



## Reports of Cases

### JUDGMENT OF THE COURT (Grand Chamber)

19 July 2012\*

(Common foreign and security policy — Regulation (EC) No 881/2002 — Regulation (EU) No 1286/2009 — Restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban — Freezing of funds and economic resources — Choice of legal basis — Articles 75 TFEU and 215 TFEU — Entry into force of the Treaty of Lisbon — Transitional provisions — CFSP common positions and decisions — Joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and from the Commission)

In Case C-130/10,

ACTION for annulment under Article 263 TFEU, brought on 9 March 2010,

**European Parliament**, represented initially by E. Perillo and K. Bradley, and subsequently by A. Auersperger Matić and U. Rösslein, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Council of the European Union**, represented by M. Bishop and R. Szostak, acting as Agents,

defendant,

supported by:

**Czech Republic**, represented by M. Smolek, E. Ruffer and K. Najmanová, acting as Agents,

**French Republic**, represented by G. de Bergues and A. Adam, acting as Agents,

**Kingdom of Sweden**, represented by A. Falk and C. Meyer-Seitz, acting as Agents,

**European Commission**, represented by S. Boelaert and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, A. Prechal, Presidents of Chambers, A. Rosas (Rapporteur), R. Silva de Lapuerta, K. Schiemann, E. Juhász, M. Berger, E. Jarašiūnas and C.G. Fernlund, Judges,

\* Language of the case: English.

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 December 2011,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2012,

gives the following

### **Judgment**

- 1 By its action, the European Parliament asks the Court to annul Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (OJ 2009 L 346, p. 42, ‘the contested regulation’).

### **Legal context**

- 2 On 16 January 2002, the United Nations Security Council (‘the Security Council’) adopted Resolution 1390 (2002), setting out measures to be imposed against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them. Paragraphs 1 and 2 of that resolution provide in particular for, essentially, the continuation of the measures for the freezing of funds imposed by Paragraph 4(b) of Resolution 1267 (1999) and Paragraph 8(c) of Resolution 1333 (2000). In accordance with paragraph 3 of Resolution 1390 (2002), those measures were to be reviewed by the Security Council 12 months after their adoption, at the end of which period the Council would either allow those measures to continue or decide to improve them.
- 3 Taking the view that action by the European Community was necessary in order to implement that resolution, on 27 May 2002 the Council adopted, on the basis of Article 15 EU, Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (OJ 2002 L 139, p. 4). Article 3 of Common Position 2002/402 provides, *inter alia*, that 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 in accordance with Resolutions 1267 (1999) and 1333 (2000) is to be continued.
- 4 On the same date, the Council, on the basis of Articles 60 EC, 301 EC and 308 EC, adopted Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9). Annex I to Regulation No 881/2002 contains the list of persons, entities and groups affected by the freezing of funds imposed by Article 2 of that regulation (‘the list’).
- 5 The contested regulation was adopted by the Council on 22 December 2009. It is based on Article 215(2) TFEU and refers to a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy (‘the High Representative’) and from the Commission. It amends Regulation No 881/2002 in response to the judgment of 3 September 2008 in 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, by introducing a listing procedure which ensures that the fundamental rights of the defence and in particular the right to be heard are respected. The revised procedure provides that the listed person, entity, body or group is to be informed of the reasons for listing, as instructed by the Committee of the Security Council established pursuant to UN Security Council Resolution 1267 (1999) so as to be given an opportunity of expressing a view on those reasons.

### **Forms of order sought**

- 6 The Parliament claims that the Court should:
  - annul the contested regulation;
  - maintain the effects of the contested regulation until the adoption of a new regulation; and
  - order the Council to pay the costs.
- 7 The Council contends that the Court should:
  - dismiss the application as unfounded, and
  - order the Parliament to pay the costs.

### **Procedure before the Court**

- 8 By order of the President of the Court of 10 August 2010, the Czech Republic, the Kingdom of Denmark, the French Republic, the Kingdom of Sweden and the Commission were granted leave to intervene in support of the forms of order sought by the Council.
- 9 By order of the President of the Court of 2 December 2010, the Kingdom of Denmark was removed from the register as an intervener, having requested to withdraw its intervention.

### **The action**

- 10 In support of its action for annulment, the Parliament raises two pleas in law. By the first and principal plea, it claims that the contested regulation is wrongly based on Article 215 TFEU, when the correct legal basis is Article 75 TFEU. By the second plea, raised in the alternative, it maintains that the conditions for recourse to Article 215 TFEU were not satisfied.

*The principal plea, alleging incorrect choice of legal basis*

### **Arguments of the parties**

- 11 By its first plea, the Parliament maintains that the contested regulation could not validly be based on Article 215 TFEU. That plea is subdivided into two parts, the first relating to the aim and content of the regulation and the second to the general scheme of the Treaties.

