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EXPERT OPINION ON THE LEGAL NATURE OF COUNCIL DECISION 2008/583/EC

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1. Introduction

1. I have been asked to give a Legal Opinion on the question whether the CFI's judgment of 4 December 2008 in *PMOI* v. *Council* **should be implemented right away or only after any appeal by the Council is determined by the ECJ.**

> To answer this question it is necessary to establish whether, as asserted by the Council, the Council decision of 15 July 2008 (2008/583/EC) in fact has the legal nature of a *regulation* and not of a *decision* proper. It would follow from this assertion that, by virtue of Article 60 (2) of the Statute of the European Court of Justice, the annulment by the CFI of the Council Decision 2008/583/EC of 15 July 2008 in the part concerning PMOI, would only take effect from the date of expiry of the period granted to bring an appeal (i.e. two months) or, if an appeal were to be brought within that period, from the date of dismissal of that appeal.

The question on which I should therefore write my Opinion is whether, whatever the *nomen juris* granted to it by the Council when passing the Decision, that Decision of 15 July 2008 has the legal nature of a **decision** or a **regulation** pursuant to Article 249 ECT.

2. My **conclusion** is that as a matter of principle judgments of the CFI must be given effect immediately, pursuant to Article 242 of the European Community Treaty (ECT) which provides that "actions brought before the Court of Justice shall not have suspensory effect." Therefore, as a rule appeals to the ECJ should not have a suspensory effect.

3. In short, I will develop the **following reasoning:** (1) Council decisions are those acts that directly and immediately affect the rights and interests of natural or legal persons; they can therefore be impugned before the CFI if they are held by their addressees to be tainted with illegality; (2) Council decision of 15 July 2008 (2008/583/EC) directly and immediately impacts on the rights and interests of the persons, groups or entities enumerated in the annexed List; (3) therefore, even if in some other respects the Decision can show some elements proper to regulations, insofar as it impinges upon those interests and rights, it has the legal nature of a decision; (4) the CFI did not annul on 4 December 2008 the whole Decision but only that part of the Decision which concerns PMOI; (5) It follows that, even if one were to consider the Decision as having in part the legal nature of a regulation, such annulment does not fall under the provisions of Article 60(2) of the Court's Statute (which exclusively deals with judgments of the CFI declaring a whole "regulation to be void"). Hence, the annulment does not have suspensory effects. (6) The annulment of the Decision, in the limited part concerning PMOI, immediately produces effects *ex tunc*. The Council is therefore duty bound to take all the consequential measures necessary to bring into effect such cessation of legal effects of its Decision (in the part concerning PMOI). (7) any contrary claim by the Council would stultify the action of the Court and amount to a serious misuse of power.

4. I will now begin my analysis by briefly dwelling on the difference between regulations and decisions.

5. I will first briefly discuss the legal difference between these two sets of act, as envisaged by Article 249 ECT, and then move on to the legal nature of the specific Council Decision under discussion.

2. The Distinction Between Regulations and Decisions: the ECJ Case Law

6. What is the legal difference between a decision and a regulation, pursuant to Article 249 ECT? The distinction is important, for pursuant to Article 230 para 4 of the ECT private persons or entities may institute proceedings for annulment only against acts having the nature of a decision and which are of direct and individual concern to them, whereas they may not challenge regulations before the Court of First Instance -- unless of course the regulation directly affects an individual (as stated by the ECJ in *Unión de Pequeños Agricultores* (C-50/00 P, 25 July 2002, at § 36) "a measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain natural or legal persons and is thus in the nature of a decision in their regard").

7. By what standards can one distinguish between a regulation and a decision? In *Phoenix-Rheinrohr AG v High Authority of the European Coal and Steel Community,* in discussing the legal nature of a letter of the High Authority, the Court held that 'the nature of an administrative measure depends above all on *its subject-matter and its content*' (17 July 1959, case 20/58; emphasis added).

