

Policy Department C
Citizens' Rights and Constitutional Affairs



**OVERVIEW OF EUROPEAN AND
INTERNATIONAL LEGISLATION
ON TERRORIST FINANCING**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS



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**Directorate General Internal Policies
Policy Department C
Citizens' Rights and Constitutional Affairs**

OVERVIEW OF EUROPEAN AND INTERNATIONAL LEGISLATION ON TERRORIST FINANCING STUDY

Abstract:

Combating terrorist financing contributes to combating terrorism (terrorist acts and terrorist organisations).

There is considerable international and European “legislation” on terrorist financing, and the initiatives taken in this field have increased significantly since the attacks of 11 September 2001.

The main players, the United Nations, the Council of Europe, the Financial Action Task Force and the European Union have addressed the issue of terrorist financing from different perspectives (the types of financing, the possibility of freezing and confiscating assets, etc.) whilst generally linking this issue to measures taken to combat money laundering.

Although the issue of the adoption and ratification of this legislation is fundamental, its operational and judicial application is no less important, with intelligence sharing now appearing to be one of the driving forces in combating terrorist financing.

Similarly, managing the United Nations and European Union “blacklists” in a way that observes fundamental rights and which is subject to judicial review is essential for the impartial and realistic implementation of targeted asset-freezing actions.

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SUMMARY

- International and European legislation to combat terrorist financing comes into play at two stages of the financing process: at the fundraising stage and at the time of the cross-border transfer of funds.
- The European Union adopted a counter-terrorism strategy and an action plan in 2004. The European Counter-Terrorism Coordinator published a *Revised Strategy on Terrorist Financing* on 17 July 2008.
- The international community, through the substantial work of the United Nations, the Council of Europe and the Financial Action Task Force (FATF), has adopted numerous measures on terrorist financing. Combating terrorism is moreover the subject of a United Nations Global Counter-Terrorism Strategy.
- The 40 Recommendations on money laundering and terrorist financing and the 9 Special Recommendations adopted by the FATF – measures that are not binding upon States – are a source of legislative inspiration for all the international and European legislators.

- There are various types of terrorist financing; it is derived from either lawful or illegal activities. It is currently difficult to assess the exact proportion of one or the other, just as it is also impossible at the moment to estimate with certainty the total financing needs of terrorist organisations.
- Remittance methods enable the funds raised to be transferred. New methods are being targeted by the legislators: alternative remittance services, online payments, for instance. However, the more “traditional” methods such as wire transfers or cash couriers should not be forgotten.

- Intelligence sharing between the private sector and financial intelligence units (FIUs), between FIUs and other competent national authorities, between all these authorities and Europol and Eurojust constitutes one of the main priority areas of current European legal instruments: the third directive on money laundering, the decision of 20 September 2005 and the framework decision of 18 December 2006.

- Another priority area is the implementation of freezing and confiscation procedures for the proceeds of crime (including proceeds used to finance terrorism). The Council the Europe and the European Union have adopted specific texts devoted to the very issue which unfortunately have not yet been ratified/implemented by the majority of EU countries.
- The financing of terrorism is a predicate offence to money laundering. The third Community directive on money laundering applies an extended version of the “KYC” (Know your Customer) principle. It reinforces not only the oversight regime applying to transactions in the financial sector, but also that applying to legal professionals, notaries, accountants, real estate agents and casinos. Persons trading in goods are also covered, and the range of offences is widened to include tax fraud.

- The main national protagonists involved in combating money laundering – whose remit has been extended to combating terrorist financing – are the financial intelligence units. The FIUs vary in their nature and have different levels of cooperation amongst themselves and with Europol. In addition, a number of them use the secure networks of the Egmont Group or FIU.net to exchange financial intelligence. The FIUs are notified of suspicious transactions and must also be informed of breaches of the obligation to declare cash and bearer negotiable instruments of over 10,000 euros in value (in accordance with European legislation).
- The United Nations has adopted two main resolutions enabling in particular the freezing of assets of specific persons or groups. Resolution 1267, adopted on 15 October 1999, states that the assets of the Taliban shall be frozen. This measure is extended to the assets held by Usama bin Laden as well as to the individuals and entities associated with him (including Al-Qaida) by Resolution 1333. Furthermore, Resolution 1373, adopted on 28 September 2001, also requires States to adopt measures freezing the assets of terrorist organisations. Each State is therefore obliged to establish a list of persons or groups coming within the scope of this resolution. Resolutions 1267 and 1373 each create a Committee responsible for monitoring the provisions of these texts: United Nations Committee 1267 and the United Nations Committee against Terrorism.
- Following on from an EU common position, a Community regulation of 27 May 2002 takes the asset-freezing obligations against certain persons and entities linked to Usama bin Laden, the Al-Qaida network and the Taliban to the Community level. The Commission has implementing and monitoring powers for this text, which is regularly amended in line with amendments made by the United Nations Security Council Sanctions Committee to the list of groups and persons concerned. The Community has implementing powers, bound as a result of obligations incumbent upon Member States and by virtue of the primacy of United Nations law. The Court of Justice has established the principle of review of such a list, to protect fundamental rights and the principle of legal redress, while taking counter-terrorism imperatives into account (European Court of Justice (ECJ), 3 September 2008, Kadi). Indeed, the obligations imposed by an international agreement may not prejudice the constitutional principles of the EC Treaty, in particular the principle according to which all Community instruments must observe fundamental rights. Community instruments implementing a United Nations resolution are therefore subject to review by the ECJ.
- United Nations Resolution 1373, taken over by Common Position 2001/930, also gave rise to the creation of two “autonomous” European lists. Common Position 2001/931 established a list of the names of persons and entities with regard to whom States are committed to implementing the mechanisms of law enforcement assistance. On the basis of this common position, a Community regulation, namely Regulation 2580/2001, provides for the establishment of a second list aimed at freezing the assets of those addressed therein.

- The EU has established a specific procedural regime for inclusion on its lists. A decision must have been taken by a competent authority (a judicial authority or equivalent) to include a name on the list. With a view to improving the overall inclusion process, the Council created a specialised working party (Common Position 931 Working Party), which examines and evaluates the information with a view to either including or de-listing persons, groups and entities, and drafts recommendations. The Council furnishes detailed reasons for its decision, which is subsequently notified.
- The EU judges exercise a minimal review of the Community list, and the Court of Justice has established the principle of a possible review of common positions in the form of a preliminary ruling.
- The Community judicature reviews the admissibility of appeals against the list, the procedure for inclusion or maintenance on the list, as well as compliance with the obligation to provide reasons therefore. The review of the reasons given by the Community institution includes checking whether the Council has committed a manifest error of appraisal. The judicature is precluded from substituting its own assessment of what is appropriate for that of the Council. As such, the Court of First Instance (CFI) has on several occasions annulled the inclusion and maintenance of the People's Mujahedin Organization of Iran (PMOI) on the Council list, most recently on 4 December 2008.
- The Treaty of Lisbon puts an end to a great deal of this legal complexity by establishing a basis for a thorough judicial review in Article 275 of the Treaty on the Functioning of the European Union (TFEU).

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STUDY

OVERVIEW OF EUROPEAN AND INTERNATIONAL LEGISLATION ON TERRORIST FINANCING

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1. INTRODUCTION

According to Terry Davis, Secretary General of the Council of Europe, *Terrorists seldom kill for money but they always need money to kill*².

The process of terrorist financing can be seen as having three phases. First, terrorist groups clearly need the means with which to fund their activities (recruitment, training, support for the families of martyrs, the preparation of attacks, etc.). Although the costs of organising a terrorist attack are generally considered not to be particularly high – for example the Madrid attacks of 11 March 2004 are estimated to have cost 10,000 USD³ – recruitment and training costs in particular are reputed to be far more significant.

Terrorist organisations therefore have to raise the necessary funds, either directly or indirectly. There are several legal or unlawful ways in which terrorist groups can obtain financial means.

Finally, these funds generally have to be moved from one State to another through various types of institutions or financial schemes.

The second and third stages of this process constitute the battleground for the fight against terrorist financing. It is currently impossible to know what the exact financing needs are of the various terrorist groups.

States generally have sovereign powers in the fight against terrorism. Nevertheless, a coordinated international and European approach appears to be crucial in view of the very nature of terrorist activities, transnational as they very often are.

¹ Ms Long drafted the first part of the study and related recommendations, and Professor Labayle the second part (from the “Terrorist Lists of the European Union” onwards) and related recommendations.

² Joint Moneyval/Financial Action Group meeting, 21.02.2007.

³ Financial Action Group, *Terrorist Financing*, 29 February 2008, p.7.

European Union

The Council and Commission Action Plan implements the Hague Programme of 5 November 2004 on strengthening freedom, security and justice in the European Union⁴. This action plan focuses on Member States' capacities to combat the financing of terrorism.

A **Plan of Action** on Combating Terrorism was adopted by the European Council at its meeting on 17 and 18 June 2004⁵. The current **European Strategy** countering terrorist financing and covering the three pillars of the European Union, was adopted by the European Council on 16 and 17 December 2004. It describes *identifying and disrupting the mechanisms through which terrorism is financed* as key in the effort to combat terrorism⁶.

In addition, a **European Union Counter-Terrorism Coordinator** was appointed in March 2004 to coordinate the Council's counter-terrorism work, to ensure an overview of the EU texts in the field and to manage the implementation of the EU's counter-terrorism strategy. Mr Gilles de Kerchove is the current EU Counter-Terrorism Coordinator⁷. On 17 July 2008 he published the **Revised Strategy on Terrorist Financing**⁸. This document recalls the essential components of Community legislation applying to money laundering and financing of terrorism, highlighting a number of "strategic" points, including better intelligence sharing among competent authorities in particular.

The provisions on terrorist financing are currently divided between the three pillars of the Community structure, something that obviously does not favour a high degree – albeit crucial – of coordination between the European institutions. The latest report on the implementation of the High Representative's European Security Strategy⁹ is possibly revealing in this regard in that does not explicitly declare terrorist financing to be a priority – at least not of the second pillar – while it does mention the role played by organised crime and the need to increase intelligence-sharing with certain third country and regional partners such as the United States, South Asia and Africa.

Various initiatives also indirectly contribute to combating terrorist financing. Two such noteworthy initiatives are the European Arrest Warrant¹⁰ and Joint Investigation Teams¹¹.

⁴ OJ C 198 of 12.8.2005, p.1.

⁵ 10586/04.

⁶ Secretariat General/High Representative 16089/04, 14 December 2004.

⁷ Mr Kerchove was appointed on 19.09.2007.

⁸ 11778/1/08 Rev. 1.

⁹ Report on the Implementation of the European Security Strategy – Providing Security in a Changing World, 10 December 2008 17/04/08

¹⁰ Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA).

¹¹ Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. OJ C 197, 12/07/2000 pp. 0003-0023.

There is a large degree of complementarity between money laundering and the financing of terrorism. International bodies and the European legislators have recognised this fact in linking the efforts to combat both these scourges. As such, it would seem all the more important to ensure there are operational services working on both these offences, as well as States – whether EU Members or third countries – that accept to cooperate in both of these fields at national and European level.

International Community

Many institutions have adopted texts on the financing of terrorism that are legally binding to a greater or lesser extent, the main institutions being **the United Nations, the Council of Europe and the Financial Action Task Force (hereafter FATF)**. Nonetheless, the **major role** played by other international bodies in this field such as **the World Bank, the International Monetary Fund, the OSCE or the Basel Committee for instance is undeniable.**

The United Nations has adopted a Global Counter-Terrorism Strategy¹², which among others includes *measures to prevent and combat terrorism and measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard. The Strategy provides the outline of an ambitious agenda for the next decade¹³*. A Special Counter-Terrorist Team made up of the International Criminal Police Organization (Interpol) and 24 bodies from the United Nations System (e.g. World Bank, World Customs Organization, etc.) was created in July 2005 to *ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system¹⁴*, which among other things has helped UN Member States to draft legal instruments underpinning the fight against terrorism.

The Council of Europe's legislative's role in this field is fundamental. So are also two of its bodies, the Moneyval (see FATF below) and Codexter which examines EU legislative developments on terrorism and in particular identifies the *lacunae* in international law in the field of action against terrorism.

Finally, the work of the FATF is as much a significant *indirect* legislative source for the European Union as it is for the international community.

This study employs the term “legislation” in a broad sense. The main legal texts are mentioned, irrespective of whether or not they are binding, as are the main institutions or bodies involved in European and international cooperation against the financing of terrorism.

First, we will attempt to propose certain key definitions for the study of the principal legislation on terrorist financing. Then we will highlight the fundamental texts in the area

¹² United Nations General Assembly, Resolution 60/288 of 8 September 2006.

¹³ United Nations General Assembly, Report of the Secretary General, A/62/898.

¹⁴ *Ibid.*, p. 2.

of information-sharing and cooperation between competent services within the European Union before exploring the links between legislation on money laundering and on terrorist financing. In a section on the assets and financing of terrorism, we will detail the different options for the freezing and confiscation of assets and in particular will scrutinise the targeted actions of the United Nations and the European Union to freeze the assets of certain individuals, groups and entities.

This last point will comprise a study of the most recent Community jurisprudence in this field. An annex will then list all the recommendations that both authors have considered useful to make on the basis of this study.

2. DEFINITIONS AND SCOPE OF ACTIVITIES LINKED TO THE FINANCING OF TERRORISM IN THE EUROPEAN UNION

2.1 Key definitions

Terrorism

Although there is no common definition of terrorism at international level, the European Union was able to adopt a common definition in its framework decision of 13 June 2002 on combating terrorism¹⁵. This framework decision provides the basis of the Counter-Terrorism Strategy adopted by the European Union¹⁶.

Article 1 thereof provides that terrorist offences are *intentional acts (...) which given their nature and context, may seriously damage a country or an international organisation where committed with the aim of seriously intimidating a population, unduly compelling a Government or international organisation to perform or abstain from performing an act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.*

A list of the intentional acts covered by this definition then follows (kidnapping or hostage-taking, causing extensive destruction to a Government or public facility, attacks upon a person's life which may cause death, etc.).

Money Laundering

According to the **United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)**, laundering is:

- *The conversion or transfer of property, knowing that such property is derived from any offence or offences (...) or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;*

¹⁵ Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA).

¹⁶ General Secretariat of the Council, 7 November 2008, Draft Framework Decision Amending Framework Decision 2002/475/JHA on Combating Terrorism, 15139/08.

- *The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences (...) or from an act of participation in such an offence or offences;*
- *The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences (...) or from an act of participation in such offence or offences*¹⁷.

According to the United Nations Convention against Transnational Organized Crime of 2000 (Palermo Convention), *predicate offences* must cover the widest range possible (and not, amongst others, be limited to drugs trafficking)¹⁸.

The **third Community directive**¹⁹ **adopts the same definition as that made by the United Nations in 1988** whilst adding a paragraph:

- *participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing points.*

Financing of terrorism

Article 1 of **the third directive on money laundering** defines terrorist financing as *the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism*²⁰. This definition is close to that of the International Convention for the Suppression of the Financing of Terrorism adopted by the United Nations in 1999.

The funding of terrorism in any way is considered to be participation in the activities of a terrorist group when it occurs with its perpetrator's (natural and legal persons) *knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group*²¹.

