



Reports of Cases

Joined Cases T-316/14 RENV and T-148/19

Kurdistan Workers' Party (PKK)

v

Council of the European Union

Judgment of the General Court (Fourth Chamber, Extended Composition), 30 November 2022

(Common foreign and security policy – Restrictive measures against the PKK with a view to combating terrorism – Freezing of funds – Common Position 2001/931/CFSP – Applicability to situations of armed conflict – Terrorist group – Factual basis of the fund-freezing decisions – Decision taken by a competent authority – Authority of a third State – Review – Proportionality – Obligation to state reasons – Rights of the defence – Right to effective judicial protection – Modification of the application)

1. *Judicial proceedings – Decision or regulation replacing the contested measure in the course of proceedings – New factor – Extension of the initial pleadings – Condition – Measure that is the subject of the initial application for annulment – Concept*
(Rules of Procedure of the General Court, Art. 86(1); Council Decisions (CFSP) 2015/521, (CFSP) 2015/1334, (CFSP) 2017/1426 and (CFSP) 2020/1132; Council Regulations 2019/1337, 2020/19 and 2020/1128)

(see paragraphs 21, 22, 24, 25)

2. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Adoption or maintenance on the basis of a national decision to investigate, prosecute or convict – Competent authority to adopt that national decision – Concept – Administrative authority – Included – Conditions*
(Council Common Position 2001/931, Art. 1(4))

(see paragraphs 32, 33, 50-55, 58, 63)

3. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Adoption or maintenance on the basis of a national decision to investigate, prosecute or convict – Re-examination in order to justify retention on the fund-freezing list – Cooperation between the Council and competent authorities – Scope – Distinction between the initial adoption and the review of the measures*
(Council Common Position 2001/931, Art. 1(4) and (6))

(see paragraphs 35, 40)

4. *European Union – Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Duty of sincere cooperation between Member States and the EU institutions – Initial decision to freeze funds – Reasons – Burden of proof borne by the Council – Scope*
(Council Common Position 2001/931, Art. 1(4))

(see paragraphs 36, 37, 137)

5. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Adoption or maintenance on the basis of a national decision – New material justifying retention being required to be the subject of a national decision taken after the decision on which the initial listing was based – None*
(Council Common Position 2001/931, Art. 1(4) and (6))

(see paragraphs 38, 43, 151, 152, 192)

6. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Adoption or maintenance on the basis of a national decision to investigate, prosecute or convict – Council's duty to state reasons – Scope*
(Art. 296 and Art. 263, fourth subpara, TFEU; Council Common Position 2001/931, Art. 1(4) and (6); Council Regulation No 2580/2001; Council Decisions (CFSP) 2019/25 and (CFSP) 2019/1341; Council Regulations No 125/2014, No 790/2014, 2015/513, 2015/1325, 2015/2425, 2016/1127, 2017/150 and 2017/1420)

(see paragraphs 39, 138, 153, 216-219, 222-224, 227-231, 238)

7. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Adoption or maintenance on the basis of a national decision to investigate, prosecute or convict – No requirement that a national decision be taken in the context of criminal proceedings stricto sensu – Conditions*
(Council Common Position 2001/931, Art. 1(4))

(see paragraphs 56, 57)

8. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Duty of sincere cooperation between Member States and the EU institutions – Decision to freeze funds – Adoption or maintenance on the basis of a national decision to investigate, prosecute or convict – National decision to convict – No obligation to adduce the serious and credible evidence or clues underlying the national decision*

(Council Common Position 2001/931, Art 1(4); Council Regulations No 125/2014, No 790/2014, 2015/513, 2015/1325, 2015/2425, 2016/1127, 2017/150 and 2017/1420)

(see paragraphs 73-76, 80)

9. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Adoption or maintenance on the basis of a national decision – Competent authority to adopt that national decision – Concept – Authority of a third State – Included*
(Council Common Position 2001/931, Art 1(4); Council Regulations No 125/2014, No 790/2014, 2015/513, 2015/1325, 2015/2425, 2016/1127, 2017/150 and 2017/1420)

(see paragraphs 85, 86)

10. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Adoption or maintenance on the basis of a national fund-freezing decision of an authority of a third State – Whether permissible – Condition – National decision adopted in accordance with the rights of the defence and the right to effective judicial protection – Council’s verification obligation – Obligation to state reasons – Scope*
(Council Common Position 2001/931, Art. 1(4); Council Decisions (CFSP) 2019/25 and (CFSP) 2019/134; Council Regulations Nos 125/2014, 790/2014, 2015/513, 2015/1325, 2015/2425, 2016/1127, 2017/150 and 2017/1420)

(see paragraphs 87, 88, 91, 93-98)

11. *Judicial proceedings – Application initiating proceedings – Formal requirements – Identification of the subject matter of the dispute – Clear and precise statement of the pleas relied on – Requirement that evidence be adduced in support of the plea relied on – None – Admissibility*
(Statute of the Court of Justice, Arts 21, first para. and 53, first para; Rules of Procedure of the General Court, Art. 76(d))

(see paragraphs 104-106)

12. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Freezing of funds – Scope – Persons, groups and entities involved in terrorist acts – Initial listing – Terrorist acts – Concept – Classification by national authorities – Council’s obligation to verify*
(Council Common Position 2001/931, Art. 1(3), (4) and (6))

(see paragraphs 109-118, 139-146)

13. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Freezing of funds –*

Common Position 2001/931 – Scope – Armed conflict within the meaning of international humanitarian law – Included
(Council Common Position 2001/931, Art. 1(3), first subpara; Council Framework Decision 2002/475/JHA; Council Regulation No 2580/2001)

(see paragraphs 122-124, 127-131, 134)

14. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Freezing of funds – Scope – Principle of self-determination – Distinction between the objectives specific to the exercise of the right to self-determination and the behaviour adopted to achieve them – Council's margin of discretion*
(Council Common Position 2001/931, Art. 1(3), first subpara, (i) to (iii))

(see paragraphs 125, 126, 131, 133)

15. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Precautionary nature of the measures adopted – Principle that offences and penalties must be defined by law – Applicability – None*
(Charter of Fundamental Rights of the European Union, Art. 49(1); Council Common Position 2001/931)

(see paragraph 136)

16. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Retention on the basis of a national decision – National decision no longer by itself supporting the conclusion that there is an ongoing risk of involvement in acts of terrorism – Obligation of the Council to take into account more recent facts which demonstrate that that risk is ongoing*
(Council Common Position 2001/931, Art. 1(4) and (6); Council Decisions (CFSP) 2019/25 and (CFSP) 2019/1341; Council Regulations Nos 125/2014, 790/2014, 2015/513, 2015/1325, 2015/2425, 2016/1127, 2017/150 and 2017/1420)

(see paragraphs 147-150, 158, 164, 166-168, 172, 175, 181, 184-186, 188, 196-198, 200, 202, 203, 253, 254, operative part 1)

17. *European Union – Judicial review of the legality of the acts of the institutions – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Continued listing on the basis of a national decision adopted by a competent authority – Scope of the review – Review extending to all of the material used to demonstrate that the risk of involvement in acts of terrorism is ongoing – Not all of the material being derived from a national decision adopted by a competent authority – Irrelevant*
(Council Common Position 2001/931, Art. 1(6))

(see paragraph 154)

18. *EU law – Principles – Rights of the defence – Right to effective judicial protection – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Decision to freeze funds – Right of access to documents – Right subject to request for access being made to the Council – No infringement*
(Council Common Position 2001/931; Council Regulation No 2580/2001)

(see paragraphs 165, 240)

19. *Common foreign and security policy – Specific restrictive measures directed against certain persons and entities with a view to combating terrorism – Freezing of the funds of an organisation involved in acts of terrorism – Restrictions on the right to property, freedom of expression and the right of assembly – Breach of principle of proportionality – None*
(Council Common Position 2001/931; Council Decisions (CFSP) 2019/25 and (CFSP) 2019/1341; Council Regulations Nos 2580/2001, 2015/513, 2015/1325, 2015/2425, 2016/1127, 2017/150 and 2017/1420)

(see paragraphs 206-211, 214, 215)