Subsequently the ECJ discussed the matter in more general terms. In *Fédération nationale de la boucherie en gros et du commerce en gros des viandes and others v. Council of the European Economic Community* it held that

> Under the terms of Article 189 of the EEC Treaty, a regulation shall have general application and shall be directly applicable in all member States, whereas a decision shall be binding only upon those to whom it is addressed. The criterion for the distinction must be sought in the general 'application' or *otherwise of the measure in question.* The essential characteristics of a decision arise form the limitation of the persons to whom it is addressed, whereas a regulation, being essentially of a legislative nature, is applicable not to a limited number of persons, defined or identifiable, but to *categories of persons viewed abstractly and in their entirety*. Consequently, in order to determine in doubtful cases whether one is concerned with a decision or a regulation, it is necessary to *ascertain whether the measure in question is of individual concern to specific individuals.* In these circumstances, if a measure entitled by its author a regulation contains provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons, it must be admitted, without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation, that *in any case those provisions do not have the character of a regulation and may therefore be impugned by those persons under the terms of the second paragraph of Article 173*. (case 19/62 to 22/62, Judgment of 14 December 1962, at 498; emphasis added).

8. This holding has been restated in many cases (see judgments in case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409, at p. 415; 242/81 *Roquette Frères* v *Council* [1982] ECR 3213, §§ 6-7; C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605, § 17; C-41/99 P *Sadam Zuccherifici and Others* v *Council* [2001] ECR I-4239, § 24, and orders in C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, § 33, and T-45/02 *DOW AgroSciences* v *Parliament and Council* [2003] ECR II-1973, § 31), including, more recently, T-306/01 *Yusuf* v. *Council and Commission* 21 September 2005, (§ 185).

9. In *Plaumann and others* v. *Commission of the EEC,* the Court held that “decisions are characterized by *the limited number of persons to whom they are addressed*. In order to determine whether or not a measure *constitutes a decision one must inquire whether that measure concerns specific persons.*” (15 July 1963, at 95; emphasis added).

3. The Ruling in *Yusuf* v. *Council and Commission*

10. In *Yusuf* v. *Council and Commission* – a case heavily relied upon by the Council in the current dispute-- the CFI specifically addressed the issue of regulations concerning terrorism. The applicants had claimed that Council regulation 881/2002 of 27 May 2002 (imposing restrictive measures directed against persons and entities associated with specific terrorists) infringed Article 249 ECT. The Court stressed that one should distinguish between the *addressee* of an act and the *object* of the act, noting that

> Article 249 EC contemplates only the former, in that it provides that a regulation has general application, whereas a decision is binding only upon those to whom it is addressed. By contrast, the object of an act is immaterial as a criterion for its classification as a regulation or a decision. (§ 187).

The Court went on to point out that

> Thus, an act the object of which is to freeze the funds of the perpetrators of terrorist acts, viewed as a general and abstract category, would be a decision if the persons to whom it was addressed were one or more persons expressly named. On the other hand, an act the object of which is to freeze the funds of one or more persons expressly named is in fact a regulation if it is addressed in a general and abstract manner to all persons who might actually hold the funds in question. That is precisely the situation in this case. (§188).

11. It can be suggested, with respect, that this holding is open to objection. First of all, although it was formally preceded by a reference to the scope of Council acts (see § 185 of the judgment), in fact it obliterates the importance of such *scope* as a discriminating factor between the two categories. It thereby neglects – in actual fact-- the actual wording of para 2 of Article 249, which instead emphasizes that regulations “have a general application” that is, a general scope (in the French text: *Le règlement a une portée générale*).

It bears stressing that the notion that one of the fundamental discriminating criteria between the two categories of act under discussion resides in the **scope of the act** was enunciated by the ECJ in *Fédération nationale de la boucherie en gros et du commerce en gros des viandes and others v. Council of the European Economic Community*. There, as reported above, the Court stated that **“The criterion for the distinction** [between regulations and decisions] **must be sought in the general ‘application’ or otherwise of the measure in question.**” (emphasis added). And in *Binderer* v *Commission* (147/83, 29 January 1985) the Court held that “the test for distinguishing between a regulation and a decision, according to the settled case-law of the Court, [is] **whether or not the measure in question has general application**” (§ 12; see also § 14; emphasis added).