According to Article 5 of the Council framework decision of 13 June 2002, this offence shall be punishable by criminal penalties, and in particular by custodial sentences with a maximum sentence of not less than eight years.

The freezing of assets

¹⁷ United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Arts. 3b) and 3c).

¹⁸ United Nations Convention against Transnational Organized Crime, Arts. 2 and. 6.2(a), Terminology.

¹⁹ See 4.2 of the study and Article 1.2 of the directive.

²⁰ OJ L 164 of 22.6.2002, p. 3.

²¹ Council Framework Decision of 13 June 2002 on Combating Terrorism, Article 2.2 b).

The **Council of Europe Convention of 16 May 2005 on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism** defines *freezing* or *seizure* as *temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority*²².

The definition proposed by **Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence** is slightly different. Freezing makes it possible *provisionally to prevent the destruction, transformation, moving, transfer or disposal of property that could be subject to confiscation or evidence*. This text therefore sets out one of the aims of freezing: confiscation, thereby establishing a logical coherence between the two operations.

The confiscation of assets

According to the above-mentioned **Convention of the Council of Europe of 16 May 2005** *confiscation means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property*²³. Unlike the freezing and seizure of assets, confiscation therefore implies the transfer of ownership to the State that carried out the confiscation.

The **FATF Interpretative Note to Special Recommendation III** stipulates that *the person(s) or entity(ies) that held an interest in the specified funds or other assets at the time of the confiscation (...) loses all rights, in principle, to the confiscated (...) funds or other assets*.

2.2 Types of terrorist financing

There are various types of terrorist financing. In recent years the competent authorities have been able to increase the supervisory measures related to legal activities, to funds that are transferred through informal structures and to certain economic sectors considered to be particularly vulnerable to fundraising in support of terrorist activities, such as the charitable (or non-profit) sector.

It is also necessary to distinguish between the different financing needs of terrorist organisations according to their nature. Thus, among organisations with mainly national ambitions, such as nationalist or separatist groups, the funds tend mainly to be raised in the national territory or within a specific geographical area. There are therefore fewer remittances from one country to another. As such they are clearly different to international terrorist groups – Islamist or others – who have recourse to financing covering a much larger geographical area, the funds therefore having to transit several countries before reaching their final destination.

²² Council of Europe Treaty Series (CETS) Convention No. 198, Chapter I, Article 1.

²³ Ibid.

2.2.1. Terrorist financing may, in broad outline, be categorised into two major groups:

Proceeds from legal activities

Several types of legal activities have been identified which could be used for the financing of terrorism.

- **Legal economic activities** can finance terrorist activities. The FATF has, for example, published a study on laundering and terrorist financing through transactions in the real estate sector²⁴. Selling of goods on internet may also be another example.

- **Remittances made by families of terrorists.**

- The **personal fortune of these individuals**: Usama bin Laden²⁵ has allegedly invested a fortune earned in the real estate sector in Saudi Arabia in Al-Qaida's activities.

- **Collections by charitable associations or NGOs. FATF Special Recommendation VIII** stipulates that States must ensure that non-profit organisations *are not misused by terrorist organisations to pose as legitimate entities; to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; or to conceal or obscure the clandestine diversion of funds intended for legitimate purposes but diverted for terrorist purposes*. The FATF has also published *International Best Practices* in the field²⁶. According to the FATF, States should adopt supervisory measures covering the activities of these associations, ensuring transparency for donors on the use of the collected funds (such transparency potentially going as far as monitoring the collected funds in the field).

The main concern here is not to impede the work of these associations, whilst addressing the real difficulties currently faced by law enforcement services in proving the wrongful use of funds collected by these associations. Very few associations have in fact been found liable in law for such acts in either Europe or the United States.

The Commission has launched two studies on non-profit organisations, the outcomes of which are to be presented in 2009, potentially providing a basis for new European legislation in the area²⁷.

- **The proceeds of such legal activities will then be “blackened”**, that is to say that their use will become illegal: the opposite of what is known as the “laundering of dirty money”. The use of this money for terrorist financing can sometimes be particularly difficult to prove. How indeed can it be proven before the courts that money collected in one EU Member State is then used in Iraq or elsewhere for the terrorist activities? This

²⁴ FATF, Money Laundering & Terrorist Financing through the Real Estate Sector, 29 June 2007.

²⁵ Because there is no universally accepted standard in the West for transliterating Arabic words and names into English, bin Laden's name is transliterated in many ways. The version often used by most English-language mass media is Osama bin Laden. This study will use the transliteration found in United Nations Security Council Resolution 1333(2000) and Council Regulation 467/2001/EC, namely Usama bin Laden.

²⁶ FATF, Combating the Abuse of Non-Profit Organisations, International Best Practices 11.10.2002.

²⁷ Recommendation 4 of Mr de Kerchove, 11778/1/08 Rev. 1.

would imply effective international and bilateral cooperation between the State in which the funds were collected and the State at the end of the chain, and therefore the conclusion of cooperation agreements enabling the exchange of operational information as well as suspects' names.

Proceeds of criminal activities

Europol's report "**Te-Sat 2008, EU Terrorism Situation and Trend Report**"²⁸ confirms the use of the proceeds of criminal activities to finance terrorism. In 2007, 5% of those arrested for activities linked to Islamist terrorism were arrested for terrorist financing (as opposed to 10% in 2006). This financing comes in particular from drug trafficking or from legal activities such as front companies in the real estate sector²⁹. **Goods can also quite simply be stolen and sold on the black market. Other criminal methods, such as the extortion of funds,** have also been uncovered by France and Spain, for example, in investigations linked to the Liberation Tigers of Tamil Eelam, (LTTE)³⁰ and to Corsican and Basque separatist groups.

Eurojust has also reported on cases of terrorism being financed through criminal activities³¹.

Nevertheless, it is impossible to put precise figures to these facts. While the trafficking of drugs and chemical precursors may benefit the Taliban in Afghanistan³², at this point in time we are currently only able to go so far as to suppose contacts between certain terrorist groups and criminal networks, without however being able to prove with any certainty the systematic involvement of terrorist groups in transnational organised crime.

Generally speaking, experts disagree as to the exact total expenditure required for terrorist groups to survive. Without these figures, is it realistic to think that international and European legislation can really grasp the true extent of the problem as it stands today and that major stakeholders as a consequence, give States sufficient motivation to take up this fight?

2.2.2. Different Remittance Methods

Wire transfers

²⁸ www.europol.europa.eu

²⁹ Europol, Te-Sat 2008, EU Terrorism Situation and Trend Report p. 23.

³⁰ Ibid. pp. 31 and 32.

³¹ Italy requested the assistance of Eurojust with an investigation in which the suspects were members of a criminal organisation specialising in the forgery of residence permits, ID cards and passports. They were also involved in the trafficking of human beings and cigarette smuggling. These actions served to collect funds for use in terrorist actions in Italy, Afghanistan, Iraq and in other Arabic countries. The investigation showed a clear link to Al-Qaida. Eurojust, 2007 Annual Report, p. 35.

³² See Security Council Resolution 1817 (2008) of 11 June 2008 and Resolution 1822 (2008) of 30 June 2008, paragraph 10.

These are so-called “**traditional**” **methods of transferring funds**. **FATF Special Recommendation VII** calls upon financial institutions *to include accurate and meaningful originator information (...) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain*. This method concerns cross-border transfers.

Internet

- **Use of the internet in terrorist fundraising**

This possibility is specifically mentioned in the Report of the Secretary-General on the United Nations Global Counter-Terrorism Strategy³³. **However, this use of the internet is rarely mentioned in European Union texts**. The internet is said above all to be used for recruitment and for the sharing of the technical knowledge necessary to make bombs. In fact, the internet can certainly be used for the online sale of propaganda materials and miscellaneous objects with a view to financing terrorism. Appeals for donations can also be made via the internet. The European Counter-Terrorism Coordinator has however mentioned the risk of (illegal) products being sold on the internet, by way of reference to a FATF study³⁴ in his *Revised Strategy on Terrorist Financing*.

- **New financing methods**

These new methods are often linked to internet use. E-gold is an electronic currency, issued by E-gold Ltd., a Nevis corporation, backed by gold bullion. The e-gold payment system enables people to spend specified weights of gold, which go into other e-gold accounts. The system is not regulated by any national or international legislation. On 27 April 2007, a federal grand jury in Washington D.C. indicted E-gold Limited³⁵; this system of payment was indeed being used by a number of criminal networks.

- Other means of electronic payment are also currently subject to specific provisions and vigilance, for example the **electronic purse and payments made by mobile phone**.

Alternative remittance systems

Alternative remittance systems were developed well before the existence of the traditional banking system, in particular with a view to facilitating international trade and the transmission of migrant workers' money; it featured around the Indian Ocean in particular. **These systems have different names: hawala, hundi, etc.** Funds are available on the order of a party in another geographic location for the benefit of another party. **The procedure is minimal (particularly those procedures enabling client identification) and transaction costs are low**. These transactions are based on

³³ A/62/898, p. 10.

³⁴ FATF, Money Laundering & Terrorist Financing Vulnerabilities of Commercial Websites and Internet Payment Systems, 18.06.2008.

³⁵ http://www.usdoj.gov/opa/pr/2007/April/07_crm_301.html.

confidence (and not on formal documentation of a financial relationship), and are in general not subject to any national or international supervision or regulation.

Within this framework, it is certainly worth noting the increasing importance of certain remittance companies with a worldwide network which are subject to less stringent controls than classic financial institutions³⁶.

FATF Special Recommendation VI, *Alternative Remittance*, suggests formalising these relations: *each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions (...).*

A **European directive of 13 November 2007**³⁷ established a single licence for all providers of foreign payment services taking deposits or issuing electronic money; i.e. all payment institutions that execute remittances but which fall outside the traditional categories of financial institutions, to ensure their compliance with certain legal and regulatory obligations. This directive is to be transposed into the national legislation of the Member States before 1 November 2009.

The issue of registering/licensing operators is constantly raised by all counter-terrorism legislators. The FATF stresses however that *Government oversight should be flexible, effective, and proportional to the risk of abuse*³⁸. Certainly, **formalising the activities of these operators** could well lead to an increase in the costs of such services, thereby markedly reducing their use. **This would cause major problems both for migrants, who sometimes have no other choice but to use these networks**, and for certain States that receive very significant sums from their nationals via these informal systems. It is clear that Mr de Kerchove shares this concern when he states that *a balance needs to be found, therefore, between safeguarding legitimate use of the systems and combating their abuse for terrorist financing activities*³⁹.

Cash Couriers

FATF Special Recommendation IX and its Interpretative Note state that *countries should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including a declaration system or other disclosure obligation*. Furthermore, any suspicion of terrorist financing, money laundering or false declaration should suffice for States to *stop or restrain* these funds.

³⁶ Example: Western Union.

³⁷ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on Payment Services in the Internal Market Amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and Repealing Directive 97/5/EC.

³⁸ FATF, Combating the Abuse of Alternative Remittance Systems, International Best Practices 20.06.2003, para. 9.

³⁹ 11778/1/08, point 3.1.

According to the FATF, *cash smuggling is one of the major methods used by terrorist financiers, money launderers and organised crime figures to move money in support of their activities*⁴⁰.

3. INFORMATION-SHARING AND COOPERATION BETWEEN COMPETENT AUTHORITIES WITHIN THE EU

While this issue concerns the fight against terrorism generally, at this juncture it strikes us as opportune to survey the existing structures and texts in the field, thus reflecting the concerns highlighted in particular in the *Revised Strategy on Terrorist Financing*⁴¹ published by the Counter-Terrorism Coordinator in July 2008. Furthermore, this issue is also raised in other major European documents, such as the Report on the Implementation of the European Security Strategy: *better co-ordination, transparency and flexibility are needed across different agencies, at national and European level*⁴².

3.1 Information-sharing between competent national authorities

Here we will make reference to the main texts on intelligence-sharing between the various Member States of the European Union.

Schengen

The Schengen Agreement of 1985 and implementing Convention of 1990⁴³ strengthen – in return for the greater freedom of movement of persons resulting therefrom – customs and police cooperation in particular on drugs and weapons trafficking, illegal immigration, etc. The sharing of police intelligence is provided for in particular by Articles 39 and 46 of the Convention implementing the Schengen Agreement⁴⁴.

The Agreement and Convention are included in the “**Schengen acquis**”, as they were incorporated into the legislative corpus of the European Union in 1997 in a protocol annexed to the Treaty of Amsterdam.

It should be noted that in 2007, the SIS I network (**Schengen Information System**) – the main instrument for the exchange of “Schengen” information – also became accessible to

⁴⁰ FATF, Detecting and Preventing the Cross-Border Transportation of Cash by Terrorists and Other Criminals, International Best Practices, 12.02.2005, p. 2. The legislation in this area is referred to in point 4.3 of this study.

⁴¹ Counter-Terrorism Coordinator, Revised Strategy on Terrorist Financing, 11778/1/08 Rev 1.

⁴² Report on the Implementation of the European Security Strategy – Providing Security in a Changing World, 11 December 2008, p. 4.

⁴³ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, signed in Schengen on 14 June 1985; Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders. OJ L 239 22.09.2000.

⁴⁴ OJ L 239 of 22/09/2000 p. 0019-0062.

Europol agents. Furthermore, Schengen Information System II is soon (2010?) to be implemented between the Member States.

Requests for mutual legal assistance and the execution of judicial decisions

Article 4 of the **decision of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences**⁴⁵ provides that:

Each Member State shall take the necessary measures to ensure that requests from other Member States for mutual legal assistance and recognition and enforcement of judgments in connection with terrorist offences are dealt with as a matter of urgency and are given priority.

Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union

This **framework decision of 18 December 2006** was issued following the declaration on combating terrorism adopted by the European Council on 25 March 2004 in which the European Council instructed the Council to examine measures that would simplify the exchange of information and intelligence between the law enforcement authorities of the Member States⁴⁶.

This text paves the way for the transmission of available intelligence between different EU Member States under the same conditions as if this transmission had taken place between national authorities⁴⁷. Nevertheless, the information provided cannot be used *de facto* before a court of law. The framework decision establishes maximum time limits for transmission according to the urgency of the request, and Member States may only refuse transmission in cases exhaustively listed therein.

This framework decision replaces the provisions of Article 39(1), (2) and (3) and of Article 46 of the Convention Implementing the Schengen Agreement in as far as they relate to exchange of information and intelligence for the purpose of conducting criminal investigations or criminal intelligence operations⁴⁸.

Prüm Treaty

This Treaty on cross-border cooperation, **signed on 27 May 2005 by 7 EU Member States, facilitates the access of law enforcement agencies to various databases of the**

⁴⁵ Council Decision 2005/671/JHA of 20 September 2005 on the Exchange of Information and Cooperation Concerning Terrorist Offences. Deadline for transposition: 30 June 2006.

⁴⁶ 2006/960/JHA, Recital 12.

⁴⁷ Ibid., article 3.3.

⁴⁸ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, article 12.1.

Member States (particularly where it concerns fingerprint and DNA data sharing)⁴⁹. This document was **partly transposed into the legal framework of the European Union by a Council decision of 23 June 2008**⁵⁰.

Article 16 stipulates that the States should, without necessarily being requested to do so, provide other Contracting Parties' national contact points in Member States with personal data and information relevant to the fight against terrorism.

