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COMMISSION OF THE EUROPEAN COMMUNITIES

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2009/0055 (CNS)

Proposal for a

COUNCIL REGULATION

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

(presented by the Commission)

EXPLANATORY MEMORANDUM

- (1) Since 1999 and acting in accordance with Chapter VII of the Charter of the United Nations (UN), the UN Security Council has applied sanctions, and in particular the freezing of funds and economic resources, against the Taliban, Al Qaida and Mr Usama bin Laden. To that end, the UN established the UN Al Qaida and Taliban list of individuals and entities, which is binding under international law for all members of the UN, including all Member States of the European Union.
- (2) On 27 May 2002, the Council adopted 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. It implements some elements of UN Security Council Resolutions 1267(1999) and 1390(2002) and in particular freezes the funds and economic resources of individuals and entities included in a list drawn up by the UN for this purpose. Regulation (EC) No 881/2002 is in line with Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them.
- (3) On 3 September 2008 the Court of Justice annulled Regulation (EC) No 881/2002, in so far as it concerned Mr Yassin Abdullah Kadi and Al Barakaat International Foundation. The Court of Justice held that the Community authority deciding to freeze the funds and economic resources of an individual or entity in accordance with Regulation (EC) No 881/2002 must communicate the grounds on which that decision is based to the individual or entity concerned, in order to observe the rights of defence, in particular the right to be heard, and the right to judicial review. In order to comply with the Court's judgment the EU sought from the Sanctions Committee the relevant statements of reasons on which the two parties were listed and communicated those to the parties for comments. Following an evaluation of the comments, the Commission adopted a new Regulation maintaining Mr Kadi and Al Barakaat International Foundation on the list of individuals and entities subject to the freezing of funds and economic resources (Regulation (EC) No 1190/2008 of 28 November 2008).
- (4) It is considered necessary to amend Regulation (EC) No 881/2002 to codify these new elements and to provide for a procedure respecting fundamental rights that will be followed as regards individuals and entities newly listed by the UN. The new procedure is based on the procedure applied for the purpose of implementing Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism, which concerns the terrorism list drawn up by the EU itself, set out in Council document 10826/1/27 of 28 June 2007. It would be as follows:
 - Upon notification by the UN Sanctions Committee of a new listing decision and the statement of reasons, the Commission will take a provisional decision to freeze the funds and economic resources of the individual or entity concerned;
 - In parallel the Commission will send the statement of reasons to the individual or entity concerned without delay, in order to give him, her or it an opportunity to express his, her or its views;

- The Commission will examine the views that have been expressed and consult an advisory committee of experts of the Member States before taking the final decision.
- (5) In order to ensure that fundamental rights are respected, it is also necessary to address the position of individuals and entities already listed. UN Security Council Resolution 1822 of 30 June 2008 foresees a review of all names included in the UN list on 30 June 2008. This UN review should be completed by 30 June 2010.
 - (6) If the UN decides to de-list an individual or entity, de-listing at Community level should, as before, take place without delay and not be subject to making a request for de-listing to a Community Institution.
 - (7) Given the subject-matter the United Nations or a third State may deem it necessary to provide classified information to the Community Institution in support of the decision made. A provision is proposed to provide clarity on the handling of such information.
 - (8) A provision is also needed to provide clarity on the applicable rules for processing of personal data of listed individuals, and in particular for processing of data relating to offences, criminal convictions or security measures under this Regulation.
 - (9) This proposal also comprises certain additional provisions, such as updating Article 2a of Regulation (EC) No 881/2002 to take account of paragraph 15 of UN Security Council Resolution 1735(2006) which extends the non-objection period that applies when Member States consult the UN on granting of exemptions for basic expenditure, to three working days. It also contains certain amendments of a technical nature, such as aligning the definition of freezing of funds and Article 11 on Community jurisdiction with the standard wording set out in the Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (Council document 15114/05 of 2 December 2005).

Proposal for a

COUNCIL REGULATION

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 60, 301 and 308 thereof,

Having regard to Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them¹,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament²,

After consulting the European Data Protection Supervisor,

Whereas:

- (1) Common Position 2002/402/CFSP provides, *inter alia*, that the European Community is to take certain restrictive measures, including the freezing of funds and economic resources, in accordance with Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) of the Security Council of the United Nations.
- (2) The freezing of funds and economic resources has been implemented by means of Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban³.
- (3) An article on exceptions was inserted in that Regulation by means of Regulation (EC) No 561/2003 of 27 March 2003⁴. The non-objection period referred to in that Article should be brought in line with UN Security Council Resolution 1735 of 22 December 2006.

¹ OJ L 139, 29.5.2002, p. 4.

² OJ C , , p. .

³ OJ L 139, 29.5.2002, p. 9.

⁴ OJ L 82, 29.3.2003, p. 1.

