EU asylum procedures and the right to an effective remedy

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10 The use of secret information in asylum cases

In some asylum cases (part of) the establishment of the facts is based on evidence gathered by the authorities, which is not made available to the asylum seeker concerned or his legal representative. This information may be kept secret for several reasons. State-authorities may refuse to reveal the identity and function of the sources of the information in order to protect those sources or the international relations with the country of origin of those sources.[1] Furthermore States may want to protect the methods they use for assessing the credibility of individual asylum accounts. In some Member States legal advisors may not have access to country of origin information relied on by the determining authority.[2] Finally information may be kept secret for national security reasons.[3] Member States generally do not disclose information regarding investigations into terrorism or organised crime in asylum or expulsion proceedings.

The fact that a person is involved in terrorism may lead to a risk of *refoulement* upon return in his country of origin.[4] Information concerning this person's terrorist activities may thus be relevant for the assessment of the risk of *refoulement*. However, information regarding the danger of an asylum seeker for national security of the State in which he claimed asylum cannot be included in the question whether a person is in need of protection on the basis of the EU prohibition of *refoulement*. The ECtHR ruled several times that the risk of a violation of Article 3 ECHR upon expulsion cannot be balanced against national security concerns. Therefore, national security concerns and evidence substantiating such concerns cannot lead to the refusal of protection against *refoulement*. Furthermore they cannot justify a limitation of the right to an

1 In the Netherlands the identity of some sources which provided information for country of origin information reports or reports by the Ministry of Foreign Affairs regarding an asylum seeker's life or activities in his country are kept secret.

2 The Commission mentions Lithuania and Spain as examples. Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 8 September 2010, COM(2010) 465 final, p 8.

3 According to the Commission evaluation of the Procedures Directive of September 2010, limitations to the right of access to the file for legal representatives (Art 16 PD) on national security grounds are applicable in Greece, Cyprus, Lithuania, Ireland, Spain, the Netherlands and the United Kingdom. Commission Report COM(2010) 465 final, p 8.

4 See for example ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06.

effective remedy against a decision on the existence of a risk of *refoulement*.[5] As the Court of Justice respects the ECHR when interpreting EU asylum law, it should be assumed that the same applies to the EU prohibition of *refoulement*.

National security concerns may play a role in the decision whether a person may be excluded from an EU refugee or subsidiary protection status. According to EU law a person may be excluded from such a status, because there are serious reasons for considering that he committed a serious crime or because of his current involvement in terrorist or other criminal activities.[6] Secret evidence substantiating such serious reasons or such involvement may thus be used in the assessment of a person's EU right to an asylum status and affect his procedural rights.[7] As decisions regarding the exclusion of a person from an asylum status fall outside the scope of this study, they will not be specifically addressed in this chapter.[8] However the conclusions drawn in this chapter are also relevant for these decisions.

For the person concerned it is very difficult to challenge a decision, which is based on secret information or on information of which the sources are not known to him. It is therefore often argued that the right to adversarial proceedings and the principle of equality of arms are violated in these cases. Sometimes also the court reviewing the decision does not get access to (all) the information underlying the challenged decision, which affects the effectiveness of judicial review. Under EU law several other rights and principles play a role in cases concerning secret information such as the right of access to the file, the right to be heard and the duty to state reasons, which are all interlinked.[9]

A separate chapter on the issue of the use of secret evidence is included in this book, because in the case-law regarding this issue the three basic notions discussed in section 4.5 clearly come to the fore. The most apparent aspect in cases concerning secret information is that the interests of the party concerned to adversarial proceedings and equality of arms must be balanced against the interests of the State and/or third parties to keep certain information secret. Secondly it is accepted particularly in the case-law of the ECtHR that limitations to the right to adversarial proceedings may be justified, as long as they are counterbalanced by using compensation techniques such as special advocate proceedings. The question whether the Convention has been violated thus depends on the fairness or effectiveness of the procedure seen as a whole. Finally, the nature of the case seems to determine the level of procedural guarantees required in a case.

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5 See ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06 and ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom,* no 22414/93.

6 Artt 12 (2), 14 (4a) and 17 QD.

7 See for example Bliss 2000, pp 120-123.

8 See section 1.5.

9 See also section 4.2.

In this chapter it will be argued that although EU legislation, in particular the Procedures Directive, allows for the use of secret information in asylum cases, the Member States' discretion is limited by the EU right to be heard, the duty to state reasons and the right to effective judicial protection. The explicit possibility left open by the Procedures Directive to withhold relevant information to the national court deciding the appeal against a negative asylum decision clearly infringes the right to effective judicial protection and should therefore be considered void.

The two main sources addressed in this chapter are the case-law of the Court of Justice and Court of First Instance/General Court and that of the ECtHR. The EU Courts addressed the use of secret evidence mainly in competition cases and cases regarding EU sanctions for persons and entities included in terrorist lists. The ECtHR has ruled on this issue in very different cases, regarding civil rights and obligations, criminal charges, secret surveillance, detention and expulsion. It will be shown that the case-law of these courts on the one hand show clear parallels and at the same time complement each other. In this chapter an attempt is made to derive from this case-law one set of procedural standards for asylum cases in which secret evidence is used.

10.1 THE USE OF SECRET INFORMATION UNDER EU LAW

Article 41 of the Charter includes 'the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy'. The right of access to the file had already been recognised as a general principle of EU law by the EU Courts. According to the EU Courts the right of access to the file is 'one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively'.[10] The right of access to the file is also linked to the obligation to state reasons and the right to an effective remedy as well as to the principles of equality of arms and adversarial proceedings. In all proceedings in which sanctions are imposed the rights of the defence must be respected in administrative as well as appeal proceedings.[11]

10 Case T-53/03 *BPB v Commission* [2008], para 31, Case T-170/06, *Alrosa v Commission* [2007], para 197 and Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 69.

11 Case T-53/03, *BPB v Commission* [2008], para 40, Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 69, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 94.

EU asylum legislation

Article 16 PD explicitly accepts that the asylum applicant and his legal representative, and in cases concerning national security, also the court or tribunal examining the appeal against a negative asylum decision, may be refused access to (part) of the file underlying the asylum decision. This suggests that the asylum decision may be (partly) based on secret information. Article 16 (1) PD provides that the legal representative may be refused access to information in the asylum seeker's file, where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question shall be available to the authorities (a court or tribunal) which provide the effective remedy required by Article 39 PD. The access of the court or tribunal to this information may however be precluded in cases of national security.

Article 4 QD does not mention the use of evidence which is not or partly disclosed to the asylum applicant. Noll states however that the the examining authorities' obligation to assess the relevant elements of the asylum claim in cooperation with the applicant laid down in Article 4 (1) QD, may imply that classified investigative material which cannot be shared with the applicant must be excluded from the basis for a decision in the case.[12]

The EU Courts case-law

The EU Courts have applied the right of access to the file and its related rights and principles in cases concerning several, very different fields of EU law. In all these cases, the EU Courts seems to apply the same standards. The case-law developed under the right of access to the file in one field of EU law should therefore be considered relevant for other fields of EU law, including asylum law.[13] The CFI for example referred in its judgments concerning EU measures freezing the funds of persons or organisations suspected of involvement in terrorist activities to its earlier case-law in competition law cases. Violations of the right of access to the file and the rights of the defence are assessed on

12 Noll 2005-II, p 7.

13 See also Craig who states with regard to Case T-42/96, *Eyckeler* [1998], which concerned customs decisions: 'The ease with which the CFI reasoned by analogy from competition to customs, signifies the generalization of access to the file as an aspect of the right to be heard, irrespective of the subject-matter area in question, and this is in accord with the formulation in the Charter of Fundamental Rights'. Craig 2006, p 367.

a case by case basis,[14] which gives the EU Courts the opportunity to take the nature of the case into account.[15]

Most of the case-law which will be discussed below concerns decisions of the EU institutions which were reviewed by the CFI or the General Court and (in some cases) eventually by the Court of Justice. In asylum cases it is the national courts which are confronted with decisions which are (partly) based on confidential information. It may be assumed that the CFI's case-law regarding the right of access to the file is also relevant for national courts dealing with decisions based on confidential information.[16] The EU rights and principles applied in these cases such as the rights of the defence and the right to an effective remedy also apply in the national context. Furthermore as will be shown in section 10.2.1.4 that the Court of Justice seems to apply similar standards to procedures before the EU courts and the national courts.

The EU Courts have recognised in their case-law that the right of access to the file is not absolute. EU Institutions may refuse to disclose documents containing business secrets, internal documents, and information which should remain confidential in order to protect the sources that provided these documents or this information or for reasons of national security. In those situations the interests in not disclosing relevant information must be balanced against the rights of the defence.

The EU Courts sometimes refer to the case-law of the ECtHR when addressing the right of access to the file and the rights of the defence.[17] Furthermore the CFI and the Court of Justice have indicated that national procedures in which confidential information plays a role must comply with the requirements following from Article 6 ECHR.[18] The references to the ECtHR's case-law are however quite random and incomplete. Nonetheless there exist clear parallels between the EU Courts' case-law and that of the ECtHR. It is conceivable that

14 The CFI states in Case T-53/03, *BPB v Commission* [2008], para 33: 'According to the case-law, an infringement of the rights of the defence cannot be founded on a general argument but must be examined in relation to the specific circumstances of each particular case'.

15 See for example Case T-221/95, *Endemol v Commission* [1999], para 68, where it considered that the principles following from the case-law concerning the right of access to the file in competition cases also apply to concentration cases examined under Regulation 4064/89, 'even though their application may reasonably be adapted to the need for speed, which characterises the general scheme of that regulation'.

16 In her opinion with Case C-450/06, *Varec* [2008], para 61, A.G. Sharpston stated that the pragmatic solution found by the CFI in a case in which confidential evidence was used and the CFI's rules of procedure, cannot constitute any binding precedence for a national court. However she considered 'that they provide helpful practical guidance as to the approach to be taken, which must conform with the rules applicable to that court in so far as they do not conflict with any higher norm'.

17 See for example Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 344 and Case T-228/02, *Modjahedines du peuple d'Iran v Council* [2006], paras 119 and 158.

18 Case C-450/06, *Varec* [2008], paras 44-48 and Case T-47/03, *Sison v Council* [2007], para 166

in the future the ECtHR's case-law will help the EU Courts to fill in some of the existing gaps in their jurisprudence concerning the use of confidential information. Section 10.3 will address the ECtHR's case-law quite extensively, in order to understand which minimum standards are set by this Court.

The case-law which will be addressed in this chapter is divided into two parts. Section 10.2.1 discusses the case-law concerning economical issues, mostly competition law. Section 10.2.2 examines the case-law regarding EU measures freezing the funds of persons and entities suspected of involvement in terrorist activities. Confidential information may also play a role in other fields of EU law such as customs decisions or civil service cases. I chose to limit this chapter to competition cases and terrorism cases. In competition cases the EU Courts developed a comprehensive body of case-law concerning the right of access to the file. In terrorism cases, as in asylum cases, the limitation of the right of access to the file for reasons of national security plays an important role.

10.1.1 Competition cases and the protection of business secrets

In competition cases the EU Courts have set out the general principles with regard to cases in which the protection of confidential information on the one hand and the rights of the defence of the parties concerned on the other hand, collide. Such cases concern for example the imposition by the Commission of a fine on one or more companies for participating in a concerted practice and/or abusing their dominant position or the refusal to give permission for a merger. The Commission's decisions are often (partly) based on information provided by other companies.[19] Those companies may wish to remain anonymous or request the Commission to ensure the confidentiality of documents containing business secrets. The EU Courts have held that in such cases the right to confidentiality must be balanced against and reconciled with the rights of the defence, in particular the right of access to the file and the right to be heard.

The case-law which will be discussed in this section mostly concerns decisions by the Commission and their review by the CFI and subsequently the Court of Justice.[20] Two cases however (*Varec* and *Mobistar*) regard preliminary questions concerning the required review of confidential information by national courts. These cases will be addressed in section 10.2.1.4. In both sorts of cases similar principles are used by the EU Courts. Furthermore some

19 See for the special problems which characterise the production of evidence in competition cases the opinion of A.G. Geelhoed in Case C-411/04 P, *Salzgitter Mannesmann v Commission* [2007], paras 52-59.

20 For the purpose of gathering relevant case-law I used Barents 2007, pp 568-589.

references will be made to the Commission Notice on the rules for access to the Commission file in certain competition cases (the Commission Notice).[21]

10.1.1.1 The right of access to the file

In competition cases the legality of the use of confidential information is usually addressed under the right of access to the file and the right to be heard. The purpose of providing access to the file in competition cases is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by it in its statement of objections on the basis of that evidence.[22] The right of access to the file is justified by the need to ensure that the undertakings in question are able properly to defend themselves against the objections raised in that statement.[23] The party concerned must be able during the administrative procedure to make know its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission.[24]

When taking a decision aversely affecting a party the EU Institutions are obliged to provide access to the file to this party.[25] The 'file' consists of all information relevant to the defence of the interests of the party concerned.[26] It thus includes both inculpatory and exculpatory evidence.[27] The rights of the defence of the party concerned have been infringed only if the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment.[28] The Commission is allowed to preclude from the administrative procedure evidence which has no relation to the allegations of fact and of law in the statement of objections and which therefore has no relevance to the investigation.[29] In

21 Commission Notice on the rules for access to the Commission file in cases pursuant to Artt 81 and 82 of the EC Treaty, Artt 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C-325/7 (Commission Notice on the rules for access to the Commission file). See for the procedure before the Commission also Commission decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings [2001] OJ L 162/21.

22 See for example Case C-51/92 P, *Hercules Chemicals v Commission* [1999], para 75.

23 See for example Case T-221/95, *Endemol v Commission* [1999], para 65,

24 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 69.

25 See also Erlandsson 1998, pp 145-146.

26 See for example Case C-49/88, *Al-Jubail* [1991], para 17 (anti-dumping case).

27 Erlandsson 1998, p 146. According to the Commission Notice on the rules for access to the Commission file the parties will in principle be granted to all documents making up the Commission's file. This file consists of all documents which have been obtained, produced and/or assembled by the Commission Directorate for Competition, during the investigation.

28 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 78.

29 This is also called the objective link criterion. See for example Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 126.

order to ascertain whether the non-disclosure of a document could have harmed the defence during the administrative procedure, a distinction should be made between inculpatory and exculpatory evidence.[30]

Inculpatory evidence

The right of access to the file is not an end in itself, but is intended to protect the rights of the defence.[31] Therefore the Commission is under no obligation to disclose to the undertakings concerned the inculpatory evidence upon which it does not rely in its decision in support of the complaints.[32] 'A document can be regarded as a document that incriminates an applicant only where it is used by the Commission to support a finding of an infringement in which that party is alleged to have participated.'[33] In *BPB* the CFI considered for example that the information provided by an anonymous informant, which was not disclosed to the undertaking concerned, was a factor triggering the Commission's investigations. However, no objection in the statement of objections or the contested decision was based solely on the information provided by this informant. For that reason, and because the confidentiality of the information was justified, the rights of the defence and the principle of equality of arms had not been violated.[34]

Inculpatory documents that have not been communicated to the undertakings concerned during the administrative procedure are not admissible as evidence. Therefore they must be excluded as evidence, if the Commission relied on them in its decision.[35] The decision must only be annulled if the other evidence underlying the decision does not meet the required standard of proof.[36] The party concerned must show that the result at which the Commission arrived in its decision would have been different if the document(s) which were not communicated to it, had to be disallowed as evidence.[37] A document containing incriminating evidence does not automatically need to be excluded if only part of the information included in it must remain confidential (see further section 10.2.1.3.).[38]

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30 Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 130.
31 Case C-51/92 P, *Hercules Chemicals v Commission* [1999], para 76.
32 Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line and others v Commission* [2003], para 377.
33 Case T-53/03, *BPB v Commission* [2008], para 32.
34 Case T-53/03, *BPB v Commission* [2008], paras 32-38.
35 Case T-53/03, *BPB v Commission* [2008], para 41, Case C-62/86, *AKZO* [1991], paras 21 and 24 and Case 107/82, *AEG* [1983], paras 24-25.
36 Case 107/82, *AEG* [1983], para 30.
37 Case C-407/08 P, *Knauf Gips v Commission* [2010], para 13. See also Case T-410/03, *Hoechst v Commission* [2008], para 146, Case T-53/03, *BPB v Commission* [2008], para 45 and Erlandsson 1998, p 172.
38 Case C-411/04 P, *Salzgitter Mannesmann v Commission* [2007], para 44. See differently Case 107/82, *AEG* [1983], paras 23-24.

Exculpatory evidence

The party concerned must have access to documents which are or might be capable of substantiating its defence. However, according to the CFI the rights of the defence have only been infringed, if it has been established that the non-disclosure of the documents in question

> might have influenced the course of the procedure and the content of the decision to the applicant' s detriment. The possibility of such an influence can therefore be established if a provisional examination of some of the evidence shows that the documents not disclosed might 'in the light of that evidence' have had a significance which ought not to have been disregarded.[39]

Thus the undertaking concerned must 'establish not only that it did not have access to certain exculpatory evidence, but also that it could have used that evidence for its defence'.[40] The CFI in some cases granted the undertaking access to non-confidential versions of the non-disclosed documents and invited it to show how the non-disclosure of these documents could have harmed its defence.[41] The CFI and (in appeal cases) the Court of Justice examine whether a document, which is relevant and therefore should have been disclosed to the undertaking concerned, was of use to this undertaking's defence.[42] In this examination the strength of the (disclosed) evidence relied on by the Commission and that of the positions of the party concerned are taken into account.[43] The CFI concluded in many cases that the evidence could not have been capable of substantiating the undertaking's defence and that

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39 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 78. See also Case C-407/08 P, *Knauf Gips v Commission* [2010], para 23, Case C-51/92 P, *Hercules Chemicals v Commission* [1999], para 80 and Case T-161/05, *Hoechst v Commission* [2009], para 166.

40 Case C-407/08 P, *Knauf Gips v Commission* [2010], para 24. See also Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 133. Case T-53/03, *BPB v Commission* [2008], para 55 and Case T-410/03, *Hoechst v Commission* [2008], para 146.

41 See for example Case T-52/03, *Knauf Gips v Commission* [2008], para 68, Case T-410/03, *Hoechst v Commission* [2008], para 150 and Case T-7/89, *Hercules Chemicals v Commission* [1991], para 56.

42 See for example Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 87, where the CFI concluded that some documents which were not disclosed to the undertaking concerned were capable of substantiating its defence. See also Case C-407/08 P, *Knauf Gips v Commission* [2010], para 25.

43 In Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 86 the CFI takes into account the 'weakness of the documentary evidence' relied on by the Commission and the 'strong positions held by the applicant'. The CFI found a violation of the rights of the defence. In Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], paras 156-164, the Commission relied on direct evidence. The applicants had not stated precisely what evidence was distorted by the CFI and had not demonstrated the errors which lead to that distortion. No violation was found.

therefore no violation of the rights of the defence occurred.[44] If an infringement of the rights of the defence has been established, the decision must be annulled.

According to the EU Courts it cannot be for the Commission alone to decide which documents are useful for the defence of the undertaking.[45] This follows from the principle of equality of arms, which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission.[46] In *Imperial Chemical Industries* the CFI considered that where difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed. This is particularly true in proceedings where documents may just as easily be interpreted in a way favourable to the undertakings concerned as in an unfavourable way.[47] The CFI considered that

> in such circumstances any error made by the Commission's officials in categorizing as "neutral" a given document which, as an item of irrelevant evidence, will not then be disclosed to the undertakings, must not be allowed to impair their defence.[48]

Obligation to request for access to the file?

