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European cooperation in counter-terrorism and the case of individual sanctions

by

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Abstract

This paper assesses European cooperation in counter-terrorism, which was prompted by the terrorist attacks at the beginning of this century. The first part of the paper will provide a description of the main features of the European counter-terrorism policy together with the most important achievements attained in this field. Attention is then focused on the combat against terrorist financing; in particular on the implementation within the European Union of the regime of targeted financial sanctions adopted by the United Nations Security Council. The transposition of these measures within the EU uncovered the shortcomings regarding the institutional structure of the European Union during the pre-Lisbon period and the problems ensuing from the UN regime of financial sanctions, most notably as regards fundamental rights. Finally, the article evaluates the enhancements introduced by the Treaty of Lisbon and the future challenges in this field.

Key-words

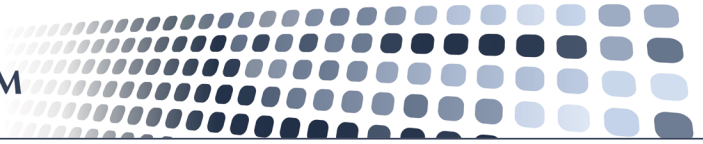
European counter-terrorism strategy, financial restrictive measures, UN resolutions, judicial cooperation in criminal matters, Area of freedom, security and justice (AFSJ), terrorism.



1. Outline of the European Union cooperation in counter-terrorism

After the terrorist attacks on 11 September 2001 most States and international organisations started to issue measures to cope with international terrorism, among them the European Union (EU). A concerted reaction by European Member States was all the more necessary since the EU constitutes a space without internal frontiers. In fact, since the Amsterdam Treaty came into force in 1999, the *Schengen acquis*^I was integrated within the framework of the European Union, extending the gradual abolition of controls at common internal frontiers to all participating Member States^{II}. Consequently, no Member State can now deal with international organized crime, and above all terrorism, on its own. And yet the need for cooperation in preventing and fighting cross-border organized crime among European Member States is crucial.

The EU always had very limited powers in the field of police and judicial cooperation, Member States privileging *intergovernmental* action. The cooperation in Justice and Home Affairs (JHA), which among others includes the police and judicial cooperation in criminal matters, started as an *informal* collaboration among States^{III}. All negotiations in this field were framed as public international law rather than Community law. It was only when the Maastricht Treaty came into being in 1993 that a *formal*, but still intergovernmental system for JHA cooperation was created. The Treaty of Maastricht provided for three different approaches to integration commonly referred to as “pillars”. Next to the first pillar referring to the European Community (EC) and governed by the so-called community method, there were other two pillars: respectively, the Common Foreign and Security Policy (second pillar) and the Cooperation in Justice and Home Affairs (third pillar). Under the third pillar were collected many different policies ranging from asylum to judicial cooperation in criminal matters^{IV}. Within the JHA pillar the powers of the European institutions were very limited, and the intergovernmental method prevailed. Many aspects of the third pillar testify that condition: the European Commission did not enjoy monopoly on proposal; the procedure for the adoption of legal instruments required almost always unanimity in the Council; the European Parliament (EP) used to play a very marginal role; the European Court of Justice (ECJ)^V did not enjoy full jurisdiction; the third



pillar had *ad hoc* legal instruments that differed from those of the first pillar; lastly, the effect of the measures of the third pillar was unlike the acts of the first pillar, for example, by rule they didn't have direct effect^{VI}.

With the entry into force of the Amsterdam Treaty the new concept of an area of freedom, security and justice (AFSJ) appeared. This new treaty introduced some important changes to the so-called third pillar; it transferred the areas of immigration, asylum, borders and civil law within the first pillar, while leaving judicial cooperation in criminal matters and police cooperation under the third. Even if divided, the two areas once constituting the JHA pillar remained united in terms of Union's objective. That was, under article 2 TEU, fourth indent, the maintenance and development of the Union as an area of freedom, justice and security. The AFSJ was designed for the creation of a common European space affording to European citizens an adequate level of "security and justice", were the improvements undertaken with relation to the *freedom of movements* goes hand in hand with progress in the field of *police and judicial cooperation*.

The Amsterdam Treaty generally enhanced the role of the European institutions and went in the direction of shortening the distances between the procedures governing the first and the third pillar, but the latter remained mostly intergovernmental^{VII}. Until the Treaty of Lisbon there were no further amendments touching upon the AFSJ worthy of mention.

That was the state of European cooperation in JHA when the 9/11 attacks took place. It should be noted that the AFSJ includes those policies normally falling under the interior justice and home affairs ministries of national States, fields in which the European Member States jealously guard their sovereignty. Accordingly, the European Union could not play a prominent role in the field of counter-terrorism; indeed the fight against organized crime is usually a primary responsibility of local and national authority. Therefore the action of the European Union in the fight against terrorism is mostly confined to coordination between Member States' own policies. Besides, the EU role in counter-terrorism was never intended to supplant the efforts of its Member States; rather it has always been presented as a value added to national policies. This is clear when one reads the European Union Counter-Terrorism Strategy (CTS) of 2005^{VIII}, which reorganized into a single framework the unsystematic measures adopted up to that moment by the EU in response to the terrorist threat. This overall strategy is based upon four



strategic objectives: Prevent, Protect, Pursue and Respond. Each of them covers one particular aspect of the EU strategy to dismantle current terrorism and prevent future radicalisation. Equally, in order to assure a comprehensive and coordinated effort of the Union, the European Council had already established in 2004 the position of the Counter-Terrorism Co-ordinator^{IX}.

However, the lack and uncertainty of powers given to the EU in the field of counter-terrorism has proven to be a significant challenge. Firstly, it prevented the EU from planning a concerted counter-terrorism strategy from the beginning, and made EU response to terrorism event-driven rather than scheduled. Secondly, the EU has been experiencing difficulties in ensuring that the AFSJ cooperation took place according to the democratic principle of accountability, the rule of law and fundamental rights. The pre-emption of power retained by the Council, the marginalisation of the European Parliament and the numerous cases held before the European Union judicature attest to some of the problems of European counter-terrorism cooperation. The next section of the paper will focus on the concrete measures adopted by the EU to enhance judicial cooperation among Member States authorities with a view to contrasting organized crime and terrorism.

