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EUROPEAN UNION

This communication summarizes the developments since the 39th meeting of this Committee which took place in Strasbourg on 18-19 March 2010.

1. Legislative developments in the European Union

When the UN Security Council introduces or modifies sanctions against states under Chapter VII of the UN Charter, the European Union adopts restrictive measures to give effect to the Security Council resolutions by adopting 'restrictive measures' referred to as 'bilateral' country regimes. Since the last communication, the European Union applied or modified restrictive measures regimes in respect of the Democratic Republic of Congo¹, Cote d'Ivoire/Ivory Coast², Eritrea³, Iran⁴, the Democratic People's Republic of Korea (North Korea)⁵, Somalia⁶ and Libya⁷. In adopting these measures mandated by the UN Security Council, the European Union may also decide to apply additional restrictions, and for example, apply measures to parties that have not nominally been designated by the United Nations Security Council or the Sanctions Committee.

The European Union also operates restrictive measures regimes on an autonomous basis in respect of other countries. For example, the European Union recently adopted restrictive measures in respect of the Republic of Guinea (Conakry)⁸ and Tunisia.⁹ As of 25 February 2011 a total of thirty separate restrictive measures regimes were operated in the EU.¹⁰ This includes the two restrictive measures regimes relating to international terrorism.¹¹

Generally, the European Union measures apply (a) within the territory of the Union, including its airspace; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.

¹ Council Decision 2010/788/CFSP (Official Journal of the European Union (OJ) J L 336, 21.12.2010, p. 30).

² Council Decision 2010/656/CFSP (OJ L 285, 30.10.2010, p. 28). Council Regulation (EC) No 560/2005 (OJ L 95, 14.4.2005, p. 1).

³ Council Decision 2010/127/CFSP (OJ L 51, 2.3.2010, p. 19); Council Regulation (EU) No 667/2010 (OJ L 195, 27.7.2010, p. 16).

⁴ Council Decision 2010/413/CFSP (OJ L 195, 27.7.2010, p. 39); Corrigendum (OJ L 197, 29.7.2010, p. 19); Council Regulation (EU) No 961/2010 (OJ L 281, 27.10.2010, p. 81).

⁵ Council Decision 2010/800/CFSP (OJ L 341, 23.12.2010, p. 32); Council Regulation (EC) No 329/2007 (OJ L 88, 29.03.2007, p. 1).

⁶ Council Decision 2010/231/CFSP (OJ L 105, 27.4.2010, p. 17). Council Regulation (EU) No 356/2010 (OJ L 105, 27.4.2010, p. 1).

⁷ Council Decision 2011/137/CFSP (OJ L 58, 3.3.2011, p. 53). Council Regulation (EU) No 204/2011 (OJ L 58, 3.3.2011, p. 1).

⁸ Council Decision 2010/638/CFSP (OJ L 280, 26.10.2010, p. 10); Council Regulation (EU) No 1284/2009 (OJ L 346, 23.12.2009, p. 26).

⁹ Council Decision 2011/72/CFSP (OJ L 28, 2.2.2011, p. 62) Council Regulation (EU) No 101/2011 (OJ L 31, 5.2.2011, p. 1)

¹⁰ The full list of the Restrictive Measures in force in the European Union is available from the following website:
http://ec.europa.eu/external_relations/cfsp/sanctions/docs/measures_en.pdf

¹¹ The first one relating to UN Security Council Resolution 1267 (2009) in respect of Usama bin Laden, Al Qaida and Taliban Council Regulation (EC) No 881/2002 (OJ L 139, 29.5.2002, p. 9) as amended by Council Regulation (EU) No 1286/2009 (OJ L 346, 23.12.2009, p. 42). The second one is the EU autonomous restrictive measures regime in respect of foreign terrorist organisations: Council Regulation (EC) No 2580/2001 (OJ L 344, 28.12.2001, p. 70).

