ASSET FREEZE MEASURES IN THE FIGHT AGAINST TERRORISM

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"*Nervos belli: pecuniam infinitam*" said the illustrious Cicero in his fifth Philippic. Nowadays, this proverb echoes the fight of democracies against organised crime.

Asset freezing is a sanction aimed at depriving criminal organisations of their economic resources. This logic is particularly necessary when fighting against international organisations. It is not merely sufficient to imprison the perpetrators in these organisations, for their wealth can indirectly contribute to the thriving of the organisation and the recruitment of new members.

To this extent, the freezing of assets aims at forbidding targeted individuals from disposing of their economic resources as a preventive measure. As a consequence, they lack the necessary means to perform their criminal activities. The term *freeze* means *"to prohibit the transfer, conversion, disposition or movement of funds or other assets*"[1]. It is necessary to stress the difference between asset freezing and confiscation. Confiscation implies that a sentence has been passed by a court whereas the freezing of assets is a preventive measure. The two processes are closely linked, as confiscation is supposed to be the outcome of an asset freezing measure, the same way imprisonment is linked to pre-trial detention. As it is patent from its definition, asset freezing represents a true threat to fundamental rights and especially property rights and the free movement of goods.

The freezing of assets has been a useful tool in facing the rising threat of terrorism. To fight terrorism, the international community pointed out the need to identify and cut financing channels. "*Terrorists seldom kill for money but they always need money to kill*", said Terry DAVIS, Secretary General of the Council of Europe between 2004 and 2009. For example, according to Iraqi religious cleric Sheikh Abu Saad al-Ansari, the jihadist group Islamic State (ISIS) estimated its 2015 budget at two billion[2]. That is why it is necessary for states fighting terrorism to prevent this organisation from using its resources, such as oil wells in Iraq. Besides, in the current "global village", the ease with which individuals and companies move financial goods throughout the planet, and the purchase of tangible goods, leads to the necessity of a global and coordinated fight against the financing of terrorism and the participation of civil companies such as banks.

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1 *S/RES/1267(1999)* UN Security Council Resolution

2 http://europe.newsweek.com/isis-release-2015-budget-projections-2bn-250m-surplus-296577?rm=eu

Historically, the first international sanctions regarding terrorism targeted the states themselves, as they were subject to international law. However, those sanctions had some collateral damage on civilians and third countries. For humanitarian reasons, and after several seminars on this issue, such as the Interlaken process that took place between 1998 and 1999 in Switzerland, the United Nations decided to set up what was called "smart sanctions"[3]. These sanctions aim at individuals rather than states. This evolution forms part of the rise of individuals on the international stage as a subject of rights. The identification and freezing of terrorist assets are only an example of these smart sanctions but they can also aim at reducing the terrorists' freedom of movement.

As far as "terrorism" is concerned, the term has always been complicated to define. In fact, two different things usually define terrorism: the means, i.e. the use of terror, and the political aim behind the acts. Different definitions have been given to terrorism by several international conventions. For example, in its article 2, the International Convention for the Suppression of the Financing of Terrorism defines its scope, stating "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out, (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) any other act intended to cause death or serious bodily injury to civilians, or to any other person not taking an active part in the hostilities in a situation of armed conflict when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." Issues arising from this definition concern the concept of "freedom fighters", acts of terrorism during a state of war or state terrorism[4]. International law lacks a unique definition of terrorism and this failure is a chink in this fight's armour.

Actually, two different procedures can be distinguished in the area of asset freezing in the European Union. Firstly, an "administrative" procedure, which consists mainly in issuing black lists, was first set up by the Security Council of the UN and was then implemented both at a regional and national level. Secondly, a "judicial" procedure, specific to the states and coordinated by the European Union, which does not specifically target terrorism but several

[3] Les sanctions financières internationales, David HOTTE et al., RB Edition 2012

[4] « Defining Terrorism : Is one man's terrorist another man's freedom fighter ? » Boaz GANOR, Police, Practice and Research : an International Journal, 3 (4), 2002, p. 287-304

offences including terrorism. These two procedures coexist at a European level, raising different issues. Whereas the "administrative" procedure is more political and involves primarily the state and the government, the "judicial" procedure is built around judicial authorities (judges and prosecutors). Both of these procedures constitute preventive measures taken prior to any decision being issued by a court or a tribunal, and as such, they call into question a crucial concept in criminal law, the presumption of innocence. Moreover, as can be deduced from the definition of asset freezing, these measures are inclined to infringe upon property rights.

The questions of property rights, free movement of goods, and presumption of innocence, are at the heart of the fight against terrorism. With this in mind, the part given to the different authorities, internationally, regionally, and nationally, and the guarantees provided to citizens to protect their freedoms and fundamental rights is a key question in the fight against terrorism. A consequence of that this first question issue is also the part played by the judicial authorities, as protectors of individual freedoms and rights in this matter.

