Article

ISSN 0927-460X

MERKOURIOS
Utrecht Journal of International and European Law

Asset Freezing: Smart Sanction or Criminal Charge?

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Keywords
Criminal Charge, Smart Sanctions, Asset Freezing, Article 6 ECHR, EU, EC, Terrorism.

Abstract
In this article the question is asked whether asset freezing can be qualified as a criminal charge within the meaning of Article 6 ECHR and if yes, what effects this qualification may have on the legislative framework on so called smart sanctions. By analysing Community and EU law and case law of the European Court of Human Rights, General Court of Instance and Court of Justice of the European Communities the authors give an overview of the notion and possible qualification of asset freezing as a criminal charge. The article further focusses on the consequenses of qualifying asset freezing as a criminal charge under ECHR and EC/EU law and concludes by answering the aforementioned question.

This article is a rewrite of a research paper written under supervision of prof. dr. J.A.E. Vervaele and prof. dr. C.H. Brants (Willem Pompe Institute for Criminal Law and Criminology, Utrecht University School of Law), whom the authors would like to thank for their useful comments and supervision.

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Merko*urios* 2010 – Volume 27/Issue 72, Article, pp. 18-27.
URN: NBN:NL:UI:10-1-100924
ISSN: 0927-460X
URL: www.merkourios.org
Publisher: Igitur, Utrecht Publishing & Archiving Services

"There is something distasteful about a process which begins by convicting someone and then proceeds to inquire whether there is a case against them."

- Lord Archer of Sandwell (UK)

I. Introduction

The 9/11 terrorist attacks have shocked the world. They gave rise to global concerns about security and crime control and also gave great impetus to the idea that global security and the protection against terrorist threats are of greater importance than individual freedom. This has caused a shift in criminal investigations and processes from the judiciary to the executive, and has changed the position of the protection of fundamental human rights therein. At the same time, it has caused changes in the use of coercive measures that are used to combat crimes.[1]

It is this context in which blacklisting and asset freezing should be placed. Asset freezing is one of the so-called *smart sanctions*; it ensures that assets cannot be used by their owner anymore. The aim of the freezing of assets is to prevent terrorist suspects from carrying out their plans and to prevent terrorist financiers to send money to terrorists in order to enable them to carry out their plans. Because the aim is prevention, it is not necessary to be an official suspect of a crime, or that the authorities have started a criminal procedure against the individual or entity. Only a few indications that one may be a terrorist, or that there are links to suspected terrorist organizations or individual terrorists can be sufficient to put a person or entity on the blacklist and have his assets frozen.

But where does this leave fundamental human rights? In practice, targeted individuals or entities can do very little against the action that has been taken against them, while asset freezing causes severe economic disruption and financial hardship on them, their families, on the reputation of the business and its employees, or even on the users of their services.

One of the solutions that could possibly solve the lack of human rights protection in the system of blacklisting and asset freezing, is the full application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention) on these matters.[2] This article will research whether asset freezing can be qualified as a criminal charge under Article 6(1) ECHR and what difference this would make for the procedural rights of the subject.

In order to come to an answer to this question, section two will first deal with the definition of asset freezing and the legislative framework on which it is based. The third section is about the notion of a criminal charge as developed in the case law of the European Court of Human Rights (ECtHR). In addition, this section deals with the notion of 'criminal sanction' under Community law and the usage of the notion of criminal charge in EU law.[3] Finally, the third section deals with case law of the Court of First Instance (CFI) and Court of Justice of the European Communities (ECJ) on anti-terrorism measures to see if there is any indication for the qualification of asset freezing as a criminal charge or criminal sanction. Subsequently, section four deals with the different procedural rights that subjects can derive from the notion of administrative sanction, and the notion of a criminal charge as laid down in Article 6 ECHR. In section five, the information of the previous sections is connected to research whether asset freezing can be qualified as a criminal charge, as laid down in Article 6(1) ECHR, as well as to research the relevant implications this has for the procedural rights of the subject. This article ends with a conclusion.

1 C Brants, 'Developments in the protection of fundamental human rights in criminal process: Introduction', (2009) 1 *Utrecht Law Review* 6, 4.

2 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950. It should be pointed out that a possible negative answer to the question whether asset freezing can be qualified as criminal charge is, however, not the end of the discussion. This article does not refer to the right of property, as laid down in Article 1 of Protocol 1 to the Convention. If asset freezing would not constitute a criminal charge, it is almost incontrovertible that disputes over property fall under the concept of civil rights under Article 6(1) ECHR. In that situation, targeted individuals and entities still have certain procedural rights under the Convention.

3 It should be stressed that this article still deals with the distinction between Community law (First Pillar) on the one hand, and EU law (Second en Third Pillar) on the other hand. Although the Pillar structure has been abolished with the entering into force of the Treaty of Lisbon on 1 December 2009, it is still this legislation that is applicable. Also, the case law of the European Court of Justice (ECJ) and the Court of First Instance (CFI) refers to the legislation that was already applicable before the Treaty of Lisbon entered into force. Only where necessary is reference made to the new Treaty provisions. Furthermore, it should be stressed that the Charter of Fundamental Rights and Freedoms, which has become a binding instrument with the entering into force of the Treaty of Lisbon, is used in this article, because of the fact that several references to this Charter have already been made in previous case law. Last, reference is still made to CFI and ECJ although they are now called General Court and Court of Justice of the European Union.