12. What is meant by “general application”? It is clear from the Court’s holding reported above that this expression is intended to designate acts that apply to broad (and “abstract”) categories of persons or states or other entities, and do not directly concern specific individuals or entities, whether or not they belong to those categories.

13. The other fundamental distinguishing standard necessary for differentiating between the two classes of act under discussion, which was also clearly propounded by the Court in *Fédération nationale de la boucherie en gros et du commerce en gros des viandes and others v. Council of the European Economic Community* **simply draws the logical consequences from, and indeed spells out, the first criterion**. This standard lies in “**whether the measure in question is of individual concern to specific individuals”**.

14. In light of the above remarks, the holding in para 188 of *Yusuf* v. *Council and Commission* would seem to be objectionable. Indeed, that holding implies that a regulation, although it directly affects rights and interests of specific persons and entities (whose funds are requested to be frozen), would nevertheless remain –from a legal viewpoint-- a regulation if it is addressed in a general and abstract manner to all persons who might hold those funds. The consequence of such view is that in those cases the persons or entities directly and individually affected by the “regulation” would be unable to institute proceedings against the act. This would plainly be contrary to Article 249 ECT.

15. In summary, the ultimate and fundamental **litmus test** for establishing whether a community act is a regulation or a decision resides in determining whether such act directly and specifically affects rights of one or more specific individuals, groups or entities. If it does, the act must be regarded as a decision, with the consequence that those individuals, groups or entities have the right to institute proceedings against that decision, pursuant to Article 230 para 4 ECT.

16. Could one infer from the above that the holding in *Yusuf* v. *Council and Commission* whether or not questionable, could nevertheless apply to the question of the legal nature of Council decision 2008/583/EC? My answer is in the negative. **Even assuming that that Court holding were correct, it would only apply to the specific Regulation brought before the Court, namely Council Regulation (EC) no 881/2002, which is markedly different from Council decision 2008/583/EC.**

17. That Regulation had all the hallmarks of a regulation proper, in that (i) it was essentially of a legislative nature, (ii) contained a set of provisions clearly having a general purport and applicability, (iii) was objectively applicable to determined situations and entailed legally effects for categories of persons regarded generally and in the abstract; (iv) ended with the usual clause of regulations (“This Regulation shall be binding in its entirety and directly applicable in all Member States”). However, the Regulation **also included one provision** directly impinging on rights and interests of specific natural and legal persons: Article 2(1) provided that “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 I shall be frozen.” In this respect the Regulation had the effects of a decision and could therefore be impugned before the CFI by the parties concerned.

18. The Council decision 2008/583/EC has instead been couched as a decision proper, in that (i) it is expressly intended not to contain any legislative measures but only to

implement Regulation EC no 2580/2001; it is this clearly an **administrative act**; (ii) it only aims at **listing the persons,** groups or entities against which restrictive measures can and must be directed; (iii) it consequently does not produce any legislative effects but only **adversely affects** – directly and immediately—the natural and legal persons mentioned in the annexed List; (iv) it has been **termed a decision by the Council itself** both in its title and in Article 3; (v) **it does not end with the usual formula or clause** of regulations, referred to above, in the preceding paragraph of this Opinion. (All these points relating to the legal nature of the Decision will be spelled out below, in Section 4 of this Opinion)

19. Given these striking differences between the two Council acts, what the Court stated in *Yusuf* v. *Council and Commission* with regard to the former (the Regulation) , even if correct, would in any event not apply to the latter act (the Decision).

4. The Specific Problem of the Legal Nature of Council Decision 2008/583/EC

20. Whatever the value and soundness of the aforementioned decision of the CFT in *Yusuf* v. *Council and Commission*, we should now analyse the legal purport and significance of the Council decision of 15 July 2008 (2008/583/EC) to ascertain whether it constitutes a Decision pursuant to Article 249 ECT or is rather to be held to amount to a Regulation, as claimed by the Council.

A) Council Decision 2008/583/EC of 15 July 2008 is Indisputably a Decision under Article 249

21. A comparison between Council Regulation (EC) no 2580/2001 of 27 December 2001 and Council decision 2008/583/EC of 15 July 2008 manifestly shows that while the former is a regulation, the latter is a decision proper.