The provisions of this text enshrine the **principle of “availability”**⁵¹ between law enforcement officers of the various EU Member States.

3.2 Information sharing between the competent national authorities at national and European level

3.2.1. Financial intelligence units, Egmont and FIU.net

Financial Intelligence Units differ in status across the world. **Being units of an administrative or judicial nature, they cooperate in a different way among themselves and with the various European or international institutions.**

The **Council decision of 17 October 2000 concerning arrangements for cooperation between Financial Intelligence Units of the Member States in respect of exchanging information**⁵² attempts to harmonise cooperation between FIUs, whatever their status. Although this text originally only applied to money laundering, since its adoption the remit of the FIUs has expanded to encompass combating the financing of terrorism. As a result, this text should *de facto* also apply to the exchange of intelligence in this field.

Despite the above-mentioned Council decision of 2000, the FIUs of the Member States of the EU **do not cooperate with each other in the same way, nor do they contribute to the same extent to the relevant Europol Analysis Work Files on terrorist financing.** Mr de Kerchove stresses that *further ways to facilitate the exchange of information, irrespective of the nature of a national FIU, should be explored*⁵³.

Many FIUs are members of **the Egmont Group**, a network created in 1995 to “stimulate international cooperation”⁵⁴ between financial intelligence units. It **enables the hundred-odd member financial intelligence units throughout the world to exchange intelligence via a secure website**⁵⁵, as well as to meet with a view to sharing best

⁴⁹ Treaty of 27 May 2005 between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the Stepping up of Cross-border Cooperation, particularly in Combating Terrorism, Cross-border Crime and Illegal Migration.

⁵⁰ Council Decision 2008/615/JHA of 23 June 2008.

⁵¹ This principle, established in the Hague Programme in 2004, makes it possible for law enforcement authorities to obtain information from law enforcement authorities of other Member States online.

⁵² 2000/642/JHA.

⁵³ 11778/1/08 Rev. 1, point 5.1.

⁵⁴ See the website of the Egmont Group www.egmontgroup.org

⁵⁵ Egmont Secure Web.

practices in combating money laundering and the financing of terrorism. In addition, **the Egmont Group proposes its own definition of terrorism financing** (*Countering Terrorism financing interpretative note*⁵⁶) as well as **best practices in the exchange of intelligence between financial intelligence units.**

The **FIU.net project** was initiated in **2000** by the Dutch Ministry of Justice in cooperation with the Dutch, British and Belgian financial intelligence units. **It consists of a secure system through which the financial intelligence units involved in the project can share financial intelligence.** However, this service is still not being used by all EU FIUs, something that has prompted Mr de Kerchove to declare that *FIU.net as a technical tool should be used by all 27 EU FIUs to exchange information*⁵⁷.

FIUs should thus not be isolated from other counter-terrorist intelligence services; relevant information must be cross-checked and supplemented, and cooperation needs to be increased.

Concerning the **feedback from the FIUs to the private sector** advocated by the European Coordinator⁵⁸, it is in our view important to target precisely when this feedback should be given. **If done too early it risks compromising possible future or ongoing investigations.**

3.2.2. Pooling of intelligence between national authorities and Europol/Eurojust

Using the terms employed in the Opinion of the Economic and Social Committee⁵⁹, it is necessary to stress, the importance of pooling operational intelligence between competent authorities: *the roles of the Member States, EU institutions, Europol, Eurojust, etc. are well defined, but it is above all the operational nature of cooperation within intelligence agencies and investigations which requires constant improvement.*

Council decision on the exchange of information and cooperation concerning terrorist offences

The **Council decision of 20 September 2005 requires the provision of specific information to Europol and Eurojust on investigations and judicial proceedings concerning terrorist offences**⁶⁰. This decision should have been transposed by 30 June 2006 at the latest by all Member States. However, by the end of May 2008, only 10 Member States had adopted internal implementing measures for the decision⁶¹.

⁵⁶ www.egmontgroup.org/files/library_egmont_docs/fiu_def_tf_compl_int_note.pdf The Egmont Group stipulates in particular that the information reported to the financial intelligence units should not only cover lists of designated or suspected terrorists.

⁵⁷ 11778/1/08, point 5.1.

⁵⁸ 11778/1/08 Rev. 1, point 5.3.

⁵⁹ Opinion of the European Economic and Social Committee on the “Prevention of Terrorism and Violent Radicalisation”, (2008/C 211/17), para. 3.13.

⁶⁰ Decision 2005/671/JHA.

⁶¹ 9416/08 Add 1 Rev 1.

The provision of “terrorist” information to Europol and Eurojust is in fact far from systematic. As stated by the European Counter-Terrorism Coordinator, Gilles de Kerchove, *not all cases of prosecution or investigation are sent to Europol or Eurojust, respectively. So it is important for me to remind Member States of this obligation*⁶².

Europol Analysis Work Files

Under the European Action Plan, the fight against terrorism, including the financing of terrorism, constitutes an absolute priority for Europol⁶³.

Terrorist activity is the subject of two analysis work files at Europol. One concerns Islamist terrorist activities while the other covers non-Islamist terrorist activities. The vast majority of States contribute to these Analysis Work Files, which have helped produce concrete results in combating the financing of terrorism⁶⁴. Furthermore, Europol also publishes an annual report (Te-Sat⁶⁵) which, with contributions from the Member States, Eurojust and the Joint Situation Centre (SitCen),⁶⁶ analyses terrorist events (attacks and activities) from a judicial and law enforcement perspective.

One of the difficulties in the field of counter-terrorism intelligence, including the financing of terrorism, is the **importance of proactive, and not just reactive (after the event), operational intelligence.** This is why close cooperation between the EU Member States is so important, a situation to which Europol can provide definite added value in a supporting role.

Furthermore, **the Analysis Work File dedicated to money laundering** should also be mentioned as it is the Europol Analysis Work File aiding in the detection of terrorist financing activities. This Analysis Work File focuses on:

- statements on suspicion transactions;
- statements on cross-border movements of cash (“cash couriers”);
- money laundering investigations.

Cross-checking does occur between the three above-mentioned Analysis Work Files, with money-laundering techniques being regularly used not only by criminal groups but also by terrorists.

Eurojust

⁶² <http://consilium.europa.eu/uedocs/cmsUpload/080923DeutscheWelle.pdf>

⁶³ 2007 Europol Annual Report, p. 23.

⁶⁴ The Austrian Liaison Bureau reported in Europol’s Annual Report that operation *Welfare* made it possible with the aid of the Analysis Work File on Islamic terrorist activities to dismantle an organisation strongly suspected of illegal financing of Islamic extremists. Europol Annual Report 2007, p. 54.

⁶⁵ http://www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TE-SAT/TE-SAT2008.pdf

⁶⁶ SitCen, a Council Unit working under the second pillar and composed of national experts in intelligence provides the European institutions with confidential reports on the terrorist situation in Europe.

The fight against terrorism is just as much a priority for Eurojust. Its 2007 Annual Report⁶⁷ states that **Eurojust’s aim is to establish a centre of expertise on terrorism, following trends and patterns in all fields of terrorism including the financing of terrorism.**

Eurojust considers that 5 out of a total of 34 cases related to terrorism fall within the category of the “financing of terrorism”⁶⁸.

The satisfactory cooperation that exists between Europol and Eurojust in the field of counter terrorism should also be highlighted, with analysts from both organisations regularly cooperating in this area⁶⁹.

Imminent texts on Europol and Eurojust

Two imminent Council decisions should, in the near future, replace and amend the Europol Convention of 1995⁷⁰ and the Eurojust decision of 2002⁷¹. These new directives will be the main legal instruments ensuring greater effectiveness in combating terrorism and terrorist financing at EU level.

Although legislative tools exist within the EU, operational cooperation needs to be further enhanced.

3.2.3. Information sharing between EU Member States and third countries

It is essential to have functioning intelligence-sharing agreements, not only with third countries actively involved in combating terrorism (for example, the United States), but also with other third countries that have been victims of terrorist acts (the Philippines, Algeria etc.). These agreements enable or shall enable the European Union – Member States or European bodies such as Europol and Eurojust⁷² – to receive information in return. Mr de Kerchove has stressed the importance of continuing the *constructive dialogue with key EU partners (the United States and the Gulf Cooperation Council)*⁷³.

⁶⁷ www.eurojust.europa.eu

⁶⁸ Eurojust, 2007 Annual Report, p. 26.

⁶⁹ Europol, 2007 Annual Report, p. 37.

⁷⁰ Proposal for a Council decision establishing the European Police Office (Europol). COM (2006) 817 final of 20.12.2006.

⁷¹ Initiative of the Kingdom of Belgium, the Czech Republic, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden with a view to Adopting a Council Decision concerning the Strengthening of Eurojust and Amending Decision 2002/187/JHA.

⁷² Europol and Eurojust have concluded a certain number of strategic or operational agreements with third countries. The operational agreements enable the exchange of nominative information. For a detailed list, see www.europol.europa.eu/index.asp?page=agreements and www.eurojust.europa.eu/official_documents/eju.agreements.htm

⁷³ 11778/1/08 Rev. 1, point 6.

4. MONEY LAUNDERING AND TERRORIST FINANCING

The oldest European initiative in the field of money laundering was a Council of Europe recommendation⁷⁴ identifying the introduction of funds of criminal origin into the banking system. The Council of Europe was already stressing the importance of identity checks on customers at that time.

Since the attacks of 9 September 2001 on the United States, the strategies used to combat money laundering have generally been extended to terrorist financing. In addition to purely financial institutions, commercial services (casinos, legal professions, jewellers, etc.) have also been subject to these policies.

FATF Special Recommendation II: *Criminalising the financing of terrorism and associated money laundering* links the two offences, stating that the **each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offences are designated as money laundering predicate offences.**

4.1 FATF's achievements

FATF was created in 1989. It is an inter-governmental body whose purpose *is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing*⁷⁵.

34 countries are members of the FATF⁷⁶, and two countries have observer status (India and the Republic of Korea).

The main “legislative” work of the FATF, which is not however binding for States, can be found in its 40 Recommendations for combating money laundering and terrorist financing and in its 9 Special Recommendations to detect, prevent and suppress the financing of terrorism and terrorist acts⁷⁷. These recommendations are the most emblematic international provisions on money laundering and terrorist financing, with the **United Nations Global Counter-Terrorism Strategy explicitly encouraging States to implement its recommendations**⁷⁸ and for **European Union legislation to incorporate its recommendations**. Furthermore, the World Bank and the

⁷⁴ Council of Europe Recommendation No. R (80) 10 of the Committee of Ministers to Member States.

⁷⁵ www.fatf-gafi.org

⁷⁶ Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, European Commission (27 Member States), Finland, France, Germany, Greece, Gulf-Cooperation Council, Hong Kong China, Iceland, Ireland, Italy, Japan, Kingdom of the Netherlands, Luxembourg, Mexico, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United States, United Kingdom.

⁷⁷ These 40 Recommendations were published in 1990. In 2001, 8 Special Recommendations on terrorist financing were added. The recommendations were revised in 2003, and in October 2004, the FATF published the 9th Special Recommendation.

⁷⁸ Resolution 60/288 adopted by the General Assembly of the United Nations, 20 September 2006.

International Monetary Fund have evaluated the follow-up given by States to the 40 Recommendations on money laundering and to the 9 FATF Special Recommendations on terrorist financing⁷⁹.

In various reports the FATF stresses the similarity there is between the methods used by terrorists and those of other criminal organisations where it concerns use of the financial system. However, the inherent difficulty in applying the recommendations consists in the fact that in certain jurisdictions *terrorist financing does not fit the definition of money laundering and as such the arsenal of measures available to the authorities under anti-money-laundering legislation is limited*⁸⁰.

In addition to work on money laundering and terrorist financing typologies, the FATF and its associated members⁸¹ propose **guidelines** for combating these phenomena, aimed at States as well as directly at professionals (casinos, legal professionals etc.). The FATF also publishes *red flag indicators* (for example, internet payment management indicators).

4.2 The third directive and other Community texts

The third directive, or the “**Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing**”, was adopted on 26 October 2005⁸², repealing Directive 91/308/EEC of 1991 which had been broadened in scope in 2001 by Directive 2001/97/EC. Notably, the 2005 directive incorporates the 2003 revision of the 40 FATF Recommendations. It **reinforces the oversight regime applicable to transactions in the financial sector, as well as to legal professionals, notaries, accountants, real estate agents and casinos. Trust or company service providers, persons trading in goods** (to the extent that payments are made in cash for an amount of EUR 15,000 or more) are also covered by it. By doing so the Directive follows **FATF Recommendation 20**, which encourages the application of all the recommendations *to businesses and professions, other than designated non-financial businesses and professions, that pose a money laundering or terrorist financing risk*.

The third directive therefore applies an extended version of the “**KYC**” (Know your Customer) **principle** which also appeared in FAFT Recommendation 5. In general, all the international texts (FATF, Community instruments, as well as the United Nations International Convention for the Suppression of the Financing of Terrorism of 1999), stress the obligation incumbent upon banks and financial institutions not to open accounts

⁷⁹ Anti-Money Laundering and Combating the Financing of Terrorism: Observations from the Work Program and Implications Going Forward, Staff Report prepared by the IMF Monetary and Financial Systems and Legal Departments and the World Bank, Financial Sector Vice-Presidency, 31 August 2005, at www.imf.org/external/np/pp/eng/2005/083105.htm

⁸⁰ FAFT, *Report on Money Laundering Typologies 2000-2001*.

⁸¹ The Council of Europe – Moneyval, The Asia/Pacific Group on Money Laundering (APG), Caribbean Financial Action Task Force (CFATF), The Financial Action Task Force on Money Laundering in South America (GAFISUD), Middle East and North Africa Financial Action Task Force (MENAFATF).

⁸² Directive 2005/60/EC of the European Parliament and of the Council.

where the holder is not identified or identifiable, to notify the competent authority of any “suspicious” transactions and to keep all supporting documents for a minimum length of time (5 years in the case of the United Nations Convention).

Furthermore, this third directive broadens **the range of offences to include tax fraud**. Finally, this directive encourages the FIUs to work together more effectively.

The Directive does not however transpose all the FATF Recommendations. Another legal text, namely **Regulation EC 1781/2006**⁸³, transposes **Special Recommendation VII**, entitled *Wire transfers*, into Community legislation. This regulation makes it possible to extend supervision methods to informal remittance and payment systems⁸⁴.

The third directive should have been transposed into the national law of the Member States by 15 December 2007, and the Commission recently instituted legal proceedings before the Court of Justice of the European Communities against Belgium, Ireland, Spain and Sweden for the non-transposition of this text. The Commission must submit a report on the implementation of the directive to the European Parliament and the Council by 15 December 2009 at the latest.

The third directive on money laundering increases the obligations that the above-mentioned professionals have with regard to their clients and the effective beneficiaries of transactions for the purpose of traceability of transactions and reporting to financial intelligence units. The obligations listed in this directive incumbent upon financial institutions and other professions subject thereto to declare a suspicion must not however hide the **large disparity there is in the transmission of statements between the different professions and in particular the – at times – quite insufficient cooperation of lawyers with the FIUs**⁸⁵.

4.3 Monitoring of cash movements

The monitoring of cash movements is mentioned in the International Convention for the Suppression of the Financing of Terrorism adopted by the United Nations in 1999. Member States must *detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments*⁸⁶.