II. Definition of asset freezing and the legislative framework

The freezing of assets is one of a number of so-called smart sanctions which were introduced as part of the efforts to fight international terrorism. They are called smart sanctions because they target only specific individuals or organizations, with minimal effects for society.[4] They were initially used as a means for sanctioning foreign states, but recently their use has shifted to preventive aims, most importantly the prevention of terrorism.[5] The UN Security Council and the European Union have introduced smart sanctions as an instrument to fight international terrorism.

The UN sanctions take their legal basis from Resolution 1267 of the UN Security Council concerning Al Qaida and the Taliban and associated individuals and entities.[6] This Resolution created the legal basis for the placing of individuals or entities on so-called *blacklists.* It should be borne in mind that it are States, on the basis of their national legislation, that should request the inclusion of an individual or an entity on a blacklist. The inclusion on such a blacklist requires the national authorities to impose sanctions on these individuals or entities; blacklists thus serve as a means to enforce the sanctions. One of the sanctions imposed is the freezing of assets, which includes financial assets such as cash or bank accounts, but also economic assets such as real estate, equipment and vehicles. Freezing means preventing the use, alteration, movement, transfer or access of assets, or in case of economic assets, selling, renting or mortgaging them. The *aim* of asset freezing according to the UN Security Council Sanctions Committee, is to deny the listed individuals or entities the means to support terrorism, by ensuring that no funds are available to them as long as they remain on the blacklists.[7]

In the European Union, this UN Resolution was implemented by EC Regulation 881/2002 which contains the UN list of individuals and entities.[8] The measures contained in this Regulation are identical to those taken by the UN. The EU also created an autonomous 'EU blacklist' in the form of a Third Pillar Common Position, no. 931/2001.[9] This EU instrument thus provides a separate legal basis for the imposition of smart sanctions on EU citizens. Asset freezing is also included as a possible enforcement instrument with regard to subjects listed on this autonomous EU blacklist.

The freezing of assets is, at least in the view of the UN Sanctions Committee, a temporary measure with a preventive aim which allows the State to prevent the owners from having access to their funds. However, these funds remain their property, and access is only restricted for as long as the subject is included on the blacklist; as soon as their name is removed, they will regain access. States are moreover required to prevent, to the extent possible, the undue deterioration of assets.[10]

It is also important to bear in mind that asset freezing is mostly imposed as part of a set of sanctions which also includes travel restrictions and arms embargos. In order for these sanctions to be imposed on a person or entity, his name first has to be included on either the UN or autonomous EU blacklist after a request from a State. It is therefore difficult to analyse asset freezing as a sanction *per se* without taking into account that its imposition needs to be preceded by inclusion on a blacklist.

Finally, one needs to be careful with terminology. The UN and EU institutions refer to asset freezing as a sanction, but often also as a measure. These terms are used almost interchangeably. However, some confusion has been caused by the fact that sometimes a distinction is made between the two terms, and a different meaning is attached to sanctions as opposed to measures. The question of terminology will also be dealt with in section 3.2.

III. The notion of a criminal charge under ECHR and EC/EU case law

1. The notion of a criminal charge under ECHR case law

In order to find an answer to the question whether asset freezing can be regarded as a 'criminal charge' under 6(1) ECHR, it is necessary to have established what this notion comprises. This section deals with the key case law issues on the notion of criminal charge.

4 M Winkler, When Legal Systems Collide: The Judicial Review of Freezing Measures In The Fight Against International Terrorism (2007) *Yale Law School Scholarship Papers 3.*

5 Winkler (n 4).

6 UN Security Council Resolution 1267 (1999), S/RES/1267, clause 14(b).

7 UN Security Council Sanctions Committee, *Asset Freeze: explanation of terms*, < www.un.org> , accessed1 December 2010.

8 Council Regulation (EC) No. 881/2002 of 27 May 2002, imposing certain specific restrictive measures directed against certain persons and entities as sociated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation no. 467/2001 (OJ 29 May 2002, L 139) 9.

9 Common Position 931/2001 (OJ 2001, L 344/93).

10 UN Security Council Sanctions Committee, *Asset Freeze: explanation of terms* 2.

A. *On the notions 'criminal' and 'charge'*

The notion of a criminal charge bears an autonomous meaning, independent of the categorizations employed by national legal systems of the Member States.[11] The same could apply to classifications in the framework of Community or EU law, or international law. Regarding the notion of 'criminal', this means that offences that are not classified as criminal in the national legal order, but rather as regulatory, may still fall under the autonomous notion of criminal. The concept of charge has to be defined within the meaning of the Convention. In several cases the Court held that it may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'.[12]