22. The former act is general in scope. It provides that against certain persons, groups or entities suspected of terrorism such restrictive measures shall be taken as (*a*) the freezing of assets owned or held by those persons, groups or entities, and (*b*) the denial of the provision of financial services to those persons, groups or entities. The Regulation, in addition to providing for modalities for implementing those restrictive measures, stipulates in Article 2(3) that the Council, acting unanimously, shall “establish, review and amend” the list of persons, groups or entities suspected of terrorism, to whom or to which the restrictive measures under discussion may apply.

23. The Decision is instead designed merely to enumerate the *specific* persons or groups or entities *against whom or which* those measures shall be taken. Thus the Decision **individualizes** the general provisions of the Regulation. Clearly, the relationship between the Regulation and the Decision is the same as that between a **legislative** and an **administrative** act or measure.

24. It is also striking that the Decision does not set out at the end the clause that accompanies regulations enacted by the Council (“This Regulation shall be binding in its entirety and directly applicable in all member States”). This bears out the intention of the Council to legally consider the Decision to be a decision proper.

25. Admittedly, all the addressees of the Decision are not specifically mentioned. Only those whom I will term "***passive addressees***", are named, that is the persons, groups or organizations suspected of terrorism, against whom or which the freezing of assets and other restrictive measures shall be taken. Instead no specific mention is made of the "***active addressees***" (those with regard to which the Decision specifies the obligation deriving from the Regulation to freeze the assets and take the other restrictive measures envisaged in the Regulation). Such addressees are of course the Member States and their authorities as well as all their financial institutions (banks, insurance companies, etc.).

This trait of the Decision to some extent makes it legally resemble a regulation, which typically does not specifically mention its individual addressees. However, in this case the legal nature of a decision is overriding, because the Decision specifically mentions the name of a set of persons, groups or entities (the "passive addressees") and imposes against them the triggering of a host of restrictive measures **that directly and individually affect them**.

26. Thus, although the Decision can be taken to show some distinguishing traits typical of regulations (in that it does not specify its "active addressees"), its legal nature as a decision is overriding, at least insofar as the persons, groups and entities listed there are concerned. In this respect the aforementioned holding of the ECJ in *Fédération nationale de la boucherie en gros et du commerce en gros des viandes and others v. Council of the European Economic Community* seems to me to be crucial. The Court held that

> if a measure entitled by its author a regulation contains **provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons,** it must be admitted, without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation, that **in any case those provisions do not have the character of a regulation and may therefore be impugned by those persons under the terms of the second paragraph of Article 173.** (case 19/62 to 22/62, Judgment of 14 December 1962, at 498; emphasis added).

Thus, even admitting, *quod non*, that the Decision were to be regarded as having the legal nature of a regulation, in any event **its provisions concerning PMOI (and other persons, groups or entities listed there) "do not have the character of a regulation"**, and therefore can be challenged by the natural or legal persons concerned.

27. That the legal nature of a decision is **prevalent and indeed absorbing** –at least with regard to the persons, groups or entities targeted in the Decision-- is born out by an *ad absurdum* reasoning: were the Decision to be considered as a mere regulation, the legal nexus between the Council Regulation 2580/2001 and the Decision would be missed, since both acts would have the same legal nature of acts endowed with a general scope. Instead, it is legally more correct to hold that the Decision, as stated above, is intended to individualize and concretely implement --with specific reference to a set of persons, groups and entities-- the general provisions of Council Regulation 2580/2001.

28. In sum, the **Council acted correctly and appropriately** when it termed the act passed on 27 December 2001 "regulation" and then characterized the act adopted on 15 July 2008 as a "decision". In both instances the Council chose **the right *nomen juris*** reflecting the legal nature and content of its acts.

B) This Conclusion is Born Out by the Holding of the CFI in *OMPI* v *Council and the UK* (12 December 2006)

29. That the Council Decision of 15 July 2008 has the legal purport and scope of a decision proper, in spite of some features that it shares with regulations, is confirmed by the case law of the CFI.