Regulation (EC) 1889/2005 of 26 October 2005 on controls of cash entering or leaving the Community is more precise here in that an individual has the obligation to declare all movements of an amount equal to or over 10,000 euros. In the event of failure to comply with the obligation, the money may be detained in accordance with national

⁸³ Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on Information on the Payer Accompanying Transfers of Funds, OJ L 345, 8.12.2006, p.1.

⁸⁴ Nevertheless, payment services providers collecting funds for charitable purposes should be exempt from the obligations mentioned in the regulation below for donations of up to 150 euros executed within the territory of that Member State.

⁸⁵ Author’s interview with Tracfin, France, 18 February 2009.

⁸⁶ International Convention for the Suppression of the Financing of Terrorism, United Nations, 1999, Article 18.2 6).

legislation. However, a significant defect should be noted: **according to the text, gold or precious commodities with a value of over 10,000 euros would not have to be declared**⁸⁷. The trade in precious commodities has however been recognised in the past by testimony given during judicial proceedings as one of the means of financing certain terrorist groups⁸⁸.

5. ASSETS AND FINANCING OF TERRORISM

FATF Special Recommendation III stresses the importance of being able to:

*Freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts. Each country should also adopt and implement measures (...) which would enable the competent authorities to **seize and confiscate** property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations.*

There are therefore two types of measures. The first generally consists of being able to freeze and confiscate assets that could be used to finance terrorism (acts, organisation). In addition there are targeted measures adopted by the United Nations – and the European Union – which should be applied by States.

5.1. Freezing, seizure and confiscation – general measures

International Convention for the Suppression of the Financing of Terrorism

The **United Nations International Convention for the Suppression of the Financing of Terrorism of 1999**⁸⁹ calls upon each State Party to take *appropriate measures (...)* for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the terrorist offences set forth in Article 2 of the Convention as well as *appropriate measures (...)* for the forfeiture of (these) funds⁹⁰.

Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

The **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005**⁹¹ entered into force on 1 May 2008. So far only 11 States have ratified it, 5

⁸⁷ Regulation 1889/2005 of 26 October 2005 on controls of cash entering or leaving the Community, Article 2.

⁸⁸ Testimony of the Personal Secretary of Usama bin Laden (Wadhi el Hage) before the Southern District of New York, United States District Court.

⁸⁹ 9416/08 ADD 1 REV 1.

⁹⁰ International Convention for the Suppression of the Financing of Terrorism, Article 8.1 and 8.2.

⁹¹ CETS 198.

of which are EU Members⁹². This convention strengthens the provisions of the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No 141) and introduced new practical measures. It entered into force on 1 May 2008.

It is the first international instrument covering both the prevention and monitoring of money laundering and terrorist financing. It is based on the principle that the key to an effective prevention and enforcement strategy is rapid access to financial information and information on the assets held by criminal and terrorist organisations.

Various EU instruments

On 26 June 2001, the Council adopted a framework decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. This framework decision calls upon Member States to take the necessary steps to implement the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. **Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence was adopted on 22 July 2003.** Although the deadline for the transposition of this text was set for December 2004, **at the end of May 2008 10 Member States had still not implemented it or sent their national legislation to the Council.**

The recovery of the proceeds of crime and assets related to terrorist financing has certainly benefited from the recent Council decision on the **creation of Asset Recovery Offices**⁹³. However, these agencies still have to be created in a majority of Member States.⁹⁴ Those agencies will then have to apply the European texts governing the detection, freezing, and the seizure of assets in a uniform way to allow for their “judicial” confiscation.

The confiscation of assets was recognised at European level in two main texts: **Council Framework Decision 2005/212/JHA of 24 February 2005 and Council Framework Decision 2006/783/JHA** of 6 October 2006. These two texts respectively enable:

- Member States to **confiscate, either wholly or in part, property belonging to a person convicted of an offence (...)** which is covered by the *Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism*⁹⁵.
- **The execution by a Member State of a confiscation order issued by a Court of another Member State**⁹⁶.

⁹² The 5 EU Member States that have ratified this Convention are: Romania, the Netherlands, Slovakia, Malta and Poland.

⁹³ Council Decision 2007/845/JHA of 6 December 2007 Concerning Cooperation between Asset Recovery Offices of the Member States in the Field of Tracing and Identification of Proceeds from, or other Property related to, Crime.

⁹⁴ The deadline for the transposition of the decision is 18 December 2008. A report will evaluate this transposition at the latest by 18 December 2010.

⁹⁵ Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, article 3.1 b).

5.2 The freezing of assets – targeted actions

5.2.1. The United Nations terrorist lists

The UN “blacklists” are part of the United Nations Global Counter-Terrorism Strategy, which calls upon the Security Council Committee established pursuant to Resolution 1267 (1999) to *strengthen the effectiveness of the United Nations sanctions regime against Al-Qaida and the Taliban, while ensuring that measures taken or policies adopted comply with high standards of transparency and accountability*⁹⁷. The 1267 Committee Monitoring Team has recommended certain measures – adopted by the Security Council – that are designed to help States combat crimes that might be connected with terrorism (drug trafficking, the arms trafficking and money laundering). This team has also established a partnership with Interpol to develop the special notices concerning people subject to the United Nations sanction regime.

Several United Nations Security Council Resolutions have been adopted to combat terrorism.

Resolution 1267

This Resolution was adopted on 15 October 1999 and imposes sanctions against the Taliban regime in Afghanistan.

Resolution 1267 was adopted under Chapter VII of the United Nations Charter, which authorises the Security Council to determine *the existence of any threat to the peace, breach of the peace, or act of aggression*⁹⁸. The Security Council shall then make *recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security*⁹⁹. Security Council decisions taken under this Chapter of the Charter are **binding upon the Member States of the United Nations**. These decisions shall be *carried out by the Members of the United Nations directly and through their action in the international agencies of which they are members*.

Paragraph 4 b) of Resolution 1267 (1999) stipulates that *all States shall (...) freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 (of the Resolution), and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled,*

⁹⁶ Council Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders, Article 1.1.

⁹⁷ A/62/898, p. 8.

⁹⁸ Charter of the United Nations, Chapter VII, Article 39.

⁹⁹ Ibid.

directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.

This Resolution was followed by a series of additional Resolutions imposing similar measures against Usama bin Laden and Al-Qaida, and any individuals or entities associated with them, one such being Resolution 1333, adopted on 19 December 2000¹⁰⁰. Paragraph 12 of this resolution stipulates that the Committee shall create, draw up and maintain, *based on information provided by States and regional organizations, lists of the individuals and entities designated as being associated with Usama bin Laden*. The term individual or entity “associated” with Al-Qaida, Usama bin Laden or the Taliban consists more particularly of individuals or entities having *participated in financing* of these three entities¹⁰¹.

The 1267 Committee establishes the “United Nations blacklist” at the request of Members of the Security Council. The persons appearing on this list, which is updated by the Committee, are subject to an assets freeze and travel ban. States may request the Committee to add names to it. It also examines petitions for de-listing as well as for exemption from the freezing of assets, and regularly reports to the Security Council on its activities.

Resolution 1822 (2008) reiterates the de-listing procedures as well as the **establishment of the Focal Point pursuant to Resolution 1730 (2006) which directly receives petitions for de-listing from individuals, groups or entities included in the list**. These petitions are then examined by the designating States and States of citizenship and residence, which have to indicate whether they support the request before the Committee proceeds with its review.

Resolution 1822 (2008) also stipulates that the Committee has to conduct a review of all the names on the list by 30 June 2010 and thereafter carry out an annual review of all the names on the list that have not been reviewed in three or more years¹⁰². One of the major criticisms of the list system established under Resolution 1267 is the great difficulty listed individuals and groups have in getting themselves de-listed. The same criticisms have generally been made in the European Union. The EU has however, come up with a different response to them (see part 5.2.4.B of the study).

Resolution 1373

Following the attacks of 11 September 2001 on the United States, the Security Council adopted Resolution 1373, under Chapter VII of the Charter of the United Nations on 28 September 2001. This Resolution differs from Resolution 1267 in that it calls upon States to adopt concerted action so as to prevent any assistance – financial or other – being given to any terrorist organisation. **Unlike Resolution 1267, Resolution 1373 does not set out a list of persons or organisations classified as “terrorist”. Each State therefore has to draw up and adopt the necessary measures to:**

¹⁰⁰ S/RES/1333 (2000).

¹⁰¹ Security Council Resolution 1822 (2008), S/RES/1822 (2008) of 30 June 2008, para. 2b).

¹⁰² Ibid. paras. 25 and 26.

- *Prevent and suppress the financing of terrorist acts;*
- *Criminalize the wilful provision or collection (...) of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;*
- *Freeze (...) funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled (...) by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities (...)*¹⁰³.

FATF Special Recommendation III (*Freezing and confiscating terrorist assets*) as well as the Interpretative Notes thereto call upon States to implement measures in accordance with Security Council Resolutions to enable them to seize and confiscate property that is intended for use in the financing of terrorism and terrorist organisations.

The United Nations Counter-Terrorism Committee evaluates the national implementation of Security Council Resolution 1373 (2001) in particular on the basis of reports presented to the Committee by the UN Member States. However, the criteria by which this Committee evaluates national policies are not entirely clear.

5.2.2. The European Union's terrorist lists

There are two types: some adopt the lists of sanctions established by the United Nations while the others express the EU's own determination to impose these sanctions. Their differing bases account for their different procedures and control mechanisms. However, they all have shortcomings that have been subject to the same criticism¹⁰⁴.

A The basis of the terrorist lists adopted by the EU

The European Union's recourse to restrictive measures is not new given that it is one of the **means by which the Common Foreign Security Policy (CFSP) is conducted**. The Union has frequently made use of it in situations as different as those of the former Yugoslavia, Zimbabwe and Iran. In the field of counter-terrorism, this technique has become one of the main EU working tools.

The lists implementing UNSC resolutions

The EU's action is based on United Nations Security Council (UNSC) resolutions. UNSC Resolution 1333 (2000) of 19 December 2000 requires that States freeze the assets of

¹⁰³ Resolution 1373 (2001), para. 1.

¹⁰⁴ For a critique of a political nature see: Report D. Marty, United Nations Security Council and European Union Blacklists, 16 November 2007 and addendum of 22 January 2008, doc. 11454 of the Parliamentary Assembly of the Council of Europe and Resolutions 1594 (2008) and Recommendation 1824 (2008) taken on the basis thereof.

Usama bin Laden and Al-Qaida, which was set out in Regulation 467/2001 of 6 March 2001¹⁰⁵. Appended to the text was a long list of persons and entities concerned.

On 16 January 2002, the UNSC adopted Resolution 1390 (2002), widening the scope of previous resolutions where it concerned the freezing of funds and the prohibitions on funds being made available. The Council of the European Union therefore amended its legislation by adopting Common Position 2002/402 CFSP of 27 May 2002¹⁰⁶ which, *for the sake of clarity and transparency*, compiles the applicable provisions in one legal instrument and repeals the preceding common positions. Article 3 of this common position states that the European Community shall order the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in Article 1 and shall ensure that funds, financial assets or economic resources will not be made available, directly or indirectly, to or for the benefit of the individuals, groups, undertakings and entities referred to in Article 1.

Following the adoption on 20 December 2002 of Resolution 1452 (2002) providing for exceptions to the restrictive measures imposed by United Nations Security Council Resolutions 1267 (1999) and 1390 (2002), the Council of the European Union adopted Common Position 2003/140 CFSP of 27 February 2003 concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP¹⁰⁷.

In the meantime the Council had adopted **Regulation 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**, which constituted the text of reference and repealed previous Regulation 467/2001¹⁰⁸. Article 2 of the regulation states that all funds and economic resources belonging to, or owned or held by a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen (paragraph 1); no funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I (paragraph 2) and that no economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services (paragraph 3)). Annex I of the regulation sets out a list of persons and entities concerned by these freezing measures.

The distinctive feature of this text lies in the **implementing and monitoring powers to the Commission**¹⁰⁹: *The Commission shall be empowered to amend or supplement Annex I on the basis of determinations made by either the United Nations Security Council or the Sanctions Committee*. It is also empowered to amend Annex II concerning the “*competent*” national authorities on the basis of information supplied by Member States.

¹⁰⁵ OJ L 67 of 9 March 2001, p. 1.

¹⁰⁶ OJ L 139 of 29 May 2002, p. 4.

¹⁰⁷ OJ L 53 of 28 February 2003, p. 62.

¹⁰⁸ OJ L 139 of 29 May 2002, p. 9.

¹⁰⁹ Article 7 of Regulation 881/2002.

The Commission is to maintain all necessary contacts with the Sanctions Committee for the purpose of the effective implementation of the regulation.

Due to these necessary updates, on 22 December 2008, Regulation 881/2002 was **amended for the hundred and third time** by Commission Regulation 1330/2008¹¹⁰, because, on 21 and 27 October 2008 and on 12 November 2008, the Sanctions Committee of the United Nations Security Council decided to amend the list of natural and legal persons, groups and entities to whom the freezing of funds and economic resources should apply, adding seven natural persons to the list on the basis of information related to their association with Al-Qaida. The statements of reasons regarding the amendments have been provided to the Commission, which is drawing its conclusions from them.

The autonomous EU lists

The adoption of Resolution 1373 (2001) of 28 September 2001 by the UNSC directly after the attacks on the World Trade Center produced a **second reaction on the part of the European Union**. This resolution sets out a strategy to combat terrorism with all possible means, and in particular to combat its financing. Therefore, paragraph 1 c) thereof provides that all States shall freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities. The Member States of the European Union are obviously concerned by this obligation.

- At its extraordinary meeting on 21 September 2001, the European Council, called upon the Council to *take the necessary measure*” to combat the financing of terrorism. The latter, basing its action on Articles 15 and 34 of the Treaty on European Union, considered that *under these extraordinary circumstances* Community measures were necessary. It adopted a general, so-called “blanket”, CFSP common position on combating terrorism, **common position 2001/930 of 27 December 2001**¹¹¹. Article 2 thereof criminalizes the direct or indirect provision of funds aimed at perpetrating terrorist acts. Article 3 thereof states that *funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; entities owned or controlled, directly or indirectly, by such persons; and persons and entities acting on behalf of or under the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities, shall be frozen.*

Common Position 2001/930 does not contain a list of names. Two types of “autonomous” lists coexist, each with their own basis.

¹¹⁰ OJ L 345 of 23 December 2008, p. 60.

¹¹¹ OJ L 344 of 28 December 2001, p. 90.

- In a more precise way and with a view to implementing the guidelines of Common Position 2001/930, the Council adopted a second CFSP common position on the same day, **namely Position 2001/931 on the application of specific measures to combat terrorism**¹¹². This provides both that the EU should take additional measures in order to implement UNSC Resolution 1373 (2001) and that action by the Community is necessary in order to implement some of those additional measures. Article 4 adds that *Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member State*". The regulation was implemented by Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences¹¹³.

The annex to this second common position contains a “list” of persons and entities concerned, the procedure for the inclusion of whom is set out in Article 1 (4, 5 and 6) thereof. In other terms, and given the silence of Resolution 1373 (2001), it establishes an autonomous European procedure for inclusion on a terrorist list. This **list is “updated” every six months** (see below); the most recent version can be found in the annex to Common Position 2009/67/CFSP updating Common Position 2001/931/CFSP¹¹⁴.

