COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.7.2009
COM(2009) 395 final

2009/0111 (CNS)

Proposal for a

COUNCIL REGULATION

amending Council Regulation (EC) No 314/2004 concerning certain restrictive measures in respect of Zimbabwe

EXPLANATORY MEMORANDUM

(1) On 18 February 2002, the Council decided to impose restrictive measures in respect of Zimbabwe in response to the serious violations of human rights, including violations of the freedoms of opinion, association and peaceful assembly in that country (Common Position 2002/145/CFSP). In view of its continuing concern about the human rights situation in Zimbabwe, the Council has adopted Common Position 2004/161/CFSP to extend and amend the restrictive measures in respect of Zimbabwe. These measures were last extended by means of Common Position 2009/68/CFSP of 26 January 2009.

(2) Article 5(1) of Common Position 2004/161/CFSP stipulated that the freezing of funds and economic resources would apply to "individual members of the Government of Zimbabwe and any natural or legal persons, entities or bodies associated with them" as listed in the Annex to the Common Position. By means of Common Position 2008/632/CFSP of 31 July 2008 the Council broadened this scope by adding "any other natural or legal persons whose activities seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe".

(3) Regulation (EC) No 314/2004 concerning certain restrictive measures in respect of Zimbabwe implements the restrictive measures provided for in Common Position 2004/161/CFSP, to the extent that they fall within the scope of the Treaty establishing the European Community.

(4) The main purpose of this proposal is to align Regulation (EC) No 314/2004 with the amended Common Position 2004/161/CFSP.

(5) Decisions taken in respect of the Annex to Common Position 2004/161/CFSP state the individual and specific grounds for the listing of each natural or legal person, entity or body included in that list. The procedure proposed for amending the part of Annex III to Regulation (EC) No 314/2004 which covers natural or legal persons whose activities seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe, and who are not linked to the governing regime of Zimbabwe, should include the publication of a notice on how to submit information in order to enable the persons, entities and bodies listed to exercise their right to be heard. Following the examination of any information submitted by a listed person, entity or body, the Commission should take a new decision in accordance with Regulation (EC) No 314/2004.

(6) In order to cover "any other natural or legal persons whose activities seriously undermine democracy, respect for human right and the rule of law in Zimbabwe", the legal basis of the proposed Regulation must include Articles 60, 301 and 308 of the EC Treaty. Indeed, the European Court of Justice held, in its Judgment of 3 September 2008 in joined cased C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council, that measures vis-à-vis "third countries" in the sense of Articles 60 and 301 of the EC Treaty include the freezing of funds and economic resources of the rulers of a third country and of individuals and entities associated with them or controlled, directly or indirectly, by them. These Articles did not provide a suitable legal base for the freezing of funds and economic resources of individuals and entities not having such a link to the governing regime of a third country. The Court of Justice accepted, however, that Articles 60, 301 and 308 of the

EC Treaty constitute a sufficient legal base for the freezing of funds and economic resources of such individuals and entities.

(7) A provision is proposed to provide clarity on the handling of classified information which may be provided in support of decisions taken in respect of the Annex to Common Position 2004/161/CFSP.

(8) Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, protects the right to privacy with respect to the processing of personal data. A provision is needed to provide clarity on the applicable rules for processing of personal data of listed individuals, and in particular for processing of data relating to offences, criminal convictions or security measures under Regulation (EC) No 314/2004.

(9) This proposal also comprises certain amendments of a technical nature, such as aligning the definition of funds and Article 13 on Community jurisdiction with the standard wording set out in the Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (Council document 15114/05 of 2 December 2005).

2009/0111 (CNS)

Proposal for a

COUNCIL REGULATION

amending Council Regulation (EC) No 314/2004 concerning certain restrictive measures in respect of Zimbabwe

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Common Position 2004/161/CFSP of 19 February 2004 renewing restrictive measures against Zimbabwe[1] as amended by Common Position 2008/632/CFSP of 31 July 2008 amending Common Position 2004/161/CFSP renewing restrictive measures against Zimbabwe[2],

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament[3],

After consulting the European Data Protection Supervisor,

Whereas:

(1) Regulation (EC) No 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe[4] implements several restrictive measures provided for by Common Position 2004/161/CFSP, including the freezing of funds and economic resources of certain natural or legal persons, entities and bodies. It is necessary to align the scope of the freezing of funds and economic resources of Regulation (EC) No 314/2004 with Common Position 2004/161/CFSP as amended by Common Position 2008/632/CFSP.

