

## All done and dusted? Reflections on the EU standard of judicial protection against UN blacklisting after the ECJ's *Kadi* Decision

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### I. Introduction

Few decisions of the European Court of Justice (ECJ) have sparked off such a wide debate amongst academics and politicians as the *Kadi and Al Barakaat* judgment (hereafter “the *Kadi* decision”), which was delivered on 3 September 2008.<sup>1</sup> With this decision the ECJ annulled Council Regulation 881/2002 (hereafter “the Regulation”) implementing UN Security Council Resolution 1267 (1999) (hereafter “the UNSC Resolution”) on terrorist blacklists for not complying with the EU’s fundamental rights standard.<sup>2</sup>

The judgment gives rise to a number of questions relating, among other things, to institutional EU law,<sup>3</sup> and the relation between EU law and international law, notably United Nations law.<sup>4</sup> These questions have been extensively discussed elsewhere and shall not be addressed in this paper. Instead, the present article examines the concrete implications of the judgment for the judicial protection of individuals against UN targeted sanctions implemented by the EU.

The paper proceeds as follows. After a brief summary of the main facts and the outcome of the case, the article analyses the precise standard of judicial protection against the EU Regulation implementing the UN blacklists established by the *Kadi* decision. Also, the measures taken by the Council and the Commission in order to comply with the ECJ’s decision are discussed. Subsequently, it is analysed, in light of other case law of the EU Courts, whether the amended blacklisting measures will be regarded as compatible with the

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<sup>1</sup> Case C-402/05 P and C-415/05 P *Kadi and al Barakaat v Council and Commission* [2008] E.C.R. nyr [hereinafter: ECJ *Kadi* judgment].

<sup>2</sup> Council 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-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.

<sup>3</sup> See Eckes Christina, *International Sanctions against Individuals: a Test Case for the Resilience of the European Union’s Constitutional Foundations*, [2009] *European Public Law* (forthcoming).

<sup>4</sup> See Griller, Stefan, ‘International Law, Human Rights and the European Community’s Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*’, [2008] 4 *European Constitutional Law Review*, 528–553; see also Nollkaemper, Andre, ‘Rethinking the Supremacy of International Law’, *Amsterdam Center for International Law Working Papers* 2009 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1336946](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1336946); and d’Aspremont, Jean; Dopagne, Frédéric ‘*Kadi*: The ECJ’s Reminder of the Elementary Divide between Legal Orders’, [2008] *International Organization Law Review*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1341982](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341982).

Court's standard of judicial protection. The conclusion summarises the outcomes of the analysis and puts them into a wider perspective.

## II. The background and main issues of the case

### 1. Facts of the case

The UNSC instigated the blacklisting regime as part of its quest for more effective mechanisms in the fight against international terrorism. This blacklisting regime provides for a number of targeted sanctions against individuals that are suspected of being involved in the activities of the Taliban and Al Qaida, in particular the freezing of assets and a travel ban. The blacklists were first implemented by the UN bodies in the late 1990's.<sup>5</sup> Since the very beginning the regime's history is fraught with tensions, particularly those that have arisen between the UNSC Sanctions Committee imposing the measures and the states, since individuals and entities are usually listed based on proposals or information produced by Member States.<sup>6</sup>

For a long time, the blacklisting system has been criticised for a number of deficits in the procedural guarantees afforded to individuals. The critique has focused on the fact that individuals are not appropriately heard by the Sanctions Committee at any time either before or after listing and, once listed, do not have a proper avenue for complaint to the Sanctions Committee about their listing and the sanctions that are then imposed. Whilst there is a procedure for the delisting of individuals at the UN level, this procedure is of a purely diplomatic character which does not provide for any independent judicial review.<sup>7</sup> Within the European Union these measures are implemented by the Council of Ministers through a combination of first and second pillar measures.<sup>8</sup> Since quite a notable number of individuals holding financial assets in European banks have been listed, a number of complaints have been lodged with European courts.<sup>9</sup> Two of these complaints resulted in the *Kadi* judgment which was first decided by the CFI and subsequently appealed against to the ECJ.

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<sup>5</sup> The UN blacklists against Al Qaida and the Taliban were established by UN Security Council Resolution 1267 (1999) of 15 October 1999. The most recent Resolution in this respect is UN Security Council Resolution 1822 (2008) which updates the earlier versions of the blacklists.

<sup>6</sup> Van den Herik, Larissa. 'The Security Council's Targeted Sanctions Regime' [2007] 20 *Leiden Journal of International Law*, 799.

<sup>7</sup> See further Schmahl, Stefanie, 'Effektiver Rechtsschutz gegen "targeted sanctions" des UN-Sicherheitsrates?', [2006] *Europarecht* 4, 566, 568, 576.

<sup>8</sup> The basic legal act implementing the UN blacklists at the EU level is Council Common Position 1999/727/CFSP concerning restrictive measures against the Taliban. The UN sanctions regarding the applicant Kadi were implemented by Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001. The UN sanctions regarding the applicant Al Barakaat's were implemented by Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001. See also Fratangelo, Pierpaolo, 'L'Union européenne face à la lutte contre le financement du terrorisme', [2006] *Revue du Droit de l'Union Européenne* 4, 815, 840.

<sup>9</sup> Examples include the complaints lodged by Yusuf and Hassan, see Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] E.C.R. II-3533; Case T-49/04 *Hassan v Council and Commission* [2006] E.C.R. II-52. The latter case is currently under appeal; see Case C-399/06 P Pending Case, *Hassan / Council and Commission*.