– The aim and content of the contested regulation

- 12 The Parliament observes that the choice of legal basis for a European Union measure must rest on objective factors amenable to judicial review, including, in particular, the aim and content of the measure. In the light of the content and purpose of the contested regulation, its legal basis ought to be the same as that for Regulation No 881/2002, adopted on the basis of Articles 60 EC, 301 EC and 308 EC. Those articles having, however, been repealed or become inapplicable following the entry into force of the Treaty of Lisbon on 1 December 2009, the appropriate legal basis is Article 75 TFEU, concerning the prevention of terrorism and related activities.
- 13 As regards its content, for the most part the contested regulation merely reformulates or clarifies provisions of Regulation No 881/2002 or facilitates its application, but does not in any way change the nature of that regulation's content. The only genuinely new substantive provisions are those on the listing procedure. The contested regulation is in the nature of a 'framework for administrative measures' within the meaning of Article 75 TFEU, in so far as it amends or adds to the legislative framework for the adoption and implementation of administrative measures to freeze the funds of the parties concerned.
- 14 With respect to the objective of the contested regulation, it is, like that of Regulation No 881/2002, to combat terrorism and the financing of terrorism, which is consistent with the objectives of Article 75 TFEU. That is corroborated by paragraph 169 of *Kadi and Al Barakaat International Foundation v Council and Commission*, which states that the essential purpose and object of the latter regulation is to combat international terrorism, in particular to cut it off from its financial resources by freezing the economic funds and resources of persons or entities suspected of involvement in activities linked to terrorism. Furthermore, the Court held in paragraph 199 of that judgment that the position of the Court of First Instance of the European Communities, to the effect that Regulation No 881/2002 pursued one of the objectives under the EU Treaty, as it stood before the Treaty of Lisbon, in the sphere of external relations including the common foreign and security policy ('the CFSP'), runs counter to the very wording of Article 308 EC.
- 15 Given that it is not the purpose of Regulation No 881/2002 to achieve CFSP objectives, it is difficult to see how the contested regulation, adopted to ensure the application of the former regulation, could do so. The Parliament emphasises that the Council may have recourse to Article 215 TFEU only for measures that pursue CFSP objectives, more particularly when a decision intended to achieve the objectives of that policy makes provision for such recourse.
- 16 According to the Parliament, the Council's position is not consistent with the facts or with reality, in so far as it is based on a distinction between international or 'external' terrorism, on the one hand, and 'internal' terrorism, on the other. The fight against terrorism must be international if it is to succeed. The only distinction that can be made in this context is between national measures to combat terrorism, and international anti-terrorism measures. It is not always possible to say with any certainty whether terrorist and related activities carried out within the European Union will create a threat within or without the European Union.
- 17 The Council, on the other hand, argues that, in the light of its objectives and its content, the contested regulation falls within the scope of the provisions of the Treaties relating to the European Union's external action, and more specifically within the sphere of the CFSP. Article 215 TFEU constitutes the appropriate legal basis for that measure.
- 18 The purpose of that regulation, like that of Regulation No 881/2002, is to combat international terrorism and its financing in order to maintain international peace and security. In this regard, the Council refers to the wording of Security Council Resolution 1390 (2002) and of the contested regulation and cites *Kadi and Al Barakaat International Foundation v Council and Commission*.

