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IV.

Nikolaos Lavranos, The Hague/Florence*

The effect of UN sanctions on private party transactions(Gerda Möllendorf und Christiane Möllendorf-Niehuus,
ECJ of 11 October 2007, C-117/06)

The Möllendorf case is an interesting example of how far-reaching UN sanctions can affect private party transactions. Most cases involving UN sanctions that have so far come before the CFI and ECJ concerned complaints of individuals whose financial assets had been frozen, i.e. complaints by those who are directly affected by the UN sanctions.¹ More specifically, those cases focused on the public law side, that is, the issues arising out of the relationship between the public organs that adopted the measures and the listed individuals. In contrast the Möllendorf case relates to a real es-

tate transaction between two private parties that could not be finalised, that is legally validated, due to the fact that one of the parties was blacklisted by a UN sanction.

(1) Background

(a) The legal framework

In the past decade the use of the instrument of sanctions against states and private parties has rocketed.² Whereas in the past sanctions were applied only against states or regimes, more recently the UN Security Council as well as the EU are using





«smart» sanctions that target specific individuals and private organisations. In particular, after 9/11 when the «war against terror» started, sanctions are used to target listed individuals and private organisations that are suspected of being involved with terrorist activities.³ The sanction measures focus especially on the *freezing of all financial assets* of listed suspects in order to reduce their ability of financing and/or carrying out terrorist activities. But sanctions are not limited to the freezing of financial assets; rather they encompass a whole array of different measures, including for instance restrictions on travelling.⁴

After the UN Security Council has decided to impose sanctions, a so-called *UN Sanctions Committee* is established to supervise the proper implementation of the sanctions in the UN members. One of the important tasks of the UN Sanctions Committee in this context is the *blacklisting of persons and organisations* that are to be targeted by the sanctions. The term blacklisting means that on the basis of secret data received by intelligence services of the UN members, the UN Sanctions Committee draws up a list of suspects that are to be targeted by the sanctions. The UN Sanctions Committee is moreover the only body that can «delist», that is, remove the names of persons and organisations from the sanctions list, once the UN Sanctions Committee decides unanimously that there is no longer reason for being listed.

The EU, while not being a member of the UN, generally implements the sanctions imposed by the UN Security Council based on Chapter VII of the UN Charter by a two step procedure.⁵ First, the EU adopts a common position within the inter-governmental II. pillar of the Common Foreign and Security Policy (CFSP).⁶ Second, in order to give a legally binding effect to the common position, the EC adopts within the I. pillar (the EC Treaty) a basic Regulation which is directly applicable in all EU Member States.⁷ The subsequent enforcement of the basic Regulation implementing the UN sanction within the EC is entrusted to the European Commission. The European Commission has in particular the task (and the power) of updating automatically the listing of suspected targets in accordance with the list of the UN Sanctions Committee by issuing Commission Regulations.⁸

Hence, a «*communitarization*» of UN Security Council Resolutions within the Community legal order takes place. As a consequence thereof, UN sanctions as implemented by the EC/EU enjoy supremacy over all national law, including constitutional law, of the EU Member States. In addition,

the Regulations – the basic Regulation as well as the Commission Regulations – are directly applicable from the moment they are published in the Official Journal of the EU. Moreover, it should be noted that the adoption and implementation of UN sanctions and, in particular, the listing of suspects takes place on a *purely executive regulatory power basis*, that is, that neither on the international, European nor national level is there any involvement of parliament or other supervisory body. In other words, the UN Security Council – amplified by the supremacy of Community law and direct application of the Regulations – directly reaches into the national law level and exerts direct force in the sense that the sanctions have to be executed by the national authorities purely on the basis of these executive acts.⁹

Consequently, the implementation of UN sanctions through the Community legal order modifies the previously public international law nature of UN sanctions into measures that have obtained EC law characteristics such as supremacy over all national law and direct applicability. At the same time, this communitarization of UN sanctions brings the European courts into the picture as a forum to which suspects targeted by UN sanctions could potentially turn to for obtaining judicial review.

Indeed, a flow of proceedings have been brought by individuals before the European Court of First Instance (CFI) challenging the validity of EC measures implementing the UN sanctions.¹⁰ More specifically, the targeted suspects not only question whether the EC is at all competent to impose sanctions against individuals, but also raise violations of fundamental rights such as the right to access to court, rights of defence and judicial review.¹¹

However, the *Möllendorf* case is different in that it primarily concerns the rights and obligations of private parties within the context of finalising a transaction between them, whereas the other cases concerned the public law relationship between the suspected terrorist and the measures that have been adopted against him/her by the UN Security Council, the EC and national state organs.