## 2. The judgment of the CFI and the AG's opinion

The CFI commenced its judgment by discerning the legal basis for the legislation of the Community for the implementation of the UN blacklists.<sup>10</sup> In a winding discussion of the various fields of the Community's actions, the Court arrived at the inference that Articles 60 and 301 EC, together with Article 308 EC made up the legal basis for imposing such measures on individuals of third states.<sup>11</sup> The Court then turned to the question of whether the Regulation implementing the UNSC Resolution was compatible with the applicant's fundamental rights. In this regard, the CFI's judgment concluded from Article 103 of the UN Charter and Article 27 of the Vienna Convention on the Law of Treaties that Member States were obliged to implement UNSC Resolutions as a part of their positive international legal obligations.<sup>12</sup> Furthermore, the CFI relied on Articles 297 and 307 EC which stipulate that the EC Treaty shall not affect the international agreements by which the Member States were bound before acceding to the Community.<sup>13</sup> Since the review of a Community Regulation implementing a UNSC Resolution would, in the CFI's view, be tantamount to an indirect review of the latter,<sup>14</sup> the Court found that it had "no authority to call in question, even indirectly, their lawfulness in the light of Community law".<sup>15</sup> The CFI thereby in principle excluded any review of EU Regulations implementing UNSC Resolutions by the European judiciary. In the CFI's view, the only exception in this regard applied to "the superior rules of international law falling within the ambit of *jus cogens*."<sup>16</sup> However, the CFI considered that the applicant's right to property, the right to a fair hearing, and the right to a judicial remedy, which the applicant invoked, were, as far as they constitute *ius cogens*, not infringed by the Regulation.<sup>17</sup>

This conclusion did not stand unchallenged at the time. The ECJ's long-awaited judgment in the cases does not fail to reflect the tone of the Advocate General Maduro's Opinion on the case, which was presented to the Court on 16 January 2008.<sup>18</sup> Some of the more interesting parts of Maduro's submissions pertain to his appreciation of what the rejection or review of a UNSC Resolution would have meant.

He noted that the Community legal order and the international legal order do not "pass by each other like ships in the night".<sup>19</sup> However, he asserted that the "relationship between international law and the Community legal order is governed by the Community legal order itself", and "international law can permeate that legal order only under the conditions set by

<sup>10</sup> For a detailed review of the CFI's judgment see Eckes, Christina, 'Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the Court of First Instance', [2008] 14 *European Law Journal* 1, 74, 92; Möllers, Christoph, 'Das EuG konstitutionalisiert die Vereinten Nationen – Anmerkungen zu den Urteilen des EuG vom 21.09.2005, Rs. T-315/01 und T-306/01', [2006] *Europarecht* 3, 426, 431.

<sup>11</sup> Case T-315/01, *Kadi v. Council and Commission* [2005] E.C.R. II-3649, para. 135.

<sup>12</sup> *Id.*, paras. 182, 183, and 221.

<sup>13</sup> *Id.*, paras. 185, 188, and 224.

<sup>14</sup> *Id.*, para. 215.

<sup>15</sup> *Id.*, para. 225.

<sup>16</sup> *Id.*, para. 231. It is also useful to make note of Bianchi's recent article on the place for human rights as part of the body of *jus cogens* norms; Bianchi, Andrea, 'Human rights and the Magic of *jus cogens*' [2008] 19 *European Journal of international law* 3, 491, 508; Judge *ad hoc* Dugard has also recalled Lauterpacht's suggestion that a Security Council resolution will be void if it conflicts with a norm of *jus cogens* (Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda, judgment of 3 February 2006, ICJ Rep. 2006, at para. 8 (Separate Opinion of Judge Dugard)).

<sup>17</sup> Case T-315/01, *Kadi v. Council and Commission* [2005] E.C.R. II-3649, paras. 252, 276 and 291.

<sup>18</sup> Advocate General Maduro's opinion of 16 January 2008 in Case C-402/05, *Kadi v Council and Commission*.

<sup>19</sup> *Id.*, para. 22.

the constitutional principles of the Community”.<sup>20</sup> He further held that although this “may inconvenience the Community and its Member States in their dealings on the international stage, the application of these principles by the Court of Justice is without prejudice to the application of international rules on State responsibility”.<sup>21</sup>

### 3. The ECJ’s judgment

The ECJ handed down the *Kadi* decision on 3 September 2008. After reviewing the treatment of the case by the CFI with considerable attention, the Court divided its conclusions into three separate but interdependent issues: (i) the Council’s competence in adopting the Regulation for the freezing of financial resources by states of persons related directly or indirectly to organisations considered to engage in international terrorist activities; (ii) the compatibility of the Regulation with Article 249 EC; and (iii) the compliance of the Regulation and its provisions with certain fundamental rights.

The Court upheld the CFI’s conclusion that the Council was competent to adopt the regulation under Articles 60, 301 and 308 EC,<sup>22</sup> however, for different reasons.<sup>23</sup> Also, it considered that Article 249 EC was not infringed, contrary to what the applicants alleged.<sup>24</sup> Subsequently, the Court turned to the question of whether the Regulation was compatible with the fundamental principles of Community law.

Here, the Court had to first deal with the question whether the ECJ had the competence to review EC Regulations implementing UNSC Resolutions. The Court started by pointing out a strictly dualist perspective on the relation between Community Law and UN law. The Court clarified that the EU legal order is different and separate from the international legal order.<sup>25</sup> Moreover, it asserted that any decision to the effect that a transposing regulation is “contrary to a higher rule of law in the community legal order would not entail any change in the primacy of the resolution in international law”.<sup>26</sup> Subsequently, the Court examined whether “the principles governing the relationship between the international legal order under the United Nations and the Community legal order” excluded the judicial review of the Regulation at hand.<sup>27</sup>

The Court emphasised that the Community institutions “must respect international law in the exercise of its powers”.<sup>28</sup> However, the Court noted that since there is no dogmatic model for the adoption and transposition of UNSC Resolutions into the domestic legal orders of the UN Member States, this should be done “in accordance with the procedure applicable in that respect in the domestic legal order of each Member State”.<sup>29</sup> More importantly, however, the Court stated that an immunity of a Community regulation

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<sup>20</sup> *Id.*, para. 24.

<sup>21</sup> *Id.*, para. 39.

<sup>22</sup> *Id.*, para. 236. This part raises complex legal questions which cannot, however, be addressed in this paper. For a comprehensive overview see Eckes, *supra* note 1.

<sup>23</sup> *Id.*, paras. 196 et seq.

<sup>24</sup> *Id.*, para. 247.

<sup>25</sup> The Court held that “an international treaty cannot affect the allocation of powers fixed by the treaties, or, consequently, the autonomy of the community legal system”; ECJ *Kadi* judgment para. 282. See also *id.*, para. 202.

<sup>26</sup> ECJ *Kadi* judgment, para. 288.

<sup>27</sup> *Id.*, para. 290.

<sup>28</sup> *Id.*, para. 291.

