ACADEMY OF EUROPEAN LAW

COUNTER TERRORISM JURISPRUDENCE OF THE ECJ

RECENT DEVELOPMENTS

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The establishment of so-called 'terrorist lists' by the European Union raises difficult and sometimes vital questions pertaining to the very structure of the Union (2 & 3) but most importantly to the fundamental human rights of the individuals and organizations concerned (1).

The European Court of Justice (ECJ) had surprisingly few opportunities to address such issues, given the relatively low number of individuals and organizations concerned and the unlikelihood of many of them ever bringing a case to the Luxembourg court.

Still, most of the few cases presented to the Court show how serious the issues of due process raised by the list can be. It is therefore useful to provide a brief account of the specific facts of some of the cases of the individuals who and organizations which have appeared before the Court (1). I shall then discuss how the Court addressed issues relating to the EU's institutional structure (2) and most importantly the remedies and rights enjoyed (or not!) by individuals and organizations on the list (3).

1. A tale of two so-called 'terrorists'

1.1. Yassin Abduhllah Kadi (Security Council Resolution)

Yassin Abduhllah Kadi is a prominent Saudi businessman with interests and assets all over Europe. He was included on 19 October 2001 in the amended list issued by the relevant Sanctions Committee of the United Nations Security Council (UNSC).

The amended list had been issued pursuant to UNSC Resolutions 1267 (1999) and 1333 (2000) which provided for the freezing of all assets belonging to individuals or organizations connected with the Taliban regime in Afghanistan.

The European Commission swiftly implemented the amended list by amending its own list, established pursuant to EC Regulation No 467/2001, thereby freezing all of Mr. Kadi's assets in Europe.

Mr. Kadi tried to contact the UNSC Sanctions Committees, but was rebuked on the grounds that individuals did not have standing to bring comments before the Committee. He also tried to trigger diplomatic protection from Saudi Arabia, but his requests remained unanswered.

Mr. Kadi was therefore left with only one option: indirectly challenging the Security Council's measures before domestic courts. He was cleared of any wrongdoing by the Swiss Federal Criminal Court and allowed to regain control of his Switzerland-based assets. He also turned to the European Court of Justice, requesting the annulment of various EC regulations which included and maintained him on the EU list of 'terrorists'.

1.2. PMOI (European Union procedure)

The People's Mojahedin of Iran (PMOI) is one of the components of the National Council of Resistance of Iran (NCRI), which is based in France and which is the main opposition group to the current regime in Iran.

The PMOI was not listed by UNSC resolutions and was first listed in Europe in 2001 as a "proscribed organization" by the UK under the Terrorism Act (Proscribed Organisations) (Amendment) Order 2001.

At the request of the UK authorities alone, the PMOI was added to the list by Council Decision 2002/334 on 2 May 2002. Its inclusion was confirmed by a series of subsequent decisions including Decision 2005/930, of December 21, 2005, always at the request of the UK authorities.

The inclusion of the PMOI had dire consequences for the organization and its supporters. The Iranian government made extensive use of the label to justify exactions committed against PMOI supporters in the Western media. European governments revoked the political asylum status of, or denied visas to, many Iranian exiles on the charge that they were PMOI supporters. The government of Iraq even used the European 'terror' label as justification for putting pressure PMOI members residing in Iraq and pledging to expel them to Iran because its constitution does not allow the presence of 'terrorists' on Iraqi soil.

The PMOI were left by European institutions to wonder how and on the basis of what evidence they had been included on the list. They were not advised on the reasons why the Council had seen it fit to include them on the list and not asked to express their views. The PMOI had no choice but to turn to the European Court of Justice and challenged their designation before the Court.

2. Why should the European Community freeze terrorists' assets in the first place?

The fight against terrorism remains chiefly a national affair and has for a large part not been transferred to the European level by European governments. Freezing the assets of individuals and organizations is a significant decision which directly affects the economic and even social or reputational situation of the entities concerned. European institutions are seldom entrusted with powers so intrusive with respect to individuals' lives and property.

Moreover, national and international security issues are normally addressed within the framework of the EU's Common Security and Foreign Policy (CFSP). One of the first questions raised by some of the individuals or organizations designated as 'terrorists' under an EC Regulation was therefore: "why is the European Community taking such measures in the first place?"