B. *Criteria applicable to the assessment of the determination of a criminal charge*

Three criteria are used to determine the applicability of Article 6 ECHR.[13] First, the *domestic classification* is of importance. This criterion is of a relative weight: even if national law does not classify an offence as criminal, it may still be regarded as to fall under the notion of a criminal charge. The second criterion, *the nature of the offence*, is the key criterion.[14] The Court has held that a factor that could play a role in the consideration is whether the legal rule is addressed exclusively to a certain group of persons, or of a generally binding character. Also, the Court should look whether that legal rule has a punitive or deterrent effect.[15] The classification of the procedures in other States Parties could be an indication.[16] Two other indicators are of importance, namely whether the proceedings are instituted by a public body which has statutory powers of enforcement and whether the imposition of any penalty is dependent upon a finding of guilt.[17] The third criterion is *the severity of the potential penalty* which the person concerned risks incurring.[18] This is an alternative to the second criterion. It therefore suffices that one of these two requirements is fulfilled.[19] However, if either criterion is by itself not sufficient to amount to the criminal aspect, they can be analyzed together.[20]

2. The notion of criminal sanction under Community law

It is useful to make a small side-step to have a look at the case law on what constitutes a criminal charge under Community law. The ECJ has always kept silent about the term 'criminal charge', which is used by the European Court of Human Rights, but instead refers to a 'criminal sanction'. This is not surprising, for it is only the ECtHR that can interpret the Convention and the ECJ cannot interfere with the case law of the ECtHR. It should furthermore be emphasized that the concept of 'criminal charge' comes to play already in an early phase of the criminal procedure: the protection stretches from the moment a person receives an official notification from the competent authority of an allegation that he has committed a criminal offence up until the final determination, while the criminal sanction only comes to play at the end of the criminal procedure. Thus, the ECJ puts the starting point for obtaining of certain procedural rights in a later phase of the proceedings, but these rights should also be provided to the individual or entity *before* the determination of a criminal sanction. Concluding, although the starting points of the procedural rights are different in the notions of a criminal charge and a criminal sanction as used by the ECtHR and ECJ, the rights apply both before the final ending of the procedure. It can thus be helpful to verify if there is any indication in Community law and the notion of criminal sanction that could lead to the conclusion on the question whether asset freezing can constitute a criminal charge under Article 6(1) ECHR.

The legal terminology in Community law implies that there is a clear-cut distinction between criminal and administrative sanctions, although in practice this distinction is not so obvious at all. Of course, this separation has to do with the little criminal law competences that the Community institutions have in the framework of the First Pillar. Due to the lack of enforcement of Community legislation by the Member States over the past decades and the fact that the Community has

11 *Adolf v. Austria* ECtHR (26 March 1982) Appl. no. 8269/78 para. 30.

12 See for instance: *Deweer v. Belgium* ECtHR (27 February 1980) Appl. no. 6903/75, para. 42, 46; *Eckle v. Germany* ECtHR (15 July 1982) Appl. no. 8130/78 para. 73.

13 *Engel and Others v. the Netherlands* ECtHR (8 June 1976) Appl. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, para. 82, 83.

14 *Jussila v. Finland* ECtHR (23 November 2006) Appl. no. 73053/00 para. 38.

15 *Bendenoun v. France* ECtHR (24 February 1994) Appl. no. 12547/86, para. 47; the Court also held this in *Öztürk v. Turkey* ECtHR (28 September 1999) Appl. no. 22479/93 para. 53.

16 *Öztürk v. Turkey* ECtHR para. 53.

17 *Benham v. the United Kingdom* ECtHR (10 June 1996) Appl. no. 19380/92 para. 56.

18 *Campbell and Fell v. the United Kingdom* ECtHR (28 June 1984) Appl. no. 7819/77; 7878/77 para. 72; *Demicoli v. Malta* ECtHR (27 August 1991) Appl. no. 13057/87 para. 34.

19 *Öztürk* (n 15) para. 54.

20 *Bendenoun v. France* (n 15) para. 47.

basically no competences in the imposition of criminal sanctions in the First Pillar, administrative sanctions have gained increased importance in this respect.[21]

There is, however, doubt as to the nature of these administrative sanctions: should they be seen as punitive sanctions to punish the offenders or as preventive or reparative sanctions, ie to ensure obedience to Community law in the future? There is some confusion on the terminology here. Sometimes, administrative sanctions are distinguished from administrative measures.[22] Administrative measures are then reparative or preventive in nature and aimed at recovering benefits unduly received, while administrative sanctions are characterized as punitive. If this distinction applies, the administrative sanctions, which are also called administrative wrongs and are in essence not very different in nature from criminal sanctions, require stricter rules than administrative measures.[23] Yet, it also seems that the terms measures and sanctions are mixed up sometimes.[24] The terms measures and sanctions are then used interchangeably and it is not immediately clear whether the administrative measures or sanctions are reparative, preventive, or repressive in nature.

