable to impose an asset freeze on internal terrorists. However, it did report that it expected that the EU's proposed Lisbon Treaty would be likely to strengthen due process both in regard to the EU's autonomous list and in

integrating UNSCRs on sanctions into the EU's legal framework. Finland plans to conduct another review of the need to establish a national freezing mechanism, called a trusteeship, after the treaty's adoption, anticipated for November 2009. Meanwhile, it is actively working within the EU framework to amend and adjust existing practices.

Sweden

In Sweden the Swedish Ministry for Foreign Affairs (SMFA) is mainly responsible for policies in regard to EU and UN sanctions. As in EU member states, all Council regulations are directly applicable in Swedish law. In practice, the SMFA coordinates various geographical desks and cooperates with other relevant governmental ministries, notably the Ministry of Justice. Such other authorities as the Agency for Non-Proliferation and Export Controls, the Swedish National Criminal Police, the Swedish Radiation Safety Authority, the National Board of Trade, and the Swedish Financial Supervisory Authority also deal with various aspects of sanctions implementation.

The Swedish Financial Supervisory Authority makes

sure that all financial operators in Sweden have access to relevant policies in regard to asset-freeze measures and updated sanctions lists that conform with the country's sanctions act,⁴ which enables the Swedish government to implement UN and EU sanctions against a state or other entity without the customary legislative procedures.⁵ It also includes a provision that imposes criminal sanctions on breaches of any prohibition Sweden has issued under the sanctions act or of any prohibition in EU regulations. So far, sanctions that the EU or the UN have adopted have been under EU (EC) regulations.⁶ Sweden does not, however, have a sanctions list parallel to the existing EU one, but rather makes use of the EU's current listing and delisting system, which is the CP 931 WP forum, and UN decisions.⁷

Denmark

As with most countries in Europe, Denmark does not have an independent national procedure for listing entities placed on autonomous EU or UN terrorism lists. This means it has no separate national list of persons or entities connected with terrorism.⁸ It essentially implements UN sanctions through EU

community competencies derived from its membership in the EU, which mandates adherence to applicable EC regulations. Such measures generally included in EU Council CPs as arms embargoes and travel restrictions can fall within member-state competence and therefore do not need Council regulation. Denmark has legislation to implement these.⁹

In regard to UNSCR 1373/2001, Denmark customarily bases its implementation of asset-freezing measures on CP 2001/930/CFSP, CP 931, and Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. Its obligations under Regulation (EC) No 2580/2001 and Article 249 of the EU Treaty therefore have a direct effect. In regard to the latter, EU member states, including Denmark, have an obligation to establish national legal foundations for the implementation of the sanctions indicated.¹⁰

In practice, when a financial institution suspects that a transaction is meant for the financing of terrorism, it must suspend the transaction and report it to the police's Financial Intelligence Unit (FIU) and the Danish State Public Prosecutor for Serious Economic Crime. The prosecutor's office must

decide within two days whether a seizure is justified. If it does the FIU begins a criminal investigation in cooperation with the Danish Security Intelligence Service.

The FIU can also initiate investigations and is in a position to seize assets if the situation is urgent and they obtain a police or court order. Freezing measures take place within the framework of the Danish Administration of Justice Act. In addition, Danish authorities may freeze or seize assets at the request of other countries if the freezing of assets or their seizure could be undertaken in a similar national case. Any freezing under 881/2002 or 2580/2001 remains in effect until the EU decides otherwise. No court hearing is required.

Any person or other entity whose funds are frozen may apply to the Danish Enterprise and Construction Authority (DECA) for exemptions under the terms of the Regulation.¹¹ DECA then consults with the Ministry of Foreign Affairs and the Public Prosecutor for Serious Economic Crime. The designated entity has the right to appeal to a national court [or the ECJ]. CFI and ECJ can annul the regulation (listing decision) (ECJ can give an interpretation of the provisions of a Regulation, preliminary ruling, on request of a national court

but there is no direct appeal to CFI and ECJ against a national decision refusing a request for an exemption.

In regard to the implementation of UNSCR 1267 and its list of persons and entities associated with Osama bin Laden, al-Qaeda, and the Taliban, community competence is directly applicable.

Persons, groups, or other entities who assert that they have been unjustly included in a UN or an EU list and have been subjected to restrictive measures may submit a request for removal from the list or lists. Requests for delisting in connection with EU sanctions against third countries may be submitted to either the EU Council or the Ministry of Foreign Affairs. However, no one has yet lodged a national court challenge in regard to Danish implementation of a listing measure, although the Danish government has taken note of recent court rulings.

Norway

Norway is not a member of the EU and is therefore not bound by CP 931. However, Norway's dualistic system means that the implementation of binding UNSCRs requires that all ac-

tions involving the listing of natural legal entities must be provided for in national law, as in a dualistic system conventions and other binding international obligations are not directly applicable. Norway, however, does not have an independent national terrorist list, as do other countries with dualistic systems. Since it has no national terrorist list, it has no national body that decides whether to list or delist entities.