- 19 The content of the contested regulation is consistent with that objective. Articles 7a and 7c, which that regulation inserts into Regulation No 881/2002, confirm that those regulations directly implement the listing decisions adopted by the Sanctions Committee and establish a system of interaction between the Sanctions Committee, the European Union and the individuals and entities listed.
- 20 In the Council's view, Regulation No 881/2002 and the contested regulation do not in any way fall within the scope of the provisions intended to create an area of freedom, security and justice within the European Union. They govern matters that do not relate to border controls, internal security or the recognition of judicial and extra-judicial decisions.
- 21 The Council argues that the Treaties, as they stood before the Treaty of Lisbon entered into force, did not provide for any specific legal basis for the adoption of measures to freeze the funds of terrorists posing a threat to public security in the Member States, that is to say, 'internal' terrorists. The only legal bases for adopting such restrictive measures were Articles 60 EC, 301 EC and 308 EC, which applied only to 'external' terrorists in the context of the European Union's external action.
- 22 It is clear from the structure and the wording of the Treaties, as amended by the Treaty of Lisbon, that the location of a purported threat and the political objectives of a listed person or group must be taken into consideration when deciding on the legal basis for a restrictive measure. Article 75 TFEU now provides a legal basis for adopting measures to freeze the funds of 'internal' terrorists, such as the individuals and groups whose names, marked with an asterisk, are included in the list annexed to Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93). Conversely, if the threat relates primarily to one or more third States or to the international community in general, Article 215 TFEU is the appropriate legal basis. It would be unlawful for the European Union, on the basis of Title V of Part Three of the FEU Treaty, governing the area of freedom, security and justice, to adopt a measure freezing assets that contributed to the security of a third State but was not aimed at safeguarding internal security.
- 23 Furthermore, the Council, supported in substance by the Kingdom of Sweden, submits that the Parliament's proposition fails to take account of those cases where, in the context of the fight against terrorism, the European Union seeks to adopt or impose restrictive measures other than the freezing of assets, such as a travel ban, in respect of persons or entities associated with 'external' terrorism.
- 24 The Kingdom of Sweden points out that the effect of the Parliament's position would be that United Nations sanctions against terrorists would be implemented on different legal bases for different measures within one and the same system of sanctions. This cannot have been the intention of the European Union legislature, not least because such a system would involve the application of different decision-making procedures under the CFSP and the Union's internal policy, respectively.
- 25 The Commission explains that, when proposing an amending act, it uses the provision or provisions that formed the basis for the adoption of the original act. Thus, the proposal for a Council Regulation amending Regulation No 881/2002, presented by the Commission on 22 April 2009 (COM(2009) 187 final), referred to Articles 60 EC, 301 EC and 308 EC as its legal bases. Since that proposal was pending before the Council on 1 December 2009, the Commission was required to carry out a purely legal and technical examination of the consequences of the entry into force of the Treaty of Lisbon for that act. It came to the conclusion, endorsed by the High Representative, that Article 215(2) TFEU covers all relevant aspects of Articles 60 EC, 301 EC and 308 EC. That approach is consistent with the Court's findings in *Kadi and Al Barakaat International Foundation v Council and Commission*.
- 26 With regard to the consequences of that judgment for the question of the legal basis, the Commission challenges the Parliament's claim that an act based on Article 308 EC cannot pursue a CFSP objective. According to the Commission, the Court did not in that judgment deny that Articles 60 EC and 301 EC were legal bases permitting the adoption of Community measures pursuing a CFSP objective. As regards Regulation No 881/2002, the Court identified a second, underlying Community objective



linked to the functioning of the common market to justify the inclusion of Article 308 EC as a third legal basis. Moreover, it confirmed that the EC Treaty required recourse to that provision for the imposition of restrictive measures in respect of natural or legal persons in cases where there is no link with the governing regime of a non-member State.

- 27 The Commission considers that Articles 215 TFEU and 75 TFEU cannot be used jointly as legal bases for the contested regulation. It is not possible to base an act on those two articles at the same time, for they lay down different procedural and decision-making conditions, including the condition relating to the application of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the EU Treaty and the FEU Treaty, and the application of the Protocol (No 22) on the position of Denmark, annexed to those treaties. The Commission emphasises that one of the crucial differences between Articles 215 TFEU and 75 TFEU is to be found in the need of a link to decisions in the sphere of the CFSP, taken in the interests of international peace and security, whatever the precise geographical location or the scope of the terrorist threat at issue. When restrictive measures relating to terrorism must be adopted under the FEU Treaty following a CFSP decision further to a Security Council Resolution, Article 215 TFEU is the only possible legal basis.

– The general scheme of the Treaties

- 28 According to the Parliament, the general scheme and the spirit of the Treaties may be taken into account for the purposes of interpreting their provisions. In this instance, they justify the choice of Article 75 TFEU as the legal basis for the contested regulation.
- 29 In the first place, the contested regulation is linked to the protection of individuals and groups. Since the entry into force of the Treaty of Lisbon, however, the European Union may adopt measures concerning fundamental rights only under the ordinary legislative procedure or with the consent of the Parliament. Article 215(2) TFEU is applicable only in respect of measures that do not raise issues of fundamental rights to the same extent.
- 30 In the second place, Article 75 TFEU empowers the European Union to adopt measures with regard to capital movements and payments, thus recognising that such measures may affect the proper functioning of the internal capital market and the provision of financial services. The Court acknowledged in paragraph 229 of *Kadi and Al Barakaat International Foundation v Council and Commission* that restrictive measures of an economic nature by their very nature offer a link to the operation of the common market. Furthermore, Regulation No 881/2002 itself refers, in recital 4 of its preamble, to the need to avoid, in particular, distortion of competition.
- 31 In the third place, the contested regulation is linked to the establishment of an area of freedom, security and justice. It assists in combating crime, especially terrorism and the financing of terrorism, which is one of the objectives of that space, as is apparent from, in particular, Article 3(2) TEU.
- 32 Last, the Parliament claims that there is no link between the contested regulation and the CFSP. Under Article 24(1) TEU, the CFSP is subject to specific rules and procedures. To give effect to those rules and procedures outside their ambit would run counter to the objectives set out in the second paragraph of Article 1 TEU and have the effect of depriving national parliaments of the application of the protocols on their role and on the application of the principles of subsidiarity and proportionality, and of denying the Parliament the application of the ordinary legislative procedure.
- 33 In support of its position, the Parliament refers also to paragraph 235 of *Kadi and Al Barakaat International Foundation v Council and Commission* in which the Court held that the inclusion of Article 308 EC in the legal basis of Regulation No 881/2002 was justified, for it enabled the

Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under Articles 60 EC and 301 EC, no role is provided for that institution.