Articles 2 and 3 of Common Position 2001/931 provide that the European Community, acting within the limits of the powers conferred on it by the Treaty establishing the European Community, shall order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex. It shall ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of persons, groups and entities listed in the Annex.

- On the basis of this common position, considering that Community action was *necessary* under Articles 60, 301 and 308 TEC, the Council adopted on the same day **Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism**¹¹⁵. This regulation is presented as *a measure needed at Community level and complementary to administrative and judicial procedures regarding terrorist organisations in the European Union and third countries*. Article 2 (3) provides that, in accordance with Article 1(4), (5) and (6), the Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which the regulation applies. The lists consist of *natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism as well as legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism* and

¹¹² OJ L 344 of 28 December 2001, p. 93.

¹¹³ OJ L 253 of 29 September 2005, p. 22.

¹¹⁴ OJ L 23 of 27 January 2009, p. 37.

¹¹⁵ OJ L 344 of 28 December 2001, p. 70.

*legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in previous points*¹¹⁶.

Council Decision 2001/927 was adopted at the same time. This **Council decision was the first establishing the list** provided for in Article 2 (3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism¹¹⁷. From that moment, this list was amended approximately every 6 months, until Decision 2009/62 of 26 January 2009¹¹⁸ was issued, repealing the previous decision, Decision 2008/583. Each amended list “replaces” the previous list.

- The Court of First Instance (CFI) has described Community action in its decision of 12 December 2006 in the first *OMPI* case¹¹⁹. The CFI notes that UNSC Resolution 1373 (2001), upon which the EU’s action is based, does not specify individually the persons, groups and entities who are to be the subjects of those measures; nor does the Security Council establish specific legal rules concerning the procedure for freezing funds, or the applicable safeguards or judicial remedies. Thus, it is for the Member States of the United Nations – and, in this case, the Community, through which its Member States have decided to act – to specifically identify the persons, groups and entities whose funds are to be frozen pursuant to that resolution, in accordance with the rules in their own legal order¹²⁰.

Here, when the Council adopts economic sanctions on the basis of Articles 60 EC, 301 EC and 308 EC **the Community does not act under powers circumscribed** by the will of the Union or that of its Member States. These measures “*involve the exercise of the Community’s own powers, entailing a discretionary appreciation by the Community*”¹²¹.

The Legal Bases of European Union Action

The determination of the legal bases of the restrictive measures decided upon by the Community has just been ruled on by the European Court of Justice in a judgment of principle in the *Kadi* case¹²². These issues had already caused a problem during the drafting of Regulation 2580/2001, with the Commission having to revise its initial choice. In any case, three provisions of the Community treaty are used in a combined manner: Articles 60 and 301 ECT as well as Article 308 ECT.

¹¹⁶ Article 2(3).

¹¹⁷ OJ L 344 of 28 December 2001, p. 83.

¹¹⁸ OJ L 23 of 27 January 2009, p. 25.

¹¹⁹ CFI, 12 December 2006, *OMPI*, T-228/02.

¹²⁰ Point 102.

¹²¹ Point 106.

¹²² ECJ, 3 September 2008, *Kadi et Al Barakaat*, C-402/05 P and C-415/05 P.

- From the Commission’s point of view, the first two articles¹²³ offered a sufficient legal basis for the Community to act, their wording being sufficiently broad to enable this. For the Council, an **additional reliance on Article 308 TEC** was essential as it allows the Council to take all the appropriate measures, acting unanimously, to attain, in the course of the operation of the common market, an objective of the Community, if such action should prove necessary and the Treaty has not provided the necessary powers.

The ECJ validates this interpretation¹²⁴. It considers that **no specific provision of the EC Treaty provides for the adoption of measures similar to those laid down in the contested regulations relating to the campaign against international terrorism**. This is particularly so with respect to the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of international terrorism, where no connection whatsoever has been established with the governing regime of a third State. In addition the first condition for the applicability of Article 301 EC was satisfied and it is necessary to use this as a basis in the case in point.

From the Court’s perspective, Articles 60 and 301 TEC, which provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, are the expression of an implicit underlying objective, namely that of making it possible to adopt such measures through the efficient use of a Community instrument. That **objective may be regarded as constituting a Community objective** for the purpose of Article 308 EC¹²⁵, without going so far as to confuse CFSP objectives¹²⁶ with that of the Community¹²⁷.

- The provisions of the **Treaty of Lisbon** will render this reasoning obsolete due to Title IV of the TFEU, entitled “*restrictive measures*”. Article 215 (2 and 3) provides that *Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities*” and that these acts “*shall include necessary provisions on legal safeguards*”.

B. The procedure for inclusion on the EU’s terrorist lists

¹²³ Article 301 TEC authorises the Council “*to interrupt or to reduce [...] economic relations with one or more third countries*” with “*urgent measures*” necessary to execute the common foreign and security policy of the Union. Article 60 TEC authorises the Council in this case to take the “*necessary urgent measures on the movement of capital and on payments*”.

¹²⁴ This was not the opinion of the Advocate General in point 15 of his conclusions: “either a measure directed against non-State actors fits the objectives of the CFSP which the Community can pursue by virtue of Article 301 EC, or, if it does not, then Article 308 EC is of no help”.

¹²⁵ Point 227.

¹²⁶ As in Article 11 TEU.

¹²⁷ Contrary to the view held by the CFI which had considered that Article 308 TEC constituted a “bridge” between the two.

The procedure varies depending on whether the EU is acting autonomously or whether it is executing a UNSC decision.

The procedure for inclusion in the UN implementing lists

The procedure for inclusion in the UN list is based on different UNSC resolutions which have widened the use of this procedure since Resolution 1267 (1999), creating to this end the Al-Qaida and Taliban Sanctions Committee.

- At UN level, firstly, **States are encouraged to establish a procedure to determine who should be included in the “list”** and to evaluate the proposals to be submitted to the Committee without a charge or conviction necessarily being required. States are invited to submit names for inclusion on the list once they have gathered evidence of an association with Al-Qaida or the Taliban. Then, **the Committee examines the names to be added to the list** in accordance with the criteria listed in paragraphs 2 and 3 of Resolution 1617 (2005), succeeded by Resolution 1822 (2008). In the different resolutions¹²⁸, States are invited to provide a detailed statement of case in support of the proposed listing¹²⁹ with sufficient information to allow for the positive identification of the listed parties by Member States. States also need to identify those parts of the statement of case that may be publicly released, including for use by the Committee for the drafting of the summary described in paragraph 13 of Resolution 1822 (2008) or for the purpose of notifying or informing the listed individual or entity, as well as those parts which may be released upon request to interested Member States. After considering the requests, the **Committee reaches its decisions by consensus of its 15 Members**, and the consolidated list is updated accordingly¹³⁰.
- At EU level, the various above-mentioned CFSP common positions have transposed this implementation obligation¹³¹. In order to implement these provisions, the Community adopted the above-mentioned Regulation 881/2002, which defines the scope of these sanction obligations, without any particular procedural details other than the specific role of the Commission as defined in Article 7. **Annex I containing the list of persons and entities subject to the sanctions is therefore purely a reproduction of the United Nations list.** The practice followed by the European Union here falls within the general framework set out by the guidelines on the implementation and evaluation of restrictive measures in the framework of the CFSP¹³².

¹²⁸ See para. 4 of Resolution 1617 (2005) as reiterated in para. 5 of Resolution 1735 (2006) and as reaffirmed in para. 12 of Resolution 1822 (2008).

¹²⁹ Including: specific findings demonstrating the alleged association or activities, the nature of the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.) or documents that can be provided, and the details of any connection with a currently listed individual or entity.

¹³⁰ See http://www.un.org/sc/committees/1267/fact_sheet_listings.html

¹³¹ See Article 3 of Common Position 2002/402 CFSP.

¹³² Doc. 15579/03.

The procedure for inclusion on the EU lists

The Union has developed an **autonomous sanctions policy** in parallel, leading to the establishment of a particular procedural system. This is enshrined on the one hand by a common position and on the other by an implementing regulation.

- Common position 2001/931/CFSP contains an initial description of this inclusion procedure, explaining that Member States shall, through cooperation within the framework of Title VI TEU, afford each other the widest possible assistance in preventing and combating terrorist acts (Article 4).

This is described in Article 1 (4 and 5) of the common position. **The list in the annex is drawn up on the basis of precise information** or material in the relevant file which indicates that a **decision** on the persons, groups and entities concerned **has been taken by a “competent authority”**. A “competent authority” denotes a **judicial authority**, or, where judicial authorities have no competence in this area, an equivalent competent authority. These national decisions may vary, 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 associated with terrorism and against whom it has ordered sanctions may be included in the list. Finally, the common position stipulates that **the Council shall ensure that names of natural or legal persons, groups or entities listed in the Annex have sufficient particulars** appended to permit effective identification of specific human beings, legal persons, entities or bodies, thus facilitating the exculpation of those bearing the same or similar names.

- Regulation 2580/2001 takes over this common law procedure for itself. Here, contrary to the sanctions regime imposed under UNSC decisions, the **Council establishes the procedure itself** “*in view of the specific means available to its members for that purpose*”¹³³. Article 2(3) of the text invests the Council with powers to establish and amend the list. From a technical point of view, the sanctions procedure adopted by the Union is particularly obscure despite a recent attempt to make it more transparent.

First, a specific working group known as the “**clearing house**” was set up on the basis of a decision of the Permanent Representatives¹³⁴, composed of representatives of the Member States, the General Secretariat and the Commission. It was responsible for carrying out the preparatory work for the Council, collecting names in accordance with the provisions laid down in Common Position 2001/931/CFSP and making proposals to Coreper, with Member States having two weeks should they wish to submit information to their competent national authorities.

¹³³ Recital 9.

¹³⁴ Doc. 11693/02.

Secondly, the Member States agreed on the need to improve the whole inclusion and review process for the list. On 20 December 2006, after the **first judicial annulment** of the OMPI case, which highlighted the lack of clarity of the process, a **Council notice made three important clarifications**. First, it drew attention to the possibility of relying on Article 5 of Regulation 2580/2001 by making **an exception on humanitarian grounds**, i.e. an application could be submitted in order to obtain authorisation to use frozen funds to cover basic needs. Secondly, a request may be submitted to the Council to **obtain the statement of reasons for the inclusion**. Finally, a **request to reconsider** the decision on inclusion may also be submitted to the Council, together with supporting documentation¹³⁵.

Finally, the Council was determined to rationalise its action with a “*thorough review and consolidation of its procedures*”. The creation of a specialised working party, **Common Position 931 Working Party (CP 931 WP)** made it possible to group these around specific themes: proposals for inclusion, the exchange of information among Member States, the handling of proposals, statements of reasons, as well as notifications and requests for de-listing. The CP 931 Working Party replaces the informal consultation mechanism between Member States dating back to 2001.

Persons, groups and entities can be included in the list on the basis of **proposals submitted by Member States** or third States. In reality there is no obligation upon the Member States to ensure rigorous supervision of this phase, albeit essential, because – according to the jurisprudence – the EU institutions should afford it total credibility. In practice, all relevant information should be presented in support of proposals for listings and circulated to Member States’ delegations for discussion within the CP 931 Working Party.

The **CP 931 Working Party examines and evaluates information** with a view to the listing and de-listing of persons, groups and entities, and to assessing whether the information meets the criteria set out in Common Position 2001/931/CFSP. It then **makes recommendations** for listing and de-listing to be reflected in the necessary legal instruments, which are **adopted by the Council** and published in the Official Journal. Confidentiality of the proceedings of the CP 931 Working Party is ensured.

The issue of the statement of reasons central to this review. It echoes the CFI jurisprudence and the Court’s marked attention to the exercise of the rights of the Defence. For each person, group and entity subject to restrictive measures under Regulation 2580/2001, **the Council must provide a statement of reasons which is sufficiently detailed** to allow those listed to understand the reasons therefor and to enable the Community courts to exercise their power of review where a formal challenge is brought against the listing.

The draft statement of reasons is drawn up by the Council Secretariat, in consultation with the proposed Member State. Each case is individually examined by the CP 931

¹³⁵ OJ C 320 of 28 December 2006, p.3.

Working Party, taking into account the need for confidentiality, before being approved by the Council having been examined by the Permanent Representatives.

The statement of reasons makes clear how the criteria set out in Common Position 2001/931 have been met. It begins with a statement indicating the involvement of the person, group or entity concerned in terrorist acts. It includes the following specific elements: terrorist acts committed with reference to relevant provisions of Common Position 2001/931; the nature or identification of the competent authority which took a decision in respect of the person, group or entity concerned; and the type of decision taken, with reference to the relevant provisions of Common Position 2001/931.

Notification of the decision is made in a letter of notification from the General Secretariat of the Council. It includes the following elements: a description of the restrictive measures taken; a reference to the humanitarian exemptions available; the Council's statement of reasons for the listing; reference to the possibility for the person, group or entity to send a file to the Council with supporting documents, asking for their listing to be reconsidered; reference to the possibility of an appeal to the Court of First Instance; and a request for the listed person, group or entity's consent to give public access to the statement of reasons. In addition, a notice is published in the Official Journal informing the persons, groups and entities subject to restrictive measures about these elements. This notice also serves to inform the persons, groups and entities whose address is not known of the possibility to obtain the Council's statement of reasons concerning them.

Humanitarian exemptions

UNSC Resolution 1452 (2002) amended by Resolution 1735 (2006) decided that **the freezing of assets shall not apply to funds** and other financial assets or economic resources that have been determined by the relevant State(s) to be **necessary for basic expenses**, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for the holding or maintenance of frozen funds or other financial assets or economic resources. The relevant State or States must give prior notification to the Committee of the intention to authorise, where appropriate, access to such funds in the absence of a negative decision by the Committee within three working days of such notification.

Regulation 561/2003 of 27 March 2003¹³⁶ therefore amends Regulation 881/2002 where it concerns the exemptions to the freezing of funds or economic resources. Article 2 bis allows the persons concerned to request an exemption to the freezing of their assets to cover basic expenses, in accordance with national procedures.

¹³⁶ OJ L 82 of 29 March 2003, p. 1.

Articles 5 and 6 of Regulation 2580/2001 contain the same type of provisions. The competent authorities of the Member States may grant specific authorisations on an *ad hoc* basis under such conditions as they deem appropriate, in order to prevent the financing of acts of terrorism, authorise the use of frozen funds to cover the essential human needs of a natural person included in the list referred to in Article 2(3) or a member of his family.

5.2.3. The Interaction between the EU Lists and the UN Lists

All of the lists adopted by the EU are linked to action taken by the UN, the difference being in the EU's decision-making autonomy. The *autonomous* EU lists therefore aim to take *additional measures* in order to implement UNSC resolutions¹³⁷. The list contained in the revised version of Common Position 2001/931 reflects this intention and does not rule out including persons and entities identified by the UNSC as being associated with terrorism and against whom it has ordered sanctions¹³⁸.

Nevertheless, the issue of legal interaction between the UN and EU lists basically arises when the EU adopts a list with a view to implementing UNSC decisions.