There are numerous international procedures on asset freezing which involve the intervention of different actors at different levels (I), but it would seem that the guarantees given to citizens in the process of these procedures are slowly but steadily on the increase (II).

I- The entanglement of international asset freezing procedures

The existence of several asset freezing procedures can be a source of complexity in this issue. In fact, two different processes currently coexist: administrative procedures (A) and judicial procedures (B).

A) Asset freezing in administrative procedures: blacklisting

Administrative asset freezing decisions may be taken at several levels.

1. International level: resolutions of the Security Council of the United Nations

Article 39 of Chapter VII of the United Nations Charter authorises the Security Council of the United Nations (UNSC) to acknowledge the existence of any threat to peace, breach of peace,

or act of aggression. When such a threat is thus defined, the UNSC shall make recommendations, or decide what measures shall be taken to maintain or restore international security. [6]

Terrorism falls within the scope of a threat as defined by Chapter VII of the UN Charter. Therefore, a global strategy in the fight against the financing of terrorism has been developed progressively. To this extent, Resolution 1267 dated October 15 1999 implemented smart sanctions against the Taliban regime in Afghanistan. One of the sanctions consisted in the freezing of assets and financial resources, directly or indirectly controlled by the Taliban (i.e. funds, goods or properties belonging to or controlled by them). Resolution 1267 also created a Committee to establish a United Nations' Blacklist at the request of the UNSC. Originally named Committee 1267, its title has been forever changing through numerous resolutions defining its scope of action. The latest resolution to date is resolution 2253 of December 2015, naming the Committee Security Council ISIL (Daesh) and Al Quaeda Sanctions Committee.

The individuals appearing on the list are subject to asset freezing and travel bans.

The procedure for registration on the UN Blacklist has been progressively consolidated. It now consists in the implementation by states of a procedure sovereignly elaborated by them, through which they submit names to the UNSC Committee. A criminal conviction or a criminal prosecution are not necessary to justify the submission of a name to the Committee. However, states have to gather the elements of proof of association with a terrorist group. To this extent, states are invited to present a memorandum to identify precisely the individuals (in order to prevent possible confusion with homonyms). The motivations for subscription must also be indicated, with the mention of restrictions for the publicity of such information, as required by the state.

The Committee then establishes a set of criteria guiding its decision to put a name on a list. The decision is taken by a consensus of its 15 members.

Resolution 1333 of 2000 later extended the scope of these sanctions to Usama Bin Laden, Al Qaeda, and any natural or legal person suspected of taking part in their terrorist activities. States have to take measures in order to give full effect to the blacklist.

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6 Charter of the United Nations, Chapter VII, Article 39

In the wake of the 9/11 attacks, resolution 1373 of September 28 2001 called upon states to implement concerted actions in order to prevent financial assistance, or any type of assistance, to terrorists. The UNSC asked each state to establish its own blacklist of organisations and persons depicted as « terrorist ». States should also "*criminalize the wilful provision or collection (...) of funds by their nationals or in their territories with the intention that the funds should be used (...) in order to carry out terrorist acts*."[7] Such measures were also extended to Daesh, also known as ISIL, by Resolution 2253 of December 17 2015. This legal framework has led to the creation of European anti-terrorist lists.

2. *Regional level: the anti-terrorist lists of the European Union*

There are two different types of European lists: lists implementing UN Resolutions and autonomous European lists. Even though these two types refer to numerous different lists (due to their update and the many annexes needed for their implementation), the interests of clarity require referral to the two types as two lists.

a) The lists implementing UN Resolutions

The Council of the European Union has adopted several measures in order to comply with Resolution 1333 and the subsequent resolutions of the UNSC. Amongst these measures, Common Position 2002/402 CFSP and European regulation 881/2002, implement some of these smart sanctions including the freezing of assets against individuals identified on the UN blacklist, i.e. individuals linked to Usama Bin Laden, Al Qaeda, and to the Taliban. The European Commission has been given the power to execute and follow up those sanctions. In fact, the Commission has the capacity to update the list, on the basis of information given either by the UNSC or the 1267 Committee. It is also possible for the Commission to change annex II of the list, dedicated to national authorities competent to implement these sanctions.

This list is a simple transcription of the UN lists. Therefore, a proposal to the 1627 Committee is sufficient to put someone on the list, as explained earlier.

[7] UN Security Council, *Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]*, 28 September 2001, S/RES/1373 (2001)

b) The autonomous EU lists

In the aftermath of the 9/11 attacks, the Council of the European Union, following the wishes exposed in Resolution 1373(2001), adopted a common position 2001/930 CFSP of December 27 2001. In that position, " the direct or indirect provision of funds aimed at perpetrating terrorist acts »[8] was criminalised.