- 34 The Parliament concludes that it would be contrary to European Union law for it to be possible to adopt measures having a direct impact on the fundamental rights of individuals and groups, on the internal market and on the fight against crime by means of a procedure which excludes the participation of the European Parliament, when the ordinary legislative procedure applies for the adoption of measures in those areas. The Treaty of Lisbon reflects the intention of the Member States to enhance the democratic nature of the European Union. It responds to an urgent need to provide for parliamentary scrutiny of listing practices. Recognising Article 215(2) TFEU as the correct legal basis for measures such as the contested regulation would, in practice, deprive Article 75 TFEU of much of its effectiveness. The Parliament also points out that Article 75 TFEU constitutes a more specific legal basis than Article 215 TFEU.
- 35 The Council submits that the arguments put forward by the European Parliament with respect to the general scheme of the Treaties do not constitute relevant criteria for determining the correct legal basis of the contested regulation.
- 36 The powers of the institutions are determined by the Treaties and vary according to the different fields of action of the European Union. The Parliament's proposition amounts to a claim that procedures determine the choice of legal basis rather than the other way round. The fact that the role of the Parliament in the procedure varies is relevant only in exceptional circumstances. It is thus relevant in the case of an act which simultaneously pursues a number of objectives or has several components that are indissociably linked, without one's being secondary to the other. In such circumstances, the corresponding different legal bases may be used, provided they are not incompatible. In order to determine whether they are compatible, it is necessary to consider whether the combination of those legal bases would be such as to undermine the Parliament's rights. In this regard, the Council refers in particular to the judgment in Case C-155/07 *Parliament v Council* [2008] ECR I-8103.
- 37 The Council states that the choice of legal basis must rest on objective factors, in particular, the aim and the content of the measure. That principle was confirmed by *Kadi and Al Barakaat International Foundation v Council and Commission*. Although the Court observed, in paragraph 235 of that judgment, that recourse to Article 308 EC permitted the Parliament to take part in the decision-making process, the fact remains that that observation was made only in order to supplement the Court's principal arguments, based on the objectives of the EC Treaty.
- 38 Furthermore, the Parliament's argument to the effect that the European Union can adopt measures concerning respect for human rights only with the Parliament's involvement is contradicted by Article 215(3) TFEU, which provides that '[t]he acts referred to in this Article shall include necessary provisions on legal safeguards'. That provision makes it clear that an act adopted under that article may potentially affect fundamental rights.
- 39 The Council submits too that the purpose of Article 215 TFEU is to enable the Council to adopt measures which are directly applicable to economic operators. That provision helps to ensure the proper functioning of the common market.
- 40 As regards the relationship of the contested regulation to the CFSP, the Council refers to the specific threat posed by Al-Qaeda. That regulation constitutes the framework within which the European Union performs its obligations under the Charter of the United Nations. It is not unreasonable to take account of the objective of the resolutions adopted by the Security Council in determining the appropriate legal basis.

- 41 Lastly, the Council points out that the Treaty of Lisbon has not affected the distinction between the CFSP and the area of freedom, security and justice. On the contrary, the importance of a line clearly delimiting those two fields was emphasised in the second paragraph of Article 40 TEU. In consequence, if the Court were to take the view that the contested regulation pursues an objective falling under the CFSP, Article 215(2) TFEU would be the only possible legal basis for its adoption.

## Findings of the Court

### – Preliminary observations

- 42 According to settled case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure (see, in particular, *Parliament v Council*, paragraph 34 and case-law cited).
- 43 If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component (see, in particular, *Parliament v Council*, paragraph 35 and case-law cited).
- 44 With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one's being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases (see, in particular, *Parliament v Council*, paragraph 36 and case-law cited).
- 45 None the less, the Court has held also, in particular in paragraphs 17 to 21 of Case C-300/89 *Commission v Council* [1991] ECR I-2867 ('*Titanium dioxide*'), that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other (see, in particular, *Parliament v Council*, paragraph 37 and case-law cited).
- 46 If it was in the context of the cooperation procedure that the Court found, in *Titanium dioxide*, an incompatibility between that procedure, provided for by one of the two legal bases concerned in that judgment, and the Council's acting unanimously after merely consulting the European Parliament, provided for by the other, the Court has, nevertheless, in its subsequent decisions adopted a similar approach in connection with the procedure under Article 251 EC, known as 'the co-decision procedure' (see, to this effect, Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, paragraphs 58 and 59, and *Parliament v Council*, paragraphs 76 to 79). Such an approach is still valid, after the entry into force of the Treaty of Lisbon, in the context of the ordinary legislative procedure.
- 47 In this instance, while Article 75 TFEU provides for application of the ordinary legislative procedure, which entails qualified majority voting in the Council and the Parliament's full participation in the procedure, Article 215(2) TFEU, for its part, entails merely informing the Parliament. In addition, recourse to Article 215(2) TFEU, unlike recourse to Article 75 TFEU, requires a previous decision in the sphere of the CFSP, namely, a decision adopted in accordance with Chapter 2 of Title V of the EU Treaty, providing for the adoption of restrictive measures such as those referred to in that provision. As a general rule, adoption of such a decision calls for unanimous voting in the Council acting alone.
- 48 Differences of that kind are such as to render those procedures incompatible.



