



Protection of Personal Data and Citizens' Rights of Privacy in the Fight against the Financing of Terrorism

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Introduction

"No liberties for the enemies of liberty." This dictum could be the justification upon which the authors of Council Regulation n° 881/2002 of 27 May 2002¹ imposing certain specific restrictive measures directed against certain person and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban might have based their decision to create a legal framework which permitted the freezing of such assets.

The provisions of this Council Regulation were wide in scope. Under Article 2, it related to all natural and legal person, entities and bodies. It covered all funds and economic resources belonging to these natural and legal person, group or entities which had been designated by the UN Sanctions Committee and listed by the EU under Regulation n° 881/2002 as terrorists.

This paper critically examines the role this Regulation plays in the fight against international terrorism. Firstly, it summarises the main concepts of Council Regulation n° 881/2002. In addition, it compares this Regulation with the original proposal submitted by the Commission and Council Regulation n° 2580/2001² which aimed to freeze assets of other terrorist groups. This comparison will illustrate the conflicting approaches adopted by the various

European institutions and the inconsistent evolution of European legislation with respect to the arena of freezing procedures. As a consequence of this confusion, its effect on the rights of citizens is addressed. Moreover, the importance of keeping European human rights standards at the centre of any mechanism set up to fight the financing of terrorism has to be seen as primary. It is the single most vital condition to legitimise any action in this field. Without such primacy, such legislation faces the risk of being challenged by the European Court of Human Rights.

Secondly, we discuss the issues that arise as a result of the collection and processing of personal data as provided by Council Regulation n° 881/2002. Such issues include: what information is collected, which authorities are involved and under which conditions do they have any access to the information.

Thirdly, we examine the extent to which citizens' rights are affected by Council Regulation n° 881/2002. In addition we analyse to what extent the Directive n° 95/46/EC³ on the protection of personal data is applicable within this context.

1. Council Regulation n° 881/2002

Aim and main concepts

Under Articles 60, 301 and 308 of the Treaty establishing the European Community, the purpose of this Regulation was to implement into Community legislation the relevant decisions taken by the United Nations Security Council. The Security Council had ordered member states to take such action as to freeze the funds and prohibit any funding of those groups connected with Usama Bin Laden, the Al-Qaida network and the Taliban.

The Regulation sets out a wide definition of funding on which restrictions are to be placed. Article 2 states that:

1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex 1 shall be frozen;

¹ Council Regulation (EC) n° 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) n° 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect to the Taliban of Afghanistan (OJ L 139/9, 29.5.2002).

² Council Regulation (EC) n° 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ L 344/70, 28.12.2001).

³ Directive n° 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L.281/31, 23.11.1995).

2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity (...)
3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity (...), so as to enable that person, group or entity to obtain funds, goods or services.

This definition of the prohibition of funding has been made applicable to a wide group of individuals, entities and bodies listed in Annex 1 of the Council Regulation. If the scope of the persons/entities/bodies targeted by the Council Regulation is clear, one should nevertheless underline a distinct lack of definition regarding those entities that are required to freeze their assets.

Having defined the terms of Council Regulation n° 881/2002, we will now compare its contents with the original proposal for such a Regulation as submitted by the Commission to the Council on 3rd March 2002.⁴ In addition, attention will be given to Council Regulation (EC) n° 2580/2001 of 27th December 2001, entitled “Specific restrictive measures directed against certain persons and entities with a view to combating terrorism”. As mentioned before, this Regulation is dealing with other groups not connected with Usama Bin Laden, the Al-Qaida network and the Taliban.

Original proposed Regulation submitted to the Council

The original Proposal submitted to the Council gave a major role to the European Commission. It aimed to give this body the central task of collating all data with respect to various groups and then disseminating this information to the various competent authorities of the member states. The consequence of this proposal was that the information would have been concentrated in one single authority (the European Commission) rather than being circulated between the various competent authorities of the member states, as has been provided by the final text. Indeed, the adopted Council Regulation has provided for any information to be notified to the competent authority of the member states and, directly or through these competent authorities, to the European Commission. A single supervising authority would have provided a more coherent information process.

In addition the original proposal gave competent authorities the power to report to the European Commission any

transactions or activities that aroused suspicion.⁵ This possibility has not been adopted in the final Council Regulation. To a certain extent, this would have placed a controversial tool in the hands of the various national competent authorities (see below).

We should also note that, without any apparent reason, the Council Regulation, in its final text, does not include the possibility of ‘exemption’. The Proposal, in its Article 2.3 foresaw that: “Paragraphs 1 and 2 shall not apply to funds, other financial assets and economic resources for which the Sanctions Committee has granted exemption.”

The original Proposal lacked any clear definition of terms such as “other financial assets” as well as what “funds and economic resources” were. The final Regulation, however, adopted clear definitions of these terms and provided a suitable framework within which the Regulation could operate.

