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EUROPEAN UNION: LISTS OF TERRORIST PERSONS OR ORGANIZATIONS

This report discusses the legal basis for the UN/EU and the EU lists of terrorist individuals and organizations. It also reviews procedures for listing and delisting names and several cases in which listings were challenged.

LAW LIBRARY OF CONGRESS
EUROPEAN UNION
LISTS OF TERRORIST PERSONS OR ORGANIZATIONS

Executive Summary

In the aftermath of September 11, 2001, the European Union responded immediately by adopting several legal instruments to implement Security Council Resolutions and to deal with the terrorism threat within the EU more effectively. Part of this undertaking was the drafting of two lists, one prepared under the authority the Sanctions Committee of the Security Council and endorsed by the EU, the UN/EU list; and the other, the EU list, prepared unanimously by the Council of the EU.

Both lists have raised fundamental rights questions and have been challenged before the European Courts by those listed who claimed to be included unjustifiably. In the cases of Yusuf and Kadi, the European Court of Justice upheld the EU/UN regime. On the other hand, in the case of the Organisation des Modjahedines du Peuple Iranien (OMPI), the Court annulled the decision of the Council relating to the inclusion of OMPI on the EU list. The Court did not invalidate the Regulation on the basis of which the list was prepared. Thus, the Regulation is still in force. The Council has announced that it plans to make its listing and de-listing procedure more transparent and that it intends to provide a statement of reasons to individuals or entities subject to the freezing of assets.

I. Background

Following the attacks of September 11, 2001 against the United States, the European Union responded immediately to the threat of terrorism by adopting new legislative measures. The EU's response to the terrorist attacks was undertaken in part due to realization of the urgent need to tackle terrorism more effectively at the EU level, but also because of implementation requirements of the United Nations Security Council Resolutions. Resolution 1373/2001¹ obliged UN Members to immediately freeze funds, other financial assets, or any economic resources of any member of the Taliban and the Al-Qaida organizations. The requirement also applied to the assets of persons or organizations who are associated with them and have been involved in terrorist activities, including the planning, facilitation, preparation, or perpetration of terrorist acts. The UN also established a Sanctions Committee that was given the tasks of compiling a list of entities and individuals deemed to be associated with Taliban and Al-Qaida and in general ensuring the implementation of sanctions against all those included on the list.²

Currently, there are two lists of persons, groups, or entities designated as involved in terrorist activities and subjected to restrictive measures: 1) a list comprised of names designated by the UN Sanctions Committee, the Security Council, or the UN Member States (the UN/EU regime); and 2) an EU

¹ The Resolution, adopted pursuant to chapter VII of the UN Charter, established a number of measures in an effort to fight terrorism. It requires Members to immediately 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.

² Based on Resolution 1267/1999. The list is available at the UN Web site, <http://www.un.org/sc/committees/1267/consolist.shtml> (last visited June 8, 2007).

list prepared by the Council of the EU acting under authorization arising from EU legal instruments, the so-called EU autonomous regime. The Council of the EU decides unanimously on the names for that list. Both lists have been subject to constant revision and updates, as new names are added or deleted. There is no time limit or expiration date for designations to the lists. The EU/UN list contains the names of 361 individuals and 125 entities.³ As updated on May 29, 2006, the EU list included the names of forty-five individuals and forty-eight groups and entities that are subject to restrictive measures at the EU level.⁴ In December 2006, the names of nine more individuals were added, along with two groups or entities.⁵

The initial 2001 EU list prepared by the Council included only the terrorist wing of the Palestinian Organization Hamas, not the full organization. In 2005, Hamas as a whole was included. The Lebanese organization Hezbollah has not as yet been added to the EU list.⁶ On July 31, 2006, Xavier Solana, the EU Foreign Minister, claimed that there was not sufficient data to add Hezbollah to the list. In response to his statement, a letter signed by 210 members of the U.S. Congress urged the EU to add Hezbollah to its list.⁷ However, unanimity is needed for any addition. Recently, the EU has started entering the names of the individuals and entities on the lists into the Schengen Information System. Thus, those listed are refused entry into the Schengen countries as illegal aliens.⁸

This report examines three basic aspects related to the two lists:

- a) the criteria on the basis of which persons or organizations are designated to be added to the lists;
- b) de-listing procedures; and
- c) judicial recourse of aggrieved parties before the EU courts.