Administratively, Norway's Ministry of Foreign Affairs handles such matters associated with listing and delisting as following up on statements of reasons, sometimes along with such other relevant authorities as the police. Norway implements UNSCR 1373 through its Criminal Procedure Act (see section 202d and 202e).¹² These provisions provide a mandate for the freezing of funds in cases in which reasonable cause to suspect that an act of terrorism financing has been committed is present.

Norway implements UNSCR 1267 via its national Regulations on Sanctions Against Osama Bin Laden, al-Qaeda, and the Taliban of 22 December 1999 No. 1374.¹³ The legal basis for these regulations is in Section 1 of the Act of 7 June 1968, which addresses the implementation of mandatory deci-

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sions by the UNSC and provides the legal basis for the King in Council to issue such regulations as are necessary for the implementation of such UNSC decisions.¹⁴ Otherwise, such implementation would have to be accomplished through parliamentary legislation. To keep track of the latest consolidated list, the Norwegian Regulations on Sanctions Against Osama Bin Laden, al-Qaeda, and the Taliban include a hyperlink to the sanctions committees' consolidated list. In this way, Norway updates its list immediately whenever the UN does.

Norway has also aligned itself with such EU restrictive measures as those against Zimbabwe, Burma, and Uzbekistan. It implements these measures through national regulations in much the same way as it does UN sanctions, with the important exception that as a non-member decisions made in CPs are not, as such, directly binding.

Norway's Ministry of Foreign Affairs is responsible for implementing listing decisions. If a listing decision is binding on Norway, such as those the UNSC makes acting under UN Chapter VII, it implements it either by amending the relevant existing regulations or by adopting new ones. Some of the EU regulations implementing restrictive measures with

which Norway has aligned itself contain their own lists, which Norway also must amend in its relevant implementation instruments. In addition to updating the regulations, the Ministry of Foreign Affairs also passes information about listing decisions to such relevant authorities as the police, financial authorities, customs, and the immigration authorities, which then have the responsibility for fulfilling their obligations in their respective fields.

This means that if the UN places a Norwegian citizen on a sanctions list under the 1267 regime, the Ministry of Foreign Affairs, the police, the Financial Supervisory Authority of Norway, and the customs authorities would be involved in implementing the sanction. A listed person or entity would have to send a request for delisting either directly to the UN focal point in accordance with UNSCR 1730 (2006) or indirectly there through the Ministry of Foreign Affairs. A listed person or entity can send applications for exemptions, such as on humanitarian grounds, to the Ministry of Foreign Affairs. The relevant Norwegian government agencies meet regularly to discuss the implications of listing measures.

The Netherlands

The Netherlands has a national freezing mechanism in addition to regular EU and UN procedures, partly due to legal considerations involving the EU not applying the same legal regime to internal terrorist individuals and entities as to external ones. From the Dutch point of view, therefore, a national regime with a separate national terrorism list is an effective approach to freezing the assets of internal terrorists. The Netherlands may also use its national regime to list international terrorists under its jurisdiction when they are not yet subject to the EU's listing measures. It can also apply its national mechanism to penalise violations of the EU's sanction regime, as under Dutch law breaching this regime is a crime.

The Dutch minister of Foreign Affairs, in consensus with the minister of justice and the minister of finance, has the authority to list and delist entities from the national lists. National authorities obviously cannot amend the EU list, though any decision to list an individual or entity (or is it make proposals for listing in the EU framework?) is subject to prior consultation with the relevant authorities. The minister must act according to the criteria of a national, but not public,

protocol that includes a set of conditions and procedures for meeting standards of consistency and validity based on intelligence, court decisions, or both.

The Netherlands established its national mechanism with a ministerial regulation called the Terrorism Regulation of 2002.¹⁵ As mentioned earlier, the minister of foreign affairs, in agreement with the minister of justice and the minister of finance, is authorized to freeze the assets of persons and organisations who fall within the scope of one of the relevant UNSCR resolutions, such as 1373,¹⁶ and since European regulations are legally binding and directly applicable, the Netherlands uses its national mechanism exclusively for persons and organisations under Dutch jurisdiction who are not yet listed by the EU but whom it expects to be so and for individuals whom it does not expect the EU to list.¹⁷ This mechanism covers both EU internal entities as well as national entities. The internal list corresponds with the asterisk list of CP 931 by means of cross-referencing. The number of national entities is consequently limited. The Netherlands can also apply its national mechanism to cover the period between a UN decision and an EU regulation.

The minister of finance, in agreement with the minister of foreign affairs, has the authority to decide on applications for exemptions.¹⁸

To ensure due process, entities can appeal against decisions to list them to the Foreign Ministry first and subsequently to the Administrative Court. The same authorities responsible for the decision to list decide on the administrative appeals, reconsidering their decision using the same criteria they applied in their original decision.

