



Advocate General Bot proposes that the Court of Justice should set aside the judgment of the General Court in '*Kadi II*'

According to the Advocate General, the nature of the review undertaken by the General Court is unsuited to the fight against terrorism

In 2005, the General Court delivered its first judgments¹ on measures taken in the field of the fight against terrorism, holding that the EU regulations implementing the measures of the UN Security Council **are largely exempt from judicial review**.

In 2008, the Court of Justice², taking the opposite view that **the Community courts must ensure the review, in principle the full review, of the lawfulness of Community acts** – including those implementing Security Council resolutions – held that obligations imposed by an international agreement cannot prejudice the principle that fundamental rights must be respected. Accordingly, it annulled the regulation imposing certain specific restrictive measures³ directed against certain persons and entities associated with Usama bin Laden, in so far as it infringed certain fundamental rights that Mr. Yassin Abdullah Kadi held under Community law. The Court held that an act of the Union does not enjoy immunity from review as a consequence of the principles governing the international legal order in the context of the UN.

Interpreting the judgment of the Court of Justice in *Kadi*, the General Court annulled⁴ the Commission's new regulation maintaining the freezing of Mr Kadi's funds⁵, taking the view that it was required to undertake a full and rigorous judicial review of the lawfulness of that act.

The Commission, the Council and the United Kingdom appealed against that judgment.

In his Opinion delivered today, Advocate General Yves Bot notes that the Court of Justice has already stated that, even though the institutions of the EU have only a limited freedom of action in giving effect to international law and without calling into question the primacy of a Security Council resolution at the international level, requiring Community institutions to pay due regard to the institutions of the UN cannot result in their abstaining from reviewing the lawfulness of Community measures in the light of fundamental rights. It would, in his view, be wrong for the Court to reverse its decision not to grant immunity from review to an act such as the contested regulation.

The Advocate General takes the view that the principle of judicial review laid down by the Court of Justice in its judgment in *Kadi* now requires further clarification. In his analysis of the General Court's reasoning, he isolates a number of errors made by that Court. He considers, in effect, that when the Court of Justice laid down the principle of judicial review, it did not define its nature in any way.

¹ Cases [T-306/01](#) and [T-315/01](#). See also Press Release No [79/05](#).

² Cases [C-402/05 P](#) and [C-415/05 P](#). See also Press Release No [60/08](#).

³ Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (OJ 2002 L 39, p. 9).

⁴ Case [T-85/09](#). See also Press Release No [95/10](#).

⁵ Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st 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 (OJ 2002 L 322, p. 25).

In his view, there are a number of reasons why judicial review of the kind required by the General Court in the judgment under appeal should not represent a rule which must be followed. Those reasons concern the preventative nature of the measures at issue, the international context of the contested act, the need to balance the requirements of combating terrorism and those of the protection of fundamental rights, the political nature of the assessments made by the Sanctions Committee in deciding to list a person or an entity and the improvements in the procedure before that body in recent years and, in particular, since the judgment of the Court of Justice in *Kadi*.

The Advocate General observes in particular that funds freezing measures constitute temporary precautionary measures, in that funds are frozen but not confiscated. In addition, those measures do not constitute criminal sanctions, but were adopted in order to maintain peace and security at the global level. Furthermore, several of the Treaty provisions militate in favour of limiting judicial review and of a common foreign and security policy which has due regard to the action undertaken by the UN.

The Advocate General also notes that the procedure before the Sanctions Committee has been improved with respect to the rights of the defence. That process reflects a realisation within the UN that, despite confidentiality requirements, the listing and delisting procedures must now be implemented on the basis of a sufficient level of information, that the communication of that information to the person concerned must be encouraged and that the statement of reasons must be adequately substantiated.

In the light of these factors, the Advocate General considers that the listing and delisting procedures within the Sanctions Committee provide sufficient guarantees for the institutions of the EU to be able to presume that the decisions taken by that body are justified. The EU judicature should therefore not perform an intensive review of the justification for listing on the basis of the evidence on which the assessments made by the Sanctions Committee are based, but should merely ensure that a listing within the EU is not based on a statement of reasons which is manifestly inadequate or erroneous.

Next, the Advocate General sets out proposals concerning the judicial review which should be undertaken as regards acts of the EU implementing decisions of the Sanctions Committee.

In his view, **the formal and procedural aspects of the contested act should be subject to normal review** (review of *external lawfulness*). The EU judicature should undertake a rigorous review of whether such an act has been adopted under a procedure which respects the rights of the defence. It must, in particular, ascertain whether the reasons for listing were communicated to the person concerned, whether those reasons are sufficient to enable him to defend himself properly, whether he was able to submit his comments to the Commission and whether the latter took them into consideration adequately. That high level of protection in procedural matters will ensure that the protection of fundamental rights and the fight against terrorism are properly balanced.

By contrast, **the EU judicature must exercise a limited review of the merits of the statement of reasons** (review of *internal lawfulness*), and simply ascertain that there was no manifest error. The assessment of the appropriateness of a listing is a matter for the Sanctions Committee. An examination by the Commission and the EU judicature of the evidence and information on the basis of which that Committee drafted the statement of reasons cannot therefore be required on the grounds of the protection of the rights of the defence and the right to effective judicial protection.

In the light of all of those matters, the Advocate General proposes that the Court should allow the appeal and set aside the judgment of the General Court of 30 September 2010.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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