II. EU and UN Lists of Persons, Groups, or Entities⁹

Grounds for Inclusion on the EU List (the Autonomous Regime)

³ EU Council Secretariat, Press Release, Judgment by the Court of First Instance in the OMPI Case T-228/02, <http://www.consilium.europa.eu> (last visited June 11, 2007).

⁴ Common Position 2006/380/CFSP of May 29, 2006, Updating Common Position 2001/931/CFSP on the Application of Specific measures to Combat Terrorism and Repealing Common Position 2006/231/CFSP, 2006 OJ L144 25.

⁵ Council Decision of December 21, 2006, Implementing Article 2(3) of Regulation (EC) No 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, 2006 OJ L379 123.

⁶ During the crisis situation in southern Lebanon when Israel attacked Hezbollah in retaliation for the kidnapping of two Israeli soldiers, the then Finnish Presidency stated that the EU does not intend to place Hezbollah on its list for the time being, but could be added in the future. *EU Not to Place Hezbollah on Terrorist List, For Now*, EUBUSINESS, Aug. 1, 2006, available at <http://www.eubusiness.com/afp/060801183958.ypg0n0x4>.

⁷ *Adding Hezbollah to EU's Terror List Needs Unanimity*, EUROPEAN JEWISH PRESS, July 31, 2006, available at http://ejpress.org/article/in_dept/mideast_crisis/9966.

⁸ *Statewatch Comparative Analysis of the US, UK, UN and EU "Terrorist Lists,"* <http://www.statewatch.org/terrorlists/listsbground.html> (last visited June 11, 2007).

⁹ For an analysis of this issue, see Chia Lehnardt, *European Court Rules on UN and EU Terrorist Suspect Blacklists*, 11 ASIL INSIGHTS, Jan. 31, 2007, available at <http://www.asil.org/insights/2007/01/insights070131.html>.

Under Resolution 1373 (2001), it is incumbent upon the UN Member States to identify, in accordance to their own rules, the persons, groups, or entities whose funds are to be frozen.

In December 2001, the Council adopted two Common Positions: 1) 2001/930/CFSP on Combating Terrorism, and 2) 2001/931/CFSP¹⁰ on the Application of Specific Measures to Combat Terrorism.¹¹ Furthermore, in order to implement the common foreign and security policy of Common Position 931, the EU adopted a Regulation No. 2580/2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism. The Annex to the Regulation includes the authorities in the Member States, as designated by the Member States, competent to make a determination as to inclusions to the list. In brief, these measures call for:

- the freezing of funds and other financial assets or economic resources of those on the list;
- an assurance from the EU side that funds, financial assets, or financial or related services will not be made available either directly or indirectly for the benefit of such persons or entities;
- close police and judicial cooperation among the EU Members.

Definitions

The offense that qualifies individuals or organizations for inclusion on the EU list is the commitment, or attempt to commit, terrorist acts or the participation in or facilitation of the commission of terrorist acts.¹² The perpetrators thus can be either individuals or groups or entities owned or controlled directly or indirectly by such persons or persons, groups, and entities acting on behalf of or under the direction of such persons, groups, and entities. Funds derived from property either owned or controlled by such persons, groups, or entities are included.

Common Position 931 defines a terrorist act as an intentional act that may seriously damage a country or an international organization and that is committed with the purpose of performing certain offenses. These offenses are exhaustively enumerated in the Common Position and include, *inter alia*, intimidation of a population; compelling of a Government or an international organization to perform or abstain from performing certain acts; and destabilizing or destroying the fundamental political, constitution, economic, or social structures of a country or an international organization.

