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1. Legislative developments in the European Union

As of **March 2013** some thirty separate restrictive measures regimes were in force in the European Union (EU).[1] This includes the two restrictive measures regimes relating to international terrorism.[2]

When the UN Security Council introduces or modifies sanctions against states or persons under Chapter VII of the UN Charter, the EU adopts restrictive measures to give effect to the Security Council resolutions by adopting 'restrictive measures'.

In adopting these measures mandated by the UN Security Council, the EU 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 a UN Sanctions Committee.

The EU also operates restrictive measures regimes on an autonomous basis in respect of other third countries. In 2012, apart from the update and periodic review of most of the regimes, substantial new (autonomous) restrictive measures were adopted by the EU in respect of the following third countries: Belarus[3], Iran[4] and Syria[5].

2. Developments regarding litigation

The targeted restrictive measures regimes applied by the EU are the subject of a steady stream of litigation in the Union's courts in Luxembourg. **By 5 February 2013,** a total of **117 cases** regarding restrictive measures were pending before the General Court and the Court of Justice. In 2012, 61 new cases have been initiated and 6 in the first two months of 2013. The vast majority of these cases concern the autonomous "third-country" EU regimes while 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 importance of the litigation for the future of EU autonomous third-country regimes is underscored by the fact that around 20% (around 240)[6] from the ± 1.200 individual listings are currently challenged before the Courts.

3. Case-law of the General Court and the Court of Justice of the European Union

There are a number of **horizontal questions** involving, inter alia, fundamental rights issues and the legal nature of restrictive measures that have been decided by or are pending before the

[1] The full list of the Restrictive Measures in force in the European Union is available from the following website: http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf

[2] The first one relating to UN Security Council Resolution 1267 (2009) in respect of Usama bin Laden and Al Qaida Council Regulation (EC) No 881/2002 (OJ L 139, 29.5.2002, p. 9) as amended, inter alia, 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).

[3] Council Regulation (EU) No 114/2012 (OJ L 38, 11.2.2012, p. 3) and Council Regulation (EU) No 354/2012 (OJ L 113, 25.4.2012, p. 1).

[4] Council Regulation (EU) No 267/2012 (OJ L 88, 24.2.2012, p. 1).

[5] Council Regulation (EU) No 36/2012 (OJ L 16, 19.1.2012, p. 1).

[6] 124 cases including the "Tomana" case involving all 123 listed persons from Zimbabwe.

Courts. In particular:

1. The legal nature of the listing decisions

The question of the nature of a listing decision under EU law was addressed by the Court of Justice in an appeal brought by *Melli Bank 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 judgement of 16 November 2011 the Court of Justice 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.[7]

The same issue will be reconsidered by the Court's in the framework of the Kadi II appeal following the doubts expressed by the General Court in the Kadi judgment for case T-85/09 especially as regards assets freeze measures of a long duration[8].

Moreover, in a recent Court Order[9], the applicability of Article 60 2nd subparagraph of the Statute of the Court (suspensory effect of the appeal) to restrictive measures cases was put to question.

In response to the General Court's queries on this Order (in the framework of pending cases), the Commission recalls the *Melli Bank Iran* case law.[10]

This means that, as consistently and correctly held by the General Court, the temporal effects of the annulment of an individual designation are governed by Article 60, 2nd subparagraph of the Statute of the Court[11]. This entails that judgments of the General Court declaring a regulation to be void take effect only from the date of expiry of the 2 months and 10-days time-limit of lodging an appeal or, if an appeal has been brought within that period, as from the date of dismissal of the appeal.

2. Grounds for listing under the third country EU regimes and categories of listed persons

Based on the Court's findings in the *Tay Za* appeal judgment[12], under the third country EU restrictive measures regimes, one can distinguish three categories of targeted persons:

a) the leaders of the third country,
b) the persons associated or controlled by those rulers (measures against both adopted under Article 215(1) TFEU) and,
c) the persons who meet the CFSP designation criteria and violate the CFSP objective of the restrictive measures (measures adopted under Article 215 (2) TFEU).

As regards the third category, from the nature alone of the reasons that need to be substantiated (fulfilment of CFSP designation criteria), there will be a higher standard of evidence to be met than for the first two categories where what must be proven is a) the position of the "leader" or b) the association with that leader.