2. The concrete response of the European Union

The 9/11 attacks and still more the bombings that directly concerned Europe – Madrid and London – fostered the existing cooperation and prompted further integration in the field of counter-terrorism in particular, and in that of police and judicial cooperation in general. Immediately after the 9/11 attacks, the European Heads of State and Government gathered in a special Council meeting^X and issued a Plan of Action containing the European policy to combat terrorism threat. The main strands of action constituting the first European counter-terrorism strategy were: the enhancement of police and judicial cooperation; the development of the existing international legal instruments; the blockage of international financing of terrorism; the strengthening of air security; and finally, the coordination of European Union's external action. The unprecedented Council meeting suggested the adoption of concrete measures that would constitute the most important achievements of the Union in the fight against organized crime and against terrorism.



The first important measure was the introduction of the European arrest warrant^{XI}, which supplanted the former system of extraditions between Member States and was designed in order to reduce the formalities for cooperation between national judicial authorities. The Council then considered of utmost importance to agree on a common list of acts that should be considered terrorist offences^{XII} by all EU national authorities. Apart from strengthening mutual trust between Member States, a common definition of terrorist offences is very useful for enhancing judicial cooperation among Member States since it guarantees a common ground for devising national counter-terrorism policies. It should, however, be kept in mind that not every Member State had already experienced national or international terrorism, and above all some Member States had never instituted counter-terrorism legislations.

Both the EU arrest warrant and the definition of terrorist offences were measures already set in the agenda of the Tampere European Council^{XIII} of 1999, the first multiannual programme striving for the development of “the area of freedom, security and justice”. It was namely at the Tampere meeting that the European Council endorsed the principle of mutual recognition as the cornerstone of judicial cooperation both in civil and in criminal matters. Another plan previously proposed was the establishment of Eurojust^{XIV}; a European coordination unit among national prosecutors and magistrates to reinforce the effectiveness of national judicial authorities of the Member States when prosecuting and conducting criminal investigations of cross-border and serious organized crime cases.

In addition to the aforementioned measures, a very important commitment of both the European and the international fight against terrorism aims at cutting off the financing of terrorism. The combat against terrorism financing is based on two main strands of action: the first aims at directly cutting off the funds and economic resources of terrorist suspects or terrorism supporters, the other at stopping the misuse of the financial system in order to channel money (criminal or not) to terrorist purposes^{XV}. In the first case, the fight against terrorism financing makes use of a list of natural or legal persons related to terrorism for the purpose of freezing their assets. This practice is based on the anti-terrorism regime of sanctions endorsed by the United Nations Organisation (UN) before and in the aftermath of September 11. The UN Security Council (UNSC) has enacted two types of sanctions: the first introduced by Resolution 1267 of 1999^{XVI} and the other



governed by Resolution 1373 of 2001^{xvii}. This latter constitutes a direct response to the 9/11 attacks and calls upon UN member States to adopt a number of general obligations to contrast international terrorism. The third pillar of the European Counter-Terrorism Strategy^{xviii}, “Pursue”, also covers the action to be taken by the European Union in this field. The following part will further investigate this aspect of the European strategy against terrorism. In particular, this paper addresses EU legislation concerning the financing of terrorism, specifically the measures imposing the freezing of assets belonging to persons and entities related to terrorism

3. Counter-terrorism targeted financial sanctions: a system of multilevel intervention

The international fight against terrorism is based on a certain number of actions enforced on a multilevel basis; normally national States, regional and international organizations are involved. Since the end of the nineties the United Nations Security Council has been adopting resolutions to counter terrorism, and among these measures aiming at tackling international terrorism, the ones creating the most concern are *targeted sanctions*^{xix}. This is a special category of sanctions, not involving the use of armed force, adopted under Chapter VII of the UN Charter for the purpose of restoring international peace and security wherever there is a threat to peace. The specific feature of targeted sanctions lies in the fact that they target natural or legal persons regardless of any *link* with a certain State or government^{xx}. Indeed, the imposition of these sanctions is justified by a specific behaviour or a personal quality of the target.

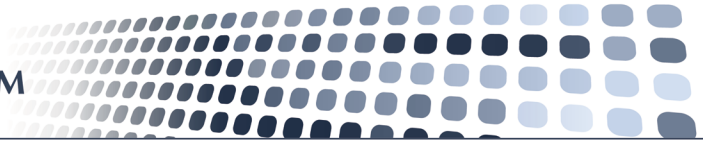
The most important sanctions regime was established by Resolution 1267 (1999) and Resolution 1333 (2000)^{xxi}, concerning Al-Qaeda, the Taliban and associated individuals and entities^{xxii}. Three main coercive measures form this sanctions regime: an asset freeze, a travel ban and an arms embargo^{xxiii}. The sanction attracting most attention, at least before Courts, is the *financial measure*. This is a *preventive* tool that aims at freezing all funds and financial assets belonging to individuals held to be close to international terrorism. Targeted sanctions are *preventive* in nature^{xxiv}, thus their charge is not based on a conviction but solely on intelligence information provided by UN Member States. These



administrative measures entail the use of financial instruments and institutions to apply coercive pressure on transgressing parties. In concrete terms, the UNSC Sanctions Committee^{xxv} provides a “Consolidated list” containing names and personal details of those natural or legal persons thought to be associated with terrorism.

When firstly enacted the sanctions regime effected by Resolution 1267 completely lacked a delisting procedure enabling targeted individuals to challenge their inclusion in the so-called “blacklist”. That was a significant gap in UN anti-terrorist action because restrictive measures entail heavy negative consequences for the individuals concerned. Fortunately this situation has been improved over the years; the UNSC has constantly ameliorated its practices, for instance improving access of petitioners to delisting procedures. Nevertheless, the way forward to a fair review mechanism was not firm, but responded to episodic criticisms raised by States, scholars and NGOs (See e.g. Biersteker and Eckert 2006; Ciampi 2006: 85; Eckes 2009). The latest improvement concerning delisting was introduced by UNSC Resolution 1904 (2009)^{xxvi}, which established the office of the Ombudsmanperson in charge of receiving and managing delisting requests forwarded by individuals and entities concerned by sanctions. So, about ten years after the first counter-terrorism resolution, the UNSC framed a delisting procedure trying to respect the international standard of protection of fundamental rights.