It also defines a terrorist group as a “structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts.” “Structured group” means “a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership, or a developed structure.”

Consequently, individuals, groups, or entities that meet the elements of the above definitions are included on the list. Additions are made on the basis of a decision taken by a competent authority in a Member State. The competent authority is usually a judicial authority. The decision to include a name on the list is made on the grounds of “precise information or material in the relevant file.” The decision could be relevant to or irrespective of initiation of investigation or prosecution, based on credible evidence or clues, for a terrorist act or an attempt to perpetrate, participate in, or facilitate such an act.¹³

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The Common Position provides that the names of individuals, groups, or entities should have sufficient information to allow proper identification of those listed and to facilitate the exoneration of those bearing the same or similar names.¹⁴

Council Regulation 2580/2001 authorized the Council of the EU to prepare a list of persons, groups, or entities whose funds, financial assets, and economic resources are subject to freezing. Those listed are prevented from moving, transferring, altering, using, or dealing with the funds in any way. Under specific authorization, exceptions may be made in order to cover basic human needs, such as payment for food, medicines, or a mortgage or for other reasons, including payment of taxes.

The list of persons, groups, or entities to which Regulation 2580/2001 applies was established by Council Decision 2001/927/EC.¹⁵ The initial list compiled in December 2001 included only ten names. Hamas-Izz a-Din al Qassem (the terrorist wing of Hamas) was included on this 2001 list.¹⁶

Criteria for Inclusion on the UN/EU List (the Consolidated List)

The Security Council Committee established in accordance with Resolution 1267/1999 Concerning AL-Qaida and the Taliban and Associated Individuals or Entities adopted its initial guidelines on preparing a list on November 7, 2002. The guidelines were amended on April 10, 2003, and further amended in November 29, 2006.¹⁷

This list includes individuals and entities designated as belonging to or associated with the Taliban, Osama Bin Laden, and the Al-Qaida organization, based on “relevant information” provided by the UN Members and regional organizations. The European Commission has the authority to supplement or amend this list on the grounds of pertinent notification or information from the Member States, the Security Council, or the Sanctions Committee.

Pursuant to the revised Guidelines, UN Members should provide a statement to support a proposed listing that contains as much data as possible regarding: a) specific findings which demonstrate the association or activities alleged; b) the nature of supporting evidence (e.g. law enforcement, intelligence, etc.); and c) a list of supporting evidence or documents that can be supplied.

III. De-Listing Procedures

Pursuant to the Common Position 931, the EU list is reviewed at least once every six months to ensure that those listed should continue being on the list.¹⁸ However, the Common Position does not provide an appeal mechanism. Those individuals or entities subject to freezing of assets and resources have the right to apply to the competent authority of a Member State to request specific authorization to unfreeze funds. Under EU rules, Common Positions cannot be subject to review by the EU courts, since they are adopted under the Common Foreign and Security Policy rules, which fall outside the courts’ jurisdiction. On the other hand, regulations and decisions are subject to review by the EU courts regarding their validity or interpretation.

¹⁴ *Id.*, para. 5.

¹⁵ 2001 OJ L 344 83.

¹⁶ Common Position, *supra* note 12, at art. 1.

¹⁷ Guidelines of the Committee for the Conduct of Its Work, Nov. 29, 2006, *available at* http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf.

¹⁸ Common Position, *supra* note 12, at para. 6.

The UN revised guidelines contain specific provisions on de-listing.¹⁹ Individuals or entities may petition the government of citizenship and/or residence to request review of the case and should provide grounds for the de-listing request. The petitioned government should review all pertinent information and then approach the governments that proposed the initial inclusion on the list to seek additional information. The Al-Qaida and Taliban Sanctions Committee will decide by consensus as to whether to de-list a particular individual or entity.²⁰

IV. Legal Recourse of Aggrieved Persons or Groups Included on the Two Lists

Both lists have been challenged before the European Courts. The EU autonomous regime has been unsuccessfully challenged many times. The OMPI case described below is the first case that successfully challenged the inclusion of a particular group on the list

Several individuals who are listed on the UN list initiated legal action before the European Court of First Instance. Following the Court's dismissal of their applications, a number of these judgments have been appealed before the European Court of Justice.

