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## EUROPEAN UNION

This communication deals with developments since the 41<sup>st</sup> Meeting of the Committee which took place in Strasbourg on 17-18 March 2011.

### 1. Legislative developments in the European Union

As of March 2012 some thirty separate restrictive measures regimes were operated in the European Union (EU).<sup>1</sup> This includes the two restrictive measures regimes relating to international terrorism.<sup>2</sup>

As set out in earlier communications, when the UN Security Council introduces or modifies sanctions against states under Chapter VII of the UN Charter, the EU gives effect to these resolutions by adopting 'restrictive measures'. The EU may also decide to apply additional restrictions, and for example, apply measures to parties that have not nominally been designated at UN level. The EU also operates restrictive measures regimes on an autonomous basis in respect of other countries. In the period under review substantially new or amended restrictive measure regimes have been adopted by the EU in respect of the following third countries: Egypt,<sup>3</sup> Iran,<sup>4</sup> Libya<sup>5</sup> and Syria<sup>6</sup> and Afghanistan.<sup>7</sup>

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

The targeted restrictive measures regimes applied by the EU are the subject of a steady stream of case law from the Union's courts in Luxembourg.<sup>8</sup> By mid-March 2012, more than 120 cases

<sup>1</sup> 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](http://ec.europa.eu/external_relations/cfsp/sanctions/docs/measures_en.pdf)

<sup>2</sup> 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 persons and entities involved in terrorism: Council Regulation (EC) No 2580/2001 (OJ L 344, 28.12.2001, p. 70).

<sup>3</sup> Freezing of funds and economic resources of persons identified as being responsible for the misappropriation of Egyptian State funds, and natural or legal persons, entities and bodies associated with them) Council Decision 2011/172/CFSP (OJ L 76, 22.3.2011, p. 63); Council Regulation (EU) No 270/2011 (OJ L 76, 22.3.2011, p. 4)

<sup>4</sup> This regime includes *inter alia* - restrictions on admission of (i) persons responsible for serious human rights violation in Iran and (ii) persons associated with them; - freezing of funds and economic resources of (i) persons responsible for serious human rights violations in Iran and (ii) persons, entities and bodies associated with them; Council Decision 2011/235/CFSP (OJ L 100, 14.4.2011, p. 51); Council Regulation (EU) No 359/2011 (OJ L 100, 14.4.2011, p. 1).

<sup>5</sup> This regime includes *inter alia* restrictions on admission of listed natural persons and freezing of funds and economic resources of listed persons, entities and bodies; - prohibition to grant certain claims to listed persons and entities and any other; persons and entities in Libya, including the government of Libya; 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).

<sup>6</sup> This regime includes *inter alia*, restraint on commitments for public and private financial support for trade with Syria and ban on new long term commitments of Member States; - restrictions on admission of certain persons; - freezing of funds and economic resources of certain persons, entities and bodies; - prohibition to satisfy claims made by certain persons, entities or bodies Council Decision 2011/782/CFSP (OJ L 319, 2.12.2011, p. 56); Council Regulation (EU) No 442/2011 (OJ L 121, 10.5.2011, p. 1).

<sup>7</sup> Measures against the Taliban: Council Decision 2011/486/CFSP (OJ L 199, 2.8.2011, p. 57); Council Regulation (EU) No 753/2011 (OJ L 199, 2.8.2011, p. 1). It should be noted that the Taliban regime was created by the EU following the splitting on 27 June 2011 by the Security Council of the previous Al Qaeda sanctions regime into two separate regimes: one for Al Qaeda (Resolution 1989 (2011)) and one for the Taliban (Resolution 1988 (2011)).

<sup>8</sup> All cases referred to in this communication can be found on the Court of Justice website:

regarding restrictive measures were pending before the Court of Justice, a small number of which concern appeals brought before the Court of Justice against judgments rendered by the General Court.<sup>9</sup> The number of applications for annulment brought by parties listed under the two regimes operated by restrictive measures regimes to combat terrorism is decreasing. The majority of new cases brought now relate to third country regimes.

In the period under review the Court of Justice and the General Court issued rulings in some 40 cases. A fair number of these rulings relate to horizontal questions involving fundamental rights issues arising under several restrictive measures regimes operated by the EU.