20. *Action for annulment – Judgment annulling a measure – Effects – Obligation to implement – Scope – Obligation to ensure that the annulled measure is not replaced by a measure affected by the same irregularity – Extension of that obligation to subsequent measures*
(Art. 266 TFEU; Statute of the Court of Justice, Art. 60(2))

(see paragraphs 246-248)

21. *Judicial proceedings – Costs – Costs caused unreasonably or vexatiously – Consequences of the Council's failure to comply with its obligation to draw the appropriate conclusions from the illegalities found by a judgment annulling a measure – Order requiring each party to bear its own costs.*
(Rules of Procedure of the General Court, Arts 133, 134(1) and (3), 135(2) and 219)

(see paragraphs 251, 255-259)

Résumé

Since 2002 the Kurdistan Workers' Party (PKK) has been listed as an organisation involved in acts of terrorism on the lists of persons or entities subject to fund-freezing measures annexed to Common Position 2001/931/CFSP and Regulation No 2580/2001.¹ In the measures that it had adopted in 2014 against that organisation, the Council relied on national decisions adopted by a UK authority and by US authorities respectively, in addition to relying, from 2015, on judicial decisions adopted by French courts.

¹ Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) and Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70). Those measures were subject to regular updates.

By judgment of 22 April 2021, *Council v PKK* (Case C-46/19 P),² the Court of Justice had set aside the judgment of the General Court of 15 November 2018 in the Case *PKK v Council* (T-316/14),³ which itself had annulled several measures adopted by the Council of the European Union between 2014 and 2017⁴ which had retained the PKK on the lists at issue. That case was referred back to the General Court (T-316/14 RENV) and was joined to the Case *PKK v Council* (T-148/19), in which the PKK also sought annulment of the measures adopted against it by the Council between 2019 and 2020.⁵

By its judgment in both cases, the General Court annuls the regulations adopted by the Council in 2014 in so far as they retain the PKK on the lists at issue, on the ground that the Council failed to comply with its obligation to update the assessment of whether there was an ongoing risk that the PKK was involved in terrorism. As regards the acts adopted subsequently by the Council, the Court concludes, however, that the pleas raised by the applicant concerning the US and UK national decisions do not call into question the Council's assessment – which is based, inter alia, on subsequent incidents and facts – as to whether that risk was ongoing. The General Court also took the opportunity to clarify its case-law on the scope of Article 266 TFEU in relation to restrictive measures.

Findings of the Court

The Court notes, first of all, the principles governing the initial adoption of the restrictive measures and their review by the Council under Common Position 2001/931/CFSP.⁶ In the absence of means on the part of the European Union to carry out its own investigations, the procedure that may lead to the adoption of an initial fund-freezing measure takes place on two levels: national level, through the adoption by a competent national authority of a decision in respect of the person concerned, and European level, through the Council's decision to include the person concerned on the list in question, on the basis of precise information or material in the file which shows that such a decision was taken at national level. Such a prior decision has the function of establishing the existence of serious and credible evidence or clues of the involvement of the person concerned in terrorist activities which are considered reliable by those national authorities. Consequently, it is not for the Council to verify whether the events relied on in the national condemnation decisions on which an initial listing was based actually took place and who is responsible for them and the burden of proof borne by it in that regard is therefore relatively limited in scope.

² Judgment of 22 April 2021, *Council v PKK*, C-46/19 P, EU:C:2021:316.

³ Judgment of 15 November 2018, *PKK v Council*, T-316/14, EU:T:2018:788.

⁴ Council Implementing Regulation (EU) No 125/2014 of 10 February 2014 (OJ 2014 L 40, p. 9); Council Implementing Regulation (EU) No 790/2014 of 22 July 2014 (OJ 2014 L 217, p. 1); Council Decision (CFSP) 2015/521 of 26 March 2015 (OJ 2015 L 82, p. 107); Council Implementing Regulation (EU) 2015/513 of 26 March 2015 (OJ 2015 L 82, p. 1); Council Decision (CFSP) 2015/1334 of 31 July 2015 (OJ 2015 L 206, p. 61); Council Implementing Regulation (EU) 2015/1325 of 31 July 2015 (OJ 2015 L 206, p. 12); Council Implementing Regulation (EU) 2015/2425 of 21 December 2015 (OJ 2015 L 334, p. 1); Council Implementing Regulation (EU) 2016/1127 of 12 July 2016 (OJ 2016 L 188, p. 1); Council Implementing Regulation (EU) 2017/150 of 27 January 2017 (OJ 2017 L 23, p. 3); Council Decision (CFSP) 2017/1426 of 4 August 2017 (OJ 2017 L 204, p. 95); and Council Implementing Regulation (EU) 2017/1420 of 4 August 2017 (OJ 2017 L 204, p. 3).