(b) The facts of the case

On 19 December 2000 *Gerda Möllendorf* and *Christiane Möllendorf-Niehuus* (the sellers) agreed to sell land and buildings belonging to them in Berlin to *Salem-Abdul Ghani El-Rafei*, *Kamal Rafehi* and *Aqeel A. Al-Aqeel* (the buyers) in exchange for payment by the latter of a sale price of





DEM 2.375.000 (approximately 1.214.318). The parties agreed that ownership of the immovable property was to be transferred to the buyers and the transfer of ownership registered at the Land Registry. Moreover, the **sale price** had to be deposited in a **trust account** of the attesting notary (the notary), and then paid to the sellers when the property transfer was provisionally registered at the Land Registry, pending final registration. On 8 March 2001, the transfer of ownership to the buyers was provisionally registered at the Land Registry.

However, by decision of 29 October 2003, the Grundbuchamt, the office which is responsible for the registration of ownership of immovable property at the Land Registry, and which is attached to the Amtsgericht (Local Court), rejected the application made by the notary on 22 January 2003 for final registration at the Land Registry of the transfer of ownership, on the ground that certain documents, production of which had been requested by letter of 28 March 2003, had not been provided on time. On 9 December 2004, the notary submitted a new **application for final registration** at the Land Registry of the transfer of ownership to the buyers on the basis of the notarially recorded instrument (the contract between the parties) of 19 December 2000.

However, by decision of 21 April 2005, the Grundbuchamt, having ascertained that the name of one of the buyers appeared on the list in Annex I to Regulation No 881/2002, refused to accept the application for final registration, relying on Articles 2(3) and 4(1) of that regulation. The name Aqeel was blacklisted by the UN Sanctions Committee on 6 July 2004, which appeared a week later on the EC sanctions list.¹²

Article 2 of Regulation No 881/2002 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 I shall be frozen.

2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.

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 designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.»

While Article 4(1) of Regulation No 881/2002 provides that:

«*The participation, knowingly and intentionally, in activities, the object or effect of which is, directly or indirectly, to circumvent Article 2 or to promote the transactions referred to in Article 3, shall be prohibited.*»

On 3 May 2005, the notary submitted a complaint against that decision to the Grundbuchamt. Acting on its own initiative, the Grundbuchamt referred the complaint to the Landgericht (Regional Court) Berlin, which dismissed it by order of 27 September 2005. In turn, the notary brought an appeal against that decision before the Kammergericht (Higher Regional Court) Berlin.

In its request for a preliminary ruling from the ECJ, the Kammergericht Berlin explained that, under German law, ownership of immovable property cannot be acquired directly as a result of a notarially recorded contract of sale between seller and buyer. If title to the property is effectively to pass to the buyer, it is also necessary for the two parties to conclude, in accordance with Article 925 of the Civil Code (Bürgerliches Gesetzbuch, «the BGB»), an agreement that ownership is to be transferred and for that transfer to be registered at the Land Registry, in accordance with Article 873 of the BGB.

Moreover, the Kammergericht added that, under German law, if there is any restriction on the right to dispose of property – as in the case before the referring court because of the supervening obligation to freeze the funds of one of the buyers – and if that restriction comes into being after conclusion of both the notarially recorded contract of sale and the agreement to transfer ownership, but before the application for registration of the transfer in the Land Register, the Grundbuchamt must, as a general rule, take account of that restriction. In addition, the **legal impediment to registration** of the transfer of ownership in the Land Register **precludes completion of the contract of sale**, with the consequence that the sellers are required, under Articles 275 and 323 of the BGB, to repay the sale price to the buyers.

The question arises, however, whether such **repayment** is compatible with the prohibition laid down in Article 2(2) of Regulation No 881/2002.

In a supplementary order of 23 February 2006, the referring court observed that it cannot be inferred from Articles 2(1) to (3) and 4(l) of Regulation No 881/2002 that the seller may be ordered to deposit a sum of money corresponding to the sale price of the property concerned if, at the time when the sale contract was concluded or the sale





price was received, the seller had no knowledge of the sanctions affecting the buyer.

In the same order, the referring court stated that it was also unclear whether, in cases where there is more than one buyer or, as in the main proceedings, where a number of buyers are members of a partnership, the right to repayment of the sale price must be suspended in its entirety or only in proportion to the entitlement of the buyer affected by the restrictive measures.