The ECJ has not been very willing to concern itself with the distinction between administrative sanctions and criminal sanctions. It is even explained by Advocate-General Saggio that: '[i]n general, it must be noted that the Court has never found it necessary to define specifically the nature of the European Community's power to impose penalties and has avoided distinguishing between administrative penalties and criminal penalties.'[25] The Court has explicitly excluded the fines imposed by the Commission in competition law matters as having a criminal nature.[26] In its 1992 landmark ruling, *Germany v. Commission*, the Court stated that the Community is competent to prescribe administrative sanctions that have a punitive character, but at the same moment it denied that these sanctions amount to criminal sanctions.[27] Later case law has confirmed this landmark ruling.[28] By denying the criminal character of administrative sanctions, the ECJ has a very narrow concept of what constitutes a criminal sanction, which is actually different from the case law of the ECtHR that has a broad and autonomous concept of criminal charge.

3. The notion of a criminal charge under EU law

We have seen that the ECJ has developed the notion of a criminal sanction in its extensive First Pillar case law. It is important to point out that in EU-related matters (ie the Second and the Third Pillar before the entry into force of the Treaty of Lisbon), the ECJ has not applied the Community law notion of a criminal sanction, nor has it developed a new, similar notion.

The first reason is that the ECJ only had little or no jurisdiction in the framework of the Second and Third Pillar.[29] The second reason is the reference in Article 6(2) TEU to the fundamental rights guaranteed by the ECHR. Therefore, in EU-related judgments, the ECJ has mostly referred to Article 6 ECHR and its corresponding notion of criminal charge. A good example is to be found in the famous *Pupino* judgment.[30] In this case the ECJ expressly acknowledged that Article 6(2) TEU should be interpreted in accordance with the case law of the ECtHR.[31] It has been pointed out that the rationale of this reference is that the ECJ tries to avoid different standards of protection for individuals in criminal proceedings.[32]

21 K Ligeti 'European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law' (2000) *Acta Juridica Hungarica* 199-212 at 202.

22 See for instance: Council Regulation 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 23 December 1995, L 312, 1-4), which makes a distinction between administrative *measures* and administrative penalties.

23 Ligeti (n 21) 204; M Zuleeg, 'Enforcement of Community Law: Administrative and Criminal Sanctions in a European Setting', in: JAE Vervaele, *Compliance and Enforcement of European Community Law* 349-360, at 355.

24 For instance with regard to the imposition of smart sanctions through Community regulations, which are also called "restrictive measures" at the same time.

25 Opinion Advocate-General Saggio of 16 June 1999 in: *Molkereigenossenschaft Wiedergeltingen eG v Hauptzollamt Lindau* ECJ EC (6 July 2000) Case C-356/97, *M*, 2000 ECR I-5461.

26 See for example *Tetra Pak International SA v Commission of the European Communities* CFI (6 October 1994) *T*, [1994] ECR I-755; *CF Chemiefarma NV v. Commission* ECJ EC (15 July 1970) Case 41/69, *A*, [1970] ECR I-661.

27 *Germany v. Commission* ECJ EC (27 October 1992) Case C-240/90 [1992] ECR I-5383.

28 See for instance: *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas* ECJ EC (11 July 2002) Case C-210/00 [2002] ECR I-6453 para. 29.

29 Article 35(2) TEU (old); Article 35(5) TEU (old).

30 *Criminal Proceedings against Mario Pupino* ECJ EC (16 June 2005) Case C-105/03 [2006] ECR I-5285.

31 *Pupino* (n 30) para. 58-59.

32 S Lorenzmeier 'The Legal Effect of Framework Decisions – A Case-Note on the Pupino Decision of the European Court Of Justice', (2006) *Zeitschrift für Internationale Strafrechtsdogmatik* 583 – 588 at 587.

4. ECtHR and anti-terrorism sanctions: any indication of qualification as a criminal charge?

Although the ECtHR has emphasized the importance of combating terrorism and the legitimate right of democratic societies to protect themselves against the activities of terrorist organizations over the years, there is only little case law on anti-terrorism measures and the relation to Article 6 ECHR.[33] The only relevant case here is the *Segi* judgment, which deals with the judicial protection offered by the ECtHR to individuals blacklisted or targeted by smart sanctions. Segi, a Basque youth organization, was put on a blacklist that was annexed to an EU Common Position, because it allegedly had connections with the Spanish separatist organization ETA. It complained to the ECtHR that, among others, Article 6 ECHR on the right to a fair trial had been violated, more specifically that its right to the presumption of innocence had been flouted. The ECtHR held that the complaints were inadmissible, on the basis that the two organizations were not (yet) victims within the meaning of the Convention. They were blacklisted, but no measures were taken against them since the Member States were only obliged to intensify their international cooperation.[34] This could have been different if the organizations were not solely listed in the annex of a Common Position, but also confronted with smart sanctions pursuant to an EC Regulation.[35]

This case illustrates the reluctance of the ECtHR to adjudicate on matters related to EU institutions and questions of Community law. The most famous example is the *Bosphorus* case in which the ECtHR held that it would not review EC law, as the protection of fundamental rights by the EC is considered to be 'equivalent' to that of the Convention system.[36] It created a high threshold and held that only in case of a 'manifest deficiency' this requirement of equivalence will not be met; only then could the ECtHR review EU acts.[37]

Hence, in the case law of the ECtHR there seems to be no indications of qualification of anti-terrorism sanctions as a criminal charge.