<sup>29</sup> *Id.*, para. 298.

implementing a UNSC Resolution “cannot find a basis in the EC Treaty”.<sup>30</sup> While noting Article 307 EC, the Court ruled that this provision cannot in any event lead to a derogation from the “principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights”.<sup>31</sup>

Interestingly, the ECJ also examined the case law of the European Court of Human Rights (ECtHR) and concluded that the latter had not *per se* excluded the review of regulations implementing UN acts.<sup>32</sup> The Court also noted the absence of any meaningful judicial review of targeted sanctions at the UN level.<sup>33</sup> By and large, the Court came to the conclusion that EU measures implementing measures taken by the UNSC were not excluded from review by the European judiciary.<sup>34</sup>

The Court subsequently turned to the question whether the Regulation complied with the EU fundamental rights standard. More specifically, the Court dealt with the individual’s right of defence and his right to an effective remedy, both of which it considered the Regulation to breach (see *infra*). The Court equally dealt with the right to property. While noting that giving effect to sanctions adopted by the UNSC could, in principle, justify such a restriction,<sup>35</sup> the Court found a violation of the right to property “in the circumstances of this case”.<sup>36</sup> The main reason for this was the aforementioned absence of any procedural guarantees, which the Court, drawing on the ECtHR’s case law, considered a crucial element for the assessment of the right to property.<sup>37</sup> The Court thus found a breach of the applicant’s fundamental rights in all three cases.<sup>38</sup>

However, the Court did not immediately annul the Regulation as far as it concerned the applicants. Rather, it allowed the Regulation to withstand for a transitory period of three months running from the day of the delivery of the judgment, in order to allow the Council to remedy its current defects without prejudicing the effectiveness of the restrictive measures issued by the UN bodies.<sup>39</sup>

### III. Implications for the standard of judicial protection of targeted sanctions against individuals

The ECJ’s *Kadi* judgment breaks new legal grounds not only with respect to the relation between EU law and UN law but also regarding the application of human rights standards to administrative counter-terrorist sanctions. It is clear now that no Regulation restricting individual’s rights can escape the Courts’ scrutiny just because it implements a UNSC resolution. However, although the *Kadi* judgment was celebrated as a victory for human rights and the rule of law within the European Union, and as a setback for one-sided

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<sup>30</sup> *Id.*, para. 300.

<sup>31</sup> *Id.*, para. 304. A similar reasoning was applied to the objections relating to Articles 297 and 300(7) EC, see *id.* paras. 302 and 303 as well as paras. 306 and 308.

<sup>32</sup> *Id.*, paras. 310 et seq.

<sup>33</sup> *Id.*, para. 322.

<sup>34</sup> *Id.*, para. 327.

<sup>35</sup> *Id.*, paras. 365 et seq.

<sup>36</sup> *Id.*, para. 367.

<sup>37</sup> *Id.*, paras. 368 and 369.

<sup>38</sup> For the ECJ’s reasoning on the right of defence and an effective remedy see *id.*, paras. 348 and 349; for the discussion of the violation of the appellant’s right to property see *id.*, para. 370.

<sup>39</sup> *Id.*, para. 376.

security interests,<sup>40</sup> it appears that the availability or extent of judicial protection remains not entirely clear even after the *Kadi* judgment. The following section analyses the exact standard of protection that the Court establishes as well as its consequences at the EU level, and puts the findings of the *Kadi* case in context with the former case law of the European judiciary.

### 1. The standard of judicial protection established by the *Kadi* judgment

The ECJ undertook a comprehensive review of the Regulation in terms of its compatibility with the applicants' procedural guarantees. In accordance with its settled case law, the Court used the ECHR as its main standard of reference, also citing Article 47 of the EU Charter of Fundamental Rights.<sup>41</sup>

The Court distinguished between two specific fundamental rights: First of all, the right of defence, as enshrined in Article 6 ECHR, was at stake since the individual could only prepare an appropriate defence if he had knowledge of the grounds for the decision. Secondly, the right to an effective legal remedy, as provided for by Article 13 ECHR, was affected because knowledge of the grounds was necessary for the individual to take a reasonable decision about whether to bring an action against a particular measure.<sup>42</sup>

Special attention was placed on the balance of fundamental rights and the security considerations underlying the restrictive measures. In particular, the Court was prepared to accept a number of restrictions of the guarantees provided by the right of defence. The Court stated that this right did not require the Community authorities to communicate the grounds of the decision before the implementation of the blacklisting measures, as this was more than likely to hamper the effectiveness of the measure.<sup>43</sup> In the same vein, the individual affected could not rely on being guaranteed the right to be heard before the adoption of such measures.<sup>44</sup>

Also, with respect to the quality and quantity of the information to be communicated to the individuals concerned, the Court allowed some level of discretion. Here, the Court also took into account the context of the Regulation as an instrument implementing a UNSC Resolution concerning the "fight against terrorism" and the related problems with secret evidence.<sup>45</sup> In the Court's view, "overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters."<sup>46</sup>

That said, the Court drew some clear lines regarding the restriction of fundamental rights. Hereby, it based itself on the conviction that the claim that acts on restrictive measures affect "national security and terrorism" was not sufficient to exclude any judicial review of these measures. Rather, the Court considered it necessary to use "techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of

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<sup>40</sup> See, e.g., Tzanou, Maria, 'Case-note on Joined Cases C-402/05 P & C-415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of European Union & Commission of European Communities', [2009] 10 *German Law Journal* 2, 150-151.

<sup>41</sup> ECJ *Kadi* judgment, para. 335.

<sup>42</sup> *Id.*, para. 337.

<sup>43</sup> *Id.*, paras. 338-339.

<sup>44</sup> *Id.*, para. 341.

<sup>45</sup> *Id.*, para. 342.