It seems to follow from the CFI's case-law that the Commission is obliged to ensure of its own motion that the rights of the defence are respected and thus that the party concerned has access to the documents included in the investigation file.[49] The undertaking is thus not required to request the Commission to be granted access to the file.[50] When the undertaking does request access to documents which were not communicated to it, it must specify which

44 See for example Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], paras 158-164, Case T-151/07, *Kone v Commission* [2011], paras 152-156 and Case T-191/06, *FMC Foret v Commission* [2011], paras 300-314.

45 See for example Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 126 and Case 107/82, *AEG* [1983], para 24

46 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 93.

47 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], paras 91-92 and 111.

48 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 92.

49 See for example Case T-49/88, *Al-Jubail Fertilizer* v *Council* [1991], para 17, where the CFI held that 'in performing their duty to provide information, the Community institutions must act with all due diligence by seeking [..] to provide the undertakings concerned, as far as is compatible with the obligation not to disclose business secrets, with information relevant to the defence of their interests, choosing, if necessary on their own initiative, the appropriate means of providing such information'.

50 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 96. See Erlandsson 1998, p 166.

documents it wishes to have access to and for what reasons.[51] The CFI held that the Commission is not required to make available, of its own initiative, documents which are not in its investigation file and which it does not intend to use against the parties concerned in the final decision. An undertaking which learns during the administrative procedure that the Commission has documents which might be useful for its defence and wishes to inspect them must make an express request to the Commission for access to those documents. If the applicant fails to make such request during the administrative procedure, his right to do so is barred in any action for annulment brought against the final decision.[52]

Access to the file in practice
According to the Commission Notice access to the file may be provided in several ways: by means of an electronic data storage device, through copies of the accessible file in paper, sent to the parties by mail, by inviting the parties to examine the accessible file on the Commission's premises or a combination of those methods.[53]

10.1.1.2 The right to confidentiality

The EU courts have accepted that the confidentiality of the following documents or information may be justified in competition cases:
- documents containing other companies' business secrets
- internal documents of the Commission
- other confidential Information disclosed to the Commission subject to an obligation of confidentiality, such as information enabling complainants to be identified.[54]

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51 Case T-53/03, *BPB v Commission* [2008], para 33. The CFI held that the applicant may not demand access, in a general and abstract way, to documents or information which have not been communicated to it without stating how the inculpatory evidence relied upon by the Commission in the contested decision was determined by those documents or that information.

52 Case T-186/06, *Solvay v Commission* [2011], para 227, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and others* v *Commission* [2000], para 383.

53 Commission Notice on the rules for access to the Commission file, para 44.

54 See for example Case T-410/03, *Hoechst v Commission* [2008], para 145, Case T-53/03, *BPB v Commission* [2008], para 36 and Case T-221/95, *Endemol v Commission* [1999], para 66. The Commission Notice on the rules for access to the Commission file also states that access to internal documents, business secrets of other undertakings and other confidential information will be refused. See also Art 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

Protection of business secrets

Article 41 of the Charter explicitly mentions that business secrets must be respected.[55] The EU Courts have also recognised the protection of business secrets as a general principle of EU law.[56] According to the Commission a business secret is information about an undertaking's business activity, disclosure of which could result in serious harm to the same undertaking.[57] The protection of business secrets helps the Commission to achieve the objectives of competition law. It should make it easier for the Commission to obtain information from third undertakings.[58] The Court of Justice held in *AKZO* that a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets.[59] However in later cases the EU Courts accepted that the right to confidentiality must be balanced against the rights of the defence (see further section 10.2.1.3).

Internal Commission documents

Internal documents are not to be communicated to the parties concerned unless the circumstances of the case are exceptional and the parties concerned make out for the need to do so. According to the CFI the restriction on access to internal documents is justified by the need to ensure the proper functioning of the institution concerned.[60] The Commission Notice states that internal documents can be neither inculpatory or exculpatory. The restriction of access to internal documents therefore does not prejudice the proper exercise of the parties' rights of the defence.[61]

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55 See also Art 339 TfEU, which requires the members of the institutions of the Union, the members of committees, and the officials and other servants of the Union, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

56 See for example Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 98 and for the national context Case C-450/06, *Varec* [2008], para 49.

57 Commission Notice on the rules for access to the Commission file, para 18. Examples of information that may qualify as business secrets are: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold.

58 Erlandsson 1998, p 148.

59 Case 53/85, *AKZO Chemie BV and AKZO Chemie UK v Commission* [1986], para 28**.** The Court states that any other solution would lead to the unacceptable consequence that an undertaking might be inspired to lodge a complaint with the Commission solely in order to gain access to its competitors business secrets.

60 Case T-410/03, *Hoechst v Commission* [2008], para 165, Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999], paras 35-36.

61 Commission Notice on the rules for access to the Commission file, para 12.

Other confidential Information

The CFI has held that 'in the case of information supplied on a purely voluntary basis, accompanied by a request for confidentiality in order to protect the informant's anonymity, an institution which accepts such information is bound to comply with such a condition'.[62] According to the CFI 'the Commission's ability to guarantee the anonymity of certain of its sources of information is of crucial importance with a view to ensuring the effective prevention of prohibited anti-competitive practices.'[63] The EU Courts have recognised 'that an undertaking holding a dominant position on the market might adopt retaliatory measures against competitors, suppliers or customers who have collaborated in the investigation carried out by the Commission.' Therefore third-party undertakings which submit documents to the Commission in the course of its investigations and consider that reprisals might be taken against them as a result can do so only if they know that account will be taken of their request for confidentiality.[64]

10.1.1.3 Confidentiality versus access to the file

It follows from the above that the Commission may face a dilemma: should it keep certain information confidential and therefore refrain from using it as evidence, or should it disclose the information with a risk of seriously harming the interests of the company which provided the information.[65] The Commission has recognised that in proceedings under Articles 81 and 82 of the former EC Treaty the qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement or could be necessary to exonerate a party. In that case the need to safeguard the rights of the defence of the parties may outweigh the concern to protect confidential information of other parties. The Commission assesses whether those circumstances apply to any specific situation, taking into account: the relevance of the information, whether the information is indispensable, the degree of sensitivity involved and the preliminary view of the seriousness of the alleged infringement. When the Commission intends to disclose information the person or undertaking in question gets the opportunity to provide a non-confidential version of the information. The non-confidential information must have the same evidential value as the confidential version.[66]

According to the EU Courts, the rights of the defence must be balanced against the right of other economic operators to the protection of their confi-

62 Case T-53/03, *BPB v Commission* [2008], para 36.
63 Case T-53/03, *BPB v Commission* [2008], para 36.
64 Case C-310/93 P, *BPB and Britisch Gypsum v Commission* [1995], para 26. See also Commission Notice on the rules for access to the Commission file, para 19.
65 See also Erlandsson 1998, p 158.
66 Commission Notice on the rules for access to the Commission file. paras 24 and 25.

dential information and their business secrets.[67] If an inculpatory or exculpatory document contains genuine business secrets or cannot be disclosed for one of the other reasons mentioned above, a solution must be sought in which the right of confidentiality and the rights of the defence are reconciled.[68] The communication of a non-confidential version or a summary of the document is the most important solution proposed by the CFI. Furthermore the Commission may provide a list of documents contained in the Commission's file, before granting access to (non-confidential versions) of those documents.

Non-confidential versions or summaries

According to the CFI the Commission can protect the business secrets or other confidential information of third parties by deleting the sensitive passages from the copies of the documents sent to the applicant.[69] This could also imply that the identity of the source of the information is not disclosed. A non-confidential summary must be sufficiently precise.[70] According to the Commission Notice 'the non-confidential versions and the descriptions of the deleted information must be established in a manner that enables any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to the information claimed to be confidential'.[71]

The CFI held in several cases that the provision of non-confidential versions of evidence underlying the contested decision did not infringe the rights of the defence. However, the weight of the evidence may be reduced because of the fact that certain information is not communicated to the undertaking concerned. In *Endemol* , a concentration case, the Commission provided non-confidential summaries of some independent television producers' replies to the Commission's questionnaires. These summaries concealed the identity of those producers. The CFI noted that the replies to the questionnaires contained only the views of the third parties on the likely consequences of the concentration. 'The non-confidential summaries made those views clear. It was thus

67 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 98. See for the national context Case C-450/06, *Varec* [2008], para 51 and Case C-438/04, *Mobistar* [2006], para 40.

68 See for example Case T-221/95, *Endemol v Commission* [1999], para 67.

69 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 102. It is not clear whether such non-confidential summaries must be provided by the Commission of its own motion, or on the party's request. In Case C-310/93 P, *BPB and British Gypsum v Commission* [1995], para 31 the party's complaint that no non-confidential summaries were provided by the Commission was dismissed, because it had not been established that such summaries were requested by the party concerned or that such a request would have been justified.

70 See Case T-410/03, *Hoechst v Commission* [2008], para 154.

71 Commission Notice on the rules for access to the Commission file, para 38.

not necessary to know the identity of the third parties in question in order to be able to challenge the views expressed.'[72]

In *Salzgitter Mannesmann* the Court of Justice held that the CFI rightly allowed a document as incriminating evidence, while the identity of the author and the person who transmitted it to the Commission were not disclosed to the party concerned. The Court referred to the following three circumstances. First of all it pointed at the fact that the CFI in assessing the credibility of the document took into account the anonymous origin of that document. According to the CFI the credibility of that document was necessarily reduced by the fact that the context in which it was drafted was largely unknown and because the Commission's assertions in that regard could not be verified. Secondly the CFI held that evidence of anonymous origin cannot in itself establish the existence of an infringement of EC competition law. In this case the anonymous statements were supported by other evidence and they were only of ancillary importance. Finally the Court took into account that the party concerned was given opportunity to comment on the document and to put forward its arguments on the probative value of that document in the light of its anonymous origin.[73]

In *Hoechst* the CFI held that the non-confidential version of relevant documents in the form made available to the undertaking concerned bore 'a close relationship to a failure to disclose' those documents. The Court took into account that the documents consisted of 101 pages virtually all of which were blank and marked 'Business secrets'. No summary of the content of the documents was provided during the administrative proceedings. Only a list setting out the date, sender and addressee of the documents and where appropriate the subject-matter were mentioned.[74] In *Alrosa* some third party observations submitted to the Commission were essential for the Commission's decision as it changed its initial position on the basis of them. Alrosa only received a summary of the Commission's conclusions drawn from these observations and non-confidential summaries of the observations themselves. The non-confidential version of the third party observations requested by Alrosa were supplied at a moment when it was impossible for Alrosa to provide an effective reply to them. According to the CFI Alrosa was therefore not given the opportunity to fully exercise its right to be heard.[75]

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72 Case T-221/95, *Endemol v Commission* [1999], paras 71-72.

73 Case C-411/04 P, *Salzgitter Mannesmann v Commission* [2007], paras 46-50. These three conditions were also mentioned by A.G. Geelhoed in paras 62-65 of his opinion in this case.

74 Case T-410/03, *Hoechst v Commission* [2008], para 152. The Court did not find a violation of the right of access to the file because the documents concerned could not have changed the Commission's conclusions.

75 Case T-170/06, *Alrosa v Commission* [2007], paras 196-203.

List of documents

If protecting a third company's business secrets or other sensitive information by preparing non-confidential versions of all the documents in question proves difficult, the Commission could send to the party concerned a list of documents contained in the Commission's file.[76] Then the party concerned can request access to specific documents on the list. Those documents or, if necessary non-confidential versions of them, should be provided to the party concerned. The purpose of having a list as proposed by the CFI is that the information contained in it 'should provide to the applicant information sufficiently precise to enable it to ascertain, with knowledge of the facts, whether the documents described were likely to be relevant for its defence'.[77]In several cases the Commission sent the party concerned a list of documents contained in the Commissions file. In *Endemol* the CFI held that the table of the file contents presented by the Commission did not infringe the rights of the defence. In that case the Commission had prepared a summary list of all 279 documents which made up the file. That list gave first of all a breakdown of the documents by type (annual reports, internal notes, requests for information and so forth). Secondly, the list indicated, for each document or group of documents, whether it was accessible to the companies concerned, partially accessible to them, confidential or not relevant.[78]

10.1.1.4 Judicial review

In appeals against Commission decisions in competition cases the General Court (like the former CFI) may request the Commission to submit its file including all confidential evidence.[79] In order to enable the CFI to determine whether it is conducive to proper conduct of the procedure to order the production of certain documents, the undertaking should identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the procedure.[80] The Commission may request the Court not to disclose the confidential information to the applicant undertaking.[81]

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76 See also the Commission Notice on the rules for access to the Commission file, para 45.

77 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 104, See also Case T-410/03, *Hoechst v Commission* [2008], para 154.

78 Case T-221/95, *Endemol v Commission* 1999], para 78.

79 Art 24 of the Statute of the Court of Justice states that 'the Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal. Protocol (No 3) on the Statute of the Court of Justice of the European Union [2008], OJ C 115/210.

80 Case C-185/95 P, *Baustahlgewebe v Commission* [1998], para 93.

81 See for example the CFI's Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999], para 37, where the CFI considered that the Commission's obligation to submit all relevant documents to the Court does not

The Court first of all carries out a comparative and provisional analysis of the probative value of the documents that were not disclosed and of the evidence that the Commission regards as sufficient to lead to the findings made in its decision.[82] During this procedure the Court does not disclose the documents concerned to the applicants.[83] In its analysis the Court establishes whether the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment.[84] Documents which are not relevant to the applicant's defence are left out of the Court's file. They remain wholly extraneous to the proceedings and are not taken into consideration by the Court.[85]

In some cases the Court examines whether the (partial) non-disclosure of the relevant evidence is justified.[86] During this examination the Court guarantees the confidentiality of the evidence submitted by the Commission.[87] If the confidentiality is not justified, the Court will disclose the confidential evidence to the parties concerned.[88] If confidentiality is justified, a non-confidential version of the evidence may be made available to the applicant.

The Court then assesses according to the principles set out above whether the rights of the defence are infringed and whether the decision should be annulled. Where a document is not at all disclosed to the applicant, the Court

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intend to enable the applicants to peruse the files of the institution concerned as they see fit. Its sole purpose is to assist the Court in the exercise of its power of review of the legality of the contested measure by placing the whole of the administrative file at its disposal.

82 Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 132,

83 Art 67 (3) of the Consolidated Version of the Rules of Court of the General Court (2010/C 177/02) [2010], OJ C 177/37.

84 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 78. See also the CFI's Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999], para 40.

85 See for example the CFI's Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999], para 33 and Case T-410/03, *Hoechst v Commission* [2008], paras 169-171.

86 See for example Case T-221/95, *Endemol v Commission* [1999], para 69 and Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 102. This also follows from Art 67 (3) of the Consolidated Version of the Rules of Court of the General Court (2010/C 177/02) [2010], OJ C 177/37, which states that 'where it is necessary for the General Court to verify the confidentiality, in respect of one or more parties, of a document that may be relevant in order to rule in a case, that document shall not be communicated to the parties at the stage of such verification.' In Case T-44/00, *Mannesmannröhren-Werke v Commission* [2004], paras 81-99 the Court did not assess whether the non-disclosure of the names of the sources of relevant information was justified.

87 See Art 67 (3) of the Consolidated Version of the Rules of Court of the General Court (2010/C 177/02) [2010], OJ C 177/37.

88 See for example CFI's Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999].

does not take that document into account.[89] The Court examines whether the decision can be based on the non-confidential evidence. If during the administrative proceedings the applicant only had access to a non-confidential version of a document, the Court examines whether this amounts to an infringement of the rights of the defence.[90] Where possible exculpatory documents were not disclosed to applicant, the rights of the defence are violated and the decision will be annulled.

An infringement of the rights of the defence which occurred during the administrative procedure cannot be regularised during the proceedings before the Court of First Instance or the Court of Justice.[91] According to the Court of Justice the belated disclosure of documents in the file does not put the undertaking back into the situation it would have been in, if it had been able to rely on those documents in presenting its written and oral observations to the Commission.[92] The CFI notes in this regard that it carries out a review solely in relation to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure. If during the administrative procedure the applicant had been able to rely on documents which might exculpate it, it might have been able to influence the Commission's assessment. The Court cannot therefore rule out the possibility that the Commission would have found the infringement to be shorter and less serious and would, consequently, have fixed the fine at a lower amount.[93]

Application to procedures before national courts

The Court of Justice answered two questions of national courts relating to the meaning of the right of access to the file and the rights of the defence before them.[94] In *Mobistar* the national court asked the Court of Justice whether EU law required it to have at its disposal all the information necessary for the merits of the case to be duly taken into account including the confidential information on the basis of which the national authority adopted the decision which is the subject-matter of the appeal.[95] In *Varec* the national court wanted

89 Art 67 (3) of the Consolidated Version of the Rules of Court of the General Court (2010/C 177/02) [2010], OJ C 177/37 states that the General Court shall take into consideration only those documents which have been made available to the lawyers and agents of the parties and on which they have been given an opportunity of expressing their views.

90 See for example Case T-221/95, *Endemol v Commission* [1999], para 72.

91 See for example Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 104 and Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 108.

92 Case C-51/92 P, *Hercules Chemicals v Commission* [1999], paras 78-79.

93 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], paras 108 and 113.

94 The *Varec* judgment concerned the review by a national court of a decision taken by a contracting authority in the context of a contract award procedure. *Mobistar* regarded a dispute concerning a decision fixing the set-up costs payable by a receiving mobile telephone operator for number transfer or portability from one operator to another.

95 Case C-438/04, *Mobistar* [2006], para 19.

to know whether EU law required the appeal authority to ensure confidentiality and observance of the business secrets contained in the files communicated to it by the parties concerned, including the determining authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration.[96]

The Court of Justice held in both cases that national courts should have at their disposal all the information necessary in order to decide in full knowledge of the facts on the merits of the appeal, including confidential information.[97] However it considered in *Varec* that, in the context of national (judicial) review of a decision taken by a contracting authority in relation to a contract award procedure 'the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned, which has been filed with the body responsible for the review.[98] It recognised that in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest.[99] Here the Court referred to the ECtHR's case-law under Article 6 ECHR.[100]

Like in competition cases against the Commission discussed above, the Court held that the principles of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the right to effective legal protection and the rights of the defence of the parties to the dispute.[101] A national body reviewing a decision which is (partly) based on confidential information, must therefore decide 'to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute.' This implies an objective review of the question whether information is genuinely business sensitive.[102] If this body is a court, the procedure must comply with the requirements of fair trial.[103]

96 Case C-450/06, *Varec* [2008], para 21.
97 Case C-438/04, *Mobistar* [2006], para 40, Case C-450/06, *Varec* [2008], para 53.
98 Case C-450/06, *Varec* [2008], para 51.
99 The Court recognised that operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without the fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them. Case C-450/06, *Varec* [2008], paras 36 and 43.
100 Case C-450/06, *Varec* [2008], para 47. The Court refers to *Rowe and Davis v the United Kingdom* and *V. v Finland,* both cases concerned complaints under the criminal limb of Art 6 ECHR.
101 Case C-450/06, *Varec* [2008], para 52, See also C-438/04, *Mobistar* [2006], para 40.
102 See Von Papp 2009, p 996.
103 Case C-450/06, *Varec* [2008], para 55, see also Case C-438/04, *Mobistar* [2006], para 43.