5. CFI and ECJ case law and anti-terrorism sanctions: any indication of a qualification as a criminal charge or a criminal sanction?

The CFI and the ECJ have on a number of occasions been called upon to adjudicate on the matter of smart sanctions and the rights of the person subject to it. Even though the Courts do not use the term criminal charge, it is clear from case law that in these cases a distinction is made between criminal and administrative sanctions, and that this distinction has consequences for the procedural rights of the subject.

As will be explained below, this distinction was for the first time made explicit in the *El Morabit* judgment.[38] Yet, already before this judgment was delivered, both the ECJ and CFI had adjudicated upon the procedural rights that need to be observed in the context of blacklisting and smart sanctions. Most noteworthy are the *Kadi and Al Barakaat*, and the two *OMPI* judgments.[39]

In its famous *Kadi* judgment, the Court of Justice made explicit that the principle of effective judicial protection is also applicable in cases where a person is placed on a blacklist and restrictive measures are imposed on him.[40] The Court further stated that a Community authority is bound to communicate to the person or entity concerned the grounds on which the inclusion is based. Even though for reasons of effectiveness this authority cannot be required to communicate these grounds *before* the inclusion on a list, a 'sufficient measure of procedural justice' must be accorded to the individual, including a right to be heard.[41]

33 UNODC, *Jurisprudence of the European Court of Human Rights related to Terrorism* <https://www.unodc.org/tldb/en/case-law-of-the-european-court-of-human-rights-related-to terrorism.html> accessed: 1 December 2010.

34 I Cameron, 'European Union Anti-Terrorist Blacklisting' (2003) *Human Rights Law Review* 225-256, at 231-232; I Tappeiner, 'The fight against terrorism. The lists and the gaps' (2005) *Utrecht Law Review* 97-125, at 117.

35 Cameron (n 34) 232.

36 *Bosphorus* ECJ EC (30 July 1996) Case C-84/95 ECR I-3953.

37 *Bosphorus v. Ireland* ECtHR (30 June 2005) Appl. no. 45036/98.

38 *El Morabit v. Council* CFI (2 September 2009) joined cases T-37/07 and T-323/07 ECR I-0000.

39 See also: *Gestoras Pro Amnistía and Others v. Council* ECJ (27 February 2007) case C-354/04P ECR I-1579; *Segi and Others v. Council* ECJ (27 February 2007) case C-355/04P ECR I-1657.

40 *Kadi and Al Barakaat v. Counci* ECJ (3 September 2008) joined cases C-402/05 P and C-415/05 P [2008] ECR, I- 0000, para. 335. For further reading: C Eckes, 'Judicial review of European anti-terrorism measures – The Yusuf and Kadi judgments of the Court of First Instance' (2008) 14 *European Law Journal* 74 et seq; V. Azarov and F. C. Ebert, 'All done and dusted? Reflections on the EU standard of judicial protection against UN blacklisting after the ECJ's *Kadi* Decision' (2009) 5 *Hanse Law Review* 205-224.

41 *Kadi and Al Barakaat* (n 40) para. 344 and 353.

The Court of First Instance elaborated the question of procedural rights in relation to asset freezing more thoroughly in the *OMPI* case.[42] The Court states that it is not contested that the obligation to state reasons is fully applicable with regard to the freezing of funds.[43] The right to effective judicial protection is stated to apply 'particularly' to freezing of funds. This means, according to the Court, that the people or entities concerned enjoy a right to be heard, but that at the Community level this right is fairly limited, since the Community authorities have only limited obligations to support their decisions with evidence; this obligation lies mainly with the national authorities.[44] The Court repeated its statements in the second *OMPI* case.[45] In this case, the Court condemned the Council for not having communicated new evidence for the inclusion on the list to the concerned organisation. The Court stressed the importance of providing the people or entities concerned with a statement of reasons for the purpose of making effective judicial review possible.[46]

From this case law it is clear that the effective judicial protection must apply in cases regarding smart sanctions. Both the ECJ and CFI cases, however, do not say anything about the criminal or administrative character of the sanctions.

This distinction was first made explicit in the CFI judgment in *El Morabit*.[47] In this case, the defendant invoked the presumption of innocence on the grounds that the conviction which was the basis for his inclusion on the blacklist was not yet final. The CFI did not accept this argument. It held that the presumption of innocence does not prevent the imposition of a precautionary measure with a preventive aim, *such as asset freezing*, since these are not sanctions and do not entail a decision of guilt.[48] The imposition of such a measure is not a determination that an infringement has indeed taken place, but is merely imposed within an *administrative procedure* which is purely preventive and nature and enables the Council to effectively counteract terrorism.[49]

With this statement, the CFI appears to draw a distinction between sanctions that are of a criminal nature, which entail a statement of guilt, and sanctions that are imposed within an administrative procedure, which do not. Asset freezing is clearly considered to fall within the latter category. What is interesting is that the Court uses the term *sanction* in a different manner here. While in other judgments such as *Sison* the Court uses the terms *sanction* and *measure* interchangeably,[50] the Court in *El Morabit* clearly states that asset freezing is not a sanction, thereby making clear that a sanction has its own distinct meaning. Despite the fact that the Court does not define this concept any further, it may be concluded from the second criterion, that there is no determination of guilt and that by sanctions the Court means punitive or criminal sanctions. However, since it is the first time that the Court explicitly distinguishes between the two, it is difficult to determine the exact meaning of the Court's statement. Nevertheless, it is clear that the Court attempts to remove asset freezing from the criminal 'sphere' and that it clearly regards freezing measures as a part of administrative procedures.