<sup>46</sup> *Id.*, para. 342.

information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice.”<sup>47</sup>

In this respect, the Court’s reasoning was twofold. First of all, the judges held that it was incompatible with the applicant’s procedural guarantees that the Council had not informed the individuals in question of any evidence underlying their being put on the blacklist at all.<sup>48</sup> In the Courts view, the Council should have provided the “evidence used against them” at least within a reasonable amount of time. Without this information, the individual concerned was unable to rebut the claims made against him or to meaningfully evaluate whether to take further legal steps. This amounted to a breach both of the right of defence and the right to a legal remedy.<sup>49</sup>

Secondly, the Court dealt with the question whether the infringement of the applicants’ procedural rights had been remedied during the course of the legal proceedings. It seems that the Court was, in principle prepared to accept that the failure to communicate the relevant evidence to the applicants could be compensated if the evidence was at least communicated to the Court, so as to allow the judges to undertake a reasonable review of the Council’s measure.<sup>50</sup> However, even this requirement was not fulfilled. The Council, considering that the evidence on which the blacklisting measures are adopted, may on no account be subject to the scrutiny of the judiciary, had refused to submit any evidence to the courts. The Court, hence, found itself unable to meaningfully review the legality of the Regulation. The proceedings before the Court could not therefore be considered an effective remedy, thereby generating a violation of the applicant’s procedural guarantees.<sup>51</sup> Following AG Maduro in his Opinion in the case, the Court rejected the viewpoint supported by some Member States, to the effect that courts are generally ill-equipped to scrutinize decisions taken by the UNSC and that they should therefore refrain from doing so.<sup>52</sup>

## 2. The Consequences of the Kadi judgment

Given the clear indications of the Court, and the rather demanding three-months deadline for the amendment of the Regulation, the Community institutions had to react without delay. Thereby, the Council and the Commission found themselves in a delicate situation. On the one hand, they were required not to reveal classified information, since much of this information originated from confidential sources, let alone to simply remove the applicants from the blacklist. On the other hand, a way needed to be found to meet the European

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<sup>47</sup> *Id.*, paras. 343-344; here, the ECJ explicitly referred to the case law of the ECtHR, *Chahal v. United Kingdom* (judgment of 15 November 1996), *Reports of Judgments and Decisions* 1996-V, § 131. A similar reasoning is applied in the ECtHR case of *Fox, Campbell and Hartley v. United Kingdom* of 30 August 1990, Series A no. 182, para. 16.

<sup>48</sup> ECJ *Kadi* judgment, paras. 345-346.

<sup>49</sup> *Id.*, paras. 348-349.

<sup>50</sup> *Id.*, para. 350. Here, the Court seems to have been inspired by the case law of the ECtHR. The ECtHR grants the national authorities a wide margin of appreciation on how to implement the procedural guarantees of Article 6 ECHR. In particular, it is possible to counterbalance the breach of the individual’s rights perpetrated by the authorities with the help of effective judicial control of the relevant acts. The essential criterion is that the legal procedure as a whole can be considered as amounting to fair hearing. *See also* Gomien, Donna, *Short Guide to the European Convention of Human Rights* (Council of Europe, Strasbourg 2002), available at [http://www.coe.int/T/E/Human\\_rights/h-inf\(2002\)5eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)5eng.pdf), 29.

<sup>51</sup> ECJ *Kadi* judgment, paras. 350-351.

<sup>52</sup> *See* AG Maduro Opinion, para. 43.

Courts' requirements so as to not make the blacklisting arrangement as a whole inoperable at the EU level. Either way, the Community institutions risked endangering cooperation at the UN level with the other actors involved in the "fight against terrorism", in particular the United States of America.

In the light of this setting, it was hardly surprising that the applicants were not removed from the Council's blacklist. Rather, the Commission introduced certain procedural changes to the listing process. More specifically, the applicants were given the "narrative statements of reasons" that the Commission had received from the UN Sanctions Committee, and were then provided with the possibility to send their comments concerning the grounds to the Commission.<sup>53</sup> It is clear from the annual report of the UN Sanctions Committee that the Commission provided this information specifically because of the ECJ decision and following a specific request by the Council.<sup>54</sup> Meanwhile, the same procedure is applied to the other individuals on the list, which is manifestly necessary in order to prevent creating similar problems in their cases.<sup>55</sup>

The applicants were also given a possibility to give their views on the information provided by the Community. However, the Commission concluded that "[a]fter having carefully considered" the applicants' comments, it was justified to maintain them on the list.<sup>56</sup> One may wonder how "careful" and, more importantly, objective the Commission's appreciation of the applicants' comments actually was. Given the fact that the removal of the applicants from the blacklist would have been likely to cause an outcry at the UN level, it seems rather improbable that the Commission would be persuaded by any comments the applicants could possibly have made on the evidence.

### 3. Operationalising the principles established in *Kadi*

#### a) General Remarks

In light of the Commission's palpable efforts to prevent further problems with the European judiciary and, at the same time, to avoid conflicts at the UN level, the question arises whether the EU judiciary consider the amended blacklisting procedure as compatible with the applicant's procedural guarantees. The ECJ's *Kadi* judgment only stipulated that the Regulation at stake in the *Kadi* case did not comply with the ECJ's standard of procedural guarantees, but did not specify under which conditions the blacklisting measures would

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<sup>53</sup> See 3<sup>rd</sup> Recital of Commission Regulation (EC) No 1190/2008 of 28 November 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-Qaida network and the Taliban.

<sup>54</sup> 2008 UN Sanctions Committee Report, 6, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N09/206/16/PDF/N0920616.pdf?OpenElement>.

<sup>55</sup> For the current practice of providing limited information on the grounds of the listing and the possibility to comment on these grounds see 5<sup>th</sup> Recital of Commission Regulation (EC) No 1109/2008 of 6 November 2008 amending the 100<sup>th</sup> time Council Regulation (EC) No 881/2002 imposing specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban. In cases where the UN does not provide the current addresses of the individuals concerned, the Commission publishes a note in the Official Journal so that the victims could contact the Commission in order to receive the grounds for them being blacklisted in order to comment on these grounds. See also the fifth Recital of Commission Regulation No 1330/2008 of 22 December 2008 amending for the 103<sup>rd</sup> time Council Regulation (EC) No 881/2002 imposing specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.

<sup>56</sup> *Id.*, 6<sup>th</sup> and 7<sup>th</sup> Recital.

have been admissible. Therefore, a number of questions remain regarding the precise standards of procedural guarantees applicable to the blacklisting measures.