[7] Case C-548/09P, Bank Melli Iran, para. 45.
[8] Case T-85/09, Kadi/Commission, paras 148-151.
[9] Order of 19 July 2012 in case *Tarif Akhras v Council*, C-110/12 P(R), para 29.
[10] Case C-548/09P, *Bank Melli Iran*, 16 November 2011, paragraph 45; see too Joined Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, paragraph 241.
[11] Case *T-318/01 Othman,* paragraph 98; T-316/11; *T-86/11 Bamba v Council,* paragraph 58; Case T-16/11 *Morokro v Council*, paragraph 38; Joined Cases T-439/10 and T-440/10, *Fulmen and Mahmoudian v Council,* paragraph 108; Case T-509/10, *Kala Naft v Council*, paragraph 129.
[12] Case C-376/10 P, Tay Za, paragraphs 68-70.

3. Sufficiency of proof and respect of fundamental rights

A point that has been the subject of conflicting case law from the General Court is whether the sufficiency of evidence used for the listings is an issue that concerns the respect of fundamental rights or it is instead an issue of substance.

In the Fulmen judgment, the General Court found that, even in the absence of evidence, when the grounds for listing enable the applicants to understand what are accused of having done and to dispute either the truth or the relevance thereof, there is no violation of the rights of their defence and the right to an effective judicial protection[13].

The General Court judged otherwise in the Kadi judgment, where it found that in the absence of the communication of the evidence for listing the applicant's rights of defence and effective judicial protection were violated.[14]

The Court of Justice will give judgment on this matter in the framework of the "Kadi II" appeal (pending joined cases C-584/10 P, C-593/10 P and C-595/10 P). The Commission follows the Fulmen line and invites the Court to place the debate on the proof of the grounds for listing within the plea of error in the appreciation of facts and not within the plea of fundamental rights' violation.

4. The obligation to state the reasons for the listing decisions

Pursuant to constant case law of the Court, the purpose of the obligation to state the reasons for an act adversely affecting a person, is, first, to provide the person concerned with sufficient information to make it possible to determine whether the measure is well founded or whether it is vitiated by an error which may permit its validity to be contested before the Courts of the European Union and, secondly, to enable the latter to review the lawfulness of that measure.

The obligation to state reasons therefore constitutes an essential principle of European Union law which may be derogated from only for compelling reasons. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him, for failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Courts of the European Union.

Consequently, unless there are compelling reasons touching on the security of the European Union or of its Member States or the conduct of their international relations which prevent the disclosure of certain information, the Council is required to inform the entity covered by restrictive measures of **the actual and specific reasons** why it considers that those measures had to be adopted. It must thus state the matters of fact and law which constitute the legal basis of the measures concerned and the considerations which led it to adopt them.[15]

This case law was confirmed by the Court of Justice in the Bamba appeal (C-417/11 P) judgment of 15/11/2012.[16]

On the issue of the degree of detail required for the motivation of listings, the Court found[17]: "it is not necessary to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question".

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[13] Joined cases T-439/10 and T-440/10 Fulmen and Mahmoudian, paragraphs 52, 84-89, contrary to the findings in Kadi on appeal judgment.
[14] Case T-85/09 paras 171-181.
[15] Judgment of 29/01/2013, T-496, Bank Mellat/Council, paras 49-50 and case law referred therein.
[16] C-417/11 P, paras 49-51.
[17] C-417/11P, para 53.

5. Legal basis and procedure for listing decisions

In a recent case, (Bank Industry and Mine / Council, T-10/13), the applicant claims that the Council had no competence to decide the listing by a Council implementing Regulation. This would constitute a violation of Article 215 (2) TFEU that provides for the joint proposal of Commission and HR for the decision of restrictive measures on individuals.

The case is pending.

6. Legal consequences of de-listings

Recently the General Court ruled on requests by the Commission not to adjudicate on two cases generated by an individual's listing after the deletion of his name from the Annex to the relevant Regulation No. 881/2002.[18] *Ayadi and Abdulrahim* opposed the discontinuation of their case by submitting a number of arguments. In particular, they claimed that:[19]

- the retroactive effect conferred on the contested regulation was not nullified by the new regulation;
- it was not possible to assume the fund freezing measure contested by the present action will not be reintroduced in the future;[20]
- non adjudication equals with granting the Commission *de facto* impunity;
- there was an overriding public interest that the contested regulation be subject to judicial scrutiny since it had been adopted on the basis of information extracted under torture, therefore in violation *of jus cogens;*[21]
- there was a breach of article 8 of the European Convention of Human Rights;
- the repeal of the contested regulation through the adoption of a new one cannot be regarded as equivalent to its annulment, which would have the effect of removing that act from the legal order of the European Union as if it had never existed;
- a decision on the merits of the case is also necessary to enable them to obtain reimbursement of his costs.