> Having regard to the extremely serious damage which could result from improper communication of certain information to a competitor, that body must, before communicating that information to the dispute, give the economic operator concerned an opportunity to plead that the information is confidential or a business secret.[104]

The Court of Justice thus applies principles which are similar to those applied in the context of appeals against Commission decisions in competition cases before the EU Courts. However, it does not refer extensively to its case-law in these cases and it does not provide much guidance to the national court as to how the rights of the defence and the right to confidentiality must be reconciled.[105]

It is interesting to note that in her opinion in *Varec* AG Sharpston did propose more detailed criteria which were based on the CFI's practice in competition cases in which confidential evidence played a role, notably its orders in the *Steel beems* cases.[106] She stated that although neither the pragmatic solution adopted by the CFI or the rules of procedure of the CFI

> can constitute any binding precedent for a national court, [..] they provide helpful practical guidance as to the approach to be taken, which must conform with rules applicable to that court, in sofar as they do not conflict with any higher norm.[107]

According to the AG the principles applied must be the following:

> a) 'A party may not refuse to communicate evidence to the review body on the ground of business secrecy
> b) A party communicating evidence to the review body may ask for it to be treated as confidential, in whole or in part, vis-à-vis another party
> c) All principal parties should have access to all evidence relevant to the outcome of the review, in a form adequate to enable them to comment on it
> d) The review body should take care not to use any evidence withheld from one or more principal parties in any way which could infringe those parties' rights to a fair hearing and to equality of arms.'[108]

The AG is furthermore of the opinion that this assessment needs to be done on a case by case basis and must seek to assure the greatest protection of each interest (confidentiality of business secrecy and the right to a fair hearing)

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104 Case C-450/06, *Varec* [2008], para 54.
105 See also Von Papp 2009, p 995.
106 In particular the Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999].
107 These higher norms include EU legislation as interpreted in the light of the right to the protection of business secrets and the right to a fair hearing.
108 Opinion of A.G. Sharpston of 25 October 2007 with Case C-450/06, *Varec* [2008], para 62.

which is achievable without impairing the substance of the other, and to strike as fair a balance as is possible between the two.[109]

10.1.1.5 Subconclusion: the use of secret information in EU competition cases

In competition cases the EU Courts attach great importance both to the rights of the defence and to the protection of confidential information, in particular business secrets. They have recognised that the disclosure of business secrets or other confidential information may cause an undertaking serious harm. On the other hand they have accepted that the refusal to communicate evidence to the undertaking which is the object of a Commission decision (for example to impose a fine) may harm the rights of the defence. The fact that a relevant document has not been disclosed to the undertaking concerned, has severe consequences. Inculpatory documents which were not communicated to the undertaking should be excluded as evidence. The rights of the defence are infringed when exculpatory documents have not been disclosed which might have influenced the course of the procedure and the content of the decision to the applicant' s detriment. The undertaking must be able to assess itself whether information is relevant to its defence. It should substantiate before the CFI that the documents may have changed the Commission's conclusions. In several cases the undertaking did not succeed in doing so. In its assessment the CFI took into account the strength of the (disclosed) evidence relied on by the Commission and that of the undertaking's positions.

The Commission does not necessarily need to choose between the protection of confidential information and the rights of the defence. According to the EU Courts in competition those two interests must be balanced against each other. A compromise, such as the provision of non-confidential versions of documents are permissible. Such summaries must provide sufficiently precise information enabling the party concerned to determine whether the information deleted is likely to be relevant for its defence and to express its views on it.

When reviewing competition decisions in which it is claimed that the rights of the defence have been infringed, because confidential information has not been disclosed to the undertaking concerned, the General Court plays an active role. It assesses whether the information concerned could be relevant for the undertaking's defence. In some cases it examines whether the (partial) non-disclosure of the relevant information is justified. Finally it rules whether the rights of the defence have been infringed because possible exculpatory evidence has not been disclosed. It also decides whether, after exclusion of the inculpatory evidence not disclosed to the undertaking, the remaining non-confidential evidence is sufficient to support the decision.

Also in proceedings before national courts ruling in similar cases, the protection of business secrets must be observed in such a way as to reconcile

109 Opinion of A.G. Sharpston of 25 October 2007 with Case C-450/06, *Varec* [2008], para 63.

it with the right to effective legal protection and the rights of the defence of the parties to the dispute. Therefore the national court should be able to review evidence which has not been disclosed to the party concerned and assess whether the non-disclosure is justified.

10.1.2 EU sanctions and the protection of national security

Since 11 September 2001 the EU has taken measures to combat terrorism. It has engaged in sanctions freezing the funds and assets of persons who commit and/or facilitate terrorist acts and those of groups and entities owned, controlled or acting on behalf of such persons (henceforth EU sanctions).[110] EU sanctions are often based on information which is not disclosed to the person or entity concerned. The information may be provided to the EU Institutions by Member States or third countries, on the condition that this information would remain confidential. This information or other information underlying the EU sanction is usually kept confidential in the interest of the security and the conduct of the international relations of the Member States and/or the European Union.

In most cases which have been judged by the CFI and the General Court the party concerned complained about a total lack of reasons for the decision, the fact that the evidence underlying the decision had not been notified to it and that therefore it did not get the opportunity to defend itself. In their case-law regarding EU sanctions, the EU Courts usually refer to three principles in particular: the right to be heard, the obligation to state reasons and the right to an effective remedy. The requirements derived from these three principles will be discussed in sections 10.2.2.2 – 10.2.2.4. The Court of Justice's case-law in *Kadi* will be used as point of departure. However, the CFI's case-law with regard to procedural requirements, of which the judgment in *PMOI I* is leading, is much more detailed and will thus be discussed extensively in this section.[111]

The general principles used in EU sanction cases and in competition cases are the same. As was stated in the introduction to this chapter, the CFI in EU sanction cases referred to relevant case-law in competition cases. However, there are also some important differences between the EU Courts' approach in these cases. This section will show that the limitations to the rights of the defence allowed in EU sanction cases seem to be more far-reaching than in competition cases. The reason for this potentially relates to the nature of the

110 Koedooder & de Lang 2009, p 313.

111 Tridimas and Gutierrez-Fons state that in *Kadi* the Court of Justice was preoccupied with asserting the rule of law and the existence of judicial review over Community action dictated by the UN Security Council. The CFI however was preoccupied with the detailed requirements of procedural rights. Tridimas & Gutierrez-Fons 2008, p 730.

case and the grounds for not disclosing relevant evidence. Furthermore the fact that the scope of judicial review of (autonomous) EU sanctions on the EU level is rather limited, as a result of a division of tasks between the national and EU level (see for explanation under 9.2.2.1), may play a role.

The case-law concerning EU sanctions is much less developed than in competition cases, as until now most EU sanctions have been annulled because of the complete absence of a statement of reasons and a total lack of a hearing. The EU Courts therefore have not yet addressed the question how the rights of the defence must be balanced against the protection of the safety and the conduct of the international relations of the Member States and/or the European Union.

10.1.2.1 Legal framework and scope of judicial review

Before turning to the examination of the case-law of the EU Courts, some remarks will be made regarding the relevant legal framework and possibility of judicial review of EU sanctions. There are two strands of EU sanctions[112]: those designated to give effect to resolutions issued by the United Nations Security Council[113] and autonomous EU sanctions.[114]The EU sanctions are based on several common positions.[115] Lists of persons and entities suspected of involvement in terrorism are drawn up by the Council.[116] Those lists are regularly reviewed.[117] The common positions are given effect by the adoption

112 Murphy 2010, p 301.

113 See for example Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], Case T-318/01, *Othman v Council and Commission* [2009] and Joined Cases C-399/06 P and C-403/06 P, *Hassan and Ayadi v Council and Commission* [2009].

114 See for example Case T-228/02, *Modjahedines du peuple d'Iran v Council* [2006], Case T-47/03, *Sison v Council* [2007].

115 Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism (2001/930/CFSP) [2001, OJ L 344/90, Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP) [2010], OJ L 344/93 (Common Position 2001/931/CFSP), Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (2002/402/CFSP) [2002], OJ L 139/4 (Common Position 2002/402/CFSP).

116 See Annex 1 of Common Position 2001/931/CFSP and Annex 1 of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L 139/9 (Council Regulation No 881/2002).

117 According to Art 6 of Common Position 2001/931/CFSP the list must be reviewed at least every six months. Also the list annexed to Council Regulation No 881/2002 is regularly reviewed.

of Council regulations.[118] According to the Court of Justice the legal basis for the sanctions could be found in Articles 60, 301 and 308 of the former EC Treaty.[119] Since the entrance into force of the Treaty of Lisbon, the sanctions are based on Article 75 TfEU.

Both the procedure for imposing EU sanctions based on UN Security Council resolutions and the procedure for taking autonomous EU sanctions take place on two levels: the UN level and the EU level or the national level and the EU level. As a result the task of the EU Courts in EU sanction cases is limited. It will be argued below that this may explain why in EU sanction cases the scope of the obligation to state reasons and the right to be heard seems to be more limited than in competition cases. I will now briefly describe both procedures and the possibilities for judicial review of the decisions taken on both levels. The required scope and intensity of judicial review will be addressed in section 10.2.2.4 concerning the right to effective judicial protection.

EU sanctions based on UN Security Council resolutions

The EU sanctions which give effect to UN Security Council resolutions are preceded by a Security Council decision to place a person or entity on the terrorist list.[120] Following this decision the Council draws up a list of suspected terrorists and subsequently issues a regulation which is applied to the individual included in the list.[121]

Little is known about the procedure of listing individuals suspected of terrorist activities at the UN level. Suspects must be identified based on information provided by States and regional organisations. Individuals do not have the opportunity to be heard before or after the listing and they have no right to appeal the decision to place them on the UN list.[122] Furthermore the Security Council does not communicate the reasons and evidence justifying his appearance on the list to the person concerned.[123]

118 See Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L 344/70, which implements Common Position 2001/931/CFSP and Council Regulation (EC) No 881/2002, which implements Common Position 2002/402/CFSP.

119 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 158-236. See also Murphy 2010, pp 301-304,Tridimas & Gutierrez-Fons 2008, pp 664-679 and Eckes 2007, p 1121.

120 See Art 4 of Common Position 2001/931/CFSP and Art 7 (1) of Council Regulation No 881/2002.

121 Koedooder &. de Lang 2009, p 319.

122 Koedooder &. de Lang 2009, pp 316-317. See also Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 319-325.

123 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 325. Tzanou and El Droubi mention that in *Othman* the Court of First Instance seems to endorse the applicant's view that the Security Council's decision to include him in the terrorist list is a political decision, taken in a wholly non-judicial manner, without any regard to the rules of evidence or of fairness. Tzanou & El Droubi 2010, p 1240.

In *Kadi* the Court of Justice held that EU sanctions which are directly based on Security Council resolutions can be reviewed by the EU Courts and should comply with EU fundamental rights, such as the rights of the defence and the right to an effective remedy.[124] The EU Courts also review the question whether the evidence adduced against the persons concerned justifies the inclusion of their names on the EU terrorist list. The EU Courts do not review the legality of the Security Council decision itself.[125]

Autonomous EU sanctions

Autonomous EU sanctions are based on information of the Member States. According to Article 4 (1) of Common Position 2001/931 the list in its annex

> shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.

The term "competent authority" shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this provision, an equivalent competent authority in that area.

Before imposing an EU sanction, the EU institutions must decide first of all whether a national decision as mentioned in Article 4 (1) of Common Position 2001/931 (henceforth also: national decision) has been taken. Secondly they must assess whether it is (still) justified to include the person or entity concerned in the EU terrorist list.[126] When performing this second assessment the EU institutions enjoy broad discretion.[127] As a result the review by the CFI of this decision is limited.[128] The CFI has stressed however that it does review the Council's interpretation of the relevant facts and that review of the observance of certain procedural guarantees is of fundamental importance.[129]

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124 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 326.

125 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 286. See on this issue also Tridimas & Gutierrez-Fons 2008, pp 679-702.

126 See for example Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], para 51.

127 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 159 and Case T-49/07, *Fahas v Council* [2010], para 57.

128 The CFI stressed that this limited review applies, especially, to the Council's assessment of the factors as to appropriateness on which decisions to freeze funds are based. Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 159

129 Case T-256/07, *People's Modjahedin Organization of Iran v Council* [2008], paras 138-139.

The Council should generally refrain from testing the legality of the national decision underlying the EU sanction. In the *PMOI I* case the CFI considered:

> [I]t is not for the Council to decide whether the proceedings instigated against the party concerned and resulting in that decision as provided for by national law of the Member State were correctly conducted or whether the fundamental rights of the party concerned were respected by the national authorities. That power belongs exclusively to the national courts or as the case may be to the European Court of Human Rights.[130]

Also where the EU sanction is based on a national decision concerning investigations or prosecutions, rather than on a conviction or a sentence, the Council should

> defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are "serious and credible evidence or clues' on which the decision is based and also in respect of recognition of potential restrictions on access to that evidence or those clues legally justified under national law.[131]

This follows from the duty of sincere cooperation which is currently laid down in Article 4 (3) TEU. The CFI only allows the possibility of review of the national decision on the EU level, if the national decision is not taken by a competent authority in the meaning of Article 4 (1) of Common Position 2001/931.[132] This may also apply if the national decision is a decision to investigate or prosecute (and thus not a conviction and sentence) taken by an authority which is not a judicial authority[133] and which is not subject to judicial review on the national level.[134]

As a result the CFI generally only reviews whether the Council's burden proof is met and the rights of the defence are respected with regard to two aspects of the decision to impose an EU sanction: the establishment that there is (1) a national decision which (2) justifies the inclusion in the EU terrorist

130 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 121 and Case T-47/03, *Sison v Council* [2007], para 168.

131 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 124, Case T-47/03, *Sison v Council* [2007], para 171 and Case T-256/07, *People's Modjahedin Organization of Iran v Council* [2008], para 133.

132 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 125 and Case T-47/03, *Sison v Council* [2007], para 172.

133 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 124 ('at least where it is a judicial authority') and Case T-47/03, *Sison v Council* [2007], para 171. See also Gattini 2009, p 239.

134 Case T-256/07, *People's Modjahedin Organization of Iran v Council* [2008], para 145.

list and thus the imposition of an EU sanction.[135] It does not engage in the question whether the person or entity concerned can be considered to be involved in terrorism. It is for the national determining authority and courts to examine the (confidential) evidence underlying the national decision and to ensure that the rights of the defence are respected in the procedure which lead to the decision mentioned in Article 4 (1) of Common Position 2001/931.[136] In this context the CFI referred to the ECtHR's judgment in *Tinnally v the United Kingdom* concerning the rights of the defence under Article 6 ECHR, which will be discussed in section 10.3.[137]

10.1.2.2 The right to be heard

The general principles developed in cases regarding other fields of EU law also apply to EU sanctions.[138] As was mentioned above, the right to be heard has a rather limited purpose in the context of EU sanctions. In the view of the CFI, in case of an initial decision to freeze funds, the right to be heard requires, in principle, first, that the party concerned be informed by the Council of the specific information or material in the file which indicates that a national decision has been taken in respect of it by a competent authority of a Member State, and also, where applicable, any new material which has not yet been assessed by a competent authority at the national level.[139] Secondly the party concerned must be placed in a position in which it can effectively make known its view on the information or material in the file. In the case of a subsequent decision to freeze funds, observance of the right to be heard similarly requires, first, that the party concerned be informed of the information or material in the file which, in the view of the Council, justifies maintaining it in the disputed lists, and also, where applicable, of any new material which has not yet been assessed by a competent authority at the national level. Secondly it must be afforded the opportunity effectively to make known its view on the matter.[140]

According to the CFI the right to be heard does not give the party concerned the right to a formal hearing: it is sufficient that it has the opportunity to

135 See for example Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 146.

136 Case T-256/07, *People's Modjahedin Organization of Iran* [2008], paras 145-146.

137 Case T-47/03, *Sison v Council* [2007], para 166. See for criticism on this case-law Spaventa 2009, pp 1256-1260.

138 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 91-93.

139 Tridimas and Gutierrez-Fons state that the 'CFI appears to leave itself here sufficient margin of manoeuvering to intervene in exceptional circumstances'. They state that it is not clear however whether it is open to the applicant to argue in all cases that the national proceedings was defective. Tridimas & Gutierrez-Fons 2008, pp 712-713.

140 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 126. See also Tridimas & Gutierrez-Fons 2008, p 709.

submit written observations.[141] The CFI held that the Council is not obliged to spontaneously grant access to the documents in its file. It is only on the request of the party concerned that the Council is required to provide access to all non-confidential official documents concerning the measure at issue. It is only obliged to communicate sufficiently precise information, enabling the entity concerned to make its point of view on the evidence adduced against it by the Council known to advantage.[142]

Possible limitations to the right to be heard

Both the Court of Justice and the CFI have accepted that far-reaching limitations of the right to be heard may be justified in procedures concerning EU sanctions. These limitations regard the moment in the procedure at which the hearing takes place as well as the disclosure of evidence.

As to the moment of the hearing both Courts held that EU authorities are not obliged to hear the party concerned (and therefore to notify the evidence adduced against it) before imposing an EU sanction. A measure freezing the funds or a person or entity must by its very nature take advantage of a surprise effect and apply with immediate effect.[143] Therefore the party concerned does not need to be heard before its name is included on the terrorist list.[144] These considerations do not apply to subsequent decisions to impose an EU sanction. Therefore such a decision needs to be preceded by the possibility of a further hearing.[145]

Secondly the Court of Justice and the CFI accepted that 'overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters'.[146] According to the CFI such restrictions are

141 Case T-256/07, *People's Modjahedin Organization of Iran v Council* [2008], para 93.

142 Case T-390/08, *Bank Melli Iran v Council* [2009], para 97. According to the CFI it would be excessive to require spontaneous communication of the matters in the file, given that when a fund-freezing measure is adopted it is not certain that the entity concerned intends to check, by means of access to the file, the matters of fact supporting the allegations made against it by the Council.

143 The Council and the Member States have pointed at the fact that the party concerned could have taken advantage of the time period allowed to it to submit its comments to transfer those funds out of the Union. Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 81.

144 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 338-341.

145 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 131. See also Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], paras 38-43 where the CFI held that the Council did by no means establish that the right to be heard could not be respected because a decision had to be taken urgently.

146 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 342 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 133.

consistent with the constitutional traditions of the Member States and the ECtHR's case-law under Article 6 ECHR.[147] The refusal to disclose evidence applies, in the view of the CFI, above all to the 'serious and credible evidence or clues' on which the national decision to instigate an investigation or prosecution is based, in so far as they may have been brought to the attention of the Council. However, the CFI also finds it

> conceivable that the restrictions on access may concern the specific content or the particular grounds for that decision, or even the identity of the authority that took it. It is even possible that, in certain, very specific circumstances, the identification of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardise public security, by providing the party concerned with sensitive information which it could misuse.[148]

Possible compensation for the absence of a hearing

If the evidence has not been disclosed to the party concerned during the administrative proceedings this evidence must be notified to this party, in so far as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds. A hearing does not need to be conducted immediately after the decision 'in the light of the possibility that the parties concerned also have immediately to bring an action before the CFI, which also ensures that a balance is struck between observance of the fundamental rights of the persons included in the disputed list and the need to take preventive measures in combating international terrorism.'[149] Unlike in competition cases, in cases concerning EU sanctions the absence of a hearing during the administrative phase can thus be compensated during the appeal phase.[150] During the appeal the Court can use techniques which accommodate the rights of the defence and concerns legitimating non-disclosure of evidence.[151] If the evidence underlying the contested decision is not disclosed to the EU Courts compensation of an infringement of the rights of the defence during the appeal phase is not possible.[152]

In *Kadi II* the General Court held with regard to EU sanctions based on UN Security Council resolutions that it is not sufficient that a person's rights of defence have been 'observed' only in the most formal and superficial sense. The person concerned must, on the basis of the information provided to him,

147 The CFI here referred to the judgments in *Chahal* (which did not concern Art 6 ECHR) and *Jasper*. Both cases will be discussed in section 10.3.