30. The Council claims instead that its view that the Decision under discussion is in fact a regulation is corroborated by a passage in the judgment of the CFI of 12 December 2006. In that passage the Court said the following:

> 97. It is also true that the contested decision [of the Council concerning the PMOI], which maintains the applicant in the disputed list, after the applicant had been included by the decision initially contested, has the same general scope as Regulation No 2580/2001 and, like that regulation, is directly applicable in all Member States. Thus, despite its title, it is an integral part of that regulation for the purposes of Article 249 EC (see, by analogy, order in Case T-45/02 *DOW AgroSciences* v *Parliament and Council* [2003] ECR II-1973, paragraphs 31 to 33, and case-law cited, and *Yusuf*, paragraph 29 above, paragraphs 184 to 188).

31. This passage must not be read out of context. In the judgment under consideration the CFI had stated that the right to be heard (comprising both the right to be informed of the evidence likely to justify a proposed sanction, and the right to set out one's own views about that evidence) was a fundamental right existing in the context of an *administrative* procedure. The Court had then discussed the argument of the Council and of the UK that instead such right did not exist when the adoption of an act of a legislative nature was at stake; the Court had concluded that such view was indeed correct (§ 96). The Court had then admitted that the Council decision concerning PMOI had a "general scope" and was therefore "an integral part of that regulation [Regulation no. 2580/2001] for the purposes of Article 249 EC." The Court however, immediately qualified this statement by adding that, despite this general scope, the decision was of direct and individual concern to the applicant and therefore **its administrative nature overrode its "legislative" nature** (§ 98)[1]. The Court concluded that hence the right to a fair hearing was "fully applicable in the context of the adoption of a decision to freeze funds under Regulation no. 2580/2001."(§ 108)

32. It is apparent from the above that the Court, after admitting the right to a fair haring with regard to administrative procedures and ruling it out in the context of a Community legislative process, for the sake of the argument conceded that the contested decision partook of a legislative nature on account of its "general scope". However, the Court then immediately added that in the case at issue the **administrative aspect was dominant**

[1] "98. In the instant case, however, the contested regulation is not of an exclusively legislative nature. Whilst being of general application, it is of direct and individual concern to the applicant, to whom it refers by name as having to be included in the list of persons, groups and entities whose funds are to be frozen pursuant to Regulation No 2580/2001. Since it is an act which imposes an individual economic and financial sanction (see paragraph 92 above), the case-law cited in paragraph 96 above is therefore irrelevant (see, by analogy, *Yusuf*, paragraph 29 above, paragraph 324)."

and therefore pointed out that the right to a fair hearing did apply with regard to that Decision.

5. Article 60(2) of the Court's Statute May Not Apply to the CFI's Judgment of 4 December 2008

33. It should be added that in any event Article 60(2) of the Court's Statute[2] -- the provision invoked by the Council for the purpose of arguing that the CFI's annulment does not produce immediate effects-- does not apply in the case at issue.

34. That provision is intended to attach suspensory effects to decisions of the CFT **that declare a regulation to be void.** Clearly, the provision only holds true for judgments that quash the entire regulation. Given the normative effects of such acts, the draftsmen of the Statute aimed at giving some time to the parties concerned, so that the complex situation stemming for the voidance of an entire regulation can be duly considered and remedied. In our case, instead, the Court's decision simply annuls **that specific part of the Council decision which relates to PMOI.** In contrast, it leaves **unaffected** the whole Decision with regard to the numerous other persons, organizations and groups listed there.

35. One can arrive at the same conclusion by developing a different reasoning, as follows. Assuming that the Council Decision of 15 July 2008 is partly a regulation (in that it does not specify its "active addressees", as pointed out above) and partly a decision (in that it affects the rights and interests of specific individuals, groups or entities, and is consequently subject to judicial review by the CFI at the request of any of those persons, groups or entities that consider to be affected by the decision), the part of the Decision that concerns PMOI must manifestly be considered, from a legal point of view, as a mere "decision". It necessarily follows that **it may not fall under Article 60(2) of the Court's Statute.** With the consequence that the 4 December 2008 annulment by the CFI of that specific part of the decision takes immediate effects and annuls the Council Decision of 15 July 2008 – in the part concerning PMOI— *ex tunc*.

