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Case T-256/07, *People's Mojahedin Organization of Iran* v. *Council*, judgment of the Court of First Instance of 23 October 2008 (Seventh Chamber), not yet reported.

Case T-284/08, *People's Mojahedin Organization of Iran* v. *Council*, judgment of the Court of First Instance of 4 December 2008 (Seventh Chamber), not yet reported.

1. Introduction

The rulings in the *People's Mojahedin Organization of Iran* (*PMOI*) cases annotated here are part of lengthy litigation brought by the PMOI before national and European courts in order to challenge national and European authorities' decisions to include the organization in the EU terrorist list and to freeze its assets at Community level. All courts which have heard the matter have declared the listing of the PMOI unlawful either because of serious procedural failures,[1] or because of lack of evidence as to its current connection with terrorist activities.[2] In relation to the EU list, the CFI had already declared in December 2006 that in including the applicants the Council had failed to respect their basic procedural rights.[3] Following the first decision, and in order to comply with the CFI ruling, the Council sought to remedy these procedural failures, while maintaining the group on the list.[4] As a result, the PMOI had to

1. Case T-228/02, *Organisation des Modjahedines du peuple d'Iran (OMPI)* v. *Council*, [2006] ECR II-4665; this was the first ruling concerning the PMOI and is better known with its French acronym of *OMPI* (*Organisation des Modjahedines du peuple d'Iran*). In order to avoid confusion we will refer throughout the case note to *OMPI/PMOI* to indicate the first ruling; and to *PMOI II* and *PMOI III* to indicate the rulings annotated in this case note.

2. In *Lord Alton of Liverpool and others (in the matter of the People's Mojahedin Organization of Iran)* v. *Secretary of State for the Home Department*), unreported but available on the POAC website (www.siac.tribunals.gov.uk/poac/Documents/outcomes/PC022006%20PMOI%20FINAL%20JUDGMENT.pdf), the decision of the British Home Secretary to refuse to deproscribe PMOI was considered "perverse" by the POAC (operative part of the ruling, para 360). The POAC refused leave to appeal to the Home Secretary and this was confirmed by the Court of Appeal in *Secretary of State for the Home Department* v. *Lord Alton of Liverpool*, [2008] 1 WLR 2341; in *PMOI III*, the CFI found that Council did not submit evidence as to the terrorist activities of the group.

3. *OMPI*/*PMOI*, *supra* note 1, case note by Eckes, 44 CML Rev. (2007), 1117; and della Cananea, "Return to the due process of law: the European Union and the fight against terrorism", 32 EL Rev. (2007), 896.

4. EU Council Secretariat Factsheet, "Judgment of the Court of First Instance in the OMPI Case T-228/02", para 3; and Notice for the attention of those persons/groups/entities that have

bring new proceedings to challenge new decisions[5] that confirmed its inclusion in the list, and the cases annotated here concern these more recent challenges. In both rulings, the CFI annulled the Council decision as far as the applicant was concerned, albeit on different grounds. In the first case, the applicant had been included at the request of the British Government, while in the second case the applicant had been included at the request of the French Government.

The *PMOI* saga unveils in considerable detail the deep flaws in the EU terrorist listing system. While the CFI's approach had been very cautious in the first two cases, showing a substantial deference to Council's decisions as to who should be defined as a terrorist, in the third, and – it is to be hoped – final,[6] case the Court's ruling seems to show impatience with the Council's cavalier attitude to judicial protection and the rule of law. For the first time, the CFI indicates its willingness to carry out not only a review of compliance with the procedural rights of those listed, but also of compliance with the legal conditions required by the Community instruments, and to a certain extent of the substantive reasons that led to inclusion.

These two cases are of paramount constitutional importance in relation to both the EU system of proscription and the constraints imposed on the Council in defining an individual or an organization as involved in terrorist activity. And yet, as we shall see in detail below, the problems are far from solved.

been included by Council Decision 2006/1008/EC of 21 Dec. on the list of persons, groups and entities to which Regulation 2580/2001 applies, O.J. 2006, C 320/02.

5. Council Decision 2007/445/EC of 28 June 2007, implementing Art. 2(3) of Reg. (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC, O.J. 2007, L 169/58; Council Decision 2007/868/EC of 20 Dec. 2007, implementing Art. 2(3) of Reg. (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/445/EC, O.J. 2007, L 340/100; Council Decision 2008/583/EC of 15 July 2008, implementing Art. 2(3) of Reg. (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC, O.J. 2008, L 188/21.

6. The PMOI was finally taken off the list on 26 Jan. 2009, see Council Decision 2009/62/EC of 26 Jan. 2009, implementing Art. 2(3) of Reg. (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2008/583/EC, O.J. 2009, L 23/25. Following the ruling, the Council brought an action in the CFI for the interpretation of the *PMOI III* ruling. In its action, Council was seeking confirmation that since the act annulled was in substance a Regulation, the ruling would take effect only from the date of expiry of the period granted to bring an appeal; the CFI dismissed the action as manifestly inadmissible; see Case T-284/08, *INTP*, Order of 17 Dec. 2008, nyr. However, France has appealed the ruling in *PMOI III*, Case C-27/09 P, *France* v. *People's Mojahedin Organization of Iran*; and the PMOI had appealed the ruling in the *PMOI II* ruling, Case C-576/08 P, *People's Mojahedin Organization of Iran* v. *Council* but it withdraw this, see Case C-576/08 P, Order of 3 June 2009, nyr.

2. Legal background

As part of its counter-terrorism strategy, the EU adopted Common Position 2001/931,[7] which is based on a mixed Second and Third Pillar legal basis, and which provides for the listing of individuals and organizations to be considered as connected with terrorism.[8] According to Common Position 2001/931, the list is drawn up by the Council on the basis of "precise information or material" which indicates that "a decision has been taken by a competent authority". The decision must be taken on the basis of "serious and credible

7. Council Common Position 2001/931/CFSP of 27 Dec. 2001, on the application of specific measures to combat terrorism, O.J. 2001, L 344/93, as updated regularly (hereinafter Common Position 2001/931 or the EU list).

8. The EU also adopted Common Position 2002/402/CFSP of 27 May 2002, concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organization and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP, O.J. 2002, L 169/4 (hereinafter Common Position 2002/402 or the UN-derived list), which gives effect to UN Security Council Resolution (1390) 2002, and which was given effect in the Community through Council Reg. 881/2002 of 27 May 2002, imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban …, O.J. 2002, L 139/9. Annexed to the Regulation is a list of individuals and organizations (identified at UN level) whose assets are frozen. The list is updated by means of a Commission Regulation; it was lastly amended by Commission Reg. (EC) No. 1330/2008 of 22 Dec. 2008, amending for the 103rd time Council Reg. (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, O.J. 2008, L 345/60. In Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat* v. *Council*, judgment of 3 Sept. 2008, nyr, the ECJ rejected the CFI's interpretation of the relationship between Community law and UN Security Council Resolutions (Case T-315/01, *Kadi* v. *Council and Commission*, [2005] ECR II-3649; Case T-306/01, *Yusuf and Al arakaaat International Foundation* v. *Council and Commission*, [2005] ECR II-3533), and asserted the primacy, from an internal viewpoint, of the former over the latter. As a result, fundamental rights as general principles of Community law are applicable to legislation directly implementing Security Council Resolutions. Thus, inclusion in the list at Community level is open to review even when it derives from a UN decision. The reception to the ruling has been mixed, e.g. Tridimas, "Terrorism and the ECJ: Empowerment and democracy in the EC legal order", 34 EL Rev. (2009), 103; Halberstam and Stein, "The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order", 46 CML Rev. (2009), 13; Kunoy and Dawes, "Plate tectonics in Luxembourg: the Ménage à trois between EC law, international law and the European Convention on Human Rights following the UN Sanctions cases", 46 CML Rev. (2009), 73; Gattini, *Annotation of Kadi*, 46 CML Rev. (2009), 213; Griller, "International law, human rights and the European Community's autonomous legal order: Notes on the European Court of Justice Decision in *Kadi*", 4 EuConst. (2008), 528; De Búrca, "The European Union and the International Legal Order after *Kadi*", *Jean Monnet Working Paper* 1/09, www.jeanmonnetprogram.org/papers/09/090101.pdf; and Weiler, "Editorial: *Kadi*: Europe's *Meddling*", 19 EJIL (2008), 895. Following the *Kadi* ruling the Commission issued a proposal for a Council Regulation amending Reg. 881/2002 (COM(2009)187 final), so as to finally provide at least some guarantees to those listed (see esp. Art. 7).