148 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 136.

149 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 129-130. See also Case T-390/08 *Bank Melli Iran v Council* [2009], para 98.

150 This also follows from Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 337.

151 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 344. See further section 10.2.2.4.

152 Case T-85/09, *Kadi v Commission* [2010], para 182.

be able to launch an effective challenge to the allegations against him so far as his alleged participation in terrorist activities is concerned. Here the Court referred to the ECtHR's judgment in *A and others v the United Kingdom*, which will be discussed in section 10.3.4.

Application to specific cases

As was mentioned before, in most of the cases before the Court of Justice and the CFI the party concerned did not have access to the evidence underlying the contested decision and a violation of the right to be heard was found. In some cases the Council even refused to inform the applicant of the identity of the Member State which was the author of the national decision underlying the EU sanction.[153] In *Kadi* the Court of Justice considered that the applicable EU legislation on which the EU sanction was based did not provide for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the terrorist list and for hearing those persons, either at the same time as that inclusion or later. Furthermore it took into account that the Council at no time informed the appellants of the evidence adduced against them that allegedly justified the inclusion of their names for the first time in the list. The Court concluded that

> because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage.[154]

Therefore, the appellants' rights of the defence, in particular his right to be heard, were not respected.[155]

In *Kadi II* the person concerned was provided with a summary statement of reasons which set out the allegations against him. According to the General Court however the procedure followed by the Commission, in response to the applicant's request, did not grant him even the most minimal access to the evidence against him. 'The applicant was refused such access despite his express request, whilst no balance was struck between his interests, on the

153 Case T-47/03, *Sison v Council* [2007], para 209.

154 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 345-348. See also Case T-318/01, *Othman v Council and Commission* [2009], paras 82-85.

155 See also Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 160-162 and Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], paras 36-37, where the CFI held that the right to be heard was violated because the Council adopted a subsequent decision to impose an EU sanction without first informing the applicant of the new information or new material in the file, which in its view, justified maintaining it on the list.

one hand, and the need to protect the confidential nature of the information in question, on the other.'[156] The General Court found that

> in those circumstances, the few pieces of information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him so far as his alleged participation in terrorist activities is concerned.[157]

The Court mentioned as an example the allegation, not otherwise substantiated and thus irrefutable, that the applicant was a shareholder in a Bosnian bank in which planning sessions against a United States facility in Saudi Arabia may have taken place. The Court considered that its conclusion is consistent with the ECtHR's judgment in *A and others v the United Kingdom*.[158]

The approach of the General Court applied in *Kadi* which concerned EU sanctions based on UN Security Council resolutions seems to be different than that in several cases concerning autonomous EU sanctions. In those cases the CFI did not seem to set very high standards as regards the right to be heard. This difference may be explained by the fact that in cases regarding autonomous EU sanctions it is up to the national courts to ensure the rights of the defence with respect to the allegations of involvement in terrorist activities, while at the UN level no judicial review of the decision to place a person on a terrorist list takes place.

In *Sison I* the CFI considered that the Council should have communicated the national decisions to Sison as they were official acts adopted at the end of public judicial proceedings to which the applicant had been a party. It was thus not necessary to keep those decisions confidential.[159] In the *PMOI II* judgment however the CFI found with regard to one of the two subsequent decisions to impose an EU sanction that the right to be heard had not been violated. It took first of all into account that the Council communicated to the applicant a number of documents from the file. As regards the documents, which were not notified to the applicant, the Council explained that it was not in a position to forward them to the applicant, because the State which had provided them had not consented to their disclosure. Furthermore the CFI referred to the fact that the applicant had challenged neither that refusal to communicate certain incriminating documents, nor the reasons put forward to justify it. Secondly the CFI held that the Council placed the applicant in a position to make its case properly regarding the evidence incriminating it, an opportunity of which it in fact availed itself on several occasions.[160] In *Bank Melli Iran* the CFI ruled that the obligation to inform the party of the

156 Case T-85/09, *Kadi v Commission* [2010], para 173.
157 Case T-85/09, *Kadi v Commission* [2010], para 174.
158 Case T-85/09, *Kadi v Commission* [2010], paras 175-176.
159 Case T-47/03, *Sison v Council* [2007], para 212.
160 Case T-256/07, *People's Modjahedin Organization of Iran* [2008], paras 91-92.

evidence adduced against it to justify the proposed sanction had been met because sufficient reasons were given for the contested decision. Those reasons were in fact confined to one short paragraph and contained only general allegations. The Council's obligations under the right to be heard were thus also very limited.[161]

In *PMOI II* the CFI also indicated that the Council's duty to show that it took into account the submissions of the party concerned is limited. The party concerned complained that the Council had not sought in any way to respond to the criticism levelled at it and that it had taken no account at all of the exculpatory material produced by it. The CFI held that the rights of the defence had not been violated on this ground. It derived from the Council's letters and the fact that the applicant's submission had been communicated to the delegations of the Member States before the decision had been adopted, that due account was made of the applicant's submissions. Moreover it stated that the Council was not obliged to reply to the applicant's observations in the light of the documents submitted by the applicant, if it thought that they did not warrant the conclusions that the applicant claimed to infer from them. The fact that the statement of reasons did not address the applicant's submissions, but was rather a word-for-word repetition of the initial statement of reasons 'in itself means only that the Council maintained its point of view'. In the absence of any other relevant evidence, as was the case here, 'such similarity of texts does not establish that the Council failed, when assessing the case, to afford proper consideration to the arguments put forward by the party concerned in arguing its case.' According to the CFI the Council did give a specific reply to the applicant's main argument.[162]

10.1.2.3 The obligation to state reasons

In *Kadi* the Court of Justice reiterated its case-law regarding the obligation to state reasons.[163] It follows from this judgment and the CFI's case-law that in principle the requirements following from the obligation to state reasons recognised by the EU Courts in other fields of EU law, also apply to EU measures freezing funds.[164] The Council had argued in the *PMOI I* case that the material conditions regarding the obligation to state reasons in the fight

161 Case T-390/08, *Bank Melli Iran* [2009], paras 95-104. See also Case T-49/07, *Fahas v Council* [2010], para 49.

162 Case T-256/07, *People's Modjahedin Organization of Iran* [2008], paras 94-96. See also Case T-49/07, *Fahas v Council* [2010], para 49.

163 The Court however put most weight on the right to be heard and the right to an effective remedy and did not find a separate violation of the statement of reasons. Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 350, where the Court states that the infringement of the rights of the defence had not been remedied in the course of the actions before the Community judicature.

164 See also Case T-228/02, *Organisation des Modjahedines du peuple d'Iran* [2006], para 109.

against terrorism are not the same as those existing in other areas, such as competition.[165] The Court of Justice and the CFI, which expressly referred to the case-law concerning the obligation to state reasons in other fields of EU law, did not agree with the Council.

The CFI addressed the obligation to state reasons more elaborately in the *PMOI I* case and subsequent case-law. The CFI considered that the obligation to state reasons constitutes an essential principle of EU law which may be derogated from only for compelling reasons. According to the CFI the statement of reasons for a decision to impose an EU sanction which is based on a national decision must show first of all that the conditions for taking the decision, set out in Article 4 of Common Position 2001/931, are met. It must therefore indicate which national decision underlies the decision imposing the EU sanction. If the Council based its decision on information communicated by the Member States, which has not been assessed by a national authority, it must indicate why it considers that this information justifies the inclusion of the person concerned on the list.[166] Secondly the decision must include the actual and specific reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned.[167] Subsequent decisions to freeze funds must indicate the actual and specific reasons why, after a re-examination, the Council considered that there were still grounds for the EU sanction.[168]

Possible limitations to the statement of reasons

The CFI has recognised that exceptions to the obligation to indicate the actual and specific reasons for the EU sanction are allowed under exceptional circumstances. First of all it has considered that a detailed publication of the complaints put forward against the parties concerned might conflict with the overriding considerations of public interest concerning the security of the EU and its Member States, or the conduct of their international relations. Moreover it may jeopardise the legitimate interests of the persons and entities in question, in that it would be capable of causing serious damage to their reputation. In such a situation, the Court finds, exceptionally, that only the operative part of the decision and a general statement of reasons need be in the version of the decision to freeze funds published in the Official Journal. The actual,

165 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 83.

166 Tridimas & Gutierrez-Fons 2008, pp 716-717. According to them this formulation appears to suggest that the Council is under an obligation to show that it was satisfied that the national authority assessed the evidence.

167 Case T-341/07, *Sison v Council* [2009], para 60.

168 Case T-47/03, *Sison v Council* [2007], para 217. If the grounds of a subsequent EU sanction are in essence the same as those already relied on when a previous decision was adopted, a mere statement to that effect may suffice, particularly when the party is a group or entity. See also Case T-341/07, *Sison v Council* [2009], para 60 and Case T-253/04, *KONGRA-GEL and others v Council* [2008], para 97.

specific statements of reasons for that decision must however be formalised and brought to the knowledge of the parties concerned by any other appropriate means.[169]

Secondly the CFI has held that the overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds. The considerations regarding the restrictions of the right to a fair hearing (set out in section 10.2.2.2) also apply to the restriction of the obligation to state reasons. Furthermore the CFI drew inspiration from Article 30(2) of Directive 2004/38/EC and the case-law applicable to that provision.[170] This provision states that 'the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision restricting the freedom of movement and residence of a citizen of the Union or a member of his family taken in their case is based, unless this is contrary to the interests of State security'. According to the Court of Justice's case-law the State concerned must, when notifying an individual of such a restrictive measure give him a precise and comprehensive statement of the grounds for the decision, to enable to take effective steps to prepare his defence.[171] The CFI has not explained how the obligation to state reasons can be reconciled with the protection of overriding considerations of public interest.

Possible compensation for a lack of reasons

The statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him or at the very least as swiftly as possible after that decision.[172] In *Kadi* the Court of Justice did not seem to exclude that the infringement of the obligation to state reasons be remedied during the appeal before the EU Courts.[173] As was pointed out in section 4.4.3 it is the EU Courts' standing case-law that the failure to state the reasons cannot be remedied by the fact that the person concerned learns

169 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 147.

170 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 147. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

171 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 148-150.

172 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 336.

173 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 350. See for critique: Tridimas & Gutierrez-Fons 2008, p 700. They state that if process rights are to have any meaning, it is difficult to see how the requirement of reasoning can be complied with retrospectively.

the reasons for the act during the proceedings before the EU Courts. The CFI has followed this case-law in cases concerning EU sanctions and has held that the possibility of regularising the total absence of a statement of reasons after an action has been started might prejudice the right to a fair hearing. The reason for that is that the applicant would have only the reply in which to set out his pleas contesting the reasons which he would not know until after he had lodged his application. The principle of equality of the parties before the EU Courts would accordingly be affected. In *KONGRA-GEL* the CFI held that the Council did not comply with the obligation to state reasons, by providing a statement of reasons after the adoption of the decision imposing the EU sanction and after the appeal before the CFI had been lodged. According to the Council it provided the statement as soon as reasonably possible after the contested decision in the light of the guidance provided by the *PMOI I* judgment. According to the CFI the Council's argument was based on the mistaken premise that the statement of reasons can be provided after the action before the EU Courts has commenced.[174]

Application to specific cases

In several cases the CFI annulled the EU sanction because the decision did not comply with the requirement to state reasons. Sometimes the CFI based its annulment of the EU sanction solely on this ground.[175] In some cases there was a complete absence of a statement of reasons. In *Sison I* the CFI concluded that the contested decision did not comply with the obligation to state reasons

> for they do no more than state […] that it is 'desirable' or that it has been 'decided' to adopt an up-to-date list of the persons, groups and entities to which Regulation (EC) No 2580/2001 applies. Such general and formulaic wording is tantamount to a total failure to state reasons.[176]

The CFI held in this case that the decision should have mentioned at the very least the national court judgments on which the decision was based.[177] Furthermore it ought to have indicated, subject to their possibly being of a confidential nature, the main reasons why the Council took the view, in the

174 Case T-253/04, *KONGRA-GEL and others v Council* [2008], para 100. See also Case T-256/07, *People's Modjahedin Organization of Iran* [2008], para 90 and Case T-341/07, *Sison v Council* [2009], para 182.

175 Tridimas & Gutierrez-Fons 2008, p 721. They mention *KONGRA-GEL*, *PKK* and *AL-Aqsa*. In their view the severe limitations on the right to a hearing recognised by the CFI and the fact that it may be reduced to no more than the right to be notified of the evidence at the time when the decision is adopted, it is difficult to see what it adds to the requirement to give reasons.

176 Case T-47/03, *Sison v Council* [2007], para 216. See also Case T-327/03, *Stichting Al Aqsa v Council* [2007], para 55.

177 See also Case T-327/03, *Stichting Al Aqsa v Council* [2007], paras 60-64 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 166.

exercise of its discretion, that the applicant was to be the subject of such a decision on the basis of those judgments.[178]

In later cases in which the Council did state reasons for the EU sanction, the CFI seems to be satisfied rather easily. In *Melli Bank* the CFI deemed sufficient a statement of reasons which was in its own words 'exceptionally concise'.[179] In the *PMOI II* case the CFI found that the Council sent to the applicant 'a statement clearly and unambiguously explaining the reasons which, in its opinion, justified the applicant's continued inclusion in the list at issue [..].' It took into account that the statement contained specific examples of acts of terrorism as referred to in the relevant EU provisions for which the applicant was said to be responsible. Apparently the Council did not need to explain why these acts made the freezing of funds necessary.[180] Furthermore the CFI referred to the fact that the decision stated that, because of those acts, a decision had been taken by a competent authority of the United Kingdom to proscribe the applicant as an organisation concerned in acts of terrorism and that that decision was subject to review under the applicable United Kingdom legislation and that it was still in force.[181] In the same judgment the CFI held however that the statement of reasons with regard to a later decision to continue the EU sanction was obviously insufficient as it did not make it possible to grasp how far the Council took into account a new national decision, in which it was held that the organisation concerned was no longer concerned in terrorism.[182] Moreover the CFI took into account that the decision did not explain the actual specific reasons why the Council took the view in spite of this decision that the continued inclusion of the applicant in the terrorist list remained justified.[183]

178 Case T-47/03, *Sison v Council* [2007], para 217. See also Case T-253/04, *KONGRA-GEL and others v Council* 2008], para 98.

179 Joined Cases T-246/08 and T-332/08, *Melli Bank v Council* [2009], paras 146-151. See also Case T-390/08, *Bank Melli Iran v Council* [2009], paras 12 and 84-85.

180 Case T-256/07, *People's Modjahedin Organization of Iran* [2008], para 90. See also Case T-341/07, *Sison v Council* [2009], paras 65-66 and Case T-49/07, *Fahas v Council* [2010], para 57, where the CFI held that having regard to the broad discretion enjoyed by the Council with regard to taking EU sanctions, the Council does not need to state in what way the freezing of the applicant's funds may in concrete terms contribute to the fight against terrorism or prove that the applicant might use his funds to commit or facilitate act of terrorism in the future.

181 Case T-256/07, *People's Modjahedin Organization of Iran* [2008], para 90. See also Case T-341/07, *Sison v Council* [2009], para 64.

182 The national authority held that there was such a lack of evidence that the decision to proscribe the organisation could be defined as unreasonable and perverse. Case T-256/07, *People's Modjahedin Organization of Iran* [2008], para 90. See also Case T-341/07, *Sison v Council* [2009], para 184.

183 Case T-256/07, *People's Modjahedin Organization of Iran* [2008], para 90. See also Case T-341/07, *Sison v Council* [2009], paras 177-185.

10.1.2.4 The right to an effective remedy

As was already stated in section 10.2.2.1 decisions imposing EU sanctions may be subjected to judicial review by the EU Courts.[184] The CFI has addressed the scope of judicial review in cases regarding autonomous EU sanctions extensively in the *PMOI I* case. The CFI is of the view that it must first of all ensure that the legal conditions for imposing the EU sanction are fulfilled. The judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it and to the evidence and information on which that assessment is based. Secondly the Court must ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied. In this context it must examine whether the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded.[185] The restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial. According to the CFI judicial review is, in cases concerning EU sanctions, 'all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights.'[186] It follows from these considerations that the CFI reviews whether the refusal to communicate certain evidence to the party concerned is justified.[187] The General Court derived from the Court of Justice's judgment in *Kadi* that the same extent of judicial review must be applied in cases regarding EU sanctions based on UN Security Council resolutions. It considered in this regard:

> It is obvious from [..] the judgment of the Court of Justice in Kadi and from the reference made there to the judgment of the European Court of Human Rights in Chahal v. United Kingdom [..] that the Court of Justice intended that its review, 'in principle [a] full review', should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in the measure are based.[188]

184 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 343 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 156.

185 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 153-154.

186 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 155. See also Case C-550/09, *E and F* [2010], para 57.

187 See for example Case T-47/03, *Sison v Council* [2007], paras 212 and 223.

188 Case T-85/09, *Kadi v Commission* [2010], para 135. The General Court derived this from the Court of Justice's judgment in *Kadi*.

The EU Courts have made it very clear that the evidence underlying the contested decision must be sent to them.[189] The CFI held in the *PMOI III* case that

> the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision.[190]

If the Council does refuse to send the relevant confidential evidence the Court is not able to conduct its judicial review.[191]

The General Court has recognised that in cases regarding autonomous EU sanctions the Council enjoys broad discretion in its assessment of the matters to be taken into account for the purpose of imposing EU sanctions. As a result the intensity of judicial review is limited. The EU Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council.[192] However the Court also held that

> that does not mean that the Court is not to review the interpretation made by that institution of the relevant facts [..]. The Community judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it.[193]

189 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 155, where the CFI held that it must be able to review the lawfulness and the merits of the measures to freeze funds 'without it being possible to raise objections that the evidence and information is secret or confidential. See also for example Case T-47/03, *Sison v Council* [2007], para 202.

190 Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], para 73.

191 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 351.

192 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 159. Here the CFI referred to the ECtHR's case-law in *Leander v Sweden* and *Al-Nashif v Bulgaria*. In other judgments concerning EU sanctions in which the same consideration is used, the CFI referred to its standing case-law concerning the intensity of judicial review in other fields of EU law, such as Case C-525/04 P, *Spain v Lenzing* [2007]. See for example Case T-256/07, *People's Modjahedin Organization of Iran* [2008], paras 138-139 and Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], para 55.

193 Case T-85/09, *Kadi v Commission* [2010], para 142. The General Court referred by analogy to Case C-525/04 P, *Spain v Lenzing* [2007], a State aid case. With regard to the intensity of judicial review performed by the EU Courts see also section 9.2.1.

The existence of a national decision on which the EU sanction should be based, is for example subjected to (more) rigorous review.[194] The Court pays more deference to the EU Institution's assessment of the factors as to appropriateness on which decisions to freeze funds are based.[195] The General Court held that these standards for the intensity of judicial review also apply to cases regarding EU sanctions based on UN Security Council resolutions.[196] It even held that the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned.[197]

Possible limitations to the right to an effective remedy
It follows from the EU Courts' case-law that also during appeal overriding considerations to do with safety or the conduct of the international relations of the EU and of its Member States may militate against the communication of certain matters to the parties concerned.[198]

Possible compensation for limitations to the rights of the defence during the appeal
In *Kadi* the Court of Justice stated that if certain evidence cannot be communicated to the parties during the appeal phase

> it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice.[199]

The Court has not further explained what kind of techniques could be applied. It only referred to the ECtHR's case-law in *Chahal v the United Kingdom*, in which such techniques were mentioned for the first time. It concerned the use of special advocates who act on behalf of the party to which certain information is not disclosed and who can examine and comment on this information. After

194 See for example Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], where the CFI held that the information provided by the Council did not enable either the applicant or the Court to verify that the contested decision was adopted on the basis of a national decision in the meaning of Art 1 (4) of Common Position 2001/93. In Case T-341/07, *Sison v Council* [2009], paras 107-115 the CFI held that the national judgments on which the contested decision was based did not constitute national decisions in the meaning of Art 1 (4) Common Position 2001/931.

