**Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding the Processing of personal data in connection with regulations requiring asset freezing as CFSP related restrictive measures**

Brussels, 22 February 2012 (Case 2010-0426)




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## 1. Proceedings

On 3 June 2010 the European Data Protection Supervisor (EDPS) received a notification for prior checking relating to the processing of personal data in connection with regulations requiring asset freezing as Common Foreign and Security Policy (CFSP) related restrictive measures from the Data Protection Officer (DPO) of the European Commission.

Questions were raised on 14 July 2010, to which the Commission replied on 14 March 2011. On 28 March, the EDPS requested a meeting to the relevant service of the Commission in order to clarify certain factual aspects of the notification. The meeting took place on 7 April 2011. Further questions were sent to the Commission on 29 April. The reply was sent to the EDPS on 3 August 2011. The draft description of the facts was sent to the DPO for comments on 6 October 2011. The EDPS received a reply on 26 October 2011 and raised additional questions on the comments on 27 October 2011. Answers to these questions were received on 09 January 2012. Similarly, the draft Opinion was sent to the DPO for comments on 23 January 2012; comments were received on 8 February 2012. Final clarifications were asked on 9 February 2012 and received on 22 February 2012.

## 2. The facts

### 2.1. Background on restrictive measures adopted at the UN and EU level

The notification refers to the processing of personal data in accordance with a number of regulations requiring the freezing of certain individuals' and legal persons' assets. Such restrictive measures are decided in the framework of the Union's Common Foreign and Security Policy (CFSP). The regulations are directly applicable legislative instruments mostly based on Article 215 of the Treaty on the Functioning of the European Union (TFEU).[1] In this context, personal data are used to establish, update, rectify and publish lists of persons whose assets are to be frozen. Data may also be processed for communication with the listed persons and with the UN, the Member States and third countries in the follow-up to such measures, including a review procedure. The processing is carried out by the Commission to fulfil its tasks under these regulations, such as publication of an annex listing persons whose assets have to be frozen, and to facilitate economic operators' compliance with the asset freezing obligations, by consolidating the published lists in one single electronic list so economic operators can quickly and clearly identify the names and personal details of persons whose assets have to be frozen on the basis of UN or EU autonomous listings.

The different types of processing activities are taking place in the context of the implementation of various regulations adopted in relation to different categories of addressees. The existence of several Council Regulations results from Article 215 TFEU, which is interpreted as not allowing one single Council Regulation on the freezing of foreign assets, but requiring a specific Regulation to address each CFSP issue.

The Commission mainly refers to two regulations in its notification.

The first of these, Council Regulation (EC) 881/2002,[2] has the purpose to implement the asset freezing measures towards individuals and entities associated with the Al-Qaida network as

[1] The older regulations are based on either Articles 60 and 301 TEC or Articles 60, 301 and 308 TEC.

[2] Official Journal L 139, 29.5.2002, p. 9–22, as amended by Council Regulation (EU) 754/2011, see Official Journal L 199 2.8.2011, p. 23–32. Notable earlier amendments include Council Regulations (EC) No 561/2003, OJ L 82, 29.3.2003, p. 1–2, which introduced certain exceptions to the freeze, e.g. to pay for subsistence and Council Regulation (EC) 1286/2009, OJ L 346, 23.12.2009, p. 42, which introduced a review procedure.

set out in a list drawn up by the United Nations Security Council. In this Regulation, the Commission is empowered to amend the annex containing the list of persons and entities subject to the sanctions on the basis of determinations of the United Nations Security Council or the Sanctions Committee established under UN Security Council Resolution (UNSCR) 1267 (1999).[3] Since the end of 2009 this Regulation in particular contains specific provisions related to protection for the rights of the defence of the persons targeted by the asset freezing orders, and a provision on personal data processing activities which are not mentioned in older regulations. This is – as indicated by the Commission itself – a legislative response to the judgement of 3 September 2008 of the Court of Justice in the Kadi case.[4]

The second one, Council Regulation (EC) 2580/2001[5], provides another legal basis for asset freezing measures requiring processing of personal data, on the basis of Common Position 2001/931/CFSP of the Council of the European Union "*on the application of specific measures to combat terrorism*".[6] As regards this Regulation, the Council amends the list, which is based on Article 2(3) of this Regulation.[7]

The notification also referred to 16 other regulations targeted at specific states, persons or organizations. The Commission subsequently submitted that the list was not intended to be exhaustive, since new regulations are regularly adopted. The notification is meant to cover the data processing under future sanctions regimes as well. However, in case there would be substantial changes to the data processing, the Commission submitted that it could update the notification. The present Opinion focuses on the regulations which have been mentioned in the notification but the assessment applies to all regulations subsequently applied, in so far as the data processing is carried out in the same way as described in the following. The regulations are the following:

Council Regulation (EU) No 356/2010 on Somalia[8]
Council Regulation (EU) No 1284/2009 on Guinea (Conakry)[9]
Council Regulation (EC) No 194/2008 on Myanmar (Burma) [10]
Council Regulation (EC) No 423/2007 on Iran,[11] which has been repealed and replaced by Council Regulation (EU) 961/2010[12] in the meantime
Council Regulation (EC) No 329/2007 on the Democratic People's Republic of Korea[13]
Council Regulation (EC) No 765/2006 on Belarus[14]
Council Regulation (EC) No 305/2006 on Lebanon[15]
Council Regulation (EC) No 1184/2005 on Sudan[16]

[3] Also known as the UN Al Qaida [and Taliban] Sanctions Committee. The Taliban reference was dropped after approval of Resolutions 1988 and 1989(2011).
[4] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351.
[5] Official Journal L 344, 28.12.2001, p. 70–75.
[6] Official Journal L 344, 28.12.2001, p. 93–96.
[7] The reason why also this regulation is included in the notification by the Commission is explained further below.
[8] Official Journal L 105, 27.4.2010, p. 1–9.
[9] Official Journal L 346, 23.12.2009, p. 26–38, now amended by Council Regulation (EU) 269/2011, Official Journal L 76, 22.3.2011, p. 1-3.
[10] Official Journal L 66, 10.3.2008, p. 1–87, now amended by Council Regulation (EU) No 1083/2011, Official Journal L 281, 28.10.2011, p. 1–2.
[11] Official Journal L 103, 20.4.2007, p. 1–23.
[12] Official Journal L 281, 27.10.2010, p. 1–77.
[13] Official Journal L 88, 29.3.2007, p. 1–11.
[14] Official Journal L 134, 20.5.2006, p. 1–11, now amended by Council Regulation (EU) 84/2011, Official Journal L 28, 2.2.2011, p. 17-31.
[15] Official Journal L 51, 22.2.2006, p. 1–8.
[16] Official Journal L 193, 23.7.2005, p. 9–16.

Council Regulation (EC) No 1183/2005 on the Democratic Republic of Congo[17]
Council Regulation (EC) No 560/2005 on Côte d'Ivoire[18]
Council Regulation (EC) No 1763/2004 on certain persons indicted by the International Criminal Tribunal for the former Yugoslavia[19] (repealed in the meantime)
Council Regulation (EC) No 872/2004 on Liberia[20]
Council Regulation (EC) No 314/2004 on Zimbabwe[21]
Council Regulation (EC) No 1210/2003 on Iraq[22]
Council Regulation (EC) No 2488/2000 on the Federal Republic of Yugoslavia[23].

In its replies submitted on 14 March 2011, the Commission added Regulation (EU) No 101/2011 on Tunisia[24] to this list and replaced the repealed Regulation on sanctions against Iran with its successor, Council Regulation (EU) 961/2010.[25]

In its replies submitted on 26 October 2011, the Commission added the following Regulations to this list:

Council Regulation (EU) No 204/2011 on Libya;[26]
Council Regulation (EU) No 270/2011 on Egypt;[27]
Council Regulation (EU) No 359/2011 on Iran;[28]
Council Regulation (EU) No 442/2011 on Syria (replaced by Council Regulation (EU) No 36/2012 in the meantime).[29]

Also, Council Regulation (EU) No 753/2011 on Afghanistan[30] now implements sanctions against the Taliban, which used to be included in the sanctions regime under Council Regulation (EC) 881/2002 (see also below 2.1.1).

The various processing activities and the relevant data controllers differ among the various regulations. In some cases, the regulations have several annexes including lists

(i) The Commission is empowered to amend the lists of persons whose assets are to be frozen, which are attachments to the main regulation, on the basis of determinations or decisions of the UN Security Council or UN Sanctions Committee in the following cases ("UN listings"):

Council Regulation (EC) No 329/2007 on the Democratic People's Republic of Korea;[31]
Council Regulation (EC) No 305/2006 on Lebanon (which currently has a blank annex);
Council Regulation (EC) No 1184/2005 on Sudan;
Council Regulation (EC) No 1183/2005 on the Democratic Republic of Congo;

[17] Official Journal L 193, 23.7.2005, p. 1–8.
[18] Official Journal L 95, 14.4.2005, p. 1–8, now amended by Council Regulation (EU) No 25/2011, Official Journal L 11, 15.1.2011, p.1-17.
[19] Official Journal L 315, 14.10.2004, p. 14–23.
[20] Official Journal L 162, 30.4.2004, p. 32–37.
[21] Official Journal L 55, 24.2.2004, p. 1–13.
[22] Official Journal L 169, 8.7.2003, p. 6–23.
[23] Official Journal L 287, 14.11.2000, p. 19–37.
[24] Official Journal L 31, 5.2.2011, p. 1–12.
[25] Official Journal L 281 27.10.2010, p. 1 1–77.
[26] Official Journal L 58, 3.3.2011, p. 1–13.
[27] Official Journal L 76, 22.3.2011, p. 4–12.
[28] Official Journal L 100, 14.4.2011, p. 1–11.
[29] Official Journal L 16, 19.1.2012, p.1–32.
[30] Official Journal L 199, 2.8.2011, p. 1–22.
[31] See also fn. 32.

Council Regulation (EC) No 872/2004 on Liberia;
Council Regulation (EC) No 1210/2003 on Iraq;
Council Regulation (EC) No 881/2002 on certain persons and entities associated with the Al-Qaida network.

(ii) The Commission is on the other hand empowered to amend the lists of persons whose assets are to be frozen on the basis of amendments to lists which are originally annexed to Council Common Positions or (as from December 2009) to Council Decisions (CFSP) in the following cases ("autonomous EU listings"):

Council Regulation (EC) No 329/2007 on the Democratic People's Republic of Korea;[32]
Council Regulation (EC) No 1763/2004 on certain persons indicted by the International Criminal Tribunal for the former Yugoslavia (repealed in the meantime);
Council Regulation (EC) No 314/2004 on Zimbabwe;
Council Regulation (EC) No 2488/2000 on the Federal Republic of Yugoslavia.

(iii) In some other regulations, changes are introduced by the Council on the basis of determinations of the United Nations Security Council or the Sanctions Committee. This applies to the following regulations:

Council Regulation (EU) No 753/2011 on Afghanistan;
Council Regulation (EU) No 204/2011 on Libya;[33]
Council Regulation (EU) No 961/2010 on Iran;[34]
Council Regulation (EU) No 356/2010 on Somalia;
Council Regulation (EC) No 560/2005 on Côte d'Ivoire (since its amendment by Council Regulation (EU) No 25/2011[35]).

(iv) Finally, for some regulations, both the establishment of the list and its amendment are carried out by the Council. This applies to the following regulations:

Council Regulation (EU) No 36/2012 on Syria;
Council Regulation (EU) No 359/2011 on Iran;
Council Regulation (EU) No 270/2011 on Egypt;
Council Regulation (EU) No 204/2011 on Libya;[36]
Council Regulation (EU) No 101/2011 on Tunisia;
Council Regulation (EU) No 961/2010 on Iran;[37]

[32] The sanctions against the Democratic People's Republic of Korea are a special case in that the relevant Annexes IV and V of Council Regulation (EC) 329/2007, containing the lists of persons subject to them, may be amended on the basis of determinations made by the Sanctions Committee established under UNSCR 1718(2006) or the Security Council, and on the basis of decisions taken by the Council on the basis of Common Position 2006/795/CFSP, respectively (see Article 13 (d) and (e) of Regulation 329/2007). This regulation therefore belongs both to categories (i) and (ii).