### ***Third country regimes: notion and scope, reasons and evidence for listing***

On 13 March 2012 the Court of Justice (Grand Chamber) rendered a judgment in an appeal brought by an individual targeted by the EU's restrictive measures against Burma/Myanmar, on the grounds that he was a family member of a leading business figure benefiting from the economic policies of the targeted government. In its ruling the Court clarified legal questions surrounding the notion and scope of third country restrictive measures regimes under EU law.<sup>10</sup>

The main question was whether the EU is entitled to list natural persons solely on the ground of their family connection with persons associated with the leaders of the targeted country. In answering this question the Court of Justice referred to the ruling which it gave earlier in the *Kadi and Al Barakaat* appeals judgment of 3 September 2008.<sup>11</sup> It holds that consequently such measures "must be directed only against the leaders of such countries and the persons associated with those leaders"<sup>12</sup> and that this concept must be restricted "to categories of persons whose connection with the third country concerned is quite obvious, namely the leaders of third countries and the individuals associated with them".<sup>13</sup> The Court rejected as unlawful listing individuals on the basis of a rebuttable presumption that family members of listed persons benefit from the economic policies of the targeted country. In particular, the Court did not accept that natural persons can be targeted on the sole ground of their family connection with persons associated with the leaders of the third country concerned, irrespective of the personal conduct.<sup>14</sup> The Court indicated furthermore that to prove association of a natural person with the rulers of a third country "concrete evidence" is required which would have enabled it to be established that the listed person "benefits from the economic policies" of the leaders of the targeted country.<sup>15</sup>

On 13 March 2012 the Court of Justice (Grand Chamber) also rendered its judgment in the appeal brought by *Melli Bank plc* (C-380/09P) relating to another third country regime (Iran). The Court ruled that for a subsidiary to be listed under this regime it was sufficient to show that the latter was "owned or controlled" by the mother company (*Bank Melli Iran*) which itself had been listed because of its involvement in the financing of nuclear proliferation.<sup>16</sup>

In the period under review the General Court also rendered notable judgments annulling the inclusion of certain individuals under third country regimes on the grounds of violation of the obligation to state reasons. In the case of *Nadiany Bamba v Council* the General Court (fifth

<http://curia.europa.eu>

<sup>9</sup> Three of these cases on appeal relate to the Judgment of the General Court of 30 September 2010 in the case *Kadi v Commission* (T-95/10) (terrorism/Al Qaeda).

<sup>10</sup> Case C-376/10P, *Pye Phyo Tay Za*, Judgment of 13 March 2012, nyr.

<sup>11</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008, ECR, 2008 I-6351, paragraph 166 in which the Court had indicated that the concept of adoption of measures vis-à-vis third countries "may include the rulers of such a country and also individuals and entities associated with or controlled, directly or indirectly by them".

<sup>12</sup> Case C-376/10P, *Pye Phyo Tay Za*, paragraph 63.

<sup>13</sup> *Ibid.*, paragraph 68.

<sup>14</sup> *Ibid.*, paragraphs 65-66.

<sup>15</sup> *Ibid.*, paragraph 70.

<sup>16</sup> Case C-380/09 P, *Melli Bank plc*, Judgment of 13 March 2012, nyr, paras. 75-81.

chamber, extended composition), noted that Ms Bamba had been subjected to restrictive measures in view of the situation in Ivory Coast, on the grounds that as director of a publishing group, who published the newspaper 'Le Temps', she had engaged in obstruction of the peace and of reconciliation process by publicly inciting to hatred and violence and through participation in disinformation campaigns in connection with the 2010 presidential election in Ivory Coast. This reasoning was found to be vague and general. In particular, the General Court ruled that these reasons failed to provide the actual and specific reasons of why the Council, who enjoys a wide margin of discretion, considered it necessary to apply restrictive measures to Ms *Bamba*. The Court found that the reasons given did not enable the applicant to understand how she would have engaged in the alleged misconduct. It noted in particular the absence of a single concrete element that would justify the measures taken.<sup>17</sup> A similar annulment decision, on similar grounds, was taken by the same chamber of the General Court in a subsequent judgment involving the Ivory Coast regime. The applicant concerned had been listed on the grounds that as president of "Petroivoire" he had contributed to the financing of the illegal administration of Mr Laurent Gbagbo.<sup>18</sup>