The Netherlands has recently amended its legislation in order to create the possibility of administrative appeal.¹⁹ It did this because prior to the enactment of Sanction Regulation Terrorism 2007-II, the law had restricted legal remedy to civil action. The amendment made it possible for interested parties to submit a notice of objection and consequently appeal to an administrative court. They can make an objection by submitting a notice of objection to the administrative authority that made the decision to list, which can come before an administrative tribunal. At least five natural persons have appealed listing actions brought against them.²⁰ The tribunal can only make decisions in regard to national listing decisions.

Although different sanctions lists exist, EU and UN processes for deciding whether to list or delist raise no special distinction per se. The same agencies consult with each other in regard to listing or delisting individuals or entities under Dutch jurisdiction, as in cases involving national listing or delisting with permanent representatives at the EU or UN acting as intermediaries.

Belgium

Belgium has a national freezing mechanism for implementing UNSCR 1373 in parallel with CP 931, but no consolidated national terrorist list. Although the mechanism is parallel and similar to the EU mechanism, it also allows for freezing the assets of internal terrorists whose assets cannot be frozen by virtue of the EU Treaty.²¹ A royal decree confirmed by a parliamentary act (Law of 25 April 2007) introduced the national procedure, but Belgian authorities seldom use it.²²

A royal decree of 26 December 2006²³ provides for listing measures through an inter-ministerial committee that acts upon evaluations made by the Coordination Unit for Threat Analysis (*Belgium Organe de L'analyse de la Men-*

ace), which is a coordinating agency of different Belgian intelligence and security services. The Threat Analysis Act of 10 July 2006 (published 20 July 2006 in the government gazette *Moniteur Belge*) established its work, procedures, and criteria. A royal decree must endorse its recommendations with the listing measures, this decree being always subject to an appeal to a national administrative tribunal, the *Conseil d'Etat*. Such decrees are in principle copies of CP 931 and Regulation 2580/2001.²⁴ Any Belgian autonomous listings are subject to an administrative review every six months, but no such decrees have yet been issued and are highly unlikely to be, as EU sanctions are more appropriate, considering Belgium's geographical position within the EU. Furthermore, the Lisbon Treaty will make such measures superfluous if implemented.

Belgium adopts travel bans using CPs. The Consular Directorate General of the Ministry of Foreign Affairs implements any new CPs at the national level immediately by sending directives to Belgian embassies and consulates abroad notifying them of the new listings. Embassies and consulates must then refuse to issue any visas to listed individuals except under circumstances that the CPs stipulates. A lack of such

adequate identifiers as the full name and date of birth may, however, create problems.

Belgium's Treasury implements asset freezes at the national level in response to both 1267 and autonomous EU sanctions. Under the 1267 regime, the Treasury can take measures implementing UNSCRs under a law enacted 11 May 1995 (MB 29.05.1995). A royal decree implementing this law in regard to the Taliban was issued on 17 February 2000 (MB 15.03.2000), and implemented by a ministerial decree on 15 June 2000 (MB 01.07.2000). These regulations are still in force for the implementation of EC Regulation 881/2002 in regard to al-Qaeda. Belgian authorities expect banks to implement EC regulations. A law enacted on 13 May 2003 for implementing EU restrictive measures (MB 13.06.03 and 20.06.03) provides penalties for the non-implementation of EU measures, making no separate Belgian legislation necessary for all UN and EU measures adopted since 2003.

In order to ensure the protection of a listed entity's right to legal due process in regard to delisting and to decide on basic exemptions, EU freezing measures may be directly implemented and are therefore subject to regular review and

appeal to the CFI and the ECJ. CPs and regulations detail the procedures for exemptions. However, since Belgium has no autonomous listing these procedures have yet to be applied.

EU CPs and regulations provide for independent reviews for each restrictive measure, allowing any individual or other entity to make their views known and to challenge economic measures before the EU's courts. The right to such reviews and legal appeals also exists at the Belgian national level, but are unlikely to occur in the absence of any Belgian list.

Germany

Germany enforces sanctions within the framework of the CFSP and the UNSC's listing procedures, reasoning that EC regulations dealing with asset-freezing measures are directly applicable in Germany and it therefore needs no other additional national implementing measures. It consequently reported the members of the internal German Sauerland Group currently on trial to the Al-Qaeda and Taliban Sanctions Committee established by UNSCR 1267 for inclusion in the terrorist list and for subsequent EU listing according to EC regula-

tion 881/2002.. Apart from interim measures, it also has no independent national legislation for adopting financial restrictions.²⁵

Germany has no need to supplement EC regulations with national implementation measures to deal with asset-freezing, as these regulations are directly applicable throughout the EU. It may, however, need some interim national measures to address the time lag between the adoption of UN designations and EC regulations to prevent the moving of assets.²⁶ Germany undertakes all asset-freezing measures based on UN designations or EU listings in Regulation 2580/2001 and Regulation 881/2002, to which Germany is bound. German financial institutions must therefore respect such freezes by blocking listed persons' accounts.