When assessing European strategy against terrorism one cannot ignore that this is made up of many measures enforced by different levels of government, first of all: the UN, the EU itself, and the States participating in both organisations. Accordingly one can speak of *multilevel* fighting against international terrorism; this suggests that all these levels cooperate for the ultimate objective of fighting international crime and maintaining international peace and security. However, the overlap between different legal systems led to problems of competency and coordination. The European Union found itself in an uncomfortable position, between the UN and its Member States. This happened because common European legislation was deemed necessary in order to avoid distortion of competition and to ensure maximum legal certainty within the EU. Besides, the European Community^{xxvii} wanted to assert itself as a global actor, able to implement Member States’ obligations under UNSC resolutions (Cremona 2009: 573). But its institutional structure, namely the third and the second pillar, was immature for such measures. In fact, the EU turned out to be unable to provide a firm response to the quest for justice advocated by



listed applicants and criticism was levelled against both the UN and the EU procedures governing the sanctions regimes (See Cameron 2006; Eckes 2009; Andersson et al. 2003; Cannizzaro 2009; Couzigou 2008; Eeckhout 2007).

The most important issues left unresolved by the UN sanctions regime regarded the review mechanism and the lack of transparency in the procedure leading to listing. This appeared evident in particular as regards targeted financial sanctions, which impinge upon several rights of alleged terrorists, which are: the right to property, the right to reputation, family rights and, possibly, the right to privacy. The UN review mechanism, once arranged, proved to be insufficient because it substantially mirrored some models of diplomatic protection. So, alleged terrorists could only submit a petition for delisting through the intermediary of their State (either of nationality or residence), and this was handled on a bilateral basis between the designating State and the petitioned State. Additionally, since financial sanctions are preventive in nature, blacklisting is not solely dependent a criminal charge or conviction but merely on intelligence information. There was a general lack of transparency surrounding listing and delisting procedures of the Sanctions Committee that, in any case, didn't notify targets either of their blacklisting or of the reasons justifying their inclusion on the list. Hence different problems affected the imposition of targeted financial sanctions; ranging from the lack of transparency of the procedure for blacklisting to the inefficiency of the review mechanism, which impeded petitioners from appealing to an independent authority.

As a consequence, the simple transposition of the UN targeted sanctions within the EU legal order led to the imposition through mixed EC and EU instruments of acts infringing upon the rights of targeted individuals. This situation challenged the autonomy of the European legal system and disregarded one of its fundamental principles, that is, respect for human rights. In particular, the problem of international counter-terrorism resolutions lay in the lack of adequate legal safeguards for alleged terrorists and thus on the infringement of their rights of defence. The individual aspect^{xxviii} that characterises targeted sanctions makes all the more evident the necessity for an efficient and fair review mechanism in order to afford *due process* rights to targets.

The introduction of restrictive measures within European Union law turned out to be troublesome in some particular ways. First of all, they involve the non-institutionalized relationship between the EU and the UN system. It is worth noting that the EU cannot be



a member of the UNO^{xxxix}, whereas the EU Member States join that organisation and have the duty to implement its acts. However, *ex art.* 48 of the UN Charter, regional organizations, such as the EU can carry out the measures decided by the UNSC on behalf of their Member States. The central question was whether the European Union pursuant to the pre-Lisbon Treaties had the competence to adopt targeted sanctions, that is, sanctions aimed directly against individuals rather than third States. Mostly through an expansionist^{xxx} use of the Treaty provisions, this competence was provided. The imposition of targeted economic sanctions required a two-step procedure and an inter-pillar legal basis: firstly, a CFSP decision was adopted, and then, on its authorization, a first pillar regulation^{xxxi}. At all events, the legal bases used for the introduction of the sanctions regimes within the EU legal order were not created to serve this purpose; this is the reason why EU competence was debated since it started to adopt these kinds of actions (Lang 2002: 63 ss). Secondly, as was already pointed out, restrictive measures created considerable concerns about human rights. Finally, those measures, and more particularly, the consequences of the violation of human rights, put the European legal order under stress as some fundamental principles of the Union were being ignored.

To sum up, the main shortcomings concerning the institutional structure of the EU consisted of: the lack of a clear legal basis, the exclusion of the European Parliament on a sensitive subject such as individual rights, and the limited powers of review attributed to the ECJ.

Through a series of important judgements, the Court of Justice of the European Union paved the way for an improvement in the protection of the rights of targeted individuals and stressed the need for a reform of the third pillar. As regards the legal basis, the contention *should* have finished with the arrival of the Treaty of Lisbon, which contains two articles that respond to former concerns about EU competence in this field^{xxxii}. Likewise the Lisbon Treaty lifted the divide between pillars offering a renewed institutional framework for AFSJ policies. However, once again the question of restrictive measures stands before the Court of Justice of the European Union.

4. The steady string of judgements delivered by the Court of Justice of the European Union



Six years after the first *Kadi* ruling of 2005^{xxxiii}, the European landmark judgement regarding individual sanctions, there are still cases concerning restrictive measures and their encroachment upon fundamental rights pending before the Court of Justice of the European Union^{xxxiv}. The first organ of the European judicature dealing with counter-terrorism *restrictive measures* was the former Court of First Instance (CFI), now the General Court^{xxxv}. Its judgement mostly drew criticisms in literature and was then reversed by the ECJ^{xxxvi}. Both the *Kadi* rulings attracted a large amount of attention and comments by European and international legal writers (See e.g. Cannizzaro 2009; Conforti 2006; de Burca 2009; De Sena and Vitucci 2009; Eckes 2009; Tridimas and Gutiérrez-Fons, 2009). The majority of them dealt with the following issues: the resort to *jus cogens* made by the CFI; the “dualistic or monistic” approach respectively applied by the CFI and ECJ; and in general, they lingered over the infringement of applicants’ fundamental rights. This analysis will primarily deal with the most important consequence of the *Kadi* cases: initially, with the judgement of the CFI, the establishment within EU law of a double standard of protection for alleged terrorists, then, with the appeal, the return to a single legal framework. This will describe the European response to the problems triggered by the transposition within its legal order of the UN counter-terrorism resolutions.