On 21 March 2012, the General Court (fourth Chamber), annulled the listing of an Iranian company, *Fulmen* and Mr *Mahmoudian*, the company's majority shareholder and Chairman of its Board of Directors, on the grounds of the Council's failure to adduce evidence.<sup>19</sup> The company had been listed under the EU's restrictive measures against Iran, on the grounds that it was involved in the installation of electrical equipment in the Qom/Fordoo nuclear site in Iran at the time when the existence of the site had not yet been revealed. Mr Fulmen was included in the restrictive measures list as director of that company. The case before the General Court turned in the end on the question of evidence regarding the alleged support given by the listed parties to nuclear proliferation. The General Court dismissed the Council's defence that it could not be expected to adduce evidence of this claim. It rejected the argument that judicial review must be limited to determining that the reasons relied on to justify the adoption of restrictive measures are 'probable'. The Court recalled that: "(...) *the judicial review of the lawfulness of a measure whereby restrictive measures are imposed on an entity extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. In the event of challenge, it is for the Council to present that evidence for review by courts of the European Union (...) Accordingly (...) the review of lawfulness which must be carried out in the present case is not limited to an appraisal of the abstract 'probability' of the grounds relied on, but must include the question whether those grounds are supported, to the requisite legal standard, by concrete evidence and information.*"<sup>20</sup>

Neither did the General Court accept the Council's defence that the evidence was with the Member States that made the listing proposal.<sup>21</sup> It also rejected the Council's defence that the evidence could not be disclosed as it came from confidential sources.<sup>22</sup> The General did acknowledge that the Council may encounter difficulties when proving the alleged involvement, but ruled that whilst this may affect the standard of proof, such difficulties could not relieve the Council entirely of its burden of proof.<sup>23</sup> As the Council now disposes of two months extended on account of distance by ten days as from the notification of the judgment of annulment, the Court suggested that there is time for the Council to remedy the infringement established.<sup>24</sup> A further noteworthy aspect is that the failure of the Council to adduce evidence was judged not to have affected the Council's obligation to state reasons<sup>25</sup>; nor the principle of respect of rights of the defence<sup>26</sup> or the right to

<sup>17</sup> Case T-86/11 *Nadiany Bamba v Council*, Judgement of 8 June 2011 rendered by the fifth chamber of the General Court (extended composition), nyr, paras. 50-52. The judgment is appealed by the Council and by France.

<sup>18</sup> Case T-316/11, *Mathieu Kadio Morokro v Council*, Judgment of 16 September 2011, nyr.

<sup>19</sup> Joined Cases T-439/10 and T-440/10, *Fulmen and Fereydoun Mahmoudian v Council*, Judgment of 21 March 2012, nyr.

<sup>20</sup> *Ibid.*, paras. 96-97.

<sup>21</sup> *Ibid.*, para. 99

<sup>22</sup> *Ibid.*, para. 100.

<sup>23</sup> *Ibid.*, para. 101.

<sup>24</sup> *Ibid.*, para. 106.

<sup>25</sup> *Ibid.*, para. 57.

effective judicial protection.<sup>27</sup> The Court judged that the failure to adduce evidence amounted to an error of assessment as regards the applicant's involvement in nuclear proliferation which they contested.<sup>28</sup>

### **Scope of prohibited activities pertaining to freezing of funds and economic resources**

The Court of Justice was asked by a referring national court to provide an interpretation of two separate prohibitions set out in the EU regulation pertaining to the restrictive measures regime against Iran: the prohibition of making available, directly or indirectly, funds or economic resources to or for the benefit of the listed parties and the prohibition of participating, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the measures referred to, *inter alia*, in the former prohibition. In its judgment of 21 December 2011 the Court ruled that the first prohibition should be interpreted broadly and that it encompasses the supply and installation of items capable of contributing to nuclear proliferation even where the item itself is not ready for use.<sup>29</sup> As for the second prohibition, in the view of the Court this entails cumulative requirements of knowledge and intent that are met where the person deliberately seeks the object or the effect, direct or indirect, of circumvention connected therewith or where the person in question is aware that his participation in such an activity can have that object or effect and accepts that possibility.<sup>30</sup>

