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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.7.2009
COM(2009) 393 final

2009/0114 (CNS)

Proposal for a

COUNCIL REGULATION

imposing certain specific restrictive measures directed against certain natural and legal persons, entities and bodies in view of the situation in Somalia

EXPLANATORY MEMORANDUM

- (1) On 20 November 2008, the UN Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1844(2008) confirming the general and complete arms embargo against Somalia imposed by UN Security Council Resolution 733(1992) and introducing further restrictive measures against those who 1) engage in or provide support for acts that threaten the peace, security or stability of Somalia, including acts that threaten the Djibouti Agreement of 18 August 2008 or the political process, or threaten the Transitional Federal Institutions (TFIs) or the African Union Mission in Somalia (AMISOM) by force, 2) have acted in violation of the arms embargo and related measures, or 3) obstruct the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia.
- (2) The additional restrictive measures concern restrictions on admission and financial restrictive measures against individuals and entities designated by the competent United Nations Sanctions Committee. In addition to the general arms embargo in force, the Resolution introduces a specific ban on the direct or indirect supply, sale or transfer of weapons and military equipment and a specific ban on the provision of related assistance and services, to individuals and entities listed by the Committee.
- (3) Common Position 2009/138/CFSP of 16 February 2009¹ confirmed the restrictive measures which had been applied since 2002² and made provision for additional measures against individuals and entities identified by the United Nations Sanctions Committee.
- (4) Some of the measures provided for by Common Position 2009/138/CFSP, namely the prohibition to provide technical and financial assistance and other services related to military activities to the individuals and entities listed by the UN Sanctions Committee, and the freezing of funds and economic resources of the said individuals and entities, fall within the scope of the Treaty establishing the European Community.
- (5) Council Regulation (EC) No 147/2003³ imposed a general ban on provision of technical advice, assistance, training, financing or financial assistance related to military activities, to any person, entity or body in Somalia. The Commission proposes to implement the measures concerning individuals and entities listed by the UN Sanctions Committee, in the Community by means of a separate Council Regulation.
- (6) In order to cover all persons and entities listed by the Committee, the legal basis of the proposed Regulation must include Articles 60, 301 and 308 of the EC Treaty. Indeed, the European Court of Justice held, in its Judgment 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*, that measures vis-à-vis “third countries” in the sense of Articles 60 and 301 of the EC Treaty include the freezing of funds and economic resources of the rulers of a third country and of individuals and entities associated with them or controlled, directly or indirectly, by them. These Articles did not provide a suitable legal base for the freezing of funds and economic resources of

¹ OJ L 46, 17.2.2009, p. 73.

² OJ L 334, 11.12.2002, p. 1.

³ OJ L 24, 29.1.2003, p. 2.

individuals and entities not having such a link to the governing regime of a third country. The Court of Justice accepted, however, that Articles 60, 301 and 308 of the EC Treaty constitute a sufficient legal base for the freezing of funds and economic resources of such individuals and entities.

- (7) 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.
- (8) The procedure proposed for amending Annex I to the Regulation includes the publication of a notice including advice on how to submit information in order to enable the individuals and entities listed to exercise their right to be heard. The notice will be published after the Commission decision listing a person or entity for the first time. Following the examination of any information submitted by a listed person or entity, the Commission should take a final decision in accordance with the Regulation.
- (9) Given the subject-matter the United Nations or a third State may deem it necessary to provide classified information to the Commission in support of a decision made. A provision is also proposed to provide clarity on the handling of such information.
- (10) Regulation (EC) No 45/2001 of the European Parliament and of the Council 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 data, protects the right to privacy with respect to the processing of personal data. A provision is proposed 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 the Regulation.

Proposal for a

COUNCIL REGULATION

imposing certain specific restrictive measures directed against certain natural and legal persons, entities and bodies in view of the situation in Somalia

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 2009/138/CFSP of 16 February 2009 concerning restrictive measures against Somalia and repealing Common Position 2002/960/CFSP⁴,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament⁵,

After consulting the European Data Protection Supervisor

Whereas:

