

# Case T-228/02

## Organisation des Modjahedines du peuple d'Iran

v

## Council of the European Union

(Common foreign and security policy — Restrictive measures directed against certain persons and entities with a view to combating terrorism — Freezing of funds — Action for annulment — Rights of the defence — Statement of reasons — Right to effective judicial protection — Action for damages)

Judgment of the Court of First Instance (Second Chamber), 12 December 2006 II - 4674

### Summary of the Judgment

- 1. Procedure — Decision replacing the contested decision during the proceedings*
- 2. Actions for annulment — Jurisdiction of the Community judicature — Action brought against a common position adopted pursuant to Titles V and VI of the Treaty on European Union*  
*(Art. 230 EC; Arts 15 EU, 34 EU, 35 EU and 46 EU)*

3. *Community law — Principles — Rights of the defence — Decision to freeze funds directed against certain persons and entities suspected of terrorist activities*  
(Art. 249 EC; Council Regulation No 2580/2001, Art. 2(3); Council Decision 2005/930)
4. *Community law — Principles — Rights of the defence — Resolution of the United Nations Security Council requiring restrictive measures to be taken against unspecified persons and entities suspected of terrorist activities — Implementation by the Community in the exercise of own powers*  
(Arts 60 EC, 301 EC and 308 EC; Council Regulation No 2580/2001)
5. *Community law — Principles — Rights of the defence — Decision to freeze funds directed against certain persons and entities suspected of terrorist activities*  
(Common Position 2001/931, Art. 1(4); Council Regulation No 2580/2001, Art. 2(3))
6. *European Union — Common foreign and security policy — Police and judicial cooperation in criminal matters — Obligation of sincere cooperation between the Member States and the Community institutions*  
(Art. 10 EC; Common Position 2001/931, Art. 1(4); Council Regulation No 2580/2001, Art. 2(3))
7. *Community law — Principles — Rights of the defence — Decision to freeze funds directed against certain persons and entities suspected of terrorist activities*  
(Common Position 2001/931, Art. 1(4) and (6))
8. *Acts of the institutions — Statement of reasons — Obligation — Scope*  
(Art. 253 EC; Council Regulation No 2580/2001)
9. *Acts of the institutions — Statement of reasons — Obligation — Scope*  
(Art. 253 EC; Common Position 2001/931, Art. 1(4) and (6); Council Regulation No 2580/2001)
10. *European Communities — Judicial review of the legality of the acts of the institutions*  
(Art. 230, second para., EC; Common Position 2001/931, Art. 1(4) and (6); Council Regulation No 2580/2001, Art. 2(3))

1. Where a decision is, during the proceedings, replaced by another decision with the same subject-matter, this is to be considered a new factor allowing the applicant to adapt its claims and pleas in law. It would not be in the interests of the due administration of justice and the

requirements of procedural economy to oblige the applicant to make a fresh application to the Court. Moreover, it would be inequitable if the institution in question were able, in order to counter criticisms of a decision contained in an application to the Community judica-

ture, to amend the contested decision or to substitute another for it and to rely in the proceedings on such an amendment or substitution in order to deprive the other party of the opportunity of extending his original pleadings to the later decision or of submitting supplementary pleadings directed against that decision. This also holds true for the scenario in which a regulation of direct and individual concern to an individual is replaced, during the procedure, by a regulation having the same subject-matter.

(see paras 28, 29)

2. The Court of First Instance has jurisdiction to hear an action for annulment directed against a Common Position adopted on the basis of Articles 15 EU under Title V relating to the Common foreign and security policy (CFSP), and 34 EU under Title VI relating to police and judicial cooperation in criminal matters (JHA), only strictly to the extent that, in support of such an action, the applicant alleges an infringement of the Community's competences.

Neither Title V of the EU Treaty relating to the CFSP nor Title VI of the EU

Treaty relating to JHA make any provision for actions for annulment of common positions before the Community Courts.