evidence or clues or condemnation of such deeds" and the "competent authority is a "judicial authority" or, where judicial authorities have no competence in the area covered, an "equivalent competent authority in that area".[9] Finally, the list must be regularly reviewed and in any event it has to be reviewed at least every 6 months.[10] The list included in the Common Position naturally does not produce direct legal effects; for this reason, the Community enacted Regulation 2580/2001 which provides for the freezing of the assets of those identified by the Council.[11] Such a list must be adopted by unanimity in accordance with the above mentioned procedure contained in the Common Position.[12] *De facto*, so far, all those individuals and organizations connected with a foreign country listed in the Common Position have also been included in the list annexed to the Regulation. Finally, it should be noted that both the Common Position and the Regulation, contain their own definition of terrorist act and of individuals and entities involved in such acts.[13]

The legal regime of the EU list is a complex one: on the one hand, there is disagreement in the scholarship as to whether the bridging competence contained in the EC Treaty was validly triggered in relation to sanctions against individuals.[14] On the other hand, the fact that the list must be updated every 6 months makes any legal challenge ineffective since, as we shall see in more detail below, the Council is always a step ahead of those bringing judicial review proceedings. It is only in the *PMOI III* case that finally, and thanks to the urgent procedure, the CFI had the chance of declaring the invalidity of a list still in force at the time of the ruling.[15]

9. Common Position 2001/931, Art. 1(4).

10. Common Position 2001/931, Art. 1(6).

11. Council Reg. 2580/2001 of 27 Dec. 2001, on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, O.J. 2001, L 344/70; the Regulation was adopted by relying on the bridging competence contained in Arts. 301 and 60 EC, as supplemented by the residual competence contained in Art. 308 EC, and for this reason it is confined to alleged terrorists having a link with a third country. The Commission and the Council in fact believed that in relation to alleged terrorists not having links outside the EU, the bridging competence between CFSP and the EC could not be used.

12. Reg. 2589/2001, Art. 2(3).

13. Common Position 2001/931, Art. 1(3) and 1(2) respectively; Art. 1(4) of Reg. 2580/2001 provides that the definition of "terrorist act" shall be that contained in Art. 1(3) of Common Position 2001/931, whilst Art. 2(3) defines those that can be included in the list and is very similar to if not substantially the same as the definition in Common Position 2001/931.

14. E.g. Tridimas, op. cit. *supra* note 8, 103; the ECJ has made clear in *Kadi* that the EC does have such competence.

15. So far, all the actions brought before the CFI, excepting those which were inadmissible, have been successful on the grounds of breach of essential procedural requirements. E.g. Case T-47/03, *Sison* v. *Council*, [2007] ECR II-73; Case T-327/03, *Stichting Al-Aqsa* v. *Council*, [2007] ECR II-79; Case T-229/02, *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK)* v. *Council*, [2008] ECR II–45. The first action brought by these applicants failed because

3. Factual background and previous legal challenges

The PMOI was founded in 1965 with the aim of replacing the Iranian Shah's regime with a democracy; after the Iranian revolution, the organization also fought against the regime of the Ayatollah Khomeini, and engaged in armed actions. It then renounced violence and gave up arms from 2001.[16]

It was first placed on the UK terrorist list in 2001 (having already been placed on the US list in 1997) and then on the EU terrorist list in 2002. In 2002, the PMOI brought proceedings before the CFI to challenge its inclusion in the EU list, and as we shall see in more detail below, the Court annulled its inclusion in that list on the grounds that the applicants' fundamental procedural rights had been violated. In order to comply with the ruling the Council then issued a notice indicating that it would provide those listed with a statement of reasons;[17] the applicants were however kept on the list.[18]

the CFI found that Mr Ocalan did not have standing to represent the PKK (Case T-229/02, [2005] ECR II-539); however the ECJ reversed this (C-229/05 P, [2007] ECR I-439); Case T-253/04, *KONGRA-GEL* v. *Council*, [2008] ECR II–46.

16. As one would expect, the assessment of the merits and faults of the organization varies considerably; members of several national parliaments have called for the de-listing of the organization (e.g. German MPs as reported by the *euobserver* on 25 Nov. 2008, euobserver.com/?aid=27172). Several MPs in the UK have not only called for de-listing but brought successful legal proceedings in the UK to have the organization struck off the UK domestic list (discussed in the main text below). On the other hand, in 2005, Human Rights Watch published a damning report about practices in the PMOI camps, *No Exit: Human Rights Abuses inside the Mojahedin Khalq Camps* www.hrw.org/legacy/backgrounder/mena/iran0505/index.htm; this gave rise to strong reactions by the PMOI who published a press release entitled "Human Rights Watch Report: A Catalogue of Lies Intended to Help Ruling Theocracy" (14 June 2005), available on www.ncr-iran.org/content/view/60/1/; and by the Friends of a Free Iran, a group of European Parliamentarians, that issued their own counter-report "People's Mojahedin of Iran: Mission Report", available on ncr-iran.org/images/stories/advertising/ep%20report-with%20cover.pdf; Human Rights Watch's response to the criticism can be found on www.hrw.org/en/news/2006/02/14/statement-responses-human-rights-watch-report-abuses-mojahedin-e-khalq-organization-#_ftnref2. All of the above websites were lastly accessed on 22 Jan. 2009.

17. Notice for the attention of those persons/groups/entities that have been included by Council Decision 2006/1008/EC of 21 Dec. on the list of persons, groups and entities to which Reg. 2580/2001 applies, cited *supra* note 4.