The Court went on to respond to these arguments by citing case law according to which if the applicant's interest in bringing proceedings disappears in their course, a decision of the General Court on the merits cannot bring him any benefit.[22] The repeal affords the applicant the desired outcome and gives him full satisfaction, given that, following the adoption of the repealing regulation, he was no longer subject to the restrictive measures which adversely affected him. Moreover, recognition of the alleged illegality itself constitutes one of the forms of compensation pursued in an action on damages.

Both cases are under a pending appeal before the Court of Justice[23]. On 22/01/2013, AG Bot delivered his Opinion in the *Abdulrahim.* He proposes to the Court to set aside the General Court's Order and to find that the applicant retains an interest in order: a) to restore his reputation, b) to ensure that the alleged illegality does not recur in the future and, c) to have a basis for possible proceedings for damages.

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[18] Order of 31 January 2012 in case T-527/09, *Ayadi* v. *Commission and Order* in case T-127/09 *Abdulrahim v Commission..*

[19] *Ibid,* paragraph 21.

[20] As far as the possibility of the alleged illegality being recurred in the future, the Court found that nothing in the case pointed towards this direction.

[21] Order of 31 January 2012 in case T-527/09, *Ayadi v. Commission*, paragraph 36, citing Case 85/82 *Schloh* v. *Council,* paragraph 14; Regarding the third argument of the applicant, even though the Commission must comply with mandatory rules of international law and is not entitled to adopt a decision based on evidence obtained under torture, the applicant is not entitled to act in the interests of the law or of the institutions and may put forward only such an interest and claims as relate to him personally.

[22] Case C-362/05P *Wunenburger* v. *Commission,* paragraphs 42 and 43 and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryannair v. Commission,* paragraphs 42 and 43.

[23] Pending cases C-183/12 P and 239/12 P.

7. Further issues as decided by the General Court – extracts from the case law

a) On the sufficient character of the grounds for listing

i) T-496/10, Bank Mellat

"66 The contested measures state the following four reasons as regards the applicant:

– according to Decision 2010/413 and Implementing Regulation No 668/2010, the applicant is a State-owned Bank ('the first reason');

– the applicant engages in a pattern of conduct which supports and facilitates Iran's nuclear and ballistic missile programmes ('the second reason');

– the applicant has provided banking services to UN and EU listed entities, to entities acting on their behalf or at their direction, or to entities owned or controlled by them ('the third reason');

– the applicant is the parent bank of First East Export [Bank] ('FEE'), which is designated under [United Nations Security Council Resolution] 1929 [2010] ('the fourth reason').

67 The first of the two proposals for adoption of restrictive measures notified on 13 September 2010 partly overlaps the second reason provided in the contested measures. It adds the following reasons:

– the applicant provides banking services to the Atomic Energy Organisation of Iran ('AEOI') and to Novin Energy Company ('Novin') which are subject to restrictive measures adopted by the United Nations Security Council ('the fifth reason');

– the applicant manages the accounts of officials of the Aerospace Industries Organisation and an Iranian procurement agent ('the sixth reason').

68 The second proposal notified on 13 September 2010 essentially overlaps the statement of reasons in the contested measures. There is one additional reason: that since at least 2003 the applicant has facilitated the movement of millions of dollars for the Iranian nuclear programme ('the seventh reason').

69 The third proposal for the adoption of restrictive measures, which is annexed to the rejoinder, contains no additional information as compared with the contested measures and the two proposals notified on 13 September 2010.

70 The applicant maintains that such a statement of reasons does not explain in sufficient detail why restrictive measures against it were adopted. It considers that that deficiency implies, further, an infringement of its rights of defence.

71 The Council, supported by the Commission, contends that the applicant's argument is unfounded.

72 The first reason is sufficiently detailed since it enables the applicant to appreciate that the allegation made against it by the Council is that part of its share capital is held by the Iranian State.

73 On the other hand, the second and third reasons are excessively vague in that they give no details of the nature of the conduct alleged on the part of either the applicant or the other entities concerned.