(2) Decisions taken in respect of the Annex to Common Position 2004/161/CFSP state the individual and specific grounds for the listing of each listed natural or legal person, entity or body. The revised procedure for amending the part of Annex III to Regulation (EC) No 314/2004 which covers natural or legal persons whose activities seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe, and who are not linked to the governing regime of Zimbabwe, should include the publication of a notice on how to submit information, in order to enable the listed persons, entities and bodies to exercise their right to be heard. Following the

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1 OJ L 50, 20.2.2004, p.66.
2 OJ L 205, 1.8.2008, p. 53.
3 OJ C , , p. .
4 OJ L 55, 24.2.2004, p. 1.

examination of any information submitted, the Commission should take a new decision in accordance with Regulation (EC) No 314/2004.

(3) In order to implement Common Position 2004/161/CFSP, as amended, this Regulation should provide for the freezing of funds and economic resources of natural and legal persons, entities and bodies who are not linked to the governing regime of Zimbabwe. In view of this, the legal basis of this Regulation should include not only Articles 60 and 301, but also Article 308 of the EC Treaty, in line with the case-law of the Court of Justice.

(4) Provision should be made for dealing with classified information provided by the Council or by a State.

(5) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union[5] and notably the right to an effective remedy and to a fair trial, the right to property and the right to protection of personal data. This Regulation should be applied in accordance with those rights and principles.

(6) The purpose of Regulation (EC) No 314/2004 is to bring about an end to the serious violations of human rights in Zimbabwe by applying restrictive measures against the Government of Zimbabwe, those who bear prime responsibility for and those who commit such violations. In order to create maximum legal certainty within the Community, the names and other relevant data with regard to natural or legal persons, entities and bodies, whose funds and economic resources should be frozen in accordance with Regulation (EC) No 314/2004, should be made publicly known. Processing by the Commission of relevant data relating to criminal offences committed by listed natural persons, and to criminal convictions or security measures concerning such persons should be authorised subject to appropriate specific safeguards.

(7) Any processing of personal data of natural persons under this Regulation should respect Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[6] and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[7].

(8) It is appropriate to align certain parts of Regulation (EC) No 314/2004 with more recent standard wording for Regulations on restrictive measures.

(9) Regulation (EC) No 314/2004 should therefore be amended accordingly,

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5 OJ C 364, 18.12.2000, p. 1.
6 OJ L 8, 12.1.2001, p. 1.
7 OJ L 281, 23.11.1995, p. 31.

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 314/2004 is hereby amended as follows:

(1) Article 1 is amended as follows:

(a) Point (b) is replaced by the following:

"(b) "funds" means financial assets and benefits of every kind, including but not limited to:

(i) cash, cheques, claims on money, drafts, money orders and other payment instruments;

(ii) deposits with financial institutions or other entities, balances on accounts, debts and debt obligations;

(iii) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;

(iv) interest, dividends or other income on or value accruing from or generated by assets;

(v) credit, right of set-off, guarantees, performance bonds or other financial commitments;

(vi) letters of credit, bills of lading, bills of sale;

(vii) documents evidencing an interest in funds or financial resources;"

(b) Point (e) is replaced by the following:

"(e) "freezing of economic resources" means preventing their use to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them."

(2) Article 6 is replaced by the following:

"1. All funds and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities or bodies listed in Annex III shall be frozen.

2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in Annex III.

3. The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to promote the transactions referred to at paragraphs 1 and 2 shall be prohibited.

4. Annex III shall consist of natural and legal persons, entities and bodies designated by the Council in accordance with Common Position 2004/161/CFSP as amended. Annex III shall comprise a Part A listing individual members of the Government of Zimbabwe and natural or legal persons, entities or bodies associated with any of them, and a Part B listing other natural or legal persons, entities or bodies whose activities seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe.