### **Legal Nature of EU Listing Decision**

In period under review the Court of Justice has dealt with a number of questions regarding the precise nature of the restrictive measures under EU law: Are they legislative measures of a general nature addressed to EU Member States or do they constitute decisions of an individual nature addressed to the listed party?<sup>31</sup> Do such measures only need to be published in the Official Journal of the EU or do they need, in addition, to be individually notified to the listed parties concerned? These questions were settled by the Court of Justice in its judgment on the appeal brought by *Bank Melli Iran*, a party who had been included in the EU's restrictive measures regime against the Islamic Republic of Iran to prevent nuclear proliferation. In its judgment of 16 November 2011 the Court of Justice (Grand Chamber) noted that even where a listing decision is formally taken by the EU in the form of a decision, it is nevertheless of the same legal nature as an EU regulation: an EU act that is binding in its entirety on and directly applicable in all EU Member States.<sup>32</sup> The Court also addressed the question of individual notification. Whilst under EU law a regulation needs only to be published,<sup>33</sup> the Court recalled that the freezing of funds has considerable consequences for the listed parties, for it may restrict the exercise of their fundamental rights.<sup>34</sup> The Court also recalled that the principle of effective judicial review requires that the listed party be informed of the individual and specific reasons for the party's inclusion in the EU's list, either when the measure is adopted or as swiftly as possible thereafter to enable the listed party to exercise its right to bring an action before the court.<sup>35</sup> For those reasons the Court rejected the suggestion that publication of the restrictive measure in the Official Journal of the European Union would be sufficient.<sup>36</sup> It held

<sup>26</sup> *Ibid.*, para. 84.

<sup>27</sup> *Ibid.*, paras 87-91.

<sup>28</sup> *Ibid.*, paras. 93-103.

<sup>29</sup> Case C-72/11, *Afrasiabi et al.*, Judgment of 21 December 2011, nyr, para. 57.

<sup>30</sup> *Ibid.*, paras. 63 to 68.

<sup>31</sup> Under Article 288 of the Treaty on the Functioning of the European Union (TFEU), an EU regulation has general application, is binding in its entirety and is directly applicable in all EU Member States; a decision is also binding in its entirety, but it must specify those to whom it is addressed and it shall only be binding upon them.

<sup>32</sup> Case C-548/09P, *Bank Melli Iran*, para. 45.

<sup>33</sup> Article 297(2) of the TFEU.

<sup>34</sup> Case C-548/09P, *Bank Melli Iran*, para. 49..

<sup>35</sup> *Ibid.*, para. 47, with reference to the Court's earlier judgment in Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat International Foundation*, [2008], I-6351, para. 336.

<sup>36</sup> Case C-548/09P, *Bank Melli Iran*, para. 50.

that the decision must be communicated individually to the listed party.<sup>37</sup> Still, this communication does not need to take a particular form, as long as useful effect is given to the obligation of the EU's institutions to ensure effective judicial protection of the listed party.<sup>38</sup>

### **Procedural deadline for instituting legal proceedings**

A further question relating to the nature of the decision and publication/communication requirements is what deadline listed parties dispose of to contest their inclusion in an EU restrictive measures list before EU courts. This question is particularly relevant for non-EU individuals and entities outside the EU, who are targeted by EU restrictive measures. In the period under review the General Court has issued orders dismissing as manifestly inadmissible applications by parties who had sought to challenge their listing by the EU but brought their challenge outside two months procedural deadline following publication of the measure in the Official Journal of the EU.<sup>39</sup> Thus, the fifth chamber of the General Court rejected as manifestly inadmissible the cases brought by five parties listed under the EU's restrictive measures regime in view of the situation in Ivory Coast, judging that they had been brought outside the applicable time limits following publication of the measure in the EU's Office Journal. This chamber specifically rejected the applicants' objection that this procedural deadline could not be invoked against them as the measures in question had not been notified to them individually. On the latter aspect, the fifth chamber of the General Court took the view that the starting point for the deadline for seeking the annulment of the EU measure concerned was the publication of the act. It held that this procedural deadline, like all procedural deadlines before the EU courts, is mandatory in nature ('ordre public') and could not be extended with reference to the time when the applicant allegedly received knowledge of the act.<sup>40</sup> The same strict line was generally followed by the second chamber of the General Court in respects of challenges brought by parties listed under the EU's restrictive measures regime in view of the situation in Libya. This chamber dismissed as manifestly inadmissible four cases on the grounds of having been brought outside the applicable procedural deadlines specifying that the deadline for bringing the application starts to run from the day of publication of the EU measure in the EU's Official Journal.<sup>41</sup> On the other hand, in a case brought by a party listed under the restrictive measures regime taken in view of the situation in Tunisia, the third chamber of the General Court did allow for the legal possibility that the deadline might not start to run from the date of publication of the EU measures in the Official Journal of the EU, but that it might start to run from the day that the measure was communicated to the applicant.<sup>42</sup>

The question of whether the deadline for calculating the time for bringing a legal challenge starts to run from the day of publication of the measure in the EU's Official Journal or from the day that the measure is communicated to the individual concerned, will probably have to be settled in an appeal to the Court of Justice.<sup>43</sup>

<sup>37</sup> Ibid., para. 52.