- (4) Following the judgment of the Court of Justice of the European Communities of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council, Regulation (EC) No 881/2002 should be amended to provide for a listing procedure ensuring that the fundamental rights of defence and in particular the right to be heard are respected.
- (5) The revised procedure should include providing to the listed person, entity, body or group the reasons for listing as transmitted by the UN Al Qaida and Taliban Sanctions Committee, so as to give the listed person, entity, body or group an opportunity to express his, her or its views on those reasons. The purpose of Regulation (EC) No 881/2002 is to freeze the funds and economic resources of persons, entities, bodies and groups included in the Al Qaida and Taliban list drawn up by the UN. As the relevant UN Security Council Resolutions provide that such freezing has to take place “without delay”, such measure must, by its very nature, take advantage of a surprise effect. Therefore, the Commission should be able to take a provisional decision before informing the person, entity, body or group concerned of the reasons for listing. The reasons for listing should, however, be notified to that person, entity, body or group without undue delay, after that decision has been published, to give the person, entity, body or group concerned an opportunity to make effectively his, her or its point of view known.
- (6) Following the examination of any views submitted, a final decision should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁵.
- (7) While the Commission should endeavour to notify the reasons for listing directly to the person, entity, body or group concerned, such notification may not be possible in some cases due to incomplete contact details or the complete absence thereof. In such cases, a notice should be published in the Official Journal to inform those concerned of the applicable procedures.
- (8) It is necessary to make provision for a specific procedure concerning persons, entities, bodies and groups listed before 3 September 2008, in order to respect their rights of defence and in particular their right to be heard.
- (9) Provision should be made for dealing with classified information that may be provided by the United Nations or by a State.
- (10) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union⁶ and notably the right to an effective remedy and to a fair trial, the right to property and the right to protection of personal data. This Regulation should be applied in accordance with those rights and principles.
- (11) The purpose of Regulation (EC) No 881/2002 is to prevent terrorist crimes, including terrorist financing, in order to maintain international peace and security. In order to create maximum legal certainty within the Community, the names and other relevant data with regard to natural or legal persons, entities, bodies or groups, whose funds

⁵ OJ L 184, 17.7.1999, p. 23.

⁶ OJ C 364, 18.12.2000, p. 1.

should be frozen in accordance with Regulation (EC) No 881/2002 should be made publicly known. Processing by the Commission of relevant data relating to criminal offences committed by listed natural persons, and to criminal convictions or security measures concerning such persons should be authorised subject to appropriate specific safeguards.

- (12) Any processing of personal data of natural persons under this Regulation should respect Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁷ and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁸.
- (13) It is appropriate to clarify the meaning of certain words and to align certain parts of Regulation (EC) No 881/2002 with more recent standard wording for Regulations on restrictive measures.
- (14) Regulation (EC) No 881/2002 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 881/2002 is amended as follows:

- (1) Article 1 is amended as follows:

- (a) Point 3 is replaced by the following:

“3. ‘freezing of funds’ means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management;”

- (b) The following points 5 and 6 are added:

“5. ‘group’ means a terrorist group as defined in Article 2(1) of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism⁹.

6. ‘Sanctions Committee’ means the Committee of the UN Security Council established pursuant to UN Security Council Resolution 1267 (1999) concerning Al Qaida and the Taliban.”

- (2) Article 2 is replaced by the following:

⁷ OJ L 8, 12.1.2001, p. 1.

⁸ OJ L 281, 23.11.1995, p. 31.

⁹ OJ L 164, 22.6.2002, p. 3.

“Article 2

1. All funds and economic resources belonging to, owned, held or controlled by a natural or legal person, entity, body or group listed in Annex I, shall be frozen.
 2. No funds or economic resources shall be made available, directly or indirectly, to, or for the benefit of, natural or legal persons, entities, bodies or groups listed in Annex I.
 3. Annex I shall consist of natural and legal persons, entities, bodies and groups designated by the UN Security Council or by the Sanctions Committee.
 4. The prohibition set out in paragraph 2 shall not give rise to liability of any kind on the part of the natural or legal persons, entities or bodies concerned, if they did not know, and had no reasonable cause to suspect, that their actions would infringe these prohibitions.”
- (3) In Article 2a(1), point (c) is replaced by the following:
- “(c) (i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within three working days of notification; or
- (ii) in the case of a determination under point (a) (iv), the Sanctions Committee has approved the determination.”
- (4) The following Article 2b is inserted:

“Article 2b

Article 2(2) shall not prevent financial or credit institutions in the Community from crediting frozen accounts where they receive funds transferred by third parties to the account of a listed natural or legal person, entity, body or group, provided that any additions to such accounts will also be frozen. The financial or credit institution shall inform the competent authorities about such transactions without delay.”

- (5) Article 3 is replaced by the following:

“Article 3

Without prejudice to the powers of Member States in the exercise of their public authority, it shall be prohibited to provide, directly or indirectly, technical advice, assistance or training related to military activities, including in particular training and assistance related to the manufacture, maintenance and use of arms and related materiel of all types, to any natural or legal person, entity, body or group listed in Annex I.”