Besides the establishment of a national terrorist list, in order to propose designations to the autonomous EU internal terrorist list, Germany has enacted Section 6a of its Banking Act, which provides for the freezing of accounts in Germany for national security reasons. Depending on whether the identified terrorist is an EU resident, Germany sends its designations, which are recommendations to the Council, either to the

EU's external autonomous terrorist list for non-EU residents, to the UN for EU residents and non-residents linked to al-Qaeda or the Taliban, or to the EU's internal autonomous terrorist list for EU residents not linked to al-Qaeda or the Taliban. No national implementation measures are necessary in relation to sanctions against EU residents linked to al-Qaeda or the Taliban (consider in this regard also Regulation (EC) No 881/2002).

The Federal Ministry of Interior, the Federal Ministry of Justice, and the Federal Foreign Office have joint responsibility for the limited internal EU list, the Foreign Office's role essentially being to transmit designations of German nationals to the Council. The Federal Ministry of Finance also takes part in consultations in regard to decisions to list nationals. By designating its nationals to the autonomous EU internal terrorist list, the German government indirectly renounces responsibility for those who become listed, as that is an EU decision. The competent authorities are therefore likely to defend the Council if those listed appeal to the CFI or the ECJ.

The Federal Supervisory Authority for the banking sector administers the assets of those entities designated to

the autonomous EU internal terrorist list, sometimes in close consultation with the Federal Central Bank. The Federal Central Bank, however, is the only administrator of the assets frozen under the autonomous EU external terrorist list, and the Federal Office for Economy and Export Control administers the freezing of economic resources other than funds. Most of the work, however, is undertaken in the framework of the country-specific sanctions regimes and in the autonomous EU external listing regime.

The Federal Central Bank's Service Centre for Financial Sanctions is the focal point for granting exemptions in regard to frozen funds. The Federal Office for Economy and Export Control grants exemptions concerning economic resources.

The Federal Foreign Office prepares the instructions for the Council's German representative, always after consulting with the Economic Affairs Ministry and the Ministries of Finance, Justice, and the Interior, and with the Chancellor's office in many cases, especially politically sensitive ones. The Economic Affairs Ministry is the most strongly involved ministry in addition to the Foreign Office in most cases, always

providing input in regard to adding or removing proposals to the decision.

The different departments' degrees of involvement depend on the measure's nature, the involvement of the Chancellor's office, the Ministry of the Interior, and the Ministry of Justice being stronger for cases dominated by terrorism or travel-ban issues. The Finance and Economic Affairs ministries' input is more detailed for cases in which financial sanctions are central.

France

France has prepared national regulations establishing freezing mechanisms for terrorism suspects and other entities outside current EU internal terrorism lists, as have other member states. More specifically, it has developed two main mechanisms that allow the freezing of terrorists' assets alongside such mechanisms as CP 931, CR 2580/2001, UNSCR 1267, and UNSCR 1373. It has judicial mechanisms in place that provide for provisional confiscation of terrorist assets under the supervision of a special judge of terrorist affairs. It also has a national administrative procedure that stands alongside

EU Regulation 881 (al-Qaeda) and Regulation 2580/2001.

The aim of the national mechanism is to allow the freezing of assets of persons and other entities deemed to be implicated in activities related to terrorism and its financing. An added objective here is to accelerate the implementation of decisions made under UNSCR 1267 at the national level by enabling French authorities to freeze the assets of those listed immediately after the decision appears on a UN committee's website and before the EC takes action in accordance with regulation 881/2002. The enabling legislation is a law enacted on 23 January 2006 relating to the struggle against terrorism,²⁷ the fifth French law addressing terrorism since 1986.²⁸ This law has made it necessary for France to have a national terrorist list so it can also freeze the assets of entities that have already been listed on the autonomous EU internal terrorist list, for whom the EU lacks the jurisdiction to freeze their assets. France freezes assets temporarily and then transfers the cases into the jurisdiction of laws covering regular criminal procedures. Criminal prosecutions follow if reasons justifying them are present.²⁹

An independent judicial body makes the decisions to

list and delist entities, the standard of proof being governed by the French penal code. It is the responsibility of the finance minister, usually following recommendations of the Justice Ministry or the Ministry of Interior, to decide whether to impose asset freezes and to inform those sanctioned of the decisions' motivations. Those subjected to sanctions can challenge these decisions before a national court or appeal to an administrative tribunal. The main challenge to listing mechanisms is to reconcile efficiency with guarantees of due process.

The Ministry of Economics and Finance makes decisions about exemptions if the sanction does not stem from a decision taken at the UN or EU level. The Law of 2006 governs the standard of proof, which is lower than that of most of French law.

The UK

The UK has been one of the major UNSC powers responsible for adding names to the consolidated list.³⁰ Its Foreign and Commonwealth Office (FCO) is primarily responsible for the scope and content of its policies toward listing measures

for EU and UN targeted sanctions. Domestically, the UK's Treasury plays an important role in the actual implementation and daily administration of financial sanctions, such as by deciding domestic designations and licensing exemptions for those designated on the sanctions lists (HM Treasury handles licensing issues for all listed persons, not just those listed domestically, save that UK Mission in New York handles the notifications to the sanctions committee).