Organisation des Modjahedines du Peuple Iranien (OMPI) v Council of the European Union²¹

Under EU law, Community acts, that is regulations, directives, decisions, and other acts adopted by the Council or the Commission, must state the grounds on which they are based.²² The Community acts described above are subject to judicial review by the two EU courts: the Court of First instance and the European Court of Justice. Any natural or legal person has legal standing to institute proceedings against a decision addressed to that natural or legal person.²³

The OMPI case challenged the EU list and the legal instruments on the basis of which the list was compiled. The applicant, OMPI, was established in 1965 in Iran with the purpose of replacing the Shah's regime with a democracy. The applicant was included on the list prepared by the Council in May 2002, and since then it has been kept on the list.²⁴

¹⁹ Guidelines of the Committee for the Conduct of Its Work, *supra* note 17, at art. 8.

²⁰ *Id.*

²¹ Judgment of the Court of First Instance (Second Chamber), Dec. 12, 2006, *available at* <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&>.

²² Art. 253, Treaty Establishing the European Community [EC Treaty], Feb. 7, 1992, [1992] 1 C.M.L.R. 573.

²³ *Id.*, art. 230.

²⁴ In *Ayadi and Hassan*, the Court of First Instance on Dec. 12, 2006, annulled a Community decision made pursuant to Regulation No. 2580/2001. The latter authorized the Council to maintain a list of persons against whom the restrictions will apply. As stated above, the latter implemented SC Council Resolution 1373/2001. The Court reached similar conclusions to those in the OMPI case regarding the right to a fair hearing and the right to effective judicial protection.

OMPI brought an action before the Court of First Instance and requested that the Court annul the Common Positions and Decisions on the basis of which OMPI was added to the list and was further subjected to a number of restrictive measures.²⁵

The Court held that certain fundamental rights and safeguards, including the right to a fair hearing, the obligation to state reasons, and the right to effective judicial protection, are, as a matter of principle, fully applicable in the context of the adoption of a Community decision to freeze funds under Regulation No 2580/2001.²⁶

The Court also differentiated between this case and earlier cases, summarized below, that dealt with the freezing of funds of individuals and entities connected with Osama Bin Laden, Al-Qaeda, and the Taliban. It stated that the Security Council had allowed UN Members to designate those people and entities that should be included on the list and be subject to restrictive measures. Consequently, under Regulation 2580/2001, the Council of the EU acting unanimously has the power to add or delete people or groups to whom sanctions will apply. Thus, in the OMPI case, the process of identification involves the exercise of Community powers, and consequently, the Council of the EU is bound to abide by the fundamental rights provided in the Community legal order.

The Court noted that the decision of the Council to include OMPI on the list infringes upon the right to a fair hearing and the right to be informed of the specific information or material in the file. The Court stated that a decision of the Council to include individuals or organizations on the list must state the actual and specific information on the basis of which the Council made its decision. It also noted that the legislation does not explicitly provide for any procedure for notification of the evidence or for a hearing of the parties, either prior to adding their names in the list or when considering having their names removed. In this case, OMPI was not provided with an opportunity to present its arguments to the Council.²⁷

For all the above reasons, the Court held that the decision that ordered the freezing of OMPI's funds does not contain precise and sufficient information as to the reasons for its adoption, that OMPI was deprived of the right to a fair hearing, and that the Court cannot review the legality of the Council's decision. Therefore, the Court ordered the annulment of the Council's decision concerning OMPI. The Court did not make a determination as to the other references to the list. Therefore other individuals and organizations that are listed remain so. The Court also did not annul Regulation 2580/2001.