Comparison of the Council Regulation n° 881/2002 with preceding Council Regulation n° 2580/2001 dealing with other terrorist groups

Both Regulations share similar aims in that they seek to freeze assets of terrorist groups. Similarly, both prohibited any funds to be made available to terrorist groups. In this vein, the United Kingdom froze the assets of over 100 organisations and over 200 individuals.⁶

There is nevertheless an important distinction between these two Regulations. Council Regulation n° 881/2002 concerns those persons and groups of persons identified and listed by the Sanctions Committee of the United Nations in accordance with UN Security Council Resolutions 1267 (1999) and 1390 (2002) – principally Usama bin Laden, the Al-Qaida network and the Taliban. This contrasts with Council Regulation n° 2580/2001, which dealt with a wider group of people “who commit, or attempt to commit, terrorist acts or who participate in or facilitate the commission of such acts” and who are identified and listed by the European Union and not by the United Nations.

In addition, three other differences emerge between the two Council Regulations. Principally, one could note the absence of the following aspects within Council Regulation n° 881/2002 which are, however, present in Council Regulation n° 2580/2001:

- the definition of what we would call the different ‘economic actors’ that are concerned by the provisions of the Council Regulation (Articles 1.3., 1.5., 1.6.);
- the modalities concerning the establishment, review and amendment of the list of persons, groups and entities to which the Council Regulation applies (Article 2.3.); and

⁴ Proposal for a Council Regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) n° 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ C151 E/188, 25.6.2002.

⁵ Art.5.1.(c).

⁶ “Combating the financing of terrorism – A report on UK action”, October 2002, HM Treasury and Home Office, p. 9.

- the ‘exemption regime’ which is spelled out in Article 5.2. as well as the regime spelled out in Article 6.1;

As the Council Regulation n° 2580/2001 gives a very precise definition of “financial services”, “owning a legal person, group or entity”, “controlling a legal person, group or entity”, we could consider that the scope of ‘economic actors’ concerned by this Council Regulation is extremely wide.

Contrary to Council Regulation n° 881/2002 (see below), it is the responsibility of the Council under Council Regulation n° 2580/2001, “acting by unanimity” (in 2001) and now qualified majority to establish, review and amend the “list of persons, groups and entities to which this Regulation applies”. The scope of such a list is extremely wide as it includes (Article 2.3):

- natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;
- legal person, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;
- legal person, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred here above; and
- natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to above.

Finally, it is worth emphasising that the exemption procedure set up by Article 5.2 of the Council Regulation n°2580/2001 provides that “the competent authorities of the Member States may grant specific authorisations...for”:

1. the use of frozen funds for essential human needs of a natural person listed, to be fulfilled within the Community;
2. payments from frozen accounts for the following purposes: payment for public utility services (gas, water, ...etc.) to be paid in the Community; payment of charges due to a financial institution in the Community for the maintenance of accounts; and
3. payments to a person entity or body person listed due under contracts, agreements or obligations concluded or arose before the entry into force of the Regulation.

Article 6.1 provides that the competent authorities of member states may grant specific authorisations in order to protect the interests of the Community which include the interests of its citizens and residents.

This short comparison demonstrates the extent to which the legal framework set up to fight against the financing of terrorism is not fully consistent. To make the legal framework more effective, a better harmonisation is needed.

2. Issues resulting from the collection and processing of personal data provided by Council Regulation n° 881/2002

At this stage, it may be useful to distinguish in the context of the Council Regulation n° 881/2002, the different types of information that are to be shared with the various competent authorities of member states. We then examine various problematic aspects associated with the collection and processing of personal data.

There are three types of information to be provided by natural and legal persons, entities and bodies:

- information that the provisions of the Regulation are being, or have been, circumvented (Article 4);
- information that would facilitate compliance with the Regulation such as accounts and amounts frozen in accordance with Article 2 (Article 5.1); and
- *additional information directly received by the Commission (Article 5.3).*

Except for Sweden, in which the competent authority is different depending upon whether information is being provided on the basis of Article 4 (“Rikspolisstyrelsen”) or Article 5 (“Finansinspektionen”), all the other 24 member states (now) have designated either the Economic Ministry, Treasury Ministry or Central National Bank as the “competent authority referred to in Article 5” (Annex II). With regard to all these state activities, there is a distinct lack of judicial oversight and the procedure remains very much administrative. This may undermine the legitimacy of such a collection and processing of personal data as any effective control by the domestic courts has been foreseen, despite what it is required by the European Court of Human Rights.⁷

We should notice also that because of the different scope of Council Regulation n° 2580/2001, the competent authorities are not always the same as those designated in the framework of Council Regulation n° 881/2002.