18. And in breach of the requirements of Common Position 2001/931 and of Reg. 2589/2001, it failed to review the list within the 6 months prescribed. Rather, more than a year elapsed before the reviews. The Council did adopt a decision in Dec. 2007 but this was merely to add people to the list rather than re-examine those already included, see Council Decision of 21 Dec. 2006, implementing Art. 2(3) of Reg. (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, O.J. 2006, L 379/123. Each review entails the adoption of a new decision (see *PMOI II*, para 69). I have argued elsewhere that the 6 months review should be considered mandatory, and not left to the Council's goodwill, see Spaventa "Fundamental rights and the interface between the Second and

In the meantime, a group of British Members of Parliament brought an action before the Proscribed Organization Appeal Commission (POAC), a special tribunal set up to review inclusion in the UK list, asking the Appeal Commission to strike off the applicant from the UK list. The POAC, after having considered the evidence, some of which was classified and could therefore not be seen by the applicants, declared the decision to maintain the applicants on the list "perverse".[19] The Court of Appeal subsequently refused leave to appeal to the Home Secretary on the grounds that the action had no reasonable prospect of success.[20] PMOI also brought a second challenge, against a new EU decision which kept them on the list. This second challenge was adjudicated after the decisions of the POAC and Court of Appeal. Again, PMOI won the case; however, in the meantime a new decision had been adopted and therefore PMOI had to bring a third case, which also benefited from the accelerated procedure, and again the CFI declared the inclusion in the list unlawful.

We shall first recall briefly the decision in the first *OMPI/PMOI* case, to then turn to a detailed analysis of the second and third decisions.

3.1. *The ruling in OMPI/PMOI I*

The most important points made by the CFI in the *OMPI/PMOI I* case are the following:

The right to a fair hearing applies to the Council's decisions to include or maintain someone in the list.[21] This comprises two parts: notification of the evidence and the right for the person/organization concerned to make his/its view known on the evidence.

A decision of a national authority is an essential precondition for placing an organization/individual on the EU list and therefore the right to a fair hearing must be guaranteed first and foremost at national level.[22]

Third Pillar" in Maresceau and Dashwood (Eds.), *Law and Practice of EU External Relations* (CUP, 2008), p. 129, at p. 143.

19. Appeal No.: PC/02/2006, *Lord Alton of Liverpool and Others (In the matter of the People's Mojahadeen Organisation of Iran*) v. *Secretary of State for the Home Department*, judgment of 30 Nov. 2007, available on the POAC's website, www.siac.tribunals.gov.uk/poac/Documents/outcomes/PC022006%20PMOI%20FINAL%20JUDGMENT.pdf.

20. Court of Appeal, *Lord Alton of Liverpool and Others* v. *Secretary of State for the Home Department*, judgment of 7 May 2008, [2008] EWCA Civ 443; [2008] 2 Cr. App. R. 31.

21. The CFI decided not to adjudicate on whether the right to effective judicial protection applied to the listing or whether, as argued by the Council, the Court had no jurisdiction to review the internal lawfulness of the provisions of Reg. 2580/2001 since they were adopted by virtue of powers circumscribed by the general anti-terrorism security Council Resolution (1373(2001)); paras. 110 et seq. Following the ruling in *Kadi and Al Barakaat* v. *Council*, cited *supra* note 8, this question is no longer relevant.

22. Exp. para 119 of *OMPI/PMOI I*, cited *supra* note 1.

The right to a fair hearing is limited to the "legal conditions" of application of the Community measure (i.e. that there is an initial decision to freeze funds; that there is specific information in the file showing that a decision has been taken by a national authority; and, in the case of subsequent decisions that there is a justification for maintaining someone in the list).[23]

For obvious reasons of effectiveness, in the case of first inclusion in the list, notification might be postponed to after the decision has been taken. For less obvious reasons, in the case of an initial decision there is no right to a hearing, not even after the decision has been taken, since the parties can bring judicial proceedings.[24] On the other hand, in the case of subsequent decisions, the decision to maintain someone in the list must be preceded by the possibility of a hearing and, if appropriate, notification of new evidence.

However, and this is the biggest limitation of the CFI ruling, these are mere procedural rights in that there is no requirement in Community law for the party concerned to be afforded the possibility of questioning whether the decision is well founded, since those issues, in the Court's view, can only be raised at national level. And there is, as a general rule, no possibility to make one's views known in relation to whether the decision is based on "serious and credible evidence or clues".[25]

Overriding considerations of security or of conduct of national/Community international relations may preclude disclosure of evidence, and consequently the right to a hearing. This might apply to any information, including that relating to the identification of the Member State or third country in which a competent authority has taken a decision. However, in order to guarantee effective review, the Council cannot raise objections to disclosure of evidence on the grounds that such information is secret or confidential.

23. Worryingly, in an obiter the Court held that it is not even for the Council to investigate whether proceedings at national level were conducted correctly or whether the fundamental rights of the applicants were respected (para 121).

24. The Council seems to have taken a more liberal view and in the *Factsheet* "The EU list of persons, groups and entities subject to specific measures to combat terrorism" (27 Jan. 2009) indicates that a person/entity listed has a right to send documents to the Council to ask it to reconsider its decision even after the first listing (page 4).

25. In the eyes of the CFI (para 125) when the Council based its initial decision or a subsequent decision "on information or evidence communicated to it by representatives of the Member State *without it having been assessed by the competent national authority*" (emphasis added) then this would be considered as newly adduced evidence and therefore it would be subject to notification and hearing at Community level. However, it is difficult to reconcile this statement with the wording of Art. 1(4) Common Position 2001/931 which states the list shall be "drawn up on the basis of precise information or material in the relevant file which *indicates that a decision has been taken by a competent authority*" (emphasis added). It seems therefore that the decision of a competent authority is a necessary pre-condition for inclusion in the list, and that therefore in the absence of such decision inclusion in the list would fail to meet the requirements for legality prescribed in Common Position 2001/931.

Finally, the standard of review is restricted to checking that "rules governing procedure and the statement of reasons have been complied with, that the fact are materially accurate, and there has been no manifest error of assessment of the facts or misuse of power".[26]

Since none of the procedural safeguards described above had been complied with, the relevant Council decision was annulled insofar as it concerned the applicant; however, the Council did not strike off the applicant from the list but rather it provided it with a statement of reasons as to its inclusion.[27]

The ruling in *OMPI/PMOI I* is constitutionally very important, in that, at least in theory, it rejects the possibility a grey legal area in relation to counter-terrorism measures. However, the ruling is also rather limited in its impact since it confines the applicants' rights to mere procedural rights, and limits, if not altogether excludes, the possibility for a meaningful substantive review of the decision to include someone in the list and freeze their assets. As we shall see, these limitations are present also in the *PMOI II* ruling, and to a lesser extent in the *PMOI III* ruling.

4. The *PMOI II* ruling

As mentioned above, following the first *OMPI/PMOI* ruling, the Council provided the applicants with a statement of reasons, which clarified that a decision by a competent authority (in the UK) had been taken regarding the applicant; that that decision was still in force; that it was subject to review under British law; and that therefore the reasons for including the applicant in the EU list still applied. The applicants therefore brought new proceedings for annulment in front of the CFI. The case was decided under the expedited procedure.