A The context of the problem

The fact that EU lists are drawn up with a view to implementing sanctions decided on by the United Nations Security Council raises the issue of their legal subordination to these decisions.

There is no doubt whatsoever as to the **binding nature of UNSC resolutions**, in particular under Chapter VII of the UN Charter. The EU Member States are therefore obliged to conform with them in accordance with Articles 24 (1), 25, 41 to 48 (2) and 103 of the Charter. The Community, though not a UN Member, is obliged to act within its spheres of competence in such a way as to meet the obligations incumbent upon UN Member States due to their membership of the United Nations.

The enacting of restrictive measures by the Community **transposes into the Community legal order** Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), adopted pursuant to Chapter VII of the Charter of the United Nations, originally against the Taliban in Afghanistan and subsequently in response to terrorist activity linked to the attacks of 11 September 2001. The Community institutions would thus give effect to the obligations incumbent upon Member States of the Community by means of the automatic transposition into the Community legal order of the lists of individuals or entities drawn up by the UNSC or the Sanctions Committee in accordance with the applicable procedures and **without any discretionary powers**.

In the case in point **the Community has no more discretionary powers**, scope for interpretation or even autonomous power to alter the content of those resolutions than the

¹³⁷ Recital 5 of Common Position 2001/931.

¹³⁸ Recital 4 para. 2 of Common Position 2001/931/CFSP.

individual Member States. Given that it otherwise would be infringing its international obligations and those of its Member States, the Community therefore does **not have the possibility to exclude** particular individuals from the list drawn up by the UN Sanctions Committee or to serve prior notice on them or otherwise to provide for a review process that could result in certain individuals being removed from the list.

In other terms, **the principle of primacy of United Nations law** enshrined in Article 103 of the Charter carries with it **complete obedience** to United Nations Security Council Resolutions, the significance of which the Court had the opportunity to highlight in the *Bosphorus*¹³⁹ jurisprudence. As stated by the CFI, from the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations *clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty*¹⁴⁰. This primacy is expressed in the decisions contained in a Security Council resolution in accordance with Article 25 of the Charter.

The CFI has ruled on this as follows: *pursuant both to the rules of general international law and to the specific provisions of the Treaty, Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations... the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it*¹⁴¹.

This total subordination to UNSC decisions, whatever mistakes might have marred their drafting, implies that all considerations inherent to the specificity of Community law are put aside. **No judicial review of these lists could therefore come into play**, either on the basis of Community law or on the basis of international law. In other terms, the “lawfulness effect” of these decisions shields them from any consideration or scrutiny at EU level. This was the interpretation of the law until Autumn 2008.

B. The Interpretation of the Court of Justice

This view of the subordinacy of the EU lists was supported by the institutions and by a certain number of Member States¹⁴². The CFI had validated it under the conditions discussed¹⁴³.

¹³⁹ CJEC, 30 July 1996, *Bosphorus*, C-84/95, ECR. p. 3953.

¹⁴⁰ CFI, 21 September 2005, *Kadi v. Council and Commission*, T-315/01, ECR p. II-3649 point 181.

¹⁴¹ CFI above, points 190 and 193.

¹⁴² In particular France, the United Kingdom and the Netherlands.

¹⁴³ A. Bainham, “Is it Really for the European Community to Implement Anti-terrorism UN Security Council Resolutions?”, *The Cambridge Law Journal* 2006 p.281; D. Simon and F. Mariatte, “Le Tribunal de première instance des Communautés: Professeur de droit international? À propos des arrêts Yusuf, Al Barakaat International Foundation et Kadi du 21 septembre 2005”, *Europe* 2005 December No 12 Etude p.6; J. Roldán Barbero “La justicia comunitaria y el control de legalidad de las resoluciones del Consejo de

The Court of Justice refuted this point of view highlighting the specificities of the Community legal order and its primacy to reverse the CFI solution. The Judgment of the Grand Chamber delivered in the *Kadi*¹⁴⁴ case therefore marks an **extremely important step**.

Addressing the issue from the perspective of its own jurisdiction to review a Community implementing list, it recalled that the obligations imposed by an international agreement cannot have the effect of *prejudicing the constitutional principles of the EC Treaty*. These include **the principle according to which all Community acts must respect fundamental rights**, that respect constituting a condition of their lawfulness which is incumbent upon the Court to review in the framework of the complete system of legal remedies established by the Treaty¹⁴⁵.

Certainly, the observance of the undertakings given in the context of the United Nations and the need for the Community to exercise its competences whilst respecting international law are taken as given. In the framework of the Treaty, the Community is therefore required to take the measures imposed by a UN resolution. **That is not to say, however, that a Community act implementing such a resolution enjoys jurisdictional immunity**¹⁴⁶, as a “corollary” of this primacy of UN law.

Indeed, *the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement*. This review arises in the framework of the autonomous and internal Community system in which the Court has jurisdiction to determine the legality of the regulation establishing the list.

"The deference" due to United Nations law and the possibility for the United Nations to carry out administrative supervision of the sanctions regime is not sufficient to invest the Community list (see below) with any jurisdictional immunity. **The Court could not authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) TEU as a foundation of the Union**. Nor can it be envisaged either to permit any challenge to the principles that form part of the very foundations of the Community legal order, one being the protection of fundamental rights, which includes the review by the Community

Seguridad de Naciones Unidas. Comentario a las Sentencias Yusuf/Al Barakaat y Kadi, de 21 de septiembre de 2005, del Tribunal de Primera Instancia de las Comunidades Europeas”, Revista española de Derecho Internacional 2005 p.869; N. Angelet, Nicolas and A. Weerts “La mise en oeuvre par la Communauté européenne des mesures adoptées par les Nations unies en matière de lutte contre le financement du terrorisme”, Journal des tribunaux / droit européen 2006 No. 127 p.73; W. Vlcek, “Acts to Combat the Financing of Terrorism : Common Foreign and Security Policy at the European Court of Justice”, European Foreign Affairs Review 2006 p. 491.

¹⁴⁴ ECJ, 3 September 2008, Kadi v Council and Commission, C-402/05 P.

¹⁴⁵ Paragraph 285.

¹⁴⁶ Paragraph 300.

judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.

Jurisdictional immunity of Community acts with regard to a review of their compatibility with fundamental rights would sanction the “absolute primacy” of the UNSC resolutions they implement. In the Court’s view, this primacy at the level of Community law does not, however, extend to primary law, in particular to the general principles of which fundamental rights form part¹⁴⁷; **it is therefore important that the Court reviews the Community implementing legislation.**

C. The Wait-and-See Attitude of the Security Council

The jurisprudence of the ECJ on “targeted” sanctions could have found an echo in the Security Council, given that it could reduce the effectiveness of the sanctions in the name of the protection of fundamental rights. Following the Bombay attacks, the UNSC meeting of 9 December 2008 devoted to combating terrorism was in a position to draw lessons from the Kadi jurisprudence by amending the procedure for inclusion on the list¹⁴⁸ in operation at that time, and in doing so following the wishes of a certain number of Member States¹⁴⁹.

That was not the case. The guidelines for the conduct of the work of the Al-Qaida and Taliban Sanctions Committee¹⁵⁰ have not really been amended in any significant way and they do not contain any possibility of recourse other than administrative or amicable. The President’s Statement at the end of the general debate did not make the slightest reference to it.

5.2.4 De-listing by the Council of the European Union

The duality of the EU lists requires a distinction to be made between the autonomous lists and the lists implementing UN lists. Generally speaking, the possibility for an individual wrongly included on the list to obtain a de-listing remains **largely illusory**, due to the lack of adequate supervision.

A. De-listing from the United Nations implementing lists

Initially, United Nations law did not provide for any possibility of a review or re-examination of the established list. This possibility only appeared progressively, given that the Community implementing legislation did not provide for its own measures on the matter.

¹⁴⁷ Paragraph 308.

¹⁴⁸ United Nations Documents, S/PV.6034.

¹⁴⁹ Aside from the numerous references to the protection of fundamental rights made with a view to advancing the situation to one of greater transparency and clarity (see by way of example the statements of Belgium and France), South Africa specifically referred to the ECJ jurisprudence.

¹⁵⁰ http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

De-listing from the implementing lists

De-listing from the UN lists was **not initially provided for** in the UNSC resolutions and in particular Resolution 1267 (1999) of 15 October 1999 initiating the sanctions process against Al-Qaida. Resolution 1730 (2006) constituted a turning point in that it established a **de-listing procedure**, until then lacking from UN procedures, following the invitation set out in paragraph 18 of Resolution 1617 (2005).

This procedure draws on the experience resulting from the shortcomings of the existing system and of the feeling that *once a name has been added to a list, it is difficult to delist it and to plead one's case, since the procedure has been so opaque and inaccessible*¹⁵¹. Without going as far as the Danish proposal for an independent review mechanism, Resolution 1730 (2006) created a *a focal point to receive de-listing requests*. Any individuals, groups, undertakings, and/or entities on the consolidated list of the Committee **may submit a petition for de-listing**. In the de-listing submission, the petitioner needs to provide justification for the de-listing request, provide all relevant information, and request support for the de-listing. A petitioner can submit a request for de-listing either directly to the focal point or through his/her State of residence or citizenship, unless the State has decided that the petitioner should address the focal point. The petitioner has to provide justification for his request, in particular an explanation as to why he no longer meets the criteria described in paragraph 2 of Resolution 1617 (2005) as reaffirmed in paragraph 2 of Resolution 1822 (2008). The petitioner may make reference to and/or attach any documentation that supports this request and explain, where appropriate, the relevance of such documentation. The Committee considers de-listing requests that have been brought to its attention and reaches its decisions by consensus of its 15 Members.

Such a procedure does not satisfy the requirements of fundamental rights and its lack of effectiveness is patent¹⁵². An applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request. Moreover, the Committee is not required to communicate to the applicant the reasons and evidence justifying his appearance in the list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.

In this context, it can be understood that, in its *Kadi* judgment, the **Court of Justice** highlighted these deficiencies: *the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto*¹⁵³.

¹⁵¹ UNSC, Verbatim record of the 5599th meeting, 19 December 2006, S/PV.5599.

¹⁵² Dick Marty's report notes similarly that out of over 100 cases reviewed in 2007, only one had resulted in a de-listing.

¹⁵³ Paragraph 323.

Review of the implementing lists

The review of the implementing lists is not carried out with the aim of protecting the individuals concerned but **with a view to effectiveness**. It only appeared recently. In paragraph 25 of Resolution 1822 (2008), the UNSC directed the Committee *to conduct a review of all names on the Consolidated List (...) by 30 June 2010 in which the relevant names are circulated to the designating states and states of residence and/or citizenship, where known, pursuant to the procedures set forth in the Committee guidelines, in order to ensure the Consolidated List is as updated and accurate as possible and to confirm that listing remains appropriate.*

The Council further directed the Committee, upon completion of the review *to conduct an **annual review** of all names on the Consolidated List that have not been reviewed in three or more years, as well as to consider an annual review of the names on the Consolidated List of individuals reported to be deceased.*

B. De-listing from the EU's autonomous lists

A review of the autonomous EU lists was **provided for from the start**, without going so far as establishing what strictly speaking amounts to a de-listing procedure. Article 1(6) of Common Position 2001/931 provides that the names of persons and entities on the list in the annex shall be reviewed **at regular intervals** and at least **once every six months** to ensure that there are grounds for keeping them on the list. Article 2(3) of Regulation 2580/2001 confirmed this obligation, which provides that *The Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931/CFSP.* The – at the very least – summary nature of this procedure is illustrated in the working methods of the “Clearing House” in this field¹⁵⁴.

Following the judicial annulment ruled in the *OMPI* case in 2006, the Council was determined to be more thorough. In addition to the 6-monthly examination of the list by the CP 931 Working Party, the persons, groups or entities concerned were notified that they could submit a request to obtain the Council's statement of reasons for their inclusion on the above-mentioned list and that they could also **request** that the Council reconsider the **decision** to include them on the list in question, attaching all the necessary supporting documentation¹⁵⁵.

¹⁵⁴ *Any delegation may at any time request a name of a person or an entity to be reviewed with a view to maintaining or not maintaining it on the list. Any material related to such a request would be presented and distributed in accordance with the procedures described under point II above. Requests stemming from a third country would also follow the procedure outlined above in point II. In the event that a competent authority, e.g. a jurisdiction of a Member State, takes a decision that may concern a person, group or entity that is listed under Common Position 2001/931/CFSP, a meeting of the Clearing House will be convened immediately to draw the necessary consequences...*, doc. 11693/02, declassified version.

¹⁵⁵ Notice for the attention of those persons/groups/entities that have been included by Council Decision 2006/1008/EC of 21 December on the list of persons, groups and entities to which Regulation 2580/2001 applies (2006/C 320/02), OJ C 320 of 28 December 2006 p. 3.

This periodic review has an **unforeseen and particularly serious consequence** for the judicial protection of individuals: the 6-monthly review of the lists led on the one hand to a new common position “updating” and replacing the previous one¹⁵⁶ and, on the other, to a Council Decision implementing Regulation 2580/2001¹⁵⁷ carrying out a review of the list and replacing the previous one. The **position of applicants before the EU judicature** is completely weakened by this methodology as, should they obtain the annulment of the list that concerns them, the annulment will annul a list that no longer exists, given that it has been replaced in the meantime by a new list which continues to freeze their assets and which the Council will amend with greater or lesser good will¹⁵⁸... It is therefore only possible to remedy this by establishing a specific and rapid judicial review procedure, as illustrated by the CFI (see below) or by setting a deadline for inclusion.

An effective *de jure* and *de facto* de-listing procedure is lacking, as even the Council has admitted itself: *A transparent and effective de-listing procedure is essential to the credibility and legitimacy of restrictive measures. Such a procedure could also improve the quality of listing decisions. De-listing could be appropriate in various cases, including evidence of mistaken listing, a relevant subsequent change in facts, emergence of further evidence, the death of a listed person or the liquidation of a listed entity. Essentially de-listing is appropriate wherever the criteria for listing are no longer met. When considering a request for de-listing, all relevant information should be taken into account. Apart from submission of requests for de-listing, a regular review, as provided for in the relevant legal act, involving all Member States, shall take place in order to examine whether there remain grounds for keeping a person or entity on the list. While preparing such regular reviews, the State that proposed the listing should be asked for its opinion on the need to maintain the designation and all Member States should consider if they have additional relevant information to put forward. Any decision to de-list should be implemented as swiftly as possible*¹⁵⁹.

5.2.5. Recent jurisprudence of the ECJ and the CFI

The jurisprudence on the judicial framework of the EU lists is as complex as it is voluminous: **20 cases tried so far, 6 of which by the ECJ**¹⁶⁰. The judge firstly raised the principle of the Court’s jurisdiction before explaining its functioning.

¹⁵⁶ The latest being: Council Common Position 2009/67/CFSP of 26 January 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2008/586/CFSP, OJ L 23 of 27 January 2009 p. 37.

¹⁵⁷ The latest being: Decision 2009/62/EC of 26 January 2009 implementing Article 2 (3) of Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2008/583/EC, OJ L 23 of 27 January 2009 p. 25.

¹⁵⁸ Thus explaining the “saga” of the OMPI case despite three successive annulments, see below.

¹⁵⁹ 8666/1/08 Rev 1, Update of the EU Best Practices for the effective implementation of restrictive measures, para. 17.

