



**TERRORIST FINANCING AND EU SANCTIONS LISTS:
IS THE COURT'S ANNULMENT OF A COUNCIL DECISION A LASTING
PROTECTION FOR AN ORGANIZATION?**

Elena Bratanova

I. EU RULES ON FREEZING TERRORIST FINANCING

After the attacks on the World Trade Center, the UN Security Council adopted Resolution 1373 (2001) with a view of combating terrorism, and the financing of terrorism, by all means—particularly by freezing the funds of persons who committed or attempted to commit terrorist acts.¹ On the European level, the Resolution was implemented through Common Position 2001/931/CFSP² and Regulation 2580/2001,³ which ordered the freezing of funds and other financial assets or economic resources of “persons, groups and entities involved in terrorist attacks” as determined by a “competent authority.”⁴

Resolution 1373 (2001) and the legislation passed to implement it in the EU should be contrasted with the following year’s Security Council Resolution 1390 (2002),⁵ which deals exclusively with Osama bin Laden, Al-Qaeda, and the Taliban, and leaves no discretion to the Member States where the lists were created at the level of the UN Security Council’s Sanction Committee. The implementing legislation for Resolution 1390 (2002), Council Regulation 881/2002,⁶ was annulled in the European Court of Justice’s recent *Kadi* decision,⁷ which held that any new Regulation should be subject to the human rights protections provided for in the Community legal order. Unlike this Regulation, Regulation 2580/2001⁸ deals with terrorist groups unrelated to the

¹ S.C. Res. 1373, ¶ 1(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

² Council Common Position 2001/931/CFSP, On the Application of Specific Measures to Combat Terrorism, 2001 O.J. (L 344) 93 (last amended through Council Common Position 2005/936/CFSP, 2005 O.J. (L 340) 80).

³ Council Regulation 2580/2001, On Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, 2001 O.J. (L 344) 70 (EC).

⁴ Common Position 2001/931/CFSP, *supra* note 2, art. 1(1), (4). *See also* Regulation 2580/2001, *supra* note 3, art. 6(2).

⁵ S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

⁶ Council Regulation 881/2002, Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Osama bin Laden, the Al-Qaeda Network and the Taliban, 2002 O.J. (L 139) 9 (EC) (the list annexed to this regulation is reviewed by the Commission, on the basis of updating by the Sanctions Committee).

⁷ Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council of the European Union*, 3 C.M.L.R. 41 (2008). After the Court annulled Regulation 881/2002, the Council amended it with a new regulation. Commission Regulation 1190/08, Amending for the 101st Time Council Regulation (EC) No 881/2002, 2008 O.J. (L 322) 25. For further consideration of the *Kadi* judgment and its impact, see Albert Posch, *The Kadi Case: Rethinking the Relationship Between EU Law and International Law?*, 15 COLUM. J. EUR. L. ONLINE 1 (2009); Giacinto della Cananea, *Joined Cases C-402/05 P & C-415/05 P*, Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council—*Global Security and Procedural Due Process of Law Between the United Nations and the European Union*, 15 COLUM. J. EUR. L. ____ (2009).

⁸ Regulation 2580/2001, *supra* note 3.

Taliban or Al-Qaeda. In the context of Security Council Resolution 1373 (2001),⁹ it is up to the Member Nations of the UN to specifically identify the persons, groups, and entities whose funds are to be frozen pursuant to that Resolution and in accordance with their own legal order.

The procedure which leads to freezing funds takes place at both the national and Community levels. A “competent national authority”—which is in principle the judiciary—must, in respect of the party concerned, make a list in compliance with Article 1(4) of Common Position 2001/931.¹⁰ Anyone on the list must then be approved by unanimous vote by all twenty-seven members of the EU’s Council of Ministers (the Council).¹¹ Next, the Council must, at least every six months, ensure that there are sufficient grounds for keeping the party concerned on the list.¹² Unlike most of those on the UN’s list, however, all parties on the EU lists must either have been convicted of a terror-related offense or be subject to prosecution.¹³ Furthermore, all have a right to challenge their inclusion on the list at the national level, before either the Council or the EU Courts.