⁵ Council Decision (CFSP) 2019/25 of 8 January 2019 (OJ 2019 L 6, p. 6); Council Decision (CFSP) 2019/1341 of 8 August 2019 (OJ 2019 L 209, p. 15); Council Implementing Regulation (EU) 2019/1337 of 8 August 2019 (OJ 2019 L 209, p. 1); Council Implementing Regulation (EU) 2020/19 of 13 January 2020 (OJ 2020 L 81, p. 1); Council Decision (CFSP) 2020/1132 of 30 July 2020 (OJ 2020 L 247, p. 18); and Council Implementing Regulation (EU) 2020/1128 of 30 July 2020 (OJ 2020 L 247, p. 1).

⁶ See Article 1(4) and (6) of Common Position 2001/931/CFSP.

The Court goes on to note that a distinction must be drawn, for each of the contested measures, according to whether they are based on the decisions of competent national authorities justifying the applicant's initial listing or according to whether they are based on subsequent decisions of those national authorities or on material independently relied on by the Council.⁷ As regards the material on which the Council may rely in order to demonstrate that there is an ongoing risk of involvement in terrorist activities at the stage of the periodic review of measures adopted previously,⁸ it is for the Council, in the event of challenge, to establish that the findings of fact mentioned in the measures maintaining the entity concerned on the lists in question are well founded and for the Courts of the European Union to determine whether they are made out.

The Court notes, moreover, that the Council also remains subject to an obligation to state reasons as regards both the incidents found to have occurred in the national decisions taken into account at the stage when the measures at issue were initially adopted and the incidents found to have occurred in subsequent national decisions or any incidents taken into account by the Council independently.

As regards the order of the UK Home Secretary of 29 March 2001 proscribing the PKK, the Court notes that it has previously held, in its case-law, that that decision emanates from a 'competent authority' within the meaning of Common Position 2001/931/CFSP, which does not preclude the taking into account of decisions of administrative authorities, where those authorities may be regarded as 'equivalent' to judicial authorities if their decisions are open to a judicial review that covers matters both of fact and of law. Appeals against orders of the UK Home Secretary may be brought before the Proscribed Organisations Appeal Commission and, where appropriate, before an appeal court.

In the present case, after stating that the common position does not require the decision of the competent authority in question necessarily to be taken in the context of criminal proceedings *stricto sensu*, the Court finds that the 2001 order was issued in the context of the fight against terrorism and forms part of national proceedings seeking the imposition on the PKK of measures of a preventive or punitive nature. The Court concludes that the contested measures meet the conditions laid down in that regard by the common position.⁹

However, the Court concludes that it was for the Council to verify the classification of the facts by the competent national authority and whether the acts taken into account by that authority correspond to the definition of terrorist acts established by the common position. It considers it sufficient in that regard that it stated, in the statements of reasons adopted by the Council in support of the contested measures, that it verified that the underlying grounds for the decisions taken by the national competent authorities are covered by the definition of terrorism set out in Common Position 2001/931/CFSP. The Court notes that that verification obligation relates solely to the incidents identified in the decisions of the national authorities on which the initial listing of the entity concerned was based. When it retains the name of an entity on the fund-freezing lists in the context of a periodic review,¹⁰ the Council need only establish that there is an ongoing risk of that entity being involved in such acts.

⁷ Those two types of basis are governed by different provisions of Common Position 2001/931/CFSP, the former falling within Article 1(4) of that position and the latter falling within Article 1(6) thereof.

⁸ See Article 1(6) of Common Position 2001/931/CFSP.

⁹ Article 1(4) of Common Position 2001/931.