¹⁶⁰ ECJ, 18 January 2007, PKK and KNK v Council, C- 229/05 P, ECR 2007, p. I-439; ECJ, 1 February 2007, Jose Maria Sison v Council, C- 266/05 P, ECR 2007, p. I-1233; ECJ, 27 February 2007, Gestoras Pro Amnistia and Others v Council, C- 354/04 P, ECR 2007, p. I-1579; ECJ, 27 February 2007, Segi and Others v Council, C- 355/04 P, ECR 2007, p. I-1657; ECJ, 11 October 2007, Möllendorf, C-117/06, ECR

A The principle of judicial review of the terrorist lists

The principle of a review of the lists by the EU Court of Justice could not be taken for granted due to their international basis.

Review of the lists implementing UNSC resolutions

The authority attached to UNSC resolutions on which the lists are based raises a question of principle. For this reason, the CFI initially refused to carry out such a review.

It considered that it was not possible to review the legality of the lists in question. The Community authorities acted under powers circumscribed by the UNSC resolutions, with the result that they had no autonomous discretion. The alleged origin of the illegality could not be sought in Community law but in the implemented resolutions. Any review of the internal lawfulness of lists established by the UNSC would have implied that the CFI is to consider indirectly the lawfulness of the resolutions which imposed the sanctions, especially from the point of view of general provisions or principles of Community law relating to the protection of fundamental rights. For the CFI, *It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations*¹⁶¹.

The Court of Justice **rebutted this jurisprudence** in the above-mentioned *Kadi*¹⁶² case, asserting the principle of a review of the UN implementing lists.

For the Court, the question of its jurisdiction to examine the lists established on the basis of Regulation 2580/2001 arises in the context of the internal and autonomous legal order of the Community, within whose ambit the regulation falls **and within which the ECJ**

2007, p. I-8361; ECJ, 3 September 2008, *Kadi v Council and Commission*, C-402/05 P. CFI, Order 7 June 2004, *Segi and Others v Council*, T-338/02, ECR p. I-1345; CFI, Order 15 February 2005, *PKK and KNK v Council*, T- 229/02, ECR 2005, p. II-539; CFI, 26 April 2005, *Jose Maria Sison v Council*, T- 110/03, T-150/03 and T- 405/03, ECR 2005, p. II-1429; CFI, 21 September 2005, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, T-306/01, ECR, 2005, p. II-3533; CFI, 21 September 2005, *Yassin Abdullah Kadi v Council and Commission*, T-315/01, ECR, 2005, p. II-3649; CFI, Order 18 November 2005, *Abdelghani Selmani*, T-299/04, ECR 2005, p. II-20; CFI, 12 July 2006, *Chafiq Ayadi v Council*, T- 253/02, ECR 2006, p. II-2139; CFI, 12 July 2006, *Faraj Hassan v Council and Commission*, T-49/04, ECR 2006, p. II-52; CFI, 12 December 2006, *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, T-228/02, ECR 2006, p. II-4665; CFI, 31 January 2007, *Leonid Minin v Commission*, T-362/04, ECR 2007, p. II-2003; CFI, 11 July 2007, *Jose Maria Sison v Council*, T- 47/03, ECR 2007, p. II-73; CFI, 11 July 2007, *Stichting Al-Aqsa*, T-327/03, ECR 2007, p. II-79; CFI, 23 October 2008, *People's Mojahedin Organization of Iran v Council*, T-256/07; CFI, 4 December 2008, *People's Mojahedin Organization of Iran v Conseil*, T-284/08.

¹⁶¹ CFI, 21 September 2005, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, T-306/01, ECR, 2005, p. II-3533 para. 276. It is only in an indirect (and at least curious) way that the CFI accepts the principle of a review "*with regard to jus cogens*" (para. 277)

¹⁶² ECJ, 3 September 2008, *Kadi v Council and Commission*, C-402/05 P.

has jurisdiction to review the validity of Community measures in the light of fundamental rights. There can be no question of challenging the principles upon which the Community is founded, which include the judicial protection of fundamental rights, and the Court distinguishes between a UNSC Resolution and the Community acts implementing it, which are not “directly attributable” to the UN. Although the review of the latter is essential, this in no way challenges the authority of the former.

Whether or not the UN Sanctions Committee has its own review procedure changes nothing in this regard. This procedure would not give rise to *generalised immunity from jurisdiction within the internal legal order of the Community*, particularly as *clearly that re-examination procedure does not offer the guarantees of judicial protection*¹⁶³. Would it have been different had the UN procedure offered these guarantees? It is impossible to know what the Court’s assessment would have been and whether this would have satisfied it to the extent of waiving the implementation of such a review.

Furthermore, in the Court’s perspective, whilst recognising the legal authority of the United Nations, *the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations*¹⁶⁴.

Review of the autonomous EU lists

This review is adapted to the duality of the “autonomous” lists decided on by the EU, namely:

- the list of entities and persons in the annex to Common Position 2001/931/CFSP, updated every 6 months,
- the list of entities and persons in the annex to successive Council Decisions implementing Regulation 2580/2001 which this common position implements itself.

Review of the lists contained in the common positions

The judicial review of the periodically updated list contained in Common Position 2001/931 raises the issue of the jurisdiction of the EU courts. Adopted on the basis of Articles 15 TEU (under Title V of the EU treaty on the CFSP) and 34 TEU (under Title VI of the EU treaty on Justice and Home Affairs – JHA-) this list can only be reviewed with regard to the provisions of the TEU. Article 46 TEU does **not** provide for **judicial**

¹⁶³ Para. 322. This criticism should be compared with the CFI jurisprudence which was satisfied with the review procedure and in the Ayadi case conferred this upon the national judge

¹⁶⁴ Para. 326.

supervision of the CFSP pillar and organises the supervision of the JHA pillar in a restrictive way.

Where this concerns the scope of supervision of the JHA pillar under Article 35 TEU, it must be noted that on the one hand it does not entail a review of the legality of common positions but only decisions and framework decisions. The jurisdiction of the Court to give preliminary rulings, as defined in Article 35 (1) TEU, does not extend either to common positions but is limited to checking the validity and interpretation of framework and other decisions, the interpretation of conventions established under Title VI and the validity and interpretation of the measures implementing them. There is therefore no **possibility in the texts to execute a judicial review of the list contained in a common position, whether in terms of its legality or from a compensatory perspective.**

The Court of Justice has validated the analysis carried out in these terms by the Court of First Instance¹⁶⁵. The CFI stated in the *Segi* case, *it must be noted that indeed probably no effective judicial remedy is available to them, whether before the Community Courts or national courts, with regard to the inclusion of Segi on the list of persons, groups or entities involved in terrorist acts*¹⁶⁶. This is reiterated with the same force¹⁶⁷ where it concerns the CFSP part of the common position: *the Court of First Instance has jurisdiction to hear an action for annulment directed against a CFSP common position only strictly to the extent that in support of such an action the applicant alleges an infringement of the Community's powers*¹⁶⁸.

In a constructive interpretation, the Court of Justice did however go further than this acknowledgement of powerlessness. It considers that, in that it does not enable national courts to refer a question on a common position to the Court for a preliminary ruling, Article 35(1) EU *treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties*¹⁶⁹ and that it should not be interpreted restrictively. The right to make a reference to the Court of Justice for a **preliminary ruling** must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties. As a result, **it has to be possible to make a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act, subject to review by the Court.**

That is the case of 2001/931 and its Article 4. Therefore, a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position would be able, subject to the conditions set out in Article 35 TEU, to ask the

¹⁶⁵ ECJ, 27 February 2007, *Gestoras Pro Amnistia and Others v Council*, C- 354/04 P, ECR 2007, p. I-1579; ECJ, 27 February 2007, *Segi and Others v Council*, C- 355/04 P, ECR 2007, p. I-1657

¹⁶⁶ CFI above, para. 37.

¹⁶⁷ See also CFI, 12 December 2006, *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, T-228/02, ECR 2006, p. II-4665 para. 54.

¹⁶⁸ CFI, Order, 18 November 2005, *Abdelghani Selmani*, T-299/04, ECR 2005, p. II-2I para. 56.

¹⁶⁹ ECJ, 27 February 2007, *Segi and Others v Council of the European Union*, C-355/04 P, ECR 2007, p. I-1657 para. 53.

Court to give a preliminary ruling, *It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling*¹⁷⁰.

Review of Community legislation implementing common positions

Matters are simpler where it concerns decisions implementing Regulation 2580/2001, as this is within the Community framework. **The purpose of the ordinary review of the Community judge is to play according to the rules of the TEC.**

The OMPI case allowed the CFI to assert the existence of this review, through its different developments. Although it would not be possible to directly challenge a common position, this *requires the adoption of implementing Community and/or national acts in order to be effective. It has not been contended that those implementing acts cannot themselves be the subject-matter of an action for annulment either before the Community Courts or before the national courts*¹⁷¹. In this case the Community acts which specifically apply those restrictive measures to a given person or entity through the adoption of a list come within the full discretion of the Community institutions that are subject to judicial supervision. Their **powers are not “circumscribed” by the authority of the Security Council and** therefore the principle of primacy, which would remove them from such supervision, does not apply to them. As such, Community decisions on inclusion or maintenance on the Community list based on Regulation 2580/2001 are fully part of the judicial review through ordinary legal channels¹⁷².

B. The level of judicial review of the terrorist lists

The jurisprudence of the Court of First Instance and the Court of Justice sets out a judicial review of the terrorist lists which does not amount to ordinary review, due to its objective.

The discretionary powers of the Member States

The Court firstly indicated in its *OMPI* jurisprudence in 2006, repeating it in its opinion on the *Sison* case, that the Council has broad scope in its discretionary powers when it decides to adopt economic and financial sanctions in accordance with a CFSP common position. Judicial supervision of sanctions is necessarily limited by this scope.

As such, the Community **judicature may not, in particular, substitute its own assessment** of the evidence, facts and circumstances justifying the adoption of such

¹⁷⁰ Id. Para. 54.

¹⁷¹ CFI, 12 December 2006, *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, T-228/02, ECR 2006, p. II-4665 para. 55.

¹⁷² ECJ, 18 January 2007, *PKK and KNK v Council*, C- 229/05 P, ECR 2007, p. I-439; ECJ, 1 February 2007, *Jose Maria Sison v Council*, C- 266/05 P, ECR 2007, p. I-1233; ECJ, 27 February 2007, *Gestoras Pro Amnistia and Others v Council*, C- 354/04 P, ECR 2007, p. I-1579; ECJ, 27 February 2007, *Segi and Others v Council*, C- 355/04 P, ECR 2007, p. I-1657

measures for that of the Council. Therefore the review carried out by the Court of First Instance of the lawfulness of decisions to freeze funds is restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that it is factually accurate, and that there has been no manifest error of assessment of the facts or misuse of power.¹⁷³

Nevertheless, although the Court acknowledges the broad discretion that the Council possesses, that does not mean that the judicature is not to review the interpretation made by the Council of the relevant facts¹⁷⁴. **The Community judge 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. However, when conducting such a review, it must not substitute its own assessment of what is appropriate for that of the Council.

The determination of whether or not evidence exists therefore led the Court to annul the OMPI's inclusion on the list of Council on 4 December 2008. It also made it reject the arguments of the same applicant, considering that **the broad discretion** enjoyed by the Council with regard to the matters to be taken into consideration for the purpose of adopting or of maintaining in force a measure freezing funds extends to the **evaluation of the threat** that may be represented by an organisation having in the past committed acts of terrorism, notwithstanding the suspension of its terrorist activities for a more or less long period, or even their apparent cessation¹⁷⁵.

The judge considered, that review is all the more essential because it constitutes the only safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Since the restrictions imposed by the Council on the rights of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial" ... "the Community courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential¹⁷⁶.

The Court of Justice confirmed this approach: *the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of restrictive measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action¹⁷⁷.*

¹⁷³ CFI, 12 December 2006, People's Mojahedin Organization of Iran v Council, T-228/02, para. 159.

¹⁷⁴ CFI, 4 December 2008, People's Mojahedin Organization of Iran v Council, T-284/08, para. 55

¹⁷⁵ T-256/07 para. 112.

¹⁷⁶ Para. 75.

¹⁷⁷ ECJ, 3 September 2008, Kadi v Council and Commission, C-402/05 P, para. 336.

Adapting review to security needs

Despite the resolve of the judiciary to discharge a review, the performance of this review is limited by the legitimate objective to combat terrorism.

- Firstly, **major limitations on fundamental rights can be justified** by the judge due to their necessity: *with reference to an objective of general interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate*¹⁷⁸.

This explains how restrictions on the right of ownership or on the obligation to state reasons could be justified. According to the Court, where it concerns the notification of the grounds for initial inclusion on the list, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, **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 notification of certain matters to the persons concerned** and, therefore, against their being heard on those matters¹⁷⁹. The CFI had already stated as much in the OMPI case when it recognised that *certain restrictions on the right to a fair hearing (...) may legitimately be envisaged and imposed on the parties concerned, in circumstances such as those of the present case, where what are in issue are specific restrictive measures, consisting of a freeze of the financial funds and assets of the persons, groups and entities identified by the Council as being involved in terrorist acts*. Thus, notification of the evidence adduced and a hearing of the parties concerned, before the adoption of the initial decision to freeze funds, would be liable to jeopardise the effectiveness of the sanctions and would thus be incompatible with the public interest objective pursued by the Community. The Judge considered that *An initial measure freezing funds must, by its very nature, be able to benefit from a surprise effect and to be applied with immediate effect. Such a measure could not, therefore, be the subject-matter of notification before it was implemented*¹⁸⁰.

- Secondly, the particularly sensitive nature of the fight against terrorism leads to a **restriction of the access of entities and persons** affected by the sanctions to the information concerning them. The Court upheld the CFI's determination¹⁸¹ that documents held by the public authorities concerning persons or entities suspected of terrorism and coming within the category of sensitive documents as defined by Article 9 of Regulation No 1049/2001 must not be disclosed to the public so as

¹⁷⁸ Id para. 363.

¹⁷⁹ Id para. 342.

¹⁸⁰ OMPI 2006, paras. 127-128

¹⁸¹ ECJ, 1 February 2007, Jose Maria Sison v Council, C- 266/05 P, ECR 2007, p. I-1233, para. 77.

not to prejudice the effectiveness of the operational fight against terrorism and thereby undermine the protection of public security¹⁸². In its view, any personal information would necessarily reveal certain strategic aspects of the fight against terrorism, such as the sources of information, the nature of that information or the level of surveillance to which persons suspected of terrorism are subjected. Furthermore, international cooperation concerning terrorism presupposes a confidence on the part of States in the confidential treatment accorded to information which they have passed on to the Council. **Disclosure of that information could therefore compromise** the position of the European Union in international cooperation concerning the fight against terrorism.

- Thirdly, the judge does not hesitate in the case of an annulment **to limit the effects of the annulment by imposing a fixed time period**. Considering that annulment with immediate effect would be capable of irreversibly prejudicing the effectiveness of the restrictive measures which the Community is required to implement, and because the annulment is granted for procedural reasons, the Judge does not rule out that “*on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified*”¹⁸³. Therefore, by virtue of Article 231 EC, the judge decides that the effects of the contested regulation are to be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants’ rights and freedoms. In the case in point, for a period that may not exceed three months.