- (6) Article 6 is replaced by the following:

“Article 6

The freezing of funds and economic resources or the refusal to make funds or economic resources available, carried out in good faith on the basis that such action is in accordance with this Regulation, shall not give rise to liability of any kind on the part of the natural or legal person, entity or body implementing it, or its directors or employees, unless it is proved that the funds and economic resources were frozen, or not made available, as a result of negligence.”

(7) In Article 7, paragraph 1 is replaced by the following:

“1. The Commission shall be empowered to:

(a) amend Annex I, where necessary in accordance with the procedure referred to in Article 7b(2), and

(b) amend Annex II on the basis of information supplied by Member States.”

(8) The following Articles 7a to 7e are inserted:

“Article 7a

1. Where the United Nations Security Council or the Sanctions Committee decides to list a natural or legal person, entity, body or group for the first time, the Commission shall, as soon as a statement of reasons has been provided by the United Nations, take a provisional decision on the amendment of Annex I without delay.
2. Once the provisional decision referred to in paragraph 1 has been taken, the Commission shall without delay communicate the statement of reasons provided by the United Nations, to the person, entity, body or group concerned, either directly or through the publication of a notice, providing him, her or it an opportunity to express his, her or its views on the matter.
3. The Commission shall take a final decision concerning the person, entity, body or group concerned in accordance with the procedure referred to in Article 7b(2).
4. Where the United Nations decide to de-list a natural or legal person, entity, body or group, or to amend the identifying data of a listed person, entity, body or group, the Commission shall amend Annex I accordingly.

Article 7b

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

Article 7c

1. Natural or legal persons, entities, bodies and groups which have been included in Annex I before 3 September 2008 and continue to be listed, may present a request for a statement of reasons to the Commission. The request shall be submitted in writing in an official language of the Community. It shall specify a postal address other than a post office box, for the sending of the reply and any subsequent correspondence on the matter.
2. As soon as the requested statement of reasons is provided by the United Nations, the Commission shall communicate it to the person, entity, body or group concerned. If views are submitted, the Commission shall follow the procedure described in Article 7a(3).

Article 7d

1. If the United Nations or a State submits classified information, the Commission shall treat such information in accordance with Decision 2001/844/EC, ECSC, Euratom of 29 November 2001 amending its Internal Rules of Procedure¹⁰ and, where applicable, the agreement on the security of classified information concluded between the European Union and the submitting State.
2. Documents classified at a level corresponding to 'EU Top Secret', 'EU Secret' or 'EU Confidential' shall not be released without the consent of the originator.

Article 7e

1. The Commission shall process personal data in order to carry out its tasks under this Regulation. These tasks shall include:
 - (a) preparing amendments of Annex I to this Regulation;
 - (b) consolidating the contents of Annex I in the electronic, consolidated list of persons, groups and entities subject to EU financial sanctions available on the Commission website¹¹;
 - (c) processing of information concerning the grounds for listing; and
 - (d) processing of information on the impact of the measures of this Regulation such as the value of frozen funds and information on authorisations granted by the competent authorities.
2. Annex I shall only include the following information on listed natural persons:
 - (a) surname and given names, including alias names and titles, if any;
 - (b) date and place of birth;

¹⁰ OJ L 317, 3.12.2001, p. 1.

¹¹ http://ec.europa.eu/external_relations/cfsp/sanctions/list/consol-list.htm

- (c) nationality;
 - (d) passport and ID card numbers;
 - (e) fiscal and social security numbers;
 - (f) sex;
 - (g) address or other information on whereabouts;
 - (h) function or profession;
 - (i) the date of designation referred to in Article 2a(4)(b).
3. Annex I may also include the following personal data relating to listed natural persons, if such data are provided by the United Nations Security Council or by the Sanctions Committee and are necessary in a specific case for the sole purpose of verification of the identity of the listed natural person in question:
- (a) surname and given names of the natural person's father;
 - (b) surname and given names of the natural person's mother.

The natural persons concerned shall be informed of the use made of their names in Annex I in the same manner as the listed natural person.

4. The Commission may process relevant data relating to criminal offences committed by listed natural persons, and to criminal convictions or security measures concerning such persons, only to the extent that such processing is necessary for the preparation of a statement of reasons and review of the views on it expressed by the natural person concerned, subject to appropriate specific safeguards. Such data shall not be made public or exchanged.
5. For the purposes of this Regulation, the Commission unit listed in Annex II is designated as "controller" within the meaning of Article 2(d) of Regulation (EC) No 45/2001, in order to ensure that the natural persons concerned can exercise their rights under Regulation (EC) No 45/2001."

- (10) Article 11 is replaced by the following:

"Article 11

This Regulation shall apply:

- (a) within the territory of the Community, including its airspace;
- (b) on board any aircraft or any vessel under the jurisdiction of a Member State;
- (c) to any person inside or outside the territory of the Community who is a national of a Member State;

- (d) to any legal person, entity or body which is incorporated or constituted under the law of a Member State;
- (e) to any legal person, entity or body in respect of any business done in whole or in part within the Community.”

Article 2

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

For the Council
The President
[...]