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THE PROPORTIONALITY PRINCIPLE WITHIN THE CONTEXT OF THE FIGHT AGAINST FINANCING TERRORISM¹

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In the fight against financing terrorism, the EU has adopted a wide range of various measures. However, their particular necessity and effectiveness have not often been questioned. Generally speaking, the same goes for their proportionality which, given the effect such measures could have on civil liberties, should be at the heart of any proposed/adopted measure. In this context, the example of asset freezing of those listed on the EU terrorist lists is particularly relevant.

Very recently, the UK House of Lords concluded in a report on the effectiveness of economic sanctions (including against listed terrorists persons and entities) that:

“The evidence suggests that the amounts of money frozen are so small, both in absolute terms and relative to the probable resources of the targets, that it is doubtful whether asset freezes are effective as a means of inhibiting or changing the behaviour of those who are targeted”⁴.

Writing on the new European anti-money laundering Directive⁵ and more particularly on the lists of persons/entities suspected of terrorist activities, a bank Compliance Officer emphasised that very rarely are

¹This article is only a very short summary of a more comprehensive article under preparation which aims in a first part to address the notion of proportionality as developed by the Court of Justice of the European Communities within the framework of the Community principle of free movement of capital. In a second part, the basic principles which the European Court of Human Rights has developed with regard to the proportionality within the context of Article 8 ECHR and Article 1 of Protocol n° 1 will be recalled. In a third and final part, these principles as developed both by the Luxembourg and Strasbourg Courts will be applied to Council Regulation (EC) n° 2580/2001 in order to try to determine to what extent it respects proportionality.

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³ The views expressed herein are those of the author and may not be regarded as stating an official view of the institutions he represents.

⁴ House of Lords, Select Committee on Economic Affairs, 2nd Report of Session 2006-07, “*The Impact of Economic Sanctions*”, vol. I, May 2007, para. 68 and 137, pp. 26 and 43, <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeconaf/96/96i.pdf>

⁵ Directive n° 2005/60/EC of the European Parliament and the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, *O.J.* n° L 309 25 November 2005, p. 15, http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_309/l_30920051125en00150036.pdf

terrorists identified on the basis of their financial transactions as in most cases terrorists will of course make sure not to appear in these financial transactions⁶.

These considerations are very relevant as far as the issue of the effectiveness of funds freezing operations, as well as the listing procedures of persons and entities, within the general context of the fight against financing terrorism are concerned. Indeed, the effectiveness of restrictive measures is the first part of the three-part "*proportionality test*" the Court of Justice of the European Communities has developed in its case law⁷. Applying this proportionality test with regard to a Community Regulation dealing with assets freezing of listed persons and entities suspected of terrorist activities appears to be capital for several reasons: firstly, this is an issue which touches directly upon civil liberties; secondly, the consequences of listing procedures are very serious, both in terms of personal reputation but also in terms of financial daily life.

Against this background, it is necessary to introduce very briefly Council Regulation (EC) n° 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism⁸. In compliance with Articles 60, 301 and 308 of the Treaty establishing the European Community, this Regulation intends to implement at Community level measures adopted within the framework of Foreign and Security Policy. Three sets of measures are specifically organized:

1. measures prohibiting funds and other financial assets or economic resources from being made available for the benefit of suspected terrorist persons, and prohibiting financial or other related services from being provided for the benefit of such persons;
2. measures ensuring the co-operation of the private financial sector;
3. measures organizing the collaboration between the Commission, the Council and the Member States.

⁶ "Si ces systèmes de détection engendrent quotidiennement de nombreuses alertes, très rares sont celles qui ont débouché sur l'identification d'un véritable terroriste. L'investissement en matériel et en temps est gigantesque par rapport aux résultats obtenus. Il est évident, en effet, qu'une personne se sachant reprise sur des listes internationales de terroristes veillera à ne pas apparaître dans des transactions financières et que ce n'est qu'en cas d'imprudence qu'elle risque de se faire identifier. Quant aux associations, elles ont pour la plupart été dissoutes, pour laisser la place à d'autres, plus discrètes." (Christian BERDEN, "Les règles européennes « anti-blanchiment » et le monde bancaire", *JTDE*, 2007, p. 79).

