Case Notes

Ten Long Years – The Court Annuls Measures Freezing Stichting Al-Aqsa's Assets

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Case T-348/07 Stichting Al-Aqsa v. Council of the European Union[1]

A national component is a necessary basis for a measure to freeze assets and once the Netherlands repealed the Sanctieregeling 2003 which formed the basis for Stichting Al Aqsa's asset freeze at the national level, the Community basis for the asset freeze also seized to exist (author's headnote).

I. Facts

In response to the terrorist attacks of 11 September 2001, the United Nations Security Council on 28 September 2001 adopted Resolution 1373 (2001).[2] This Resolution lays down strategies to combat terrorism. One of the core strategies laid down in Resolution 1373 is combating the financing of terrorism through the freezing of funds of terrorists and terrorist organizations. Paragraph 1(c) of Resolution 1373 provides that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities. Resolution 1373 was adopted unanimously by the Security Council under Chapter VII of the United Nations Charter and therefore requires implementation by the member states. The Council of the European Union as a response to Resolution 1373 adopted, in accordance with its Member States' obligations under the Charter of the United Nations, on 27 December 2001, under Articles 15 EU and 34 EU, Common Position 2001/930/CFSP on combating terrorism and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism.

Stichting Al-Aqsa (the Applicant) is a foundation governed by Dutch law, with its stated objective the social welfare and improvement of the living conditions of Palestinians living in the Netherlands and the provision of assistance to Palestinians living in the territories occupied by Israel. On 3 April 2003 the Dutch Minister of Foreign Affairs together with the Minister of Finances adopted the Sanctieregeling Terrorisme 2003, which ordered the freezing of the funds and financial assets of the Applicant.[3] The Sanctieregeling Terrorisme 2003 exclusively targeted the Applicant. The Applicant applied for an interim order suspending the measure before the District Court of The Hague. This Court found that the order against the Applicant was based predominantly upon secret information provided to the Minister of Foreign Affairs by the AIVD (the General Intelligence and Security Service). The Court in a first interim order ruled that it should be granted access to this material. The Court acknowledged that this procedure was an exception from the normal course of action under Dutch law, where both parties and the Court would normally have access to all the evidence in a case. However, in this case the Court attached importance to the fact that such a review of the evi-

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1 Judgment of September 9, 2010.

2 SC Res. 1373, 28 September 2001.

3 Sanctieregeling Terrorisme 2003, Staatscourant 7 April 2003, nr. 68/page 11.

dence is not unusual in Dutch administrative law and the fact that both parties had explicitly agreed to this course of action. After the Court was enabled by the AIVD to review the information that formed the basis for the order against Applicant, the District Court in a definitive order on 3 June 2003 dismissed the proceedings brought by Applicant. The Court held that on the basis of its review of the evidence the findings of the AIVD provided adequate grounds to support the latter's conclusion that the funds collected by the applicant in the Netherlands had been used for the benefit of organizations linked to the Palestinian Islamist movement Hamas, and furthermore that several of those organizations linked to Hamas provided funds enabling the perpetration or facilitation of terrorist acts by Hamas. The Sanctieregeling Terrorisme 2003, which ordered the freezing of the Applicant's funds, was subsequently repealed on 3 August 2003 as a result of the placement of the Applicant on the EU list of persons and organizations whose funds are frozen.

In Case T-327/03 *Stichting Al-Aqsa v. Council of the European Union* [2007], the Court of First Instance annulled Council Decision 2006/379/EC of 29 May 2006 insofar as it concerned the Applicant, essentially on the ground that it did not contain an adequate statement of reasons. In a letter dated 23 April 2007, the Council of the European Union informed the Applicant that, in its view, the reasons for including it originally in the list annexed to Council Regulation (EC) No 2580/2001 of 27 December 2001 were still valid, and that it therefore intended to continue to include the applicant on that list. The Council enclosed a statement of reasons with this letter to clarify its intention to keep the Applicant on the list. In this statement, the Council noted that Applicants makes funds available to certain organizations linked to Hamas. These organizations make funds available for the commission or facilitation of terrorist acts. The Council furthermore points out that, based on the Sanctieregeling Terrorisme 2003 and the interim order of the District Court, the decision to freeze the assets of Applicant in its view was taken by a competent authority. For these reasons, the Applicant was kept on the list.