Anticipating which standard of judicial protection will be applicable to blacklisting decisions is further complicated by the fact that the ECJ in its *Kadi* judgment did not qualify the targeted sanctions at stake, but merely referred to them as “restrictive measures”. It remains therefore unclear whether the Court views them as simple administrative measures or as measures equivalent to criminal sanctions. This qualification would have been useful given the fact that international human rights instruments, including the ECHR, tend to apply different standards of procedural guarantees to these two types of measures.<sup>57</sup>

In the case of the blacklisting measures, this qualification is all but easy. The ECtHR employs an autonomous definition of the concept of a “criminal charge”. It uses various criteria in order to determine whether a criminal charge is at stake, such as the character of the offence, the severity and nature of the sanction, and the qualification of the measure under national law.<sup>58</sup> In particular, the nature of the sanction, which is considered the most important criterion,<sup>59</sup> argues in favour of considering the targeted sanctions as a criminal charge. Although the targeted sanctions do not involve the imprisonment of those blacklisted, they provided for far-reaching restrictions of their liberty. The freezing of assets and the travel ban considerably restrict both the private and the professional life of the individuals concerned.<sup>60</sup> However, as Cameron notes, the targeted sanctions are in any event “a strange type of a criminal charge” as there is no norm defining the prohibited acts, and therefore there is also no offence.<sup>61</sup> Moreover, up to now, the ECtHR case law does not provide a clear standard for procedural safeguards in terms of blacklisting, and is therefore seen as offering only little concrete guidance.<sup>62</sup> The EU Courts are, hence, confronted with the challenge of finding a standard of procedural safeguards for an entirely atypical type of sanctions.

With regard to the application of procedural guarantees to blacklisting measures, interesting insights may be drawn from case law on the EU’s autonomous blacklisting regime. In addition to the blacklists at stake in the *Kadi* case, which directly implement blacklists established by the UN Sanctions Committee itself, the EU also adopted additional blacklists against other terrorist suspects. These sanctions, too, are based on a UNSC Resolution.<sup>63</sup>

<sup>57</sup> See for the ECHR Leach, Philip, *Taking a Case to the European Court of Human Rights* (OUP, Oxford 2<sup>nd</sup> ed., 2006), 242.

<sup>58</sup> See Ovey, Clare and White, Robin. *Jacobs and White: The European Convention on Human Rights* (OUP, Oxford, 3rd ed., 2002), 141.

<sup>59</sup> See for example the reasoning of the ECtHR in *Kadubec v. Slovakia*, judgment of 2 September 1998, *Reports* 1998-VI, paras. 50 et seq.

<sup>60</sup> This appears even more problematic in the light of the fact that the targeted sanctions are, unlike most criminal sanctions, are not limited to a specific period of time.

<sup>61</sup> Cameron, Ian, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, (Council of Europe, Strasbourg, 2006), available at [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/public\\_international\\_law/Texts\\_& Documents/Docs%202006/I.%20Cameron%20Report%2006.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_& Documents/Docs%202006/I.%20Cameron%20Report%2006.pdf), 10. The absence of any legal criterion in combination with the punitive nature of the sanctions raises significant issues concerning the presumption of innocence since authorities may blacklist individuals without having to prove any wrongful behaviour. See also McCulloch, Jude; Carlton, Bree, ‘Preempting Justice: Suppression of Financing of Terrorism and the ‘War on Terror’’, [2006] 17 *Current Issues in Criminal Justice* 3 397, 412.

<sup>62</sup> See Cameron, Ian, *European Union Anti-Terrorist Blacklisting*, [2003] 3 *Human Rights Law Review* 2, 225, 256, 256.

<sup>63</sup> UN Security Council Resolution 1373 of 28 September 2001.

However, this UNSC Resolution does not specify which measures should be taken, or which individuals should be subjected to such measures. Hence, the EU authorities have full discretion in this respect. Unlike in the case of the UN blacklists, Courts' jurisdiction over such autonomous sanctions was never in doubt, and has already been made use of in various cases.<sup>64</sup>

In this respect, the *OMPI* line of cases, dealing with the Organisation des Mojahedines du peuple d'Iran (OMPI), an Iranian opposition group, is of most importance. The first of these cases concerned Council Decision 2002/460/EC allowing for hardly any information to be provided to the individuals concerned.<sup>65</sup> Here, the CFI found a breach both of the right to a fair hearing and the right to receive effective judicial protection.<sup>66</sup> Since the succeeding Council Decision continued to blacklist OMPI, OMPI filed another action of annulment with the CFI.<sup>67</sup> The Council decision in question was, therefore, annulled.<sup>68</sup> Since the Council maintained OMPI on the following blacklisted, despite the second annulment decision, OMPI brought another action of annulment against the relevant Council decision,<sup>69</sup> pursuant to which the Council decision in question was again annulled.<sup>70</sup> Although the ECJ is, of course, not bound by the CFI's case law, it constitutes, in the absence of a ECJ judgment to the contrary, the highest judicial precedent and thus defines the present legal state of affairs. More so, any new cases on UN blacklists will first come before the CFI, which is why its case law on this matter should be afforded particular salience.

b) The applicant's right to receive the evidence adduced against him

As we have seen in the *Kadi* judgment, the ECJ allows certain restrictions on the individual's right to receive the evidence adduced against him, both in terms of the quantity of the information, and with regards to the moment of its communication. However, it is unclear whether a summary statement such as that provided by the Commission to the applicants after the ECJ's decision can be seen as sufficient for the purpose of compliance with the individual's procedural rights.

Some insights can be drawn from the first *OMPI* decision in this respect. Here, the CFI came to the conclusion that "a general, stereotypical formulation" was not sufficient.<sup>71</sup> Rather, the statement of reasons had to contain "the matters of fact and law which

<sup>64</sup> See also Eckes, Christina, 'Sanctions against Individuals – Fighting Terrorism within the European Legal Order', [2008] *European Constitutional Law Review* 4, 205, 208, 224.

<sup>65</sup> Council Decision 2002/460/EC of 17 June 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/334/EC.

<sup>66</sup> Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] E.C.R. II-4665 (hereinafter: CFI *OMPI I* judgment). See further Eckes, Christina, 'Case Note – Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council and UK (OMPI)*, Judgment of the Court of First Instance (Second Chamber) of 12 December 2006', [2007] 44 *Common Market Law Review*, 1117, 1129.

<sup>67</sup> Case T-256/07 *People's Mojahedin Organization of Iran v Council* [2008] nyr (hereafter CFI *OMPI II* judgment).

<sup>68</sup> CFI *OMPI I* judgment, para. 186.