⁷ Grainne de BURCA, "The principle of Proportionality and its Application in EC Law", in *Yearbook of European Law*, 1993, Oxford, Clarendon Press, 1994, p. 113.

⁸ *O.J.* n° L 344, 28.12.2001, p. 70–75, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_344/l_34420011228en00700075.pdf.

Besides these measures, the Council Regulation (EC) n° 2580/2001 organizes a listing procedure of the persons against whom the freezing measures have to be taken. The Council is the competent authority to establish and modify such a list. For doing so, the Council may take into consideration:

“precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds”⁹.

Moreover, further to Council Regulation (EC) n° 2580/2001, any person who is listed in compliance with its provisions is to be deprived of all their assets. In a recent case, the European Court of Justice commented on the serious consequences for freedom of financial transactions and reputation that restrictive measures under Council Regulation (EC) n° 2580/2001 could have¹⁰. One could speak of “*mort civile*” coming from within the framework of a purely administrative procedure.

The application of this Council Regulation has been already challenged before the European Court of Justice of Luxemburg. Within this context, various violations of fundamental rights have been alleged. Among these violations, the Court of First Instance has annulled a decision implementing Article 2.3 of Council Regulation (EC) n° 2580/2001 after having noticed that the applicant did not have the right to a fair hearing¹¹. Nevertheless, to the best of our knowledge, the proportionality of the measures in dispute here has still not been examined by the Court.

⁹ See Article 1.4 of Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (O.J. n° L 344, 28.12.2001, p. 94; http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_344/l_34420011228en00930096.pdf).

¹⁰ E.C.J., 18 January 2007, *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK), Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v Council of the European Union*, C-229/05, §110-111, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-229%2F05&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100>.

¹¹ E.C.F.I., 12 December 2006, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union*, T-228/02, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=T-228%2F02&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100>.

Being considered as referring to a “relationship between means and end”¹², the proportionality principle is a very sensitive and complex one since it could mean two different things. Thus, it could imply “ensuring that administrative or legislative measures do not have an excessively restrictive or adverse effect on legally protected rights and interests”¹³. Alternatively it could mean “conducting a general evaluation of the cost-effectiveness, efficacy, or relative importance of the aim of a particular measure.”¹⁴. In order to apprehend properly this principle within the context of the fight against financing terrorism, it is helpful to briefly recall the case-law the European Court of Justice has developed with regard to the free movement of capital and more particularly its case-law on restrictions to free movement of capital imposed under public security justification.

The European Court of Justice, in case C-54/99, ruled that:

“measures which restrict the free movement of capital may be justified on public-policy and public-security grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures”¹⁵.

In other words, according to the ECJ case-law, there are two conditions to be respected in order to conclude that restrictions to free movement of capital are legal:

1. these restrictions are necessary for the protection of guaranteed interests;
2. no other less restrictive measures are able to reach this objective.

Given the fact that the amount of money frozen under Council Regulation (EC) n°2580/2001 seems to be very low, and that there are a lot of mistakes

¹² Grainne de BURCA, *op. cit.*, p. 107.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ E.C.J., 14 March 2000, *Eglise de scientologie and Scientologie International v. France*, C-54/99, §17, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocno rec=alldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-54%2F99&ddatefs=&mdatefs=&ydatefs=&d datefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100>



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made with regard to the exact identification of listed persons¹⁶, one is necessary seriously consider the extent to which this Regulation is in compliance with ECJ case-law.

The complexity of the issue briefly outlined here requires a more in-depth and extensive study which the author is currently undertaking.

¹⁶ According to a recent audit report realized by the American Terrorist Screening Center (TSC) which is a multi-agency organization administered by the Federal Bureau of Investigation (FBI): "(...) the TSC's redress reviews have identified that the database contains records for individuals that should not be watchlisted and that some watchlist records are inaccurate or incomplete.", Audit Report n° 07-41 of September 2007 of U.S. Department of Justice – Office of the Inspector general – Audit Division, p. 4.