<sup>38</sup> Ibid., para. 56.

<sup>39</sup> According to Article 263, sixth paragraph of the TFEU, proceedings challenging an EU act 'shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.'

<sup>40</sup> Case T-348/11 *Laurent Gbagbo v Council*, Order of 13 July 2011, para. 16; Case T-349/11 *Katinan Justin Koné v Council*, Order of 13 July 2011, para. 16; Case T-350/11 *Akissi Danièle Boni-Claveri v Council*, Order of 13 July 2011, para. 16; Case T-351/11 *Alcide Djédjé v Council*, Order of 13 July 2011, para. 14; Case T-352/11 *Affi Pascal N'Guessan v Council*, Order of 13 July 2011, para 16.

<sup>41</sup> Case T-376/11, *Banque centrale de Libye (CBL) v Council*, Order of 22 September 2011, para. 11; Case T-377/11, *Fonds de développement économique et social (FDS) et al., v Council*, Order of 22 September 2011, para. 12; Case T-374/11, *Lybian Investment Authority et al. v Council*, para. 11; Case T-375/11 *Mohamad Ali Houej v Council*, Order of 22 September, para. 13.

<sup>42</sup> Case T-301/11, Order of 11 January 2011, *Ben Ali v Council*, para. 20.

<sup>43</sup> In his Opinion of 28 June 2011 in Case C-548/09P, *Bank Melli Iran* at para 57, Advocate General P. Mengozzi opined that it would be contrary to the EU's legal order to dismiss an application as out of time in a case where the applicant did not receive an individual notification. However, the Court did not address this point in its judgment of 21 December 2011. Furthermore, the Court of Justice is currently seized with appeals brought by the five individuals whose applications challenging the listing under the Ivory Coast measures had been dismissed by the fifth Chamber of the General Court. The applicants' main argument on appeal appears to be that in the event of war, the procedural time limits for bringing a

<p><b>The question of compensation/damages for wrongful listing by the EU</b></p>
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Is a party that has been removed from an EU list as a result of a court decision annulling the listing, entitled to damages from the EU for wrongful listing? If so, what are the conditions that need to be met?

This question was dealt with at length in a judgment rendered on 23 November 2011 by the General Court in Case T-341/07 *Sison*. The applicant had been included in the EU's autonomous restrictive measures regime in respect of foreign terrorist organisations.<sup>44</sup> This listing was annulled for the first time on 11 July 2007 by a judgment rendered at first instance on the grounds of breach of Mr Sison's fundamental rights. Following this judgment the EU introduced 'due process' procedures but kept Mr Sison on the EU list. Following a renewed challenge by Mr Sison, the General Court then annulled this continued listing of Mr Sison by the EU in its judgment of 30 September 2009. Mr Sison's claim for damages for wrongful listing by the EU led to the General Court's judgment on 23 November 2011. In this judgment the General Court sets out the conditions under which parties who have been removed from a restrictive measures list by the EU, following annulment of the listing decision by EU courts, are entitled to compensation from the EU's institutions on the grounds of the EU's 'non-contractual liability'.<sup>45</sup> On this principled question the General Court takes the view that holds that the criteria developed in the case law on the EU's non-contractual liability are fully applicable and hence, that the applicant must not only demonstrate wrongful conduct by the EU but must also prove this to the requisite standard of 'sufficiently serious breach' meaning that the EU institution concerned must have manifestly and gravely disregarded the limits of its discretion. In addition, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded.