In those circumstances, in view that the outcome of the proceedings before it is dependent on the interpretation of Regulation No 881/2002, the Kammergericht Berlin decided to stay proceedings and to refer the following **questions** to the Court of Justice for a preliminary ruling:

«(1) Do the provisions of Articles 2(3) and 4(1) of Council Regulation (EC) No 881/2002 ... prohibit property from being conveyed in performance of a sale and purchase agreement to a natural person listed in Annex I to that regulation?

(2) If Question 1 is to be answered in the affirmative: does Regulation No 881/2002 prohibit the entry in the land register necessary for transferring ownership in the property even when the underlying sale and purchase agreement has been concluded, and the conveyance declared binding, before publication of the restriction on disposal in the Official Journal of the European Communities, and the contractual purchase price to be paid by the natural person listed in Annex I to the regulation, as buyer, has already been

(a) deposited in the notarial trust account, or
(b) paid to the seller?»

(2) Judgment

The operative part of the judgment of the ECJ, in which it answered both questions together, was straightforward:

«In a situation where both the contract for the sale of immovable property and the agreement on transfer of ownership of that property have been concluded before the date on which the buyer is included in the list in Annex I to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban [...], and where the sale price has also been paid before that date, Article 2(3) of that regulation, [...] must be interpreted as prohibiting the final registration, in performance of that contract, of the transfer of ownership in the Land Register subsequent to that date.»

The ECJ arrived at this conclusion by interpreting the terms «made available» and «directly and indirectly» very broadly, so the ECJ easily found that the final registration of the ownership and the payment of the price fall within the prohibition of the UN sanction as implemented by the EC Regulation.¹³ Moreover, the ECJ found support for its broad interpretation of Article 2 of the Regulation by focusing on the aim and purpose of the UN sanctions, which is «to combat and root out international terrorism, inter alia by cutting off international terrorism networks from their financial sources».¹⁴

Accordingly, the ECJ had no difficulty in giving priority to the full and effective implementation of UN sanctions, that is ensuring that no financial assets are made available (in)directly to suspected terrorists or sponsors of terrorism, even if that is to the detriment of private parties.

At the same time, the ECJ recognised that there is a limit to full and effective implementation of UN sanctions, which is reached when it would lead to a disproportionate infringement of the right to property.¹⁵ However, the ECJ left it to the Kammergericht to determine whether, in view of the special features of the case, repayment of the sums received by the sellers would constitute a disproportionate infringement of their right to property and, if that was the case, to apply the national legislation in question, as far as possible, in such a way that the requirements flowing from Community law are not infringed.¹⁶

(3) Commentary

The judgment of the ECJ, which essentially follows the AG's Opinion,¹⁷ comes as no surprise, if one recalls the ECJ's *Bosphorus-judgment*.¹⁸ *Bosphorus* was a Turkish airline that leased, prior to the imposition of sanctions against the Former Republic of Yugoslavia (FRY), which involved *inter alia* the complete ending of airline services between the FRY and third countries, one plane from JAT, the state-owned Yugoslav airline, for the purpose of using that plane for flights between Turkey and other destinations – but not to or from the FRY. The EC adopted Regulations in order to implement the UN sanctions.¹⁹ In turn, Ireland impounded in conformity with the UN sanctions and EC Regulation the plane of *Bosphorus* when it was serviced at an Irish airport. *Bosphorus* appealed against that measure before the Irish courts all the way up to the Irish Supreme Court. The Irish Supreme Court, being the highest domestic court, requested from the ECJ a preliminary ruling on the legality of the Irish measure.





The ECJ explicitly stated that:

«13 As to context and aims, it should be noted that by Regulation No 990/93 the Council gave effect to the decision of the Community and its Member States, meeting within the framework of political cooperation, to have recourse to a Community instrument to implement in the Community certain aspects of the sanctions taken against the Federal Republic of Yugoslavia by the Security Council of the United Nations, which, on the basis of Chapter VII of the Charter of the United Nations, adopted Resolutions 713 (1991), 752 (1992) and 787 (1992) and strengthened those sanctions by Resolution 820 (1993).

14 To determine the scope of the first paragraph of Article 8 of Regulation No 990/93, account must therefore also be taken of the text and the aim of those resolutions, in particular Paragraph 24 of Resolution 820 (1993), which provides that «all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro)».