49 It follows from the foregoing that, even if the contested regulation does pursue several objectives at the same time or have several components indissociably linked, without one's being secondary to the other, the differences in the procedures applicable under Articles 75 TFEU and 215(2) TFEU mean that it is not possible for the two provisions to be cumulated, one with the other, in order to serve as a twofold legal basis for a measure such as the contested regulation.

– The relationship between Articles 60 EC, 301 EC and 308 EC and Articles 75 TFEU and 215 TFEU

50 The parties are at one in considering that the legal basis of the contested regulation must, theoretically, correspond to that of Regulation No 881/2002, adopted on the basis of Articles 60 EC, 301 EC and 308 EC.

51 In this regard, it must be held that, as a result of the amendments made to primary law after the Treaty of Lisbon entered into force, the content of Articles 60 EC, relating to restrictive measures with regard to capital movements and payments, and 301 EC on the interruption or reduction, in part or completely, of economic relations with one or more third countries, is mirrored in Article 215 TFEU.

52 Indeed, that last article, included in the part of the FEU Treaty on external action by the Union, provides, like Article 301 EC, for the interruption or reduction, in part or completely, of economic relations with one or more third countries. It may be noted here that Articles 301 EC and 215(1) TFEU are worded in the same way. As regards Article 60 EC, which was applicable in those cases mentioned in Article 301 EC and which provided for the application of the procedure under that same article, Article 215(1) TFEU contains a reference to financial relations to cover the areas previously within the ambit of Article 60.

53 Furthermore, Article 215(2) TFEU allows the Council to adopt restrictive measures against natural or legal persons and groups or non-State entities, namely, measures that, before the Treaty of Lisbon entered into force, required Article 308 EC too to be included in their legal basis if their addressees were not linked to the governing regime of a third country (see, to that effect, *Kadi and Al Barakaat International Foundation v Council and Commission*, paragraph 216).

54 As regards Article 75 TFEU, its context and tenor differ from those of Articles 60 EC and 301 EC. Article 75 TFEU does not, in fact, refer to the interruption or reduction, in part or completely, of economic relations with one or more third countries. Incorporated in Part Three of the FEU Treaty on Union policies and internal actions, and more specifically in Title V thereof, entitled 'Area of freedom, security and justice', that article simply refers to the definition, for the purpose of preventing terrorism and related activities and combating the same, of a framework for administrative measures with regard to capital movements and payments, when this is necessary to achieve the objectives set out in Article 67 TFEU.

– The ambit of Article 215 TFEU

55 It is necessary to examine the wording of Article 215 TFEU, the context of which that provision forms part and the objectives it pursues, in relation to those pursued by Article 75 TFEU, before determining, in the light of the purpose and content of the contested regulation, whether Article 215(2) TFEU constitutes the correct legal basis for the regulation.

56 Article 215 TFEU appears in Title IV, entitled 'Restrictive measures', of Part Five of the FEU Treaty on external action by the Union.