A second common position 2001/931 sets up a European procedure to put an individual on a blacklist and update it. The European Commission is in charge of executing the order to freeze the assets and economic resources of the individuals mentioned on the list. It has to be noted that the action of the European Commission in this matter has to fall under its scope of action as defined by the European Treaties.

The Council of the European Union, acting unanimously, is authorised by European regulation 2580/2001 to establish, review and modify this list. Therefore, it is modified on a six-monthly basis.

These sanctions have been implemented on the basis of articles 60, 301 and 308. Since the Treaty of Lisbon entered into force, these measures have been drafted in article 215 of the Treaty on the Functioning of the European Union (TFUE). Indeed, this article enables a decision adopted in virtue of chapter 2 title V of the Treaty on the European Union (TUE) to authorise the Council of the European Union to adopt restrictive measures towards natural or legal persons, groups or non-state actors. Moreover, it acknowledges that the dispositions thus taken carry all necessary judicial guarantees.

Since 2009, the procedure through which states place names on the autonomous European list falls under state cooperation as it is implemented by title VI of the TUE. Contrary to the UN procedure, the autonomous subscription procedure contains judicial guarantees. Indeed, decisions taken by competent authorities, meaning judicial authorities or authorities assimilated to the judiciary (i.e. authorities empowered to sanction) justify the addition of a name to the list. The judicial procedure is therefore needed both at the stage of criminal investigations, criminal prosecution and judicial sentencing regarding a terrorist act, the attempt to perform a terrorist act, or participation in a terrorist association, group or entity. Elements of proof must be of a serious and credible nature. Presence on the UN Blacklist is not an obstacle to registration on

[8] Council of the European Union, *Common Position of 27 December 2001 combating terrorism,* 2001/930/CFSP

the autonomous European list. States must also expose the reasons justifying their subscription request. Such motivations are subject to control by the Common position 931/2001 group.

3. National level: administrative measures

At national level, it is also possible to take measures to freeze the assets of an individual. For example, in French Law, asset freezing measures can be taken by national administrative authorities. The French financial and monetary statute, in articles L562-1 and L562-2, allows the French Minister of the Economy and the French Minister of the Interior, to jointly decide on the implementation of an asset freezing measure for a renewable length of six months. These measures apply either to persons who tried to commit or aid and abet terrorist acts, or to persons, who, due to their positions, had the possibility to commit those acts without the need to prove that they actually did.

B) Asset freezing through international judicial cooperation

Apart from this administrative procedure, the judicial authorities of each Member State have been given the means to implement international asset freezing measures, in order to prevent cross-border organised crime (and not only terrorism).

1. Harmonisation of national judicial authority power regarding asset freezing

A first way to enable international judicial cooperation is to harmonise national laws. Harmonising does not mean unifying, but rather laying down minimal rules so that different legal systems can become compatible (art. 82§2 TFEU). As far as asset freezing is concerned, harmonisation is achieved by Council Framework Decision 2003/577/JHA of 22 July 2003 and Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014.

These standards give a very wide definition of the possible subject of an assets freeze, indicating that it could concern frozen « *property of any description, whether corporeal or incorporeal, movable or immovable* […] *which the competent judicial authority in the issuing State considers is the proceeds of an offence* [...], or *constitutes the instrumentalities or the objects of such an offence* ». The framework decision also provides a powerful substitution scheme in case the property to be frozen is not directly reachable. This corresponds to an

« *equivalent to either the full value or part of the value* » of the proceeds of the offence. Moreover, the 2014 directive states that « *'proceeds' means any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits* ». Besides, it indicates that « *Member States shall take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation* ». This means that Member States should ensure any property likely to be confiscated should be freezeable.

2. Mutual recognition of asset freezing orders

After the 1999 Tampere European Council meeting on the creation of an area of freedom, security and justice, the Council adopted a plan in 2000 designed to implement the principle of mutual recognition. Framework Decision 2003/577/JHA applied this principle to asset freezing orders issued by national judges and prosecutors. It was planned to set up a tool on the recognition of both assets and evidence freezing. Regarding its scope, it is important to highlight that this framework decision is not specific to terrorism. In fact, its article 3 lists thirty-two offences amongst which "terrorism" and "participation in a criminal organisation" can be found, for which an asset freezing order has to be obeyed by the receiving State without any conditions as to its criminality in the latter.