5. The prohibition set out in paragraph 2 shall not give rise to liability of any kind on the part of the natural or legal persons or entities concerned, if they did not know, and had no reasonable cause to suspect, that their actions would infringe this prohibition."

(3) In Article 7, the following paragraph 3 is added:

"3. Article 6(2) shall not prevent financial or credit institutions in the Community from crediting frozen accounts where they receive funds transferred by third parties to the account of a listed natural or legal person, entity or body, provided that any additions to such accounts will also be frozen. The financial or credit institution shall inform the competent authorities in the Member States, as listed in Annex II, about such transactions without delay."

(4) In Article 11, the current text is numbered as paragraph 1 and the following paragraph 2 is added:

"2. The Commission shall publish a notice regarding the modalities for submitting information in relation to Annex III."

(5) The following Articles 11a, 11b and 11c are inserted:

"*Article 11a*

1. Where the Council decides, in accordance with Common Position 2004/161/CFSP, to list a natural or legal person, entity or body whose activities seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe, and who is not linked to the governing regime of Zimbabwe the Commission shall take a provisional decision on the amendment of Part B of Annex III without delay.

2. Once this decision has been taken, the Commission shall without delay publish a notice regarding the modalities for submitting information in relation to Annex III, providing the person, entity or body concerned an opportunity to express his, her or its view on the matter.

3. Following the examination of any information submitted by the persons, entities or bodies listed in Part B of Annex III, the Commission shall take a final decision.

Article 11b

1. If the Council or a State submits classified information, the Commission shall treat such information in accordance with Commission Decision 2001/844/EC, ECSC, Euratom[8] and, where applicable, the agreement on the security of classified information concluded between the European Union and the submitting State.

2. Documents classified at a level corresponding to 'EU Top Secret', 'EU Secret' or 'EU Confidential' shall not be released without the consent of the originator.

Article 11c

1. The Commission shall process personal data in order to carry out its tasks under this Regulation. These tasks include:

   (a) preparing amendments of Annex III to this Regulation;

   (b) consolidating the contents of Annex III in the electronic, consolidated list of persons, groups and entities subject to EU financial sanctions available on the Commission website[9];

   (c) processing of information concerning the grounds for listing; and

   (d) processing of information on the impact of the measures of this Regulation such as the value of frozen funds and information on authorisations granted by the competent authorities.

2. Annex III shall only include the following information on listed natural persons:

   (a) surname and given names, including alias names and titles, if any;

   (b) date and place of birth;

   (c) nationality;

   (d) passport and ID card numbers;

   (e) fiscal and social security numbers;

   (f) sex;

   (g) address or other information on whereabouts;

   (h) function or profession;

   (i) the date of designation referred to in Article 7(2)(b);

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8 OJ L 317, 3.12.2001, p. 1.

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

(j) the grounds for listing, if the function is not a sufficient ground for listing.

3. Annex III may also include the following personal data relating to listed natural persons, if such data is provided by the Council and is necessary in a specific case for the sole purpose of verification of the identity of the listed natural person in question:

(a) surname and given names of the natural person's father;

(b) surname and given names of the natural person's mother.

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

4. The Commission may process relevant data relating to criminal offences committed by listed natural persons, and to criminal convictions or security measures concerning such persons, only to the extent that such processing is necessary for the review of the views on the grounds for listing expressed by the natural person concerned, subject to appropriate specific safeguards. Such data shall not be made public or exchanged.

5. For the purposes of this Regulation, the Commission unit listed in Annex II is designated as "controller" within the meaning of Article 2(d) of Regulation (EC) No 45/2001, in order to ensure that the natural persons concerned can exercise their rights under Regulation (EC) No 45/2001."

(6) Article 13 is replaced by the following:

"*Article 13*

This Regulation shall apply:

(a) within the territory of the Community, including its airspace;

(b) on board any aircraft or any vessel under the jurisdiction of a Member State;

(c) to any natural person inside or outside the territory of the Community who is a national of a Member State;

(d) to any legal person, entity or body which is incorporated or constituted under the law of a Member State;

(e) to any legal person, entity or body in respect of any business done in whole or in part within the Community."

Article 2

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

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

Done at Brussels, […]

For the Council
The President […]