- (1) On 20 November 2008, the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1844(2008) confirming the general and complete arms embargo against Somalia imposed by the UN Security Council Resolution 733(1992) and introducing additional restrictive measures.
- (2) The additional restrictive measures concern restrictions on admission and financial restrictive measures against individuals and entities designated by the United Nations Security Council or by the competent United Nations Sanctions Committee. In addition to the general arms embargo, the Resolution introduces a specific ban on the direct and indirect supply, sale or transfer, of weapons and military equipment and a specific ban on the provision of related assistance and services, to individuals and entities listed by the Committee.
- (3) The restrictive measures should be imposed against individuals and entities designated by the UN as engaging in or providing support for acts that threaten the peace, security or stability of Somalia, including acts that threaten the Djibouti Agreement of 18 August 2008 or the political process, or threaten the Transitional Federal Institutions (TFIs) or African Union Mission in Somalia (AMISON) by force, as having acted in violation of the arms embargo and related measures, or as obstructing the delivery of

⁴ OJ L 46, 17.2.2009, p. 73.

⁵ OJ C , , p. .

humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia.

- (4) Common Position 2009/138/CFSP provides, inter alia, for financial restrictive measures concerning natural and legal persons, entities and bodies listed by the UN, as well as for a ban on direct and indirect provision of assistance and services related to weapons and military equipment to such persons, entities and bodies.
- (5) These measures fall within the scope of the Treaty establishing the European Community and, therefore, notably with a view to ensuring their uniform application by economic operators in all Member States, Community legislation is necessary in order to implement them as far as the Community is concerned.
- (6) Council Regulation (EC) No 147/2003⁶ imposed a general ban on provision of technical advice, assistance, training, financing or financial assistance related to military activities, to any person, entity or body in Somalia. A new Council Regulation should be adopted to implement the measures concerning natural and legal persons, entities and bodies listed by the UN.
- (7) For reasons of expediency, the Commission should be empowered to amend the list of natural and legal persons, entities and bodies whose funds and economic resources should be frozen on the basis of decisions reached by the United Nations Security Council or by the Sanctions Committee.
- (8) The procedure for amending Annex I to the Regulation should include the publication of a notice on how to submit information, in order to enable the listed natural and legal persons, entities and bodies to exercise their right to be heard. Following the examination of any information submitted the Commission should take a new decision in accordance with the Regulation.
- (9) Provision should be made for dealing with classified information provided by the United Nations or by a State.
- (10) Further to Common Position 2009/138/CFSP this Regulation should provide for the freezing of funds and economic resources of natural and legal persons, entities and bodies that are not linked to the governing regime of Somalia. In view of this, the legal basis of this Regulation should include not only Articles 60 and 301, but also Article 308 of the EC Treaty, in line with the case-law of the Court of Justice.
- (11) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union⁷ 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.
- (12) In order to create maximum legal certainty within the Community, the names and other relevant data with regard to persons and entities, whose funds and economic resources should be frozen in accordance with the Regulation, should be made

⁶ OJ L 24, 29.1.2003, p. 2.

⁷ OJ C 364, 18.12.2000, p. 1.

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.

- (13) 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 data⁸ 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 data⁹.
- (14) Member States should determine the penalties applicable to infringements of the provisions of this Regulation. The penalties provided for should be proportionate, effective and dissuasive,

HAS ADOPTED THIS REGULATION:

Article 1

For the purposes of this Regulation, the following definitions shall apply:

- (a) 'funds' means financial assets and benefits of every kind, including but not limited to:
- (i) cash, cheques, claims on money, drafts, money orders and other payment instruments;
 - (ii) deposits with financial institutions or other entities, balances on accounts, debts and debt obligations;
 - (iii) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;
 - (iv) interest, dividends or other income on or value accruing from or generated by assets;
 - (v) credit, right of set-off, guarantees, performance bonds or other financial commitments;
 - (vi) letters of credit, bills of lading, bills of sale;
 - (vii) documents evidencing an interest in funds or financial resources;
- (b) '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,

⁸ OJ L 8, 12.1.2001, p. 1.

⁹ OJ L 281, 23.11.1995, p. 31.

amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management;

- (c) ‘economic resources’ means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services;
- (d) ‘freezing of economic resources’ means preventing their use to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them;
- (e) ‘Sanctions Committee’ means the Committee of the UN Security Council established pursuant to UN Security Council Resolution 751 (1992) concerning Somalia;
- (f) ‘technical assistance’ means any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services; including verbal forms of assistance;
- (g) ‘investment services’ means
 - (i) reception and transmission of orders in relation to one or more financial instruments;
 - (ii) execution of orders on behalf of clients;
 - (iii) dealing on own account;
 - (iv) portfolio management;
 - (v) investment advice;
 - (vi) underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;
 - (vii) placing of financial instruments without a firm commitment basis; or
 - (viii) operating of multilateral trading facilities,

provided that the activity relates to any of the financial instruments listed in Section C of Annex I of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC¹⁰ ;

- (h) ‘territory of the Community’ means the territories to which the Treaty is applicable, under the conditions laid down in the Treaty.