It should be recalled that whilst the case was pending the Proscribed Organization Appeal Commission (POAC) declared the Secretary of State's decision to proscribe PMOI as perverse and ordered that the PMOI be struck off the UK list; and the UK Court of Appeal refused the Government's request for leave to appeal, therefore putting an end to the British procedure. After the POAC decision but before the final Court of Appeal ruling, the Council adopted a new decision and, again, it maintained the applicants in the list; the applicants were authorized by the Court to amend their pleadings so as to appeal also against this decision. Therefore, the ruling discussed concerns both Decision 2007/445 (the June 2007 Decision) as well as Decision 2007/868 (the Dec. 2007 Decision).[28]

26. Para 159.

27. See General Secretariat Document 5418/1/07 REV, 17 Jan. 2007.

28. Council Decision 2007/445/EC, cited *supra* note 5; Council Decision 2007/868/EC, cited *supra* note 5.

4.1. *The June 2007 Decision*

The first issue for discussion was the relationship between the June Decision and the original decision to include the PMOI in the terrorist list annulled in the first *OMPI/PMOI* ruling. The applicants argued that the June Decision was vitiated since it was based on the assumption that the Council was allowed to "maintain" the applicants on the list. However, since the previous decision had been annulled, then the applicants could not be "maintained" on that list. The CFI rejected this objection: it held that when a measure is annulled for formal or procedural defects, as it was the case in *OMPI/PMOI I*, then the institution can adopt an identical measure provided the latter is not vitiated by the same defects. In any event, the Court pointed out that the re-examination required by Article 1(4) of the Common Position entailed the adoption of a new decision each time. Similarly, the CFI rejected the applicants' argument that the June Decision could not be based on the same material (i.e. the British Home Secretary's decision) as the original decision; since the original decision was vitiated by procedural defects it was open to the Council to adopt a new decision based on the same information as the original decision, provided the defects were remedied.

The second part of the ruling concerns more substantive issues as to whether inclusion in the list was justified. The applicants argued that the Council had not taken into account the exculpatory material that it had provided; and that they had not been given an opportunity to express their views at a hearing. The CFI dismissed this objection on the ground that neither Regulation 2580/2001 nor the general right of defence gives the persons concerned the right to such a hearing.[29] Further, the fact that the Council had passed on the material provided by PMOI to the Member States' delegations before the adoption of the June Decision was sufficient, and in any event Council had no duty to reply to the applicants' observations if it thought that the documents submitted "did not warrant the conclusions that the applicant claimed to infer from them".[30] Further, the Court found that whilst the Council is under a duty to take into account the factual circumstances justifying the measures, and the legal considerations leading to their adoption, it is not under a duty to discuss all the points of fact and law which may have been raised by the persons concerned during the *administrative* procedure.[31]

The applicants also questioned the Council's interpretation of Article 2(3) of Regulation 2580/2001, arguing that since the definition of terrorist act

29. *PMOI II*, para 93.
30. Ibid., para 95.
31. Ibid., para 101.

contained in the Common Position is expressed in the present tense, only current and present terrorist activity justifies inclusion in the list. The CFI dismissed also this objection, stating that nothing in the Common Position or in the Regulation precludes "the imposition of restrictive measures on persons and entities that have in the past committed acts of terrorism, despite the lack of evidence to show that they are at present committing or participating in such acts".[32] Moreover, the Court failed to circumscribe in any way the power of the Council to list organizations based on past conduct alone: on the contrary, it stated that those measures are based more on an appraisal of future threat than on evaluation of past conduct and that the Council's *broad discretion* in these matters extends to the evaluation of the threat represented by an organization, regardless of the fact that it has suspended its terrorist activities for a longer or less extended period, or even when such activities have apparently stopped altogether.[33]

By far the most important part of the ruling, however, concerns the burden of proof and the standard of review required by Community law in relation to measures freezing the assets of alleged terrorist organizations. Here, the PMOI argued that given the effect of the measures under consideration, and their impact on the applicants' rights of freedom of expression, freedom of association and right to property, the burden to prove that the measures adopted are necessary fell on the Council. Further, the PMOI also argued that such burden of proof should be that required in criminal cases, and that the Court should conduct a full review of the facts, both those relied upon by the Council and those relied upon by the applicants. On the other hand, the UK argued that the proceedings in which such measures are challenged are civil proceedings and therefore the standard of proof would be that applicable to civil proceedings and the burden of proof would fall on the applicant. As for the standard of review applicable, both Council and the UK also argued that the Court should not substitute its own assessment of the facts and evidence for that of the Council.

The Court substantially upheld the Council's position. It started by restating its findings in the *OMPI/PMOI I* case: thus, in adopting the first decision concerning the freezing of assets of a group or a person, the Council must simply verify that a decision by a competent national authority has been adopted, whilst in relation to subsequent decisions to maintain someone on the list Council has to verify the consequences of that decision at the national level. This means, in the Court's view, that the role of the burden of proof is rather limited since it just relates to proving the existence of precise information in

32. Ibid., para 107.
33. Ibid., para 112.

the relevant file indicating that a decision at national level has been taken; and, in the case of subsequent decisions, to whether the freezing of funds is still justified, having particular regard to the action taken upon the decision of the competent national authority. Finally, the Court re-stated that the Council enjoys discretion in assessing the reasons why a person should be subject to the fund-freezing measure. Thus, the review performed by the Court is limited to scrutinizing whether there has been a "*manifest error of assessment*".[34] In the case at issue, and in relation to the June Decision, the Court found that there had been no such error since there was a decision of a national authority. Furthermore, the Court added that when there is an appeal pending against the national decision, the Council acts "reasonably and prudently" when it refuses to "express an opinion on the validity of the arguments on substance raised by the party concerned" before the outcome of the national proceeding is known. Otherwise, there would be a risk that the Council's findings might differ from those of the national tribunal or court.[35] As a result, the CFI upheld the validity of the June Decision.

4.2. *The December 2007 Decision*

On the other hand, the December Decision was annulled: the main difference between the two decisions lay in the fact that, as mentioned above, when the June Decision was adopted the appeal against the UK Home Secretary's decision to include the PMOI in the national list was still pending, whilst when the December Decision was adopted the POAC had already ruled that the Home Secretary's decision was perverse (although the applicants were still on the UK list since an appeal from the Government was pending). Thus, the circumstances between the June and December Decision had changed. However, the Council's statement of reasons did not reflect, or did not sufficiently reflect, this change of circumstances and therefore the new decision was annulled.

5. The *PMOI III* ruling

It has been mentioned that the terrorist list needs (at least in theory) to be reviewed every six months. Not surprisingly then, whilst the *PMOI II* proceedings were still in course, the Council adopted a new decision (the July 2008 Decision),[36] which included the applicants. At the time the July 2008 Decision

34. Ibid., para 141, emphasis added.
35. Ibid., para 147.
36. Council Decision 2008/583/EC, cited *supra* note 5.

was adopted, the British Home Secretary, in order to comply with the decision of the POAC, had already removed the PMOI from the list of organizations proscribed under the Terrorism Act 2000. This notwithstanding, the Council held that new information which had been brought to its attention justified maintaining the PMOI on the EU list. Consequently, the PMOI brought fresh proceedings for annulment. The case was decided under the expedited procedure at considerable speed.[37]

In the preliminary procedure, the Court ordered the Council to provide *all* documents relating to the adoption of the decision under scrutiny, clarifying that should the document be deemed confidential, they would not, at that stage in the proceedings, be communicated to the applicants. The Council made such a request for one of the documents which it had submitted. Further, the Court also ordered the disclosure of all documents relating to the voting procedure leading to the adoption of the decision.