[33] This regulation has two different annexes, one for persons designated by the UN Security Council or the Sanctions Committee (Annex II) and another one for persons designated by the Council (Annex III), similar to the sanctions regime against the Democratic People's Republic of Korea.

[34] Changes based on the UN list are introduced in accordance with paragraph 12 of UNSCR 1737 (2006), paragraph 7 of UNSCR 1803 (2008) or paragraphs 11, 12 or 19 of UNSCR 1929 (2010). Regulation (EU) 961/2010 on Iran also has an EU list. The Commission submitted that it is standing practice to make separate annexes when there are two lists of different origin.

[35] Official Journal L 11, 15.1.2011, p. 1–17. This regulation has two different annexes, one for persons designated by the UN Security Council or the Sanctions Committee and another one for persons designated by the Council.

[36] See fn. 33.

[37] See fn. 34.

Council Regulation (EU) No 1284/2009 on Guinea (Conakry) (since the amendments included in Council Regulation (EU) 269/2011[38]);
Council Regulation (EC) No 194/2008 on Myanmar (Burma) (since the amendments included in Council Regulation (EU) No 1083/2011;
Council Regulation (EC) No 765/2006 on Belarus (since its amendment by Council Regulation (EU) No 84/2011);[39]
Council Regulation (EC) No 560/2005 on Côte d'Ivoire[40]
Council Regulation (EC) 2580/2001 on specific measures to combat terrorism.

To summarise, there are four categories of Regulations:

(i) those in which the Commission amends the annex on the basis of UN decisions;
(ii) those in which the Commission does so based on Council Common Positions or (as from December 2009) on Council Decisions;
(iii) those whose annexes are amended by the Council on the basis of information from the UN;
(iv) those where the Council independently establishes and amends the lists.

In view of the differences between the personal data processing activities carried out on the basis of the different regulations, not all observations made in relation to the main Regulation object of this Opinion (Regulation (EC) 881/2002) are applicable to each and every legal instrument in relation to which the Commission processes personal data of persons targeted by the asset freezing orders. The EDPS will analyse in detail the procedures mentioned in the notification in relation to Regulation (EC) 881/2002 and to Regulation (EC) 2580/2001, in view of the specific focus of the Commission notification regarding these two instruments. However, these observations can be applied to the other Regulations as well, depending on the distinction made above between regulations which are connected to UN listings or to autonomous EU listings, as well as the distinction between cases in which the amendment of the annexes containing information on listed persons is delegated to the Commission or carried out by the Council itself.

### 2.1.1. Regulation (EC) 881/2002 (Al-Qaida)

Regulation (EC) 881/2002 initially implemented restrictive measures against Usama bin Laden, members of Al-Qaida, the Taliban, other individuals, groups, and undertakings and entities associated with them as mandated in UNSCR 1390(2002). This Resolution determined that the Taliban had failed to respond to UN Security Council demands and subjected them and Al-Qaida to a number of sanctions in exercise of the powers of Chapter VII of the UN Charter, specifically, an asset freeze, travel ban, and arms embargo. In this Resolution, the UNSC recalled the obligation to implement UNSCR 1373(2001) which among other things requires UN Member States to freeze assets of terrorists. As these measures fall under the scope of the Treaty, Community legislation was needed to implement them in the (Community) Union territory.[41]

Common Position 2002/402/CFSP, adopted by the Council on 27 May 2002, requires the European Community to order the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up pursuant to UNSCR 1267(1999)[42] and 1333(2000)[43] and to ensure that funds,

[38] Official Journal L 76, 22.3.2011, p. 1–3.
[39] Official Journal L 28, 2.2.2011, p. 17–31.
[40] See fn. 35.
[41] See recital 4 of Regulation 881/2002.
[42] S/RES/1267(1999) demanded that the Taliban regime hand over Usama bin Laden and stop the use of territory under its control for the training of terrorists. This resolution imposed a flight ban and a freeze of assets on the

financial assets or economic resources will not be made available, directly or indirectly, to or for the benefit of those individuals, groups, undertakings.

At the same time, Regulation (EC) 881/2002 was adopted. This Regulation sets out rules governing the implementation of asset freezing measures and provides definitions of 'freezing', 'funds' and 'economic resources' (which are now standard wording). It establishes that the list of natural and legal persons subject to asset freezing shall be published for "*maximum legal certainty*" (recital 5). It mentions that the UN Sanctions Committee can grant exemptions from the ban for humanitarian reasons and that rules to implement such exemptions in the Community are needed (recital 7, Article 2a). Additionally, it states that the Commission should be empowered to amend the annex containing the list according to pertinent notifications from the UN Sanctions Committee (recital 8, Article 7) and that the Commission and Member States should inform each other of the measures taken under the Regulation and other relevant information (recital 9, Article 8). The Commission and the Member States are also to cooperate with each other and the UN Sanctions Committee.

With two resolutions adopted on 17 June 2011, the UN Security Council split the sanctions regime, establishing two separate regimes, one for persons and entities associated with Al-Qaida,[44] and a country-specific one for Afghanistan, mainly freezing the assets of Taliban.[45] The EU has amended its sanctions accordingly. Regulation (EC) 881/2002 continues to implement certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaida network, while sanctions against the Taliban are now implemented under a different regulation.[46]

### 2.1.2. Council Regulation (EC) 2580/2001 (Specific measures to combat terrorism)

Council Regulation (EC) 2580/2001 establishes an independent EU list of individuals, groups and entities involved in terrorism whose funds and other financial assets are to be frozen as part of the fight against the financing of terrorism. Reference is made to Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism.[47] The purpose of this Common Position is to apply certain measures to combat terrorism, in conformity with UNSCR 1373(2001).

For this purpose, Council Regulation (EC) No 2580/2001 defines key concepts such as "*funds, other financial assets and economic resources*" and provides for the establishment and amendment of a list of persons, groups and entities to which it applies. It also includes exceptions for the unfreezing of assets under certain circumstances.

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Taliban until Usama bin Laden is handed over. A sanctions committee should monitor the implementation of the sanctions.

[43] S/RES/1333(2000) reiterates the demands of S/RES/1267(1999) and additionally notes that the Taliban profit from the production of opium. Additionally to the sanctions already in place, it imposed an arms embargo and a stop of military assistance. It also asked UN Member States to close down Taliban "embassies" and missions in their territory. The implementation of these sanctions was to be monitored by the same committee as for S/RES/1267(1999).

[44] S/RES/1989(2011).

[45] S/RES/1988(2011).

[46] Council Regulation (EU) No 753/2011 of 1 August 2011 concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan, Official Journal L 199, 2.8.2011, p. 1–22. It is worth noting that this Regulation reserves implementing powers as regards the list for the Council.

[47] Official Journal L 344, 28.12.2001, p. 93–96.

Member States, the Council and the Commission shall inform each other of measures taken in its implementation. This list is autonomously established by the Council, based on information submitted by the Member States. The Commission submitted that, also in relation to these lists, it carries out certain processing activities (see point 2.2.2 below), such as publicizing them through the electronic consolidated financial sanctions (asset freezing) list.[48] The Commission also keeps and updates an electronic list created for the purpose of this consolidation.

## 2.2. Description of processing

In general, the processing operations follow the same pattern: a list of targeted persons is drawn up and published, targeted persons are informed[49] and presented with an opportunity to make their views known, and the list can be subsequently amended. There are also processing operations related to the authorisation of exemptions from the asset freeze. Data are used for preparing and/or processing:

- regulations amending the list of persons subject to sanctions;
- notifications of statements of reasons for listing;
- correspondence with listed persons in the framework of the review process;
- correspondence with relevant UN Sanctions Committees (in the case of UN sanctions) and third countries, if necessary;
- correspondence with EU Member States;
- inquiries concerning identification of listed persons;[50]
- a database of persons subject to asset freezing;
- the electronic consolidated list of persons subject to asset freezes, which is available on the internet;[51]
- overviews of aggregate amounts of assets frozen in the EU.

The processing operations which the Commission carries out under both Regulations differ in scope, due to the absence of implementing powers for the Commission for the list based on Regulation 2580/2001.[52] Because of this, each of the following sections will be divided into two parts, one describing processing operations under Regulation (EC) 881/2002 and another one under Regulation (EC) 2580/2001.

### 2.2.1. Legal basis

The legal basis for the processing notified as regards the implementation of UN sanctions under UNSCR 1333 (2000) and 1390 (2002) is Council Regulation (EC) 881/2002, in particular Articles 2a, 5(3), 7, 7a to 7d and 8. In particular, Article 7d specifically provides that the Commission shall process personal data on the basis of Regulation (EC) 45/2001 ("the Regulation") "*in order to carry out its tasks under*" under Regulation (EC) 881/2002 and lists the type of personal data that "*may*" be contained in the Annex.

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[48] http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm.

[49] There is no homogeneous way of implementing the "information to the concerned person" among the various regimes. This depends on lack of clarity about the applicability of the Kadi and OMPI case-law on sanctions regimes which include publication of the grounds for listing (several court cases are pending). However, the Commission submitted that whereas old regimes did not provide for the targeted persons to be informed of their listing and presented with the opportunity to make observations, from 2010, this has become a current practice under CFSP Decisions, even if not expressly mentioned in a Regulation.

[50] In the answers to these requests, non-published information may be forwarded to the requesting entity (competent authority in a Member State or economic operator).

[51] http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm.

[52] This distinction can also be made for the other regulations enumerated in 2.1; those in categories (i) and (ii) delegate implementing powers to the Commission, while those in categories (iii) and (iv) reserve them for the Council.

Under Council Regulation (EC) 2580/2001 the legal bases for processing by the Commission are Articles 4, 6, and 8. This Regulation provides, in its Article 2(3), for a list of the natural and legal persons whose assets are to be frozen. This list is drawn up by Council.

There is a high number of regulations amending and updating these legal instruments. As of writing, there have been more than 160 amendments to Regulation (EC) 881/2002 and about 15 for Regulation (EC) 2580/2001.[53] Most of these amendments relate to the annexes or Articles listing the persons concerned.

Additional sanction regimes are established under the other regulations mentioned in point 2.1 above. The respective legal bases for processing carried out by the Commission are:

Council Regulation (EU) No 36/2012 on Syria: Articles 29 and 30;
Council Regulation (EU) No 204/2011 on Libya: Articles 8, 13 and 14;
Council Regulation (EU) No 270/2011 on Egypt: Articles 4, 5(2), 9 and 10;
Council Regulation (EU) No 359/2011 on Iran: Articles 4(2), 5(2), 9 and 10;
Council Regulation (EU) No 101/2011 on Tunisia: Articles 4, 5, 7, 9;
Council Regulation (EU) No 961/2010 on Iran: Articles 3 (7), 3 (8), 18 (c), 19 (2) (b), 21 (4) (d), 31 (1) (a), 31 (2) and 35;
Council Regulation (EU) No 356/2010 on Somalia: Articles 5 (3), 9 (1) (a), 11;
Council Regulation (EU) No 1284/2009 on Guinea (Conakry): Articles 8(2), 9(2), 12 (a);
Council Regulation (EC) No 194/2008 on Myanmar (Burma): Articles 5(8), 5(9) and 13(2);
Council Regulation (EC) No 329/2007 on the Democratic People's Republic of Korea: Articles 7(3), 10(l) (a) and 13;
Council Regulation (EC) No 765/2006 on Belarus: Articles 3, 5 and 8;
Council Regulation (EC) No 305/2006 on Lebanon: Articles 5 and 8;
Council Regulation (EC) No 1184/2005 on Sudan: Articles 6 and 9;
Council Regulation (EC) No 1183/2005 on the Democratic Republic of Congo: Articles 6, 8 and 9;
Council Regulation (EC) No 560/2005 on Côte d'Ivoire: Articles 8 and 10;
Council Regulation (EC) No 1763/2004 on certain persons indicted by the International Criminal Tribunal for the former Yugoslavia: Articles 3, 4, 7 and 10;
Council Regulation (EC) No 872/2004 on Liberia: Articles 5, 8 and 11;
Council Regulation (EC) No 314/2004 on Zimbabwe: Articles 7, 8 and 11;
Council Regulation (EC) No 1210/2003 on Iraq: Articles 8 and 11;
Council Regulation (EC) No 2488/2000 on the Federal Republic of Yugoslavia: Articles 3 and 4.