2. Developments regarding litigation and case-law of the General Court and the Court of Justice of the European Union

As can be seen, the targeted restrictive measures regimes applied by the European Union are the subject of a steady stream of case law from the Union's courts in Luxembourg.¹²

Insofar as judgments rendered by the Court of Justice, the following cases are worthy of note. In the reporting period the Court issued two important rulings in preliminary references relating to restrictive measures to combat terrorism. The UK House of Lords referred a question to the Court regarding whether under the European Union Regulation that gives effect to the UN *Al Qaeda and Taliban* sanctions regime, a Member States can apply restrictions to state social security or social assistance benefits allocated to spouses of listed persons. In its preliminary ruling the Court held that in the circumstances of the case referred to it, this was not allowed. According to the Court, the European Union Regulation giving effect to the UN sanctions regime "*cannot be construed as applying to the spouse of a person designated by the UN Sanctions Committee on the grounds only that the spouse lives with that person and will or may use some of those payments to pay for goods and services which the designated person also will consume or from which he also will benefit.*"¹³

As reported earlier, following judgments of the General Court¹⁴ in 2006 regarding the European Union autonomous restrictive measures regime to combat terrorism,¹⁵ the Council thoroughly revised its procedures and introduced procedural safeguards in mid- 2007 for parties listed under this regime. The Court of Justice was recently seized of a question referred to it by a national court in Germany which involved the following situation: a German prosecutor had brought criminal charges against two individuals for having provided funds to a listed terrorist organization, in violation of the European Union Regulation establishing the autonomous restrictive measures. However, the charges related partly to acts prior to mid-2007, and therefore were alleged to have been committed during the time that the European Union had not yet implemented a regime of procedural safeguards for parties included in the European Union list annexed to the Regulation. In its preliminary ruling the Court of Justice held that the individuals could not be prosecuted for acts committed prior to the mid-2007, when the organization concerned had not yet benefited from procedural safeguards to allow it to contest its listing by the EU.¹⁶

As of the beginning of March 2011, there are more than forty cases pertaining to different restrictive measures regimes pending before Court of Justice of the European Union. More than thirty cases are pending at the first instance level before the General Court, and the remainder is before the Court of Justice.¹⁷ Among the important horizontal questions that are currently before the courts and involve fundamental rights issues are:

¹² All cases referred to in this communication can be found on the Court of Justice website:

<http://curia.europa.eu>

¹³ Case C-340/08, *M and Others*, Judgment of 29 April 2010, not yet reported.

¹⁴ Following the entry into force of the Lisbon Treaty, the Court of First Instance was renamed General Court.

¹⁵ *Inter alia*, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665; judgments of 11 July 2007 in Case T-47/03 *Sison v Council* and Case T-327/03 *Al-Aqsa v Council*; and judgments of 3 April 2008 in Case T-229/02 *PKK v Council* and Case T-253/04 *Kongra-Gel and Others v Council*.

¹⁶ Case C-550/09, *E and F*, Judgment of 29 June 2010, not yet reported.

¹⁷ A large number of cases before the General Court relate to the Union's restrictive measure regimes in respect of third countries. Two cases have been brought by parties targeted under the Guinea regime, one under the Zimbabwe regime and sixteen under the amended restrictive measures regime involving Iran. There are five cases pending relating to the European Union autonomous regime aimed at combating terrorism, and seven relating to the *Al Qaeda and Taliban* sanctions regime. At the appeals level, the Court of Justice has been seized of three appeals on points of law relating to the *Al Qaeda and Taliban* sanctions regime; three appeals involving the European Union autonomous regime aimed at combating terrorism; one appeal relating to the Burma/Myanmar sanctions regime, two appeals involving the Iran sanctions regime and one case brought by the European Parliament in which the latter challenges the legal basis of the amended regulation adopted by the Union following the Court of Justice's judgment of 2008 in the *Kadi and Al Barakaat* cases.

- What is the correct legal basis for the European Union Regulation amending European Union implementation of the UN Security Council *Al Qaeda and Taliban* sanctions regime under the new Treaty on the Functioning of the European Union: was the Council of the Union correct when it chose as legal basis Article 215 of the Treaty of the Functioning of the European Union (TFEU) (which only allows the European Parliament to be informed) or should the Regulation have been based on article 75 TFEU (which provides for a substantial role of the EP as co-legislator?)¹⁸
- What are the precise fundamental rights standards and the standard of judicial review for European Union restrictive measures when the European Union gives effect to the mandatory listings pursuant to the UN Security Council *Al Qaeda and Taliban* sanctions regime? Do the same standards as those applicable in the European Union autonomous measures to combat terrorism apply?¹⁹
- What are the precise standard of review and the fundamental rights standards applicable to parties targeted by the European Union under the so-called bilateral country regimes? Do the same standards as those applicable in the European Union autonomous measures to combat terrorism apply?²⁰
- Is a party that has obtained annulment of its listing by the European Union entitled to compensation? If so, what are the conditions that need to be fulfilled? What form should this compensation take? Is annulment of the European Union listing sufficient compensation? If not, what heads of claim can be put forward?²¹