Since no other Court was available, alleged terrorists brought actions for annulment against counter-terrorism restrictive measures before the Court of Justice of the European Union. Nevertheless, the European judicature was not able to grant a clear and swift response to the quest for justice advanced by targeted individuals. Most problems regarded EU acts transposing UN sanctions, rather than restrictive measures operated on a European autonomous basis. The fundamental difference between the two restrictive measures regimes^{xxxvii} lies in the list of suspects. The UN blacklist is drawn up directly by the Sanctions Committee or the UN Security Council according to UN Resolution 1267 (1999), whereas the EU autonomous list applies to those alleged terrorists specifically identified by the EU Council according to UN Resolution 1373 (2001).

The Court of Justice held a significant number of judgements concerning both types of sanctions. The most important case regarding the EU *autonomous* sanctions regime is the *Organisation des Modjahedines du Peuple de l’Iran (OMPI)* case^{xxxviii}. The *OMPI* case of 2006 is the first successful challenge of a European counter-terrorism restrictive measure



operated against individuals. For the first time the Court of First Instance annulled, as far as the applicant was concerned, an act of the European Community. This was Council Decision 2005/930/EC^{XXXIX} implementing article 2(3) of Regulation EC 2580/2001^{XI}, which contained the updated list of persons and entities against whom the regulation applied. Indeed, the Court found that the Council decision listing the *OMPI* did not comply with the procedural safeguards normally afforded by the European legal order when a measure is liable to create adverse effects against an individual^{XLI}. *De facto*, the Court stated that the decision of the EU Council infringed upon the applicant's rights of defence and right to a fair hearing. According to the Court, the contested decision did not contain a sufficient statement of reasons and it was adopted through a procedure within which the applicant's right to a fair hearing was not observed. Furthermore the Court was not, even after the oral procedure, in a position to review the lawfulness of the decision; this was due to the shortage of file materials and information justifying the inclusion of the applicant in the list. Accordingly, the applicant was not even placed in the position to avail himself of the right of action before the Court.

Thanks to this judgement the EU Council improved its practice concerning listing and statement of reasons. The CFI maintained that alleged terrorists should be notified, either concomitantly or as soon as possible, about the specific information and material in the file that justify a listing decision according to art. 1(4) of Council Common Position 2001/931^{XLII}. In any case, they should be afforded the possibility to make known their view on the matter. In this connection, the EU Member States that gather information and issue the initial decision are *in primis* responsible to grant at national level the right to a fair hearing. At the same time, the Court recognised that there were significant restrictions to the rights of alleged terrorists, in particular as regards notification, since overriding considerations concerning the security of the European Union and of its Member States may preclude the disclosure of certain evidence. The Court restricted its review to checking that the rules of procedure, namely the procedural safeguards afforded to applicants, had been respected^{XLIII}.

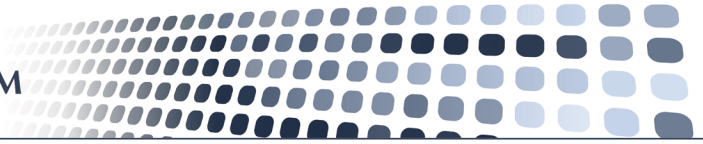
So, as far as EU autonomous sanctions are concerned the European judicature guaranteed the protection of the rights of defence of alleged terrorists in compliance with EU law. Yet, the answer of the Court was different for those applicants from the UN list, even if they were complaining about the infringement of the same rights recognised



patently not respected in the following *OMPI* judgement. In the *Yussuf* (2005)^{XLIIV} and *Kadi* (2005)^{XLIV} cases, concerning sanctions against individuals specifically identified at UN level, the Court denied its jurisdiction, depriving alleged terrorists of a review mechanism. According to the Court, the difference between the two sanctions regimes lies in the powers of the EU Council: those resolutions and decisions of the UNSC and of its Sanctions Committee, designating alleged terrorists by name, were implemented within the European legal order under *circumscribed* powers; whereas, resolution 1373 (2001) charged the Community (through which Member States decided to act) with *autonomously* identifying suspects with a view to freezing their assets. Consequently, the *OMPI* case did not depart from the previous case law of the ECJ. Rather, since the *OMPI* ruling was pronounced, the Court distinguished between the two regimes of sanctions and set up a *double standard* of protection of fundamental rights within EU law.

The *Kadi* ruling of 2005 suffered from a deferral of powers made by the CFI in favour of the UN. The Court of First Instance held that Community acts, such as the contested regulation^{XLVI}, implementing UN obligations *without* power of *discretion*, as a matter of principle fall outside of the scope of its jurisdiction. Most notably, the Court could not review the contested act because it would amount to an indirect review of the UN resolution itself. As a consequence, the applicants were deprived of the only possibility of review before an impartial judge and the CFI attributed a primacy status to UN obligations even departing from primary European law, most notably the protection of fundamental rights.

The coexistence of a double standard ended only in 2008, when the Court of Justice overturned the first *Kadi* ruling handed down by the CFI, and restored uniformity in the standard of protection of human rights within EU law. In the *Kadi* appeal the ECJ firmly made out a clear-cut distinction between the EU legal order and the international one. It stated that the Court of Justice of the European Union has the duty, in accordance with article 230 TEC (now 263 TFEU), to rule on the legality of the acts of the European institutions. The judicial review of an act of the European Union^{XLVII}, even if implementing a UN resolution, is confined to the European legal order itself. Accordingly, its review does not affect the international legal order, which instead is governed by public international law. The Court confirmed the Opinion of Advocate General (AG) Maduro^{XLVIII}, which stressed the autonomy of the European legal order and its respect for the rule of law. The



Court, after confining its review to the realm of EU law, held that, as far as the applicant was concerned, the rights of defence were patently not respected^{XLIX}. As it already made for autonomous European sanctions, the Court annulled the disputed act on the basis of the infringement of the procedural rights governing listing procedure. The Court did not enter the merits of the lawfulness of the contested regulation, since the Council adduced no evidence. Thus, apart from the first part of the judgement distinguishing the autonomy of the EU legal order from the international one, the ECJ reached the same conclusions as in the *OMPI* case. In fact, following the *Kadi* appeal of 2008 an equal treatment concerning procedural safeguards was restored for both types of sanctions.