As regards the publication of the lists in relation to both regulations, the Commission clarified that the legal basis is (inherent in) the obligation to amend the relevant annexes: any amendment of the annexes is in itself a Commission Regulation or a Council Implementing Regulation, which must be published in the Official Journal, as required by Article 297 TFEU.

As regards the processing of the data under Regulations for which the Council reserved the implementing powers as regards the list of persons for itself, the Commission processes the

[53] For 881/2002, see: http://eurlex.europa.eu/Notice.do?val=273722:cs&lang=en&list=465245:cs,273722:cs,&pos=2&page=1&nbl=2&pgs=10&hwords; for 2580/2001, see:http://eurlex.europa.eu/Notice.do?val=262026:cs&lang=en&list=508898:cs,451066:cs,262026:cs,249116:cs,&pos=3&page=1&nbl=4&pgs=10&hwords=.

data from all asset freezing Regulations on the basis of an agreement with the European credit sector associations on the consolidated financial sanctions (asset freezing) list.[54]

### 2.2.2. Controllership

In the initial notification, the Commission (represented by the Head of Unit DDG1.A 2 in DG RELEX) was mentioned as the controller. Due to the reorganisation and the establishment of the European External Action Service, this post now corresponds to the Head of Unit FPI.2 Stability instrument operations in the Service for Foreign Policy Instruments (FPI), a Commission service reporting to a Commission Vice-President who is also the High Representative of the Union for Foreign Affairs and Security Policy. As the FPI is part of the Commission, it is the Commission that shall be considered as data controller. From a legal perspective, the institution as such is the controller, although the practical implementation might be delegated to a person responsible for the processing.

However, for some parts of the processing, notably the amendment of the list under Regulation (EC) 2580/2001 and other regulations under which the Council establishes and amends the lists on its own, the Council should be considered the data controller. As mentioned above in paragraph 2.1, the fact that the Council is to be considered the data controller for the "amending" operations under these Regulations does not exclude that the Commission is processing personal data derived from these lists in particular in order to consolidate and publish the lists on the internet.

In its reply of 3 August 2011, the Commission highlighted that, even in cases where the Council has reserved for itself implementing powers as regards the lists of individuals and entities whose assets have to be frozen, the Commission should also be considered as a data controller for some processing operations. This is because in these cases the Commission receives draft lists and letters addressed to the Council from listed persons (in the case of reviews); because the lists amended by the Council are consolidated, together with the relevant Commission Regulations, into one single list for the purpose of facilitating the application of the freezing measures and because the Commission sometimes seems to receive letters from listed individuals or entities which should have been addressed to the Council. As a result, the Commission considers that these other processing activities should also be covered by the notification.

The processing is carried out by the Commission on its own initiative in order to carry out its tasks under the Regulations and to facilitate economic operators' compliance with the asset freezing obligations.

As the institution which notified this prior checking is the Commission, this Opinion focuses on those processing operations in which the Commission should be considered controller.

### 2.2.3. Preparation of the lists and publication

In relation to asset freezes under Regulation (EC) 881/2002, processing by the EU institutions starts when the Commission receives a press release or 'note verbale' informing of the UN decision to list a person and a statement of reasons for listing of the person whose assets are to be frozen, from the UN Sanctions Committee or the UN Security Council. The UN Al Qaida Sanctions Committee maintains a consolidated list which is published on the internet.[55] The Commission "*shall, as soon as a statement of reasons has been provided by the Sanctions*

[54] In order to be able to implement the sanctions, the European banking sector created the tool for the consolidated sanctions list and subsequently made an agreement providing that it would be managed and kept up to date by the Commission.

[55] Available at: http://www.un.org/sc/committees/1267/consolist.shtml.

*Committee, take a decision to include* [...]"[56] the relevant names of natural or legal persons, entities, bodies or groups in Annex I to this Regulation. As these acts, including their annexes containing the list, are published in the Official Journal, they are available to the public. Following publication in the Official Journal, the data from the list are introduced into the electronic consolidated asset freezing list, which is publicized on the internet.

Under Regulation (EC) 2580/2001, it is the Council of the European Union which, acting by unanimity, establishes, reviews and amends the list of persons, groups and entities whose assets are to be frozen.[57] The list is based on "*precise*" information or material indicating that a relevant decision has been taken by a competent authority. This mostly relates to decisions of judicial or equivalent competent authorities on "*the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds*".[58] The Council then prepares legal acts to update the list of persons, groups and entities subject to the asset freeze. The lists are an annex to the implementing acts themselves and as such published in the Official Journal and available to the public. Once these acts have been adopted, the Commission introduces the data into the same public electronic consolidated asset freezing list as the one containing the listings under Regulation (EC) 881/2002, based on the information published in the Official Journal. Similarly, information from all other asset freezing regimes is consolidated and publicized in this consolidated list.

### 2.2.4. Categories of data subjects and fields to be stored

For Regulation (EC) 881/2002, personal data are processed by the Commission in relation to two categories of data subjects:

- natural persons, entities, bodies or groups included in the lists and natural persons who, while having the same name as a listed person, claim not to be that person.
- lawyers representing the listed (natural/legal) persons in the first category,

The amount of personal data stored about the two categories of data subjects differs. According to the Commission, for data subjects in the first category ("listed persons") the following data fields - where available - may be stored and processed:

1. Surname and given names (including aliases)
2. Date and place of birth
3. Nationality, passport and ID card numbers
4. Fiscal and social security numbers
5. Gender
6. Address or other information on whereabouts
7. Function or profession
8. Date of first listing
9. Names of the father and of the mother
10. Name of the spouse
11. Telephone and fax numbers, e-mail address
12. Information on nature of association with Al-Qaida, including information on arrests and convictions
13. Amount of funds and economic resources frozen
14. Information on authorizations granted

[56] Article 7(a)(1) Reg. 881/2002.
[57] In accordance with Article 1(4), (5), and (6) of Common Position 2001/931/CFSP.
[58] Council Common Position 931/2001/CFSP Article 1(4).

15. Information on appeal against listing, if any
16. For persons claiming not to be listed persons, incoming and outgoing mail is stored.

On the basis of the notification, the Commission can process any of these data.

However, not all these personal data are to be inserted in the Annex and subsequently published in the Official Journal and in the online consolidated sanctions list. Only items 1 to 8 are specifically mentioned in the list in Article 7d of Regulation (EC) 881/2002 as personal data that may be included in the Annex. However, the Commission can also include in the published list also item 9 (names of parents) for the purpose of identifying the concerned person. Furthermore, in some cases also the reasons for listing (item 12) are also published.[59] According to the notification, documents including the information on which the statements of reasons are based [...] are not published but are kept in the electronic and paper case folders.

As regards lawyers representing listed persons, the following data are stored, but not published:

1. Surname, given names
2. Law firm
3. Address
4. Telephone and fax numbers, email address
5. Name of client.

For asset freezes under Regulation (EC) 2580/2001, the legal basis does not provide a list of data categories to be published or stored. As the notification does not include direct information from the Council, the EDPS assumes that the Council stores and processes similar personal data as those identified above for Regulation (EC) 881/2002. The EDPS verified that the personal data derived from lists amended by the Council and published in the online consolidated sanctions list are:

1. Surname and given names (including aliases)
2. Date and place of birth
3. Nationality, passport and ID card numbers
4. Gender
5. Address or other information on whereabouts
6. Function or profession, title
7. Remarks (for example on membership in listed groups).

The Commission submitted that it is invited for and represented in all Council (working party and ministerial) meetings, including those where the lists are discussed. It therefore receives all documents sent to the Council members. The Commission also includes the data from the

[59] Article 7d(2) of Regulation (EC) 881/2002 establishes that the list shall include information supplied by the UN that is "*necessary for the identification*", further explaining that "*such information may include* [list of data items]". This means that the list of data items is not meant to be exhaustive, and other information, if supplied by the UN, can also be published. As regards item 12, i.e. the statement of reasons, the Commission claims not to insert it in the public list. The UN provides statements of reasons since 2008 (UN Security Council Resolution 1822 (paragraphs 12 and 13)). Decisions made before mid-2008 sometimes have elements which might be considered as 'reasons' rather than identifiers. In fact, there is a difference between Regulations 881/2002, 2580/2001 and 356/2010 on the one hand and the other relevant regulations on the other, in that the latter require that the 'grounds for listings' be included in the published part (see e.g. Article 3(1) of Regulation 101/2011 on Tunisia; see also legal analysis 3.4 below).

Council lists in the electronic consolidated financial sanctions (asset freezing) list (as it is responsible for updating it).

### 2.2.5. Data transfers and recipients

Under Regulation (EC) 881/2002, the identification details and the statement of reasons for including a person on the list are part of the interservice consultation concerning draft Commission regulations amending Annex I. These data are shared with the Legal Service and other Directorates-General and services whose approval is required.

During the review process, which is triggered by a request of the listed person, non-published data, such as comments on the statement of reasons, are shared with the Legal Service and other DGs and services to the extent necessary to prepare a Commission position. It is also shared with Member States when the Commission seeks their opinion.[60] The Commission reserves the right to forward information received from the data subject to other EU institutions, governments of Member States and third countries as well as the UN Sanctions Committee, unless the data subject objects. Data subjects are informed of this in the letter notifying them of their inclusion in the list. In case the notice is published in the Official Journal, this is omitted.[61]

Once the Commission has finished its review, the result is made available to the listed person and the UN Sanctions Committee (Articles 7a(3) and 7c(3)).

Another flow of data occurs between the Commission, the competent authorities of the Member States and private actors, notably economic operators such as banks and insurance companies.[62] The latter are obliged to provide any information they have and "which would facilitate compliance with this Regulation". This includes information on accounts and amount of funds frozen. They shall supply it to the competent authorities of the Member States and, directly or through the competent authorities, to the Commission. The Commission shall then forward any information received directly by it to the competent authorities in the Member States as well.

The Commission not only receives such information but may also receive questions on the identification of persons from economic operators and the competent authorities in the Member States to help them in verifying whether a customer is a listed person or not and in verifying whether transactions have been authorised. To answer such questions, non-published information may be transferred.

Under Regulation (EC) No 881/2002 the Member States and the Commission share relevant information, notably on appeals, amounts frozen, measures taken and authorisations.

Under Regulation (EC) 2580/2001 the Member States, the Council and the Commission share relevant information, notably on appeals, amounts frozen, measures taken and authorisations.

[60] As the Commission informed the EDPS, this can happen in a regulatory committee ("*examination procedure*" under the new Comitology decision) or, exceptionally, a Council working party.

[61] The notice is meant to draw the attention of a listed person whose address is not available to the fact that a statement of reasons can be sent when requested; if a request is made, the letter is sent.

[62] Article 5 Reg. 881/2002 generally refers to "natural and legal persons, entities and bodies" while Reg. 2580/2001 uses the following wording in Article 4: "banks, other financial institutions, insurance companies, and other bodies and persons".

Under this Regulation, too, private actors are to supply "*any information which would facilitate compliance with this Regulation*" to the competent national authorities, and through these to the Commission (Article 4(1)).

Under both regulations[63], the Commission forwards requests for authorisations for use of funds which have been wrongly addressed to it to the relevant competent authorities in the Member States.

