

## **Update to the questionnaire on national implementation measures of UN sanctions and respect for human rights**

March 2009

The European Union<sup>1</sup> operates two different 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.

### 1. The Al-Qaida/Taliban list

On 3<sup>rd</sup> September 2008, the European Court of Justice rendered its judgment in the two leading cases *Kadi* and *al Barakaat International Foundation*<sup>4</sup>.

The Court reversed the judgment of the Court of First Instance (CFI) which had declined to exercise judicial control over Community legal acts implementing UN Security Council resolutions, except where such a resolution would constitute an infringement of a fundamental norm of international law (*jus cogens*).

Whilst holding the legal basis of the Regulation under Community law, the Court found that it violated a number of fundamental rights guarantees which form part of Community primary law.

In the Courts view it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that the measures is intended to give effect to a binding resolution of the UN Security Council.

In that respect, the Court stressed that it does not review the UN Security Council resolution itself.

Rather, it reviewed the legality of the Community's implementing Regulation in the light of fundamental rights of constitutional force.

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<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> ECJ, Judgment of 3 September 2008, C-415/05 P *Kadi* and C-402/05 *Al-Barakaat*. All judgments can be downloaded from the website of the European Court of Justice (<http://www.curia.europa.eu>).

The Court also examined whether it should forgo the exercise of judicial review because there was an adequate system for the protection of listed persons at UN level.

In that respect, it found that the present re-examination procedures before the UN Sanctions Committee do not offer the guarantees of judicial protection, as the listed person cannot himself assert the rights and the Committee may reject his appeal without any duty to give reasons.

In such circumstances, the Community judicature must exercise in principle full review.

The Court then looked into the substance of the alleged human rights violations.

It found, that the claimants were not given notice of the evidence and reasons for being listed. Neither had the Council communicated any material to the Court, which made it impossible to carry out judicial review. Finally, the right to property was also violated in the absence of any possibility for the claimant to make its view heard.

The Court therefore concluded that the Regulation violated the right to be heard, the right to effective judicial review and the right to property.

In conclusion the Court annulled the regulation as far as it concerned the applicants, but granted a three months period to the institutions to remedy the breaches, given that it could not be excluded that the imposition of the measures against the claimants could prove to be justified.

In order to comply with the judgment of the Court of Justice, the Commission 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.

On 28 November 2008, after having carefully considered the comments received, the Commission adopted a new regulation adding the two applicants to the list within the period determined by the Court<sup>5</sup>.

In February 2009, al Barakaat Foundation brought an annulment action against the Commission in respect of this regulation.

## 2. The 'EU terrorism list'

With respect to the 'EU terrorism list', the Court of First Instance rendered a number of judgments relating to the People's Mojahedin Organisation of Iran (OMPI).

As previously reported, in December 2006, the Court of Instance had annulled a Council decision of December 2005 on the grounds that it did not respect certain due process rights (OMPI I<sup>6</sup>).

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<sup>5</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-Qauida network and the Taliban, OJ 2008, L 322/25.

<sup>6</sup> CFI, Judgment of 12 December 2006, T-228/02, People's Mojaheding Organisation of Iran v. Council of the European Union (OMPI I).

Following that judgment, the Council improved the procedures concerning the listing of persons and entities to the 'EU terrorism list', in particular as regards providing a statement of reasons and improving the rights of the defence.

In *OMPI III*<sup>7</sup>, the organization challenged the Council's decisions of June and December 2007 to maintain OMPI on the list. In support of its claim for annulment of the June decision, the applicant put forward five pleas in law.

As regards, in particular, the alleged infringement of the rights of the defence, the applicant maintained that it had never been placed in a position to state its point of view on the relevant justifications for being kept on the list.

With respect to the December 2007 decision, OMPI complained that the Council had not taken account of a ruling from a UK Court (the Proscribed Organisations Appeal Commission - POAC) of 30 November 2007 that the UK's listing of OMPI as a terrorist organisation (in the UK) was unfounded.

The CFI upheld the June 2007 decision.

It found that the new Council procedures were appropriate and that they had been correctly applied.

However, with respect to the December 2007 decision, the CFI held that, in view of the POAC's decision, the Council had not given sufficient reasons for maintaining OMPI on the 'EU terrorism list'.

Consequently, the CFI annulled the December 2007 decision on the grounds of failure to provide proper and sufficient reasons.

Following the UK Court of Appeal's rejection of the UK government's leave to appeal against the POAC decision of November 2007, OMPI's name was removed from the UK list of proscribed organisations.

Relying on new information based on investigations against suspected OMPI members in France, the Council decided to maintain OMPI on the 'EU terrorism' list.

With its judgment of 4 December 2008 in *OMPI IV*<sup>8</sup> the CFI annulled that decision as being in violation of the right to defence. Complying with the judgment, the Council removed OMPI from the 'EU terrorism list' in January 2009.

The reasoning of the CFI in *OMPI III* sheds light on a number of human rights considerations in the fight against terrorism.

In terms of procedure, the listed persons or entities have to be informed of the grounds on which the listing was decided and may request a review by the Council.

With respect to the fulfilment of substantive conditions for listing, the Council enjoys a broad margin of discretion. It is entitled to direct its appraisal to a present and future threat rather than on evaluation of past conduct.

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<sup>7</sup> CFI, Judgment of 23 October 2008, T-256/07, *People's Mojaheding Organisation of Iran v. Council of the European Union (OMPI III)*. An appeal has been lodged by the PMOI against this judgment (C-576/08P).

<sup>8</sup> CFI, Judgment of 4 December 2008, T-284/08, *People's Mojaheding Organisation of Iran v. Council of the European Union (OMPI IV)*. An appeal has been lodged by France against this judgment (C-27/09P).

The prime consideration for the Council must be its perception or evaluation of the danger posed by person or entity for listing. Such measures taken by the Council do not constitute a criminal sanction. The burden of proof is essentially limited to the question whether the freezing of funds is justified, having regard to all the circumstances of the case.