<sup>69</sup> Decision 2008/583/EC of 15 July 2008 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC.

<sup>70</sup> Case T-284/08 *People's Mojahedin Organization of Iran v Council* [2008] nyr (hereinafter: CFI *OMPI III* judgment), para. 39.

<sup>71</sup> CFI *OMPI I* judgment, para. 143.

constitute the legal basis of its decision and the considerations which led it to adopt that decision.”<sup>72</sup> In other words, the applicant had to be provided with “the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned”.<sup>73</sup> Besides, in the second *OMPI* case, the CFI ruled that the statement of reasons had to allow the applicants to understand how the Council had come to justify its decision.<sup>74</sup>

It is clear from these cases that the information provided to the applicant cannot be limited to some general information. However, it is not clear whether the information provided must also allow the individual concerned to actually *verify* the reasons for the decisions, rather than just to *understand* them. The CFI does not seem to require that all the evidence, including original documents, be transmitted to the individual concerned. It therefore appears not to be impossible that the CFI would accept the narrative statement of reasons provided by the Commission as sufficient. This threshold would be fulfilled provided that the information uncovered respects a certain degree of specificity and concerns substantively the basis on which the individual is “personally and directly” connected with the particular activities.<sup>75</sup>

#### c) Concerning the standard of judicial review by the Courts

Even more delicate than the problem of the statement of reasons provided to the applicants is probably the question concerning the content and extent of the information that must be made accessible to the Courts. Both the ECJ in *Kadi*<sup>76</sup> and the CFI in the *OMPI* cases<sup>77</sup> underlined the crucial role of the judiciary, which, as the CFI notes, “constitutes the only safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights.”<sup>78</sup>

##### *i) Requirements concerning the type and quantity of the evidence*

One pivotal question relates to the type, quantity and level of detail of the evidence, the Council must submit to the Courts. In this regard, the important statements were made in the third *OMPI* decision. Here, the CFI stated that the European judiciary

*must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it.*<sup>79</sup>

The CFI thus can be seen as submitting the autonomous EU blacklisting decisions to a rather rigorous scrutiny leaving little room for uncontrolled discretion of the executive. Interestingly, the Court drew on settled ECJ case law in order to corroborate its position. However, this case law deals with state aid issues, which are not related to any security

<sup>72</sup> *Id.* In the present case, the sporadic information provided neither conformed to the right to a fair hearing, nor to the right to receive effective judicial protection. *Id.*, paras. 165 and 166.

<sup>73</sup> *Id.*

<sup>74</sup> CFI *OMPI II* judgment, para. 178.

<sup>75</sup> Since the statement of reasons provided by the UN Sanctions Committee through the Commission is not publicly accessible no precise predictions are possible.

<sup>76</sup> ECJ *Kadi* judgment, paras. 304 and 351.

<sup>77</sup> CFI *OMPI III* judgment, para. 75.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, para. 55.

concerns.<sup>80</sup> The CFI, hence, implied that the scope of the judicial review of acts that are subject to specific security concerns should not be lower than the scope applicable to other acts. If this standard is applied to the UN blacklists that were at stake in the *Kadi* case, a problem would arise out of the fact that it is not the Council itself who takes the decision whom to put on the blacklist, but rather the UN Sanctions Committee. In many cases the Council will, therefore, not have the information on which the decision was based at its disposal. It would therefore be quite difficult if not impossible for the Courts to assess its accuracy, reliability, and consistency, let alone the question of whether the evidence was sufficient to uphold the listing decision.

It remains to be seen whether the ECJ will accept this reasoning or whether it will distinguish the blacklisting cases from the case law invoked by the CFI due to specific security grounds that may be at stake. This might allow the Court to lower the level of detail of the evidence that has to be provided to the judiciary. Also, the question arises whether the CFI itself would apply a different standard if not only the security interests of its Member States, but also the international cooperation in the fight against terrorism, were at stake. On the other hand, given the ECJ's strong statements about the relevance of judicial review in maintaining a minimum of procedural guarantees, it seems improbable that international security concerns will make the Courts derogate from their standards of judicial scrutiny as a whole. One may expect, that the bottom line of the minimum standard of judicial review will be, borrowing from AG Maduro, to prevent "that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected".<sup>81</sup> In this regard, it would seem rather unlikely that the Courts will be prepared to accept a simple narrative statement of reasons without reasonable reference to the sources as sufficient information. The information offered to the applicants by the Commission (and the UN Security Council) will, therefore, probably not satisfy the Courts. Some additional questions arise with regard to the threshold of credibility that the evidence must fulfil. In other words, how persuasive the evidence must be in order to be accepted by the Courts.<sup>82</sup> The blacklisting decisions are said to heavily rely upon intelligence information that often cannot be verified without endangering the source. Articles 6 and 13 of the ECHR, to which the ECJ refers, have been interpreted by the ECtHR so as to allow for intelligence information to become admissible evidence in court.<sup>83</sup> It can therefore be expected that the ECJ will not *per se* prohibit this type of evidence. It is clear, however, that in the case of UN blacklisting measures it will be very difficult to verify the intelligence information, be it in the form of checking written documents or testimonies before the Courts. Moreover, there is strong evidence that much of this intelligence information is

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<sup>80</sup> The CFI referred to Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, para. 57 which refers to Case C-98/78 *Racke v Hauptzollamt Mainz* [1979] E.C.R. 69, para. 5; Case C-16/90 *Nölle v Hauptzollamt Bremen-Freihafen* [1991] E.C.R. I-5163, para. 12; and Case C-326/05 P *Industrias Químicas del Vallés v Commission* [2007] ECR I-0000, para. 76.. However, when conducting such a review, the Community judicature must not substitute its own economic assessment for that of the Commission, see Case C-323/00 P *DSG Dradenauer Stahlgesellschaft v Commission* [2002] ECR I-3919, para. 43.

<sup>81</sup> AG Maduro Opinion, para. 53.

<sup>82</sup> So far, it is also unclear which criteria the evidence has to fulfill, i.e. whether the "beyond reasonable doubt" benchmark applies or it is, for instance a "reasonable cause" – criterion as applicable to the United States regime. See Whitlock, Craig, 'Terrorism Financing Blacklists At Risk', *Washington Post* of November 2, 2008 available at [http://www.washingtonpost.com/wpdyn/content/article/2008/11/01/AR2008110102214\\_pf.html](http://www.washingtonpost.com/wpdyn/content/article/2008/11/01/AR2008110102214_pf.html).