¹⁰ OJ L 145, 30.4.2004, p. 1.

Article 2

1. All funds and economic resources belonging to, owned, held or controlled by natural or legal persons, entities or bodies 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 or bodies listed in Annex I.
3. Annex I shall consist of natural and legal persons, entities and bodies designated by the UN Security Council or by the Sanctions Committee in conformity with UN Security Council Resolution 1844 (2008).
4. The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to promote the transactions referred to at paragraphs 1 and 2 shall be prohibited.
5. The prohibition set out in paragraph 2 shall not give rise to liability of any kind on the part of the natural and legal persons, entities and bodies who made funds or economic resources available, if they did not know, and had no reasonable cause to suspect, that their actions would infringe this prohibition.

Article 3

1. Article 2(2) shall not apply to the addition to frozen accounts of:
 - (a) interest or other earnings on those accounts; or
 - (b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 2 has been designated by the Sanctions Committee or the Security Council, provided that any such interest, other earnings and payments continue to be subject to Article 2(1).
2. 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 or body, provided that any additions to such accounts will also be frozen. The financial or credit institution shall inform the competent authorities in the Member States, as listed in Annex II, about such transactions without delay.

Article 4

1. By way of derogation from Article 2, the competent authorities in the Member States, as listed in Annex II, may authorise, under such conditions as they deem appropriate, the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, if the following conditions are met:
 - (a) the competent authority concerned has determined that the funds or economic resources are:

- (i) necessary to satisfy the basic needs of persons listed in Annex I, and their dependent family members, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;
 - (ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services; or
 - (iii) intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources; and
 - (b) the Member State concerned has notified the Sanctions Committee of that determination and its intention to grant an authorisation, and the Sanctions Committee has not objected to that course of action within three working days of notification.
2. By way of derogation from Article 2, the competent authorities in the Member States, as listed in Annex II, may authorise the release of certain frozen funds or economic resources or the making available of certain funds or economic resources, after having determined that the funds or economic resources are necessary for extraordinary expenses, provided that the Sanctions Committee has been notified of this determination by the Member State concerned and that the determination has been approved by that Committee.
3. The relevant Member State shall inform the other Member States and the Commission of any authorisation granted under paragraphs 1 and 2.

Article 5

By way of derogation from Article 2, the competent authorities in the Member States, as listed in Annex II, may authorise the release of certain frozen funds or economic resources, if the following conditions are met:

- (a) the funds or economic resources are the subject of a judicial, administrative or arbitral lien established before the date on which the natural or legal person, entity or body referred to in Article 2 has been designated by the Sanctions Committee or the Security Council or of a judicial, administrative or arbitral judgment rendered prior to that date;
- (b) the funds or economic resources will be used exclusively to satisfy claims secured by such a lien or recognised as valid in such a judgment, within the limits set by applicable laws and regulations governing the rights of persons having such claims;
- (c) the lien or judgment is not for the benefit of a person, entity or body listed in Annex I;
- (d) recognising that the lien or judgment is not contrary to public policy in the Member State concerned; and

- (e) the Sanctions Committee has been notified by the Member State of the lien or judgment.

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 or entity implementing it, or its directors or employees, unless it is proved that the funds and economic resources were frozen as a result of negligence.

Article 7

1. It shall be prohibited to provide, directly or indirectly, any of the following to any natural or legal person, entity or body listed in Annex I:
 - (a) technical assistance related to military activities or to the supply, sale, transfer, manufacture, maintenance or use of goods and technology included in the Common Military List of the European Union;
 - (b) financing or financial assistance related to military activities or to the supply, sale, transfer, manufacture, maintenance or use of goods and technology included in the Common Military List of the European Union;
 - (c) investment services related to military activities or to the supply, sale, transfer, manufacture, maintenance or use of goods and technology included in the Common Military List of the European Union;
 - (d) brokering services, related to military activities or to the goods and technology included in the Common Military List.
2. The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the prohibition referred to in paragraph 1 shall be prohibited.
3. The prohibition set out in paragraph 1(b) shall not give rise to liability of any kind on the part of the natural and legal persons, entities and bodies who provided financing or financial assistance, if they did not know, and had no reasonable cause to suspect, that their actions would infringe this prohibition.