The first issue to be addressed by the Court, with which this annotation is not directly concerned but which raises very important issues about accountability, related to the voting procedure followed for the purposes of the contested decision. As mentioned above, the July 2008 Decision was adopted after the British Government had de-listed the PMOI in order to comply with the POAC ruling. Following the July Decision, during a debate in the House of Lords, Lord Waddington asked Lord Malloch-Brown, Minister of State for the Foreign and Commonwealth Office, how the UK had voted in relation to the PMOI's continued inclusion in the EU terrorist list. This, of course, was very relevant since the decision to include or maintain someone in the list must be taken by unanimity. Lord Malloch-Brown held that the UK Government had abstained and following further questioning as to why it abstained when it should have opposed inclusion to comply with the POAC ruling, Lord Malloch-Brown held that the Government had no choice since the list was a "total list" and that therefore it was on a take it or leave it basis.[38]

Relying on this evidence, the PMOI argued before the CFI that the voting process leading to the adoption of the July Decision was vitiated by irregularity since the Council should consider each individual or organization on its own merits. The CFI therefore decided to look into the matter and, as mentioned above, requested the disclosure of the documents relating to the voting process. Those documents showed that the Council had reviewed the names on the list on a case-by-case basis, and that indeed it had written to all Members of the Council specifically in relation to the PMOI. The applicants' contention

37. Less than 5 months elapsed between the date when the case was lodged (21 July 2008) and when it was decided (4 Dec. 2008).

38. House of Lords, Hansard 22 July 2008, Column 1650, available at www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80722-0002.htm.

was therefore dismissed. This of course leaves open the unpalatable question as to who exactly, the Council or the British Government, was being economical with the truth.[39] And, it raises some suspicion that, in certain instances, inclusion in the list might be motivated solely by political expediency.

The second issue for consideration, which in itself was sufficient to determine the illegality of the decision, related to the breach of the right of defence. The Council had in fact failed to inform the applicants of the new information in the file which in its opinion justified it to be maintained in the list. This was in breach of the *OMPI/PMOI 1* ruling, where the Court made clear that when a person or an organization is maintained on the list, it has to be notified of the reasons *prior* to the adoption of the relevant decision. Since Council could not substantiate its claim that it was impossible for it to notify the applicant in advance, the right of the defence had been breached and the decision was vitiated. Interestingly the Court left unanswered the question whether the Council has an immediate duty to remove a person/organization from the list once a national court has found that the national decision which led to listing at Community level is not warranted.[40]

But the most important part of the ruling is undoubtedly the third part, where the CFI discussed whether the legal requirements provided in Article 1(4) to (6) of Common Position 2001/931, and Article 2(3) of Regulation 2580/2001, had been satisfied. It might be recalled that Article 1(4) to (6) of the Common Position prescribes that inclusion in the list must be based on a decision by a national authority, based on serious and credible evidence or clues. Further, the authority must be a judicial authority or, where judicial authorities have no competence, an equivalent authority. As mentioned above, when the July 2008 Decision was adopted, the British Home Secretary's decision in relation to the applicants was no longer in force. Rather, the PMOI had this time been included at the request of the French Government, which based its request on the fact that a judicial enquiry had been opened against the applicants in 2001; and that charges were brought in 2007 against some individuals alleged to be members of the PMOI. The French Government circulated in Council three documents; however, two were classified as confidential. Following an order by the Court

39. Lord Malloch-Brown in a House of Lords debate held on 12 Jan. 2009 said "This gives me the opportunity to say that, while the Court thought the view incorrect that it was impossible to vote against only one member of that list, I checked back with officials, who have reconfirmed that it is up to the presidency of the European Council at the time to determine how such business is dealt with. A whole list was given and there was no option but to vote it up or down. Therefore, if we had not abstained, other terrorist organizations would have been delisted". Hansard Column 1005, available at www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90112-0001.htm#0901126000024. It should be noted that France held the presidency of the Council, and that it was at France's request that the PMOI was kept on the list.

40. *PMOI III*, para 40.

as to disclosure, the French Government held that due to domestic legal requirements it could not comply with the Court's order in the time set by the Registrar. In any event, the Council pointed out that it had not been provided by the French Government with any additional evidence than that it had set out in the statement of reasons. As a result, the Court found that the Council failed to prove that the conditions provided in the Common Position and the Regulation as to the existence of a national decision had been satisfied.

In particular, the Court clarified that the fact that the Council possesses broad discretion in the assessment of the considerations that lead to listing, does not "mean that the Court is not to review the interpretation made by the Council of the relevant facts".[41] Thus, the Community judicature must "not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and *whether it is capable of substantiating the conclusions drawn from it*."[42] However, the Court also clarified that it would not substitute its judgement for that of the Council. Further, and after having affirmed how the evidence in the file was insufficient and how it was doubtful that a "decision of a national authority" for the purposes of the Common Position and the Regulation had been taken, the Court dealt with the Council's claim relating to confidentiality. Here, consistently with the *OMPI/PMOI I* ruling, the Court refuted the Council's viewpoint in no uncertain terms: it noted that it had not been explained why the production of information in Court would violate confidentiality while production of the same information to the governments of 26 Members States would not. More importantly the Court held 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 authorize its communication to the Community judicature whose task is to review the lawfulness of that decision".[43] Finally, the Court clarified that it had jurisdiction to review *both* lawfulness and *merits* of funds-freezing measures. As a result, the Court found that the Council had not complied with the requirements of Common Position 2001/931 and Regulation 2580/2001, and that therefore the July 2008 Decision was null. The applicants were finally taken off the list in January 2009.[44]

41. Ibid., para 55.
42. Ibid., para 55, emphasis added.
43. Ibid., para 73.
44. See also Factsheet, cited *supra* note 24, which arguably goes beyond the requirements of the *PMOI* rulings.

6. Analysis

The rulings summarized above are of paramount importance in defining the limits within which the Council can act in relation to fund-freezing measures. In this respect, the *PMOI III* ruling demonstrates the Court's willingness to engage in a more substantive review of the legal conditions that must be satisfied before an individual or an organization can be placed on the Community list. And yet, it should not be forgotten that the factual circumstances in that case were rather extreme: a national court had had the chance to look at the evidence and found that there was such a lack of it that the decision to proscribe the organization could be defined as "perverse"; no decision had been adopted in France; and the French Government refused to disclose documents. The fact that the Court lost its patience is then not surprising. This said, it is not entirely clear how the two rulings annotated relate to each other. In the writer's opinion *PMOI III* has not really affected the previous rulings concerning the listing of terrorists. Thus, one should query whether the listing regime, even given the limits set by the Court to the executive power, is as such compatible with acceptable standards of judicial and fundamental rights protection. We shall highlight the most important issues arising from the current legal regime, together with the limits in effective legal protection arising from the Court's rulings.

6.1. *The division of competences between national and Community authorities*

The legal regime established by Common Position 2001/931 and Regulation 2580/2001 mixes elements of national decision making with EU decision making. Thus, and as already mentioned, Article 1(4) Common Position 2001/931 provides that inclusion in the EU list must be preceded by a decision at national level by a judicial or equivalent authority. Leaving aside the problems arising from the lack of definition of what is to be considered an authority equivalent to a judicial one,[45] Article 1(4) clearly creates a bridge between national and EU decision making where the latter is conditional upon the former. Articles 6 and 8 of Regulation 2580/2001 widen this bridge in providing that Member States might grant a specific authorization to unfreeze funds (Art. 6), after having notified the other Member States, the Council and the Commission, but

45. The CFI does not engage with this question, although it considers the Home Secretary – a purely executive authority – as equivalent to a judicial one, whilst at first reading one might have thought that the notion of "equivalence" would relate to fundamental guarantees concerning independence and impartiality.

without there being any need of a prior decision at Community level; and that Member States have a duty to inform each other, the Commission and the Council, in respect of "violations and enforcement problems or judgments handed down by national courts" (Art. 8).