Section 1 of the UK's United Nations Act 1946 enables Cabinet to issue orders in council when it is necessary or expedient to give effect to certain UNSC decisions. This has enabled the adoption of a national freezing mechanism regulated by such orders alongside the international mechanisms of CP 931, CR 2580/2001, but also implementing UNSCR 1267, and UNSCR 1373. The Government can only use this power to implement UN resolutions.

The current legislation in force in the UK in relation to UNSCR 1373 is the Terrorism (United Nations Measures) Order 2009.³¹ It previously made designations under the Terrorism Orders of 2006 and 2001, to give effect to UN measures. This legislation both enacts EU asset freezes derived from

UNSCR 1373 (including criminal penalties etc.) and gives the Treasury the power to designate individuals and entities for asset freezes domestically under an independent domestic regime. The UK currently lists more than 80 individuals and entities domestically, with the EU also listing a small number of these, in many cases the EU listing being predicated on the UK's asset-freezing decision.

One important reason for having an independent list is that the UK government can both implement and delist more quickly, rather than waiting for the EU to adopt a CP or Council regulation.³² For instance, it listed Kadi as a designated entity one week before the UN did. For the UK, the use of an independent national procedure for listing and delisting is therefore a matter of administrative promptness, or an urgency issue, and the UK often also acts as the designating state, sometimes listing al-Qaeda entities that are not part of the UN 1267 list.

The Treasury maintains a consolidated list of all financial sanctions in the UK involving all individuals and entities that it has designated domestically or whom the UN or the EU or both have designated. The list is divided according to

whether the sanctions are under UNSCR 1267, UNSCR 1373, EU CP 931, or country-specific sanctions regimes.³³

A number of entities are currently challenging their domestic and UN designations in the UK courts. They base their challenges to the UN asset freezes on the domestic UK legislation under which the asset freeze was implemented. For example, one case before the Supreme Court (formerly the House of Lords) in October challenged the UK secondary legislation used to implement UNSCR 1267 decisions. These are launched in the High Court, and in the event of appeals the cases go to the Court of Appeal and then possibly, by further appeal, to the Supreme Court (which is also the practice true of all civil court claims in the UK).

The Treasury is responsible for listing and delisting decisions under the UNSCR 1373 domestic regime. The FCO, in consultation with other relevant government stakeholders, makes the UK's decisions to seek the listing or delisting of individuals and other entities under the UN and EU regimes. It assesses the information in cases involving the UN sanctions regime against the criteria in the relevant resolutions, in particular UNSCR 1617 (2005), and in accordance with the

review procedure in Section 9 of the Guidelines of the 1267 Committee.

Cabinet has agreed on the UK's listing and delisting procedures, which have evolved over time by it taking into account the lessons learnt and points raised by UK and EU courts. When the courts strike down or remove UK asset freezes or proscriptions the UK informs the Council that it can no longer be the competent national authority upon which the EU predicated its listing.

The Treasury may request any person to furnish the requesting authority with any information to facilitate the compliance and implementation of financial sanctions under each relevant statutory instrument for each specific financial sanctions regime, although exemptions are possible. It keeps its processes and procedures in regard to the domestic sanctions regime under review, taking into account its practical experience in operating regimes and giving consideration to the views expressed during its daily management of them and in litigation at both the national and international levels.

The 2009 Terrorism Order is the UK's latest legislation implementing UNSCR 1373.³⁴ It introduces a number of

safeguards to ensure due process whilst maintaining the regime's efficacy.³⁵

Italy

Italian Decree 109 June 2007 asserted the main purpose and field of application for the procedures of an asset-freezing mechanism under EU, UN, and national decisions for suppressing terrorism by establishing a Financial Security Committee in Italy's Ministry of Economy and Finance.³⁶ The committee has 11 members, with the Director General of the Treasury as its chairman. The members represent the ministries of economy and finance, the interior, justice, and foreign affairs, the Banca d'Italia, the Italian Stock Exchange Commission, the Italian Financial Inspection Unit (UIC, *Ufficio Italiano dei Cambi*), the Anti-Mafia Investigation Directorate, the Carabinieri, and the National Anti-Mafia Department.

The minister of economy and finance regulates the committee's work by decrees based upon the committee's proposals. It operates under confidentiality. National judicial authorities must transmit to it any information deemed useful for its work and the decree establishing it. The committee's chair

may transmit data and information to the Executive Committee for Intelligence and Security Services and to the heads of the intelligence and security services for coordination activities to be carried out by the prime minister. The chair must also alert the public prosecutor. The committee designates entities to the EU and the UN. It also proposes the delisting of entities. Its administrative procedures must take place within 120 days.

Practically, in cases of asset-freezing decisions made by the UN, the EU, or, in criminal cases, the minister of economy and finance, upon request from the Financial Security Committee the minister of foreign affairs issues a decree freezing the funds and economic resources of the designated entities. Such decrees also stipulate exemptions. State administrative offices holding any relevant information on frozen economic resources must provide it to the UIC and the Special Currency Police Unit of the Guardia di Finanza. The UIC has the responsibility for monitoring the implementation of financial sanctions. It collects information and data about designated entities and the resources to be frozen. It also facilitates the circulation of the lists of designated entities and subsequent

amendments.