The Court held *inter alia* that " (...) according to consistent case-law, the incurring of the [EU]'s non-contractual liability (...) is conditional upon the satisfaction of a set of conditions, namely, the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of (...). (...) a finding of the unlawfulness of a legal measure (...) is not enough, however regrettable that unlawfulness may be (...). This requirement of a sufficiently serious breach of [EU] law, (...) is intended, whatever the nature of the unlawful act at issue, to avoid the risk of having to bear the losses claimed by the persons concerned obstructing the institution's ability to exercise to the full its powers in the general interest, whether that be in its legislative activity, or in that involving choices of economic policy or in the sphere of its administrative competence, without however thereby leaving individuals to bear the consequences of flagrant and inexcusable misconduct (...). The decisive test for a finding that this requirement has been satisfied is whether the institution concerned has manifestly and gravely disregarded the limits of its discretion (...). It follows that only the finding of an irregularity that an administrative authority, exercising ordinary care and diligence, would not have committed in similar circumstances, can render the [EU] liable (...)."<sup>46</sup>

In the case of Mr *Sison* the General Court considered that the interpretation and application of the EU legislation in question had been a difficult task for the EU institution concerned (the Council of the EU). It ruled that whilst the EU's decision to continue Mr Sison's listing was unlawful, the infringement of EU law by the EU Council could be accounted for by the particular constraints and responsibilities borne by the Council and that this constituted an irregularity that an administrative authority exercising ordinary care and diligence might have committed if placed in similar circumstances.<sup>47</sup> In consequence, the General Court considered that, in the circumstances of the case, although the infringement of the legislation by the EU Council had been clearly established, it

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case are not enforceable: Cases C-478/11P *Laurent Gbagbo*; C-479/11P *Katinan Justin Koné*; C-480/11P *Akissi Danièle Boni-Claveri*; C-481/11P *Alcide Djédjé v Council* and C-482/11P *Affi Pascal N'Guessan*.

<sup>44</sup> Council Regulation (EC) No 2580/2001 (OJ L 344, 28.12.2001, p. 70).

<sup>45</sup> The distinction between contractual and non-contractual liability can be found in Article 340 of the Treaty on the Functioning of the European Union.

<sup>46</sup> Case T-341/07, *Sison v Council*, nyr, paras 28, 39.

<sup>47</sup> *Ibid.*, para. 73.

could not be regarded as a sufficiently serious breach of EU law so as to incur the non-contractual liability of the EU to the applicant.<sup>48</sup> Finally, on the question of principle regarding the applicable standard, the General Court took the view that neither the Charter of Fundamental Rights of the European Union nor the European Convention on Human Rights, which both guarantee the right to effective judicial protection, preclude that the EU's non-contractual liability be made subject to the finding of a sufficiently serious breach of the fundamental rights invoked by the applicant.<sup>49</sup>

On the question of damages in connection with restrictive measures, mention should also be made of an Order of 17 February 2012 of the General Court in Case T-218/11 *Dagher v Council*. The applicant's name had been removed by the EU from the restrictive measures in view of the situation in Ivory Coast. In line with the jurisprudence below, the General Court held that there was no more need for it to adjudicate on the applicant's request for annulment of the listing. The General Court also dismissed the applicant's claim for damages on the grounds that of the three cumulative grounds for obtaining damages for the EU's non-contractual liability (the institutions' conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded) the applicant had failed to substantiate the latter two conditions.<sup>50</sup>

***Consequences of removal of a party from the EU list after a legal challenge has been brought by it but before a judgment is rendered***

A further question that has arisen in a number of cases in the period under review is whether a party that has been removed from an EU list after the institution of court proceedings has a continuing interest and therefore an entitlement to request that the court proceeds to adjudicate the claim.

There have been several cases where the EU has, for a variety of reasons, after the institution of legal proceedings by a listed party but before a judgment is rendered, decided to remove the party from the restrictive measures list. In most cases the formerly listed party has decided to withdraw the legal proceedings, following which the General Court issued an order that there is no need to adjudicate.<sup>51</sup> However, in one recent case the formerly listed party declined to withdraw the application for annulment insisting that he was entitled to obtain a judgment condemning the EU institution concerned for wrongful listing. The applicant, Mr Ayadi, had been included since 30 May 2002 in the EU restrictive measures regime in matters of terrorism<sup>52</sup> which gives effect to UN Security Council Resolution 1267 (2009) in respect of Usama bin Laden, Al Qaida and Taliban. Mr Ayadi has since sought to challenge this listing before EU courts in a series of legal proceedings that closely follow the case of Mr Kadi. In the course of his latest challenge against his continued listing by the EU on 6 December 2010 Mr Ayadi decided to seize the Ombudsperson of the 1267 Sanctions Committee with a petition for delisting. This resulted in the decision of 17 October 2011 by the UN Sanctions Committee to remove Mr Ayadi's name from the list of parties to which UN Security Council Resolution 1267 (2009) applies. On 25 October 2011 the EU then adopted an act removing Mr Ayadi's name from the Annex to the EU Regulation concerned. Following this delisting, the EU institution concerned (the EU Commission) requested the General Court to declare that Mr Ayadi's action had become devoid of purpose and that there was no longer any need to adjudicate on it.