195 Case T-256/07, *People's Modjahedin Organization of Iran* [2008], para 138.

196 Case T-85/09, *Kadi v Commission* [2010], para 139.

197 Case T-85/09, *Kadi v Commission* [2010], para 151.

198 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 342-344.

199 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 344.

the judgment in *Kadi* the ECtHR further addressed such techniques as applied in the United Kingdom. This case-law will be discussed below in section 10.3.4. Apparently the Court of Justice finds that it should apply such techniques if necessary to compensate the limitations of the party's right of the defence. The CFI has also mentioned such techniques, but it has not ruled on the question whether they can or should be applied by it.[200]

Application to specific cases

Because of the strict relationship between the right to be heard, the obligation to state reasons and the right to an effective remedy, the EU Courts found a violation of the right to an effective remedy in all cases in which those first two rights had been infringed. According to the Court the applicants were not able to defend their rights with regard to the evidence underlying the decision in satisfactory conditions before the Court.[201] In the *Bank Melli Iran* and *Fahas* cases, in which the right to be heard and the obligation to state reasons were not violated, the CFI did not find a violation of the right to an effective remedy.[202]

In most cases the Council had taken the opinion that confidential evidence underlying the EU sanction could not be disclosed to the EU Courts. The EU Courts have criticised this 'fundamental position' adopted by the Council.[203] In *PMOI III* the CFI considered that the Council had not explained why the production of relevant information or material in the file would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, did not.[204] In cases in which the confidential evidence was not disclosed to the EU Court the violation of the applicant's right to be heard was not remedied

200 See for example Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 158, Case T-47/03, *Sison v Council* [2007], para 205, where it considered that 'the question whether the applicant and/or his lawyers may be provided with the evidence and information alleged to be confidential, or whether they may be provided only to the Court in accordance with a specific procedure which remains to be defined so as to safeguard the public interest at issue whilst affording the party concerned a sufficient degree of judicial protection, is a separate issue on which it is not necessary for the Court to rule in the present action'.

201 See for example Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 349, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 158, Case T-47/03, *Sison v Council* [2007], para 165, Case T-318/01, *Othman v Council and Commission* [2009], para 86 and Case T-327/03, *Stichting Al Aqsa v Council* [2007], para 64,

202 Case T-390/08, *Bank Melli Iran* [2009], para 106, Case T-49/07, *Fahas v Council* [2010], paras 59-62.

203 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 350.

204 Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], paras 72 and 76.

during the appeal proceedings before these Courts.[205] Furthermore the EU Courts found that they were not able to undertake the review of the lawfulness of the contested decision.[206]

10.1.2.5 Subconclusion: the use of secret information in EU sanction cases

The outright refusal of the Council to state reasons for decisions concerning EU sanctions and to disclose any evidence underlying these decisions to the parties concerned and the EU Courts, lead to a series of annulments of such decisions. In their judgments the EU courts made clear that also in cases concerning measures aiming at combating terrorism, EU fundamental rights, such as the rights of the defence and the right to an effective remedy must be respected. Limitations to these rights are only acceptable in exceptional situations. The Courts stressed the importance of judicial review of EU sanctions, as it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Therefore all the evidence underlying the contested EU sanction must be send to the EU Courts.

The case-law of the EU Courts in the field of EU sanctions is still developing, and there are still few cases in which the EU Courts have applied the obligation to state reasons, the right to be heard and the right to an effective remedy to decisions in which the Council attempted to comply with these principles. Therefore it is not easy to draw conclusions as to the scope of the limitations allowed to these principles by the EU courts. The EU Courts have for example not yet addressed possible methods, such as the provision of non-confidential versions of documents, which aim to reconcile the interests of the Council and the Member States to keep certain information confidential and the rights of the defence. However, the CFI's judgment in *PMOI* indicates that the scope of exceptions for the right to be heard and the obligation to state reasons is wide,[207] wider than in competition cases. First of all the right to be heard and potentially the obligation to state reasons do not need to be complied with

205 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 350.

206 See for example Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 351, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 166, Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], para 76. See differently Case T-390/08, *Bank Melli Iran* [2009], para 106, where the CFI held that it was in the position fully to carry out its review.

207 See also Tridimas & Gutierrez-Fons 2008 pp 717-718. They state that the scope for exceptions which are recognised as conterminous for both the right to a hearing and the obligation to state reasons is vast. Furthermore they point at the fact that the fact that limitations to those rights may be justified in the interests of the conduct of the international relations of the EU and its Member States 'may provide vital breathing space for the political decision-makers where evidence emanates from intelligence provide by third states.'

during the administrative procedure. Unlike in competition cases, the right to be heard may be exercised only during the appeal procedure before the EU Courts. Secondly at least in cases regarding autonomous EU sanctions the General Court does not seem to set very strict requirements as to the detail of the statement of reasons and the evidence which should be provided to the party concerned. In some cases the General Court seemed to be satisfied with a very concise statement of reasons and very limited access for the parties concerned to the Council's file. In cases regarding EU sanctions based on UN Security Council resolutions the Court has set stricter requirements. The General Court ruled that the information provided to the person concerned must be sufficiently specific, so that this person can contest the allegations against him. In such cases the General Court follows the ECtHR's judgment in *A and others*. The difference in approach between the two sorts of cases may be explained by the fact that in autonomous EU sanction cases it is up to the national courts to assess the evidence substantiating the allegations of involvement in terrorism and guaranteeing procedural rights of the party concerned, while no judicial review exists on the UN level.

A reason to allow more limitations to procedural rights in EU sanction cases than in competition cases may be that the EU Courts deem national security of the EU and its Member States and their relations with third countries worthy of more protection than the interests of businesses in protecting their secrets. The EU Court have however not explicitly stated this in their judgments. Another explanation may be that the task of the Council and the EU Courts in autonomous EU sanction cases is rather limited: the core of the case is decided on the national level. The rights of the defence should thus essentially be ensured by the national administrative authorities and courts.

10.2 The use of secret evidence under international law

The use of secret information has been addressed by the ECtHR, the Committee against Torture, the Human Rights Committee and UNHCR. The body of case-law under the ECHR provides by far the most developed standards and will therefore be discussed at length in this section. First of all however a brief overview will be given of the views of the other supervising bodies.

The Committee against Torture and the Human Rights Committee have addressed the use of secret information in cases concerning national security in a few views in individual cases. In *Agiza v Sweden* the Committee against Torture considered that national security concerns might justify some adjustments to be made to the particular process of review. However, the mechanism chosen must continue to satisfy the requirements of effective, independent

and impartial review.[208] In *Agiza* a violation of the procedural requirements under Article 3 CAT had occurred as no such review was available.[209]

The Human Rights Committee considered in *Ahani v Canada,* which also concerned a person who was to be expelled for national security reasons, that in the circumstances of national security involved, it was not persuaded that the procedure before the Canadian Federal Court in which the reasonableness of the security certificate was assessed, was unfair to the author. Nor did the Committee 'discern on the record any elements of bad faith, abuse of power or other arbitrariness which would vitiate the Federal Court's assessment [..]'. The Committee took into account that, in the Canadian Federal Court's "reasonableness" hearing on the security certification, the author was provided with a summary redacted for security concerns reasonably informing him of the claims made against him. Furthermore the Committee noted that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses.[210] The Committee did find a violation of Article 13 ICCPR regarding the appeal against the deportation order before the Canadian Supreme Court. The reason was that the Supreme Court did not grant the applicant enhanced procedural protections, including provision of all information and advice the Minister intended to rely on, receipt of an opportunity to address the evidence in writing and to be given written reasons by the Minister, because he had not made out a *prima facie* risk of *refoulement*. Such guarantees were provided in another, similar case before the Supreme Court in which a *prima facie* case risk was apparent.[211]

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208 In its Concluding Observations on New Zealand of 19 May 2009, CAT/C/NZL/CO/5, ComAT expressed its concerns with regard to the continued issuance of security-risk certificates under the Immigration Act, which could lead to a breach of Art 3 of the Convention, as the authorities may remove or deport a person deemed to constitute a threat to national security, without having to give detailed reasons or disclose classified information to the person concerned.

209 ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003, para 13.8

210 The procedure before the Federal Court is described as follows in para 2.3 of the judgment. The Court assessed whether the Ministers' certificate was "reasonable on the basis of the information available". It examined the security intelligence reports *in camera* and heard other evidence presented by the Solicitor-General and the Minister, in the absence of the plaintiff. The Court then provided the author with a summary of the information, required by statute to allow the affected person to be "reasonably" informed of the circumstances giving rise to the certification while being appropriately redacted for national security concerns, and offered the author an opportunity to respond. The evidence taken into account by the Court in its decision included information gathered by foreign intelligence agencies which was divulged to the Court *in camera* in the author's absence on national security grounds. The Court also heard the author testify on his own behalf in opposition to the reasonableness of the certificate.

211 HRC 15 June 2004, *Ahani v Canada*, no 1051/2002.

In two complaints before the Committee against Torture against Sweden a report was drawn up by the Swedish embassy in Ankara in which it was concluded that part of the applicants' asylum account was not true and/or documents provided by them were not authentic. Both reports were based on information obtained from anonymous sources and the applicants complained that they were therefore unable to effectively challenge the findings contained in the reports. In one case the Committee against Torture refused to take the report into account because it had been submitted by the State authorities after the national proceedings had been concluded. As a result 'the applicant had not had an opportunity either to contest the information provided therein or to challenge the investigator whose name has not been revealed before the domestic authorities'.[212] In the other case the Committee did not deem the applicants' complaint regarding the use of anonymous sources well-founded. Instead it considered that the applicants had failed to disprove the State's findings regarding the authenticity of the documents adduced by them.[213] The Committee thus seems to accept that information provided by anonymous sources is included in the assessment of the credibility of an asylum account.

Finally UNHCR addressed the use of secret information in proceedings in which a person is excluded from refugeeship on the basis of Article 1F of the Refugee Convention. According to UNHCR such exclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned. It accepts however that 'exceptionally, anonymous evidence (where the source is concealed) may be relied upon, but only where this is absolutely necessary to protect the safety of witnesses and the asylum-seeker's ability to challenge the substance of the evidence is not substantially prejudiced'. Furthermore UNHCR states that 'secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude. Where national security interests are at stake, these may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights'.[214]

It should be concluded that the supervising bodies mentioned above find that expulsion measures based on national security should be subjected to judicial review. They accept however that national security reasons or other interests of the State may limit the procedural guarantees offered in asylum or deportation proceedings. It does not follow from these view to what extend

212 ComAT 21 November 2008, *E.J. et al. v Sweden*, no 306/2006.

213 ComAT 2 May 2007, *E.R.K. and Y.K. v Sweden*, nos 270/2005 and 271/2005, paras 2.7, 5.4 and 7.5. The applicants only stated with regard to the Embassy report that the discrepancies in the documents were merely "alleged formal errors" and that they lack the means and necessary legal expertise to make any further comments.

214 UNHCR Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05) 4 September 2003, para 36.

procedural safeguards may be limited. The ECtHR's case-law discussed in the next section provides for much more guidance on this point.

10.2.1 The ECtHR's case-law on secret evidence

The ECtHR has addressed the use of confidential information in complaints under several provisions of the Convention and in very different sorts of cases. Usually the Court examines in such complaints whether the right of adversarial proceedings (and sometimes the right to equality of arms) has been complied with. The right to adversarial proceedings has been recognised under Articles 5 (4), 6 (1) civil and criminal limb, 8, 9, 13 and Article 1 of Protocol 7 ECHR.[215] Cases falling within the scope of Articles 5 (4), 6 (1) civil limb and 8 ECHR often concern measures, which are intended to protect the national security of the State. Examples are detention of persons suspected of being involved in terrorist activities, secret surveillance of persons, the issuing of certificates by the State relating to a person's danger for national security, which may result in a person losing or not obtaining a job or the expulsion or non-admission of persons on national security grounds. In these cases (some of) the evidence underlying the decision to take such measures are not disclosed to the person concerned for national security reasons. In criminal cases evidence may not be disclosed to the accused in order to protect witnesses or the State's interest in keeping secret police methods of investigation of crime.

The case-law of the ECtHR only concerns the guarantees which should be offered during the (appeal) proceedings before a national court (art. 5 and 6) or a national independent authority (art. 13). This is thus different than the case-law of the EU Courts examined in the previous sections, which also regarded the guarantees required during the administrative proceedings before the EU institutions.

The ECtHR has recognised that the national court or independent authority dealing with an appeal against a decision may need to afford a wide margin of appreciation to the executive in matters of national security. However this does not mean that as soon as the executive has chosen to invoke the term "national security" the decision may escape any review by the court or independent authority.[216] Under Article 6 ECHR the ECtHR held that the right to

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215 This follows from the fact that Art 1 of Protocol 7 requires that the expulsion of an alien lawfully resident is 'in accordance with the law'. The phrase 'in accordance with the law' has a similar meaning throughout the Convention and its Protocols. Under Artt 8 and 9 the Court held that the right to adversarial proceedings flows from this requirement. See ECtHR 24 April 2008, *C.G. and others v Bulgaria*, no 1365/07, para 73. This section will not further address Art 9 ECHR and Art 1 of Protocol 7 ECHR.

216 See for example with regard to Art 13 ECHR: ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 94 and 137. The ECtHR considered with regard to Art 5 ECHR that 'national authorities cannot do away with effective control of lawfulness of detention by

submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive.[217] Also under Articles 8, 9 and 13 ECHR the Court has held that a national independent authority must be able to review whether invoking national security as the basis for measures against a person is reasonable and not arbitrary.[218] The existence of a meaningful and independent review of measures is a necessary guarantee against arbitrariness and abuse of power.[219] In several cases the ECtHR found a violation of Article 6 (1), 8, or 13 ECHR because the national court or independent authority could not review the decision that the person concerned was a danger to national security, did not examine relevant facts and evidence and in some cases confined itself to 'a purely formal examination'.[220]

According to the Court the limits of the notion of national security should not be stretched beyond its natural meaning.[221] In *C.G. v Bulgaria* the ECtHR held that drugs offences are not capable of impinging on the national security of Bulgaria or could serve as a sound factual basis for the conclusion that, if not expelled, the applicant would present a national security risk in the future.[222] The same was considered with regard to allegations of human trafficking in *Raza v Romania*.[223] In several cases the ECtHR was impeded to

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the domestic courts whenever they choose to assert that national security and terrorism are involved.' See also ECtHR 26 July 2011, *Liu v Russia*, no 29157/09, para 88.

217 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 77. See also ECtHR 30 October 2001, *Devlin v the United Kingdom*, no 29545/95, para 31 and ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, para 28.

218 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 124 (Art 8) and 137 (Art 13). See under Art 9 ECtHR 12 February 2009, *Nolan and K. v Russia*, no 2512/04, para 71.

219 See for example ECtHR (Adm) 1 March 2005, *Haliti v Switzerland*, no 14015/02 , where the ECtHR held 'qu'on ne se trouve pas dans une situation dans laquelle il n'existait aucune garantie contre l'arbitraire et l'abus du pouvoir d'appréciation laissé aux organes appartenant à l'exécutif de l'Etat.' See also ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04, paras 38 and 42, ECtHR 26 July 2011, *M. and Others v Bulgaria*, no 41416/08, para 102.

220 See for example ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99 and ECtHR 26 July 2011, *Liu v Russia*, no 29157/09 (Artt 8 and 13 ECHR), para 89, ECtHR 24 April 2008, *C.G. v others v Bulgaria*, no 1365/07, paras 47 and 50 (Art 8 and Art 1 of Prot. 7), ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04, para 41 (Art 8), ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, paras 75 and 77 (Art 6).

221 ECtHR 24 April 2008, *C.G. v others v Bulgaria*, no 1365/07, para 43.

222 ECtHR 24 April 2008, *C.G. v others v Bulgaria*, Appl. no 1365/07, para 43.

223 ECtHR 11 February 2010, *Raza v Romania*, no 31465/08, para 53. In *Guliyev v Lithuania* the Court concluded that no objective materials verified by the domestic courts had been presented to the ECtHR to demonstrate that the domestic authorities had good reasons to suspect the applicant of being a threat to national security. ECtHR 16 December 2008, *Gulijev v Lithuania*, no 10425/03, para 46. See also under Art 9: ECtHR 12 February 2009, *Nolan and K. v Russia*, no 2512/04, para 72.

assess whether the measure could be justified in the light of national security because the State failed to provide it with relevant documents.[224]

It is important to remember that national security concerns cannot justify expulsion of a person to a country where he runs a real risk of *refoulement*.[225] Secret evidence substantiating that a person poses a risk to national security therefore cannot play a role in the rigorous scrutiny required in Article 3 ECHR cases. In *A v the Netherlands* in which the ECtHR found that the expulsion of the applicant would violate Article 3, secret evidence had been used by the national authorities to justify the refusal of an asylum status. This evidence had not been included in the assessment whether expulsion of the applicant would infringe Article 3 ECHR. The ECtHR did not find a violation of Article 13 ECHR reiterating that the right to political asylum is not explicitly protected by either the ECHR or its Protocols. It considered that the secret materials did not, as such, concern the applicant's fear of being subjected to ill-treatment in Libya but whether he was posing a threat to the Netherlands national security. The fact that this information was disclosed (with the applicant's permission) to the national courts which also reviewed the decision regarding the risk of *refoulement* did not, in the ECtHR's view, compromise the independence of those courts.[226]

As was pointed out in the introduction to this chapter secret evidence may also be used by national authorities in order to assess the credibility of the asylum seeker or establish the facts. The ECtHR has ruled in two asylum cases in which the Government relied on country of origin information provided by anonymous sources.[227] These cases will be further discussed in section 10.3.4.

In a way asylum cases in which secret information is used to establish the facts are comparable to criminal cases. In both sorts of cases the national court or authority must review the facts rigorously. In expulsion or other cases falling within the scope of Article 8 the situation is different. In such cases secret evidence is used in order to justify an interference with the right to family life. National authorities enjoy a wide margin of appreciation when deciding whether national concerns exist and whether they justify the interference with the right to private or family life. National courts may therefore pay deference

224 See for example ECtHR 11 February 2010, *Raza v Romania*, no 31465/08, para 53.

225 ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 151, where the ECtHR considered that in Art 3 cases, 'given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3 [..], the notion of an effective remedy under Article 13 [..] requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [..] This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State'.

226 ECtHR 20 July 2010, *A v the Netherlands*, no 4900/06, para 160.

227 ECtHR 22 September 2011, *H.R. v France,* no 64780/09, para 61 and ECtHR 2 June 2011, *Sufi and Elmi v the United Kingdom*, nos. 8319/07 and 11449/07, paras 233-234.

to those decisions. It may therefore be expected that the ECtHR will follow its case-law concerning criminal cases under Article 6 in asylum cases in which secret evidence is used in the assessment of the risk of *refoulement*. As will be pointed out in section 10.3.2 the ECtHR has already applied the guarantees required by the criminal limb of Article 6 (1) to detention and administrative cases, taking into account the nature of the case.

10.2.2 The right of adversarial proceedings: level of procedural protection.

The ECtHR has recognised that all procedures governed by Articles 5 (4),[228] 6,[229] 8[230] and 13[231] ECHR must be adversarial and that in those proceedings the principle of equality of arms must be respected.[232] The principle of adversarial proceedings entails that the parties to a trial have knowledge of and are able to comment on all evidence adduced or observations filed.[233] The principle of equality of arms 'requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a

228 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 204.