The regime introduced by the Regulation is therefore atypical, since it allows Member States to unilaterally disregard the freezing order at Community level, and it acknowledges the fact that "enforcement problems" and national rulings might affect the regime established by the Community. The reason for these provisions is easily second-guessed: the Member States clearly wished to avoid the danger of finding themselves in a constitutional trap where they would be forced to choose between, on the one hand, complying with their domestic legal requirements to give effect to national courts' rulings; and, on the other hand, complying with their EC obligations as to the freezing of funds. Thus, the Regulation allows Member States to depart unilaterally from the obligations therein imposed. Further, since the existence of a national decision is a precondition for the lawful exercise of the Council's competence to include an organization or individual in the list, the annulment of the national decision by a national court should lead, if and when the EU listing is based solely upon the decision in that State, to the nullity of the Community decision for lack of one of the requirements necessary for inclusion in the list.[46]

It is the existence of this bridge between national and EU/EC decisions concerning inclusion in the EU list that might explain the CFI's willingness to delegate judicial protection in the first instance to national authorities/courts. Thus, the CFI held that the Council's duty is limited to ascertain the existence of a national decision. And, that the standard of review operated by the Court in this respect is that of a manifest error of assessment, such as was present in the *PMOI III* ruling where the Council did not prove that there was a decision of a national authority. Therefore, not surprisingly, the Court also held that pending review at national level the Council acts prudently in not de-listing someone. And yet, even though at first sight the legal regime provided by the Regulation might support the findings of the Court, on closer scrutiny the Court's interpretation might be called into question. These two points (relocation of judicial protection and manifest error of assessment) will be examined in detail below.

46. The CFI has preferred not to rule explicitly on the matter, see para 40 *PMOI III* "*Even* assuming that the Council was not under a duty to remove the applicant from the disputed list following the POAC decision …" (emphasis added).

6.2. *The (re)location of judicial protection in the hands of the national authorities*

As mentioned above, the starting point of the Court's analysis is that judicial protection is to be guaranteed first (and foremost) at national level. Thus, as long as a decision at national level is pending, the supervision of the Court, and even that of the Council, is limited. From a practical viewpoint, this approach is easily justified: after all, national courts are better equipped to look into complex evidence, both because their rules of procedure are designed for such tasks, and because national authorities might be more willing to produce sensitive evidence in front of their own courts. And there can be little doubt that the rules of procedure that govern the Community courts are ill equipped to accommodate discussion of potentially incriminating and classified evidence. In this respect, it should be noted that both the CFI and the ECJ are fully aware of the delicate tasks they are called to perform and both courts have made clear that where such requests are justified, they are prepared to accommodate the needs of national and public security by authorizing that evidence should be disclosed only to the court. And yet, procedurally this might be not very satisfactory, since the lawyers of the party alleged to be connected to terrorism would not have a right as such to be made privy to this evidence, so that in any case the right of the defence would be crippled.

Furthermore, in the *OMPI/PMOI* ruling the CFI held that the duty to a "fair hearing must be safeguarded in the first place as part of the national procedure" and that it is in "that context that the party concerned *must* be placed in a position in which he can effectively make known his views of the matters on which the decision is based".[47] This seems to suggest that national authorities might have Community law duties when dealing with national decisions that later triggered inclusion in the Community law list. How far these duties stretch it is difficult to say: on the one hand, general principles of Community law, suggest that these obligations might be far reaching.[48] Thus, according to

47. Para 119, *OMPI/PMOI*, cited *supra* note 1, emphasis added.

48. See also Case T-253/02, *Ayadi* v. *Council*, [2006] ECR II-2139, esp. paras. 146 et seq. (appeal pending, Case C-403/06); in that case the CFI held that in relation to the UN derived list, which is implemented at Community level by Council Regulation 881/2002, Member States are bound by Art. 6 TEU and therefore have a duty to respect fundamental rights as guaranteed by Community law and the ECHR in relation to requests from listed persons to make representations on their behalf for delisting purposes. Furthermore, the decision relating to the representation process must be, as a matter of Community law, subject to judicial review. However, it is not clear whether the *Ayadi* ruling rested on the premise that the CFI had limited its own jurisdiction in relation to the fundamental rights scrutiny at Community level, limitation then overruled by the ECJ in *Kadi and Al Barakaat* v. *Council*, cited *supra* note 8, or whether it is of general application.

consistent case law, the general principles of Community law apply whenever the situation falls within the scope of Community law.[49] The CFI reference to Community law obligations in relation to the national procedure indicates that once a person has been included in the Community list, the matter falls within the scope of Community law even when the decision of the national authority predated the decision at Community level. This leaves open the possibility of applying Community law fundamental rights directly, as well as the possibility of a preliminary reference in relation to whether the national rules comply with such principles. On the other hand, Member States might be less than happy about a Community law spill-over in so sensitive an area. For instance, if the national listing process becomes a matter falling within the scope of Community law, would the ECJ have jurisdiction on a preliminary reference to assess the compatibility with Community law fundamental rights of the British proscription system?

On the other hand, and more fundamentally, from a constitutional perspective it might be questioned whether the delegation of judicial protection to national authorities is consistent with established principles governing the relationship between Community and national law.

6.3. *Relocation of judicial protection at national level: A threat to supremacy and fundamental rights protection in the EU?*

As mentioned above, the Court held that if a national decision within the meaning of the Regulation has been adopted, then it is for the national authorities to ensure judicial protection in the first instance. In this respect, the role of the Council and the review performed by the Court appear to be limited in scope, aimed at ascertaining that the national authority falls within the definition provided for in the Common Position; and that no subsequent finding at national level has had an impact on the decision to maintain someone in the list. Other than in those cases, the CFI does not seem inclined to intervene, or there is nothing in the rulings here noted, or in the *OMPI/PMOI* ruling, that suggests it would. This abdication of judicial responsibility calls into question both the principle of supremacy and the compatibility of this system with the principle of effective judicial protection.

49. This is the case both when the Member States are implementing Community law, e.g. Case 5/88, *Wachauf*, [1989] ECR 2609; and when the situation falls within the scope of Community law by virtue of the situation being connected with it, e.g. because the MS is invoking a Treaty derogation or a mandatory requirement in relation to the free movement provisions, e.g. Case C-260/89, *ERT*, [1991] ECR I-2995.

In relation to the former, consider that the EU is regulated by its own constitutional system and is bound by its own fundamental rights standards as decided by the Community judicature. This is true even in relation to measures adopted to fight terrorism, as confirmed by the ECJ in the *Kadi* case. Here, one might well argue that the ruling in *PMOI III* is the demonstration that the CFI is both willing and able to guarantee the rights of organizations and individuals listed. After all, in that case the Court ultimately annulled the Council's Decision on more substantive grounds, and that ruling led to the delisting of the applicants at Community level. And yet, it should be noted that the CFI in the *PMOI III* ruling did not engage with the substantive question as to whether the PMOI could be defined as a terrorist organization according to Community law. Rather, the Council's Decision was annulled on two grounds: first, breach of the right of defence, because the Council failed to provide an adequate statement of reasons. And, secondly, because the Council did not demonstrate that there was a decision at national level within the meaning of Common Position 2001/931. However, and as demonstrated by the *PMOI II* ruling, when a national decision exists and the Council has effectively discharged its procedural duties, then the matter must be raised at national level first.