<sup>83</sup> See the detailed analysis in Vervaele, John, 'Terrorism and Information Sharing between the Intelligence and Law Enforcement Communities in the US and the Netherlands: Emergency Criminal Law?', [2005] 1 *Utrecht Law Review* 1, 1, 20, 27.

obtained through interrogation methods that qualify as torture under the ECHR.<sup>84</sup> Here, the EU Courts might be confronted with a new and quite disconcerting question, namely whether the courts can accept information which is most, or highly, likely to have been obtained through torture, although in certain cases documentation cannot be adduced as evidence to prove it.

Furthermore, the question arises what significance is to be attached to the results of prior investigations carried out by national authorities. In the second *OMPI* case, the Court criticised the Council for failing to take into account the findings of the UK's Proscribed Organisations Appeal Commission (POAC), the judicial body competent to review the Home Secretary's decisions. This judicial body had overturned the decision of the British Home Secretary to put *OMPI* on the blacklist due to a lack of sufficient evidence.<sup>85</sup> The Court indicated that the Council should have motivated its decision to deviate from the POAC's decision,<sup>86</sup> particularly since the appeal lodged against this decision had been refused due to the absence of convincing reasons.<sup>87</sup>

These statements indicate that if national investigations find no evidence against the blacklisted individuals, the Council would have to adduce more substantiated evidence in order to convince the Courts that the blacklisting decision is nonetheless justified. In this respect, a distinction may have to be drawn between investigations specifically undertaken in order to examine the blacklisting decisions, and others such as criminal investigations. The reason for this is that, according to the logic of the blacklisting regulation, the standard of proof for finding someone a threat to the public safety on the suspicion of involvement in terrorism for the purpose of employing administrative protective measures may be lower than the threshold for finding someone guilty of the criminal offence itself.<sup>88</sup> However, the CFI intimated that the results of criminal proceedings should not be disregarded. In the third *OMPI* case, the Court explicitly took into account the fact that none of the members of the organisation had ever been convicted in any Member State.<sup>89</sup> In this light, it seems probable that the Courts would in any event cast a more critical eye on the evidence provided by the Council if national (criminal) investigations had found, as occurred in the *Kadi* case,<sup>90</sup> that there was no basis whatsoever for any criminal charges related to terrorist offences against the individuals concerned.

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<sup>84</sup> See for example The World Organization for Human Rights USA, *Torture by the United States. The Status of Compliance by the U.S. Government with the International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (WOHR USA, Washington, 2005), available at: [http://www.ushrnetwork.org/files/ushrn/images/linkfiles/Torture\\_Report\\_2005.pdf](http://www.ushrnetwork.org/files/ushrn/images/linkfiles/Torture_Report_2005.pdf), 16; Saul, Ben, 'The Torture Debate: International Law and the Age of Terrorism', Australian Red Cross: NSW International Humanitarian Law Program Lecture Series NSW Law Week, 28 March 2006, Sydney, available at [http://law.unsw.edu.au/news\\_and\\_events/doc/BenSaulTortureSpeech2006.pdf](http://law.unsw.edu.au/news_and_events/doc/BenSaulTortureSpeech2006.pdf), 3 et seq.

<sup>85</sup> CFI *OMPI II* judgment, paras. 22-23, 157-158.

<sup>86</sup> *Id.*, para. 179.

<sup>87</sup> *Id.*, para. 184.

<sup>88</sup> At least this is the appreciation of the UN Sanctions Monitoring Team, see Letter dated 2 September 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council containing the Third Report of the Monitoring Team pursuant to resolution 1526 (2004), *S/2005/572*, paras. 40 et seq.

<sup>89</sup> CFI *OMPI III* judgment, para. 66.

<sup>90</sup> See further the Statewatch Briefing "Terrorist" lists: monitoring proscription, designation and assetfreezing—Update 2009, available at: <http://www.statewatch.org/news/2009/mar/sw-terrorist-list-observatory-update-march-2009.pdf>.

*ii) Reasons for not communicating evidence to the Courts*

Given the problems the Council will most likely be faced with in terms of submitting sufficient evidence to the Courts, the question arises whether the refusal to do so may be admissible for overriding security reasons.

Notably, in the third *OMPI* case, the CFI gave some firm indications as to the standard of judicial scrutiny required, in particular, on the reasons for *not* providing information to the Court. In this case, the Court had not been provided with detailed information from the national authorities as for the grounds of the Council's decision.<sup>91</sup> It therefore found itself unable to verify the general allegations contained in the statement of reasons.<sup>92</sup> The Court considered it irrelevant in this regard that the Council had been asked by the French authorities not to disclose certain information to the Court. In its view, the Council could not base its decision on evidence "communicated by a Member State if the Member State is not willing to authorise its communication to the Community judicature".<sup>93</sup> In other words, the Court refused any "objections that the evidence and information used by the Council is secret or confidential".<sup>94</sup>

This standard might give rise to some embarrassment when applied to the UN blacklisting measures. It is highly probable that the UN Sanctions Committee would, similar to the French judiciary, refuse to submit the evidence for the blacklisting decisions to the European Courts. However, unlike the French government, the UN Sanctions Committee is likely not to even transmit the information to the Council. Although some EU Member States may have access to the evidence in their capacity as Members of the UN Sanctions Committee, they would in all probability be subject to an obligation not to share this information with other governments, let alone with any judiciary body.

The decisive question is therefore whether this standard will also be applied to the evidence on which the UN blacklisting measures are based. As mentioned before, the ECJ in the *Kadi* case considered that "overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States" can justify certain restrictions on procedural guarantees.<sup>95</sup> This statement, however, referred only to the information to be communicated to the defence, but not to the evidence to be submitted to the Courts. When dealing with the latter issue, the ECJ made no mention of any security consideration, intimating that reasons justifying the restriction of the individual's access to the evidence may not necessarily justify withholding it from the Courts' scrutiny. Rather, the ECJ referred to the need of special "techniques" to conciliate security concerns and procedural guarantees.<sup>96</sup>

In this regard it may be interesting to note that the ECJ in its *Kadi* decision explicitly referred to the ECtHR judgment *Chahal v. UK*<sup>97</sup>, where the ECtHR made a number of statements on the reasonable balance between the right of defence and legitimate security interests.<sup>98</sup> Dealing with procedural guarantees in the context of administrative detention, the ECtHR argued that when imperative security interests are at stake, intelligent

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<sup>91</sup> *Id.*, para. 57.