After this latter judgement, on a proposal of the Commission the Council passed an important legislative act concerning procedural rights applying to those alleged terrorists included in UN sanctions lists^L. That regulation codifies the due process procedures urged by the Court of Justice in the *Kadi* appeal of 2008.

The case law of the Court of Justice of the European Union demonstrates that the European Union, and all the more so, the UN, set up a strategy to counter terrorism that did not take account of the fundamental rights of those listed. That situation was worsened by the fact that the European Union did not apply its fundamental principles when transposing UN resolutions.

5. The amendments introduced by the Treaty of Lisbon

The settlement of the European Union before the Treaty of Lisbon in 2009 attributed an outstanding role in counter-terrorism to the Council. In the Treaty on the European Union (TEU) most of the law-making powers in this field were attributed to the Council of the EU. It suffices to mention the Framework Decision on combating terrorism^{LI} and the Framework Decision on the European arrest warrant^{LII}, both adopted under article 34 TEU. The most democratic institution of the European construction, the European Parliament, was in most cases marginalised. After 9/11, which should be considered a central date for the beginning of a structured European counter-terrorism policy, European cooperation made the greatest improvements in this field. The pre-Lisbon anti-terrorism cooperation was founded on a mixed third and second pillar basis,



which suffered not only from a mostly intergovernmental integration but also from gaps regarding the jurisdiction of the ECJ. In a field such as that covered by the third pillar, the participation of the European Parliament, the only directly elected institution, and the supervision of the ECJ proved to be essential.

The Treaty of Lisbon improved the previous situation introducing enhancements in relation both to the powers of the Court of Justice of the European Union and to law-making powers of the European Parliament.

In the first place, the Treaty of Lisbon provided a new “*unambiguous*” legal basis for the adoption of individual sanctions, updating the treaties to adapt to the shift towards the use of smart sanctions instead of state sanctions. This is a very important change considering the difficulties encountered by the European judicature to find an adequate legal basis for individual restrictive measures^{LIII}. The Treaty contains two different articles founding the EU competence to adopt such acts. The former is article 75 TFEU pertaining to Part three concerning Union Policies and Internal Action, Title V Area of Freedom Security and Justice. This should be used with the intent that administrative measures with regard to capital movements and payments are adopted when one of the objectives of the AFSJ (article 67 TFEU) should be attained. The second is article 215 (2) TFEU included within Part V on External Action of the Union, which should be employed following a prior decision adopted under Chapter II, Title V of the TEU that charges the Council with the adoption of restrictive measures against natural or legal persons and groups or non-State entities. Hence, the concrete restrictive measures adopted under article 215 (2) TFEU are based on a prior CFSP decision (art. 31 TEU), as was the case in the pre-Lisbon framework.

The choice of the legal basis shall not be understated; the legislative procedures of the two articles differ in a significant manner. On the one hand, article 75 TFEU requires the *ordinary legislative procedure*, according to which the Council and the European Parliament are co-legislators^{LIV}. Instead, pursuant to article 215 (1) TFEU the European Parliament only has the right to be informed. Both articles contain a final paragraph stating that those acts adopted on their basis *shall include necessary provisions on legal safeguards*, in accordance with the case law of the Court of Justice of the European Union.

Even though the addition of these articles provided the Union with the explicit competence for the adoption of restrictive measures, it is still not clear which article should



be used and in which circumstances. A current case brought by the European Parliament before the Court of Justice of the European Union raised this problem^{LV}. The European Parliament challenges EU Regulation 1286/2009^{LVI} affirming that it was adopted on the wrong legal basis, namely under article 215 (2) TFEU, rather than under article 75 TFEU. The practice is that the CFSP decisions lay down the overall sanctions; then part of the sanctions is implemented via regulations, in the case at issue under art 215 (2), whereas sanctions involving travel bans or arms embargoes are implemented by Member States.

Actually, compared to article 215 TFEU, article 75 TFEU is more specific. It concerns specifically the freezing of funds, financial assets or economic gains and it explicitly refers to the prevention and combating of terrorism. In addition, *rationae personae*, it only mentions natural or legal persons, groups or non-State entities. On the other hand, article 215 TFEU is primarily aimed at third countries and includes a broader category of measures for the interruption or reduction of economic and financial relations in general.

On being asked to give its opinion on the matter, the Committee on Legal Affairs of the European Parliament held that the Treaty clearly distinguishes between sanctions concerning EU lists and sanctions concerning UN lists^{LVII}. However, a further distinction regards measures aimed at third countries or measures that are not addressed to a specific country but whose objective concerns, for example, counter-terrorism in general. Hence, the distinguishing element should be the *objective* of the measure. Therefore, according to the EP, if a measure aims at preventing and combating terrorism in general, it should be adopted pursuant to article 75 TFEU, especially when it does not address a specific country. This is in short the position held by the EP in the case brought before the Court of Justice of the European Union.

Unfortunately, the Opinion^{LVIII} delivered by Advocate General Bot on the 31 January 2012 does not support the plea of the European Parliament. In the case at issue the primary task of the Court is to assess the respective sphere of application of article 75 TFEU and article 215 TFEU, which is not immediate from the wording of the Treaty. According to settled case law the choice of the legal basis should rest on objective factors which should be amenable to judicial review: in particular the aim and content of the measure. The purpose of the contested regulation is the same of the regulation that it amends, that is Regulation 881/2002. Its essential objective is the prevention of terrorist crimes, including terrorist financing, in order to maintain international peace and



security^{LIX}. On these premises, the AG retains that this purpose falls within the European Union's external action, the objectives of which are enlisted under article 21 (2) (a) to (c) TEU. Moreover, the AG affirms that it was within the framework of the CFSP that initially the system of interaction between the decisions taken by the UNSC and the EU was established. Specifically, art. 301 TEC (art. 215 is recorded as its successor) was introduced with the intention of providing the EU with the competence to implement UNSC sanctions. Therefore, AG Bot upholds the view of the Council maintaining that the contested regulation was correctly adopted on the basis of art. 215 (2) TFEU on account of its CFSP dimension^{LX}. In the opinion of the AG, article 215 (2) TFEU should constitute the appropriate legal basis for the adoption of: measures intended to support third States anti-terrorist actions within their territory; restrictive measures directed against persons and entities expressly designated by the UNSC; and also those measures decided by the UNSC and implemented by the EU under a certain discretion, that is when the selection of the persons and entities concerned is left to UN Member States^{LXI}. If the Court of Justice of the European Union were to follow this argument, article 75 TFEU would only be used for autonomous sanctions of the EU not relying on a UN resolution.