74 The fourth reason is set out in sufficient detail, since it enables the applicant to appreciate that the allegation made against it by the Council concerns the control it exercises over FEE.

75 The same is true of the fifth reason, which identifies the entities to which the financial services at issue were allegedly supplied.

76 Lastly, the sixth and seventh reasons are not sufficiently detailed, since the sixth does not identify the persons concerned and the seventh contains no details of the entities and transactions concerned.

77 In the light of the foregoing, it must be held that the Council is in breach of the obligation to state reasons and the obligation to disclose to the applicant, as the entity concerned, the evidence adduced against it as regards the second, third, sixth and seventh reasons. On the other hand, those obligations were fulfilled as regards the other reasons."

ii) T-316/11 Morokro/Council

"28 Il convient par ailleurs de relever qu'il ressort du point 18 du tableau A des annexes II des actes attaqués que le requérant a été inscrit sur la liste des personnes et entités faisant l'objet de mesures restrictives figurant à l'annexe II de la décision 2010/656 et à l'annexe I A du règlement n° 560/2005 au motif qu'il était « président de PETROIVOIRE » et qu'il « contribu[ait] au financement de l'administration illégitime de M. Laurent Gbagbo ».

29 Force est de constater que, par cette motivation, le Conseil se contente d'exposer des considérations vagues et générales. Il n'indique en effet pas les raisons spécifiques et concrètes pour lesquelles il considère, dans l'exercice de son pouvoir discrétionnaire d'appréciation, que le requérant doit faire l'objet des mesures restrictives en cause, comme le requiert la jurisprudence citée au point 25 ci-dessus.

30 En particulier, l'indication que le requérant est président de Pétro Ivoire ne constitue pas une circonstance de nature à motiver de manière suffisante et spécifique les actes attaqués à son égard. Cette indication ne permet en effet pas de comprendre en quoi le requérant aurait contribué au financement de l'administration illégitime de M. Gbagbo. Aucun élément concret, qui serait reproché au requérant et qui pourrait justifier les mesures en cause, n'est ainsi évoqué. À cet égard, il doit être souligné que, même s'il n'était pas nécessaire, comme le laisse entendre le requérant, que les actes attaqués indiquent, de manière précise et détaillée, la forme, le montant, la date et l'affectation du financement en cause, force est de constater que ces actes ne donnent pas même d'indication générale sur la nature ou l'ampleur dudit financement. D'ailleurs, ainsi que le relève le requérant, la même indication générique, relative à la contribution au financement de l'administration illégitime de M. Gbagbo, est également utilisée pour quatorze autres personnes visées aux annexes II des actes attaqués."

iii) T-509/10 Kala Naft/Council (under appeal):

"79 En revanche, le troisième motif, selon lequel la requérante entretient des liens avec les sociétés prenant part au programme nucléaire iranien, présente un caractère insuffisant, en ce qu'il ne lui permet pas de comprendre quel type de relations avec quelles entités lui est effectivement reproché, de sorte qu'elle n'est pas en mesure de vérifier le bien-fondé de cette allégation et de la contester avec le moindre degré de précision."

b) On the scope of the judicial review and the burden of proof

i) T-494/10, Bank Saderat/Council

"105 In accordance with the case-law, 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 the Courts of the European Union (see, to that effect, *Bank Melli Iran* v *Council*, paragraph 47 above, paragraphs 37 and 107).[…]

111 As regards, lastly, the third reason, the applicant does not dispute that DIO and IEI are engaged in nuclear proliferation. Equally, it does not deny that it handled letters of credit of those two entities.

112 None the less, the applicant does not accept that the services which it provided to DIO and IEI justify the adoption of restrictive measures against it. In that regard, the applicant maintains, in essence, that those services were ordinary banking services provided in the past in the context of handling export letters of credit, issued by third-party banks, and that those services did not relate to transactions linked to nuclear proliferation.

113 In order to determine whether those arguments are well founded, the Court asked the Council to send to it detailed information on the letters of credit handled by the applicant on behalf of DIO and IEI. "

114 The Council has not produced any evidence in reply to the Court's request. The Council maintains, in that regard, that the applicant has also failed to produce such evidence, although it could and should have done so.