Article 8

1. Without prejudice to the applicable rules concerning reporting, confidentiality and professional secrecy, natural and legal persons, entities and bodies shall:
 - (a) supply immediately the competent authorities listed in Annex II for the country where they are resident or located with any information which would facilitate compliance with this Regulation, such as accounts and amounts frozen in

accordance with Article 2, and shall forward such information, directly or through these competent authorities, to the Commission; and

- (b) cooperate with the competent authorities listed in Annex II in any verification of this information.
2. Any information provided or received in accordance with this Article shall be used only for the purposes for which it was provided or received.

Article 9

The Commission and Member States shall immediately inform each other of the measures taken under this Regulation and shall supply each other with any other relevant information at their disposal in connection with this Regulation, in particular information in respect of violation and enforcement problems and judgments handed down by national courts.

Article 10

1. The Commission shall be empowered to:
 - (a) amend Annex I, where necessary in accordance with the procedure referred to in Article 12; and
 - (b) amend Annex II on the basis of information supplied by Member States.
2. Without prejudice to the rights and obligations of the Member States under the Charter of the United Nations, the Commission shall maintain all necessary contacts with the Sanctions Committee and the United Nations Security Council for the purpose of the effective implementation of this Regulation.

Article 11

1. Where the United Nations Security Council or the Sanctions Committee decides to list a natural or legal person, entity or body 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 amendments of Annex I without delay.
2. Once the provisional decision referred to in paragraph 1 has been taken, the Commission shall without delay publish a notice regarding the modalities for submitting information in relation to Annex I, providing the natural or legal person, entity or body concerned an opportunity to express his, her, or its view on the matter.
3. The Commission shall take a final decision concerning the person, entity or body concerned in accordance with the procedure referred to in Article 12.
4. Where the United Nations decide to de-list a natural or legal person, entity or body, or to amend the identifying data of a listed natural or legal person, entity or body, the Commission shall amend Annex I accordingly.

Article 12

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 13

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 Procedure¹¹ 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 14

1. The Commission shall process personal data in order to carry out its tasks under this Regulation. These tasks include:
 - (a) preparing amendments of Annex I to this Regulation;
 - (b) consolidating the contents of Annex I in the electronic, consolidated list of persons, entities and bodies subject to EU financial sanctions available on the Commission website¹²;
 - (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;
 - (c) nationality;
 - (d) passport and ID card numbers;
 - (e) fiscal and social security numbers;

¹¹ OJ L 317, 3.12.2001, p. 1.

¹² http://ec.europa.eu/external_relations/cfsp/sanctions/list/consol-list.htm

- (f) sex;
 - (g) address or other information on whereabouts;
 - (h) function or profession;
 - (i) the date of designation referred to in Article 3(1)(b);
 - (j) the grounds for listing if the function does not qualify as such.
3. Annex I may also include the following personal data relating to listed natural persons, if such data is provided by the United Nations Security Council or by the Sanctions Committee and is 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.

Article 15

1. Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States shall notify the Commission of those rules without delay after the entry into force of this Regulation and shall notify it of any subsequent amendment.

Article 16

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 17

This Regulation shall enter into force on the 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
[...]

ANNEX I

Natural and legal persons, entities or bodies referred to in Articles 2 and 7

ANNEX II

List of competent authorities referred to in Articles 3(2), 4, 5 and 8 and address for notifications to the European Commission

(To be completed by the Member States)

BELGIUM

BULGARIA

CZECH REPUBLIC

DENMARK

GERMANY

ESTONIA

IRELAND

GREECE

SPAIN

FRANCE

ITALY

CYPRUS

LATVIA

LITHUANIA

LUXEMBOURG

HUNGARY

MALTA

NETHERLANDS

AUSTRIA

POLAND

PORTUGAL

ROMANIA

SLOVENIA

SLOVAKIA

FINLAND

SWEDEN

UNITED KINGDOM

Address for notifications to the European Commission:

European Commission

DG External Relations

Directorate A. Crisis Platform and Policy Coordination in CFSP

Unit A.2. Crisis Management and Conflict Prevention

CHAR 12/106

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