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EUROPEAN UNION

This communication summarizes the developments since the 38th meeting of this Committee which took place on 10 and 11 September 2009.

1. Legislative developments in the European Union

Before entering into specifics it should be noted that as a result of the entry into force of the Lisbon Treaty, on 1 December 2009, the European Community has been succeeded by the European Union. The new Treaty on the Functioning of the European Union (TFEU) now includes an express provision enabling the Union to take restrictive measures not only in respect of third countries¹, but also against 'natural or legal persons and groups or non-State entities'². There is also a new article specifically for the prevention and combating of terrorism and related activities, which enables the European Parliament and the Council of the European Union to define 'a framework for administrative measures with regard to capital movements, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities'.³ Furthermore, there is now also an express provision on the ECJ's competence to review the legality of decisions providing for restrictive measures against natural and legal persons adopted on the basis of the Union's common and foreign security policy.⁴

As reported earlier, the European Union operates two different sanctions lists relating to terrorism: the "Al-Qaida/Taliban list" and the EU "autonomous" sanctions list. The first list includes persons and entities that have been designated by the UN Security Council Sanctions Committee as associated with the Al-Qaida network and the Taliban.⁵ The second list differs from the Al-Qaida/Taliban list in that it implements the abstract criteria laid down in the relevant Security Council Resolution, but it is the European Union which decides autonomously on which persons or entities to include in the EU terrorism list. The decision to include persons or entities on the EU list is based on decisions by national authorities, which are in most cases, authorities of EU Member States, but which may also be from non-EU states.⁶

In relation to the first mentioned sanctions regime, an important legislative development is the adoption on 22 December 2009 by the Council of the European Union of amendments to Regulation (EC) No. 881/2002 of 27 May 2002.⁷ These amendments are aimed at introducing due provisions necessary after the landmark judgment of the ECJ of 3 September 2008 in the appeals

¹ Article 215(1) TFEU.

² Article 215(2) TFEU.

³ Article 75 TFEU.

⁴ Article 275 (2) TFEU.

⁵ The list is based on 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, and is implemented in the EU by Common Position 2002/402/CFSP and Council Regulation (EC) No. 881/2002 of 27 May 2002 ("the Al-Qaida/Taliban list"), Official Journal, 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).

⁶ This list is based on UN Security Council Resolution 1373 (2001) of 28 September 2001, EU Common Position 2001/931/CFSP of 27 December 2001 and on Council Regulation (EC) No. 2580/2001 of 27 December 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, Official Journal, L 344/70 of 18 December 2001

⁷ Council Regulation (EU) No 1286/2009 of 22 December 2009, amending 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, *Official Journal of the European Union*, 23.12.2009, L 346/42.

brought by Mr *Kadi* and the *Al Barakaat International Foundation*.⁸ The legislative amendments which were adopted on 22 December 2009 codify the *ad hoc* due process procedures which the Commission immediately applied following the Court's judgment of 3 September 2008. The new legislative amendments introduce new due process procedures to be followed by the EU in regard to all individuals and entities listed by the UN. The procedures are modeled on the procedure applied in the EU for the autonomous sanctions regime in relation to terrorism, referred to earlier.

The amendments of the *Al Qaeda/Taliban* Regulation address three different hypotheses. The first hypothesis is where the UN Security Council takes a new listing decision. In this case the new procedure encompasses the following steps: (a) Upon notification by the UN Sanctions Committee of a new listing decision and the statement of reasons, the European Commission takes an immediate decision to freeze the funds and economic resources of the individual or entity concerned; (b) In parallel the European Commission sends the statement of reasons to the individual or entity concerned without delay, to give an opportunity for the listed person/entity to express views; (c) The Commission examines any observations that have been expressed and consults an advisory committee of experts of the Member States before taking the final decision. The Commission communicates these observations received and the result of its review to the UN Sanctions Committee; (d) In case of a further request by the listed person or entity, based on new substantial evidence, the European Commission will conduct a further review following substantially the same procedure.

The second hypothesis relates to cases of decisions of de-listing by the UN Security Council. In such cases the European Commission will simply amend the corresponding EU list. The third hypothesis addresses the cases of person/entities listed before the ECJ's judgment of 3 September 2008. The amended Regulation foresees the possibility for such persons and entities to present the European Commission with a request for a statement of reasons, which the Commission will forward to the UN Sanctions Committee and communicate to the listed person/entity upon receipt, in order to provide the opportunity for expression of views in relation thereto. What follows is then a similar procedure as for the first hypothesis.