In Council Regulation n° 881/2002, the primary task of the Commission is to amend or supplement the list of persons, group or entity designated either by the UN Security Council or the UN Sanctions Committee (Article 7). In this perspective, the Commission has “to maintain all necessary contacts with the Sanction Committee”. The Commission has amended the list on 36 occasions.⁸

Article 8 requires both from the Commission and the member states, an immediate communication either of measures taken under the Regulation or of relevant information in connection with the Regulation as, for

⁷ ECHR, judgment in *Murray vs. United Kingdom* of 28 October 1994, § 58.

⁸ COM (2004) 700 final, Communication from the Commission to the Council and the European Parliament on the Prevention of and the Fight against Terrorist Financing through measures to improve the exchange of information, to strengthen transparency and enhance the trace ability of financial transactions, p. 13.

instance, “violation and enforcement problems and judgements handed down by national courts”.

It is important to note that, within the framework of Council Regulation n° 2580/2001, the ability of amending and supplementing the list has been given to the Council itself.

Both Council Regulations suffer from a distinct lack of transparency as neither provides open criteria as to what is required to be listed as a terrorist and as a result have their funds frozen. Secondly, this lack of openness infringes case law of the European Court of Human Rights which required a detailed examination of the kind of information that may be recorded, the limits on the age of information held or the length of time for which it may be kept.⁹ In addition the lack of an “external independent authority”¹⁰ assuming the supervision of data management further undermines the quality and legitimacy of the process.

Indeed, the Council of Europe in its “Guidelines on Human Rights and the Fight against Terrorism” required that: “Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular: (i) are governed by appropriate provisions of domestic law; (ii) are proportionate to the aim for which the collection and the processing were foreseen; (iii) may be subject to supervision by an external independent authority.”¹¹

We will now establish what rights are citizens entitled to who are regarded by authorities as terrorists and have therefore had their assets frozen.

3. Rights of citizens

Territorial application issues

Council Regulation n° 881/2002 foresees a broad territorial application. Article 11 provides that: “This Regulation shall apply:

- within the Territory of the Community, including its airspace,
- on board any aircraft or any vessel under the jurisdiction of a Member State,
- to any person elsewhere who is a national of a Member State,

⁹ ECHR, judgement in *Rotaru vs. Romania* of 4 May 2000, §§ 57-58.

¹⁰ “Guidelines on Human Rights and the Fight against Terrorism – adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers ‘Deputies’, September 2002, Council of Europe, p. 9.

¹¹ Article V. “Collection and processing of personal data by any competent authority in the field of State security”, op. cit., p. 9.

- to any legal person, group or entity which is incorporated or constituted under the law of a Member State,
- to any legal person, group or entity doing business within the Community.”

The main problem regarding the territorial application of the Council Regulation n° 881/2002 (as well as the Council Regulation n° 2580/2001) is the fact that it applies to every person who is a citizen of a member state in any part of the world. The question is how shall a citizen of a member state apply the Regulation in a state that is not part of EU territory? To what extent is the Regulation applicable in a non-member state in circumstances where an EU citizen happens to be working there?

Potential Remedies of the European Court of Human Rights

The question of the right to remedy could be examined under two different perspectives:

- the right to an effective remedy as it is provided by Article 13 of the European Convention on Human Rights; and
- the existence of remedy as could be provided by the Community Data Protection directives.

As mentioned above, there is a surprising lack of control by judicial authorities on the collection and processing of personal data by the competent authorities of member states. The Council of Europe, in its “Guidelines on Human Rights and the Fight against Terrorism”, Article VI entitled “Measures which interfere with privacy”, required that: “(...) It must be possible to challenge the lawfulness of these measures before a Court.”¹² The European Court of Human Rights asks for an “effective control by the domestic Courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved”.¹³

In the same perspective, the Council of Europe, in its Guidelines, considered that: “The use of property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have therefore the possibility to challenge the lawfulness of such a decision before a court.” (Article XIV).

Council Regulation n° 881/2002 does not, however, include such remedies as required by the Council of Europe in July 2002.

It shall be noted that the Council of Europe only requires the intervention of a judicial authority *a posteriori* (after the fact). In other words, the body seizing the assets need not

¹² Op. cit., p. 9.

¹³ ECHR, judgement *Murray vs. The United Kingdom* of 28 October 1994, §58.

apply to the judiciary to do so. As a direct consequence, the judiciary would only become aware of the facts if the individual makes an application to the court.

Two other shortcomings of the Council Regulation can be highlighted. Firstly, most of the persons, groups or entities identified and listed as ‘terrorist’ or related to terrorists’ activities are generally to be found outside the territory of the European Union and even the Council of Europe territory. Thus, from a geographical standpoint this makes the position of those affected more difficult in that the conditions prevent them from effectively challenging the actions undertaken against them.