There is no easy answer to that question and the Court has not been steady in its assessment of the legal basis for EC Regulations listing entities and individuals as 'terrorist'.

In this respect, it should be stressed that at the root of any EC designation of an entity or individual as 'terrorist' lie two distinct measures adopted by European Union institutions.

First, a Common Position (CP) is adopted within the framework of the European Union

Treaty (EUT), namely on the basis of Articles 15 and 34 EUT. Such common positions usually have no direct effect in the legal orders of Member States.

Second, an EC Regulation is adopted within the framework of the European Community, in connection with the CP initially issued in the framework of the European Union. Such regulations are of direct effect on EC territory and are highly efficient.

The difficulty is that the EC Treaty (TEC) does not contain any provision relating to the freezing of assets of individuals or private organizations. A number of designated 'terrorists' thus argued that the EC had no legal basis to enact such binding legislation.

The EC argued that Articles 60 and 301 TEC, or alternatively Article 308 TEC, empowered the Community to take such measures. This view was contested by a number of the individuals concerned, notably Mr. Kadi, but was ultimately confirmed by the Court.

Articles 60 and 301 TEC specifically provide for the EC to implement EU Common Positions by "taking the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned".

The provisions were construed by many, including the Court, as meaning that the EC lacked the competence to edict measures targeting individuals or organizations not linked directly to the government regime of any country. Thus the Court ruled in its Kadi judgement that, since the Taliban had lost control of Afghanistan, the EC could not justify maintaining Mr. Kadi in the list on the basis of Articles 60 and 301 alone (see *Kadi*, 3 September 2008, paras 166ff).

The Court did however go beyond the original meaning of Articles 60 and 301 TEC and found that they expressed a wider competence entrusted to the EC by its Member States to "impose restrictive measures of an economic nature".

This newly found purpose of the Community allowed the Court to justify EC action on the basis of Article 308 TEC, a 'default' provision allowing EC institutions to take any action necessary to 'attain … the objectives of the Community'.

This very liberal interpretation of the Treaty is fairly recent (the Court's decision in the Kadi case is dated 3 September 2008) and should not be too surprising. Although the Court arguably stretched the wording of the Treaties to its limit, it may have had in mind the new provisions introduced by the drafters of the Lisbon Treaty in 2007.

Although the Lisbon Treaty has yet to enter into force, it does (arguably) express the views of the Member States, notably by introducing a new Article 75 TEC. The new Article 75 explicitly entrusts the Community with the task to initiate and implement legislation on the fight against the financing of terrorism. Against this backdrop, it would seem logical that the Court would not rely on soon-to-be discarded provisions and instead construe existing provisions on the basis of soon-to-be in force provisions.

In any event the entry into force of the new Article 75 TC should erase any concern as to the legal basis of future EC regulations for the freezing of assets of entities and

individuals suspected of financing terrorism. It is unclear however whether the decision of the drafters of the Lisbon Treaty to transfer such competence to the EC erases all concerns as to whether the Community, and not the CFSP or national fora, is the appropriate forum to address such issues. It is debatable whether, of all national and international security issues, terrorism should be addressed within the framework of the European Community, with all other similar and connected issues being addressed at the EU level as part of the CFSP.

3. Balancing terror and human rights – how can the designation process protect individual and corporate human rights?

Being competent to freeze the assets of individuals or organizations suspected of financing terrorism and to take related actions is one thing. Properly assessing whether such suspicions are well-founded while nevertheless protecting the fundamental human rights of the individuals and organizations concerned is another. The European Council and Commission has so far proved to be largely incompetent in this respect.

A distinction should be made here between individuals or organizations designated as terrorists by the UNSC and those designated as terrorists by European institutions directly. All were equally mistreated by European institutions in the past, but those designated by the UNSC were left with almost no protection from the Court until only recently (1). The Court changed its view in September 2008 and now affords the same level of protection to both entities originally listed by the UNSC and entities originally listed by the EC (2).