IV. The possible consequences of qualification as a criminal charge

It is meaningless to assess whether asset freezing can be qualified as a criminal charge within the meaning of Article 6 ECHR unless it is clearly established that this qualification would have practical consequences in terms of the rights of the individual or entity who is subjected to this measure. This section analyses the differences between the protection enjoyed under Article 6 ECHR and the procedural guarantees that exist under EC/EU law with regard to criminal sanctions. Since an exhaustive discussion of all procedural guarantees that exist under the ECHR would be too comprehensive for the purposes of this article, this section outlines the most important differences. The aim is to show that qualification of asset freezing as a criminal charge would indeed make a difference with regard to procedural rights of the subject.

The most obvious difference is the difference in the degree to which procedural rights have been developed in case law. Article 6 ECHR has been developed extensively in a great number of cases. In this case law, the ECtHR has formulated a great number of concrete rules that emanate from Article 6. With regard to administrative sanctions under EU law, these rules have been formulated much more broadly and are less specific. The most important differences are the following.

42 *Organisation des Modjahedines du Peuple d'Iran* CFI (12 December 2006) case T-228/02, *(OMPI 1)* [2006] ECR II-4665.
43 *OMPI 1* (n 42) para. 109.
44 *OMPI 1* (n 42) para. 114 and onwards.
45 *Organisation des Modjahedines du Peuple d'Iran* CFI (4 December 2008) case T-284/08, *(OMPI 2)* [2008] ECR II-0000.
46 *OMPI 2* (n 45) para. 45.
47 *El Morabit v. Council* CFI (2 September 2009) joined cases T-37/07 and T-323/07, ECR I-0000.
48 *El Morabit* (n 47) para. 43.
49 *El Morabit* (n 47) para. 44.
50 *Sison v. Council* CFI (30 September 2009) case T-341/07 [2009] ECR II-0000 para. 97.

A. *The right to a fair and public hearing by and independent and impartial tribunal*

While this principle has been at the core of ECtHR case law, ECJ case law only refers to the right to a fair hearing.[51] With regard to administrative sanctions, this entails a hearing by the administrative authority that also imposes the sanction, while the ECHR explicitly calls for a hearing by an independent and impartial tribunal, which is a clear difference.[52] Also, the requirement of a *public* hearing does not appear in the ECJ's case law. The current procedure with regard to freezing measures is that subjected people have a right to make their views known, but only to the authority that also imposes the sanction (the national authorities and, to a limited extent, the European Council), which is of course in no way independent or impartial in the procedure. Only after imposition do they have access to a Court.

B. *The presumption of innocence*

This procedural safeguard, which has been much debated in the CFI's case law, it perhaps the most pivotal. The presumption of innocence is a fundamental principle of criminal procedure which has been laid down in Article 6(2) ECHR. It has been extensively developed by the ECtHR, and many more specific rights have been derived from it, most notably the right not to incriminate oneself and the right to remain silent.[53] These principles are not found in the ECJ's case law with regard to administrative sanctions; indeed, the Court of First Instance has ruled explicitly on this matter with regard to asset freezing, and has concluded that the current procedure does not violate the presumption of innocence.[54] This principle currently only plays a role at the national level, and has only very limited application at the European level. If asset freezing would be considered a criminal charge, this principle would apply which would mean that the procedure would have to change dramatically. For one, the subject would have to be notified of the reasons *before* the imposition of a sanction, after which he would have to be heard. Other safeguards would also have to be put in place; for example, a caution would need to be given to inform the subject of his rights.

C. *Right to legal assistance*

The ECJ case law also contains no mention of a right to legal assistance, unlike in ECtHR case law, in which it has been developed as part of the right of access to a court as enshrined in Article 6 ECHR.[55] It is mentioned now in the Charter of Fundamentel Rights and Freedoms (EU Charter), but as explained, it is uncertain whether this will actually be applied to administrative sanctions.

D. *Ne bis in idem*

The right not to be prosecuted twice for the same offence, the *ne bis in idem* principle, is also an essential component of criminal justice. It has been laid down in Article 4 of the Seventh Protocol to the ECHR, although this protocol has a restricted application.[56] However, it is not mentioned anywhere with regard to administrative sanctions or measures under EC/EU law. The EU Charter does contain a provision on *ne bis in idem*, but it is likely that that provision will only apply to criminal accusations and a criminal trial.[57] In the current situation the principle is not applied to administrative sanctions and is not mentioned in the case law on this point. This is not surprising, since asset freezing is not preceded by a trial but imposed as a preventive measure. Were asset freezing to be qualified as a criminal charge, this would have serious consequences. For one, it is unclear how the principle of *ne bis in idem* would apply in the vertical relationship between the EU/EC and the

51 *Bolloré* ECJ EC (26 April 2007) joined cases 109/02, T 118/02, T 122/02, T 125/02, T 126/02, T 128/02, T 129/02, T 132/02 and T 136/02 [2007] ECR I-947 para. 143. The ECJ here refers to several other cases: *Baustahlgewebe v. Commission*, paragraphs 20 and 21; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v. Commission* [2003] ECR I-8375 para. 179; *Thyssen Stahl v. Commission* para. 154; *Sumitomo Metal Industries and Nippon Steel v. Commission* para. 115.