The process was designed to be fast. This celerity is a key aspect of the framework decision insofar as moving financial property between countries has become easier. If a national judge or prosecutor wants to freeze assets located in another European country, he only has to issue a freezing order in accordance with his national law, together with a "freezing certificate" and send it to a national authority in the receiving State (except for the UK and Ireland, where freezing orders and certificates must be sent via a central authority). The freezing certificate is a common form annexed to the framework decision, translated into one of the official languages of the executing State, containing several key data about the freezing request (details about the frozen property, identification of its owner, offences related to the assets freeze, etc.).

The receiving State must act upon a freezing order "*without any further formality being required*", meaning the freezing order is sufficient in itself. Furthermore, the framework decision limits the possibility given to the receiving State to refuse or to postpone the recognition or execution of the freezing order to a few situations. A receiving State may refuse

the execution of the freezing order on three substantial grounds: in the case where there is immunity or privilege in the receiving State law that makes the freezing order impossible; in the case of a contradiction with the *non bis in idem principle*, and in the case that the act on which the freezing order is based is not an offence under the law of the executing State (art. 7). Plus, the recognition or execution of the freezing order may be postponed by the receiving State for two reasons: when asset freezing may damage an ongoing criminal investigation, or if the property to be frozen is already subject to an assets freeze order (art. 8).

As it is clear from the description of this process, the judicial authority has a very important role to play. Besides, article 4 of the Framework Decision states that "if the competent judicial authority for execution is unknown, the judicial authority in the issuing State shall make all necessary enquiries, including via the contact points of the European Judicial Network, in order to obtain the information from the executing State". This importance given to judicial authorities instead of administrative authorities is recurrent in the European Union. The procedure implemented by this decision is very similar to the procedure used for the European Arrest Warrant.

3. Persistence of mutual assistance for the implementation of an assets freeze

Despite this recent and major milestone in judicial cooperation in terms of asset freezing, it must be recalled that international asset freezing was possible before, through the classical "mutual assistance" system. The mutual assistance system consists in the sending of criminal assistance requests between European judicial authorities. Indeed, several standards have been implemented since 1959 within the Council of Europe. More particularly, as regards asset freezing requests, the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime stated that "*at the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request*" (art. 11). Later, and before they created the freezing certificate mentioned above, the EU Member States signed a Convention on Mutual Assistance in Criminal Matters in 2000, which facilitates the sending of requests between national authorities.

Unlike the European Arrest Warrant created in 2002, which totally replaced the former extradition process between Member States of the Union, the freezing certificate process does not supplant the traditional mutual assistance system in terms of asset freezing. This means that any judicial authority of an EU Member State is free to use either of the two systems. As a matter of fact, the freezing certificate still suffers from competition from mutual assistance, for old habits die hard[9].

II- The increasing guarantees in international asset freezing

Despite their entanglement, the different asset freezing procedures seem to converge on a better protection of individual rights and to give a more and more important part to judicial authorities. The protection of individuals depends firstly on the possibility for an institution to control the decision made to freeze the assets. Another means of protection is the increasing recognition of individual rights in the asset freezing process.

A) The emergence of control over asset freezing

On the issue of asset freezing, two different remedies can be distinguished. Firstly, judicial remedies can allow the target of asset freezing measures to discuss their fate. Secondly, formal complaints can also be made by those targeted at a national or international level.

1. The existence of judicial remedies lacking in effectiveness

The rise of judicial remedies mostly at a national and European level has permitted better protection of individual rights. But the entanglement of legal orders, whether international, European, European Union or national, and the jurisdiction of each Court make it a real challenge to understand the legal remedies available to the individual.

Nationally, two situations have to be distinguished. On the matter of the European asset freezing order, article 8 of the 2014 Directive states that "*Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights*".

[9] Juliette Lelieur, "*Le dispositif juridique de l'Union Européenne pour la captation des avoirs criminels*", AJ Pénal 2015, p. 232.

It is important to point out that Members States are part of the ECHR and therefore there is a certain harmonisation on the question of effectiveness of judicial remedies. In the matter of international asset freezing, an individual can also have remedies in his own State but international instruments do not provide instructions as to how this remedy should take place. For example, in France, the individuals targeted by such a sanction, may go before an administrative judge but not judicial judges. And the debate over the application of articles 13 and 6 of the European Convention on Human Rights raises the issue on the effectiveness of this remedy, as will be discussed later.

At a European level, two courts have also taken an interest in protecting individual rights in the matter of asset freezing. First, the European Court of Justice has ruled on the implementation of the UN blacklists in several cases. Similarly, the European Court of Human Rights (ECHR) has also taken an interest in offering an effective remedy to an asset freezing decision.