2. Developments regarding litigation and case-law of the ECJ

There are a number of cases pending with the General Court (the new name for the Court of First Instance) and the ECJ in relation to the *Al Qaida/Taliban* sanctions list. Mr *Kadi* and the *Al Barakaat International Foundation* brought an action for annulment before the General Court against their renewed listing by the EU, following the application of the *ad hoc* due process procedures referred to above.⁹ However, following the de-listing of the *Al Barakaat Foundation* by the UN Security Council, the latter withdrew its action for annulment. The new *Kadi* case is still pending before the General Court.

In the period under review the ECJ also rendered judgments in a number of older cases that had been suspended pending the appeals of Mr *Kadi* and the *Al Barakaat* Foundation. In particular, on 3 December 2009 the Court of Justice rendered judgment in the appeals brought by *Faraj Hassan* and *Chafiq Ayadi v Council*.¹⁰ In both cases the appellants' grounds of appeal were similar to those at issue in the *Kadi* and the *Al Barakaat* cases. The ECJ Justice annulled the listings of *Faraj Hassan* and *Chafiq Ayadi v Council* essentially on the same grounds as in its judgment of 3 September 2008.

Regarding the second type of sanctions, i.e. the EU autonomous sanctions in relation to terrorism, there are no legislative developments. However there are a number of cases pending with the General Court and the ECJ. In the period under review, the General Court rendered judgment in

⁸ ECJ, Judgment of 3 September 2008, in joined cases C-415/05P *Kadi* and C-402/05P *Al-Barakaat International Foundation*.

⁹ Cases T-45/09 *Al Barakaat Foundation v Commission* and Case T-85/09 *Kadi v Commission*.

¹⁰ Cases C-399/06 P and C-403/06 P, Judgment of 3 December 2009.

the case of Mr *Sison*,¹¹ a national of the Philippines, who sought annulment of Council listing decisions taken in so far as they concerned him. The case concerned listing decisions adopted by the EU Council following the improved due process procedures which were introduced following the judgments of the General Court in the first *Sison* case¹² and the *OMPI* judgment of 2006.¹³ In its judgment of 30 September 2009 the General Court held that the Council had, following the adopted improved procedures, duly complied with the principles laid down in its previous case law. The Court also confirmed earlier case law regarding the broad discretion enjoyed by the Council with regard to the matters to be taken into consideration for the listing purpose, even where no terrorist activity exists for a certain period. However, the Court found that in *Mr Sison's* case there was no valid decision of a competent national authority on which his inclusion on the EU list could be based. Referring to its earlier jurisprudence in the *OMPI* case, the General Court specified that it is not sufficient for a national judicial authority to rule only incidentally and indirectly on the possible involvement of the person concerned in terrorist activity. The Court also pointed to other elements in the national file which showed that the national prosecuting authorities had considered that there was not enough evidence to warrant the opening of criminal investigations into or prosecutions of Mr *Sison* in respect of an act of terrorism. As a consequence, the General Court annulled all the listing decisions which formed the subject of the proceedings. Mr *Sison* is now pursuing an action for damages before the General Court¹⁴.

The UN and the EU have also adopted so-called targeted sanctions involving the designation of individuals and entities outside the context of combating terrorism. The General Court of the EU has recently rendered judgments in cases of annulment brought by corporate entities that had been listed under one of these non-terrorism related EU sanctions regimes. The application concerned restrictive measures introduced by the EU following relevant Security Council resolutions to apply pressure on the Islamic Republic of Iran to end its proliferation-sensitive nuclear activities and development of nuclear weapon delivery systems. Separate applications for annulment against individual listings were brought by a bank owned by the Iranian state, Bank Mellī Iran, and by Mellī Bank plc, a wholly owned-subsiary of that bank. In its judgments of 9 July 2009¹⁵ and 14 October 2009¹⁶ the General Court has in regard to the rights of defence, adopted an approach which is very similar to its jurisprudence in regard to the terrorism cases, in particular the *OMPI* case, in particular for questions relating to the statement of reasons, communication and individual notification of grounds for listing, the right to a fair hearing and the right to judicial review. The General Court explicitly dismissed the argument that the due process jurisprudence developed for terrorism-related cases should not be applied *mutatis mutandis* to persons or entities listed in the framework of other sanctions regimes adopted by the EU. Both judgments are currently under appeal before the ECJ.¹⁷

¹¹ T-341/07, *Sison v Council*, Judgment of 30 September 2009.

¹² Case T-47/03 *Sison v Council*, Judgment of 11 July 2007.

¹³ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council*, Judgment of 12 December 2006.

¹⁴ Case T-341/07, *Sison v Council*.

¹⁵ Joined cases T-246/08 and T-332/08, *Melli Bank plc v Council*.

¹⁶ Case T-390/08, *Bank Mellī Iran v Council*.

¹⁷ Case 380/09P *Melli Bank plc v Council* and Case 548/09P *Bank Mellī Iran v Council*.