However the choice of the legal basis is not straightforward. One first aspect to point out relates to the fact that many recipients of UNSC anti-terrorist sanctions are European, that is to say that they are either EU citizens, organizations, groups or bodies located or constituted under the law of one of the EU Member States. This means that those measures inevitably have an AFSJ side. Since the measures under discussion include persons residing in the EU, the use of CFSP would be odd. Even more so given that article 75 TFEU is more specific and explicitly refers to terrorism as well as to asset-freezing measures. Another important aspect to be underlined is that article 75 TFEU is recorded as the successor to article 60 TEC^{LXII}. Article 60 TEC was the *lex specialis* used in combination with article 301 TEC for the adoption of financial restrictive measures. However, the combined use of the current legal bases seems to be out of discussion; primarily because the two articles pertain to different policies, then for the differences regarding their decision-making procedures^{LXIII}. Nevertheless, article 75 TFEU could be read as *lex specialis* for counter terrorist measures. On the other side, article 215 (1) TFEU could be used for general state sanctions and article 215 (2) for those targeted sanctions aimed at government officials that both have a clear CFSP aim. In my view, if the fight against terrorism is to

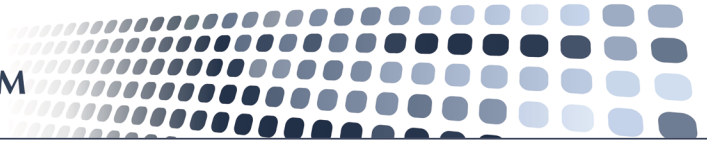


succeed, it should be international by definition^{LXIV}, but this does not mean that the reference to the international community automatically implies a CFSP scope. A last remark that needs to be made regards the geographical scope of article 75 and 215 TFEU. The United Kingdom and Denmark have an opt-out for measures adopted on the basis of article 75 TFEU pursuant to Protocol No 21 and 22 on their positions regarding the AFSJ^{LXV}. Anyway, it is worth noting that the United Kingdom made a unilateral declaration^{LXVI} annexed to the Treaty stating the intent to exercise its right^{LXVII} to take part in the adoption of all proposals made under article 75 TFEU. This situation could create problems regarding the uniform application of restrictive measures in all EU Member States.

If the Court of Justice of the European Union were to back the opinion of the European Parliament, the EU would have a unique framework for all targeted sanctions against individuals without any link to a specific country and with the objective of countering terrorism. Moreover, the adoption of any such action would always benefit from the surveillance by the EP. On the other side, under article 215 the EU would adopt all restrictive measures aimed at third countries or at their governing elites, both those adopted following an underlying UNSC Resolution and those adopted on an EU autonomous basis. Instead, if the Court were to follow the opinion of AG Bot, the European Union would adopt almost all restrictive measures under article 215 TFEU and article 75 TFEU would only be resorted to for restrictive sanctions adopted on an autonomous basis without any underlying UN Resolution.

6. The enhanced role of the Court of Justice of the European Union

The most significant change brought about by the Treaty of Lisbon is the establishment of a single legal framework for the EU. The previous three-pillar structure has been terminated and thus, in principle, all EU law should be governed by the same rules. This change matters first of all for the jurisdiction of the European Court of Justice. In fact, to the extent that specific provisions do not provide otherwise^{LXVIII}, the jurisdiction of the Court of Justice of the European Union applies to EU law as a whole and to all institutions, organs and agencies of the EU. Therefore, since the enacting of the Treaty of

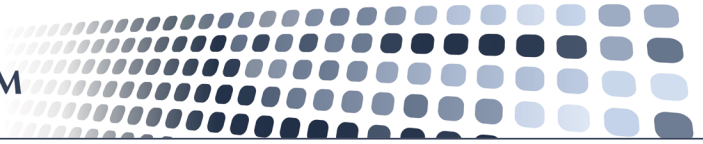


Lisbon, the provisions belonging both to the Common Foreign and Security Policy (CFSP) and the Area of Freedom Security and Justice (AFSJ) are, as a matter of principle, subjected to the jurisdiction of the ECJ. Yet, some restrictions are still in force. As far as restrictive measures are concerned, at least formally, the situation has been largely improved. According to article 75 TFEU the Court holds full jurisdiction; measures adopted under this legal basis are subjected to judicial review as is any other legal act issued by European institutions. It is thus possible to rely on article 263 TFEU, concerning the jurisdiction of the ECJ to review the legality of the acts of EU institutions, to challenge acts adopted under article 75 TFEU. It should also be noted that the amending Treaty improved individuals' right of appeal. The new article 263 (4) TFEU, which grants the right of appeal to any natural or legal person, responds to criticisms made against the highly restrictive interpretation held by the ECJ regarding the condition of "direct and individual concern"^{LXIX}.

The extension of the jurisdiction of the ECJ within the AFSJ represents a considerable improvement for the legal protection of the individuals, as well as a step ahead for the uniform interpretation and application of acts adopted in this area. However, it should be noticed that, until 1 December 2014, pursuant to Protocol No 36 on transitional provisions, former third pillar rules remain into force.