52 P Mahoney, 'The Right to a Fair Trial In Criminal Matters Under Article 6 E.C.H.R.' (2004) *Judicial Studies Institute Journal* 107-129 at 117; See for instance: *Hauschildt v. Denmark* ECtHR (24 May 1989) Appl. no. 10486/83, where a trial judge had also made pre-trial decisions about the applicant.

53 *John Murray v. United Kingdom* ECtHR (8 February 1996) Appl. no. 18731/91; Mahoney (n 52) 107-129. See in this respect for instance: *Allenet de Ribemont v. France* ECtHR (10 February 1995) Appl. no. 15175/89. See for instance: *Saunders v. United Kingdom* ECtHR (17 December 1996) Appl. no. 19187/91.

54 *El Morabit* (n 47) para. 43.

55 *Edwards v. United Kingdom* ECtHR (16 December 1999) Appl. no. 13071/87, para. 33-34; *Rowe and Davis v. United Kingdom* ECtHR (16 February 2000) Appl. no. 28901/95 para. 59; and *Janatuinen v. Finland* ECtHR (8 December 2009) Appl. no 28552/05 para. 40; *Hadjianastassiou v. Greece* ECtHR (16 December 1992) Appl. no 12945/87.

56 Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984.

57 A Eser, 'Human Rights Guarantees for Criminal Law and Procedure in the EU-Charter of Fundamental Rights' (2009) *Ritsumeikan Law Review* 185.

Member States: if a person or entity is convicted of terrorist financing at the national level, and subsequently their assets are frozen by the Council, would this entail a violation of the principle? This is questionable, since, for example in the field of competition law, the imposition of fines by both the European Commission and by a national competition authority is not considered a violation because of the shared jurisdiction between national authorities and the Commission.[58]

V. Can asset freezing be qualified as a criminal charge?

1. Preliminary remarks

As has been explained, the term 'criminal charge' refers to the official notification given to a person or entity of the allegation that he has committed a criminal offence. Some attention must be devoted here to the 'notification' aspect with regard to asset freezing. As has been explained above, no notification is given to listed individuals before sanctions are imposed on them. Moreover, asset freezing is imposed automatically after a person's name is included on a blacklist. Since inclusion is a necessary prerequisite for the freezing of assets, it is questionable whether the link with the notification should instead be sought in the blacklisting of an individual, rather than the subsequent freezing of assets.

It must be pointed out that the requirement of notification is not as absolute as it seems; in some cases, the imposition of the sanction itself may be seen as the charge, when no prior notification has been given. It would of course make no sense if a public authority could avoid the application of Article 6 ECHR simply by not notifying the person concerned.

The connection with blacklisting is more difficult. While blacklisting is the first 'notification' to a subject of the alleged offence, blacklisting as such is not considered to be a sanction.[59] It is the measure that is subsequently imposed that has effects on the functioning of the listed person or entity. So, asset freezing is only imposed after a person is blacklisted, while blacklisting in itself has no effect. With regard to the research question of this article, blacklisting and asset freezing must together be considered to constitute a sanction of which it must be determined whether they can constitute a criminal charge.

2. Asset freezing and the criteria of a criminal charge

This section deals with the question whether, on the basis of the criteria elaborated in section 3.1, asset freezing can be qualified as a criminal charge within the meaning of Article 6 ECHR.

First of all, the *domestic classification of the offence* needs to be examined. This is difficult because of the fact that while the legal basis for the freezing of assets lies in UN and EU law, the basis for the inclusion of a person or entity on a blacklist lies in domestic law of the Member States. After all, it is the Member State that decides whether there are sufficient reasons for listing an individual or entity and that requests the blacklisting; the Council only performs a limited test to see whether there is reliable evidence or whether there are any indications. The national basis for the listing of an individual or entity might be a definitive conviction by a national court, but it might also be the instigation of a criminal investigation against it. This conviction or investigation will be based on the national legal provisions that criminalize terrorist activities. The problem here is that while the underlying offence will under national law probably often be qualified as criminal, the measures at EU level are consistently classified as administrative.

When looking at the *nature of the offence*, the same problems occur, since again the reasons for listing of an individual or entity differ according to their classification under the domestic law of the Member State which has proposed the individual or entity as a candidate for blacklisting. While the legal basis will often be found in the sphere of aiding and abetting terrorist activities, there is no generally binding rule which determines the criteria for imposition of asset freezing or other sanctions. This aspect has been formulated as a possible factor in *Bendenoun v. France*.[60] Blacklisting, and the sanctions that are attached to it, are by their nature imposed on an individual basis. Very few guidelines exist, and the case law from the European Courts also does not provide for general rules.