The Special Currency Police Unit draws up a detailed report on the typology, legal status, and other details of the assets within 60 days of the receipt of the communication from the UIC and sends the report to the Financial Security Committee, the Agenzia del Demanio, and the UIC. Following Italy's Civil Procedure Code, the Special Currency Police Unit informs the designated entities that their assets have been frozen and put under the control of the Agenzia del Demanio, which sees to its custody, administration, and management during the freeze. The Agenzia del Demanio provides the Financial Security Committee with a detailed report on the asset-freeze's status and activities performed every three months. If the committee decides to delist an entity it requests the Special Currency Police Unit to inform that entity. The entitled party has the right to resume possession of the formerly frozen assets within 180 days of its notification of delisting.

Switzerland

According to Article 1 of its Embargo Act, the Swiss Confederation, which is Switzerland's federal government, may enact

compulsory measures to implement sanctions that have been decided by the UN, the Organisation for Security and Cooperation in Europe, or Switzerland's most significant trading partners, and which serve to secure compliance with international law, particularly in regard to human rights. Switzerland also has a separate mechanism for listing and delisting.

Switzerland does not, however, have a national terrorist list and it has not adopted the EU-EC list (CR 2580/2001), as it has no legal obligation to have such a list, no legal definition of who is a terrorist, and its Embargo Act provides insufficient legal basis for one. It would have to base a national terrorist list directly on its constitution. The Federal Department of Economic Affairs (FDEA) is the authority competent for listing and delisting individuals and other entities to implement decisions by the UNSC and its sanctions committees. Switzerland has no particular review mechanisms for scrutinising entities' reasons for being on the list, as UN sanctions lists are mandatory for all UN member states.

Based on the Embargo Act, the Federal Council has enacted a number of ordinances to implement the UNSC's sanctions. Switzerland currently has 17 sanctions ordinances,

of which 12 implement UN sanctions and five EU sanctions.³⁷ The main bodies of these ordinances stipulate the sanctions' measures themselves, such as whether they involve an arms embargo, the freezing of assets, a travel ban, or something else, and they list the individuals or other entities subject to the sanctions in one or more annexes.

The Federal Council has the power to amend and revoke the ordinances.³⁸ The FDEA is responsible for updating the annexes under Article 16 of the Embargo Act, and is therefore in charge of listing and delisting to conform with UNSC decisions or EU regulations. In addition to implementing UN sanctions, the Federal Council has adopted five ordinances concerning measures against certain persons from the former Yugoslavia and against Zimbabwe, Myanmar, Belarus, and Uzbekistan that mirror the respective EU-EC sanctions. Most of these ordinances stipulate the freezing of assets and other economic resources. Lists concerning certain persons from the former Yugoslavia and Zimbabwe, Myanmar, and Belarus reflect the lists published in the *Official Journal* of the EU-EC. It currently has no list for Uzbekistan. The statements of reasons parallel the statements provided in the *Official Jour-*

nal. Switzerland implements by ordinance the UN sanctions against individuals and entities designated under Resolution 1267 (1999) and subsequent resolutions addressing terrorism.

The Sanctions Unit of State Secretariat for Economic Affairs (SECO), an agency of the FDEA, is Switzerland's primary authority involved with implementing country-based sanctions. Depending on the type of sanctions, various other agencies and authorities are involved to varying degrees.

The SECO's Industrial Products Export Control Unit, its Military Equipment Export Control Unit, the Federal Customs Administration, and the Federal Department of Foreign Affairs (FDFA) take part in implementing commodities sanctions. The Swiss Financial Market Supervisory Authority, the Federal Commission of Gambling Casinos, the FDFA, and the Federal Department of Finance (FDF) take part in implementing financial sanctions. The FDFA, the Federal Office for Migration (FOM), the Federal Department of Defence, Civil Protection, and Sport (DDPS), and cantonal police, who are in charge of immigration control at airports, take part in implementing travel bans. The Federal Office of Civil Aviation

cooperates with SECO in implementing aviation sanctions.

In two separate rulings in 2007 and 2008, Switzerland's Federal Supreme Court upheld the government's freezing measures for implementing UNSCR 1267 (1999) and subsequent resolutions.³⁹ In these two court rulings, the court stated that the federal authorities do not have autonomous leeway to delist individuals or entities the UNSC has designated as terrorists.⁴⁰ It follows that in cases involving UN sanctions a delisting request should be submitted to the competent UN sanctions committee through the Swiss Government or the Focal Point. National court rulings have confirmed Switzerland's position that the UN's listing and delisting procedures need further improvement. These rulings, however, have had no effect on Switzerland's sanctions practices.

The SECO and its sanctions unit deal with humanitarian exemptions for listed entities after consultation with the FDFA and the FDF and in accordance with the relevant provisions of the UNSCRs. It has a no objection procedure in regard to such matters as basic expenses and the approval process for extraordinary expenses.