The second question referred to above receives a lot of attention. As reported earlier, in the *Kadi and Al Barakaat* appeals judgment of 3 September 2008,²² the Court of Justice affirmed the competence of the European Union judicature to review the 'internal lawfulness' of the European Union measures implementing decisions of the UN Security Council,²³ emphasizing that European Union courts have jurisdiction to review measures adopted by the European Union which give effect UN Security Council Resolutions. The Court observed that the European Union is based on the rule of law, and that neither its Member States nor its institutions can avoid review of the conformity of their acts with the constitutional principles of the European Union treaties, which establish 'a complete system of legal remedies and procedures' designed to enable the European Union judicature to review the legality of acts of the institutions.²⁴ In response to the argument that Union courts should pay deference to the UN level review processes that had been put in place, the Court of Justice found these procedures as they existed up until 2007, to be insufficient from a fundamental rights perspective and that they therefore could "not give rise to generalised immunity" within the internal legal order of the Union.²⁵ The Court held therefore that the European Union judicature must, therefore, "...ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of the fundamental rights forming an integral part of the general principles of European Union law, including review of European Union measures designed to give effect to the UN SC resolutions adopted under Chapter VII of the Charter".²⁶

Following the appeals judgment of 3 September 2008, the Union introduced 'due process' procedures but decided that the European Union decision to maintain the freezing of Mr Kadi's funds remained justified. Mr Kadi brought a new action before the General Court against this

¹⁸ Case C-130/10, *European Parliament v Council*, case pending before the Court of Justice.

¹⁹ See further below: C-584/10 P, C-593/10 P and C-595/10 P: Appeals by the Commission, Council and the UK brought against the Kadi (II) judgment (Case T-85/09, Judgment of the General Court of 30 September 2010).

²⁰ Case C-376/10 P, appeal brought by *Pye Phyzo Tay Za* against the Judgment of the General Court dated 19 May 2010 in Case T-181/08.

²¹ These questions are pending before the General Court in the *Sison (II)* case following the General Court's judgment of 30 September 2009 in Case T-341/07 *Sison v Council*.

²² Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] E.C.R. I-6351.

²³ *Ibid.*, paragraphs 289-299.

²⁴ *Ibid.*, paragraphs 281-284.

²⁵ *Ibid.*, paragraph 321.

²⁶ *Ibid.*, paragraph 326.

decision to maintain him on the European Union list.²⁷ In its judgment of 30 September 2010 the General Court annulled this new decision. It held that following the *Kadi and Al Barakaat* appeals judgement of 2008 the Union's institutions are obliged to conduct a far-reaching review of the UN mandated sanctions imposed on Mr Kadi, and that the Union's judicature itself must apply a "*full and rigorous*" review of the restrictive measures, including by reviewing the underlying evidence and information. The General Court also decided that it needed to apply the same standards as those for the European Union autonomous measures to combat terrorism. Furthermore, the General Court also dismissed as insufficient the improvements of the UN 1267 Sanctions Regime, including the establishment of the Office of the Ombudsperson by Resolution 1904 (2009). It held that this "*cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee*".²⁸ This latest judgment of the General Court in the *Kadi* case is currently under appeal to the Court of Justice.²⁹

²⁷ Judgment of 30 September 2010, *Kadi v Commission* (T-85/09), not yet reported.

²⁸ *Ibid.*, paragraphs 127-128.

²⁹ Appeals have been brought against the GC's judgment of 30 September 2010 by the Council, the Commission and the UK ([C-584/10P](#), [C-593/10P](#) and [C-595/10P](#)). The notices of the appeals brought by the Commission, Council and the UK, are published in the *Official Journal* of 5 March 2011 (OJ C 72, 5.3.2011, p. 9). These notices contain a summary of the grounds of appeal.