II. CHALLENGES IN THE EU COURTS

On December 4, 2008, the Court of First Instance (CFI) issued its third judgment, *People’s Mojahedin Organization of Iran v. Council (PMOI III)*,¹⁴ concerning the inclusion of PMOI, an Iranian opposition group, on the EU’s terror watch-list. Founded in 1965, the PMOI’s objective was to replace the regime of the Shah of Iran—and later the mullahs’ regime—with a democracy.¹⁵ In 1981, it took part in the foundation of the National Council of Resistance of Iran. In June 2001, the group renounced all military activity.¹⁶

In its first judgment, *PMOI I*,¹⁷ the CFI annulled Council Decision 2005/930/EC,¹⁸ which had placed PMOI on a sanctions list, on the grounds that the Council had failed to communicate to PMOI the reasons for its inclusion on the list. The measure had therefore been adopted in the course of a procedure during which the applicant’s rights of defense had not been observed.

⁹ S.C. Res. 1373, *supra* note 1.

¹⁰ Regulation 2580/2001, *supra* note 3, art. 2(3). Article 1(4) of Council Common Position 2001/931/CFSP, *supra* note 2, reads:

The list in the 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. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.

For the purposes of this paragraph “competent authority” shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.

¹¹ Regulation 2580/2001, *supra* note 3, art. 2(3).

¹² Council Common Position 2001/931/CFSP, *supra* note 2, art. 1(6).

¹³ Regulation 2580/2001, *supra* note 3, art. 2(3)(i)–(iv).

¹⁴ Case T-284/08, *People’s Mojahedin Org. of Iran v. Council of the European Union [PMOI III]*, 2008 WL 5082977 (Dec. 4, 2008).

¹⁵ Case T-228/02, *People’s Mojahedin Org. of Iran v. Council of the European Union [PMOI I]*, 2006 E.C.R. II-4665, ¶ 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Council Decision 930/2005, 2005 O.J. (L 340) 64.

Moreover, in this case, the CFI itself was not in a position to conduct judicial review, since it could not determine what Article 1(4) of Common Position 2001/931 national decision was being referred to. It further stated that the right to a fair hearing is a “fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question.”¹⁹ The party concerned must be notified of the evidence put forth against it and it must be afforded the opportunity to effectively make known its views on that evidence.²⁰ The CFI refuted the argument, made by the Council and the UK, that individuals do not have “any right whatsoever to be heard before the adoption of an act of a legislative nature.”²¹ The court also stated that the act imposing an individual economic and financial sanction (freezing of funds) is of “direct and individual concern.”²² The CFI further distinguished between the first application of a freezing measure—which requires surprise in order to be effective—and the subsequent decision to maintain the parties on the disputed list. The victim’s right to be heard should be contextual in the first case and preliminary in the other.²³

The Court’s reasoning shows that the CFI reviews and scrutinizes a discretionary decision of the EU more closely and thoroughly than those of other international organizations. In the *Yusuf*²⁴ and *Kadi*²⁵ judgments, for example, the Community institutions had merely transposed Resolution 1390 (2002)²⁶ of the UN Security Council and decisions of its Sanctions Committee onto the Community legal order, which then froze the funds of the parties concerned. That Resolution was not designed to authorize, at the time of actual implementation, the provision of any Community mechanism for the examination or re-examination of individual persons, groups, or entities that were on the watch-list. By contrast, Resolution 1373 (2001) obliged the Member Nations to freeze the funds of terrorists, and left it to the Member Nations to decide who should be included in the sanctions lists.²⁷

At the same time, however, the CFI restricted its power to review Council measures for compliance with governing procedures, accuracy, and non-misuse of power.²⁸ Leaving aside the restriction on the review powers, the CFI’s ability to conduct judicial review is impeded by the confused and non-transparent procedure of the adoption of freezing measures:

Moreover, neither the written pleadings of the different parties to the case, nor the file material produced before the Court, enable it to conduct its judicial review, since it is not even in a position to determine with certainty, after the close of the oral procedure,

¹⁹ *PMOI I*, 2006 E.C.R. II-4665, ¶ 91. *See also id.* ¶ 107.