Under the EU Treaty, in the version resulting from the Treaty of Amsterdam, the powers of the Court of Justice are listed exhaustively in Article 46 EU. That article does not confer any competence on the Court in relation to the provisions of Title V of the EU Treaty and, under Title VI of the EU Treaty, it follows from Articles 35 EU and 46 EU that legal remedies seeking a ruling as to validity or annulment are available only as against framework decisions, decisions and the measures implementing conventions provided for by Article 34(2)(b), (c) and (d) EU, with the exception of the common positions provided for in Article 34(2)(a) EU.

(see paras 46-49, 52, 56)

3. The safeguard relating to observance of the actual right to a fair hearing, in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, cannot be denied to the

parties concerned solely on the ground that neither the European Convention for the Protection of Human Rights nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of a legislative nature.

and, in this case, the Community, through which its Member States have decided to act — to identify specifically the persons, groups and entities whose funds are to be frozen pursuant to that resolution, in accordance with the rules in their own legal order.

Although Decision 2005/930 implementing Article 2(3) of Regulation No 2580/2001 has the same general scope as that regulation and, like that regulation, is directly applicable in all Member States and thus, despite its title, is an integral part of that regulation for the purposes of Article 249 EC, it is not, however, of an exclusively legislative nature. Whilst being of general application, it is of direct and individual concern to the persons to whom it refers by name as having to be included in the list of persons, groups and entities whose funds are to be frozen pursuant to that regulation.

That resolution does not specify individually the persons, groups and entities who are to be the subjects of those measures; nor did it establish specific legal rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the States in respect of them.

(see paras 95, 97, 98)

The Community, moreover, does not act under powers circumscribed by the will of the Union or that of its Member States when the Council adopts economic sanctions measures on the basis of Articles 60 EC, 301 EC and 308 EC.

4. In the context of Security Council Resolution 1373 (2001), it is for the Member States of the United Nations —

Since the identification of the persons, groups and entities contemplated in

Security Council Resolution 1373 (2001), and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community's own powers, entailing a discretionary appreciation by the Community, the Community institutions concerned, in this case the Council, are in principle bound to observe the right to a fair hearing of the parties concerned when they act with a view to giving effect to that resolution. It follows that the safeguarding of the right to a fair hearing is, as a matter of principle, fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

(see paras 101, 102, 106-108)

5. In the context of the adoption of a decision to freeze funds under Article 2(3) of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, the right to a fair hearing only falls to be exercised with regard to the elements of fact and law which are liable to determine the application of the measure in question to the person concerned, in accordance with those rules.

The observance of those rights in that context is however liable to arise at those two levels.

The right of the party concerned to a fair hearing must be effectively safeguarded in the first place as part of the national procedure which led to the adoption, by the competent national authority, of the decision referred to in Article 1(4) of Common Position 2001/931 on the application of specific measures to combat terrorism. It is essentially in that national context that the party concerned must be placed in a position in which he can effectively make known his view of the matters on which the decision is based, subject to possible restrictions on the right to a fair hearing which are legally justified in national law, particularly on grounds of public policy, public security or the maintenance of international relations.

Next, the right of the party concerned to a fair hearing must be effectively safeguarded in the Community procedure culminating in the adoption, by the Council, of the decision to include or maintain it on the disputed list, in accordance with Article 2(3) of Regulation No 2580/2001. As a rule, in that area, the party concerned need only be afforded the opportunity effectively to make known his views on the legal conditions of application of the Community measure in question, namely, where it is an initial decision to freeze

funds, whether there is specific information or material in the file which shows that a decision meeting the definition laid down in Article 1(4) of Common Position 2001/931 was taken in respect of him by a competent national authority and, where it is a subsequent decision to freeze funds, the justification for maintaining the party concerned in the disputed list.

(see paras 114, 115, 118-120)

6. Under Article 10 EC, relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith. That principle is of general application and is especially binding in the area of police and judicial cooperation in criminal matters governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions.

In a case of application of Article 1(4) of Common Position 2001/931 on the application of specific measures to combat terrorism and Article 2(3) of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view

to combating terrorism, provisions which introduce a specific form of cooperation between the Council and the Member States in the context of combating terrorism, that principle entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are 'serious and credible evidence or clues' on which its decision is based and in respect of recognition of potential restrictions on access to that evidence or those clues, legally justified under national law on grounds of overriding public policy, public security or the maintenance of international relations.