Yusuf and Kadi²⁸

The cases of Yusuf²⁹ and Kadi³⁰ contested their inclusion on the UN/EU list. Specifically, the applicants challenged the legality of Community Regulation No. 881/2002, implementing Security

²⁵ *Mujahidin Case Could Reshape EU Anti-Terror List*, EUOBSERVER, Dec. 12, 2006, available at <http://euobserver.com22/23083>.

²⁶ See Press Release No. 97/06 Judgment of the Court of First Instance in Case T-228/02 (Dec. 12, 2006), available at <http://www.curia.europa.eu/en/actu/communiques/CP06/aff/CP060097en.pdf>.

²⁷ *Id.*

²⁸ *Supra* note 3, at 3.

²⁹ Yusuf and Al Barakaat International Foundation v Council and Commission, OJ C 281, at 17, Nov. 12, 2005, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-306/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

Council resolutions. The latter established the sanctions regime against those persons or entities associated with Osama bin Laden, the Al-Qaida network, and the Taliban. The applicants claimed violations to their rights to property, to a fair hearing, and to an effective judicial remedy.

In these cases, the Court considered whether it was precluded from reviewing the legality of Regulation No. 881/2002, since by doing so the Court would indirectly review the legality of the Security Council resolutions. The Court examined the relationship between Community law and Security Council resolutions and held that resolutions override Community law, including provisions on fundamental rights. The Court concluded that the obligations arising out of the UN Charter and in particular out of articles 25, 48(2) and 103 and article 27 of the Vienna Convention on the Law of Treaties have precedence over any other obligations, including those arising under Community law.³¹ Thus, the Court went on to state that Security Council resolutions are binding upon the Community institutions, including the Court. The Court concluded that it did not have the authority to review the legality of resolutions implemented by EU legislation.

The Court held that regarding to the right to a fair hearing, the governments could exercise diplomatic protection through the de-listing procedure and that such an action was not improper. It also noted the limited scope of its own review and concurred with the applicants that they do not have access to other judicial recourse. Nevertheless, such lack of court access is not contrary to *jus cogens*, because it is based on the grounds of the particular nature enjoyed by the Security Council resolutions and their legitimate objectives. The Court also found that the applicants were afforded sufficient rights under the de-listing procedure.

V. Recent Developments

On November 29, 2006, the UN Sanctions Committee amended its listing guidelines and asked UN Members to include more detailed data as to the grounds for individuals or entities to be included on the list and to provide for a review mechanism for those listed for more than four years without update.³²

In December 2005, the Council of the EU adopted Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy. Moreover, on June 14, 2006, in light of current EU law and court judgments, a document on EU Best Practices for the Effective Implementation of Restrictive Measures was adopted. This document contains detailed information regarding the procedure to be followed by Member States in identifying designated individuals or entities, as well as de-listing criteria.³³

³⁰ Kadi v Council and Commission, Judgment (OJ) OJ C 281, at 17, Nov. 12, 2005, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-315/01&datefs=&datefe=&nomusuel=&domaine=&mots= &resmax=100>.

³¹ Art. 307 of the EC Treaty provides that application of the treaty does not affect the duty of EU Members to abide by their obligations under agreements concluded before the establishment of the Community of the accession thereof, including those obligations arising from the UN Charter.

³² Guidelines of the Committee for the Conduct of Its Work, *supra* note 17.

³³ EU Best Practices for the Effective Implementation of Restrictive Measures, June 14, 2006, available at <http://register.consilium.europa.eu/pdf/en/06/st10/st10533.en06.pdf>

Recently, the Council announced that it intends to provide a statement of reasons to each person or entity subject to asset freezing when it is feasible and to also establish a more transparent procedure for reconsideration of cases.³⁴

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³⁴ *Successful Challenge to EU “Terrorist” List by PMOI*, STATEWATCH NEWS ONLINE, June 7, 2007, available at <http://www.statewatch.org/news/2007/jan/04ecj-pmoi.htm>.