6. No Conclusion Favourable to the Council's Arguments can be drawn for the CFI Order of 17 December 2008

36. By an order of 17 December 2008 the CFI rejected, as manifestly inadmissible, the Council's application for interpretation of the Court judgment of 4 December 2008. In its application the Council had requested to Court to say that the annulled act (Council Decision 2008/583/EC of 15 July 2008) had the legal nature of a regulation, with the consequence that Article 60(2) of the Court's Statute would apply. In its Order the Court held that the application was inadmissible because (i) it did not claim that the operative part of the judgment was obscure or ambiguous, hence in fact it did not raise any question

[2] "By way of derogation from Article 244 of the EC Treaty and Article 159 of the EAEC Treaty, decisions of the Court of First Instance declaring a regulation to be void shall take effect only as from the date of expiry of the period referred to in the first paragraph of Article 56 of this Statute or, if an appeal shall have been brought within that period, as from the date of dismissal of the appeal, without prejudice, however, to the right of a party to apply to the Court of Justice, pursuant to Articles 242 and 243 of the EC Treaty or Articles 157 and 158 of the EAEC Treaty, for the suspension of the effects of the regulation which has been declared void or for the prescription of any other interim measure."

relating to the interpretation of the judgment, and (ii) the question whether the annulled act was a regulation or a decision had not been decided upon by the Court.

37. What inference can be drawn from this Order? Could the Council claim that the Court, as it has not dealt with the merit, in fact has not rejected its interpretation and therefore it is entitled to stick to its view until the end of the appeal process? Such conclusion would be manifestly erroneous. The Court has simply held that the Council could not obtain, by the devious means of a request for interpretation, a pronouncement confirming its views. The Court however has not taken any legal stand on the merits of the Council views. Hence, the Order leaves the issue unaffected. It follows that the Council must comply with the relevant rules and principles applicable in this case, and give immediate effects to the Court's annulment of Council Decision 2008/583/EC, in the part concerning PMOI.

7. Were the Council Decision 2008/583/EC to Be Legally Characterized as a Regulation, both *a)* a Patent Breach of the Balance between the Need to Combat Terrorism and Protection of Fundamental Rights, and *b)* a Misuse of Power Would Ensue

38. In *PMOI* v. *Council, French Republic and Commission* on 4 December 2008 the CFI forcefully emphasized a major point: the necessity for the European Community institutions always to strike "a fair balance […] between the need to combat international terrorism and the protection of fundamental rights" (§75). This balance must be the polar star for any action of Community organs dealing with terrorism.

39. If, after the CFI's annulment of Council Decision 2008/583/EC in so far as it concerns the PMOI, that Council decision were to be considered as having the legal nature of a regulation, the annulment would not take immediate effect. Rather, it would take effect only as from the date of expiry of the period granted to bring an appeal or, if an appeal was brought within that period, as from the date of dismissal of that appeal. If this were to occur, the Decision (in the part concerning PMOI) would remain in force in spite of its annulment by the Court. As under Article 56(1) of the Statute of the Court any party has the right to appeal the decisions of the CFT "within two months of the notification of the decision appealed against", the Council would have at a minimum a two- month grace period. If it appealed, it would gain even more time. Meanwhile the Council could adopt a new decision on the list of terrorist persons or organizations and thereby completely efface the practical effects of the Court's annulment.

40. Were this to happen, the balance between the need to fight terrorism and respect for fundamental rights would be seriously upset. The **Court's role** in protecting human rights would be gravely thwarted in practice and PMOI's **right to effective judicial protection** would be blatantly trampled upon. The result would be "inequitable" (see by analogy *OMPI* v *Council and the UK*, T-228/02, 12 December 2006, §§ 28-29, and *PMOI* v. *Council and the UK*, T-256/07, 23 October 2008, at §§ 46-47). Furthermore, a shadow would be cast on the credibility of the EU institutions and their capacity to ensure respect for fundamental human rights.