So, in order to have a reasonable chance of been taken off the Community list a claimant has to first pursue, and win, his/its case in front of the national authorities; however, it should be noted that the national authorities would have regard to the national definition of terrorism/terrorist act, since Regulation 2580/2001 does not attempt to harmonize the term. Consequently, as matters stand at present, it would be possible for an individual to be listed at national level on a broader definition of terrorism, and to see his inclusion in the list confirmed at national level even though he did not fall within the definition of terrorist contained in Regulation 2580/2001. This seems a constitutionally incoherent result since, according to established principles, Community law has to be given a uniform meaning across the EU.[50]

Furthermore, and leaving aside the possible fundamental rights obligations mentioned above,[51] this would also mean that the standard of fundamental rights protection to be applied in relation to the substantive issues as to whether someone is connected with terrorism would be that decided by national law.

50. See e.g. in the context of the free movement of persons, Case 75/63, *Hoekstra*, [1964] ECR 1771.

51. If the matter fell within the scope of Community law, which as explained above might be a possibility, then of course the national court would not be able to fall below the Community standard. However, and as mentioned above, it is not obvious that such an intrusion in national systems (and through the medium of Community rather than Third Pillar law) would be constitutionally sound, and in any event would be politically very controversial. However, if the national decision is to be kept to a certain extent separate from the Union/Community decision, then the fundamental rights standard applicable would be only the national law one.

This might be higher, lower or equivalent to the Community fundamental rights standard but is *not* the Community law standard.[52] And this is difficult to square with the constitutional principles established by the ECJ in over thirty years of case law according to which Community acts can be assessed *only* in relation to the Community own constitutional system; and that the Community judicature alone is competent to decide upon the validity of Community law.[53]

Relocation of judicial protection at national level also raises considerable problems in relation to the principle of effective judicial protection. In this respect, it should be noted that the decision to list at Community level might originate from more than one Member State; and that following a national decision to annul inclusion in the national list, another Member State might decide to take a decision so that the formal pre-conditions for inclusion in the Community list are still satisfied (as was the case in relation to the *PMOI* following the POAC decision). Delegation of judicial responsibility as to the substantive reasons for inclusion to national authorities means then that someone who has been placed on the Community list might have to bring judicial proceedings in more than one Member State. Aside from the constitutional issues mentioned above, this clearly creates problems in relation to the notion of effective judicial protection; and, of differing protection across the Union.

The notion of effective judicial protection, which binds the Community,[54] entails also the notion of a reasonably speedy protection.[55] The requirement that in order to bring successful annulment proceedings before the Community judicature, the person/organization affected should first demand review at national level, possibly in more than one Member State, creates an additional, and significant, burden which is at odds with ensuring that proceedings are not

52. When acting within the scope or implementing Community law and exercising discretion Member States have an obligation not to fall below the Community law standard rather than to apply the Community law standard.

53. Consistent case law, e.g. Case 29/69, *Stauder* v. *City of Ulm*, [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125; and Case 4/73, *Nold* v. *Commission*, [1974] ECR 491. Relocation of judicial responsibility at national level also entails considerable differences in Community standards of judicial protection in relation to a Community act, which is also questionable in relation to a Community act that directly and individually affects natural and legal persons. It should be noted, that when applicants have Art. 230 EC standing they might choose to bring proceedings in front of national courts (subject to Community time limits) but are by no means obliged to do so.

54. Consistent case law, e.g. recently Joined Cases, *Kadi and Al Barakaat*, cited *supra* note 8, esp. para 335.

55. See e.g. Case C-185/95 P, *Baustahlgewebe* v. *Commission*, [1998] ECR I-8417, esp. paras. 26–44; Joined Cases C-403/04 P & 405/04 P, *Sumitomo Metal Industries Ltd et al.* v. *Commission*, [2007] ECR I-9045, esp. para 115; this is established case law also at ECHR level, see e.g. Case of *Garyfallou AEBE* v. *Greece* (Appl. No 18996/91), judgment of 24 Sept. 1997, *Reports of Judgments and Decisions* 1997-V, 1821.

unreasonably lengthy. It should be recalled, in fact, that even when the applicant is successful at national level, he/she would still need to bring proceedings before the Community judicature to ensure Community delisting. In this respect consider the consequences of the CFI's refusal to adjudicate on the substantive merits of the listing of the PMOI. As mentioned above, the fact that in the first two cases, and to a certain extent in the third one, the CFI limited its criticism to procedural matters meant that the *OMPI/PMOI* proceedings took in total 6 years and 4 months.[56] In the *Baustahlgewebe* case,[57] the ECJ upheld the claimants' complaint that proceedings that took in total 5 years and 6 months were unduly lengthy. Here, it should be noted that it cannot be maintained that the length of proceedings should be assessed having regard to the three different cases taken separately, since the need to bring further proceedings arose because of the combination of the CFI's refusal to look into the substance of the case; and the updating system provided for by Regulation 2580/2001, which determines the adoption of a new decision every 6 months. Thus, in most cases, the Court's ruling is obsolete at the time of delivery. In this respect, the European Court of Human Rights has made clear that the reasonableness of the length of proceedings has to be determined as a whole, and that it falls upon the States to organize their judicial system so as to comply with Article 6(1) ECHR.[58] Since the *OMPI/PMOI* cases all related to the same issue, i.e. whether the applicants' inclusion in the list was justified, it is doubtful that the length of proceedings can be determined having regard to each single case. And, arguably, as the case law stands now, the length of proceedings at national level should also be included in assessing compliance with the ECHR of the Community system of judicial protection. The 27 Member States could then be held collectively responsible for proceedings which are excessively lengthy because of the failure in judicial protection in one Member State coupled with the Community judicature's failure to assess the merits of inclusion in the Community list for themselves.

The potential multiplication of proceedings inherent in the CFI's approach would only be consistent with the principle of effective judicial protection if the principle of supremacy were to be sacrificed so that national courts could declare the freezing of assets at Community level invalid. This seems a constitutional heresy which means that the hermeneutic monopoly of the Community judicature over Community law must apply also in those cases, and also in relation to the substantive reasons that justify inclusion in the Community list, and therefore the suggestion that national authorities have a role to play

56. The first case was lodged on 26 July 2002 and the *PMOI III* ruling was decided on the 4 Dec. 2008.

57. *Baustahlgewebe* v. *Commission*, cited *supra* note 55.

58. Case of *Garyfallou AEBE* v. *Greece*, cited *supra* note 55, esp. para 40.

seems irrelevant. This is all the more so should one consider that the listing at Community level might have been triggered at the request of a third State.

6.4. *The Council's discretion and the manifest error of assessment limit*

The second debatable premise is that the Council enjoys a broad margin of discretion in deciding whether to include someone in the list and that, as a result, the standard of review is that of a "manifest error of assessment", i.e. the standard used in relation to political decisions.