¹⁰ Under Article 1(6) of Common Position 2001/931/CFSP.

In the context of that review, the Council is required to verify whether, since the initial inclusion of the name of the person or entity concerned, the factual situation has changed as regards the latter's involvement in terrorist activities and, in particular, whether the national decision has been repealed or withdrawn as a result of new facts or any modification of the competent national authority's assessment. In that regard, the mere fact that the national decision that served as the basis for the initial inclusion is still in force may, in view of the passage of time and in the light of changes in the circumstances of the case, no longer be sufficient to support the conclusion that the risk is ongoing. In such a situation, the Council is then required to base the retention of the restrictive measures on an up-to-date assessment of the situation, which demonstrates that that risk still exists. In that case, the Council may rely on recent material taken not only from national decisions adopted by competent authorities but also from other sources and, therefore, from its own assessments.

The Court observes that, in that situation, the Courts of the European Union are required to determine, as regards whether the obligation to state reasons has been fulfilled, whether the reasons relied on in the statement of reasons underpinning the retention on the fund-freezing lists are sufficiently detailed and specific and, as part of the review of substantive legality, whether those reasons are substantiated and have a sufficiently solid factual basis. Irrespective of whether that material is derived from a national decision adopted by a competent authority or from other sources, it is for the Council, in the event of challenge, to establish that the findings of fact are well founded and for the Courts of the European Union to determine whether the events concerned are made out.

Lastly, as regards Article 266 TFEU, which was relied on by the PKK solely in Case T-148/19, according to which an institution whose act has been declared void is to be required to take the necessary measures to comply with any judgment declaring that act void,¹¹ the Court notes that that obligation is incumbent on it as soon as the judgment at issue is delivered where it declares a decision void, unlike a judgment declaring a regulation void.¹² Accordingly, on the date of adoption of the 2019 decisions concerning the PKK, the Council was required either to withdraw the PKK from the list or to adopt a re-listing measure in accordance with the grounds of the judgment of 15 November 2018 (T-316/14). The Court points out that, without that obligation, the annulment ordered by the Courts of the European Union would be deprived of practical effect.

The Court observes, in that regard, that in the 2019 decisions the Council reproduced the same reasons as those on which it had relied in the 2015 to 2017 measures which had been declared unlawful in the judgment of 15 November 2018. Although the Council lodged an appeal against that judgment, which did not have suspensory effect, such a refusal by the Council to draw the appropriate conclusions from *res judicata* was liable to harm the confidence placed by individuals in compliance with judicial decisions. However, since the judgment of 15 November 2018 (T-316/14) was set aside by the judgment of the Court of Justice of 22 April 2021 (C-46/19 P), in particular in so far as it had itself annulled the 2015 to 2017 measures, and in view of the retroactive nature of that annulment by the Court of Justice, the General Court concludes that the Council's failure to meet its obligations cannot lead to the

¹¹ Article 266 TFEU: 'The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union. This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.'

¹² Under the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union, judgments declaring regulations void are to take effect only on expiry of the period for bringing an appeal or after the dismissal of the appeal.

annulment of the 2019 decisions. Since the applicant was nevertheless entitled to believe that it was justified in bringing the action in Case T-148/19, the Court therefore takes that factor into account in the settlement of costs between the parties.

In the light of the foregoing, the Court concludes, with regard to the periodic review carried out by the Council,¹³ that the latter had infringed its obligation to update the assessment of whether there was an ongoing risk that the PKK was involved in terrorism for the purposes of the 2014 measures. Consequently, the Court annuls Council Implementing Regulations No 125/2014 and No 790/2014 in Case T-316/14 RENV. However, as regards the subsequent 2015 to 2017 measures and the 2019 decisions, the Court concludes that the pleas raised by the applicant do not call into question the Council's assessment relating to whether there was an ongoing risk that the PKK was involved in terrorism, which remains validly based on the UK Home Secretary's order, which is still in force, and, as the case may be, on other subsequent incidents. Accordingly, the Court dismisses the action as to the remainder in Case T-316/14 RENV and dismisses the action in Case T-148/19.

¹³ Under Article 1(6) of Common Position 2001/931/CFSP.