Secondly, the listing process may affect the reputation of those persons, groups or entities named on these lists. In other words, “the disreputable stigmatisation incurred by a body or individual in the list must not be neglected (...) the absence of any satisfactory remedy for the protection of their fundamental rights must be seen as regrettable”.¹⁴

Let us now discuss the remedy that could be available to citizens under two Community Data Protection Directives 95/46/EC and 2002/58/EC.¹⁵

Potential remedies under Directive n° 95/46/EC and Directive n°2002/58/EC

Directive n° 95/46/EC of 24 October 1995 aimed to harmonise the level of protection of rights and freedoms of individuals with regard to the processing of their personal data and to remove the obstacles to free flows of such data within the internal market. In other words, by the approximation of national laws, the Directive sought to ensure a high level of protection in the Community.

Directive n° 2002/58/EC of 12 July 2002 replaced Directive n° 97/66/EC, which dealt with the processing of personal data and the protection of privacy in the telecommunications sector.¹⁶ Directive n° 2002/58/EC sought to adapt Directive n° 97/66/EC to technological developments, in particular the growing use of electronic communication services. This community legislation aimed mainly to translate the principles set out in Directive n°

95/46/EC into specific rules for the telecommunications sector.

Prima facie, neither Directive seems to provide any protection as they state that they “shall not apply (...) in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law”.¹⁷ However, Article 14(a) of Directive n° 95/46/EC contains a provision which potentially allows for those who are affected by issues of data protection to object to their information being processed by a particular body even when issues of national security arise. Indeed, Article 14 entitled “The data subject’s right to object” states that:

member states shall grant the data subject the right: (a) at least in the cases referred to in Article 7 (e) and (f),¹⁸ to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, except where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data.

This is as a result of interpretational differences between this article and the preceding Article (Article 13.1) which outlines those areas where states can restrict the rights provided by the Directive. In this part reference to restrictions do not cover Article 14, thus leaving open a line of appeal. In addition Article 22 entitled “Remedies” provides that member states allow a process of judicial remedy for any breach of the rights guaranteed to citizens.¹⁹

Therefore, it could be possible to rely on Directive n° 95/46/EC to provide the protection that is absent from Council Regulation n° 881/2002.

Conclusion

It is evident that as a weapon in the fight against the financing of terrorism, Council Regulation n° 881/2002 has, like many other legal procedures adopted since 11 September 2001, seriously curtailed European human rights standards.

Within its framework, hundreds of individuals, groups and entities have seen their assets frozen without any effective legal remedy for appeal.

In addition, the EU legal framework established to fight against the financing of terrorism has appeared ad hoc and

¹⁴ “The balance between freedom and security in the response by the European Union and its Member States to the terrorist threats”, EU Network of Independent Experts in Fundamental Rights (CFR-CDF), March 2003, p. 43.

¹⁵ Directive n° 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L.281/31, 23.11.1995); Directive n° 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communication, OJ L.201/37, 31.7.2002).

¹⁶ Directive n° 97/66/EC of the European Parliament of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ L 24, 30.1.1998).

¹⁷ Article 3.2. of the Directive n° 95/46/EC and Article 1.3. of the Directive n° 2002/58/EC.

¹⁸ Article 7 (e) and (f) states that: “Member States shall provide that personal data may be processed only if: (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed.”

¹⁹ Article 15.1 and 15.2 of Directive n° 2002/58/EC referred to Article 13.1 and Article 22 of Directive n° 95/46/EC. Therefore, we do not need to explain more about this Directive.

has responded to events rather than creating an effective and sustainable legal structure. More importantly, it is now composed of many regulations with different legal concepts, provisions, procedures and relevant authorities being involved.

The lack of any single unitary body dealing with issues of supervision concerning the collection of personal data will inevitably lead to a lack of transparency as member states will retain responsibility for passing such data to the Commission for distribution to other member states. In addition, this lack of supervision will mean that the data given by the Commission do not comply with the guidelines set out by the Council of Europe.

Furthermore, the increasing role of the private sector in investigating potential terrorist financial activities undermines the principle of an independent judiciary assuming the role of investigator (in civil law jurisdictions) or at the very least being in the position of determining the validity of a body freezing the assets of individuals or

groups (in common law jurisdictions). Indeed, there is a deep concern about the present orientation by which the Council of the European Union (2004c, p. 10) invited, for instance, the Commission “to examine, in consultation with industry, possible additional co-operation and information sharing mechanisms to facilitate data exchange between law enforcement/intelligence agencies services and the private sector”. This approach could lead to a breakdown in those responsibilities undertaken by the state authorities and those of the private sector. In effect the private sector is being asked to become the police force against financial terrorism without the judicial safeguards which one would expect from state authorities.

Finally, we also have to keep in mind that in the absence of worldwide harmonisation, any legislation that provides such cooperation mechanisms will only contribute to accelerating financial movements out of the European Union to tax-free havens such as the Caribbean or British Virgin Islands.

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