3.1 Should entities designated by the United Nations Security Council enjoy human rights protection under EC and EU law?

The UNSC started maintaining lists of 'terrorists' entities in early 2000. The UNSC lists consist exclusively of individuals, organizations and other groups allegedly linked to the Taliban and/or Al-Qaeda. The lists are constantly updated by the Security Council itself and managed by the Sanctions Committee.

The EU acknowledged the obligations imposed by relevant UNSC resolutions and endeavoured to implement such resolutions in its own legal system. Various EU instruments were adopted, which in effect implemented UNSC resolutions within the EC legal order.

These instruments failed to provide any guarantee in terms of the right to be heard of the individuals and organizations concerned. Nor did they provide that such entities should even be advised of the reasons for their listing.

Several individuals and organizations, including Mr Kadi, challenged the legality of such regulations before the European Court of Justice. The obvious question put to the Court was therefore: "may the Court annul EC regulations which are in effect expressing international obligations of the EC/Member States on the basis of fundamental human rights, most notably procedural rights?"

3.1.1 The position of the Court of First Instance – 21 September 2005

The Court of First Instance (CFI) took a very restrictive view of the issue and dismissed the claims.

In a nutshell, the CFI considered that the EU itself was not a party to the United Nations Charter and was not bound by the resolutions taken by the UNSC. However all its Member States were parties to the United Nations Charter and bound under articles 24 and 103 of the Charter to implement and give prevalence to such resolutions.

The EC was therefore bound de facto by relevant provisions of the Charter and UNSC resolutions, because the Member States could not have transferred to the Community more rights than they already had under international law.

As a result, not only was the European Council bound to implement UNSC resolutions within the EU, but the Council did not even have the slightest discretion in implementing such resolutions into EU instruments. In particular, the Council could not review the accuracy of the purported links between the listed individuals and terrorist organizations including Al-Qaeda.

The CFI expressly considered that it could not assess the 'legality' of EC Regulations, which were in effect resolutions of the UNSC, against the standards of EU law because such resolutions were binding upon the Member States under international law.

However the CFI did find that it could assess the 'legality' of EC Regulations (and de facto of UNSC resolutions) on the basis of 'jus cogens', most notably general principles of human rights constituting 'jus cogens'.

The 'trick' was clever but resulted in the CFI concluding that no 'jus cogens' principle had been infringed by UNSC resolutions. The entities' right to property had not been violated because the freeze was not permanent; their right to judicial review had been preserved by the possibility afforded to them to request diplomatic protection from their home country; their right to be heard had been preserved by actual hearings and communications; and their other fundamental rights had not been infringed since the UNSC resolutions provided for the de-freezing of funds necessary to cover basic and extraordinary expenses.

In short the CFI considered that because the individuals and organizations concerned had first been listed by the United Nations, the EC was bound to list them automatically, and that the only available standard for review were jus cogens norms, with which UNSC procedures for establishing and maintaining the list were not in blatant contradiction.

Although the reference to *jus cogens* was well thought out and probably protected the CFI's decision from accusations of being outrageous, the Court's position still left a legal 'black hole' for individuals listed by the Security Council and de facto unable to make their case before any judicial authority.

3.1.2 The position of the European Court of Justice – 3 September 2008

In a landmark decision, the European Court of Justice recently overturned the CFI's ruling. The Court declared that no international norm could override fundamental human rights as understood in the European Union. Such rights formed part and parcel of the 'constitutional' 'general principles' which the Court is entrusted to protect. It was the duty of the Court to annul any instrument infringing such a fundamental principle, even if such an instrument was in reality implementing international obligations of the Member States. In the words of the Court:

> *'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty'* (*Kadi*, 3 September 2008, para 285).

The effects of the Court's decision will be far reaching and it may take us some time to fully grasp the importance and meaning of its findings.

The Court seldom had the opportunity to affirm the superiority of 'constitutional' principles of the European Union over conflicting international norms (see however the case cited at para 289). This major advance for human rights resulted in the Court annulling the EC blacklisting of Mr Kadi and other defendants. It also had the effect of de facto subjecting UNSC-based EU designations to the standards applied to original EU designations since the OMPI decision of 2006.