The third criterion that plays a role in the determination is the *effect and aim* of asset freezing. The UN Sanctions Committee and the European Council consistently refer to asset freezing as a preventive measure. It is impossible, at least within this article, to examine whether asset freezing does indeed have a preventive effect, but if it can be proven that the concerned assets are used to finance terrorist activities, it is likely that their freezing will prevent this from happening. However, in the

58 *Kyowa Hakko Kogy v. Commission* CFI (9 July 2003) Case T-223/00 [2003] ECR II-2553.

59 *Sison* (n 50).

60 *Bendenoun v. France* ECtHR (24 February 1994) Appl. No 12547/86.

assessment of the ECtHR it is important whether a sanction has a punitive effect. In this respect, many authors have pointed to the severity of the sanction of asset freezing and to the impact it has on the subject's functioning in society. There is little doubt that asset freezing is indeed very severe. The question is whether this means that it has a punitive effect, and whether this punitive effect prevails over the preventive effect. It is of course very difficult to give a definite answer to this question without an investigation into the social and psychological effects in practice. What has to be taken into account, however, is that asset freezing is - at least in theory - a temporary measure, which must be lifted when there are no longer any reasons for the individual to be kept on the list. This is ensured by the obligation of the Council to regularly re-evaluate the composition of the list, and the obligation to continuously inform subjects of the reasons for their inclusion on the list. Finally, it must be stressed, as the European Courts have done, that the imposition of asset freezing is not dependent on a finding of guilt, which is a factor of importance in the assessment of the ECtHR.

The parallel with the ECtHR's case law on seizure and confiscation is also relevant here: the ECtHR has held on different occasions that preventive measures such as confiscation do not constitute a criminal charge. Since asset freezing is a comparable instrument - although there are some differences between confiscation and freezing[61] - it is not likely that the assessment of the ECtHR will be different.

For all these reasons, it is debatable whether or not asset freezing has a punitive effect, and if so, whether this is the primary effect of this sanction; opinions in literature vary on this point.[62] Nevertheless, on the basis of the criteria developed by the ECtHR on this point, it cannot be concluded that asset freezing has a punitive effect. This criterion can, therefore, not be decisive for the question whether asset freezing can be qualified as a criminal charge. However, there does not seem to be much disagreement with regard to the severity of the sanction; most authors agree that asset freezing severely disrupts the subject's functioning.[63]

When relying mostly on the third criterion on the (potential) severity of the sanction, it can be concluded that, while not impossible, it is very unlikely that asset freezing will be qualified as a criminal charge. The most important hurdle appears to be the punitive character of asset freezing. Judged by the criteria developed in the case law of the ECtHR it is likely that asset freezing, like confiscation, will be qualified as a preventive measure, and is therefore not seen as a criminal charge.

VI. Conclusion

The question asked in this article is whether asset freezing can be qualified as a criminal charge, and what difference that would make. As to the first part of the question, the answer must be that this seems unlikely, given the criteria developed by the ECtHR in its case law. As to the second part, it is clear that the protection provided under Article 6 ECtHR is still a long way ahead of the procedural guarantees developed in the case law of the ECJ and CFI. One interesting element in this regard is the presumption of innocence, which exists in both ECtHR and ECJ case law, but which the CFI has declared to be inapplicable in the case of asset freezing. It will be interesting to see whether this ruling will be upheld in future judgments.

The question about the nature of an EU-imposed sanction would at one time have appeared academic, but has become highly relevant after the entry into force of the Treaty of Lisbon, which provided the possibility for the EU to accede to the ECHR. This means that conformity of EU sanctions with ECHR case law will become a matter of great importance since the ECtHR will, depending on the details of the EU's accession to the Treaty, have the jurisdiction to rule on the compatibility of EU acts with the Treaty. This will provide an incentive for the EU to rethink some of its policies, especially regarding sanctions. All eyes are now on the ECtHR to see whether it will step up to its responsibilities. ■

61 World Bank, (2009) *Combating Money Laundering and Terrorist Financing* 20-21.

62 See for instance: A Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States. An Overview' (2006) *Journal of International Criminal Justice* 2006 1044-1073; BT Van Ginkel and R.A. Wessel, 'VN-sancties en het individu: wordt de Veiligheidsraad slimmer?' (2002 *Jaarboek van Vrede en Veiligheid* 19-40; J Hoffmann, 'Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test' (2008) *Constellations* 543-560; L. Van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual', (2007) *Leiden Journal of International Law* 797-807.

63 M Bothe, 'Security Council's Targeted Sanctions Against Presumed Terrorists: The Need to Comply with Human Rights Standards' (2008) *Journal of Inter national Criminal Justice 6,* 541-555; I Cameron, '*The European Convention on Human Rights, Due Process and United Nations Security Council Counter- Terrorism Sanctions*' (6 February 2002) Report prepared for the Council of Europe; I Cameron, *Targeted Sanctions and Legal Safeguards*'. Report for the Swedish government, 2002; J Hoffmann, 'Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test' (2008) *Constellations* 4, 543-560.