²⁰ *Id.* ¶ 93.

²¹ *Id.* ¶ 95.

²² *Id.* ¶ 98.

²³ *Id.* ¶¶ 128, 131.

²⁴ Case T-306/01, *Yusuf & Al Barakaat Int’l Found. v. Council & Comm’n*, 2005 E.C.R. II-3533.

²⁵ Case T-315/01, *Kadi v. Council & Comm’n*, 2005 E.C.R. II-3649. The ECJ later reversed the CFI decision. *Kadi*, 3 C.M.L.R. 41 (2008). *See also* Posch, *supra* note 7; della Cananea, *supra* note 7.

²⁶ S.C. Res. 1390, *supra* note 5.

²⁷ S.C. Res. 1373, *supra* note 1.

²⁸ *PMOI I*, 2006 E.C.R. II-4665, ¶ 159.

exactly which is the national decision referred to in Article 1(4) of Common Position 2001/931, on which the contested decision is based.²⁹

In the second judgment, *PMOI II*, the CFI annulled another decision because the Council had failed to give sufficient reasons as to why it had not taken into account the judgment of the Proscribed Organizations Appeals Commission (POAC), a superior British court of record that deals with the appeals of organizations believed to be involved in terrorism.³⁰ On November 30, 2007, the POAC allowed an appeal against the Home Secretary's decision to refuse to list the proscription of the PMOI as an organization concerned in terrorism. POAC described the decision as "perverse" and unreasonable.³¹ The Council was informed of the decision of POAC but nevertheless adopted Decision 2007/868/EC and updated the list.³² The PMOI's name was included in that list. In its most recent judgment, *PMOI III*, the Court annulled Decision 2008/583/EC³³ and found that the "continued freezing of the applicant's funds by the contested decision was the result of a procedure during which the applicant's rights of the defense were not respected."³⁴

Following a judgment of the Court of Appeal, the British Home Secretary has removed the PMOI's name from the list of organizations proscribed under the Terrorism Act 2000.³⁵ The Council nonetheless still retains the applicant's name on the watch-list in its Council Decision 2008/583/EC because of "new information"—judicial inquiry has been opened against certain individuals who were suspected of belonging to the PMOI—relevant to the list.³⁶ However, besides the CFI's first judgment in this case, and with no allegation of the existence of any material or legal obstacle, the Council refrained from communicating those new elements to the applicant. Moreover, the Council and the French authorities refused to communicate the information contained in the documents even to the CFI. The inability of the CFI to review the lawfulness of the contested decision infringes the PMOI's fundamental right to effective judicial review, as outlined in each of the *PMOI* decisions.

The extent to which the Council is being counter-productive in its efforts to support civil society in Iran by blacklisting its largest opposition group is a political judgment. The continued refusal to follow the decisions of the CFI, the POAC, and the Court of Appeal, however, raises concerns about the role of courts in reviewing delicate and complex issues, such as sanctions lists, and the unwillingness of the executive branch to follow judicial decisions. The courts at the national and European level deal with the most difficult and controversial issues of our society. They are well equipped to strike a balance between the need to combat terrorism and the protection of

²⁹ *Id.* ¶ 166.

³⁰ Case T-256/07, *People's Mojahedin Org. of Iran v. Council of the European Union* [*PMOI II*], 2008 WL 4657820 (Oct. 23, 2008).

³¹ *Id.* ¶ 168.

³² Council Decision 2007/868/EC, *On Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism and Repealing Decision 2007/445/EC*, 2007 O.J. (L 340) 100.

³³ Council Decision 2008/583/EC, *On Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism and Repealing Decision 2007/445/EC*, 2008 O.J. (L 188) 21.

³⁴ *PMOI III*, 2008 WL 5082977, ¶ 47.

³⁵ Terrorism Act 2000, c.11 (Eng.).

³⁶ *PMOI III*, 2008 WL 5082977, ¶ 9.

fundamental rights. Ultimately, a higher judicial review of *ex-post* adoption of a Community measure freezing entities' assets should generate higher *ex-ante* standards.