3.2 What are the standards applicable to terrorist designations under EC and EU law?

In its latest *Kadi* case (involving UNSC designations implemented through EC regulations) the Court applied standards largely similar to the ones applied to original EC designations in its *OMPI* and other similar cases. The Court imposed on the Council and Commission an obligation to state their reasons for initiating or maintaining terrorist designations (1) and found that several of the applicants' fundamental rights had been infringed, including their right to a fair hearing (2) and their right to effective judicial protection (3).

3.2.1 Obligation to state reasons

The most basic right of being advised of the reasons for an individual administrative decision had been denied to individuals and organizations designated by EC Regulations as 'terrorists'.

In most cases the Council would simply state that the designation of given individuals or organizations was 'desirable' (see eg *OMPI*, 12 December 2006, para 164 and *Stichting Al-Aqsa et al.*, 11 July 2007, para 54). Some individuals could not even know which

country had proposed their names for inclusion in the first place (see eg *Sison et al.*, 11 July 2007, para 209).

The Court affirmed the right of designated entities to know the reasons and procedure behind their designation and be notified thereof, save for exceptional circumstances.

The parties concerned must be notified not only of the legal basis for their designation but also of the actual reasons for the decision. In the words of the Court:

> *'in principle, the statement of reasons for a measure to freeze funds under Regulation No 2580/2001 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'* (*OMPI*, 12 December 2006, para 146).

The Council does not have an obligation to communicate the reasons to the parties concerned before the measure is enacted, which would allow the entities concerned to withdraw their assets from the EU and defeat the whole purpose of the measure.

However the Council must state its reasons before any decision extending the designation after an initial time period has elapsed. EU institutions must explain 'the actual and specific reasons why the freezing of the funds remains justified', together with all new evidence used, if any (see ibid, para 151).

As a matter of principle, the Court did consider that 'overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations' may exceptionally trump the Council and Commission's obligation to state reasons, but the Court failed to see any such 'overriding considerations' in the cases before it.

The obligation to state reasons serves a dual purpose. Knowing the reasons for their designation is essential to allowing the entities concerned to bring their case and is thus directly linked to those entities' right to a fair hearing (see below 3.2.2). But stating the reasons is also essential to allow the Court to assess the legality of the decision and is thus directly linked to the entities' right to effective judicial protection. The Court would not be in a position (and indeed found that it was not in a position in several cases) to conduct an effective review of the regulations concerned if it were not aware of the reasons for which the individuals and organizations concerned were included in the list.

3.2.2 Right to a fair hearing

The Court's view of designated 'terrorists'' right to be heard was slightly more restrictive.

First, the substantive scope of the parties' right to a fair hearing was restricted by the Court.

Under the terms of relevant EU and EC instruments, individuals and organizations may be included in the EC list only if they were the subject of a relevant decision at the national level. Accordingly, the Court found that the parties concerned should not be allowed to

discuss the merits of such a decision but only to discuss whether a relevant national decision existed at all. In the words of the Court:

> *'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'* (*OMPI*, 12 December 2006, para 120).

This is in line with the scope of the Court's review, discussed below at 3.2.3. The Court analyzed relevant EC and EU instruments as entrusting the Council with a discretionary power to include individuals and organizations already subject to relevant national decisions. As will be explained below, the Court's review does not cover the merits of the decision (ie the potential terrorist related activities of the parties concerned) but the mere existence of a relevant national decision.

Second, the Court recognized that the Council could not possibly be expected to hear the entities concerned before listing them as 'terrorists' without leaving time to such entities to withdraw their assets from the EU and defeat the whole purpose of the measures (the same solution goes for the obligation to state reasons – see above 3.2.1).

Accordingly, the Court ruled that the entities concerned had no right to a hearing before their designation. Neither did they have a 'right' to a hearing immediately after such designation, since they were then at liberty to challenge such a listing before a Court.

As a result, EC institutions must only arrange for a hearing before taking a decision to maintain an individual or organization on the list after the initial time period, in addition to their obligation to state the reasons for such a decision (see above 3.2.1).

It should also be noted that the Court reiterated that 'overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations' may trump the parties' right to a hearing. No such considerations were found in the cases brought before the Court.

3.2.3 Right to effective judicial protection

The above mentioned finding that the Council had a discretionary power to include in the list any entity subject to a relevant national decision has direct implications on the Court's scope of review and hence the scope of designated entities' 'right to effective judicial protection'.