229 In some cases under Art 6 the ECtHR examined the complaints regarding the use of secret evidence under the right of access to court. See for example ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92 and ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94.

230 In Art 8 cases the right to adversarial proceedings is usually derived from the 'quality of law criterion' which follows from the requirement that an interference with the right to family or private life must be 'in accordance with the law'. In ECtHR 19 October 2010, *Özpinar v Turkey*, no 20999/04, the Court took into account the lack of adversarial proceedings in the proportionality test under Art 8.

231 See ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, para 123, where the Court held under Art 8 that 'even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence'. In para 137, under the complaint regarding Art 13 the ECtHR also stated that there must be some form of adversarial proceedings.

232 Trechsel notes that in the ECtHR's case-law, the right to adversarial proceedings is not always clearly separated from the principle of equality of arms. Trechsel 2005, p 90.

233 ECtHR (GC) 22 January 1996, *Lobo Machado v Portugal*, no 15764/89, para 31. In criminal cases the right to an adversarial trial means 'that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party'. See ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 21. Harris and others also considered the requirement that the prosecution must disclose to the defence all material evidence in their possession for or against the accused, whether or not they use it in the proceedings, to be a part of the right to adversarial proceedings. See Harris, O' Boyle & Warbrick 2009, p 254. Trechsel states with regard to criminal cases that the right to adversarial proceedings applies irrespective of whether the material of the other party concerns the establishment of the facts, legal argument on the merits or procedural issues. Trechsel 2005, p 90.

substantial disadvantage vis-à-vis his opponent.'[234] The general requirements derived from both principles seem to be the same for all cases (civil, criminal or other) governed by the ECHR.[235] As will be further explained below the specific application of those principles may however differ according to the nature of the case. Practically all case-law examined below addressed the issue of non-disclosure of evidence under the right to adversarial proceedings and not under the right to equality of arms.[236] Therefore in further sections reference will be made to the right to adversarial proceedings only.

Relevance of the nature of the case

The level of procedural protection under the right to adversarial proceedings depends on the nature of the case. Arguably the highest level of protection is offered in criminal cases falling within the scope of Article 6 (1) and (3) ECHR. The ECtHR decided to apply these high standards also in some cases falling within the scope of the civil limb of Article 6 and even other provisions of the Treaty. In *A and others v the United Kingdom* the ECtHR considered that because a suspicion of terrorism was the reason for the detention and

> in view of the dramatic impact of the lengthy – and what appeared at the time to be indefinite – deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect.[237]

In *Pocius v Lithuania* and *Aksoy v Turkey*, both cases falling within the scope of the civil limb of Article 6 ECHR the Court also applied these guarantees while referring to the circumstances of the case. In *Pocius* the applicant had contested being implicated in criminal activities as a ground for listing his name in an operational records file, as a result of which the applicant's permit to keep and carry a firearm had been revoked.[238] The *Aksoy* case concerned disciplin-

234 ECtHR 27 October 1993, *Dombo beheer v the Netherlands*, no 14448/88, para 33. See also section 4.3.7.

235 In ECtHR 27 January 1997, *Nideröst-Huber v Switzerland*, no 18990/91, the ECtHR explicitly considered that the requirements derived from the right to adversarial proceedings are the same in both civil and criminal cases. See also Van Kempen 2009, p 437.

236 Trechsel states that access to documents is *the* issue which falls to be considered under the heading of the right to adversarial proceedings. He notes however that the ECtHR does not always follow a clear and consistent approach and often combines or mixes the right to adversarial proceedings and the right to equality of arms. Trechsel 2005, p 101.

237 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 217.

238 ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 53. See also ECtHR 6 July 2010, *Užukauskas v Lithuania*, no 16965/04, para 47.

ary proceedings against a nurse who was working for a military academy for medicine in Turkey.[239]

With regard to Article 5 (4) ECHR, the Court held that this provision 'does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. According to the Court the Article 5 (4) procedure does not always need to meet the standards required under the civil and criminal limb of Article 6 ECHR. However, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. The procedure must be adversarial and must ensure equality of arms. In detention on remand cases the detainee must have the opportunity to effectively contest the basis of the allegations against him, which means amongst others that he must have access to documents in the case-file which form the basis of the prosecution case against him.[240] In remand cases as well as other cases in which a suspicion against the detainee is the ground for detention (like in *A and others*) and/or the detention has great impact on the detainee, Article 6 ECHR standards are incorporated into Article 5 (4) ECHR.[241] It may thus be assumed that in other kinds of detention cases, lower standards may apply.

The lowest standards seem to apply to cases concerning secret surveillance and the use of secret information for screening job candidates who would have access to sensitive information, governed by Article 13 ECHR. In these cases the ECtHR accepted that a remedy must be 'as effective as can be'. According to the ECtHR it is inherent in any system of secret surveillance or secret checks that there would be a restricted scope for recourse. Such a system can only function if the individual concerned remained unaware of the measures affecting him.[242] In those cases the Court did not find a violation of Article 13 ECHR although the available remedies only had limited effectiveness.[243]

Level of procedural protection under Article 3 ECHR

The Court suggests in *Chahal* that the procedural safeguards under Article 3 are stronger than those derived from Article 13 in *Klass v Germany* and *Leander v Sweden*. It considered in *Chahal* that:

239 ECtHR 31 October 2006, *Aksoy v Turkey*, no 59741/00, para 27. Also in other cases the Court referred to the important consequences of a measure for the applicants, without that explicitly leading to higher procedural guarantees. See for example ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, para 27 and ECtHR 13 December 2007, *Dagtekin v Turkey*, no 70516/01, para 34.

240 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 203-204.

241 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 217.

242 ECtHR 26 March 1987, *Leander v Sweden*, no 9248/81, paras 78 and 84 and ECtHR (Plen) 6 September 1978, *Klass v Germany*, no 5029/71, para 69. See also ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 136-137.

243 ECtHR 26 March 1987, *Leander v Sweden*, no 9248/81, para 84 and ECtHR (Plen) 6 September 1978, *Klass v Germany*, no 5029/71, paras 70-72.

> it must be borne in mind that these cases concerned complaints under Articles 8 and 10 of the Convention […] and that their examination required the Court to have regard to the national security claims which had been advanced by the Government. The requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3 […], where the issues concerning national security are immaterial.[244]

This consideration obviously refers to the fact that Article 3 ECHR is absolute and that national security issues cannot play a role in the assessment whether a person's expulsion violates this provision. However, it may also be derived from this consideration that a remedy which is "as effective as can be" will never be sufficient in cases concerning Article 3 ECHR. Instead a rigorous scrutiny must take place.[245] The ECtHR has never explicitly addressed the level of procedural protection which should be guaranteed in asylum cases in which the assessment of the risk of *refoulement* was partly based on secret evidence. Therefore it remains to be seen which standards apply in such cases and whether for example, taking into account the serious interests at stake for the person concerned, the highest standards developed under the criminal limb of Article 6 (1) ECHR apply.

Limited application of the requirement of a remedy which is 'as effective as can be'
In *Al-Nashif v Bulgaria*, the ECtHR also distinguished cases regarding the expulsion of aliens on national security grounds falling within the scope of Article 8 ECHR from the cases concerning secret surveillance and the use of secret information for screening job candidates. It considered that in expulsion cases reconciling the interest of preserving sensitive information with the individual's right to an effective remedy is obviously less difficult than in secret surveillance cases.[246] In none of the later expulsion cases the Court applied the 'as effective as can be' criteria. It may therefore be assumed that in *expulsion* cases stricter procedural guarantees are required under Articles 8 and 13 than in cases concerning secret surveillance or secret checks.[247]

Finally in *Tinnelly and others v the United Kingdom* the ECtHR considered that the requirement of a remedy which is 'as effective as can be' cannot apply to civil cases falling within the scope of Article 6 (1) ECHR. The Court stressed in this respect 'that the requirements of an "effective remedy" for the purposes of Article 13 of the Convention are less strict than those of Article 6 (1). For this reason, the Government's assertion that the access enjoyed by the appli-

244 ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 150.
245 ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 151.
246 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, para 137.
247 The level of protection guaranteed under Artt 8 and 13 ECHR in expulsion cases seems to be the same.

cants was as effective as could be in the circumstances cannot be sustained'.[248] Article 6 (1) ECHR thus offers more protection than Article 13. It does not directly follow from the case-law whether and if so with regard to which aspects the civil limb of Article 6 (1) ECHR offers less protection than its criminal limb with regard to the use of confidential information.

10.2.3 Limitations of the right to adversarial proceedings

In all sorts of cases, the ECtHR has recognised that the right to adversarial proceedings may be limited in special circumstances. In criminal cases the ECtHR held that the entitlement to disclosure of relevant evidence is not an absolute right. There may be reasons, such as the need to preserve the fundamental rights of another individual or to safeguard an important public interest, which justify a limitation of this right.[249] Under the civil limb of Article 6 the Court has held that a limitation of the right of access to court is not compatible with the Convention if it does not pursue a legitimate aim.[250] In *Al-Nashif* the Court considered in its ruling under Articles 8 and 13 that certain limitations on the type of remedies available to the individual may be justified where national security considerations are involved. Nevertheless, the remedy must remain effective in practice as well as in law.[251]

The ECtHR has identified several interests which may justify limitations of the right to adversarial proceedings. In *Sufi and Elmi v the United Kingdom* the ECtHR recognised with regard to sources providing (country of origin) information for the purpose of the assessment of asylum cases, that 'where there are legitimate security concerns, sources may wish to remain anonymous'.[252] Similarly the ECtHR has considered that the need to protect witnesses at risk of reprisals may justify a limitation of the right to adversarial proceedings.[253] The same applies to the need to keep secret police methods of investigation of crime.[254] In *van Mechelen and others v the Netherlands*, a criminal case, the ECtHR accepted that it was necessary to preserve the anonymity of an agent deployed in undercover activities for his own or his family's pro-

248 ECtHR 10 July 1998, *Tinelly & sons Ltd and others and McElduff and others v the United Kingdom*, no 20390/92 and 21322/92, para 77.
249 See for example ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45.
250 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 72.
251 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 123 and 137.
252 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 233.
253 ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 70.
254 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45 and ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 52.

tection and so as not to impair his usefulness for future operations.[255] In *Mirilashvili v Russia*, also a criminal case, the ECtHR considered that the aim of organising criminal proceedings in such a way as to protect information about the details of undercover police operations could legitimise the limitation to the right to adversarial proceedings.[256]

Furthermore the ECtHR has accepted under several provisions that limitations may be justified in order to protect national security.[257] In *A and others* for example, which concerned the indefinite detention of persons suspected of involvement in terrorist activities, the Court pointed at the fact that 'the activities and aims of the al'Qaeda network had given rise to a "public emergency threatening the life of the nation"'. According to the ECtHR it had therefore to

> be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and [..] a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information [..].[258]

Necessity of non-disclosure

In cases falling within the criminal limb of Article 6 (1) or in which the standards accepted under that provision were applied, the Court stated that only such measures restricting the rights of the defence which are 'strictly necessary' are permissible.[259] If a less restrictive measure can suffice then that measure should be applied.[260] 'Relevant and sufficient' reasons must

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255 ECtHR 18 March 1997, *Van Mechelen and others v the Netherlands*, nos 21363/93, 21364/93, 21427/93 and 22056/93, para 57. See also ECtHR (Adm) 17 September 2005, *Haas v Germany*, no 73047/01, where anonymous informants risked becoming the victim of acts of revenge abroad, where German authorities could only protect them to a very limited extent.

256 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 202.

257 See for example under Art 5 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, under Art 6 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, Appl. nos. 20390/92 and 21322/92 and under Artt 8 and 13 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99.

258 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 216-217. See also for example ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 76, where the Court stated that it was mindful of the security considerations at stake in that case and the need for the authorities to display the utmost vigilance in the award of contracts for work involving access to vital power supplies or public buildings situated in town centers in Northern Ireland. The Court has also accepted that State secrets should only be disclosed to persons who possess the appropriate authorisation. ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 54. However, the State must be able to prove that it is necessary to keep them secret. See for example ECtHR 24 April 2007, *Matyjek v Poland*, no 38184/03, para 62.

259 See for example ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45 and ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 52.

260 ECtHR 18 March 1997, *Van Mechelen and others v the Netherlands*, nos 21363/93, 21364/93, 21427/93 and 22056/93, para 58.

be adduced by domestic authorities for the use of anonymous witnesses in criminal cases.[261] In *A and others v the United Kingdom* the ECtHR considered that 'it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others'.[262] This case-law presupposes a very strict test. It does not follow from the ECtHR's case-law whether such a strict test also applies to civil cases decided under Article 6 (1) ECHR.

Under Articles 8 and 13 ECHR the ECtHR has held that 'there must be some form of adversarial proceedings before an independent body competent to review the reasons for the decision, if need be with *appropriate procedural limitations* on the use of classified information' (emphasis added).[263] This also suggests that limitations of the right to adversarial proceedings, such as the non-disclosure of evidence should be necessary.[264]

Assessment of the necessity of non-disclosure by the national court

The ECtHR has held under Articles 6 (1) and 5 (4) ECHR that the national court should decide whether it is justified to refuse disclosure of evidence to the party concerned.[265] The Court found a violation of Article 6 (1) ECHR in several criminal cases in which State authorities (such as the public prosecutor or the security service) alone assessed the necessity of keeping relevant information secret.[266] In *Mirilashvili v Russia* the ECtHR made clear that the mere involvement of a court in the decision whether evidence should be disclosed

261 See for example ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 71.

262 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 218.

263 ECtHR 6 December 2007, *Liu and Liu v Russia*, no 42086/05, para 59 and ECtHR 2 September 2009, *Kuashal and others v Bulgaria*, no 1537/08, para 29.

264 In ECtHR 11 February 2010, *Raza v Romania*, no 31465/08, para 55 the ECtHR considered that 'even in indisputable national security cases, such as those relating to terrorist activities, the authorities of countries which have already suffered from and are currently at risk of terrorist attacks have chosen to keep secret only those parts of their decision whose disclosure would compromise national security or the safety of others [..], thus illustrating that there exist techniques which can accommodate legitimate security concerns without fully neglecting fundamental procedural guarantees such as the publicity of judicial decisions'.

265 According to Van Dijk and others the Court attaches great importance to the fact that the need for disclosure is under constant assessment of the judge, who may monitor throughout the trial the fairness or otherwise of the disclosed evidence'. Van Dijk a.o. 2006, p 588. See also ECtHR 24 April 2007, *V. v Finland*, no 40412/98, para 77.

266 See for example ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, paras 63-66, ECtHR 19 June 2001, *Atlan v the United Kingdom*, no 36533/97, para 44 and ECtHR 24 June 2003, *Dowsett v the United Kingdom*, no 39482/98, para 44. In these cases the prosecution decided during the applicants' trial, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. In ECtHR 24 September 2007, *Matyjek v Poland*, no 38184/03, para 57 the Court observed that it has considered the power of the Head of the State Security Bureau to uphold and lift the confidentiality of documents inconsistent with the fairness of lustration proceedings including with the principle of equality of arms.

to a party is not sufficient.[267] In this case the Court found that the decision-making process was seriously flawed because the domestic court did not analyse amongst others whether the disclosure of the materials withheld from the applicant would, at least arguably, have harmed any identifiable public interest.[268] Finally in several criminal cases, the fact that the national court did review the necessity of the non-disclosure of confidential information, was taken into account in the Court's ruling that Article 6 (1) ECtHR had not been violated.[269]

In criminal cases the fact that evidence was not revealed to the court of first instance, which as a result could not examine the necessity of the non-disclosure of this evidence to the applicant, can sometimes be compensated during appeal proceedings.[270] In *Botmeh and Alami v the United Kingdom* the ECtHR took into account that

> given the extend of disclosure to the applicants of the withheld material by the Court of Appeal,[271] the fact that the court was able to consider the impact of the new material on the safety of the applicant's conviction in the light of detailed argument of their defence council and the fact that the undisclosed material was found by the court to add nothing of significance to what had already been disclosed at trial […] the failure to place the undisclosed material before the trial judge was in particular circumstances of the case remedied by the subsequent procedure before the Court of Appeal.[272]

By contrast in *Rowe and Davis v the United Kingdom* the Court did not find the procedure before the appeal court sufficient to remedy the unfairness of the procedure at first instance. The Court took into account the fact that the Court of Appeal had fewer investigating powers than the court of first instance and the possibility that the Court of Appeal was influenced by the jury's verdict

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267 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 197.

268 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, paras 206-208.

269 See for example ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 47 and ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 56.

270 See also Summers 2007, p 120.

271 The Court of Appeal had disclosed to the applicant's a summary of the information contained in one document and it gave an account of the events which had resulted in the fact that the undisclosed material had not been placed before the trial judge.

272 ECtHR 7 June 2007, *Botmeh and Alami v the United Kingdom*, no 15187/03, para 44. See also ECtHR 16 December 1992, *Edwards v the United Kingdom*, no 13071/87, paras 36-39. In this case the Court of Appeal examined the transcript of the trial including the applicant's alleged confession and considered in detail the impact of the new information on the conviction. The applicant's representatives had every opportunity to seek to persuade the court that the conviction should not stand in view of the evidence of non-disclosure. Furthermore it was open to counsel for the applicant to make an application to the Court of Appeal – which they chose not to do – to call witnesses.

of guilty into underestimating the significance of the undisclosed evidence.[273] The ECtHR held that the fact that the Court of Appeal did not examine the non-disclosed material cannot in itself amount to a violation of Article 6 (1) ECHR, in the situation that no deficiencies were found in the first instance procedure.[274]

Arguably also under the civil limb of Article 6 (1) ECHR the executive cannot decide on its own on the necessity of confidentiality of information. This follows from the fact that the ECtHR has held that an applicant's right to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive.[275]

The Court has not considered yet whether Article 13 ECHR requires (in expulsion measures) that an independent authority rules on the necessity of the non-disclosure of evidence. In most expulsion cases decided under Articles 8 and 13 the national court had not received the confidential documents and/or had not reviewed the facts, let alone the necessity of the limitations of the right to adversarial proceedings. It may however be expected that the Court does not accept that it is left up to the full discretion of the executive authorities to decide whether national security concerns justify the refusal to disclose documents to the applicant. Such discretion could lead to arbitrariness and would not be in line with the ECtHR's case-law which implies that the national court should assess whether national security reasons justify limitations to the right to family life.

Examination of confidential evidence by the national court

The national court should assess whether invoking national security as a justification for a certain measure has a reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.[276] Furthermore it must examine the necessity of the non-disclosure of the evidence. This presupposes that the court receives all the relevant evidence from the State.[277] The ECtHR has made clear that the con-

273 ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, para 65 and ECtHR 19 June 2001, *Atlan v the United Kingdom*, no 36533/97, para 45. See also Trechsel 2005, p 93. In ECtHR 24 April 2007, *V. v Finland*, no 40412/98, para 79, the ECtHR held that the appeal could not remedy the defects during the proceedings in first instance, amongst others because there was no possibility of making informed submissions to the court on behalf of the accused as the applicant received the requested information only after the relevant time-limit for the appeal had elapsed.

274 ECtHR 11 January 2011, *McKeaown v the United Kingdom*, no 6684/05, para 54.

275 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 77. In ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 203 the ECtHR distinguished the case from *Tinnelly* when considering that the decision to withhold certain documents was taken not by the prosecution unilaterally.