In regard to non-UN sanctions lists, the FDEA can

subject individuals and other entities to freezing measures imposed by the Federal Council if Switzerland's major trading partners have also imposed such sanctions against the same entities. Clearly, the political will must also be present. The Swiss government can decide not to implement EU sanctions or not to list certain entities. Any individual or other entity the FDEA does list can submit a request to the SECO to be delisted. Negative decisions by the SECO are subject to appeal to the FDEA. Finally, depending on the grounds of an appeal, either the Federal Council or the Federal Supreme Court is the instance of last resort. No individual or other entity has yet requested to be delisted from a Swiss sanctions list based on a non-UN EU sanctions list. Also, the main non-UN sanctions programmes – the measures against Zimbabwe, Myanmar, and Belarus – mostly target individuals on the grounds of their governmental function. A delisting request by such an individual would probably stand a good chance of success if the petitioner could credibly demonstrate that he or she was no longer associated with the targeted regime. Those in need are entitled to a free legal representation if necessary to protect their rights to legal representation.

Switzerland implements exemptions to travel bans according to the relevant UN resolutions. The ordinances involving non-UN sanctions usually stipulate exceptions for obvious humanitarian reasons, to participate in meetings of international organisations, international conferences, or a political dialogue concerning the sanctioned country's situation, or to protect Switzerland's national interest. The ordinances stipulate that the FOM is competent to grant such exemptions. For visa applications from listed individuals holding a diplomatic passport or enjoying other privileges or immunities, decisions rest with the FDFA.

Border police officials conduct immigration controls at the border. As noted earlier, cantonal police staff does this at international airports. Individuals subject to travel bans are registered on centralised electronic databases to which immigration officers have real-time access. FOM and a unit of the DDPS keep the databases up to date.

Finally, it is worth noting that Switzerland, together with Denmark, Germany, Liechtenstein, the Netherlands, and Sweden, submitted a discussion paper to the UNSC in May 2008 presenting concrete proposals for establishing an inde-

pendent panel of experts that would be authorised to issue recommendations concerning delisting to the relevant UNSC sanctions committee. These proposals have also been published as official UN documents. It is now up to the UNSC to decide on these reform proposals. Switzerland has continued to campaign for greater consideration of human rights in the UN's sanctions procedures.

Footnotes

¹ This web appendix follows the analysis made in “In Search of a Due Process: Listing Practices of the European Union” (by Mikael Eriksson 2009). This section should be seen as a platform for continued work (“work in progress”). The work herein builds on interviews with a number of officials in the countries investigated in this report. The overview provided herein however, is not exhaustive in any way, nor does it reflect the views of any one interviewed. All errors rest with the author.

² For a background on Finland's procedure, see also the note verbale from Finland's Permanent Representative of to the UN dated 16 April 2003. S/AC.37/2003(1455)/11.

³ Unofficial consolidated translation, Ministry for Foreign Affairs, originally issued at Helsinki on 29 December 1967.

⁴ Act (1996:95) on Certain International Sanctions (the Sanctions Act).

⁵ The official Swedish government report, “Internationella sanktioner” (Statens Offentliga Utredningar 2006:41), presents a close review of the Swedish legal sanctions system.

⁶ Obviously, Sweden employs different implementation practices for EU CPs and EC regulations.

⁷ Legislation has recently been proposed to allow Sweden to freeze assets provisionally in order to cover for the time gap in implementing UN decisions under the UN 1267 Committee and the time required for implementing EU regulations, as that time lag could allow a listed entity to move its assets. The proposal therefore suggests that the Swedish Financial Supervisory Authority should implement UN decisions without delay, but such decisions should only be granted when Swed-

ish authorities can expect them to be within the framework of an EC regulation. However, even without enacting the proposal it is legally possible, at least in a narrow sense, to seize assets using criminal law procedures when the suspicion of an offence, including a terrorist offences, is present. The proposal has suggested amendments in order to be able to cover the full scope of both UNSCR 1267 and UNSCR 1373. This proposal's intention was to amend the Act (1996:95) on Certain International Sanctions (the sanctions act). It remains undecided.

⁸ See also the Permanent Mission of Denmark's note verbale dated 16 April 2003 to the United Nations S/AC.37/2003/(1455)/8.

⁹ Denmark implements travel bans by restricting the admission of individuals and persons designated by the UNSC or one of its sanctions committees, or by EU CPs in accordance with the Danish Alien Act No. 1044 of 6. August 2007, with subsequent amendments, arms embargos in accordance with the Danish Weapons Act no. 752 of 11 August 1994, with subsequent amendments, and aspects of national or shared competence domestically through secondary legislation.

¹⁰ On a national basis an anti-money-laundering law also exists, the *Act on Measures to Prevent Money Laundering and Financing of Terrorism* No. 442 (11 May 2007). Note that all Member States have anti-money laundering laws, harmonized by Directive 2005/60/EC and the previous directive of 2001, which requires that the measures applied to detect money laundering should also be applied to detect terrorist financing.

¹¹ See Guidelines on Financial Sanctions of The Danish Enterprise and Construction Authority 18 June 2008.