This approach might be explained having regard to the Court's (mis)understanding of the system of cooperation between Member States and European institutions introduced by the Common Position and the Regulation.[59] Since it is for the national authorities to identify groups and organizations in the first instance, and since it is for the national courts/authorities to review those decisions, then the Council enjoys both little discretion,[60] in that it cannot identify for itself those to be included nor can it question the national legal framework which led to inclusion;[61] and broad discretion, since it is not obliged to include in the EU list those who have been identified by a national authority. For this reason, the Court is not going to go much beyond a review of whether the conditions of legality provided for in the Regulation have been complied for and will limit its review to determine whether there has been a manifest error of assessment.[62] Whilst it is true that the Court stated that it can review the interpretation made by the Council of the relevant facts, establishing whether the evidence is accurate, reliable and consistent, as well as ascertaining that such evidence contains all the relevant information and that it is capable of substantiating the conclusions drawn from it, the Court also makes clear that it will not substitute its own assessment for that of the Council.[63] From a substantive viewpoint then, the Court's review appears rather limited, especially given that

59. The Court in this respect refers to Art. 10 EC (para 132 *PMOI II*) which, following the ruling in Case C-105/03, *Pupino*, [2005] ECR I-5285, applies also to the area of cooperation in criminal matters. However, it should be noted that the measures at issue in the cases here noted were CFSP measures. Third Pillar jurisdiction was relevant only in relation to those entities and individuals that had a link with the EU. It is thus unclear whether the CFI is indicating a possible extension of the *Pupino* doctrine to the area of CFSP.

60. In the *PMOI II* ruling the Court held that the specific form of cooperation introduced by Reg. 2580/2001 entails an obligation for the Council to "defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, in particular in respect of the existence of 'serious and credible evidence or clues' on which its decision is based" (para 133).

61. See *OMPI/PMOI*, cited *supra* note 1, para 121.

62. Para 141, *PMOI II*.

63. Ibid., para 138.

the Council only needs to be satisfied of the existence of a national decision; that it should not concern itself with whether the fundamental rights of the individual/organization have been respected at national level; and that, in the case of decisions to maintain persons in the list, inclusion is still justified having regard in particular to action taken upon that decision of the competent national authority. For this reason, the burden of proof has a "relatively limited" scope in relation to Community procedure to freeze assets.[64] Not surprisingly then, in the *PMOI II* case (in relation to the June Decision), the Court found that since there was a decision of a national authority (the British Home Secretary), the Council did not make a manifest error of assessment.

The Court's unwillingness to engage with the substantive issue of whether the applicants are indeed terrorists according to the Community regime, however, appears to be flawed. Here, whilst it is indeed true that the existence of a national decision is a necessary precondition for the legality of the Council's decision to include someone in the EU list, that in itself is not sufficient.

Consider in fact, that both the Common Position and the Regulation contain their own definition of "terrorist" and "terrorist act" and an individual or organization can be included in the Community list only if he/it is connected with terrorism within the meaning of the Union/Community definition.[65] Thus, the existence of a national decision is a necessary but not sufficient precondition for including someone in the Union list. The person/organization concerned must also have committed/seeking to commit terrorist acts as defined in the relevant Union/Community legislation, and not just as defined in national law. And in this respect, there is no Council discretion: either there is sufficient evidence to include a person in the list, or there is not. The Council's discretion might exist in relation to the adoption of the Regulation, i.e. in relation to the decision that in the interest of fighting terrorism the assets of some individuals and organizations might be subject to a preventive freezing order even lacking a judicial determination as to whether there is conclusive evidence that those listed are connected to terrorism. This can be considered a policy measure the review of which is naturally limited.[66] However, in relation to the

64. Ibid., para 134.

65. The fact that the Council Framework Decision 2002/475/JHA of 13 June 2002, on combating Terrorism, O.J. 2002, L 164/3 (amended by Council Framework Decision 2008/919/JHA of 28 Nov. 2008, O.J. 2008, L 320/21) has given a common definition of terrorist offence, which in any case is broader than that contained in Common Position 2001/931 and Reg. 2580/2001, reinforces rather than weakens this finding.

66. Here, care should be taken not to confuse the listing of individuals with the system of "smart sanctions" where the aim is to target a regime or a country without disproportionate effects on the civilian population and which might incidentally have negative repercussions against innocent individuals (as it was the case in Case C-84/95, *Bosphorus* v. *Minister for Transport, Energy and Communications and others*, [1996] ECR I-3953).

identification of the individuals there is no political discretion, or else the fact that the Regulation and the Common Position define who is to be considered a terrorist would be meaningless. Thus, since the definition of "terrorist" for EU listing purposes is a Community definition, the CFI must review all of the evidence and interpret that definition to give it its Community meaning.[67] Nor could it be objected that the fact that the definition of terrorism is contained in the Common Position and is incorporated in the Regulation only by reference deprives the Court of jurisdiction. The express reference to the Common Position does in fact incorporate such definition in a Community instrument which, as such, cannot be sheltered from review. This is further confirmed by the Court itself in the *PMOI II* ruling when it agreed to interpret the definition of terrorism in relation to whether it analysed the extent to which past behaviour is relevant for inclusion in the list.[68]

If the Court has jurisdiction over the interpretation of the definition of terrorism, then the burden of proof should go much beyond the need to prove the existence of a national decision: it should concern the evidence which justifies defining a person or an organization as "terrorist" according to the Community standard. This is all the more important since the national decision which triggers listing at Community level might have been taken by a State outside the European Union.[69] In this respect, and as mentioned above, it is clear that the need to assess whether the individual/organization has been involved in terrorist activity as defined by Community law is of paramount importance in ensuring that the decision is actually legally justified rather than politically motivated.

7. Concluding remarks

The Court of First Instance was undoubtedly faced with a very difficult issue and its reticence to engage in a substantive review of the reasons that led to the inclusion of the PMOI in the EU list might be understood having regard to the fact that its procedural rules are ill adapted to engage in such matters. And, the

67. The fact that Community law should be given a Community and not a national meaning is consistent case law and justified by the need to ensure uniformity in the application of Community law; see e.g. in the context of the free movement of persons, *Hoekstra*, cited *supra* note 50.

68. *PMOI II*, para 107.

69. And given that following the *OMPI/PMOI* ruling the Council is not, in the CFI's view, empowered to look into the standard of fundamental rights protection in the originating country (see para 121), and that the originating country might not be part of the ECHR, this is all the more important.

evolution in the case law seems to suggest an increased willingness to scrutinize the Council's reasons for including individuals and organizations in the list. However, the circumstances of the *PMOI III* case were rather extreme, and it is not obvious that the findings in that case do much to enhance the protection of fundamental rights at Union level. In this respect, the starting premises seem still good law: as it is evident from the *PMOI II* case in relation to the June Decision, the Court of First Instance seems willing to delegate the assessment of the substantive reasons that led to inclusion to the national authorities; and to confine its review to the manifest error of assessment standard.

This is questionable, both in relation to the premises upon which the Community constitutional system is founded; and in relation to fundamental rights protection. The interpretation of Community law, and the assessment of its validity, is solely the task of the Community judicature. In this respect, delegation of judicial responsibility to the national authorities seems wholly inconsistent with established constitutional principles as well as problematic from an ECHR perspective. Nor is there any reason why the Court should show such deference to the Council. When the latter adopted Regulation 2580/2001 it should have been aware of the fact that the Community judicature would have full and exclusive jurisdiction over its interpretation, including the interpretation of what is to be defined as a "terrorist act" for Community law purposes, and of the evidence produced to substantiate inclusion of persons and organizations in the list. No duty of loyal cooperation can justify a pick and choose approach to Community law: if the Member States wish to give freezing orders pan-European effects then they cannot complain when individuals seek pan-European protection. Whilst it is true that justice might finally have been done in the case of the PMOI, since it no longer included in the EU list, from the viewpoint of the Community constitutional system, this seems very much a Pyrrhic victory since the CFI's rulings are still well short of enforcing an effective system of judicial protection.

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