115 That argument cannot be accepted. As is clear from the case-law cited in paragraph 105 above, it is not for the entity which is the subject of the restrictive measures, but for the Council, to produce, in the event of challenge, the evidence and information on which the Council relied when adopting those measures. In this case, since the Council relied on specific letters of credit which it claims were handled by the applicant on behalf of DIO and IEI, it is therefore for the Council to provide to the Court the related details.

116 In those circumstances, the fact that it is impossible to determine whether the applicant's arguments, that the services which it provided to DIO and IEI do not justify the adoption of restrictive measures against it, are well founded should not prejudice the applicant. On the contrary, since the reason why it is impossible is the Council's failure to meet its obligation to submit relevant evidence and information, the second plea in law must be upheld.

117 In the light of all the foregoing, the contested measures must be annulled in so far as they concern the applicant, and there is no need to examine the third plea in law, claiming an infringement of the principle of proportionality.

ii) T-439/10, Fulmen:

"97 Accordingly, contrary to what is claimed by the Council, 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. […]

102 As regards the assessment in the present case, the Council has produced no information or evidence in support of the reasons relied on in the contested measures. As the Council itself

admits, in essence, it has relied on mere unsubstantiated allegations that Fulmen installed electrical equipment on the Qom/Fordoo site before the existence of that site was discovered."

iii) T-509/10 Kala Naft:

"123 Selon la jurisprudence, le contrôle juridictionnel de la légalité d'un acte par lequel des mesures restrictives ont été adoptées à l'égard d'une entité s'étend à l'appréciation des faits et des circonstances invoqués comme la justifiant, de même qu'à la vérification des éléments de preuve et d'information sur lesquels est fondée cette appréciation. En cas de contestation, il appartient au Conseil de présenter ces éléments en vue de leur vérification par le juge de l'Union (voir, en ce sens, arrêt Bank Melli Iran/Conseil, point 58 supra, points 37 et 107).

124 En l'espèce, le Conseil n'a produit aucun élément d'information ou de preuve concernant le deuxième motif, allant au-delà de la motivation des actes attaqués. Ainsi qu'il l'admet, en substance, lui-même, il s'est fondé sur de simples allégations, non étayées par un quelconque élément de preuve, selon lesquelles la requérante aurait tenté d'acquérir des portes en alliage très résistant utilisées exclusivement par l'industrie nucléaire.

125 Dans ces circonstances, il y a lieu de conclure que le Conseil n'a pas apporté la preuve des allégations invoquées dans le cadre du deuxième motif."

c) On listings based on non-releasable information (T-439/10, Fulmen, under appeal)

"100 Secondly, the Council cannot rely on a claim that the evidence concerned comes from confidential sources and cannot, consequently, be disclosed. While that circumstance might, possibly, justify restrictions in relation to the communication of that evidence to the applicants or their lawyers, the fact remains that, taking into consideration the essential role of judicial review in the context of adoption of restrictive measures, the courts of the European Union must be able review the lawfulness and merits of such measures without it being possible to raise objections that the evidence and information used by the Council is secret or confidential (see, by analogy, *OMPI*, paragraph 155). Further, the Council is not entitled to base an act adopting restrictive measures on information or evidence in the file communicated by a Member State, if that Member State is not willing to authorise its communication to the courts of the European Union whose task is to review the lawfulness of that decision (see, by analogy, Case T-284/08 *People's Mojahedin Organization of Iran* v *Council* [2008] ECR II-3487, paragraph 73)."

d) On the use of comprehensive sector sanctions based on Article 215(1) TFEU (T-509/10, Kala Naft)

"117 Le Conseil fait encore valoir, à cet égard, qu'il est autorisé, en vertu de l'article 215, paragraphe 1, TFUE, à interrompre totalement les relations économiques et financières avec un État tiers ou à adopter des mesures restrictives sectorielles à l'égard de ce dernier.

118 Toutefois, cette circonstance est inopérante en l'espèce. En effet, les dispositions sur lesquelles s'appuient les mesures restrictives adoptées à l'égard de la requérante, énumérées au point 116 ci-dessus, ne prévoient pas de telles mesures générales ou sectorielles, mais des mesures individuelles."

e) On the possibility for state emanations to invoke violation of fundamental rights (T-496/10, Bank Mellat)

"41. […] it must be held that European Union law contains no rule preventing legal persons which are emanations of non-Member countries from taking advantage of fundamental rights protection and guarantees. Those rights may therefore be relied upon by those persons before the Courts of the European Union in so far as those rights are compatible with their status as legal persons."