- 57 Article 215(1) concerns the adoption of measures necessary for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries. In this context, Article 215(2) concerns the adoption by the Council of ‘restrictive measures [...] against natural or legal persons and groups or non-State entities’, without specifically referring to the combating of terrorism and without limiting those measures to those measures alone that concern capital movements and payments.
- 58 Moreover, Article 215(2) TFEU, unlike Article 75 TFEU, provides, as mentioned at paragraph 47 above, that it may not be used until a decision under the CFSP has provided for the adoption of restrictive measures against natural or legal persons, groups or non-State entities. For its part, Article 75 TFEU states that it may be used where necessary to achieve the objectives set out in Article 67 TFEU, that is to say, in connection with creating an area of freedom, security and justice.
- 59 In this regard, it is to be borne in mind that, at paragraph 197 of *Kadi and Al Barakaat International Foundation v Council and Commission*, the Court considered that a bridge had been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty, as it stood before the Treaty of Lisbon entered into force, in the sphere of external relations, including the CFSP. Article 215 TFEU expressly provides such a bridge, but this is not the case with Article 75 TFEU, which creates no link with decisions taken under the CFSP.
- 60 As regards combating terrorism and its funding, it is to be noted that there is nothing in Article 215 TFEU to indicate that measures designed to combat them, taken against natural or legal persons, groups or non-State entities, could not constitute restrictive measures provided for in subparagraph 2 of that article. It is to be observed here that, although neither Article 60 EC nor Article 301 EC referred expressly to combating terrorism, those two provisions did, none the less, constitute the legal basis for the adoption, before the Treaty of Lisbon entered into force, of restrictive measures designed to combat that phenomenon (see, *inter alia*, in this respect, the measures at issue in *Kadi and Al Barakaat International Foundation v Council and Commission*).
- 61 While admittedly the combating of terrorism and its financing may well be among the objectives of the area of freedom, security and justice, as they appear in Article 3(2) TEU, the objective of combating international terrorism and its financing in order to preserve international peace and security corresponds, nevertheless, to the objectives of the Treaty provisions on external action by the Union.
- 62 Article 21(2)(c) TEU, which forms part of Chapter 1 laying down general provisions on the Union’s external action in Title V of the EU Treaty, provides: ‘The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to ... preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter’. With more specific regard to the CFSP, it is to be noted that, according to the first subparagraph of Article 24(1) TEU, ‘[t]he Union’s competence in matters of [the CFSP] shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence’.
- 63 Given that terrorism constitutes a threat to peace and international security, the object of actions undertaken by the Union in the sphere of the CFSP, and the measures taken in order to give effect to that policy in the Union’s external actions, in particular, restrictive measures for the purpose of Article 215(2) TFEU, can be to combat terrorism.
- 64 That assertion is borne out by, in particular, the tenor of Article 43(1) TEU, which makes it clear that all the tasks covered by the common security and defence policy ‘may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories’.

65 It follows from the foregoing that Article 215(2) TFEU may constitute the legal basis of restrictive measures, including those designed to combat terrorism, taken against natural or legal persons, groups or non-State entities by the Union when the decision to adopt those measures is part of the Union's action in the sphere of the CFSP.

66 As the Advocate General observed in point 69 of his Opinion, in so far as Articles 75 TFEU and 215 TFEU relate to different European Union policies that pursue objectives which, although complementary, do not have the same scope, it would not seem possible to regard Article 75 TFEU as a more specific legal basis than Article 215(2) TFEU.

– The purpose and tenor of the contested regulation

67 As is made clear in paragraphs 3 to 5 above, Regulation No 881/2002, amended by the contested regulation, constitutes one of the instruments by which the European Union put into effect an action decided upon within the Security Council and intended to preserve international peace and security (see, to this effect, the penultimate sentence in the preamble to Resolution 1390 (2002)), namely: the adoption of measures freezing the funds and economic resources of persons designated by the Sanctions Committee, with regard to whom the Union simply reproduces the list. It is common ground that terrorism involving persons and entities associated with Usama ben Laden, the Al-Qaeda network and the Taliban is a phenomenon of international proportions.

68 As the Court stated at paragraphs 169 and 184 of *Kadi and Al Barakaat International Foundation v Council and Commission*, the essential purpose and object of the contested regulation is to combat international terrorism. This objective of Regulation No 881/2002 is recalled in recital 11 in the preamble to the contested regulation, which states that '[t]he purpose of Regulation ... No 881/2002 is to prevent terrorist crimes, including terrorist financing, in order to maintain international peace and security'.

69 As the Parliament has itself stressed, the contested regulation for the most part merely reformulates or clarifies provisions of Regulation No 881/2002 or makes them easier to apply, but does not in any way change the nature of the latter regulation's content.

70 It is clear from recitals 4 to 9 in the preamble to the contested regulation that the latter falls within the same line of action as Regulation No 881/2002, supplementing that measure by having the more specific purpose of reconciling the fight against international terrorism with respect for fundamental rights, in accordance with *Kadi and Al Barakaat International Foundation v Council and Commission*.

71 To that end, the contested regulation introduces a listing procedure ensuring that the fundamental rights of the defence, in particular the right to be heard, are respected. Together with Common Position 2002/402, Regulation No 881/2002 and the contested regulation thus establish a system of interaction between the Security Council and the Union.

72 It follows from the foregoing that, in the light of its objectives and of its content, the contested regulation relates to a decision taken by the Union under the CFSP.

73 Contrary to what is maintained by the Parliament, the inclusion of Article 308 EC in the legal basis of Regulation No 881/2002 does not shake that conclusion. While it is true that a measure under the CFSP could not have had Article 308 EC for its sole basis, the fact remains that that article could, as held at paragraph 53 above, supplement the legal basis of a measure adopted in reliance on Articles 60 EC and 301 EC in order to cover the adoption of restrictive measures whose addressees were natural or legal persons, groups or non-State entities not linked to the governing regime of a

third country. A supplementary legal foundation of such a kind is, however, no longer necessary since Article 215(2) TFEU has expressly made it possible to adopt measures directed to such addressees on the basis of that provision.