276 ECtHR 26 July 2011, *Liu v Russia*, no 29157/09, para 88.

277 ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, paras 63-66.

fidential information used by the State authorities should be disclosed to the national court (Articles 5 and 6 ECHR) or independent authority (Article 13 ECHR) hearing the case. If the court has not received all confidential information in the case-file it is not in the position to monitor the need for (non-) disclosure, but it is also not able to review the facts.[278] In *Tinnelly v the United Kingdom* for example the Court considered that any substantive review of the grounds motivating the issues of a national security certificate would have been impaired because the court assessing the case did not have sight of all the materials on which the Secretary of State based his decision.[279]

Assessment of secret evidence by the ECtHR

In criminal cases in which the identity of witnesses was not disclosed to the applicant, the ECtHR has assessed itself whether the reasons for such non-disclosure were 'relevant and sufficient'.[280] In criminal cases where evidence has been withheld from the defence of public interest grounds the ECtHR does not consider it to be its role to decide whether or not such non-disclosure was strictly necessary. As a general rule it is for the national courts to assess the evidence before them. The ECtHR has noted that in many cases it was not even placed in the position to perform a balancing test, as the information concerned was not revealed to it.[281] The ECtHR thus pays deference to the national decision whether certain evidence should be kept confidential for national

278 See for example ECtHR 24 April 2007, *V. v Finland*, no 40412/98, para 78, where the ECtHR considered that the courts did not, any more than the defence or the public prosecutor, have knowledge of the contents of the telephone metering information and they were not therefore in a position to monitor the relevance to the defence of the withheld information. The ECtHR furthermore held that in case of a plea of incitement, the court's duty to examine this plea and ensure the overall fairness of the trial requires that all relevant information (also information not included in the persecution file) be openly put before the court or tested in an adversarial manner. See ECtHR 4 November 2010, *Bannikova v Russia*, no 18757/06, para 64.

279 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 75. See for cases under Artt 8 and 13 ECHR for example ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04, para 41 and ECtHR 6 December 2007, *Liu and Liu v Russia*, no 42086/05, paras 61 and 63, where the Court considered that 'the domestic courts were not in the position to assess effectively whether the decision had been justified, because the full material on which it had been based was not made available to them'.

280 See for example ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 71 and ECtHR (Adm) 17 September 2005, *Haas v Germany*, no 73047/01, where the Court found that the domestic authorities adduced relevant and sufficient reasons to keep witnesses' identities secret. In that case anonymous informants risked becoming the victim of acts of revenge abroad, where German authorities could only protect them to a very limited extent.

281 See for example ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 53, ECtHR 24 June 2003, *Dowsett v the United Kingdom*, no 39482/98, para 43 and ECtHR 6 July 2010 *Pocius v Lithuani*a, no 35601/04, para 53.

security reasons.[282] Instead, the ECtHR ensures that, as far as possible, 'the decision-making process complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused'.[283]

In *Mirilashvili v Russia* the Court held that in situations involving "national security" considerations for withholding documentary evidence, the Court has applied a less exacting standard than in cases concerning the use of anonymous witnesses. The Court considered however that 'that standard of scrutiny should not be applied automatically; the Court retains the power to assess independently whether the case involved national security considerations.'[284] In a few cases regarding Article 6 ECHR the Court did indeed examine (at least marginally) whether the non-disclosure of evidence was justified. The Court has held with regard to lustration proceedings in general that, 'unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes'.[285] It is for the Government to prove the existence of a such an interest in maintaining documents secret.[286] Furthermore in *Aksoy v Turkey* the Court considered that the case-file did not contain any element which could justify the non-disclosure of the documents on national security grounds or for other relevant reasons.[287] In *A. and others v the United Kingdom* on the other hand the Court concluded that on the material before it, the Court had 'no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.'[288]

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282 This is in line with the Court's opinion that the State's enjoy a wide margin of appreciation in their assessment whether national security justifies certain measures against a person, such as expulsion measures (see section 10.3.1). Summers states that the reason for the ECtHR's deference is that the Court is not interested in acting as a Court of fourth instance. Summers 2007, p 118.

283 See for example ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 53, ECtHR 24 June 2003, *Dowsett v the United Kingdom*, no 39482/98, para 43 and ECtHR 6 July 2010 *Pocius v Lithuania*, no 35601/04, para 53. Trechsel notes that the words 'as far as possible' are somewhat vague, especially if read in conjunction with the refusal to ascertain whether the non-disclosure was 'strictly necessary'. Trechsel 2005, p 93. Van Dijk and others state that in this regard it seems crucial whether the defence is informed, can make submissions and can participate in the decision-making process'. Van Dijk a.o. 2006, p 588.

284 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para196.

285 ECtHR 24 April 2007, *Matyjek v Poland*, no 38184/03, para 56.

286 ECtHR 14 June 2011, *Mościcki v Poland*, no 52443/07, para 44.

287 ECtHR 31 October 2006, *Aksoy v Turkey*, no 59741/00, para 28. The Court was able to assess the documents withheld to the applicant, as they were sent to the Turkish High Court six years after the (national) proceedings against the applicant were concluded.

288 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 219.

No cases were found in which the ECtHR addressed its own role in the assessment whether the non-disclosure of evidence to the applicant was justified under Articles 6 (1) civil limb and 13 ECHR. In many expulsion cases under Article 13 the State did not send the confidential evidence to the ECtHR, sometimes in spite of its request to do so.[289]

10.2.4 Confidentiality versus the right to adversarial proceedings

If there is an interest which legitimises a limitation to the right to adversarial proceedings, this interest and the right to adversarial proceedings must be balanced against each other. In *Tinnelly v the United Kingdom* the Court examined for example under Article 6 (1), civil limb

> whether there existed a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' right of access to a court or tribunal.[290]

In *A and others v the United Kingdom* the Court held that the important public interests of the State to maintain the secrecy of the sources of the information about al'Qaeda and its associates had to be balanced against the applicants' right under Article 5 (4) to procedural fairness.[291]

It follows from the ECtHR's case-law that the State's interest to protect the national security of the State weighs heavily and may justify important limitations to the right to adversarial proceedings. Less weight may be attached to other State interests such as the prosecution or prevention of crimes which do not affect national security. In *C.G. v Bulgaria* the Court considered:

> While actions taken in the interests of national security may, in view of the sensitivity of the subject-matter and the serious potential consequences for the safety of the community, attract considerably less in terms of guarantees than might otherwise be the case, an expulsion designed to forestall lesser evils such as run-of-the-mill criminal activities may have to be reviewed in proceedings providing a higher degree of protection of the individual.[292]

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289 See for example ECtHR 11 February 2010, *Raza v Bulgaria*, no 31465/08, para 5 and ECtHR 16 December 2008, *Gulijev v Lithuania*, no 10425/03, para 45.

290 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom,* nos 20390/92 and 21322/92, para 77. See also in the criminal context: ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45.

291 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 216-217.

292 ECtHR 24 April 2008, *C.G. and others v Bulgaria*, no 1365/07, para 45.

In several cases the Court stressed the need for procedural safeguards while referring to what was at stake for the applicant.[293] In this section it will be explained how the balance between interests in keeping information confidential and the right to adversarial proceedings should be struck in practice.

It was already pointed out in sections 10.2.1 and 10.2.3 that national security concerns can never justify that evidence underlying the contested decision is withheld from the national court or independent authority. The court must be informed of the reasons grounding the contested decision and it should assess the merits of the case, including the existence of a threat to national security.[294] This assessment by the court or independent authority is not sufficient. Certain procedural guarantees must be offered to the person concerned. The right to adversarial proceedings also requires that the person concerned is (in some way) informed of the decision and the reasons for it.[295] In *Raza* the ECtHR regarded the complete concealment from the public of the entirety of a judicial decision in an expulsion case in which (according to the government) national security issues were at stake, not warranted.[296]

The need for compensation

When performing a balancing test it should be assured that the right to adversarial proceedings of the applicant be sufficiently guaranteed. In this light in several cases under various provisions of the Convention the ECtHR has addressed possibilities for compensation of limitations of the right to adversarial proceedings, notably the use of special advocates. In its assessment whether the right to adversarial proceedings has been infringed, the Court further takes into account the weight of the confidential evidence and the specificity of the open material in the case at hand. The issues of compensation and weight of confidential evidence will be discussed below.

293 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 217-218, ECtHR 24 April 2007, *Matyjek v Poland*, no 38184/03, para 59, ECtHR 31 October 2006, *Aksoy v Turkey*, no 59741/00, para 27 and ECtHR 19 October 2010, *Özpinar v Turkey*, no 20999/04, para 78.

294 See for example under Art 6 (1), civil limb ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos. 20390/92 and 21322/92, para 77, ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, and under Artt 8 and 13 ECHR: ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99.

295 See ECtHR 24 April 2008, *C.G. v others v Bulgaria*, no 1365/07, para 46, where the ECtHR considered that lacking even outline knowledge of the facts which had served as a basis for this assessment, the first applicant was not able to present his case adequately in the ensuing appeal to the Minister of Internal Affairs and in the judicial review proceedings. See also ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04, para 58. See under Art (6) (1) civil limb also ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, para 27.

296 ECtHR 11 February 2010, *Raza v Romania*, no 31465/08, para 53.

In criminal cases and in cases in which the Court applied the guarantees flowing from the criminal limb of Article 6 ECHR,[297] the ECtHR held that 'in order to ensure that the accused receives a fair trial any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities'.[298] In the Grand Chamber judgments *Jasper v the United Kingdom* and *Fitt v the United Kingdom* the Court was satisfied that the decision-making procedure complied with the requirement of adversarial proceedings, although the defence did not have the opportunity to examine whether the evidence which was not disclosed to it, could be used in its favour. The Court took into account that the national court assessed whether the evidence had to be disclosed to the defence and that this court stated that it would have ordered disclosure if this 'did or might help further the defence'. The national court was in a position to effectively perform this assessment as it was fully versed in all evidence and issues in the case. Furthermore the defence were able during the course of the hearing to argue the case for disclosure and to hear the arguments of the prosecution court's reasons for not ordering complete disclosure. In *Fitt* the defence were also provided with a summary of the witness statement which was kept confidential.[299] In these circumstances the Court did not find it necessary that a special counsel would participate in the proceedings.[300]

It should be noted that in *Jasper* and *Fitt* a substantial minority of the Court found that a violation of Article 6 (1) ECHR occurred and that a special advocate should be introduced in criminal proceedings in which confidential evidence is used. In their opinion in *Jasper* the dissenters took into account that the defence were not aware of the category of material which the prosecution sought to withhold from them and were not informed of the reasons for the judge's decision that the material should not be disclosed. However also in *Fitt*, where the defence were informed of the category of material which the prosecution sought to withhold and received an edited summary of the

297 See ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 218.

298 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45, ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 52, ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, paras 73-73.

299 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 47.

300 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, paras 47-49, ECtHR 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, paras 54-56. See also ECtHR (GC) 11 January 2011, *McKeaown v the United Kingdom*, no 6684/05, where the ECtHR found no violation of Art 6 (1) ECHR because evidence was disclosed to a disclosure judge, who was fully aware of the issues in the case and concluded that none of the undisclosed material was relevant to the defence and that he did not anticipate any circumstances which would result in the material becoming of value to the defence. The Court of Appeal had considered and rejected the applicant's submission that fairness required that a special counsel should have been appointed or that the disclosure judge should have been put in the position to monitor the need for disclosure in the course of the proceedings.

material, the dissenters were of the opinion that the unfairness created by the defence's absence from the *ex parte* proceedings[301] could not be remedied by the fact that the judge monitored the need for disclosure of the evidence during the trial.[302] In several other cases the Court did not accept the domestic court's decision that there was no need to disclose evidence to the defence. It found a violation of Article 6 (1) ECHR because potentially exculpatory evidence was withheld from the applicant.[303]

Special counsels

The use of special counsels or special advocates as a technique to compensate for limitations of the right to adversarial proceedings in cases in which evidence is not disclosed to a party for national security reasons, was first mentioned by the ECtHR in the *Chahal v the United Kingdom* judgment. In this case intervening parties drew the Court's attention to a system applied in Canada in such cases. The interveners described the system as follows:

> [A] Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.[304]

In its assessment of the complaint under Article 5 (4) ECHR the Court attached significance to the existence of such a system in Canada. In its view this example 'illustrates that there are techniques which can be employed which

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301 In *ex parte* proceedings such as were applied in *Jasper*, *Fitt* and *Edwards and Lewis*, the judge examined the evidence which the prosecution wanted to keep secret without the presence of the defence counsel. There are three options in such proceedings: 1. the defence is informed of the category of the materials held by the prosecution and is able to make representations to the court, 2. the defence is not informed of the category of those materials and 3. the defence is not informed of the fact that an *ex parte* application was made. See ECtHR 22 July 2003, *Edwards and Lewis v the United Kingdom*, nos. 39647/98 and 40461/98, para 34.

302 See the dissenting opinions of judges Palm, Fischbach, Vajić, Thomassen, Tsatsa-Nikolovska and Traja, of judge Zupančič and of judge Hedigan with the *Jasper* and *Fitt* cases.

303 ECtHR 22 July 2003, *Edwards and Lewis v the United Kingdom*, nos. 39647/98 and 40461/98, para 58. This judgment was confirmed by the Grand Chamber. ECtHR (GC) 27 October 2004, *Edwards and Lewis v the United Kingdom*, nos. 39647/98 and 40461/98, ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, paras 63-65, where it concerned evidence which could have been used to undermine the credibility of a key prosecution witness.

304 ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 144.

both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'.[305] After the *Chahal* judgment the United Kingdom also introduced a special counsel system.[306] In several later cases under Articles 5 (4), 6 (1), 8 and 13 ECHR the Court again referred to the existence of special techniques, without expressing itself on the question whether such system would comply with those provisions.[307]

In *A and others v the United Kingdom* the ECtHR finally assessed the compatibility with Article 5 (4) ECHR of the special advocate procedure introduced in the United Kingdom. In the United Kingdom the confidential evidence was disclosed only to a special advocate who acted on behalf of the applicant. During the closed sessions before the Special Immigration Appeal Commission (SIAC) the special advocate could make submissions on behalf of the applicant as regards procedural matters, including the need for (further) disclosure of evidence as well as the substance of the case. From the moment the special advocate had sight of the closed material, he could not have any further contact with the applicant or his representative save with the permission of SIAC.[308]

The ECtHR ruled that it depends on the circumstances of the case, in particular the specificity of the information disclosed to the party concerned whether the use of a special advocate would sufficiently compensate this party's lack of access to documents. It considered that 'the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings.'[309] However the Court also noted 'that the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.'[310] The Court concluded in *A and others* that the right to adversarial proceedings was infringed with regard to several of the applicants. The Court's considerations regarding the nature of the (non)disclosed evidence will be addressed below.

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305 ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 131.

306 Bonner 2006, p 54.

307 See for example ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 95-97 and 137, ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 78, ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, para 28 and ECtHR 13 December 2007, *Dagtekin v Turkey*, no 70516/01, para 34. See also ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 209 and 211.

308 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 215.

309 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220.

310 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220.

Other compensation techniques

Apart from the use of special counsels, several other compensation techniques were reviewed by the ECtHR. In *Doorson v the Netherlands* the Court found that the limitations of the right to adversarial proceedings were sufficiently counterbalanced as the anonymous witnesses were questioned by an investigating judge, who was aware of their identity. The council for the defence was present at this hearing and was put in the position to ask questions to the witnesses, which were all answered.[311]

In several criminal cases the Court took into account that a non-confidential summary of the relevant evidence was sent to the applicant and that the applicant was able to contest the information contained in the summary.[312] In *Botmeh and Alami v the United Kingdom* the extend of the disclosure to the applicants of the withheld material by the Court of Appeal in a summary was one of the factors which lead to the Court's conclusion that the appeal proceedings complied with Article 6 (1) ECHR.[313] Also in *Haliti v Switzerland*, a case decided under Articles 8 and 13 ECHR the ECtHR considered that the national court disclosed documents to the applicant and that it provided summaries of the relevant parts of the undisclosed information. Therefore, according to the Court, the applicant was in a position to contest the allegations against him.[314]

In *Matyjek v Poland*, in which the applicant faced lustration proceedings (a criminal charge), the applicant had access to his case file (including confidential information) after the institution of the lustration proceedings. However the applicant could consult the confidential documents only in the secret registry of the lustration court and was not allowed to make copies of the documents or to take notes out of the registry.[315]

> [T]he accused's effective participation in his criminal trial must equally include the right to compile notes in order to facilitate the conduct of his defence, irrespective of whether or not he is represented by counsel […]. The fact that the applicant could not remove his own notes, taken either at the hearing or in the secret registry, in order to show them to an expert or to use them for any other purpose, effectively prevented him from using the information contained in them as he had to rely solely on his memory.[316]

311 ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 73.

312 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 47.

313 ECtHR 7 June 2007, *Botmeh and Alami v the United Kingdom*, no 15187/03, paras 43-44.

314 ECtHR (Adm) 1 March 2005, *Haliti v Switzerland,* no 14015/02.

315 Any notes the applicant took could be made only in special notebooks that were subsequently sealed and deposited in the secret registry. The notebooks could not be removed from this registry and could be opened only by the person who had made them.

316 ECtHR 24 April 2007, *Matyjek v Poland,* no 38184/03, para 59. The Court also found a violation of the principle of equality of arms in this case, because the State party did have unrestricted access to the confidential documents. See also ECtHR 8 June 2010, *Górny v Poland*, no 50399/07, para 37 and ECtHR 31 May 2011, *Zawisza v Poland*, no 37293/09, where

It is important to note that the ECtHR held earlier in this judgment that in lustration proceedings such as in the case at hand it cannot be assumed that there remains a continuing and actual public interest in imposing limited access to materials, unless the contrary is shown in a specific case.[317] Therefore it may be assumed that limitations to the right to adversarial proceedings were addressed more critically by the ECtHR than in cases in which the non-disclosure was justified. However, this judgment does show that the right to adversarial proceedings is seriously limited by the fact that a party cannot make copies or notes of documents used in his case.

In *Tinnelly v the United Kingdom* the ECtHR rejected the State's argument that mechanisms, such as the Independent Commission for Police Complaints and the statutory controls on the activities of the security services, which assured the accountability of the police and the security services in the performance of their intelligence gathering functions could compensate for the limitations to the applicants' right of access to court.[318]

Limited weight of information supplied by anonymous sources

In *Sufi and Elmi v the United Kingdom* and in *H.R. v France*, both asylum cases decided under Article 3 ECHR, the ECtHR considered that limited weight should be attached to country of origin information, which was obtained by the State from sources whose identity was not disclosed to the ECtHR. In these cases the ECtHR did not mention the right to adversarial proceedings. However, it may be assumed that the ECtHR did have the protection of this right in mind when deciding this case. The ECtHR held that 'in the absence of any information about the nature of the sources' operations in the relevant area, it will be virtually impossible for the Court to assess their reliability'.[319] In *Sufi and Elmi* the ECtHR found that the description of the sources relied on were vague ("a diplomatic source", or "a security advisor"). According to the ECtHR such descriptions give no indication of the authority or reputation of the sources or of the extent of their presence in the region concerned. In *H.R. v France* the State authorities consulted Algerian lawyers on the consequences of the lifting of the state of emergency in Algeria. The ECtHR considered that the French Government did not give details concerning the circumstances of this consultation or the identity of the lawyers consulted. Therefore the ECtHR could not assess their independence vis à vis the power in place or the reliability of their statements.[320]

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the restrictions with regard to taking notes and making copies of documents were also applied to the applicant's lawyers.

317 See further under section 10.3.3.

318 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 77.

319 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos. 8319/07 and 11449/07, para 233.