Mr Ayadi contested this. He took the view that the General Court should adjudicate his claim to

<sup>48</sup> *Ibid.*, para. 74.

<sup>49</sup> *Ibid.*, paras 28- 81.

<sup>50</sup> Case T-218/11 *Habib Roland Dagher v Council*, Order of the General Court (Fifth Chamber) of 17 February 2012.

<sup>51</sup> E.g., Case T-436/11 *Afriqiyah Airways v Council*, Order of 17 January 2012; Case T-285/11, *Charles Kader Gooré v Council*, Order of 15 December 2011; Case T-255/11 *Zakaria Fellah v Council*, Order of 7 December 2011; Case T-194/11 *Geneviève Bro Grébé v Council*, Order of 23 September 2011; Case T-142/11 *Société ivoirienne de raffinage (SIR) v Council*, Order of 6 July 2011; Case T-160/11 *Société nationale d'opérations pétrolières de la Cote d'Ivoire Holding (Petroci Holding)*, Order of 6 July 2011.

<sup>52</sup> Council Regulation (EC) No 881/2002 (OJ L 139, 29.5.2002, p. 9).

avoid a recurrence of the unlawful acts by the EU; that the delisting did not have retroactive effect as from 30 May 2002; that the EU institution concerned should not be granted *de facto* impunity; that judicial scrutiny was necessary as his listing had been based on information extracted under torture, in contravention of the mandatory rules of international law (*jus cogens*); that his action also related to the question of breach of reputation in breach of Article 8 of the European Convention on Human Rights (ECHR); and that on the point of principle the act by which he was removed from the list could not be regarded as the equivalent to the annulment which he sought through the legal proceedings.

Each of these arguments was rejected by the General Court (Second Chamber), which based its ruling that there was no need to adjudicate on Mr Ayadi's claim on the settled case law. Accordingly, the General Court held that an applicant's interest in the proceedings must exist until the final decision. Furthermore, the withdrawal or the repeal of the contested act by the defendant institution eliminates the subject-matter of the action for annulment since it leads for the applicant to the desired outcome and gives him full satisfaction.<sup>53</sup> The Court did not accept that the recognition of illegality of the EU's action, even on the grounds of alleged infringement of a mandatory rule of international law, sought by Mr Ayadi was sufficient to establish a continuing interest in the proceedings for annulment. The Court also noted that Mr Ayadi had not filed a claim for compensation, observing that such action was still available to him and that under EU law such action does not have to be preceded by an action for annulment of the act purportedly giving rise to the alleged damage.<sup>54</sup>

On 28 February 2012 the General Court (Second Chamber) issued an order in the case of *Abdulbasit Abdulrahim v Council and Commission*, in which it decided that there was no longer any need to adjudicate on the applicant's request for annulment. Like Mr Ayadi, the applicant had been removed from the EU's restrictive measures regime in matters of terrorism<sup>55</sup> which gives effect to UN Security Council Resolution 1267 (2009) in respect of Usama bin Laden, Al Qaida and Taliban, in the course of the proceedings. In its Order the General Court rejected Mr *Abdulbasit Abdulrahim's* claims of a continuing interest to proceed to judgment on the same grounds as in the aforementioned Ayadi case.<sup>56</sup>

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<sup>53</sup> Case T-527/09 *Chafiq Ayadi v European Commission*, Order of 31 January 2012, paras. 24-26.

<sup>54</sup> *Ibid.*, paras. 34-40.

<sup>55</sup> Council Regulation (EC) No 881/2002 (OJ L 139, 29.5.2002, p. 9).

<sup>56</sup> Case T-127/09, *Abdulbasit Abdulrahim v Council and Commission*, Order of 28 February 2013.