On 28 June 2007 the Council adopted an updated list continuing to include the Applicant. The Applicant brought an action for annulment of this decision. The list has been updated since this decision a number of times maintaining the Applicant on the list for all of the subsequent updates. Applicant has adapted its action for annulment a number of times to reflect the amendments to the list. The Applicant has however not adapted its claim for Implementing Regulation No. 1285/2009.

II. Judgment

The Court refers to Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR II-4665 when setting out the parameters of placing a person, a group of persons or an entity on the list of those whose assets need to be frozen. In accordance with Article 2(3) of Regulation No 2580/2001, the Council unanimously establishes, reviews, and amends the list. The list must be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, whether it concerns the instigation of investigations or prosecution for a terrorist act, or an attempt to perpetrate, participate in or facilitate such an act, based on serious and credible evidence, or whether it concerns conviction for such deeds. A competent authority means a judicial authority or equivalent thereto. The list must be reviewed regularly to review whether the grounds for placement on the list continue to exist.

The Court, while referring to earlier case law, states that there needs to exist a national component next to the European component in the procedure to freeze assets.[4] There necessarily have to be two stages to the process. A first stage, in which a competent national authority takes measures against a person, group of persons or entity on the basis of the definition mentioned in Article 1(4) of Common Position 2001/931, based on serious and credible evidence. Then, on the basis of this national decision, the Council, acting by unanimity, must decide whether to include the person, group or entity concerned on the list. Next, the Council must regularly (at least once every six months) review the list and decide whether the persons or organization concerned should remain on the list. In this procedure, it is essential that the Council checks whether there is a decision of a com-

4 Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR II-4665 ('OMPI I') para. 117; Case T-284/08 *People's Mojahedin Organization of Iran v. Council* [2008] ECR II-3487 ('PMOI II') para. 51, and Case T-341/07 *Sison v. Council* [2009] ECR II-0000 ('Sison II') para. 93.

petent national authority, since this decision forms the basis for the initial decision by the Council to freeze funds and subsequent reviews of that decision. The relation between the Council and the competent national authority is based upon the duty to cooperate in good faith and the Council therefore extends a certain latitude to the national authorities to asses the existence of credible and serious evidence.

The Court, while taking this latitude afforded by the Council into account, must establish whether the evidence relied on is factually accurate, reliable and consistent. The Court 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. The Court finds that both the Sanctieregeling Terrorisme 2003 and the interim order by the District Court of The Hague have to be taken into account as underlying reasons for placing Applicant on the list. The Court finds that the Sanctieregeling Terrorisme 2003 and the interim order qualify as decisions taken by a competent authority within the meaning of Article 1(4) of Common Position 2001/931.

In Joined Cases T-37/07 and T-323/07 *El Morabit v. Council*, paragraph 53 the Court held that merely bringing an appeal against a conviction at the first instance does not affect the Council's right to include a convicted person or entity in the list. However, once the appeals process is concluded the Council is obligated to verify whether there are still valid grounds to keep a person or entity on the list. In that case, the Council removed a person from the list based on his acquittal before the national courts. Similarly, in *Sisson II* (paragraph 116), the Court held that where there is an abandonment of prosecution or an acquittal at the national level, the Council is under an obligation to take these developments into consideration. The same applies to an administrative procedure to freeze funds at the national level, where this decision is withdrawn by the body which ordered it or annulled by a judicial body.

In the case at hand, the Sanctieregeling Terrorisme 2003 was repealed immediately following the initial Community measure to freeze the Applicants funds. It follows that, since the decision to freeze the Applicant's funds was based on the Sanctieregeling Terrorisme 2003 in conjunction with the interim order, the legal basis at the Community level for the decision to freeze Applicant's funds has disappeared. The interim order cannot serve as an independent basis for the inclusion of the Applicant on the list, since the legal effects of the interim order are dependent on the existence of the Sanctieregeling Terrorisme 2003. The Court points to the general scheme of Regulation No 2580/2001, which makes the adoption of a Community fund-freezing measure conditional upon national anti- terrorism proceedings against the person or entity concerned. The Council should have concluded that once the Sanctieregeling Terrorisme 2003 was repealed nationally, there was also no longer a basis in the Community to maintain the Applicant on the list. The Court annulled the contested decision and all subsequent decisions that have kept the Applicant on the list.