## 2.3. Measures to ensure rights of the data subject

### 2.3.1. Information to listed persons

For listings under Regulation (EC) 881/2002, after the Commission has taken the decision to include a person, entity, body or group in the annex, it sends to the listed person the publicly releasable[64] part of the statement of reasons as provided by the Sanctions Committee. [...]. The letter also informs the concerned person that the personal data will be handled in accordance with the rules of Regulation (EC) 45/2001 and that to obtain further information on the rights under the Regulation (such as right of access and rectification of data) the data subject should contact the Commission. Persons who have been listed prior to 3 December 2008 can demand an ex-post statement of reasons for their inclusion.[65] In the letter, the data subject is also informed about the possible data transfers indicated above in the second paragraph of section 2.2.5. Unless he or she explicitly objects to this transfer (either in part or as a whole, regarding both particular documents and recipients), the Commission assumes consent.

In case the data subject's address is not known or not sufficiently detailed, a notice is published in the Official Journal.[66] The information on data transfer and the statement of reasons are not included in the notice.

For listings based on Regulation (EC) 2580/2001, the Commission did not provide specific information regarding the information to be provided to the data subjects on the basis of Regulation (EC) 45/2001. According to the notification, statements of reasons have been sent by the Council since 2007[67] in relation to listed persons. However, there is no specific legal obligation to do so under Regulation (EC) 2580/2001. In case the data subject's address is not known, the only means of information is a notice published in the Official Journal.[68] The notices published do not contain the statement of reasons, but specify that the data subject can

[63] Article 5 of Regulation 2580/2001 and Article 2a of Regulation 881/2002.
[64] See definition in Article 1(6) of Regulation 881/2002.
[65] Article 7c(1) of Regulation 881/2002.
[66] Article 7a(2) of Regulation 881/2002.
[67] As the Commission informed the EDPS, this is an outcome of the judgment in Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665. See paragraph 120: "*the right of the party concerned to a fair hearing must be effectively safeguarded in the Community procedure culminating in the adoption, by the Council, of the decision to include or maintain it on the disputed list, in accordance with Article 2(3) of Regulation No 2580/2001. As a rule, in that area, the party concerned need only be afforded the opportunity effectively to make known his views on the legal conditions of application of the Community measure in question, namely, where it is an initial decision to freeze funds, whether there is specific information or material in the file which shows that a decision meeting the definition laid down in Article 1(4) of Common Position 2001/931 was taken in respect of him by a competent national authority and, where it is a subsequent decision to freeze funds, the justification for maintaining the party concerned in the disputed list.*".
[68] See the notice accompanying Council Implementing Regulation (EU) No 1375/2011 of 22 December 2011, Official Journal C 337, 23.12.2011 p. 17.

obtain it from the Council on demand and that in order to be considered for the next review, they should supply evidence within two months of publication of the notice.[69]

### 2.3.2. Access to data

According to the notification,[70] any demand for access to data is to be dealt with by the Commission within three months and in accordance with Regulation (EC) 45/2001 ("the Regulation"). Classified information is treated according to the Commission rules of procedure,[71] meaning it would have to be declassified before disclosure. The Commission informed the EDPS that, in support of listing decisions under Regulation 881/2002, in practice classified information is unlikely to be supplied to the Commission as it is understood that in a review procedure the information usually has to be shared with the listed person and, ultimately, the court.

### 2.3.3. Rectification

Requests for rectification of data stored under Regulation (EC) 881/2002 are transmitted by the Commission to the relevant UN Sanctions Committee. If the Sanctions Committee decides to change the data, the Commission amends the data accordingly. Requests from listed persons who claim they should not be included are to be processed within three months.

For listings under Regulation (EC) 2580/2001, the Commission submitted that it transfers any requests for rectification to the Council. Following a decision by the Council, the Commission amends the data in the consolidated financial sanction (asset freezing) list.[72]

### 2.3.4. Right to object

The Commission submitted that, given the statutory obligation to amend published lists such as Annex I of Regulation 881/2002, the right to object to the processing pursuant to Article 18(a) is not granted to data subjects. According to the Commission, the same reasoning applies to Regulation (EC) 2580/2001. A delisting can only occur after the review process by the relevant UN Sanctions Committee (for UN listings) or Council (for autonomous EU listings) or by means of a judgment of the Court to that effect.

### 2.3.5. Retention period

There is no fixed retention period for entries on the list established under Regulation (EC) 881/2002. However, as will be described below, there is a procedure for reviewing and deleting entries. When a person is delisted, his/her data are removed from the publicly accessible list.

For the list established under Regulation (EC) 2580/2001, the Council has to review it at least every six months, as set out by Council Common Position 2001/931/CFSP. [...].

For both regulations, the Commission informed the EDPS that data published in the annexes are subject to the rules of the Official Journal and remain physically stored[73] in the internal

[69] See recital 3 of Council Implementing Regulation (EU) No 83/2011 of 31 January 2011, referring to the notice published in Official Journal C 188, 13.7.2010, p. 13. For another example see Official Journal C 136, 16.6.2009, p. 35.

[70] Commission reply to question 8), point 15 of EDPS questions of 14 July 2010 and point 15(a) of the notification.

[71] Official Journal L 308, 8.12.2000, p. 26–34, as amended. The Provisions on Security are in an annex published in 2001 in Official Journal L 317, 3.12.2001, p. 1, as amended.

[72] See Commission reply to question 8), point 15 of EDPS questions of 14 July 2010 and point 15(a) of the notification.

database even after having been removed from the annexes. The Commission also highlighted that a decision on continuous listing must be distinguished from the retention period, as the latter should be longer than the period of listing so as to ensure that data are still available where needed (e.g. for pending or new court cases challenging listing decisions and cases on compensation). Also in this case, there is no fixed retention period.

### 2.3.6. Possible review process

Under Regulation (EC) 881/2002, the listed person is informed of the possibility to make his or her views on the listing known in the letter notifying the listing. When observations are submitted, the Commission starts a review process.[74] The Commission reviews the listing decision in view of the subject's observations. The Commission decision at the end of the review requires prior consultation of a Committee consisting of the Member States ("examination procedure"[75]). In this context, data may be forwarded to third parties as explained above in the second paragraph of point 2.2.5. In case a decision to de-list or to amend data related to a person, entity, group or body is made by the UN, the Commission shall amend Annex I to Regulation (EC) 881/2002 accordingly.[76]

Council Regulation (EC) 2580/2001 does not contain specific rules for a possible review process. However, Council Common Position 2001/931/CFSP establishes that a review should be carried out every six months (for the most recent one, see Council Implementing Regulation (EU) No 1375/2011).[77] The Council also regularly publishes in the Official Journal "notices" for the attention of people listed in the updated annexes, in which it is indicated that data subjects can request a review and submit evidence in their favour.[78]
As it informed the EDPS, the Commission is invited to all Council meetings relating to the drafting, amending and updating of this list, however the specific role of the Commission in this context has not been clarified.

## 2.4. Security measures

[...]

[73] The Commission explained that it applies a "logical delete" to the entry. The database is accessible to selected Commission staff only, the deleted data are not available on the website presenting the consolidated financial sanctions list. This point will be further developed below.
[74] See Article 7a(3) Regulation 881/2002.
[75] Article 7a(3) refers to Articles 5 and 7 of Commission Decision 1999/468, Official Journal L 184, 17.7.1999, p. 23. As from 1 March 2011, the so-called "comitology" Decision 1999/468 has been replaced by Regulation (EU) No 182/2011 of the European Parliament and the Council, Official Journal L 55, 16.02.2011, p. 13. The specific reference in Article 7b of Regulation 881/2002 has therefore to be intended as referring to Articles 5 and 10 of Regulation 182/2011 ("examination procedure", see Article 13 of Regulation 182/2011).
[76] Article 7a (5).
[77] Official Journal L 343, 23.12.2011, p. 10.
[78] The standard text referring to the review procedure included in the notices is the following: "The persons, groups and entities concerned may submit at any time a request to the Council, together with any supporting documentation, that the decision to include and maintain them on the list should be reconsidered [...] In this respect, the attention of the persons, groups and entities concerned is drawn to the regular review by the Council of the list according to Article 1(6) of Common Position 2001/931/CFSP. In order for requests to be considered at the next review, they should be submitted within two months from the date of publication of this notice. The attention of the persons, groups and entities concerned is also drawn to the possibility of challenging the Council's Regulation before the General Court of the European Union, in accordance with the conditions laid down in Article 263(4) and (6) of the Treaty on the Functioning of the European Union.".

## 3. Legal analysis

### 3.1. General remarks

This prior check does not address a single legal instrument to implement asset freezing measures at Union level, but several regulations requiring such measures. As the Commission mostly referred to Regulations (EC) 881/2002 and 2580/2001, which represent two types of measures identified in point 2.1 above, the legal analysis will continue to follow this distinction; however, any recommendations to be made apply also to the processing of personal data carried out on the basis of any of the other regulations covered by the notification, where applicable.[79] Unless the data processing operations under additional regulations to be adopted in the future differ from the operations analysed in this Opinion, they shall also be considered to be covered under this Opinion. In case the processing operations change substantially, the Commission should update the notification.

There has been a change in the approach to data protection in the legislation on asset freezing measures. For example, Council Regulation (EC) 881/2002 initially did not mention any data protection safeguards or rights to be granted to the data subject, while the amendments incorporated by Council Regulation (EC) 1286/2009 set out a procedure for review and delisting (Article 7a(2)-(5)). Recitals 9 and 12 and Article 7d of this Regulation make explicit reference to the applicability of EU data protection legislation. There is no specific provision introducing rectification and delisting procedures in the sanctions regime established under Regulation (EC) 2580/2001. The EDPS considers that Regulation (EC) 881/2002 includes – for effect of the Court judgements mentioned above– a more advanced data protection compliant processing in comparison to the other regulations covered by the notification.

The recent case law of the General Court[80] provides guidance on the safeguards needed for this kind of processing, especially when it comes to informing the data subjects. This and other judgments[81] will therefore be taken into account when analysing the compatibility of the processing with the legal framework.

### 3.2. Prior checking

The notification concerns the processing of personal data under the scope of Article 2(a) of the Regulation. Personal data in this context relates to physical persons who are the addressees of the asset freezing measures and their legal representatives. The data processing is performed by an EU institution in the exercise of activities which fall within the scope of EU law (Article 3(1) of the Regulation, in the light of the Lisbon Treaty). The processing of the data is done at least partly by automatic means, fulfilling the scope conditions of Article 3(2) of the Regulation. Thus, the processing falls within the scope of the Regulation. Additionally, Article 7d of the amended version of Regulation (EC) 881/2002 explicitly mentions the applicability of the Regulation.

Article 27(1) of the Regulation subjects to prior checking by the EDPS all "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. Paragraph 2(a) mentions

[79] Specifically: Recommendations on relations with the UN apply to all Regulations in which the list of persons subject to the freeze is based on lists supplied by the UN; recommendations on information to the data subject apply to all Regulations.

[80] Judgment of the General Court of 30 September 2010, case number T-85/09, not yet published in ECR, particularly pts. 174 - 177 ("Kadi II").

[81] Such as Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665.

processing related to "*suspected offences, offences, criminal convictions or security measures*".

In the present case, such data may be processed as part of the reasons given by the relevant Sanctions Committee or Member States to have a person put on one of the lists. Additionally, the very purpose of restrictive measures is to exclude listed persons from certain rights and benefits, making also Article 27(2)(d) applicable ("*processing operations for the purpose of excluding individuals from a right, benefit or contract*").

For these reasons, the processing operation is subject to prior checking.

Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case, however, the processing operation has already been established. The EDPS regrets the long delay between the start of the processing operations and the notification. However, insofar as the recommendations made by the EDPS are adopted accordingly, this situation can be rectified.