The Treaty of Lisbon retains the former exclusion of the Court's jurisdiction over CFSP; nevertheless there are significant exceptions to this general rule. Article 40 TEU charges the Court with assessing the correctness of the legal basis; put differently, the ECJ can rule on proceedings relating to institutional conflicts concerning CFSP measures. Moreover, article 275 TFEU explicitly allots to the Court the power to rule on proceedings brought against decisions providing for restrictive measures adopted by the Council on the basis of Chapter 2 of Title V of the TEU. Thus, the Court of Justice of the European Union can now review the legality of legislative acts and decisions imposing restrictive measures against natural or legal persons.

7. Brief conclusions



The Treaty of Lisbon considerably ameliorated some aspects of the fight against international terrorism, namely the problems raised in the implementation of individual sanctions. Firstly, it abolished the pillars structure and *ended*, apart from the specifications made above, the special regime governing CFSP and AFSJ. It improved the right of appeal of the individuals concerned by restrictive measures and finally explicitly conferred to the Union the power to adopt individual restrictive measures. In the recent years the Court of Justice of the European Union has delivered numerous judgements assessing the flaws in the protection of human rights as regards counter-terrorism restrictive measures; finally, the Treaty of Lisbon codified these achievements.

Yet, the ECJ still has to specify other important questions concerning this subject. In *Parliament v Council*^{xx} the Court should clarify which one of the two possible legal bases should be used and in which cases. If the Court were to find that individual sanctions, aiming at combating terrorism in general, should be adopted under article 75 TFEU as the European Parliament wishes, that would guarantee the exercise of stricter control by the only democratically elected institution of the Union. Moreover, in the *Kadi II* appeal^{lxxi}, brought up by the Commission, the Council and the UK, the Court has to specify what the standards of fundamental rights are and which judicial review can be undertaken for European Union restrictive measures implementing mandatory UNSC resolutions. The contradictions that initially marked the implementation of individual sanctions within EU law have almost all been cancelled, however a few problems still remain to be settled.

^I The *Schengen acquis* consists of the 1985 Schengen Agreement, the 1990 Convention and the measures implementing the Convention. This kind of cooperation, at first initiated among 7 Member States, was made possible by the provision on “closer cooperation” (art. K.7) of the Maastricht version of the TEU.

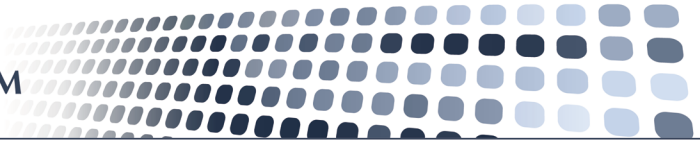
^{II} Denmark, Ireland and the United Kingdom have decided to participate in the Schengen cooperation under certain conditions.

^{III} The first organized platform for European counterterrorism cooperation dates back to mid seventies and was *Terrorisme, Radicalisme, Extrémisme et Violence Internazionale*, the so called TREVI.

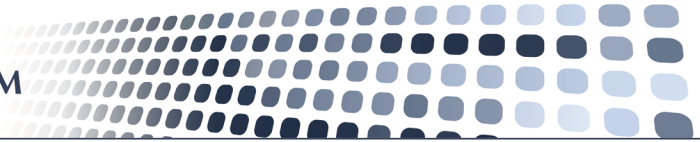
^{IV} Article K.1 Treaty on the European Union, Maastricht version.

^V It should be stressed that the Treaty of Lisbon has modified the denomination of the European judicial institution. According to article 19 (1) TEU, now this institution is called “The Court of Justice of the European Union”, which includes the Court of Justice, the General Court (previously Court of First Instance) and specialised courts. Nonetheless, already before the entry into force of the Lisbon Treaty the name “Court of Justice of the European Communities” was incorrect, since the Court already had jurisdiction over certain matters of the TEU. Within this paper the term “Court of Justice of the European Union” will be used both for the pre-Lisbon and the post-Lisbon period. Besides it will be also implied referring to the highest judicial body of the European judicature. Instead, for the pre-Lisbon period the denomination Court of First instance will be maintained. For further analysis see e.g. Barents 2010: 709

^{VI} For further analysis see Peers 2006.



- VII For further analysis see Monar 1998: 320; Peers 2006.
- VIII The European Union Counter-Terrorism Strategy, Doc. 14469/4/05 of 30 November 2005.
- IX Declaration on Combating Terrorism, European Council, Brussels, 25 March 2004.
- X Conclusions and Plan of Action of the Extraordinary Council Meeting, 21 September 2001, Press Release 21/9/2001 No 140/01.
- XI Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, OJ L 190/1. This measure enhances cooperation among national judicial authorities, which are required to recognise with the minimum formalities (and in the shortest time) requests for the surrender or the arrest of a person made by the judicial authority of another Member State.
- XII Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164/3.
- XIII Presidency Conclusion of the Tampere European Council, 15 and 16 October 1999.
- XIV Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63/1.
- XV Directive 2005/60/EC of the European Parliament and of the Council of the European Union of 26 October 2005 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing, OJ L 309.
- XVI S/RES/1267 (1999) of 15 October 1999.
- XVII S/RES/1373 (2001) of 28 September 2001.
- XVIII See *supra* note n. viii.
- XIX On the origin of targeted sanctions (also called smart sanctions or individual sanctions) see e.g.: Ciampi 2007: 42; Lang 2002.
- XX The first resolution against the Taliban and Al Qaeda lacking the link with the Afghan state was Resolution 1390, S/RES/1390 (2002) of 28 January 2002.
- XXI S/RES/1333 (2000) of 19 December 2000.
- XXII Since the entry into force of Resolution 1988 (2011) listed Taliban and listed individuals and entities of Al-Qaeda and its affiliates will be treated differently. Two different lists are now available.
- XXIII See for example the most recent Resolution 1989 (2011).
- XXIV Guidelines of the Committee for the conduct of its work, adopted on 7 November 2002, as amended lastly on 26 January 2011. Available at: http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.
- XXV The sanctions Committee was established by Resolution 1267 (1999), which states that it has the duty to update the list of international terrorist suspects on the base of the submissions received by Member States.
- XXVI S/RES/1904 (2009) of 17 December 2009.
- XXVII This essay mostly uses the current terminology introduced by the Treaty of Lisbon. In this case the term European Community is employed since, before the Lisbon amendments, the Treaties only conferred express legal personality to the EC.
- XXVIII The Individual aspect distinguishes targeted sanctions from traditional State sanctions. These last ones are indiscriminately directed against all or some sectors of the economy of a State, whereas targeted sanctions affect the economic and personal sphere of selected individual explicitly named within the act.
- XXIX Art. 4 of the United Nations Charter states that only States can be member of the UN.
- XXX The expansionist use of Treaty provisions to provide a strong legal basis for Union's competence to impose economic sanctions is underlined by Cremona 2009: 559.
- XXXI The pre-Lisbon relevant articles for the imposition of targeted sanctions were: art 301, 60 and 308 TEC.
- XXXII See *infra* next paragraphs, in particular, "The amendments introduced by the Treaty of Lisbon".
- XXXIII CFI, Case T-315/01, *Kadi v. Council of the European Union and Commission*, 2005 ECR II-3649.
- XXXIV In particular, ECJ, Case C-130/10, *European Parliament v. Council of the European Union*, ECJ, Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission, Council of the European Union and the UK v. Kadi*.
- XXXV The Court of First Instance was renamed General Court by the Treaty of Lisbon, see note n. v.
- XXXVI ECJ, Joined Cases C-415/05 P and C-402/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union*, 2008 ECR I-6351.
- XXXVII The first one relates to UNSC Resolution 1267 (1999) and 1989 (2011) concerning Al-Qaeda and associated individuals and entities implemented by Council Regulation (EC) No 881/2002 as amended by Council Regulation (EU) No 1286/2009. The second one is the EU autonomous regime concerning foreign terrorist organisations operated by Council Regulation 2580/2001.
- XXXVIII CFI, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union and UK*