Regarding the ECJ, the Court seems to take greater and greater control of the balance between individual rights and the need to take efficient measures to fight the financing of terrorism. The most important decision regarding this issue is the Kadi case[10]. In this case, the issue regarding the relationship between European Union law and international law is discussed. The Court recalled[11] the autonomy of its legal order. From that autonomy, the Court admitted its competence to control the lawfulness of the litigious regulations in light of the European treaties and stated that "*respect for human rights is a condition of the lawfulness of community acts and that measures incompatible with human rights are not acceptable in the Community*"[12]. It is important to stress that the Court refused to review the lawfulness of the Security Council resolution itself. The Court ruled that the protection of individual rights provided by the UN was not sufficient and therefore considered itself competent to rule on the matter. In the same case, the Court of First Instance adopted a very different approach. In fact, the Court reckoned that the European legal order was subordinate to the United Nations legal order. Therefore, it considered that resolutions adopted by the Security Council could not be challenged on the basis of European legal standards. However, the Court considered that the resolutions could be challenged on the basis of *jus cogens*. Even though the European Court of Justice dismissed this bold approach, this decision shows the difficulty arising from the relationship between legal orders and the difficulty for individuals to navigate through these

[10] ECJ, Case C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* (2008) I-06351
[11] ECJ, Case – 26/62, *Van Gend en Loos v Administratie der Belastingen*, (1963) 00003
[12] Ibid §284

issues.

In the NADA vs Switzerland case[13], the European Court of Human Rights found itself competent to control an act issued by a State in the implementation of a United Nations' Resolution. In this case, Mr NADA had been placed on the UN Blacklist and fell under Resolution 1390 (2002) which called upon States to hinder the freedom of movement of listed individuals. An administrative act was published by Switzerland forbidding Mr NADA to leave his enclave of Campione d'Italia. In previous cases[14], the ECHR had ruled that acts taken by States in virtue of the powers delegated by the UNSC did not fall under the competence of the Court *rationae personae*. In the NADA case, the Court declared itself competent *rationae personae* in the presence of an act issued by a State party to the European Convention of Human Rights. The nuance lies in the difference between a State acting in the delegation of power of the UNSC and the State issuing an act when implementing a delegation of power of the UNSC. Even though the reach of the NADA ruling outside the case is hard to appreciate, the ECHR made a breakthrough in the control of the implementation of the UN smart sanctions in light of Human Rights. It is important to point out that the decision made by the ECHR was only possible due to Switzerland not being a Member State of the European Union. In fact, in the Bosphorus Case[15], the ECHR considered that the European Union had adopted sufficient standards in protecting human rights and therefore, recognised its incompetence in challenging an EU decision.

It is to be noted that no international jurisdiction has been considered competent to challenge the legality of resolutions made by the Security Council of the United Nations directly. Even the International Court of Justice (ICJ), which could be considered the ideal candidate, ruled that "*undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by*"[16] the Security Council. However, the Court seems to recognise its competence in the same advisory opinion to challenge the decision made by the Security Council indirectly by verifying its conformity to the purposes and principles of the Charter. However, the position of the ICJ is not clear and it is not possible to affirm the competence of

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13 ECHR, *Nada v Switzerland*, n°10593/98, 12 September 2012

14 ECHR, *Behrami and Behrami v France*, n°71412/01, *Saramati v Germany, France, Norway*, n°78166/01, 2 May 2007

15 ECHR, *Bosphorus v Irlande*, n°45036/98, Rec. 2005-VI, 30 June 2005

16 *Legal Consequencesfor States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,* p. *16.*

the Court in this matter, which is highly political and sensitive[17].

2. The existence of unsatisfactory formal complaints

Formal complaints can also be made in every legal order that has implemented the freezing of assets, but this control is not effective due to the organ responsible and the extent of its powers.

At a national level, it is usually possible to ask the organ responsible[18] for the decision or for its implementation to review its decision. The 2014 Directive stresses this possibility, declaring "*when the initial freezing order has been taken by a competent authority other than a judicial authority, such order shall first be submitted for validation or review to a judicial authority before it can be challenged before a court*". At European level, it is also possible for an individual targeted by an asset freezing measure to request the Council of the European Union to review its decision. But the Council is not bound to answer such a request and no specific procedure is foreseen.

At international level, a specific organ has been set up. Originally, the Security Council was considered to have full authority over the issue of asset freezing. There was no possibility for a remedy, either administrative or judicial. The wave of criticism against the lack of equity and transparency, and the decision taken by the CJEU to quash asset freezing measures led to the creation of the Office of the Ombudsperson[19] in 2009. Its assignment is to assist the 1267 Committee in the reviewing of requests from individuals, groups, undertakings or entities seeking to be removed from the 'black lists'. The procedure has been modified since 2009 by the 1989(2011) Resolution.