The notification of the DPO was received on 3 June 2010. According to Article 27(4) of the Regulation the present Opinion must be delivered within a period of two months. This deadline is suspended if the EDPS raises questions to the data controller, which he did on 13 June 2010, until the receipt of replies. Upon receipt of the replies on 14 March 2011, the deadline became active again. On 28 March 2011, the EDPS requested a meeting with the data controller to clarify remaining questions. This meeting took place on 7 April 2011. Pending this meeting, the deadline was further suspended. On 29 April 2011, the EDPS asked additional questions, which were answered by the Commission on 3 August 2011. On 8 April and again on 19 September 2011, the EDPS extended the deadline in accordance with Article 27(4) of the Regulation by one month each. Additionally, the case was suspended during August 2011. A draft of the facts of the case has been submitted to the data controller for comments on 6 October 2011, which suspended the deadline until 26 October 2011, when the data controller replied with observations. On 27 October 2011, the EDPS sent further questions, which were answered on 9 January 2012. Subsequently, a full draft has been submitted to the DPO on 23 January 2012 for comments, which were received on 8 February 2012. On 9 February 2012, final clarifications were asked, which were received on 22 February 2012. In total, the case has been suspended for 471 days. This means that the EDPS will issue his Opinion no later than 22 February 2012.

### 3.3. Lawfulness of the processing

Processing of personal data must be based on one of the grounds listed in Article 5 of the Regulation to be lawful. Article 5(a) of the Regulation allows processing of personal data that is *"necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof*". Article 5(a) contains three elements, all of which must be complied with: 1) the processing must be based on law (either the Treaties or another act based on them), 2) it must be in the public interest and 3) it must be necessary for achieving this public interest. Article 5(b) of the Regulation authorises "*processing* [which] *is necessary for compliance with a legal obligation to which the controller is subject"*.

According to the Commission, Article 5(b) of the Regulation applies to all processing operations taking place under the umbrella of the various regulations object of the prior check.

In the EDPS' view, however, the notified processing operations are only partly covered by Article 5(b). Some processing operations are covered by Article 5(a) instead. The delineation between the different legal bases will be explained below.

The different processing activities mentioned in paragraph 2.2 above take place on the basis of the various Council Regulations listed in paragraph 2.2.1. They find their legal basis in acts of EU law adopted on the basis of the relevant legislative procedure provided by the Treaty. The legal bases mentioned in the various regulations are: Article 60 TEC, Article 301 TEC (now Article 215 TFEU)[82] and Article 308 TEC (now Article 352 TFEU).

Some of these regulations are designed to implement in the Community legal order resolutions of the UNSC; however, the UN resolutions as such do not impose a legal obligation on the Community (now Union), as the Community/Union is not a member of the United Nations and therefore not an addressee of the resolutions. The Union legal order provides for an autonomous legal base (Article 215 TFEU) which aims at pursuing objectives in the public interest, namely the objectives of the CFSP.[83] Some of the other regulations establish autonomous EU lists of persons subject to asset freezes.

The EDPS would like to highlight that the mere fact that a provision inserted in a secondary legislative act empowers the Commission to carry out a certain activity does not in itself entail the legal obligation to process personal data within the meaning of Article 5(b) of the Regulation. Otherwise most of the processing activities of the Commission in general would be covered by Article 5(b), thereby depriving Article 5(a) of its practical applicability. However, in some cases, these acts contain provisions that are clear in not only *empowering*, but *obliging* the Commission to process personal data. The difference is the following: Article 5(a) applies when a task is attributed to the Commission and *in order to fulfil it*, personal data need to be processed. Article 5(b) on the other hand applies if the provision in question *requires* the Commission to do so *without leeway* in the implementation.

*Publication in the Official Journal*
Article 297(1) TFEU establishes that the Institutions shall publish adopted legislative acts in the Official Journal. Regarding Regulation (EC) No 881/2002, Article 7 (1) (a) in connection with Article 7b (2) empowers the Commission to amend the annex containing the list using a comitology procedure; Article 7a establishes the conditions under which the Commission shall amend the annex pursuant to UN decisions; Article 7d (2) in turn sets out which items

[82] Art. 215 TFEU (ex 301 TEC): "Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union [*that is, specific provisions on the common foreign and security policy*], provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the *Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures.* It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the *Council may adopt restrictive measures* under the procedure referred to in paragraph 1 *against natural or legal persons and groups or non-State entities*. 3. *The acts referred to in this Article shall include necessary provisions on legal safeguards*." (emphasis added).

[83] See judgement in the *Kadi* case, paragraph 213 et seq., Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351. Paragraph 226: "Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument"; and paragraph 229: "Implementing restrictive measures of an economic nature through the use of a Community instrument does not go beyond the general framework created by the provisions of the EC Treaty as a whole, because such measures by their very nature offer a link to the operation of the common market [...].".

shall be included in the annex where "*necessary for the purpose of identifying the person concerned*". There is no way for the Commission to avoid amending the annex and publishing it in the Official Journal; similarly, Article 7d (2) demands that at least certain personal data be included in the annex. Combined, these provisions create an obligation to publish some personal data (see also 3.5 below) in the sense of Article 5(b). Similar provisions are included in some of the other Regulations establishing restrictive measures.[84] However, for the reasons set out below, the EDPS' position is that only the publication in the Official Journal is a specific duty under Article 5(b).

*Publicising the online consolidated list*
The Commission also submitted in its reply to the EDPS' questions that the consolidation of the lists published in the Official Journal (lists amended by Commission and Council) was based on an agreement with the banking associations. It seems to link the publication in the Official Journal to the publication in the online consolidated sanctions list and considers that this processing operation is based on Article 5(b) of the Regulation as well.

However, this is an activity which is separate from the publication in the Official Journal and which has no explicit legal basis in the Treaties. In the EDPS' view, the consolidation and publication of the lists in the online consolidated sanctions list is based on Article 5(a) of the Regulation since its source is also recital 5 of Regulation (EC) 881/2002 and it has been established in order to facilitate the implementing activities of economic operators which are required to implement the asset freezes. Several of the other Regulations also include similar recitals.[85] In the EDPS' view, the Commission has not provided sufficient evidence that there is a legal obligation within the meaning of Article 5(b) of the Regulation which legally obliges the Commission to process personal data of listed persons for the purpose of consolidating and publishing the online consolidated sanctions list. While the Commission has provided a copy of the exchange of letters with the banking associations, the commitments the Commission entered into do not rise to the level of a legal obligation.

However, as experience has shown, only relying on the lists as published in the Official Journal is not an effective way of implementing the sanctions. Operating a consolidated list can therefore be seen as necessary for a task (the freezing of assets) carried out in the public interest on the basis of the regulations enumerated above in 2.2.1. It is thus lawful under Article 5(a) of the Regulation.

*Other processing operations*
While the publication of the Annex and keeping the consolidated online sanctions list are the core processing operations covered by this prior check, there are also several other processing operations which merit attention.

As regards Regulation (EC) 881/2002, Article 7d(1) includes a specific provision which establishes that the "*Commission shall process personal data in order to carry out its tasks under this Regulation* [...]" (emphasis added), quoting a reference to the Regulation. The explicit tasks attributed to the Commission in this Regulation are, apart from amending the Annexes as discussed above, (i) to communicate the statement of reasons supplied by the Sanctions Committee to the concerned persons (Article 7a(2)); (iii) to review the decision once observations are submitted and exchanging the information with the Member States and the UN Al Qaida Sanctions Committee (Article 7a(3)); (iv) to receive information which

[84] See for example Article 13(2) of Council Regulation (EC) 329/2007 on North Korea, which contains wording almost identical to Article 7d (2) of Regulation 881/2002. In both Regulations, the amendments including this provision have been adopted at the same time.
[85] E.g. recital 6 of Regulation EU No. 442/2011 on Syria.

would facilitate compliance with this Regulation directly from any natural or legal person, entity or body or through the competent authorities of the Member States (Article 8).

In the other regulations the provisions are often less detailed and rarely mention the Regulation.[86] In its reply of 14 March, the Commission submitted the list of articles which in its view constitute the legal basis for processing of personal data under Article 5(b) of the Regulation. Except for the publication in the Official Journal as discussed above, however, the EDPS is not convinced that these Articles provide a legal basis under Article 5(b). He highlights that these provisions are of a more general nature and mainly refer to the establishment of a duty for Member States to communicate to the Commission measures they adopted to authorise the release of certain assets and to provide legal basis for the communication of information from the Member States and economic operators to the Commission.

In the EDPS' view these articles do not constitute a legal obligation on the Commission in the sense of Article 5(b) but are rather tasks attributed to the Commission for the purpose of carrying out a public interest, that is the establishment and management of lists of persons whose assets are to be frozen on the basis of the various secondary legislative acts based on Article 215 TFEU (formerly Articles 60 and 301 TEC) which are dealt with in this prior checking procedure.

Summing up, there are three distinguishable processing operations:

1. Updating/amending the lists and publishing them in the Official Journal;
2. Publicising the online consolidated list;
3. Other processing operations.

The first of these operations is, as explained above, covered by Article 5(b), while the second and third ones are covered by Article 5(a). Whether one Article or the other is applicable does not affect the lawfulness of the processing. However, this has consequences for the exercise of the right to object, as will be elaborated below in point 3.10.

### 3.4. Processing of special categories of data

According to Article 10(5) of the Regulation, data related to offences, criminal convictions, or security measures may only be processed if authorised by the Treaties or by legal instruments adopted on the basis thereof. The EDPS highlights that the very fact of appearing on the list of persons whose assets are to be frozen can render the personal data as such "sensitive", in that listings related to terrorism or human rights abuses imply the suspicion of being related to criminal activity. This is not necessarily the case for all listings. Furthermore, sensitive data in the context of this prior check would be in particular information included in the "statement of reasons" or in general the grounds for listing, which can include convictions, arrests and imprisonments.

For Regulation (EC) 881/2002, information falling under Article 10(5) may be received by the Commission as part of the statement of reasons supplied to it by the UN Sanctions

[86] Some of the other Regulations do not contain specific provisions, but have a recital saying that "*Any processing of personal data of natural persons under this Regulation should respect Regulation (EC) No 45/2001* [...]": Regulation (EU) 961/2010 on Iran: Recital 17; Regulation (EU) 1284/2009 on Guinea: Recital 4; Regulation (EU) 356/2010 on Somalia: Recital 15; Regulation (EU) 101/2011 on Tunisia: Recital 6; Regulation (EU) 207/2011 on Libya: Recital 7; Regulation (EU) 270/2011 on Egypt: Recital 6; Regulation (EU) 359/2011 on Iran: Recital 7; Regulation (EU) 442/2011 on Syria: Recital 6; Regulation (EU) 753/2011 on Afghanistan: Recital 8.

Committee. As outlined in section 2.2.4, the published parts of the listing sometimes contain information on arrests, imprisonments and suspected connections to terrorist organisations.

The Commission informed the EDPS that as a consequence of the Court's ruling in *Kadi*[87], such data are no longer included in the database for new listings. They may, however, still be included for "*legacy*" cases.[88]

Article 7a(1) of Regulation (EC) 881/2002 establishes that the decision to list a person shall be made "*as soon as a statement of reasons has been provided by the Sanctions Committee*", while paragraph 2 of the same Article contains an obligation for the Commission to supply the statement of reasons to the data subject. Article 7d(2) of this Regulation establishes that "*information on listed natural persons that is provided by the United Nations Security Council or by the Sanctions Committee and that is necessary for the purpose of identifying the persons concerned*" shall be included in the Annex.

Therefore, insofar as the Commission performs the processing activities prescribed substantially as a go-between the Sanctions Committee and the data subject, its processing operations are covered by the provisions mentioned above.

However, there is no legal basis for these sensitive data to be included in the annex or to be published in the online consolidated sanctions list, as information may only be included in the annex if it is necessary for the purpose of identifying the persons concerned, a purpose for which information on the suspected crimes is not needed or even useful. This is why the Commission no longer publishes these sensitive data. As regards the so-called "*legacy*" cases, the EDPS requires the Commission to carry out a thorough review of the database and list in order to remove the sensitive data still present and publicly accessible.