- 74 Moreover, the Parliament's argument that it is impossible to distinguish the combating of 'internal' terrorism, on the one hand, from the combating of 'external' terrorism, on the other, does not appear capable of calling in question the choice of Article 215(2) TFEU as a legal basis of the contested regulation.
- 75 As is made clear at paragraph 65 above, Article 215(2) TFEU provides a sufficient legal basis for adopting, in response to a decision taken under the CFSP, restrictive measures taken in order to apply that policy to natural or legal persons, groups or non-State entities involved in acts of terrorism.
- 76 In the present case, it is to be emphasised that the contested regulation amends Regulation No 881/2002 which, as found at paragraph 67 above, constitutes one of the instruments by which the European Union put into effect an action decided upon within the Security Council and intended to preserve international peace and security. In addition, as observed at paragraph 72 above, in the light of both its objectives and its content, the contested regulation relates to a decision taken by the Union under the CFSP.
- 77 What is more, although, in connection with the second plea in law, the Parliament denies that Common Position 2002/402 can possibly amount to a decision under the CFSP for the purpose of Article 215(2) TFEU, it has not, however, called in question whether it was possible for that Common Position, having enabled adoption of Regulation No 881/2002 in accordance with Articles 60 EC and 301 EC, to be validly based on Title V of the EU Treaty, as it stood before the Treaty of Lisbon, that is to say, the title of that treaty concerning the CFSP.
- 78 Having regard to those factors, it suffices to find that Article 215(2) TFEU constitutes the appropriate legal basis for measures, such as those at issue in the present case, directed to addressees implicated in acts of terrorism who, having regard to their activities globally and to the international dimension of the threat they pose, affect fundamentally the Union's external activity.
- The consequences for the Parliament's prerogatives of the choice between Articles 75 TFEU and 215 TFEU
- 79 While it is true that choosing between Articles 75 TFEU and 215 TFEU as the legal basis for the contested regulation has consequences for the Parliament's prerogatives, inasmuch as the former provides for recourse to the ordinary legislative procedure whereas, under the latter, the Parliament is merely informed, that fact cannot, however, determine the choice of legal basis.
- 80 As the Council argues, it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure.
- 81 Admittedly, participation by the Parliament in the legislative process is the reflection, at Union level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly (see, to that effect, Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, paragraph 33, and *Titanium dioxide*, paragraph 20).
- 82 Nevertheless, the difference between Article 75 TFEU and Article 215 TFEU, so far as the Parliament's involvement is concerned, is the result of the choice made by the framers of the Treaty of Lisbon conferring a more limited role on the Parliament with regard to the Union's action under the CFSP.



- 83 So far as concerns the Parliament's argument that it would be contrary to Union law for it to be possible for measures to be adopted that impinge directly on the fundamental rights of individuals and groups by means of a procedure excluding the Parliament's participation, it is to be noted that the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union. In addition, under both Article 75 TFEU and Article 215(3) TFEU, the acts referred to in those articles are to include necessary provisions on legal safeguards.
- 84 In consequence, a measure, such as the contested regulation, containing safeguards for the respect of the fundamental rights of the persons whose names appear in the list, may be adopted on the basis of Article 215(2) TFEU. The argument to the contrary, that such a measure may be adopted only on the basis of Article 75 TFEU, would, moreover, render Article 215(2) largely redundant, whereas the duty to respect fundamental rights bears also on Union measures giving effect to resolutions of the Security Council (see, to that effect, *Kadi and Al Barakaat International Foundation v Council and Commission*, paragraphs 285, 299 and 326).
- 85 In those circumstances, and having regard to all the foregoing considerations, it is to be concluded that the contested regulation was rightly based on Article 215(2) TFEU.
- 86 Consequently, the first plea in law must be rejected as unfounded.

*The second plea in law: failure to satisfy the conditions for recourse to Article 215 TFEU*

- 87 Inasmuch as the contested regulation could validly be based on Article 215 TFEU, it is necessary to assess the arguments presented by the Parliament in support of its second plea in law, alleging failure to satisfy the conditions for recourse to that article.

Arguments of the parties

- 88 The second plea is divided into two parts. The first concerns failure to comply with the condition relating to a joint proposal from the High Representative and the Commission, and the second concerns the fact that no decision under the CFSP was taken before the contested regulation was adopted.