Nevertheless, in its *Kadi* Judgment, the Court stated for the record that the imperative to combat terrorism *does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism*¹⁸⁴. It is therefore the task of the Community judicature to **apply 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 hand, the need to **accord** the individual a sufficient **measure of procedural justice**.

C. The scope of the judicial review of the terrorist lists

One may have doubted the good faith of the Council when, in a statement of 18 December 2001, it stressed its determination to ensure that its action was carried out in the observance of fundamental rights¹⁸⁵. In addition to the fact that it asserted therein that *in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress*, the Council also states that

¹⁸² Id para. 66

¹⁸³ ECJ, *Kadi*, above, para. 373.

¹⁸⁴ ECJ, *Kadi*, above, para. 343.

¹⁸⁵ Doc. 15453/01.

where the exact information or case materials mentioned in the said articles come from a third country that is not a Member of the Union, *it will in particular check the conformity of the case with the observance of the fundamental principles and procedures of the rule of law as well as with regard to human rights and particularly the right to an effective recourse and access to an impartial Court, the presumption of innocence and the right not to be tried or sentenced twice for the same offence.*

Realistically, the Court reminds the Council that **such a declaration is insufficient to create a legal remedy** not provided for by the texts and that it cannot therefore be given any legal significance or be used in the interpretation of law emanating from the EU Treaty where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question¹⁸⁶.

Furthermore, and beyond the right to reparation (*Segi*), the right of access to documents (*Sison*) or the right to ownership (*Kadi*), it is in the field of procedural guarantees that the jurisprudence of the CFI and the ECJ has proven to be the most effective.

Review of the admissibility of appeal

The Court invoked *consistency and justice* when censuring the CFI in the *PKK* case, considering that an organisation suspected of terrorism could not both have sufficient legal existence for it to be subject to the restrictive measures of the Council and not have sufficient legal existence to bring an action for annulment to contest this measure¹⁸⁷. The effect of any other conclusion would be that an organisation could be included in the list of terrorist organisations without being able to challenge its inclusion!!!

In the Court's view, it is all the more important for **judicial protection to be effective** that the restrictive measures laid down by Regulation No 2580/2001 have serious consequences: not only are all financial transactions and financial services thereby prevented in the case of a person, group or entity covered by the regulation, but also their reputation and political activity are damaged by the fact that they are classified as terrorists.

Review of the inclusion procedure

The procedure which may culminate in a measure to freeze funds therefore takes place at two different levels, one national and the other Community level. In the first phase, a competent national authority, in principle judicial, takes a decision meeting the definition in Article 1(4) of Common Position 2001/931, based on serious and credible evidence or clues. In the second phase, the Council, acting by unanimity, decides to include the party concerned in the disputed list, on the basis of precise information or material in the relevant file which indicates that such a decision has been taken. Next, the Council must be satisfied, at regular intervals, and at least once every six months, that there are grounds for continuing to include the party concerned in the list at issue, deciding by unanimity.

¹⁸⁶ ECJ, 1 February 2007, *Jose Maria Sison v Council*, C- 266/05 P, ECR 2007, p. I-1233, para. 60.

¹⁸⁷ ECJ, 18 January 2007, *PKK and KNK v Council*, C- 229/05 P, ECR 2007, p. I-439, para. 112.

The Community judge draws two conclusions from this: **verification that there is a decision** of a national authority is an essential precondition for initial inclusion by the Council. Where it concerns the decision of maintenance on the list, described as the *subsequent decision of freezing funds*, the **verification of the consequences of that decision** at national level is, then, imperative. The safeguarding of the right to a fair hearing in the context of the administrative procedure itself should nevertheless be **distinguished from that resulting from the right to an effective judicial remedy** against the act adopted at the end of that procedure, the CFI takes care to highlight¹⁸⁸ this and to sanction it¹⁸⁹.

- The right of defence of listed persons must be taken into consideration at each stage of the procedure. In the first place, it must be effectively **safeguarded as part of the national procedure** which led to the adoption, by the competent national authority, of the decision referred to in Article 1(4). Within this framework, the party concerned must be put in a position in which he can effectively make known his view of the matters on which the inclusion decision is based. Relying as it does on the Member States, this phase does not allow the Council to examine its validity, it has to *defer* to the assessment of the national authority, which, *a priori*, is a judicial authority, it is even *require*¹⁹⁰. By ascribing such importance to the national phase, the Council's obligations are, by definition, limited. The Community judge is unperturbed by this: *in the context of relations between the Community and its Member States, observance of the right to a fair hearing has a relatively limited purpose in respect of the Community procedure for freezing funds*¹⁹¹. The consequence of this is that existing law on this point should be improved so as to harmonise national practices and ensure equal treatment between individuals.
- The right of defence must also be **safeguarded in the Community procedure** culminating in the Council decision. In the case of an **initial decision to freeze funds**, the party concerned must be **informed by the Council of the specific information** or material in the file which indicates that a decision has been taken in respect of it by a competent authority of a Member State. It must be put in a position in which it can effectively make known its view on the information or material in the file.

The obligations incumbent upon the Council in the case of **maintenance on the list** are more weighty. At this stage, with the funds already being frozen, the effectiveness of the sanctions no longer depends on a surprise effect. The party concerned must be **informed of the information** or material in the file that **justifies maintaining it** on the disputed lists, and furthermore **be afforded the opportunity to make its view on the matter clear** *unless precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations*¹⁹².

¹⁸⁸ Id. paragraph 94.

¹⁸⁹ CFI, 4 December 2008, *People's Mojahedin Organization of Iran v Council*, T-284/08, para. 46

¹⁹⁰ CFI above, T-228/02, para. 142.

¹⁹¹ CFI above, T-228/02, para. 126.

¹⁹² T-228/02 above, para. 137.

Following the annulment granted by the CFI in the OMPI case in 2006, the Council took note of that, amending the notification procedure (see above).

Having set out a framework for its requirements, the CFI showed itself to be particularly severe with the Council for not having considered it necessary to conform with it: *the Court considers that the Council's omission to comply in the present case with a procedure clearly defined in the OMPI judgment, made with full knowledge of the facts and without any reasonable justification, may be material to any consideration of the abuse or misuse of powers or procedures alleged in the fifth plea in law*¹⁹³.

Review of the grounds

The obligation to give reasons incumbent upon the EU institutions by virtue of Article 253 TEC is decisive in that it constitutes the **only guarantee allowing the person included in the list to usefully avail himself of the remedies** in order to challenge the legality of that inclusion. The judge therefore checks whether the Council has reasonable grounds to proceed with the inclusion or maintenance, that is to say if it has not committed a manifest error. In the case of an initial inclusion it is a summary review as the Council cannot supplant the assessment of the national judicial authority with its own. However, it is more detailed where it concerns a decision on maintenance.

In the CFI's view, the *prime consideration for the Council* is its perception or evaluation of the danger that, for want of such a measure, those funds might be used to finance or prepare acts of terrorism¹⁹⁴.

The EU judge has devoted major efforts to establishing the **meaning of the obligation to provide reasons for a decision on inclusion or maintenance** on a list¹⁹⁵. As such, any general or stereotypical reasoning is set aside in favour of concrete and specific considerations making it possible to understand the reason why the Council makes use of its discretionary power. Certainly, both for reasons of public interest and in order to protect the reputation of the persons concerned, the communication of these reasons can be adapted and restricted accordingly. However, the verification of the obligation to provide reasons is still essential. During its first judicial annulment, the CFI pointed out in this regard that the applicant had not been placed in a position to *avail itself of its right of action*. Given the lack of explanation as well as the fact that the CFI is unable to conduct a review, and in the absence of a coherent answer from the Council as to the national basis of the contested decision on inclusion¹⁹⁶. This is by no means exceptional¹⁹⁷.

On examining a decision on maintenance while the national decision had been annulled by the national judge, the CFI annulled a decision of the Council that it deemed to have

¹⁹³ CFI, 4 December 2008, People's Mojahedin Organization of Iran v Council, T-284/08, para. 44.

¹⁹⁴ T- 256/07 above, para. 136

¹⁹⁵ See its first annulment decision in the OMPI case.

¹⁹⁶ T-228/02 above, para. 171.

¹⁹⁷ See CFI, 11 July 2007, Sison, T-47/03 paras. 224 and 225

been reasoned in a way that was *obviously insufficient*¹⁹⁸, given that the Council had not *re-evaluated* its assessment following the national annulment. The importance ascribed to the national inclusion phase therefore has a double edge in that the Council cannot ignore the challenge.

Finally, with regard to the same applicant in subsequent proceedings, the CFI clarifies the limits of the importance of the national phase. Censuring the Council again it states *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*¹⁹⁹.

Overall, there are serious deficiencies in the judicial supervision of the EU terrorist lists where it concerns observance of the principles of the Community of law.

The practice followed by the Council bears witness to a use that one could describe as deviant of the tools with which it is invested to fight terrorism. The OMPI case is exemplary of such deviancy. Finding itself on the EU lists, this entity exercised its right to a remedy for over six years before it managed to obtain a de-listing in early 2009. Included in early 2002, it obtained a first annulment from the CFI on 12 December 2006. In vain, because in the meantime the Council took a new decision on maintenance to be renewed every six months, a decision which it contested. The CFI annulled this again on 23 October 2008, after a British national judge had described the national inclusion providing the basis for the EU list as "perverse". This was still in vain, as the Council took a new decision on maintenance, based this time on material produced by the French authorities. This decision was again immediately challenged. The CFI, **by way of exception, for the first time ever**, granted a new annulment on 4 December 2008, **only twenty-four hours after the public hearing**. In this way it deliberately prevented the adoption of a new decision which would have prolonged the scenario. Quite simply, the method of 6-monthly repeal and replacement of the lists by the Council does pose a real problem for the exercise of judicial supervision which it holds in check.

5.2.6. The Lisbon Treaty

Article 275 of the Treaty on the Functioning of the European Union (TFEU) **radically changes the perspectives** for judicial review of the EU lists. It reiterates that the Court of Justice of the European Union does not have jurisdiction where it concerns the provisions on Common Foreign and Security Policy, nor where it concerns legislation adopted on their basis. *However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or*

¹⁹⁸ This did not make it possible to understand if the Council had taken into account the national judicial decision and did not give the reasons why it had decided to pay no heed to it: CFI, 23 October 2008, People's Mojahedin Organization of Iran v Council, T-256/07.

¹⁹⁹ CFI, 4 December 2008, People's Mojahedin Organization of Iran v Council, T-284/08, para. 73.

*legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union. In other words, **respect for the integrity of EU competences and the protection of individuals will be guaranteed by the judiciary** of the European Union itself in this matter. Moreover, a Declaration appended to the Treaty insists on the guarantee of a *thorough judicial review*.²⁰⁰.*

ANNEX

²⁰⁰ Declaration 25 on Articles 75 and 215 of the Treaty on the Functioning of the European Union: *The Conference recalls that the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure.*

6. RECOMMENDATIONS

I Recommendations on International and European Legal Instruments

1 Amendment of Existing Texts

- The adoption of a common international definition of terrorism would have the advantage for the Member States of the United Nations and the Council of Europe of clarifying future legislative initiatives as well as the implementation of texts already adopted. This would also be advantageous for the EU, which could then conclude more effective cooperation agreements – as they would be founded on a common basis – with third countries.

- At Community level, cash movements should include gold and precious metals (Regulation 1889/2005 of 26 October 2005).

2. Ratification of international instruments

The existing international texts must be ratified by the States. In particular:

- The International Convention for the suppression of the financing of terrorism of the United Nations, 1999.

- The Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism of 2005

3. Implementation of texts adopted by the EU

The legal instruments (directives, decisions and framework decisions) adopted by the European Union must be transposed by the EU Member States, in particular:

- the third directive on money laundering 2005;
- the framework decision on the execution in the European Union of orders freezing property or evidence of 2003;
- the framework decisions of 2005 and 2006 respectively on the confiscation of crime-related proceeds, instrumentalities and property and on the application of the principle of mutual recognition to confiscation orders;
- the decision of 2007 concerning cooperation between asset recovery offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime;
- The framework decision of 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union;
- The decision of 2008 on the transposition of the Prüm Treaty;

- The decision of 2005 on the exchange of information and cooperation concerning terrorist offences.

The Member States should in addition embark on the transposition of the future “Europol” and “Eurojust” decisions as soon as possible.

II Specific recommendations on intelligence sharing

1. Estimation of the sums of money involved – at international and European level – for terrorist organisations

States and international organisations should set up a process of estimating – as precisely as possible - the financial needs of terrorist organisations. This can obviously only be achieved through the increased sharing of the data held by different intelligence services, and the cross-checking of information.

This estimation should make it possible for the various legislators:

- to see if the current legislation addresses the full extent of the problem;
- to motivate States to cooperate at a more “appropriate” level.

2. The private sector and the competent public authorities

- Lawyers should cooperate to a greater extent with the FIUs;
- An intensification of information sharing between the FIUs and the private sector requires thorough consultation of all the FIUs and precision with regard to the conditions in which this sharing would take place.

3. Intensification of the cooperation with Europol and Eurojust.

- The financial intelligence units – whether administrative or judicial in nature – should be able to cooperate directly, even at different levels with Europol and particularly with the Analysis Work File dedicated to money laundering. This requires European stimulus and a change to some national legislations.
- Generally, the competent authorities of the Member States should collaborate and share information with Europol and Eurojust in the fight against terrorism and the financing of terrorism.

4. Cooperation between the European Union and countries that are victims of acts of terrorism

Cooperation agreements should be concluded – or improved – with countries that have been victims of terrorist acts, such as: the Philippines and Algeria. Feedback obtained by the Member States should as far as possible be shared with Europol and Eurojust with a view to improving the coordination of these issues at European level.

4. Regional cooperation

Europol and other regional organisations could intensify their cooperation, an example being *Ameripol*, created in 2007 by 20 Latin American and Caribbean States.

III Specific Recommendations on the “blacklists”

The critical examination of EU practice and the lessons of the jurisprudence has produced the following recommendations:

1. Clarify the procedure:

- A clear distinction should be made between the inclusion procedure and the procedure for maintenance on the lists, this should be supervised in specific ways;
- A common regulation of the national procedure should be made (setting out criteria and evidentiary standards, equality of treatment and the obligation of national judicial review on appeal);
- A reform of the Community phase of inclusion should be carried out establishing minimal supervision of the national inclusion request;
- A separation should be made between the review procedure initiated by the EU and the de-listing procedure at the request of those concerned;
- The handling of the de-listing procedure at the request of those concerned should be carried out by an impartial and independent body according to a quasi-judicial procedure in which the burden of proof is on the Council.

2. Specify the fundamental guarantees applicable to the following rights:

- The right to be informed of the evidence and the precise reasons for the inclusion or maintenance on the list;
- Supervision of the public security clause;
- The right to effectively present one’s defence and to be assisted in doing so;
- The right to be heard by an independent body in the case of a decision to maintain;
- A deadline for the decision on maintenance unless the national authority provides appropriate justification for its need.

3. Guarantee an appropriate judicial review:

- The right to expedited judicial review, inspired by the ECJ’s handling of urgent questions for a preliminary ruling;
- The right to compensation.