Although individuals and organizations may challenge their designation before the ECJ, the Court will normally not review the merits of the decision (i.e. whether the individuals or organizations concerned were effectively engaged in terrorist related activities) but simply whether a relevant national decision existed at all.

Except for assessing whether a relevant national decision existed, and except for severe or

gross mistakes of law or fact, the Court will not review the Council's reasons for including entities on the list. In the words of the Court:

> *'Because the Community Courts may not … substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power'* (*OMPI*, 12 December 2006, para 159).

This leaves designated terrorists with very few avenues to challenge their designation at the European level except for purely procedural concerns.

The Court was well aware of the shortcomings of its review. But the Court apparently believes that the appropriate forum for challenging one's alleged links with terrorism remains the national level, since EC designations can only be adopted following a relevant national decision.

3.3 What happens where individual or corporate human rights have been infringed by the designation process?

3.3.1 How the Council resists ECJ (and national) decisions: the case of the PMOI and others

In practice, the Court's findings on the procedural rights of designated 'terrorists' resulted in a series of annulments of EC designations, most notably for the PMOI and Mr Kadi.

It is however startling to see that some of the individuals or organizations concerned are still designated as terrorists, years after the Court ordered them out of the list.

Such individuals include for example Jose Maria Sison, a well-known Filipino activist who was ordered out of the EC list by the Court on 11 July 2007 on procedural grounds, just to be put back on the list on … 28 June 2007. A challenge of the latter decision is also pending before the Court.

But the most startling case is the case of the PMOI. As mentioned above at 1) the organization was included in the EC list in 2002. The reasons for such inclusion were never communicated to the organization. The Council had not explicitly stated on the basis of which national decision the PMOI had been listed. Indeed the Council and Commission even appeared to disagree during the course of the proceedings before the Court on the question of which national decision formed the basis of the EC listing. The PMOI's designation was maintained and extended several times. The organization's leaders were never heard, let alone invited to make their case by the Council or the Commission.

Faced with such blatant violations of fundamental human rights, the Court delivered a judgment annulling the original decision of the Council to list the PMOI and to freeze its

funds, and striking down the subsequent decisions with retroactive effect on 12 December 2006.

Declaring them unlawful, the Court annulled the decisions of the Council with respect to the PMOI, because by failing to provide the relevant information and documentation, the Council (and the UK Government, which had specially intervened in the case) prevented the PMOI from defending its position, while also preventing the Court itself from conducting an independent review of the lawfulness of the decision to include the PMOI in the terrorist list. The documentation provided to the Court by the Council and the UK Government could not and did not cure these defects.

It is most surprising to see that the Council basically ignored the Court's findings and maintained the PMOI on the terrorist list throughout 2007 and 2008, arguing that 'new evidence' had arisen. Whatever the status and nature of such new evidence, the Council failed once again to hear the PMOI before extending their designation or to state valid reasons for its decision.

The Council's position became increasingly difficult to maintain in late 2007 and early 2008, because the PMOI was ordered out of the UK list of 'terrorist groups' by British courts.

In June 2006, 35 Members of Parliament made an application to the Home Secretary seeking the removal of the PMOI from the UK list. Their application was denied, on the grounds that the PMOI was "concerned in terrorism", as set out in the Terrorism Act. By letter of September 1, 2006, the Home Secretary acknowledged that the PMOI had ceased its military activity some years earlier, but nevertheless contended that he was "entitled to fear that terrorist activity that has been suspended for pragmatic reasons might be resumed in the future."

Absolutely no evidence was cited in support of this "entitlement." The Members of Parliament appealed to the British Proscribed Organisations Appeals Commission (POAC). After an extensive review of both open and classified evidence (including the in camera cross-examination of government witnesses by special advocates), the submission of affidavits, and oral argument, POAC delivered a 144-page judgment on November 30, 2007. In that opinion, POAC concluded that the PMOI is not "concerned in terrorism," and that it has neither the capability nor the intent to engage in terrorist activity. Indeed, so strong were the arguments and evidence for the PMOI, and so weak were those of the Government, that the Commission wrote that to maintain the terrorist designation of the PMOI in light of that evidence and those arguments would be "perverse." On May 7, 2008, the Court of Appeal, in a judgment delivered by the Lord Chief Justice, denied the Government permission to appeal.