Regulation (EC) 2580/2001 does not mention grounds for listing which could contain sensitive data. However, it should be noted that, for instance, in Regulation (EU) 101/2011 on Tunisia, Article 3 requires that "*the grounds for the listing of listed persons, entities and bodies"* shall be included in the Annex (which contains the names of listed persons, then published in the Official Journal). Similar provisions are included in most regulations establishing asset freezes.[89] This can have the consequence that, even in cases when the Commission in itself is not involved in the amendment of the lists, it might be processing sensitive data at the moment of the consolidation and publication online of the lists after they have been published in the Official Journal. The publication of the grounds for listings cannot be considered necessary for the purpose for which the consolidated list is made available to the public, i.e. making known to the economic operators the identity of the listed persons and facilitating their identification.

In this regard, the EDPS recalls Article 4 of the Regulation, which states that data must be "*adequate, relevant and not excessive in relation to the purpose for which they are collected* [...]". According to the available elements, information on the grounds for listing does not seem to help in identifying the persons subject to the asset freezes among the published documents and cannot thus be considered as relevant for this purpose.

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[87] See footnote 83.

[88] At the time of writing, such data were for example still included in the online consolidated sanctions list for the listings with the IDs [...]. The Commission informed the EDPS that such data might still be included for "legacy cases". These cases mentioned have been listed since the beginning of 2001 and thus can be seen as "legacy cases". However, listings IDs [...] contain such information as well and are newer [...]. Finally, such information is also included for ID [...], which is a new case [...]. Similar observations apply to the listings [...].

[89] According to the Commission, the only other exceptions are Council Regulation (EC) 881/2002 and Council Regulation (EU) 356/2010.

Given that the various regulations therefore have different regimes in relation to the grounds for listing, the EDPS invites the Commission to review its processing activities and all the relevant regulations in order to ensure that (i) any processing of data related to grounds for listing finds a clear and specific legal basis in the relevant regulation; (ii) no information on suspected offences or similar sensitive information is published in the Official Journal or in the consolidated sanctions list. In order to ensure compliance with the requirements to state the reasons for listings as requested by the General Court, and in case a personal notification of the listing is not possible, the listed persons should be entitled to request the statement of reasons from the institution which has amended the relevant annex.

Other special categories of data, such as health data, are not processed within the scope of the notification.

**Recommendation**: Conduct a review of the online consolidated sanctions list to remove data relating to suspected offences, criminal convictions or security measures if necessary. Conduct a review of all the processing activities carried out in relation to suspected offences in order to ensure a clear legal basis and to avoid unnecessary publication of sensitive data in the Official Journal and the online sanctions list.

### 3.5. Data Quality

The Regulation stipulates that data must be collected for specified, adequate and legitimate purposes and not further processed in a way incompatible with those purposes (Article 4(1)(b); they should be adequate, relevant and non excessive in relation to the purposes for which it is collected and/or further processed (Article 4(1)(c)). Given the serious consequences of an inclusion on the list for the data subject, the processing must guarantee a high standard of data quality. The Regulation also prescribes that data are accurate and kept up-to-date (Article 4(1)d).

To recall, data are processed in order to prepare Commission Regulations with amendments to lists of persons subject to asset freezing such as Annex I of Council Regulation (EC) No 881/2002 and to perform other tasks under relevant Council regulations such as:

- preparing letters to the natural persons containing the grounds for listing and related consultations with Member States;
- making overviews of aggregate amounts frozen in the EU and to answer questions concerning identification of, and granting of authorizations to, the natural persons concerned;
- consolidating of published lists in the electronic, consolidated targeted sanctions list available on the Commission website;
- answering questions concerning identification of, and granting of authorizations to, listed persons.

The purpose seems therefore sufficiently specific and explicit. The EDPS could not find any indication that any further processing for a purpose incompatible with the one identified above is carried out by the Commission.

Regarding the criteria of being "*adequate, relevant and non excessive*", the list of personal data which the Commission submits as being object of processing in relation to Regulation (EC) 881/2002 contains items whose necessity for the stated purpose of the processing ("*identifying the persons concerned*"), can mostly be affirmed. However, it seems doubtful

whether data on family members (parents, spouse) are always necessary in order to identify the listed person.[90] The data items already present on the list should allow for enough information to identify data subjects. It is also noteworthy that information on family members is not listed in Article 7d(2) of Regulation 881/2002 (see paragraph 2.2.4).

In this regard, the EDPS invites the Commission to assess in relation to any regulation object of this prior check the necessity of the inclusion of each data item both in general (i.e. whether an item should be possibly included) and on a case-by-case basis (i.e. whether an item should be included *in this specific case*, or whether the other items suffice for reliable identification).

As regards the requirement that data be accurate and kept up to date, the review process established by Article 7a of Regulation (EC) 881/2002 and the rectification procedure mentioned in paragraph 3.9 below (provided both are amended according to the EDPS' recommendations) guarantee the possibility for a concerned person to rectify any possible inaccuracy about his or her personal data.

The Commission submitted in general that rectification of data can take place in relation to both UN and EU autonomous listings: in this case the Commission would be a relay between the data subject and the UN sanctions Committee in one case and the Council in the other case.[91]

A discussion on the right of access and rectification follows in section 3.9 below.

*Creation of statistics*
Regarding the processing of personal data to create overviews of aggregate amounts of assets frozen in the EU, the EDPS invites the Commission to assess whether –within this specific context– the personal data identifying each addressee of the freezing measures is necessary for the purpose of creating the overviews of the frozen assets.

It is doubtful if personal data are really necessary to create this kind of statistics. For instance, data could already be supplied in an anonymous form by the Member States. If they are supplied in a personally identifiable form, they should be anonymised as soon as possible.

*Source of information: press releases*
According to the notification, one of the sources used for the establishment of updates to the UN-sourced lists, such as under Regulation (EC) 881/2002, are "*relevant press releases*" of the UN. In order to ensure high data quality, the official consolidated list as published by the UN Al Qaida Sanctions Committee should be seen as the main relevant source. Press releases, such as those issued after the conclusion of a review process, can serve as additional sources, but must not be the sole reasons for including persons on the lists, as the accuracy of these documents might be lower than that of the official list.

**Recommendation**: The Commission should consider the necessity of processing each category of personal data in relation to the need to identify the persons concerned by the asset freezing measures. In particular, such assessment must always be carried out in relation to the personal data of family members of listed persons.

[90] Obviously this does not exclude the possible creation of a separate entry for spouses or parents under the relevant procedures, when there are reasons for listing them as well.
[91] See the answer to question 8 in the Commission's reply submitted on 14 March 2011.

Data used for statistics should be provided by the Member States in an anonymous way or, if this is not feasible, the Commission should anonymise them as soon as possible in the process of creation of the statistics on aggregate amounts. The Commission should report to the EDPS about the final arrangement regarding this point.

The Commission should not use UN press releases as sole sources to identify and insert names of addressees of the restrictive measures in the annexes.

### 3.6. Conservation of data / Data retention

As a general principle, according to Article 4(1)(e) of the Regulation, data is to be kept in a form which permits identification of data subjects for no longer than is necessary for the purpose for which the data are collected and/or further processed. Although the procedures for reviewing and deleting entries differ between the two lists (see section 2.3.6 above), the following observations are applicable to both regulations.

Under both regulations, data in the physical folder are kept until there is a decision to remove the person concerned from the list, either by the Council or the relevant UN Sanctions Committee, depending on the distinction between UN listings and autonomous EU listings. If necessary, they may be kept after the removal for use in court cases related to the listing.

Data which have been published in the Official Journal are subject to its rules and remain public, even if in a following issue of the Official Journal an updated list appears without a certain name that was previously included. If the review procedure leads to the result that a person should be removed, this should be explicitly mentioned when the updated list is published, for example by always including a heading indicating that the following persons shall be removed from the list. A special case occurs if the review procedure leads to the conclusion that a listing was unlawful in the first place, in which case a separate corrigendum should be published immediately.

As regards the database, a deletion of an entry is according to the notification only a "*logical delete*". This means that the names are not physically removed but just "flagged" as deleted while still potentially available in the database (although not anymore included in the publicly accessible online consolidated sanctions list).

According to the Commission, retention in the publicly available consolidated sanctions list and the rules of publication of Official Journal seem to be connected. While it is true that information which has been published in the Official Journal cannot be erased from the public record, this has no bearing on whether or not data should be continuingly stored in the consolidated sanctions list. The consolidated sanctions list is a tool to facilitate implementation of the restrictive measures currently in force. Apart from the possible use in court cases, there seems to be no reason to continually store the data after delisting has taken place.

**Recommendation**: Data should be physically deleted from the database once a delisting decision is taken and they are not needed with regard to lawsuits against the listing. The Commission should in any case clarify what it considers to be the deadline for filing a court action against a listing decision in relation to the specific acts adopted in the context of asset freezing measures and adopt a fixed retention period after delisting.

### 3.7. Data transfers

According to the notification, data may be forwarded to a number of recipients to which different legal provisions apply. For transfers within or between EU bodies or institutions - as

in the interservice consultation preceding the adoption of new legal instruments - Article 7 of the Regulation is applicable. For transfers to Member States, Article 8 is applicable if the recipient in question is subject to the national law implementing Directive 95/46/EC, or Article 9 when it is not. Article 9 is also applicable for transfers to third countries and the relevant UN Sanctions Committee.

### 3.7.1. Transfers within or between Community institutions or bodies

Article 7(1) of the Regulation establishes that "[p]*ersonal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

Article 7d(1) of Regulation 881/2002 authorises the Commission to process personal data for its tasks under it, while Article 7(1)(a) of the same Regulation empowers it to amend the Annexes. This provides a legal basis for these transfers inside the Commission during the drafting and the review process. Transfers within the Commission occur during the drafting of regulations amending Annex I of Regulation (EC) 881/2002, during which the statement of reasons and other information is forwarded to the Legal Service and relevant DGs, as well as during the review process.

In the letter informing data subjects of the listing, the Commission also informs them that it reserves the right to forward any observation to –among other recipients– the Council and the General Court or the Court of Justice.

The transfer of data to the Council is not specifically foreseen by Regulation (EC) 881/2002. However, according to Article 7a(3), the review process should follow the "examination procedure" indicated in Article 7b. According to this procedure, the Member States themselves would have a role in "controlling" the Commission's implementing powers while the Council (and the European Parliament) is to be informed about the procedure.[92] Also in this case, transfers of the data to the Council and the European Parliament would be covered by Article 7(1) of the Regulation.

The Courts would only need these data in the course of lawsuits related to listings. Transfers for this reason can be justified under Article 7(1) of the Regulation.

For Regulation (EC) 2580/2001, information exchanges between the Commission and the Council have a legal basis in Article 8 of that Regulation, which establishes that "[t]*he Member States, the Council and the Commission shall inform each other of the measures taken under this Regulation and supply each other with the relevant information at their disposal in connection within this Regulation* [...]". The EDPS invites the Commission to assess on a case by case basis the relevance of transferring personal data to other institutions under this Article.

In addition, it is worth highlighting that, as regards all the regulations covered by this prior-check, pursuant to Article 7(3) of the Regulation, the recipient institutions can only process personal data received by the Commission for the purpose for which they were transmitted.

### 3.7.2. Transfers to recipients subject to laws implementing Directive 95/46/EC

Article 8 of the Regulation governs transfers to "*recipients subject to the national law implementing Directive 95/46/EC*". In the case at hand, Article 8 is applicable to transfers to

[92] See Regulation (EU) 182/2011 Article 10(3) and (4).

economic operators and most[93] of the national competent authorities involved in the transmission of data to and from the Commission. It is worth noting that "consent" as such cannot be a legal basis for transferring of personal data according to this article.

One of the reasons allowing such transfers is if the data are "*necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*" (Article 8(a)).