[...]

22 Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.

23 Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators».²⁰

In other words, the ECJ clearly emphasised the importance of the aim pursued by UN sanctions and their **effective implementation** by the EC and its Member States. Consequently, private parties that have nothing to do with the implementation of the sanctions must accept **substantial limitations on the exercise of their right to property**.

But the consequences of the *Möllendorf*-judgment seem to go further. In this case, private parties are burdened by the ECJ with the **obligation to investigate** whether or not their counterpart is blacklisted by UN or EU sanctions before entering into any sort of contractual relationship that involves a transfer of funds or any other economic resources. In this context, it should be noted that the EU also imposes so-called «autonomous» sanctions, which do not originate from the UN Security Council.²¹ This means that if one wants to be

sure that a transaction is not potentially prohibited because of UN or EU blacklisting, one must regularly check (mostly the lists are updated every 6 months) the lists before entering into contractual relationships. This raises the question whether this burden is not disproportionately affecting the right to property, in particular if the parties are acting in good faith. Similarly, this judgment also seems to impose an obligation on those who are blacklisted to make this fact known to the other party before entering into contractual relationships, which the other party in turn will normally refuse. This kind of self-incrimination seems hardly compatible with Article 6 ECHR,²² especially if one takes into account the manner in which the names are placed on the lists, in secret by security and intelligence services, which do not operate in a transparent way and are not always reliable. In other words, being blacklisted amounts to no more than being suspected of supporting terrorism without it being verified by a judge or any other independent body.

Moreover, the ECJ left it totally open as to when a situation arises that affects the **right to property disproportionately**. Some more guidance would have been very useful for the national courts in order to ensure consistency on this issue within all EC Member States. However, from the general thrust of the *Möllendorf*-judgment it can be concluded that the full and effective enforcement of UN sanctions enjoys priority over even substantial negative effects on the exercise of the right to property. In other words, only extremely serious interferences with such rights would apparently prevail over UN sanctions. This echoes the vagueness of the ECtHR's *Bosphorus*-judgment²³ in which it introduced the «manifestly deficient» test. According to that test, the ECtHR will only review national measures implementing EC law, that is, EC law measures indirectly if the level of fundamental rights protection within the EC is manifestly deficient. However, the ECtHR did not indicate when this would be the case.²⁴

In sum, the *Möllendorf*-judgment fits into the **general approach** of the ECJ, which is to ensure first and foremost **full and effective implementation of UN sanctions** by the EC and its Member States. In this regard, the judgment is of little surprise. However, the case illustrates that the blacklisting not only affects the listed individual but also any other party that (potentially) engages in contractual relationships. That party must protect its own interests by essentially being forced to regularly check the UN and EC lists before engaging in contractual relation-





ships. But even if a party acted in good faith, that party will be exposed to the full effects of the UN sanctions, creating serious problems and additional costs in reversing a transaction. This also raises the more fundamental issue of legal certainty. As a consequence of this judgment, the validity of any transaction ultimately depends on the black-listing policy of the UN Security Council and the EU – a factor that is difficult to anticipate because it is driven by events which are normally beyond the control or influence of the private parties acting in good faith.

In sum, while the ECJ must be praised for supporting the cause of rooting out international terrorism, it seems to me that the ECJ has placed **a too heavy burden on private parties by substantially limiting their fundamental rights**.