320 ECtHR 22 September 2011, *H.R. v France,* no 64780/09, para 61.

The ECtHR generally exercises caution when considering information from anonymous sources which is inconsistent with the remainder of the information before it. However 'where the sources' conclusions are consistent with other country information, their evidence may be of corroborative weight'.[321] In *Sufi and Elmi* very little other information was available to the ECtHR. Therefore 'it was impossible for the Court to carry out any assessment of the sources' reliability and, as a consequence, where their information is unsupported or contradictory'. Therefore the ECtHR was unable to attach substantial weight to it.[322] In *H.R. v France* the ECtHR did not attach much if any weight to the statements of the anonymous Algerian lawyers. It may be derived from this case-law that national courts who do not know the sources of information supporting the asylum decision, should attach limited weight to this information. Asylum decisions cannot be based to a decisive extend on information provided by anonymous sources alone.

The judgments in *Sufi and Elmi* and *H.R* are in line with the ECtHR's case-law concerning anonymous witnesses in criminal cases under Article 6 (1) ECHR. In *Doorson* the Court considered 'that even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements.[323] In *Haas* the Court was aware that due to the non-disclosure of the informers' identities, the defence lacked information permitting it to test their reliability or cast doubts on their credibility. Furthermore the national Court of Appeal was precluded from forming their own impression on the informers' reliability. 'However given that the evidence obtained had been corroborated with further items of evidence, the Court took the view that the rights of the defence were sufficiently respected.'[324]

The weight and specificity of other evidence

In criminal cases under Article 6 (1) ECHR, the ECtHR takes into account the weight of the non-disclosed evidence for the conviction in its assessment whether the right to adversarial proceedings has been violated. In *Jasper v the United Kingdom* and *Fitt v the United Kingdom* the ECtHR not only took into account the guarantees in place in the procedure in which it was decided whether evidence should be disclosed to the defence. An important reason for its refusal to accept that a 'special counsel procedure' was necessary in those cases, was that the material which was not disclosed in those cases did

321 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 233.

322 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 234.

323 ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 73.

324 ECtHR (Adm) 17 September 2005, *Haas v Germany*, no 73047/01.

not form part of the prosecution case whatever and was never put to the jury.[325] In *Botmeh and Alami* the ECtHR took into account that the undisclosed material was found by the domestic court 'to add nothing of significance to what had already been disclosed at trial'.[326]

In *Edwards and Lewis v the United Kingdom* and *Rowe and Davis v the United Kingdom* the Court did find a violation of Article 6 ECHR on the basis that (potentially) relevant information was not disclosed to the defence. In *Edwards and Lewis* the Court considered that the undisclosed evidence related or may have related to an issue of fact decided by the trial judge, namely whether the applicants had been the victim of improper incitement by the police. The trial judge had reviewed the undisclosed material and had concluded that he had heard nothing and seen no material which would have assisted the defence in their argument that evidence should be excluded on the basis that the applicant had been entrapped into committing the offence. The ECtHR held that because the applicants were denied access to the evidence, it was not possible for the defence representatives to argue the case of entrapment in full before the judge. Moreover the non-disclosed evidence (potentially) included allegations which may have undermined the applicants' submissions on entrapment. The applicant's and their representatives were not informed on the nature of the evidence and therefore could not defend themselves against these allegations.[327]

In *Rowe and Davis* the Court found a violation of Article 6 (1) ECHR on the basis that evidence, which could have been used to undermine the credibility of a key prosecution witness, was withheld by the prosecution from both the defence and the trial judge at first instance, its non-disclosure on grounds of public interest immunity subsequently being ordered by the Court of Appeal following an *ex parte* hearing. According to the ECtHR the procedure before the appeal court was not sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge.[328]

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325 ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 55, ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 48. According to Harris and others the Court was strongly influenced by the fact that the non-disclosed evidence formed no part of the prosecution case and was not put to the jury. Harris, O'Boyle & Warbrick 2009, p 255.

326 ECtHR 7 June 2007, *Botmeh and Alami v the United Kingdom*, no 15187/03, para 44.

327 ECtHR 22 July 2003, *Edwards and Lewis v the United Kingdom*, nos 39647/98 and 40461/98, para 58. This judgment was confirmed by the Grand Chamber. ECtHR (GC) 27 October 2004, *Edwards and Lewis v the United Kingdom*, nos 39647/98 and 40461/98.

328 ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, paras 63-65. See also the summary of this case in ECtHR 7 June 2007, *Botmeh and Alami v the United Kingdom*, no 15187/03, para 38. The undisclosed information concerned amongst others person(s) to whom any reward money had been paid for information given to the police regarding the applicants.

It seems to follow from *Rowe and Davis* and *Edwards and Lewis* that in criminal cases inculpatory evidence and evidence which is potentially relevant to a person's defence should be disclosed. Unlike in *Fitt* and *Jasper* the ECtHR did not follow the domestic court(s)' ruling that the confidential material would not assist the defence.[329]

Also in cases in which the requirements flowing from the criminal of Article 6 (1) ECHR were applied such as *Pocius v Lithuania* and *A and others v the United Kingdom* the weight of the non-disclosed evidence for the outcome of the proceedings was taken into account.[330] In *A and others* the Court held that the right to adversarial proceedings would be respected in two situations:

- The evidence was to a large extent disclosed and the open material plays a predominant role in the determination
- All or most of the underlying evidence is not disclosed, but the allegations in the open material are sufficiently specific. It must be possible for the applicant to provide his representatives and the special advocate with information with which to refute these allegations.

The judgment gives several examples of sufficiently specific allegations: the allegation that a person attended a terrorist training camp at a stated location between stated dates, detailed allegations about the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places.[331] The ECtHR held also with regard to Article 8 ECHR that the allegations against a person must be sufficiently specific.[332]

The procedural requirements under Article 5 (4) ECHR would not be satisfied when all or most of the evidence underlying the detention decision is not disclosed and the open material consist purely of general allegations. With regard to several applicants the Court found that the right to adversarial proceedings had been infringed. Two applicants were accused of being involved in fund-raising for terrorist groups linked to al'Qaeda. The link between the money raised and terrorism was not disclosed. Therefore the Court

329 This may have to do with the fact that in *Edwards and Lewis* and *Rowe and Davis* the ECtHR knew the nature of the evidence withheld from the defence while it did not in *Fitt* and *Jasper*.

330 ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 56, where the Court considered that the information contained in the non-disclosed operational records file was deemed to be essential evidence of the applicant's alleged danger to society. See under Art 8 ECHR, ECtHR 16 December 2008, *Gulijev v Lithuania*, no 10425/03, para 44, where the Court took into account that the "secret" report was not only used as evidence, but, according to the information in the case file, it was also the sole ground for not granting the applicant a temporary residence permit. See also ECtHR 4 November 2010, *Bannikova v Russia*, no 18757/06, para 63.

331 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220

332 ECtHR 26 July 2011, *Liu v Russia*, no 29157/09, para 90.

did not consider that these applicants were in a position to effectively challenge the allegations against them. The Court concluded the same with regard to two other applicants. The open allegations concerning them were of a general nature, principally that they were members of named extremist Islamist groups linked to al'Qaeda.

In *A and others* the Court did not exclude that inculpatory evidence is not disclosed to the detainee, as long as the open allegations are sufficiently precise. The Court also does not address the issue of the potential non-disclosure of exculpatory evidence. The ECtHR seems to be less strict with regard to the actual use of secret information in *A and others* than in criminal cases. This may have to do with the strict standard of proof in criminal cases: a person may only be convicted when a crime is proven beyond reasonable doubt. A detention measure is justified where one of the conditions of Article 5 (1) is fulfilled.

10.2.5 Subconclusion: the use of secret information under international law

The ECtHR has addressed the use of secret evidence principally under the right to adversarial proceedings and the principle of equality of arms. These principles apply to all procedures governed by Articles 5 (4), 6, 8, 9, 13 and Article 1 of Protocol 7 ECHR. The general requirements following from these principles seem to be the same with regard to all these Articles. However the level of procedural protection offered by these principles depends on the nature of the case at issue. Arguably the highest level of protection is required in criminal cases under Article 6 ECHR, while in cases concerning secret surveillance and the screening of job candidates the remedy in the meaning of Article 13 only needs to be 'as effective as can be'. It is argued here that in asylum cases, in the light of the absolute nature of the prohibition of *refoulement* a high level of procedural protection is required.

The ECHR has accepted that the right to adversarial proceedings and the principle of equality of arms are not absolute and that there may be legitimate reasons to limit them. Most of the cases assessed by the court concerned measures aimed at protecting the national security of the State. In those cases national security was often also the reason for not disclosing certain relevant information to the parties involved in the proceedings. The ECtHR has accepted that States enjoy a wide margin of appreciation in their assessment which measures are necessary to protect national security. It also recognised that national security reasons may justify the non-disclosure of evidence to a person affected by such a measure. However, the ECtHR also made clear that State's cannot escape judicial review when invoking national security as the basis for a measure or for its refusal to communicate relevant evidence to the party concerned. Sufficient guarantees must be in place to prevent arbitrariness and

to ensure that the right to adversarial proceedings and the principle of equality of arms are respected.

From the ECtHR's case-law several minimum standards may be withdrawn, which apply to all cases falling within the scope of Articles 5 (4), 6, 8, 9, 13 and Article 1 of Protocol 7 ECHR and therefore also to asylum cases:

- Limitations to the right to adversarial proceedings must pursue a legitimate aim. Interests which may justify such limitations are the protection of national security, the need to protect sources of information or witnesses at risk of reprisals and the need to keep secret police methods of investigation of crime.
- The non-disclosure of relevant evidence should be necessary to pursue this legitimate aim.
- The national court must receive the secret evidence. This court should review whether the non-disclosure of evidence is necessary and review on the basis of that evidence the facts and circumstances of the case. Limited weight should be attached to evidence provided by anonymous sources, whose reliability cannot be examined by the court.
- If a legitimate interest justifies the non-disclosure of the evidence to the party concerned, the interest of the State to keep the evidence secret must be balanced against the right to adversarial proceedings. When carrying out this balancing test the nature of the case at issue must be taken into account. Some form of adversarial proceedings must always be guaranteed. Limitations of the right to adversarial proceedings should be compensated, for example by using a special advocate who assesses and comments on secret evidence on behalf of the party concerned or by using non-confidential summaries.
- When assessing whether the right to adversarial proceedings has been complied with the weight of the non-disclosed evidence and the specificity of the open material should be taken into account. The right to adversarial proceedings will generally not be violated if limited weight was attached to the secret evidence underlying a decision. However, a person is not able to effectively challenge allegations against him if the open material only contains general allegations.

The ECtHR has not yet addressed the use of secret information in asylum cases. It only made clear in *Sufi and Elmi v the United Kingdom*[333] and *H.R. v France*[334] that limited weight should be attached to information provided by anonymous sources, whose reliability and independence cannot be checked by the Court. The ECtHR has not mentioned the right to adversarial proceedings

333 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom,* nos 8319/07 and 11449/07, para 233.

334 ECtHR 22 September 2011, *H.R. v France,* no 64780/09, para 61.

in those cases or addressed the level of procedural protection which should be offered in *refoulement* cases. In the light of the potential severe consequences for the person concerned of expulsion in violation with the prohibition of *refoulement*, it may be argued that the same fair trial guarantees as those required under the criminal limb of Article 6 (1) should apply. This would mean in particular that limitations to the right to adversarial proceedings are only allowed if they are 'strictly necessary'. The ECtHR has applied the fair trial guarantees in other non-criminal cases in the light of the serious nature of the case. An example of such a case is *A and others v the United Kingdom*, where the ECtHR pointed at 'the dramatic impact of the lengthy – and what appeared at the time to be indefinite – deprivation of liberty'.

In the conclusion I will address the question how the ECHR standards relate to and should be incorporated into the relevant general principles of EU law. As the case-law discussed in this chapter only concerns appeal proceedings before national courts, it is most conceivable that it will inspire the interpretation of the EU right to effective judicial protection.

10.3 SYNTHESIS OF FINDINGS

Article 16 PD provides the legal advisor or other counsellor who assists or represents the asylum applicant with a right of access to such information in the applicant's file as is liable to be examined by the court providing an effective remedy against the asylum decision, insofar as the information is relevant to the examination of the application. This provision allows for limitations to the applicant's right of access to the file on several grounds. It also provides that information may be withheld from the court mentioned in Article 39 PD on national security grounds. On the basis of the case-law of the EU Courts discussed in this chapter it should be expected that this provision will be tested against and/or interpreted in the light of the rights of the defence, including the right to be heard during the administrative phase and the right to a reasoned decision (Article 41 of the Charter) and the right to effective judicial protection (Article 47 of the Charter and Article 39 PD). The extensive case-law of the ECtHR regarding the right to adversarial proceedings and the use of secret evidence provides for important guidance as to the interpretation of these EU rights. The following conclusions should be drawn:

The right of access to the file

- According to the case-law of the Court of Justice and the ECtHR the rights of the defence can only be infringed if documents *which are relevant to the case* (inculpatory or exculpatory) are not disclosed to the party concerned.

No access needs to be provided to information which could not have influenced the course of the asylum proceedings.[335]

- In asylum proceedings secret evidence may regard the assessment of the credibility of the asylum account or the risk of persecution or serious harm upon expulsion to the country of origin (prohibition of *refoulement*).[336]

Legitimate aim and necessity of non-disclosure

- Limitations to the EU right to be heard during the administrative phase, the right to a reasoned decision and the right to effective judicial protection may be justified: the limitation must have a *legitimate aim* and it should be *necessary*.[337]
- Article 16 (1) PD mentions several grounds which may justify the use of secret information in asylum cases: the protection of the security of organisations or of person(s) providing the information or the security of the person(s) to whom the information relates, the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States and the international relations or the national security of the Member States. On the basis of the case-law of the Court of Justice and the ECtHR it may be expected that those grounds will be accepted as legitimate aims for keeping information secret in asylum cases.
- Arguably, in the light of the absolute nature of the prohibition of *refoulement* evidence on which the assessment of the risk of persecution or serious harm is based, may only be kept secret if this is 'strictly necessary'. This is the same test as that required by Article 6 ECHR in criminal cases.[338]
- It is not solely up to the administrative authorities, but also for the national court in the meaning of Article 39 PD to decide whether non-disclosure of evidence pursues a legitimate aim and is necessary.[339] Furthermore the use of secret evidence may not prevent the national court to review thoroughly whether there is a risk of *refoulement*.[340]

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335 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 78. The ECtHR refers to 'the entitlement to disclosure of *relevant* evidence' (emphasis added). See for example ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, para 61.

336 Secret evidence may also be used in order to exclude a person from a refugee status or subsidiary protection status (right to asylum). Exclusion from an asylum status falls outside the scope of this study.

337 Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 68 and Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 342. See for the ECtHR: ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45 and ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 218.

338 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45.

339 ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, para 63.

340 Case C-69/10, *Samba Diouf* [2011]. The required standard of judicial review of the establishment and qualification of the facts is discussed in section 9.2.

- The national court must receive all relevant information underlying the asylum decision, including the evidence which was not disclosed to the person concerned.[341] Article 16 (1) PD which allows authorities to refuse disclosure of relevant information to the national court on national security grounds should thus be considered to be ad variance with the EU right to effective judicial protection and should therefore be declared void.

The need for secrecy of information versus the right of access to the file

- The protection of secret information must be observed in such a way as to reconcile it with the EU right to an effective remedy, the right to be heard and the duty to state reasons. The conflicting interests of the parties concerned must be balanced.[342]
- A total lack of disclosure of evidence is never allowed. The (asylum) decision should state sufficiently precise reasons in order to enable the applicant to effectively exercise his right to an effective remedy guaranteed by Article 39 PD.[343]
- This does not mean however that all inculpatory or potential exculpatory evidence must be fully disclosed to the asylum applicant. In this light the ECtHR's judgment in *A and others* provides for important guidance.[344] It follows from this judgment that the right to adversarial proceedings is not violated where the evidence was to a large extent disclosed to the applicant and the open material plays a predominant role in the determination or when the allegations in the open material are sufficiently specific. A negative asylum decision based on documents in which most or most crucial information is not disclosed thus infringes the right to adversarial proceedings.[345]

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341 Case C-438/04, *Mobistar* [2006], para 40, Case C-450/06, *Varec* [2008], para 53, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 155. See also the ECtHR's judgments under Artt 6 and 8 and 13 ECHR where the ECtHR held that substantive review of the grounds motivating a decision is impaired when the court assessing a case does not have sight of the material on which the decision is based.

342 Case C-450/06, *Varec* [2008], para 51, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 344 and ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 216-217.

343 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 150-151.

344 See Case T-85/09, *Kadi v Commission* [2010], para 176.

345 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220. The fact that the EU Courts seem to set rather limited requirements as regards the disclosure of documents underlying EU sanction decisions and the reasoning of such decisions does not mean that such limited requirements are also applicable in asylum cases. First of all it should be questioned whether the case-law of the EU courts complies with the requirements set out by the ECtHR in *A and others* under the right to adversarial proceedings. Furthermore the fact that national security of the Member States was involved, the nature of EU sanction cases and the division of powers between the EU level and the national level in such cases may have influenced the EU Courts case-law in that area.

- It may further be derived from the EU Courts' as well as the ECtHR's case-law that the weight which is attached to the confidential material for the decision should be taken into account when assessing whether the rights of the defence have been infringed in an asylum case.[346] A decision that an asylum account is not credible which is based only on the statements of an anonymous source should for example be considered problematic.
- The Court of Justice as well as the ECtHR have recognised that the credibility of evidence of anonymous origin is necessarily reduced by the fact that the context in which it was drafted is largely unknown and because administrative authority's assertions in that regard cannot be verified.[347]

Using compensation techniques

- Special techniques, such as the use of special counsels, non confidential summaries or a list of all the documents in the file, may be used in order to compensate the use of secret information. Anonymous witnesses may be questioned by an investigative judge.
- In EU sanction cases the EU Courts have referred to the special counsel procedure mentioned by the ECtHR. So far the EU Courts have not applied such techniques or assessed their compatibility with EU procedural rights. It should be derived from the ECtHR's judgment in *A and others* that a special counsel who could test the non-disclosed evidence and put arguments on behalf of the applicant during closed hearings could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing. However the Court also held that the special counsel must be able to perform this function in a useful way. This is only possible if the applicant is provided with sufficiently specific information about the allegations against him (see above) in order to give effective instructions to the special advocate.[348]
- The information disclosed in non-confidential summaries should be sufficiently precise in order to put the person concerned in the position to determine whether the deleted information is likely to be relevant for his case and to express his view on it.[349]
- It may be derived from the EU right to be heard that the applicant must be placed in the position to effectively respond to the information underlying the decision before the asylum decision is taken. Therefore compensation techniques such as non-confidential summaries and/or a special counsel system should be provided to the asylum applicant already during

346 See for example Case C-411/04 P, *Salzgitter Ma.nnesmann v Commission* [2007], para 47, ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 200.

347 Case C-411/04 P, *Salzgitter Mannesmann v Commission* [2007], para 46, ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 233, ECtHR 22 September 2011, *H.R. v France,* no 64780/09, para 61.

348 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220.

349 Case T-410/03, *Hoechst v Commission* [2008], para 154.

the administrative phase. An infringement of the right to be heard and the duty to state reasons cannot be compensated during the appeal phase.[350]

350 Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 104 and Case C-51/92 P, *Hercules Chemicals v Commission* [1999], paras 78-79. A.G. Bot suggests in his opinion in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, paras 76-78 that this may be different in asylum cases which are quasi-criminal in nature. In EU sanction cases EU authorities are not required to hear the party concerned before the first decision to freeze funds because this would undermine the effectiveness of the sanction. See Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 338-341.