III. Comment

As a consequence of the terrorist attacks of 11 September 2001 terrorism has come to the forefront of the attention of legislators. An important component of the war on terrorism has been the attempt to influence the money streams that enable terrorists to carry out their attacks. Every terrorist attack requires money, and cutting off this money stream would seriously hamper terrorist organizations and could possibly prevent terrorist attacks. One of the main problems is that it is not always clear who funds these terrorist organizations. Money innocently donated towards a good cause can end up in the wrong hands and could be used to fund terrorist organizations or terrorist attacks. This case deals with one of such organizations. In the words of Stichting Al-Aqsa, they are a charity helping Palestinians in the Netherlands and in the occupied territories in Israel. According to the Dutch intelligence services, however, Stichting Al-Aqsa is an important fundraiser for Hamas.

Security Council Resolution 1373 (2001), hastily implemented in the direct aftermath of the terrorist attacks of 11 September 2001, calls upon all states to freeze the funds and assets of terrorists and terrorist organizations. Resolution 1373 establishes a Sanctions Committee, which was given the task of monitoring the implementation of the resolution. Resolution 1373 was adopted under Chapter VII of the Charter of the United Nations and is therefore binding upon the members of the United Nations. Chapter VII of the Charter of the United Nations deals with the Security Council's powers to maintain international peace and security. However, it has been rare for the Security Council to use these

powers in a legislative capacity.[5] Previous use of these powers has mostly been to deal with specific conflicts or situations.[6] Resolution 1373 is therefore unique, in that it prescribes binding rules of international law and even creates a mechanism to monitor the implementation of these rules.[7]

In response to Resolution 1373 and the obligations created thereby for its Member States, the European Union took action. In the European Union the various Security Council Resolutions on combatting terrorist financing has led to a complicated and dense network of legislation. There are two main lists with terrorists and terrorist organizations whose funds need to be frozen, one list that incorporates the UN Sanctions regime compiled by the Sanctions Committee and an autonomous European Union list prepared by the Council of the EU acting under authorization arising from EU legal instruments. To effectuate the sanction regimes contained in these lists, there are a number of Common Positions taken by the Council of the EU, EC Regulations and decisions by national authorities. This density of legislation has led to a lot of uncertainty by the national authorities enforcing the fund freezing mechanisms and by the persons or organizations whose funds have been frozen. As soon as legislation takes effect, it is challenged before national courts and the Community courts. This has led to more clarity and improved procedures for the freezing of funds of terrorists or terrorist organizations. In previous cases, the Court has held that certain fundamental rights and safeguards of the persons and organizations concerned, including the right to a fair hearing, the obligation to state reasons for the freezing of funds, and the right to effective judicial protection, are fully applicable in the context of the adoption of a Community decision to freeze funds.

In *Al-Aqsa*, the Court made clear that Community measures to freeze funds of terrorists or suspected terrorists cannot exist in a vacuum. Community measures must be linked to national measures against these same persons or organizations. The Dutch authorities erred in repealing the Sanctieregeling 2003 after the Community measures had taken effect. They immediately repealed the Sanctieregeling 2003 after the Community measures against Stichting Al-Aqsa had taken effect. The Dutch government explained that the Sanctieregeling 2003 was repealed to prevent an overlap of national measures with Community measures and that in the opinion of the Dutch government the interim order of the District Court of The Hague was a sufficient basis for the measure against Stichting Al-Aqsa. However, the Court in this case made clear that such a course of action is not in compliance with the listing procedure set out in Regulation No 2580/2001. Any Community measure to freeze funds necessarily must be linked to a national procedure against the terrorist or terrorist organization. The decision of the Court however does not mean that Stichting Al-Aqsa will regain control over its assets immediately or even in the near future. The Dutch government on 18 April 2011 took a new measure against Stichting Al Aqsa.[8]

Resolution 1373 has created a lot of uncertainty for the European Union, its Member States and the persons and organizations whose funds have been frozen. It seems that ten years after the adoption of Resolution 1373, and numerous laws and subsequent litigation both domestically and at the Community level, there is finally a more definitive procedure for the placement of persons and organizations on fund freezing lists. Ten long years of uncertainty. This is probably not what the Security Council had in mind when they adopted the Resolution in the first place.

5 Paul C. Szasz, "The Security Council Starts Legislating", 96(4) *The American Journal of International Law* (2002), pp. 901 *et sqq.*, at p. 901.

6 *Ibid.*, at p. 902

7 *Ibid.*, at p. 902

8 Staatscourant 2011, 7209, 22 April 2011.