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- ¹ See eg: CFI [2005] ECR II-3649 *Kadi*; CFI [2005] ECR II-3533 *Yusuf*; CFI [2006] ECR II-2139 *Chafiq Ayadi*; CFI [2006] ECR II-52 *Hassan*; CFI [2006] ECR II-4665 *OMPI*; CFI of 11.7.2007, T-47/03 *Sison*. See generally: *N. Lavranos*, Judicial Review of UN sanctions by the CFI, *European Foreign Affairs Review* [2006] 471-490.
- ² See extensively: *I. Raducu*, The EU, the ECHR and the UN sanctions: which standard for Human rights protection? An analysis of the consequences of Kadi and Yusuf jurisprudence, GARNET Working Paper No: 3308, available at: http://www.garnet-eu.org/fileadmin/documents/working_papers/3308.pdf; *W. Vlcek*, Hitting the right target: EU and Security Council pursuit of terrorist financing, EUSA paper May 2007, available at: <http://www.unc.edu/euce/eusa2007/papers/vlcek-w-09h.pdf>; *L. van den Herik*, The Security Council's targeted sanctions regimes: In need of better protection of the individual, *Leiden Journal of International Law* [2007] 797-807; *V. Gowlland-Debbas* (ed.), *National implementation of United Nations sanctions: a comparative study* (Leiden 2004); *ibid.*, *United Nations sanctions and international law* (The Hague 2001).
- ³ See e.g.: UN Security Council Resolutions 1333 (2000), 1373 (2001), 1566 (2004), 1611 (2005) all available at: <http://www.un.org/terrorism/sc.htm>. Council Common Position 2005/427/CFSP of 6.6.2005 updating Common Position 2001/931/CFSP, OJ [2005], L 144/54; Common Position 2001/931/CFSP, OJ [2001], L 344/93; Common Position 2001/154/CFSP, OJ [2001], L 57/1; Council Regulation No. 2580/2001, OJ [2001], L 344/70.
- ⁴ See eg: UN Security Council Resolutions 1636 (2005), 1591 (2005), all available at: http://www.un.org/Docs/sc/unsc_resolutions05.htm.
- ⁵ See extensively: *N. Lavranos*, *Decisions of International Organizations in the European and Domestic Legal Orders of selected EU Member States* (Groningen 2004); *R. Wessel*, *The EU's Foreign and Security Policy* (The Hague 1999).
- ⁶ See eg.: Council Common Position 2005/440/CFSP of 13.6.2005 concerning restrictive measures against the Democratic Republic of Congo and repealing Common Position 2002/829/CFSP, OJ [2005], L 152/22.
- ⁷ See eg: Council Regulation (EC) No 1183/2005 of 18.7.2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo, OJ [2005], L 193/1.
- ⁸ See eg: Commission Regulation (EC) No 84/2006 of 18.1.2006 amending Council Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo, OJ [2006], L 14/14.
- ⁹ See generally: *M. Bulterman*, *Fundamental Rights and the UN financial sanctions regime: The Kadi and Yusuf judgments of the CFI*, *Leiden Journal of International Law* [2006] 753-772; *idem.*, *Oh, baby, baby, it's a wild world – Over terrorismefinanciering, financiële sancties en rechtsbescherming*, *NJCM-Bulletin* [2005] 1069-1084.
- ¹⁰ See the cases mentioned in note 2.
- ¹¹ See most recently: Opinion of AG *Poiars Maduro* in case C-402/05 *P Kadi* of 16 January 2008.
- ¹² O.J. [2004] L 241/12, Commission Regulation (EC) No 1277/2004 of 12 July 2004 amending for the 37th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001.
- ¹³ Paras. 49-51.
- ¹⁴ Para. 57.
- ¹⁵ Paras. 78-79.
- ¹⁶ *Ibid.*
- ¹⁷ The Opinion of AG *Mengozzi* in case C-117/06 *Möllendorf* of 8 May 2007 concluded as follows:
«108. *In the light of the foregoing considerations, I propose that the Court give the following answer to the questions submitted to it by the Kammergericht Berlin by orders of 21 and 23 February 2006:*
Article 2(3) of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 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, prohibits
– *both the conclusion of an agreement for the transfer of ownership of immovable property to a person listed in Annex I to the regulation, in implementation of a contract of sale entered into before that person was included in the list,*
– *and the registration of that transfer in the Land Register, in implementation of a contract of sale and an agreement for transfer of ownership, both of which were concluded before that inclusion in the list,*
and that is so regardless of whether there is an economic balance between the value of the property sold and the agreed sale price, even if that price has been paid into a notarial trust account or paid to the seller before the date of inclusion in the list.»
- ¹⁸ ECJ [1996] ECR I-3953 *Bosphorus*.
- ¹⁹ O.J. [1993] L 102/14, Regulation 990/93.
- ²⁰ *Supra*, note 18.
- ²¹ See: ECJ [2007] ECR I-1657 *SEGI*; ECtHR of 23.5.2002, Application no. 6422/02 *SEGI*, inadmissibility decision, available at: <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166D>





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²² See generally: *M. Berger*, Europeanizing Self-incrimination: The right to remain silent in the European Court of Human Rights, *Columbia Journal of European Law* [2006] 339-381.

²³ ECtHR, judgment of 30 June 2005 (Grand Chamber), Application no. 45036/98 *Bosphorus*.

²⁴ See for a detailed discussion: *N. Lavranos*, Das So-lange-Prinzip im Verhältnis von EGMR und EuGH, *Europarecht* [2006] 79-92.