<sup>92</sup> *Id.*, para. 66.

<sup>93</sup> *Id.*, para. 73.

<sup>94</sup> *Id.*, para. 75.

<sup>95</sup> ECJ *Kadi* judgment, para. 342.

<sup>96</sup> *Id.*, para. 344.

<sup>97</sup> See the ECtHR in *Chahal v. United Kingdom* of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 131.

<sup>98</sup> ECJ *Kadi* judgment, para. 344.

procedural arrangements must protect a minimum of judicial protection, even if classified information and imperative security interests are at stake. In particular, the ECtHR has mentioned that some countries have developed a special procedure, which excludes the applicant from access to classified information presented to the court, but involves the presence of a security-cleared counsel who defends the interests of the applicant.<sup>99</sup> The ECtHR was firm in stating that, given the availability of such procedures, preventing the courts from reviewing the evidence was incompatible with basic procedural guarantees.<sup>100</sup> The ECJ's reference to this case gives rise to the suspicion that the Court will be prepared to apply creative procedural devices in order to make sure that the secrecy of the evidence is protected, but it will be reluctant to accept that the evidence is not presented to the European Courts at all. Thus, it is not unequivocal that the Court will exempt the Council from the obligation to provide evidence solely because it invokes security grounds and international cooperation in the "fight against terrorism".

d) A new standard of judicial protection against UN blacklists at the EU level?

The above analysis shows that both the Courts and the other EU institutions are likely to be confronted with some difficult choices when putting the procedural guarantees for UN blacklists at the EU level into more concrete terms. It is clear from the above analysis that the standard of judicial protection applied by the CFI to the autonomous EU blacklists is rather high and might put the EU institutions under considerable pressure.

This is all the more so given that the Council and the Member States may often not even have the relevant evidence at their disposal. If the ECJ sticks to this standard, it seems rather likely that the Regulations implementing the UN blacklists cannot be seen as compatible with the standard of procedural guarantees. This would thwart the effort of the Council and the Commission to avoid frictions with their partners in the "fight against terrorism" but may well be the only possibility to reasonably take into account the fundamental rights of the individuals concerned.

In any event, allowing the Council not to produce the evidence for the implementation measures before the Courts would be tantamount to not granting the applicant any procedural guarantees at all, given that applicants are offered only very limited information for the blacklisting decision. This would counteract the ECJ's intention to provide a meaningful protection of the fundamental rights of listed individuals. At the end of the day, the value of any human rights standard is in its effective application to concrete and specific situations in daily legal practice. It can therefore only be hoped that the Courts will adhere to the approach adopted in the ECJ's *Kadi* decision and the CFI's *OMPI* decisions.

<sup>99</sup> ECtHR in *Chahal v. United Kingdom* of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 131 and 144. It should be noted that even the Israeli Supreme Court (HCJ) that regularly renders decisions on Palestinian whose rights are restricted as part of Israel's targeting measures against individuals involved in terror organizations has a practice of reviewing security material collated by the state. For instance, the recent case of HCJ 10054/08 *Fachuri v Military Judge Tirush, and the Commander of the Armed Forces in the West Bank* (judgment of 24 December 2008) the Court notes that it is its common place practice to consider the secret evidence presented by the state and issue a classification report on their part in order to confirm that the material did not contain any information that would have been useful to the defense, or that the information does indeed substantiate the state's claims against the petitioner/defendant but that it is not possible to reveal them as that would endanger the public interest and the source. In the second case, the Court's role is to examine the content of the information in the materials and confirm that it indeed substantiates the state's claims.

<sup>100</sup> ECtHR in *Chahal v. United Kingdom* of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 131.

#### IV. Conclusion

The present paper has aimed to analyse the implications of the ECJ's *Kadi* decision for the EU standard of fundamental rights protection against UN blacklisting measures. In terms of the concrete fundamental rights implications of the decisions in the case, the ECJ is seen as having upheld a well-balanced and firm approach. However, the *Kadi* decision leaves a number of questions open that will have to be addressed by upcoming litigations dealing with the Community regulations implementing UN blacklists.<sup>101</sup> As pointed out above, this may give rise to a number of demanding problems both of a legal and political nature, which will require the development of a vigilant strategy by all actors concerned.

It is to be hoped that the ECJ and the CFI will maintain their firm attitude towards the protection of the minimum core of procedural guarantees, even in the face of the political pressure that is likely to arise if more UN blacklisting cases arrive before the Courts. In the absence of any meaningful procedural guarantees at the UN level, this is not only a question of moral standards but it is also one of the judicial legitimacy of the Courts as the final arbiters of human rights standards at the EU level. Fortunately, the Courts have taken this role increasingly seriously. This is forcefully illustrated by the multi-folded annulment of the EU's autonomous blacklists in the *OMPI* case line discussed above, as well as in the ECJ's decision in the recent *Heinrich* case, where the Court held that a secret annex of an air security regulation cannot have legal force, regardless of the security reasons behind it.<sup>102</sup> It remains to be seen whether the ECJ will meet the expectations for the individual's protection against the UN's counterterrorist measures that it has produced with its striking decision in the *Kadi* case.

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<sup>101</sup> One possibility for the ECJ to provide further clarification of the standard of judicial protection applicable to blacklisting measures will be the third *OMPI* case which was appealed to the ECJ, see Case C-27/09 P Appeal brought on 21 January 2009 by the French Republic against the judgment delivered on 4 December 2008 by the Court of First Instance (Seventh Chamber) in Case T-284/08 *People's Mojahedin Organisation of Iran v Council of the European Union*; Case C-576/08 P, Appeal brought on 23 December 2008 by People's Mojahedin Organization of Iran against the judgment of the Court of First Instance (Seventh Chamber) delivered on 23 October 2008 in Case T-256/07: *People's Mojahedin Organization of Iran v Council of the European Union*.

<sup>102</sup> Case C-345/06, *Gottfried Heinrich* [2009] nyr, para. 63.