However, these considerations are valid only in so far as the evidence or clues in question were in fact assessed by the competent national authority. If, on the other hand, in the course of the procedure before it, the Council bases its initial decision or a subsequent decision to freeze funds on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority, that information must be

considered as newly-adduced evidence which must, in principle, be the subject of notification and a hearing at Community level, not having already been so at national level.

(see paras 123-125)

7. The general principle of observance of the right to a fair hearing requires, unless precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations, that the evidence adduced against the party concerned should be notified to it, in so far as possible, either concomitantly with or as soon as possible after the adoption of an initial decision to freeze funds. Subject to the same reservations, any subsequent decision to freeze funds must, in principle, be preceded by notification of any new evidence adduced and a hearing. However, observance of the right to a fair hearing does not require either that the evidence adduced against the party concerned be notified to it before the adoption of an initial measure to freeze funds, or that that party automatically be heard after the event in such a context.

In the case of an initial decision to freeze funds, the notification of the evidence requires, in principle, first, that the party

concerned be informed by the Council of the specific information or material in the file which indicates that a decision meeting the definition given in Article 1(4) of Common Position 2001/931 on the application of specific measures to combat terrorism has been taken in respect of it by a competent authority of a Member State, and also, where applicable, any new material resulting from information or evidence communicated to the Council by representatives of the Member States without it having been assessed by the competent national authority and, second, that it must be placed in a position in which it can effectively make known its view on the information or material in the file.

In the case of a subsequent decision to freeze funds, observance of the right to a fair hearing similarly requires, first, that the party concerned be informed of the information or material in the file which, in the view of the Council, justifies maintaining it in the disputed lists, and also, where applicable, of any new material referred to above and, second, that it must be afforded the opportunity effectively to make known its view on the matter.

(see paras 125, 126, 137)

8. The safeguard relating to the obligation to state reasons provided for by Article 253 EC is fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

municated to them during the administrative procedure.

(see paras 109, 146, 148)

In principle, the statement of reasons for a measure to freeze funds under Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism must refer not only to the statutory conditions of application of that regulation, but also to the reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned.

9. Unless precluded by overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, and subject also to the possibility that only the operative part of the decision and a general statement of reasons may be contained in the version of the decision to freeze funds published in the Official Journal, the statement of reasons for an initial decision to freeze funds referred to in Article 1(4) of Common Position 2001/931 on the application of specific measures to combat terrorism must at least make actual and specific reference to precise information or material in the relevant file which indicates that that decision has been taken by a competent authority of a Member State in respect of the party concerned. The statement of reasons for such a decision must also state the reasons why the Council considers, in the exercise of its discretion, that such a measure must be taken in respect of the party concerned. Moreover, the statement of reasons for a subsequent decision to freeze funds as referred to in Article 1(6) of that common position must, subject to the same reservations, state the actual and specific reasons why the Council considers, following re-

However, the overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds, just as they may preclude the evidence adduced against those parties from being com-



examination, that the freezing of the funds of the party concerned remains justified, where applicable on the basis of new information or evidence.

(see paras 116, 125, 126, 147, 151)

10. The judicial review of the lawfulness of a decision to freeze funds taken pursuant to Article 2(3) of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism is that provided for in the second paragraph of Article 230 EC, under which the Community Courts have jurisdiction in actions for annulment brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application or misuse of powers.

As part of that review, and having regard to the grounds for annulment put forward by the party concerned or raised by the Court of its own motion, it is for the Court to ensure, *inter alia*, that the legal conditions for applying Regulation No 2580/2001 to a particular scenario, as laid down in Article 2(3) of that regulation and, by reference, either Article 1(4) or Article 1(6) of Common Position 2001/931 on the application of

specific measures to combat terrorism, depending on whether it is an initial decision or a subsequent decision to freeze funds, are fulfilled. That implies that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded.

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

(see paras 153-155)