Basically, the review by the Ombudsperson is built on three stages. First, the Ombudsperson receives the complaint. After receiving it, the Ombudsperson has to inform the claimant of the procedure and his rights. He then shares the complaint with several entities, i.e. members of the Committee, the States implementing the decision questioned, and every State that he considers to be of interest. He also has to inform the "surveying team". The goal of this exchange is to gather information on the case. Secondly, the Ombudsperson has talks with the claimant over

[17] Hajer ROUIDI, L'arrêt de la CJCE du 3 septembre 2008, RSC 2009, p.7

[18] In France, it is the 'Direction générale des finances publiques'

[19] UN Security Council, *Security Council resolution 1904 (2009) [on continuation of measures imposed against the Taliban and Al-Qaida]*, 17 December 2009, S/RES/1904 (2009)

two months, asking questions or receiving him directly. Finally, the claim is examined and the committee gives its decision.

Even though the creation of the Ombudsperson is an indisputable step forward for individuals, the remedy and its efficiency are still questionable. First of all, the question of the appointment of the Ombudsperson is a real issue. In fact, the position is chosen by the UN Security Council and structurally attached to the UN. The Ombudsperson lacks independence and impartiality. Secondly, the powers of the Ombudsperson are limited. For example, if the States interviewed refuse to cooperate, the Ombudsperson does not have any means to make enquiries. Furthermore, the Ombudsperson only has an advisory opinion. These two main issues disqualify the Ombudsperson as an effective judicial remedy and such a weakness has been pointed out both by the Court of First Instance of the European Union[20] and the United Kingdom Supreme Court[21].

The efficiency of such remedies, both formal and judicial can be questioned when States do not cooperate. In fact, in several cases, the Council of Europe reiterated its decision after the ECJ had quashed the first decision.

B) The recognition of individual rights following a decision of asset freezing

Despite the multiplicity of asset freezing procedures and the complicated relationship between legal orders, a common movement of recognition of rights, either substantial or procedural, can be observed.

1. The recognition of substantial rights

One of the main limits as regards the freezing of assets consists in the implementation of a substantial right to an economic resource necessary to cover essential human needs. To this effect, asset freezing does not apply to funds, financial assets or economic resources that have been acknowledged as necessary basic expenses.

[20] CFI, Case T-85/09, *Yassin Abdullah Kadi v European Commission,* 30 September 2010, II-05177
[21] United Kingdom Supreme Court, 27 October 2010

To the United Nations, such a restriction represents a humanitarian exemption[22] applying to "*payment for foodstuffs, rent or mortgages, medicine and medical treatment, insurance premium, public utility charges".* Furthermore, the need for an individual concerned by a smart sanction to access his right to a defence has led some countries to incorporate the payment of reasonable professional fees associated with the provision of legal services in basic resources. This could be seen as defining a right to a lawyer, referring to the right of defence. The European Union has also produced its own definition of economic resources as "*assets of every kind, whether tangible or intangible, movable or immovable, which are not funds that can be used to obtain funds or financial services*". The funds from which they should be subtracted are defined as "*financial assets and economic benefits of every kind*"[23]. This exemption does not only apply to targeted individuals, but also to members of their families.

In the M.e.a. vs/ Her Majesty's Treasury ruling of the ECJ, dated April 29, 2010, the Court specified that the basic resources as defined by Regulation 881/2002 did not incorporate social benefits. Indeed, the Court decided they cannot be used to obtain funds or financial services. The judges justified their strict interpretation of the scope of basic resources by invoking the principle of legal certainty, stating that restrictive measures having an impact on individual liberties had to be clearly defined. In this particular matter, social benefits were given to the wife of an individual suspected of terrorism.

The right to a remedy has also been acknowledged in the matter: since Regulation 561/2003 of 27 March 2003, individuals concerned by asset freezing can request a humanitarian exemption to such freezing from the competent authorities of their State, in order to cover basic expenses.

Other substantial rights have been acknowledged in case law. The violation of the right to respect for private and family life (article 8 ECHR) was noted in the Nada vs Switzerland ruling of the ECHR dated September 12 2012. In the case, Mr NADA was forbidden to leave his 1.6 km2 enclave of Campione d'Italia. Mr NADA was therefore unable to be hospitalised when necessary, and to visit his family in Italy. In the second Kadi case of 2013, the ECJ underlined "*the public opprobrium and suspicion*" of registered individuals, which those measures provoke, which could be interpreted as related to the right to respect for private and

[22] UN Security Council, *Security Council resolution 1452 (2002) on the threats to international peace and security caused by terrorist acts*, 20 December 2002, S/RES/1452 (2002) amended by UN Security Council, *Resolution 1735 (2006) Threats to International Peace and Security Caused by Terrorist Acts*, 22 December 2006, S/RES/1735 (2006)

[23] Regulation 881/2002, implemented to give effect to Resolution 2002 within Member States of the European Union

family life. It is however difficult to establish the reach of the NADA ruling outside its particular context.