41. Also, the claim of the Council would in the event amount to **an abuse or misuse of power,** in that the Council would use its functions for the purpose of stultifying a judgment

of the Court. The Council would take a measure or put forward a view with the exclusive, or at any rate the main purpose, of “achieving an end other than that pleaded or for the purpose of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case” (*PMOI* v. *Council*, judgment of 23 October 2008, § 151 and case law there cited).

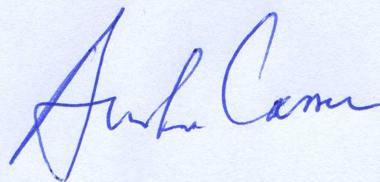
8. Summing-Up

42. (i) The Council Decision of 15 July 2008 was **rightly termed by the Council “decision**”, for it individualizes and implements, with regard to a set of persons, groups and entities, the general provisions of Council Regulation (EC) no 2580/2001 of 27 December 2001.
(ii) Admittedly, the Decision shows some features typical of regulations: while it specifies and names its “passive addressees” (that is the persons, groups or organizations suspected of terrorism, put on the List), it does not specify its “active addressees” (those bodies or entities with regard to which the Decision specifies the obligation deriving from the Regulation to freeze the assets and take the other restrictive measures envisaged in the Regulation). This is what the CFI in practice referred to in *Yusuf* v *Council and Commission* (judgment of 21 September 2005) and in *OMPI* v *Council and the UK* (judgment of 12 December 2006).
(iii) A Council regulation may not be distinguished from a decision by virtue of the process leading to its formation (cf. *Binderer* v *Commission*, 147/83, 29 January 1985), but can only be differentiated from a decision on the strength of its general scope. A decision is an act that directly and individually affects the interests and rights of specific persons, groups or entities. Since Council Decision of 15 July 2008 directly and individually affects the rights and interests of the persons, groups and entities listed in it, its title “decision” used by the Council when it passed it, is not a misnomer, but instead **its appropriate legal label.**
(iv) Even if one were to emphasize that Council Decision of 15 July 2008 shows some features typical of regulations (namely the unspecified reference to a broad range of bodies and entities that are entitled and even obliged to freeze the assets of, and take the other restrictive measures against, the persons, groups and entities enumerated in the List) one could not obliterate or pass over in silence an important fact: the Decision directly and individually affect the rights and interests of the persons, groups and entities listed in the Decision. In other words, one cannot deny that the Decision – at a minimum with regard to the natural and legal person specifically mentioned in the List-- produces the effects typical of a decision and can therefore be impugned before the CFI. This fact has been clearly – albeit implicitly-- recognized by the CFI when it has accepted to pronounce on the requests for annulment of the previous Council decisions and of that concerning the Council Decision of 15 July 2008.
(v) The annulment of Council Decision of 15 July 2008 by the CFI on 4 December 2008 does not quash the whole Decision but **only that part of the Decision that exclusively concerns PMOI**.
(vi) It follows that, even if one were to consider the Decision as having in part the legal nature of a regulation, such annulment would not fall under the provisions of Article 60(2) of the Court’s Statute (which exclusively deals with judgments of the CFI declaring “a regulation to be void”). Hence, **the annulment does not have suspensory effects**.
(vii) The annulment of the Decision, in the limited part concerning PMOI, produces immediate effects *ex tunc*. The Council is therefore duty bound to take all the

consequential measures necessary to bring into effect such cessation of legal effects of its Decision (in the part concerning PMOI).

(viii) Were the Council to rely on its claim that the annulment under discussion does not produce immediate legal effects for the purpose of gaining time so as to pass, under its six month review of the List, a new Decision putting again PMOI on the List, it would manifestly thwart the practical effects of the annulment by the CFI, thereby not only **undermining the credibility of the CFI's role and function, but also blatantly violating the fundamental rights of due process laid down in European law and PMOI's right to judicial protection.**

(ix) In addition, the claim of the Council that the annulment does not produce immediate effects may amount to **an abuse or misuse of power,** in that the Council uses its functions with the exclusive purpose of "achieving an end other than that pleaded or for the purpose of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case."



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Florence, 3 January 2009