¹² The Criminal Procedure Act can be found at <http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf>. See also references to the Penal Code section 147 a, and 147 b, which can be found at <http://www.lovddata.no/all/tl-19020522-010-018.html#147a>.

¹³ The Regulations on Sanctions Against Osama Bin Laden, al-Qaeda, and the Taliban of 22 December 1999 No. 1374 can be found AT <http://www.lovddata.no/cgi-wift/ldles?doc=/sf/sf-19991222-1374.html>

¹⁴ A translation of the Act of 7 June 1968 relating to the implementation of mandatory decisions of the Security Council can be found at <http://www.ub.uio.no/ujur/ulovdata/lov-19680607-004-eng.pdf>

¹⁵ Staatscourant 2002 (104). More precisely, its basis is the Sanctions Act 1977 and the Ministerial Sanction Regulation Terrorism 2007-II, Staatscourant 2007 (248).

¹⁶ See Sanctiewet 1977 and Sanctieregeling terrorisme 2007-II.

¹⁷ The Netherlands gives preference to international listing.

¹⁸ The criteria coincide with the criteria mentioned in article 5 of Council Regulation (EC) No 2580/2001.

¹⁹ Sanction Regulation Terrorism 2007-II (Staatscourant 2007, 248). The legislation entered into force on 2007-23-12.

²⁰ The process includes a hearing and is regulated by the General Administrative Law Act (Algemene wet bestuursrecht), chapters 6, 7 and 8 (annex).

²¹ The EU's autonomous list relating to internal groups has no asset-freezing mechanism, as Arts. 60, 301, and 308 of the EC Treaty only apply to externals in the framework of CFSP. There is in practice no national asset freezing in such cases, although it is technically possible, as Royal Decree of 28.12.2006 includes the procedures. It makes no sense to have national asset freezing that does not extend to the EU. If implemented, the Lisbon Treaty might make EU asset freezing possible for internals.

²² Belgian courts have been particularly sensitive to fundamental rights, as in the Sayadi and Vinck case (it concerns two individuals). Belgian authorities have therefore deemed it wise not to make use of national listing measures. A decision by the CFI of Brussels in February 2005 ruled the listing of Mr Sayadi and Ms Vinck as unfounded due to a lack of evidence supporting the UN decision and ordered Belgian authorities to seek Sayadi-Vinck's delisting from the UN lists. The UN delisted Mr Sayadi and Ms Vinck on 20 July 2009.

²³ This decree is based on a law for the implementation of UNSC decisions adopted 11 May 1995, which was later confirmed by a law adopted on 27 April 2007.

²⁴ See decree published in the *Moniteur Belge* of 17 January 2007.

²⁵ Article 56 of the EC Treaty.

²⁶ Usually such decisions come under the Foreign Trade and Payments Act.

²⁷ Article L 562-1 of the monetary and financial Code.

²⁸ Laws of 9 September 1986; 15 November 2001; 18 March 2003; 9 March 2004; and lastly 23 January 2006 introducing the mechanism of freezing.

²⁹ To date no one has contested decisions before national courts that have been made in accordance with Regulation 2006-64 of 23 January 2006 related to the struggle against terrorism.

³⁰ Lopez, Cortright, Millar, and Gerber-Stellingwerf, 2009: 4.

³¹ http://www.hm-treasury.gov.uk/d/si_1747_terrorism_order_2009_150709.pdf

³² It is worth keeping in mind that Regulation (EC) No 2580/2001 takes precedence over national legislation and UK national de-listing cannot undo Council listing and corresponding UK obligations under that Regulation.

³³ <http://www.hm-treasury.gov.uk/d/sanctionsconlist.pdf>

³⁴ See http://www.hm-treasury.gov.uk/fin_sanctions_terrorist.htm

³⁵ <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090715/wmstext/90715m0001.htm#09071557000424>

³⁶ Legislative Decree no. 109 of 22 June 2007, "Measures for preventing, combating and suppressing terrorist financing and the activities of Countries threatening international peace and security, pursuant to Directive 2005/60/EC". Most of the information presented here is in this decree.

³⁷ See <http://www.seco.admin.ch/themen/00513/00620/00622/index.html>

³⁸ See article 2 of the Embargo Act.

³⁹ For example, Youssef Mustapha Nada Ebada (recently delisted) has a case pending in the European Court of Human Rights, where claimants have the right to pursue their cases after exhausting the remedies in domestic courts, challenging his UN designation (formally he should complain that a party to the European Convention on Human Rights infringed his rights). He claims violations, inter alia, of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which pertains to the right to a fair trial. Decision of the Federal Tribunal in Lausanne, Case 1A.45/2007, 14 November 2007, available on the website of the Federal Tribunal at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm. Information on this case obtained from the Ninth Report of the Monitoring Team pursuant to Resolution 1526 (2004) and extended by Resolution 1822 (2008).

⁴⁰ However, on 22 April 2008 the Federal Tribunal in Lusanne dismissed a suit brought by Ali Ghaleb Himmat in regard to the imposition of sanctions against him.