(OMPI), 2006 ECR II-4665.

XXXIX Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/848/EC, OJ L 340/64.

XI. Council Regulation 2580/2001/EC of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344/70.

XLI CFI, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, cit., para. 91 ss.

XLII Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344/93.

XLIII In the string of cases following the first OMPI ruling, the Court carried out a stricter and in-depth review of the reasons justifying the maintenance of the alleged individuals on the list. See for example CFI, Case T-256/07, *Organisation des Modjahedines du peuple de l'Iran v Council of the European Union*, (OMPI III), 2008 ECR II-3019.

XLIV CFI, Case T-306/01, *Ahmed Ali Yusuf and al Barakaat International Foundation v Council of the European Union*, 2005 ECR II-3533.

XLV Cited *supra* note xxxiii.

XLVI Council Regulation 881/2002/EC of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001/EC, OJ L 139/9.

XLVII Within this article the current nomenclature is used. In fact, since the Treaty of Lisbon on the 1st December 2009, the European Community has ceased to exist. However, the act challenged in the *Kadi* case was an EC act, see *supra* note n. xlvii.

XLVIII Opinion of Mr. Advocate General Poiares Maduro delivered on 16 January 2008 in Joined Cases C-415/05 and C-402/05, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union*.

XLIX ECJ, Joined Cases C-415/05 P and C-402/05 P, cit., para. 316.

L. Council Regulation 1286/2009/EU of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, OJ L 346/42.

LI Council Framework Decision 2002/475/JHA, cit., see note xii.

LII Council Framework Decision 2002/584/JHA, cit., see note xi.

LIII The question concerning Community competence was handled by the CFI, the ECJ and by the AG Maduro, both in the first *Kadi* case and in the following appeal. Even though all three have agreed to recognise Community competence, they disagree on the proper legal bases.

LIV The ordinary legislative procedure corresponds to the old co-decision and is enshrined within article 294 TFEU.

LV ECJ, Case C-130/10, *European Parliament v. Council of the European Union*, now pending.

LVI Council Regulation (EU) 1286/2009, cit.

LVII Committee on Legal Affairs, The Chair, 4 December 2009, AL/798553EN.doc

LVIII Opinion of Mr. Advocate General Bot delivered on 31 January 2012 in Case C-130/10, *European Parliament v Council of the European Union*.

LIX Council Regulation (EU) 1286/2009, cit, recital 11 of the preamble.

LX Opinion of Mr. Advocate General Bot in Case C-130/10, cit., para. 72 ss.

LXI Opinion of Mr. Advocate General Bot in Case C-130/10, cit., para. 81.

LXII However it should be noted that article 60 TEC was included within the chapter on capital and payments, whereas article 75 TFEU forms part of the general provisions on the AFSJ.

LXIII Also AG Bot upheld this view, see Opinion of Mr. Advocate General Bot in Case C-130/10, cit., para. 69.

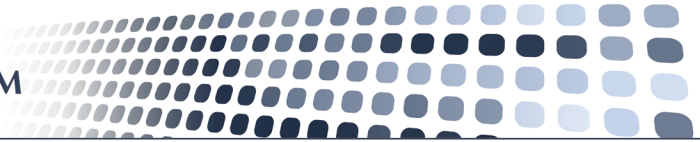
LXIV The EP is of that opinion. Opinion of Mr. Advocate General Bot in Case C-130/10, cit., para. 26.

LXV Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice and Protocol No 22 on the position of Denmark.

LXVI Declaration No. 65 by the United Kingdom of Great Britain and Northern Ireland on Article 75 of the Treaty on the Functioning of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

LXVII Under article 3 Protocol No. 21, cit.

LXVIII See for example article 24 TEU second paragraph and article 275 TFEU relating to CFSP. See also



Peers 2008.

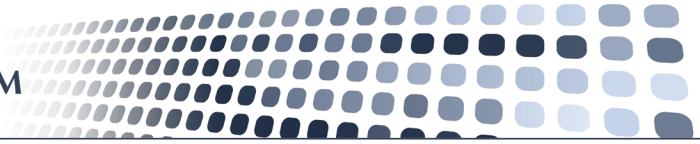
^{LXIX} To be more precise the problem concerned the fact that the interpretation provided by the Court of the condition of “direct and individual concern” prevented standing for individuals against act of general and direct applicability. See Barents 2010.

^{LXX} See *supra* note n. lv.

^{LXXI} ECJ, Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission, Council of the European Union and the UK v. Kadi*, still pending.

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