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## EUROPEAN UNION

This report summarises the developments since the 37<sup>th</sup> meeting of this Committee which took place on 19 and 20 March 2009.

It should be recalled that the European Union<sup>1</sup> operates two different terrorism sanctions lists<sup>2</sup>. First, UN Security Council Resolution 1390 (2002) on the freezing of funds of persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban is implemented by Common Position 2002/402/CFSP and Council Regulation (EC) No. 881/2002 of 27 May 2002 ("the Al-Qaida/Taliban list")<sup>3</sup>. This list includes persons and entities that have been designated by the relevant UN Sanctions Committee as associated with the Al-Qaida network and the Taliban. Second, in accordance with Common Position 2001/931/CFSP of 27 December 2001, Council Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism freezes the assets of persons, groups or entities involved in terrorist acts. While this "EU terrorist list" implements the abstract criteria laid down in UN Security Council Resolution 1373 (2001), the European Union decides autonomously which specific groups, persons or entities qualify to be listed.

Starting with the latter type of sanctions, there are a number of cases pending with the Court of First Instance and the Court of Justice.<sup>4</sup> In the period under review, the Court of First Instance has recently rendered judgement in two applications for annulment brought by Mr *Mohamed El Morabit* against Council Decisions regarding his inclusion on the 'EC' terrorism list. In its Judgement of 2 September 2009<sup>5</sup>, the Court of First Instance dismissed the applications for annulment by Mr El Morabit, following the line set out in earlier case law of the Court of First Instance and the Court of Justice in matters of restrictive measures with a view to combating terrorism. The Court of First Instance holds that the principle of the presumption of innocence is not breached by precautionary measures which do not amount to (criminal) sanctions, are not meant to prejudge guilt or innocence, are prescribed by law, are adopted by a competent authority and are limited in time.<sup>6</sup> The Court also rejects the argument of Mr El Morabit that EC listing can only take place on the basis of a final and definitive judgement convicting a person of terrorism offences.<sup>7</sup> Referring to earlier jurisprudence on this question, the Court also addresses and dismisses the applicant's complaint that a listing on the EC terrorism list violates the principle of proportionality because of the severe financial and social consequences for the person concerned.<sup>8</sup>

Insofar as developments regarding the Al-Qaida/Taliban list are concerned, in the period under review, the Court of First Instance (CFI) rendered judgement in case T-318/01 *Omar Mohammed Othman v Council and Commission*.<sup>9</sup> This judgement of 11 June 2009 is the first of the CFI after the landmark judgement of the ECJ of 3 September 2008 in the appeals brought by Mr *Kadi* and

<sup>1</sup> The information was provided by the European Commission.

<sup>2</sup> Note that the UN and the EU also adopted other targeted sanctions involving the designation of individuals and entities outside the context of combating terrorism.

<sup>3</sup> OJ 2002, L 139. The regulation replaces earlier restrictive measures against the Taliban that had been adopted to implement UN Security Council Resolution 1267 (1999) and UN Security Council Resolution 1333 (2000).

<sup>4</sup> One appeal relating to the Regulation No. 2580/2001 is pending with the ECJ: Case C-27/09P *France v OMPi*; in addition there are at least 10 separate or related cases currently pending with the CFI.

<sup>5</sup> Cases T-37/07 and T-323/07 *Mohamed El Morabit v Council*, Judgement of the Court of First Instance of 2 September 2009. All judgments can be downloaded from the website of the European Court of Justice (<http://www.curia.europa.eu>).

<sup>6</sup> *Ibid.*, paragraphs 40-49.

<sup>7</sup> *Ibid.*, paragraphs 50-56.

<sup>8</sup> *Ibid.*, paragraphs 57-65.

<sup>9</sup> CFI, Judgement of 11 June 2009, Case T-318/01 *Omar Mohammed Othman v Council and Commission*.

*the al Barakaat International Foundation*<sup>10</sup>. In the Othman judgement, the CFI follows closely the reasoning of the ECJ in the latter judgment regarding the alleged human rights violations. The CFI holds that the applicant's rights of defence, in particular his right to be heard, were violated, on the grounds that the evidence used for the imposition of the restrictive measures had not been communicated to the applicant.<sup>11</sup> In the same vein, the CFI rules that the applicant's right to an effective legal remedy and the principle of effective judicial protection had been infringed. The CFI also concluded that the restrictive measures constituted an unjustified restriction on the applicant's right of property.<sup>12</sup> Furthermore, the CFI pointed out that the EU institutions may within a short period of time remedy the infringements by adopting, if appropriate, a new restrictive measure regarding the applicant, following correct procedures. It should be noted that Mr. Othman remains listed by the UN Security Council, and a new EU listing decision has been adopted after due process, to replace the annulled decision.<sup>13</sup>

As reported earlier, in order to comply with the judgment ECJ's judgement in the *Kadi and al Barakaat International Foundation* cases, the Commission has communicated the narrative summaries of reasons provided by the UN Al-Qaida and Taliban Sanctions Committee, to Mr. Kadi and to Al Barakaat International Foundation. It also gave them the opportunity to comment on these grounds in order to make their point of view known. After having carefully considered the comments received, the Commission adopted a new regulation adding the two applicants to the list.<sup>14</sup> Both Mr Kadi and the al Barakaat Foundation brought an action annulment of the new regulation before the CFI.<sup>15</sup> These cases are currently pending with the CFI. In addition, there are a number of other cases related to the Al-Qaida/Taliban list pending both with the CFI and the ECJ. Two of these are appeals that had been suspended earlier by the ECJ, awaiting the decision in the *Kadi and al Barakaat International* cases.<sup>16</sup> For its part, the CFI will hear in September applications for annulment brought by four other applicants, whose cases had also been suspended in the view of the appeals in the *Kadi and al Barakaat International* cases.<sup>17</sup> In addition, since the latter appeals judgement three other listed persons have brought annulment actions before the CFI. All these new cases are pending as well.

Apart from these developments in jurisprudence and litigation, the EU's institutions are currently considering a proposal by the Commission for amendments to Council Regulation (EC) No. 881/2002 of 27 May 2002.<sup>18</sup> The amendments are aimed at inclusion of due process provisions in accordance with the *Kadi and al Barakaat International* appeals judgement.

<sup>10</sup> ECJ, Judgment of 3 September 2008, C-415/05 P *Kadi* and C-402/05 *Al-Barakaat*.

<sup>11</sup> CFI, Judgement of 11 June 2009, Case T-318/01 *Omar Mahammed OTHMAN v Council and Commission*, paragraph 8.

<sup>12</sup> *Ibid.*, paragraph 91.

<sup>13</sup> Commission Regulation (EC) No 732/2009 of 10 August 2009 amending for the 111th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban; OJ L 208, 12.8.2009, p. 3

<sup>14</sup> Commission Regulation (EC) No. 1190/2008 amending for the 101<sup>st</sup> time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ 2008, L 322/25.

<sup>15</sup> Cases T-45/09 *Al Barakaat Foundation v Commission* and Case T-85/09 *Kadi v Commission*.

<sup>16</sup> Case C-399/06P *Faraj Hassan*; Case C-403/06P *C. Ayadi*.

<sup>17</sup> Cases T-135/06 *Al Bashir Al-Faqih*; T-136/06 *Sanabel Relief Agency*; T-137/06 *Ghunia Abdrabbah*; T-138/06 *Taher Nasuf*.

<sup>18</sup> COM(2009)187.