Under Regulation (EC) 881/2002, the Commission and the competent authorities in the Member States may share information on "*the measures taken under this Regulation and shall supply each other with relevant information at their disposal in connection with this Regulation*" (Article 8). This provision justifies transfers to the competent authorities in the Member States in the public interest of implementing the asset freezing measures. Article 8 of Regulation (EC) 2580/2001 contains an equivalent provision.

Article 8(b) of the Regulation also allows transfers to "*recipients subject to the national law implementing Directive 95/46/EC*" if the recipient "*establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced*". The transfer to financial operators can also be justified by this second legal basis, given that financial operators might be subject to penalties under national laws pursuant to Article 10 of Regulation (EC) 881/2002 if they act in breach of the obligation to freeze relevant assets or the prohibition against making assets available to listed persons.[94] It is therefore necessary for them to establish the identity of their customers beyond reasonable doubt. Sometimes, additional information not included in the annexes may be needed to do so. In this case they can address themselves to the Commission to help in identifying customers, and therefore data transfers could be justified under the provisions of Article 8(b). However, the Commission should explore whether it is actually necessary to transfer non-published personal data to those financial operators, or whether this assistance could be organised in a way that minimises transfers of personal data.

Similarly, help for competent authorities in the Member States when determining whether an authorisation (not to freeze part of the funds for "humanitarian reasons") has been granted can be justified, this time under Article 8(a) of the Regulation because the identification of persons for the purpose of proper application of the sanctions is in the public interest and, in certain cases, additional non-published information might be needed to do so. Also in this case, possibilities to minimise transfers of personal data for this purpose should be explored.

**Recommendation**: Explore possibilities to minimise the transfer of personal data when replying to requests for assistance and implement them if possible.

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[93] This depends on how the Member State in question implemented Directive 95/46/EC: many Member States chose to implement this Directive horizontally with acts whose scope includes the whole public sector, while others exempted e.g. judicial and police authorities from its scope. If national authorities are subject to the law implementing this Directive, transfers to them are covered under Article 8. Whether a specific authority is covered is to be examined on the basis of that Member State's national law. If this is not the case, Article 9 applies.

[94] Similar provisions exist in all the other regulations as well, see e.g. Article 15 of Regulation (EC) 1210/2003 on Iraq, Article 16 of Regulation (EU) 1284/2009 on Guinea, Article 37 of Regulation (EU) 961/2010 on Iran, Article 13 of Regulation (EU) 101/2011 on Tunisia. The wording is substantially similar to the following: "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." (Article 13 of Regulation (EU) 101/2011). This does not mean that each and every person to whom financial services are rendered needs to be screened against the list, since Article 2(4) of Regulation (EC) 881/2002 excludes liability if the operators concerned "[...] *did not know, and had no reasonable cause to suspect* [...]" that their actions would infringe this prohibition.

### 3.7.3. Transfers to recipients which are not subject to laws implementing Directive 95/46/EC[95]

Transfers to the UN Al Qaida Sanctions Committee and third countries, which are recipients not subject to laws implementing Directive 95/46/EC, are governed by Article 9 of the Regulation. This Article is also applicable for transfers to authorities not subject to national laws implementing Directive 95/46/EC. The provision stipulates that for such transfers to be lawful, the recipient must ensure an adequate level of protection. Such an adequacy finding does currently not exist for the United Nations. Certain derogations are allowed, e.g. if the data subject has unambiguously given his/her consent to the transfer (Article 9(6)(a)) or if the transfer is necessary or legally required on important public interest grounds or for the establishment, exercise or defence of legal claims (Article 9(6)(d)).

In the notification, the Commission envisaged using consent as the legal basis for transfers to third countries. It also interpreted a lack of objection to the transfer as sufficient, as data subjects are informed that their answers will be forwarded to the Sanctions Committee, among other recipients. Later, it submitted that Article 7a (3), second sentence, of Regulation (EC) No 881/2002, which establishes that "[t]*he result of this review shall also be forwarded to the Sanctions Committee*", would constitute a legal obligation for the Commission to forward personal data to the UN Al Qaida Sanctions Committee. This, however, does not mean that the standards of Article 9 of the Regulation do not apply.

When wanting to use consent as a justification, Article 2(h) of the Regulation which defines consent as "*any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed*".[96]

Using consent as a legal foundation for these transfers raises two issues:

First, according to the Article 29 Working Party[97], consent is "*freely given*" if there is "*no risk of deception, intimidation, coercion or significant negative consequences*" in the case of denying it.[98] Given both the wording of the letter ("*The Commission reserves the right to...*") and the context (when denying consent, the observations could not be sent to the UN Al Qaida Sanctions Committee, making delisting highly unlikely), any consent obtained can hardly qualify as "*freely given*". Second, the Commission assumes inaction (when sending one's observations to the Commission) to signify consent. Whether inaction can qualify as "*any* [...] *indication*" of consent is doubtful.[99] Article 9(6)(a) requires unambiguous consent, necessitating more clarity than can be inferred from pure inaction.

These two factors combined preclude using consent as a legal ground for these transfers. In later correspondence, the Commission submitted the possibility to qualify these transfers as "*necessary or legally required on important public interest grounds or for the establishment, exercise or defence of legal claims*" (Article 9(6)(d)).

[95] Under Council Regulation (EC) 2580/2001, the Commission does not transfer any data to third countries; the following applies to Regulation (EC) 881/2002 and the other Regulations implementing restrictive measures decided on the UN level only.

[96] This definition is identical to the one given in Article 2(h) of Directive 95/46/EC which has recently been interpreted by the Article 29 Working Party (see below) and should be interpreted homogenously.

[97] Article 29 Working Party Opinion 15/2011 on the definition of consent, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf.

[98] Article 29 Working Party Opinion 15/2011 on the definition of consent, p. 12.

[99] Article 29 Working Party Opinion 15/2011 on the definition of consent, p. 12.

An appeal before the UN Al Qaida Sanctions Committee is one of the few possibilities[100] for data subjects to be delisted, besides a request for delisting by one Member State, or the general review of the list.[101] Therefore, the transfer could be seen as necessary for the data subject to defend its legal claim to its own property.

This exemption provides a reason to forward those statements to the UN Sanctions Committee which is in charge of the review procedure, but not for forwarding to third countries in general. Any forwarding to third countries would have to comply with the general conditions set out in Article 9 of the Regulation. It is noteworthy, in this respect, that during the "*Ombudsperson procedure for delisting*" which applies to delisting requests ('petitions') procedure, the Ombudsperson forwards the petition request to "*the members of the Committee, designating State(s), State(s) of residence and nationality or incorporation, relevant UN bodies, and any other States deemed relevant by the Ombudsperson*".[102]

In light of this, the EDPS requires the Commission to evaluate the need for transfers to third countries and the conditions under which they could take place in order to respect Article 9 of the Regulation.

Data subjects can be informed of the transfer to the UN Al Qaida Sanctions Committee in the letter notifying them of their listing, together with an explanation of why it is done.

**Recommendation**: Inform data subjects of the reasons for transfers to the UN Al Qaida Sanctions Committee. Evaluate the need for transfers to other third countries.

### 3.8. Processing of unique identifier

Article 10(6) provides that "*the European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body*".

Regulation 881/2002 mentions fiscal and social security numbers in the list of data categories that may be processed.[103] In some cases, general national identification numbers are included in the publicly accessible list[104] as well. The EDPS understands that the Commission might need to process unique identifiers of individuals in order to correctly identify the persons concerned by the asset freezing measures. This is important in order to allow economic operators to implement the freeze in relation to the correct person avoiding risks of coincidence of names and in relation to persons who have different aliases.

Also the processing of fiscal and social security numbers involved in the publication in this sense seems necessary to reach the overall purpose of the asset freezing measures system. However the EDPS encourages the Commission to evaluate, in general and on a case by case

[100] There are several possibilities for persons subject to sanctions to request a review and submit evidence in their favour. They can launch a request via their country of residence or nationality, or directly to the Ombudsperson at the 1267 Sanctions Committee. See section 7 (a) to (c) of the 1267 Sanctions Committee's Guidelines Of The Committee For The Conduct Of Its Work.
[101] Section 7 (e) to (h) and Section 10 of the 1267 Sanctions Committee's Guidelines Of The Committee For The Conduct Of Its Work, available under: http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.
[102] See the Annex to the 1267 Sanctions Committee's Guidelines of the Committee for the Conduct of Its Work, point 2, as well as point 6 (a) and (b)).
[103] Article 7d (2) of Regulation 881/2002.
[104] See for instance IDs [...].

basis, the need to minimize the processing of such data in case the identification of the concerned person can be easily reached without recourse to this sensitive data.

In addition, the Commission should verify the necessity to include general national identification numbers in the publicly accessible online consolidated sanctions list.

**Recommendation**: The Commission should reflect on ways to minimize the processing of unique identifiers.

### 3.9. Rights of access and rectification

Article 13 of the Regulation grants data subjects a right of access to data stored about them. Article 14 grants the right to have inaccurate or incomplete data rectified "without delay". According to Article 20, certain restrictions may be imposed on these rights if they are necessary for a number of reasons enumerated in that Article.

*Right of access*
The Commission submitted that it applies the rules of the Regulation, namely that it grants data subjects access to data held about them upon request and that the time limit for granting access is three months. If the file contains classified information, access would not be granted unless the information is declassified before, in accordance with the Commission Rules of Procedure.

Although the notification does not specify whether the Commission has already implemented specific procedures, the EDPS requires the Commission to establish clear, transparent and homogeneous rules or guidelines to allow data subjects to have access to all of their own personal data in relation to all regulations covered by the notification. The procedure should be explained in any communication to the data subject and be applicable even in case the person is not directly reachable, namely when the listing is only published in the Official Journal and online.

*Right of rectification*
As regards rectification, the Commission submitted that, for UN listings, the Commission transfers requests to the UN Sanctions Committee while, for autonomous EU listings, such requests are transferred to the Council. Depending on the partition of competences under the different Regulations on asset freezes, the Commission or the Council, amend accordingly the lists. The Commission then subsequently includes the rectifications in the database and the online consolidated sanctions list.

The Commission did not specify the delay within which the rectification can be guaranteed to the data subject. The EDPS therefore recommends the Commission to establish rules and/or guidelines with a fixed and short delay within which the rectification of personal data shall be done.

*Right of blocking*
The Commission does not report any activity in relation to possible requests by the data subjects to block the data pursuant to Article 15 of the Regulation. Any amendment of the list must be done through the procedures specified above, and involve ultimately the adoption and publication of official legislative acts to be published in the Official Journal.

*Right of erasure*
If a review procedure leads to the result that a person's data has been stored unlawfully pursuant to Article 16 of the Regulation, additional measures on top of a simple removal from

the list would have to be taken, in order to publicly "clear" the names of wrongfully listed persons. As it is not possible to remove data from the official record in the Official Journal once published, a corrigendum stating that a person had been unlawfully included in the list should be published in the Official Journal. This is to be distinguished from cases in which the initial decision to list was lawful, but the person is removed at a later stage when new information has become available (e.g. after charges have been dropped against persons listed under Regulation 2580/2001).

**Recommendations**: The Commission should establish rules and/or guidelines to establish clear, transparent and homogeneous rules to allow data subjects to exercise their right of access and/or rectification to all of their personal data in relation to all regulations covered by the notification.

The Commission should propose the rule according to which, in case a listing has been declared originally unlawful on the basis of the review procedures, a corrigendum in the Official Journal is published mandatorily.

### 3.10. Right to object

Article 18(a) of the Regulation grants data subjects a right "*to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her, except in the cases covered by Article 5(b), (c) and (d)*".

According to the notification, this right is not granted to data subjects as all processing operations would be based on Article 5(b) of the Regulation. However, as mentioned above in paragraph 3.3, the EDPS considers that many of the processing operations covered by the notification are to be rather considered as covered by the legal basis of Article 5(a).

The distinction between the two legal bases has an important effect on the rights of the data subjects. Qualifying all the processing activities covered by this prior check by Article 5(b) would have the effect of depriving the concerned persons of the possibility to object to the processing.