Asset freezing measures have also been judged as violating the right to property, as a consequence of the lack of remedy combined with the continuation of the measure.

In the first Kadi case of 2008, the infringement of his right to a remedy was also interpreted as having consequences regarding his right to property (art 1 Protocol 1 to the ECHR). The restriction of his property right was deemed « significant » by the Court, in the scope of both "*the general application and the continuation of asset freezing measures affecting him*"[24]. The second Kadi case of 2013 highlighted the same point: "*Notwithstanding their preventive nature, the restrictive measures at issue have, as regards those rights and freedoms, a substantial negative impact related, (...) to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of their application."*[25]

In March 2016, the French Supreme Court, the '*Conseil Constitutionnel*', came to the same conclusion. It ruled on the application of articles from the French financial and monetary statute, which allowed the French Minister of the Economy to freeze assets that belonged to either persons who tried to commit or aid and abet terrorist acts, or to persons, who due to their positions had the possibility to commit those acts without the need to prove that they actually did. The Supreme Court quashed the claim regarding the separation of powers as the claimant had a possible remedy before the administrative judge. However, the court recognised as unconstitutional the fact of the asset freezing of individuals who had the possibility of committing, due to their position, acts of terrorism, without the need for the decision-maker to establish that those individuals either had committed, tried to commit acts of terrorism or, aided and abetted the commission of those acts. In fact, the Supreme Court considered that this presumption was overtly disproportionate to the aim intended and was a breach of the Declaration of 1789 on property rights.

2. The recognition of procedural rights

As part of the same movement of rights recognition, several procedural rights were recognised

[24] ECJ, C-402/05 P- *Kadi and Al Barakaat Interntional Foundation v Council and Commission*, 3 September 2008 I-06351 §369

[25] ECJ, Case C-584/10 P, *Commission and others v Kadi*, 18 July 2013, §132

for individuals targeted by an asset freezing measure in order to ensure better protection.

The transparency of the procedure was considered to be important to protect. This transparency can amount to two main rights: the right of the individual to be aware of this measure, and secondly, his right to have the reasons for this measure explained to him. The different legal texts and cases related to the freezing of assets show the development of those rights. For example, regarding judicial cooperation in the European Union, article 8§2 of the 2014/42/EU Directive[26]states that "*Member States shall take the necessary measures to ensure that the freezing order is communicated to the affected person as soon as possible after its execution. Such communication shall indicate, at least briefly, the reason or reasons for the order concerned*". The Directive adds, "*When it is necessary to avoid jeopardising a criminal investigation, the competent authorities may postpone communicating the freezing order to the affected person*". This approach is a good example of the balance between the protection of the individual and the efficiency of criminal investigation on the sensitive issue of terrorism. Another example of this protection can be found in ECJ case law. In fact, in the first Kadi case[27], the individual is recognised, as Mr Kadi's rights of defence were breached due to the fact that the contestation "*was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection*"[28]. The court recognised that the effect of surprise was fundamental in preventive measures but the total absence of information after the measure being taken could not be tolerated. Furthermore, in the second episode of the Kadi saga[29], the Court considered it its duty to "ensure that that decision (…) was taken on a sufficiently solid, factual basis". As a consequence, judicial review could not "*be restricted to an assessment of the cogency in the abstract of the reasons relied on, but [had to] concern whether those reasons, or at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated*"[30]. Following that analysis, the Court ruled that the evidence presented to justify the adoption of those measures was not sufficient. In this ruling, the Court clearly needs the statement of reasons to control the proportionality between the infringement of individual rights and the reasons justifying such infringement. The ECHR also stressed the importance of motives in the Nada case, saying "*the maintaining or even reinforcement of those measures*

[26] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

[27] ECJ, C-402/05 P- *Kadi and Al Barakaat Interntional Foundation v Council and Commission*, 3 September 2008 I-06351

[28] Idem

[29] ECJ, Case C-584/10 P, *Commission and others v Kadi*, 18 July 2013

[30] Idem

over the years must be explained and justified convincingly"[31].

At international level, the same concern for information and motivation seems to emerge. Due to the outburst of the ECJ in the first Kadi case, guidelines were provided to the sanction committee in several resolutions, stating that the reasons for registration of an individual on the list had to be shared and that a summary of the situation was necessary. This requirement shows the importance given to motives in taking an asset freezing measure.

In addition to the right of access to an effective legal remedy and the right to a certain transparency in the procedure, one could wonder if the individual, subject to an asset freezing measure, has any other procedural rights.

