

Summary of legal opinions

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Introduction

On 15 July 2008 the Council of the European Union made a decision (2008/583/EC) maintaining the People's Mujahidin Organization of Iran (PMOI) on the EU asset freeze list. We submit that the Council's decision of 15 July, so far as it concerns the PMOI, is unlawful as briefly explained below.

The Illegality of the Council Decision

1. According to Article 1(4) of the Common Position 2001/931, the Council is obliged to include an entity on the list on the basis of a decision by a national competent authority. The French decision which the Council has relied on is not in respect of the PMOI. This alone makes the decision unlawful.
2. The Council has failed to substantiate or justify its decision with "precise", "serious" and "credible" information which the law requires. Indeed, the Council had already acknowledged that it does not have any evidence at least since 2001, contending that it does not need current information to justify its decision. This is while both the Common Position and Council Regulation uses the present tense. Furthermore, the national decision relied on, contrary to the Council's contention is not new. The Council was aware of the investigation in France and the issue was discussed in the hearing of the Court of First Instance in February 2008.
3. The Proscribed Organisation Appeal Commission and the UK Court of Appeal have concluded that the PMOI is not concerned in terrorism and that the Secretary of State's refusal to deproscribe the organisation was "flawed" and "perverse". In reaching this decision POAC considered all open and classified evidence up to July 2007 and the government were allowed to present any new evidence to the Court of Appeal up to February 2008. The evidence considered by UK court included evidence from other governments. The UK Court of Appeal said having considered closed material it strengthened its view that PMOI is not concerned in terrorism. Considering that for five years the Council solely relied on the UK decision, for the Council to maintain the organisation on the list following its deproscription in the UK, it must either show that the UK Courts' decision were flawed, which it does not contend, or produce evidence of the PMOI conducting, preparing or even having the intent to commit terrorist acts since February 2008. The Council has not done either.

4. The Council has seriously violated both the text and the spirit of EU law concerning its terrorism list, and a fundamental right laid down in Community law: the right to defence. The PMOI has at no time had the opportunity to defend itself as it does not know the evidence the Council had relied on.
5. The principle of a fair hearing has been violated for two reasons: the PMOI has no access to the evidence or information on which the national decision is based. The PMOI is not able to set forth its views on the matters on which the Council decision was based.
6. The principle of the right to effective judicial protection has been violated. The PMOI has no right to challenge the national decision which is the basis of the Council decision to include the PMOI on the list. This is because: firstly, the national decision is not in respect of the PMOI and secondly, in France the decision of a prosecutor can not be challenged.
7. The Council has failed to provide to the PMOI Statement of Reasons and evidence relied on to the PMOI before adopting its decision. The Council was fully aware, and had acknowledged in its submission to the Court of First Instance, that it was obliged to do so. This is in blatant disregard of the condition set by the CFI as being the proper legal procedure.
8. The principle of the presumption of innocence has been breached. The Council has relied on the French investigation which in order to be compatible with the law, requires the prosecutorial authority must have "serious and credible evidence or clues" (see also *PMOI v. Council*, § 117, 122 and 124) and the person, group or entity targeted should be in a position "to exercise their right to a fair hearing" (*PMOI v. Council*, § 119). None of these conditions have been met.
9. The Council has also undertaken an action that in fact circumvents the judicial safeguards laid down in French law on the matter of seizure or freezing of funds. Firstly, it violates the fundamental right of every (natural or legal) person to become apprised of the charges levelled against him or it. The PMOI was never informed of the French prosecutorial decisions. Secondly, in France interim measures (including the freezing of the assets of the person at issue) may only be ordered by an independent judge, who must be a high-ranking and experienced judge.
10. Another conspicuous flaw compounding the whole decision-making process concerning PMOI is that reportedly the French investigations by the Paris Office of the Prosecutor, which began in 2001, to a large extent relied on the EU terrorism list, on which the PMOI was included. At present the Council, in its turn, to justify its keeping the PMOI on the List refers back to the French prosecutorial decisions. This is indeed a **circular argument**, a sort of **sinister and ineluctable "Catch-22 situation"**.
11. As a matter of law after the judgment of the Court of First Instance on 12 December 2006, the Council was obliged to remove the PMOI from the list. The CFI annulled the Council decision with retroactive effect. It stated in *OMPI v. the Council of the European Union* that the Council has acknowledged that under Article 233 EC it is obliged to implement the effect of the judgment regarding any decision which might have been taken after the date of the hearing. Since then in another judgment the CFI clearly stated that the obligation of the Council: "*The institution may thus be required to take adequate steps to restore the applicant to its original situation or to avoid the adoption of an identical measure*" In this case to remove the PMOI from the list and unblock its assets.

12. Moreover, after the definitive decision of the UK Court of Appeal the PMOI could no longer be lawfully considered on the list. Therefore, the Council was not in a position to “maintain” the PMOI on the list in July 2008.

The Council Action Amounts to a Patent abuse of Powers

The cumulative effect of all the aforementioned deficiencies of the Council action seems to warrant the conclusion that we are faced here with a clear instance of misuse of powers, in particular of a procedural misuse of power, by the Council. In light of these considerations, it is apparent that the 15 July 2008 decision and its relying upon three French prosecutorial decisions is a last-ditch attempt at maintaining the PMOI on the List. It is indeed striking that only on July 2008 did the Council expressly invoke some French prosecutorial decisions, to which it might have referred back in 2001 or at least in 2003. The following striking circumstances must be emphasised:

- 1) In spite of the Court’s decision of 12 December 2006, the Council has continued to maintain the PMOI on the List, while as acknowledged by the Council it was obliged under Article 233EC to remove the PMOI.
- 2) The Council was aware that after May 2008 the PMOI could no longer be held on the List because the judgment of 7 May 2008 of the British Court of Appeal had removed the legal basis of the Council’s keeping the PMOI on the List.
- 3) The Council knew very well, as acknowledged in its submissions to the Court, that it was obliged to provide PMOI with a fresh statement of reasons and any new evidence prior to adopting any decision; nevertheless it failed to do so.
- 4) The Council was furthermore aware that the Court of First Instance, when pronouncing on the applications for annulment filed by the PMOI on 9 May 2007 and on 16 July 2007, was likely to annul the various Council decisions taken against the PMOI in 2007-2008.
- 5) In an effort to salvage its previous decision that was bound to fall apart on account of the British appellate court’s judgment, the Council has almost overnight propped up its decision to keep the PMOI on the List by referring to the French prosecutorial decisions.
- 6) The Council has taken the French prosecutorial decisions as a **procedural pretext** for its maintaining, probably on political or other inscrutable grounds, the PMOI on the List.

Conclusion

The council in taking the decision of 15 July has violated the Council’s Common Position and engaged in serious misuse of powers and as such the decision should be annulled pursuant to Article 230(2) of the Treaty on the European Community.