Certainly the EDPS is aware of the fact that the activities of establishing and amending the lists and the processing connected to the publication and information exchange, which all involve processing of personal data, are at the core of the purpose of the asset freezing measures. Indeed the whole process is set up in order for economic operators to be able to quickly and clearly identify the names and personal details of persons whose assets have to be frozen on the basis of UN or EU autonomous listings. Should a concerned person have the possibility to object to the processing of his personal data for any reason, the circumvention of the asset freezing mechanism would be unjustifiably easy.

However, Article 18(a) requires that the objection has to be based on "*compelling legitimate grounds*" and that the objection has to be "*justified*". A concerned person would have to meet this standard in order to be able to object to any of the processing activities identified above which fall under Article 5(a) of the Regulation. Such definition is broad and it is difficult to predict which type of compelling legitimate grounds the Commission would require in order to accept the objection. A restrictive application might require that a concerned person would have to present justified reasons that would overcome the grounds for listing on which the competent UN Sanctions Committee or the Council have decided to insert the relevant personal names and details. A more lenient approach would allow an objection based on legitimate procedural issues regarding the processing itself. Therefore, the uncertainty about the possibility for a data subject to exercise his or her right of objection is high.

The EDPS notes that, in the context of Regulation (EC) 881/2002, the review procedure set out in Article 7a can substantially be considered an equivalent of Article 18(a) of the Regulation. Indeed, the concerned person has the right to express his or her views after being transmitted the statement of reasons and, as a consequence, the Commission assisted by the Member States and the Sanctions Committee are required to review the listing. Such review can also be requested a second time, based on "*substantial new evidence*". The result of this review is forwarded to the competent Sanctions Committee. As a consequence the United Nations can decide to de-list a person, after which the Commission is obliged to amend the Annex.

Such a procedure, which aims at formally introducing the right to be heard and in general reflects the due process principles, has been triggered by the Courts' case law and is welcomed by the EDPS. The positive effect of this provision in terms of personal data protection is that this procedure overcomes the limitation to the applicability of the right to object for the data subject. In the EDPS' view, this review procedure should be formally extended to all legislative instruments which implement UN or EU autonomous listings[105] in the Union legal order, in order to guarantee a fair and legitimate personal data processing for all the persons concerned by the listings. Such extension would allow the creation of a common procedure for review and allow the right to object on justified and verifiable grounds for all processing activities.

**Recommendation**: Extend the procedure for review of listing to all regulations covered by this prior check and report to the EDPS within 6 months.

### 3.11. Information to the data subject

Articles 11 and 12 concern the information that the data controller must provide to the data subject in relation to the processing activities, respectively, when the personal data have been collected directly by the controller (Article 11) or when the data have not been supplied by the data subject directly (Article 12). This information must include *–inter alia–* the identity of the controller, the purposes of the processing, the recipients of the data, the existence of the right of access to and the right to rectify the data.

In principle, according to Article 12(1), data subjects shall be informed of the processing of personal data about them which has not been obtained from them "*at the time of undertaking the recording of personal data or, if a disclosure to a third party is envisaged, no later than the time when data are first disclosed*". Exemptions from this right to information are envisaged in Article 20 (a) and (d) of the Regulation, allowing restrictions if necessary for "*the prevention, investigation, detection and prosecution of criminal offences*" or "*the national security, public security or defence of the Member States*", respectively. In these cases, data subjects have to be informed of the principal reasons for the restriction and their right to recourse to the EDPS (Article 20(3)); even the provision of this information may be deferred for as long as it would deprive the restriction of its effect (Article 20(5)).

In the context of the present prior check, as mentioned in paragraph 2.3.1 above, the Commission submitted that it supplies the "information to be given to the data subject" when it sends letters notifying data subjects of their listing and of the relevant statement of reasons

[105] Of course, appropriate adaptations should be introduced for EU autonomous listings, which exclude any role of the UN and see a stronger role for the Council.

under Regulation (EC) 881/2002. If the address of the person is not known, a notice is published on the Official Journal. There is no information before this point in time, although the processing has already started.

For the initial listing decision, this deferral is justified by the need for a "surprise effect" of the asset freeze, which is a justification that can be based on Article 20(1)(a) and (d) of the Regulation.[106]

However, the letter's content only refers to the review process, not to the initial listing as such. This is evidenced by formulations such as "*The follow-up to this letter requires the recording of your personal data* [...]" and "*The personal data will be handled in accordance with the rules of Regulation (EC) No 45/2001* [...]" (emphasis added). In this sense, it mentions what will happen during the review process, but does not inform data subjects of the processing that led to the listing decision.

According to Articles 20(3) and (5) information to the data subject of the reasons of the deferral can be postponed only until the restriction (of the right of information) is no longer necessary in order not to deprive the initial sanction of its effect. In the context of Regulation (EC) 881/2002, the letter sent to the concerned person at this later stage should therefore clarify the reasons for the postponement pursuant to Article 20(3), given that the restriction has already fulfilled its purpose once the data subject cannot subtract his or her assets to the freeze. The letter sent by the Commission and the notice in the Official Journal should be amended in order to include the reasons for the deferral pursuant to Article 20(3) of the Regulation.

Furthermore, in the extracts supplied by the Commission, data subjects are informed that their data will be processed, which recipients data may be forwarded to, that they should address the Commission for more information on how to exercise their rights and on which legal basis the processing takes place. In terms of the data categories processed, the letter only refers generally to "*your personal data*", citing "*name, address etc.*" as examples. The information on the purposes of the processing is vague and should be more precise. Based on the information available, the letter fails to inform data subjects of the identity of the data controller, the legal basis for the processing operations for which the data are intended, the time-limits for storing the data and the right to have recourse to the EDPS.

However, the deferral of the information to be provided pursuant to Articles 11 and 12 of the Regulations can only be relied on for the first listing decision, but not for subsequent listing decisions, e.g. decision on continuous listing (see paragraph 2.3.5), or when new data is supplied to the relevant authorities. As clarified by the General Court for listings under Regulation (EC) 2580/2001, when the funds are already frozen, there is no further need for a "surprise effect", and thus "[a]*ny subsequent decision to freeze funds must accordingly be preceded by the possibility of a further hearing and, where appropriate, notification of any new evidence*."[107] In these cases, if the data subject has not already received the information, the Commission should provide him or her with the information pursuant to Article 11 and 12 as soon as it starts processing the updated personal data.

It is also noteworthy that Regulation (EC) 881/2002 does not contain an obligation to submit updated information to the data subject, e.g. when the statement of reasons has been amended.

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[106] See *Organisation des Modjahedines du peuple d'Iran v Council* pts. 128-130, as well as *Kadi and Al Barakaat International Foundation* v *Council and Commission*, pts. 339-341 to the same effect.
[107] See *Organisation des Modjahedines du peuple d'Iran v Council* pts. 128-130,

Neither does the Commission refer to letters containing such information. Nonetheless, Article 12 of the Regulation demands that data subjects be informed of such new information.

Regulation (EC) 2580/2001 does not include a legal obligation to supply a statement of reasons to the concerned persons. According to the Commission, such statements are supplied by the Council nonetheless following a judgment by the Court.[108] Although the notification does not mention what the Commission does in order to comply with Articles 11 and 12 of the Regulation in relation to all the other regulations covered by the prior check, all the observations made in relation to the information as regards Regulation (EC) 881/2002 also apply to regulation (EC) 2580/2001 and to the others.

In this regard, it is also noteworthy that the Commission only supplies statements of reasons when explicitly required to do so by the relevant Regulations. However, the obligation to supply information to the data subject as established in Articles 11 and 12 of the Regulation exists independently from the Regulations on restrictive measures and shall be complied with in any case.

**Recommendations:** For decisions on continuous listing, or when new personal data on an already listed person are processed by the Commission, provide additional information as soon as it is available. Amend the standard letter informing data subjects of their listing so it fulfils the requirements of Articles 11, 12 and 20 of the Regulation. Send letters containing the information required under Articles 11 and 12 of the Regulation, as applicable, to data subjects in all sanctions programmes, including information on updates of the information on which listing decisions are based.

### 3.12. Security measures

[...]

### 3.13. Future notifications

This prior check is intended as an "umbrella" Opinion including all the Regulations mentioned in point 2.2.1. It is also likely that more Regulations imposing restrictive measures will be adopted in the future.

Submitting a completely new notification for prior checking for each new Regulation would cause substantial additional work. Taking into account that the provisions of the existing Regulations imposing restrictive measures and the processing operations carried out are largely similar, and that the recommendations contained in this Opinion are also meant as a benchmark for the implementation of restrictive measures in general, there would be little added value in carrying out a full prior checking procedure each time a new Regulation imposing restrictive measures is adopted. For this reason, this Opinion and the recommendations therein shall be seen as applying to future Regulations imposing restrictive measures insofar as the processing operations foreseen are substantially identical to those analysed in this prior check and take the recommendations contained in this Opinion into account.

In order to keep the EDPS informed of new legislative developments in this area and to enable him to check whether any possible future Regulations imposing restrictive measures in

[108] According to the Commission, this is the outcome of the judgment in *Organisation des Modjahedines du peuple d'Iran v Council*. Article 12 (2) of Regulation (EU) 101/2011 on Tunisia, on the other hand, requires the Council to inform listed persons of the reasons for their inclusion.

fact are substantially identical to those analysed in this prior check, the Commission should inform the EDPS of any new Regulations by updating the notification accordingly. This can be done via a note from the DPO to the EDPS. The EDPS reserves the right to issue a new prior check opinion, should the legislative framework or the processing operations change significantly.

## 4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001, providing the considerations elaborated above are fully taken into account. This shows that it is possible to design a procedure for implementing restrictive measures such as asset freezing in a way that neither compromises their efficacy nor the data subjects' rights, while being in line with the Court's case law.

To recall, the EDPS recommends that the Commission should:

- Conduct a review of the online consolidated sanctions list to remove data relating to suspected offences, criminal convictions or security measures if necessary;
- Conduct a review of all the processing activities carried out in relation to suspected offences in order to ensure a clear legal basis and to avoid unnecessary publication of sensitive data in the Official Journal and the online sanctions list;
- Consider the necessity of processing each category of personal data in relation to the need to identify the persons concerned by the asset freezing measures. In particular, such assessment must always be carried out in relation to the personal data of family members of listed persons;
- Ensure that data used for statistics are provided by the Member States in an anonymous way or, if this is not feasible, the Commission should anonymise them as soon as possible in the process of creation of the statistics on aggregate amounts.
- Not use UN press releases as sole sources to identify and insert names of addressees of the restrictive measures in the annexes;
- Physically delete data from the database once a delisting decision is taken and they are not needed with regard to lawsuits against the listing;
- Explore possibilities to minimise the transfer of personal data when replying to requests for assistance and implement them if possible;
- Inform data subjects of the reasons for transfers to the Sanctions Committee and evaluate the need for transfers to other third countries;
- Reflect on ways to minimize the processing of unique identifiers;
- Establish rules and/or guidelines to introduce clear, transparent and homogeneous rules to allow data subjects to exercise their rights of access and/or rectification to all of their personal data in relation to all regulations covered by the notification:
- Propose the rule according to which, in case a listing has been declared originally unlawful on the basis of the review procedures, a corrigendum in the Official Journal is published mandatorily;
- Extend the procedure for review of listing to all regulations covered by this prior check and report to EDPS within 6 months;
- For decisions on continuous listing, or when new personal data on an already listed person is processed by the Commission provide, additional information as soon as it is available;
- Amend the standard letter informing data subjects of their listing so it fulfils the requirements of Articles 11, 12 and 20 of the Regulation;
- Send letters containing the information required under Articles 11 and 12 of the Regulation, as applicable, to data subjects in all sanctions programmes, including information on updates of the information on which listing decisions are based.

The Commission should inform the EDPS of measures taken to address these recommendations within three months of the adoption of this Opinion, unless specific recommendations leave more time.

Done at Brussels, 22 February 2012

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