



Reports of Cases

Case C-79/15 P

Council of the European Union v Hamas

(Appeal — Common foreign and security policy — Fight against terrorism — Restrictive measures against certain persons and entities — Freezing of funds — Common Position 2001/931/CFSP — Article 1(4) and (6) — Regulation (EC) No 2580/2001 — Article 2(3) — Retention of an organisation on the list of persons, groups and entities involved in terrorist acts — Conditions — Factual basis of the decisions to freeze funds — Decision taken by a competent authority — Obligation to state reasons)

Summary — Judgment of the Court (Grand Chamber), 26 July 2017

1. *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 to freeze funds — 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(6))

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 retention on the basis of a national decision to freeze funds — 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 — No such requirement*

(Council Common Position 2001/931, Art. 1(4) and (6))

3. *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 — Retention on the basis of a national decision to freeze funds — Ambit 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*

(Art. 296 TFEU)

1. As regards subsequent fund-freezing decisions, the essential question when reviewing whether to continue to include a person or entity on a list for the freezing of funds is whether, since the inclusion of that person or that entity on that list or since the last review, the factual situation has changed in such a way that it is no longer possible to draw the same conclusion in relation to the involvement of that person or entity in terrorist activities.

It is apparent from the foregoing that, in the context of a review pursuant to Article 1(6) of Common Position 2001/931 on the application of specific measures to combat terrorism, the Council may maintain the person or entity concerned on the list if it concludes that there is an ongoing risk of that person or entity being involved in the terrorist activities which justified their initial listing. The retention of a person or entity on that list is, therefore, in essence, an extension of the original listing.

In the process of verifying whether the risk of the person or entity concerned being involved in terrorist activities is ongoing, the subsequent fate of the national decision that served as the basis for the original entry of that person or entity on the list for the freezing of funds must be duly taken into consideration, in particular the repeal or withdrawal of that national decision as a result of new facts or material or any modification of the competent national authority's assessment.

That said, the question that still arises is whether the fact that the national decision that served as the basis for the original listing is still in force can, in itself, be considered sufficient for the purpose of maintaining the person or entity concerned on that list.

In that regard, if, in view of the passage of time and in the light of changes in the circumstances of the case, the mere fact that the national decision that served as the basis for the original listing remains in force no longer supports the conclusion that there is an ongoing risk of the person or entity concerned being involved in terrorist activities, the Council is obliged to base the retention of that person or entity on the list on an up-to-date assessment of the situation, and to take into account more recent facts which demonstrate that that risk still exists.

(see paras 25, 29-32)

2. Under Article 1(4) of Common Position 2001/931 on the application of specific measures to combat terrorism, the initial entry of a person or entity on the list for the freezing of funds presupposes the existence of a national decision by a competent authority or of a decision of the United Nations Security Council imposing a sanction.

No such condition is laid down in Article 1(6) of Common Position 2001/931, however.

That distinction is attributable to the fact that the retention of a person or entity on a fund-freezing list is, in essence, an extension of the original listing and presupposes, therefore, that there is an ongoing risk of the person or entity concerned being involved in terrorist activities, as initially established by the Council on the basis of the national decision on which that original listing was based.

Thus, although Article 1(6) of Common Position 2001/931 requires the Council to carry out at least once every six months a 'review' to ensure that there continue to be grounds for 'keeping' on that list a person or entity already listed on the basis of a national decision taken by a competent authority, it does not require any new material on which the Council may rely in order to justify the retention of the person or entity concerned on the list to have been the subject of a national decision taken by a competent authority after the decision on which the initial listing was based. To impose such a requirement would be to fail to have regard to the distinction between the original decision placing a person or entity on the list and the subsequent decision maintaining the person or entity concerned on that list.

Further, such an interpretation of Article 1 of Common Position 2001/931 would be based, at least implicitly, on the consideration that either the competent national authorities regularly adopt decisions on which the reviews the Council is required to carry out under Article 1(6) of Common Position 2001/931 may be based, or the Council has the option, if necessary, of asking those authorities to adopt such decisions.

However, that consideration has no basis in EU law.

The fact that the Member States are to inform the Council of decisions adopted by their competent authorities and to transmit those decisions to it does not mean that those authorities are obliged to adopt decisions that may serve as a basis for those reviews either regularly or, indeed, when required.

Moreover, in the absence of any specific basis in the restrictive measures regime established by Common Position 2001/931, the principle of sincere cooperation enshrined in Article 4(3) TEU does not permit the Council to require the competent authorities of the Member States to adopt, if necessary, national decisions that may serve as the basis for the reviews the Council is required to carry out pursuant to Article 1(6) of that common position.

On the contrary, that regime does not provide any mechanism that would enable the Council to be provided, if necessary, with national decisions adopted after the initial listing of the person or entity concerned, in order to carry out the reviews it is required to carry out pursuant to Article 1(6) of that common position and in the context of which it is required to verify that there is still a risk that that person or entity is involved in terrorist activities. Without such a mechanism, it cannot be held that that regime requires the Council to carry out those reviews entirely on the basis of such national decisions, if the means that are to be available to the Council for that purpose are not to be restricted unduly.

(see paras 37-45)

3. As regards the initial entry on a list for the freezing of funds, the person or entity concerned is protected, in particular by the possibility of challenging both the national decisions that served as the basis for that listing, before the national courts, and the listing itself, before the Courts of the European Union.

In the case of subsequent fund-freezing decisions, the person or entity concerned is protected, *inter alia*, by the possibility of bringing an action against such decisions before the Courts of the European Union. These are required to determine, in particular, first, whether the obligation to state reasons laid down in Article 296 TFEU has been complied with and, therefore, whether the reasons relied on are sufficiently detailed and specific, and, second, whether those reasons are substantiated.

In that context, the person or entity concerned may, in the action challenging their retention on a fund-freezing list, dispute all the material relied on by the Council to demonstrate that the risk of their involvement in terrorist activities is ongoing, irrespective of whether that material is derived from a national decision adopted by a competent authority or from other sources. In the event of challenge, it is for the Council to establish that the facts alleged are well founded and for the Courts of the European Union to determine whether they are made out.

(see paras 47-49)