The Court conducted its own review of both the open and the closed material submitted to it, and concluded that neither "was there any reliable evidence that supported a conclusion that PMOI retained an intention to resort to terrorist activities in the future". Indeed the Court declared that

> 'It is a matter for comment and for regret that the decision-making process in this case has signally fallen short of the standards which our public law sets and which those

affected by public decisions have come to expect' (*Lord Alton of Liverpool and others v the Secretary of State for the Home Department*, 7 May 2008, para 57).

As a result of its defeat before the POAC and the Court of Appeal, the Government was ordered to lay before Parliament a draft order delisting the PMOI. The order was approved unanimously by both Houses on June 23, 2008, and came into effect on the following day. As of the end of June 2008, therefore, the PMOI is no longer proscribed as a terrorist organization in the United Kingdom. The members and supporters of the PMOI are no longer prohibited from performing acts that had been criminal offenses during the time of proscription.

The ECJ annulled once again their EC designation on 23 October 2008, finding that there was no remaining relevant national decision to keep them on the EC list.

However, in the meantime, the UK government had unofficially requested other EU Member States to replace them and provide some national decision to justify maintaining the PMOI on the EU list. The Dutch government was first approached but declined the offer after a review by its own intelligence services concluded that the PMOI were not involved in terrorism in any ascertainable way.

The UK government then turned to the French government which accepted to support further inclusion of the PMOI on the EU list on the basis of alleged, and once again undisclosed, 'new evidence'.

The designation was thus further extended in July 2008 by the Council upon request of the French government, and the PMOI remains on the list pending yet another challenge before the Court.

3.3.2 Which further remedies for designated 'terrorists'?

It is unclear what further remedy listed individuals and organizations may have.

Some designated 'terrorists' tried to obtain redress by suing the Council for damages before the Court.

The Court however rejected such claims in the *Segi* and *Gestoras Pro Amnistia* cases. The Court considered that Title VI TEU (on CFSP) did not provide for any action for damages and that the claimants could not seek damages in connection with the Council's position.

The Court however insisted that the individuals or organizations concerned could challenge such a common position when it is implemented at the national level. To the extent that common positions 'are intended to have legal effects in relation to third parties', national courts may refer to the Court questions pertaining to the validity of such common positions (see *Pro Gestoras Amnistia* et al., 27 February 2007, para 53).

These decisions leave many questions unanswered. It is unclear whether individuals or organizations wrongly designated as 'terrorists' could seek damages in connection with

relevant EC regulations rather than in connection with relevant CFSP common positions. It is also unclear how they could seek damages on the basis of common positions before national courts, as the Court in *Segi* and *Pro Gestoras Amnistia* apparently suggests they can.

4. Conclusion

All in all the European Court of Justice has failed to properly enforce fundamental human rights in connection with so-called 'terrorist' lists, if only because the Council keeps issuing new listings based on 'new evidence' after its initial listings are annulled by the Court.

But the Court was at least successful in bringing issues of due process and other fundamental rights to the attention of the Member States. The Lisbon Treaty, although not yet in force, does provide that the future EC legislation on terrorism must 'include necessary provisions on legal safeguards'(Article 75 new TEU).

The Court's jurisprudence may thus be expected to ultimately result in procedural fairness for the designation of terrorist individuals and organizations in the European Union. However the Court cannot be expected to embark any time soon on any real, substantial review of the designation of 'terrorists', because the Court leaves it largely to the Council's arbitrary discretion to assess the accuracy of alleged links between suspected entities and terrorist activities, save for allegations of gross or severe mistakes in law or fact.

The responsibility for the ever-difficult task of weighing whether an entity is truly involved in terrorism remains with national authorities and with the discretionary power of the Council. Given the Court's refusal to enter this (admittedly shifting) territory, one can but hope that future EC legislation will expressly provide for some sort of judicial review of the Council reasons for labelling an organization or (worse) an individual as 'terrorist'. Until then the European Union terrorist list will, quite unfortunately, remain a fortress of unlawfulness amidst the Union's ever growing "*Communauté de droit*".