On the one hand, as far as judicial procedures are concerned, both EU law and Council of Europe law provide a wide range of procedural rights. Thus, case law under article 6 of the ECHR is abundant, and is referred to in the Charter of Fundamental Rights in the European Union (art. 47 and 53 § 3). This "fair trial" standard includes in particular the right to legal assistance, to a fair and public hearing by an independent and impartial tribunal, or to the presumption of innocence. The applicability of article 6 ECHR to judicial asset freezing measures is not disputed, since it is considered a conservative measure taking place in a criminal procedure, for example on account of terrorism. This is why persons against whom judicial asset freezing orders have been issued should enjoy every procedural right stated by the ECtHR, such as the access to a lawyer. In this respect, for its part, Directive 2013/48/EU has harmonised this right, granting it "*to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities or a member state, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty or not*" (art. 2 § 1).

On the other hand, formally-speaking, administrative asset freezing is not a criminal charge, for its issuing is not dependent on a conviction or the ruling of a judicial authority. Consequently, persons against whom administrative asset freezing measures have been issued do not enjoy the "fair trial" procedural rights stated by article 6 ECHR. CJEU case law considers "smart sanctions" as administrative measures, and contains no mention of a right to a lawyer in these

[31] ECHR, *Nada v Switzerland*, n°10593/98, 12 September 2012, §184

cases. There is a real gap in terms of procedural rights between the two kinds of asset freezing measures.

However, one could wonder whether article 6 could be applied to administrative asset freezing measures[32]. The ECHR has never had the opportunity to reach a decision on this controversial point (in the *Nada* ruling, the argument was not invoked by the claimant). Indeed, the "criminal charge" required by the Convention for the application of article 6 has been an autonomous notion for decades, meaning it goes beyond national qualifications. The European Court may thus consider "criminal" a measure that is not formally the result of a criminal procedure in the law of a Member State[33]. The Court also has a substantive conception of what should be considered a "charge"[34]. Many aspects of the administrative asset freezing measure could advocate for the applicability of article 6. Firstly, the measure may end up being as severe as a criminal sanction. Secondly, it takes place in the process of a struggle against criminality. Thirdly, the origin of the sanction is a public body, and so on. For the moment, such a qualification is speculative.

Conclusion

The system currently in place regarding the freezing of assets does not give satisfaction as far as the protection of human rights and freedoms is concerned. To fight terrorism is like fighting the Lernaean Hydra and like Hercules, States need to use more effective means which are both preventive and repressive. However, as democracies, Member States have to guarantee the "state of justice". To that end, it is important to guarantee a sufficient protection of fundamental rights. In the case of the freezing of assets, the scales are clearly tipped in favour of efficiency. The comparison between judicial and administrative freezing of assets shows a degree of difference in protecting individual rights. Whereas individuals facing the judicial freezing of assets are protected by the guarantees provided in judicial procedures, the ones being targeted by administrative sanctions are denied the same protection.

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32 Broek, Hazelhorst & Zanger, (2011). *Asset Freezing: Smart Sanction or Criminal Charge?*. Utrecht Journal of International and European Law. 27(72), pp.18–27

33 ECHR, *Engel and others v. the Netherlands*, 8 June 1976 "If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will",.

34 ECHR, *Adolf v Austria, 26* March 1982, The Court considers it has "to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a "charge" within the meaning of Article 6"

To address this division, it is possible to imagine a process, within the European Union, that could both maintain the efficiency of the asset freezing principle and offer a better guarantee for human rights. In this process, the Council of the European Union could take administrative measures for asset freezing. There would be no need to notify the target of the decision beforehand, in order to preserve the surprise effect of the asset freeze, necessary for its efficiency. However, after the freeze, the individual would be notified. Then, the European Court of Justice, or a special chamber created to that effect, would have to take a decision in a strict amount of time, for example a week. The Court would have to assess whether there was enough evidence to justify such a measure. The claimant could also express himself in front of the court. But his access to the statement of reasons could be limited to protect investigation confidentiality. The Court would also have to rule again within six months to a year. There would also be a time limit for the sanction, as a preventive sanction that lasts ten years can no longer be considered temporary.

Another idea would be to set up control by an independent judge before registration on the list. Technically, the Council of the European Union would have to refer either to a special chamber of the Court of Justice or the president of the European Court of Justice and ask permission to add the individual to the list. This procedure would be secret, fast and non-contradictory in order to protect the investigation and its interests.

In this process, the judge would be given a more central role, as a protector of individual rights and freedoms. In fact, as the High Commissioner for Human Rights stated: "*Because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction. (…) This poses serious human rights issues, as all punitive decisions should be either judicial or subject to judicial review*[35]"

The European Commission recently[36] asserted its commitment to improve "*the efficiency of the EU's transposition of UN asset freezing measures*". Will it involve more judicial review?

[35] Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (2 September 2009)

[36] « Commission presents Action Plan to strengthen the fight against terrorist financing », European Commission press release, 2 february 2016.