– No proposal compatible with the Treaties

- 89 According to the Parliament, when the contested regulation was adopted on 22 December 2009, there was no Commission that could legitimately submit a joint proposal with the High Representative, the term of office of the Commission appointed on 22 November 2004 having expired on 31 October 2009 and the new Commission not taking office until 10 February 2010. Even if it had been acceptable, in the interests of the continuity of the work of that institution, for the Commission appointed in November 2004 to continue to perform certain tasks, its authority would have been confined to dealing with current business. It would not have been empowered to take a major political initiative amending the legal basis of a measure in such a way as to divest it of its legislative nature and to divest the Parliament and the national parliaments of any influence.
- 90 The Parliament considers that it cannot be argued that the proposal submitted by the Commission and the High Representative was merely the continuation of the proposal submitted by the Commission acting alone on 22 April 2009. Furthermore, the way in which the proposal was submitted was not in conformity with the role or the responsibilities of the High Representative, as laid down in the Treaty of Lisbon. It is inconceivable that a joint proposal as required under Article 215(2) TFEU could be replaced by a mere endorsement by the High Representative of a pre-existing Commission proposal,



adopted by that institution before the entry into force of the Treaty of Lisbon. Furthermore, the High Representative, as the person responsible for the CFSP, is required to provide an adequate statement of reasons for the joint proposal submitted.

- 91 The Council submits that when the term of office of the Commission, appointed in November 2004, expired on 31 October 2009, the Commission remained in office pending the appointment of a new Commission, in order to ensure the necessary continuity in the institution's work, as indicated in recital 1 in the preamble to Decision 2010/80/EU of the European Council of 9 February 2010 appointing the European Commission (OJ 2010 L 38, p. 7). The Parliament continued, during the interim period from 1 November 2009 to 10 February 2010, to deal with the Commission as if the latter remained legitimately in existence.
- 92 The Council stresses that the contested regulation was adopted on the basis of the proposal for a regulation of 22 April 2009 endorsed by the High Representative on 14 December 2009. That proposal remained valid after the expiry of the Commission's term of office on 31 October 2009. The only effect of the entry into force of the Treaty of Lisbon was to alter the procedure governing the adoption of the contested regulation.
- 93 The Council observes that, on 2 December 2009, the Commission presented to the Parliament and the Council a communication on the consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures, including an indicative list of the pending proposals it had presented before the entry into force of the Treaty of Lisbon and indicating, for each of the proposals, the consequences of the entry into force of that treaty. The proposal presented by the Commission to the Council on 22 April 2009 was mentioned in that list, together with an indication that its legal basis was to change from the former Articles 60 EC, 301 EC and 308 EC to Article 215 TFEU.
- 94 Even if it were to be conceded that the situation in which the Commission found itself is analogous to that provided for in the sixth paragraph of Article 246 TFEU on the voluntary resignation of all the Members of the Commission, the case-law of the Union judiciary does not, in the Council's view, support the conclusion that the Commission stepped outside the sphere of current business. In paragraph 96 of its judgment in Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, the General Court held that a decision on State aid adopted by the Commission after its members had collectively resigned did not constitute a new political initiative which thus exceeded the powers of a Commission that was restricted to dealing with current business. If that was the conclusion in respect of a new decision adopted by the Commission during the period in question, the same conclusion must *a fortiori* apply in circumstances in which a pre-existing proposal remained pending. In addition, the question arises whether the limitation to dealing with current business laid down in the second paragraph of Article 201 EC was applicable, given that the Parliament had not adopted a motion of censure on the Commission's administration.
- 95 According to the Council, the joint proposal of the High Representative and the Commission was duly submitted. On 14 December 2009, the High Representative endorsed the Commission's proposal of 22 April 2009. It was neither necessary nor possible for her to present a separate statement of reasons. Nor was it possible for her to make unilateral additions to the statement of reasons set out in the preamble to the proposal.

– No decision under the CFSP

- 96 According to the Parliament, the contested regulation does not contain any reference to a decision adopted in accordance with Chapter 2 of Title V of the EU Treaty, even though Article 215 TFEU provides for it. The preamble to that regulation refers to Common Position 2002/402, but the latter

does not constitute a decision within the meaning of that provision. A common position adopted before the entry into force of the Treaty of Lisbon cannot be treated in the same way as such a decision.

- 97 According to the Parliament, the Council's arguments that the legal effects of that common position should be maintained, in accordance with the Protocol (No 36) on transitional provisions, annexed to the FEU, EU and EAEC Treaties and with what that institution calls the 'principle of continuity of acts', are irrelevant. There is nothing in that protocol, nor is there any principle of European Union law, to the effect that a common position may take the place of a decision adopted in accordance with Chapter 2 of Title V of the EU Treaty. The Council also disregards the fact that such a decision is itself amenable to judicial review by a party having the requisite legal standing and that the Court could even prohibit the Council from adopting measures under Article 215 TFEU.
- 98 The Council contends that Regulation No 881/2002, preceded by the adoption of Common Position 2002/402, defines the specific provisions and procedures necessary to give effect to the freezing of funds. Even though it was decided to amend that regulation in response to *Kadi and Al Barakaat International Foundation v Council and Commission*, by adding to it provisions on procedural safeguards, it was not necessary to amend Common Position 2002/402 or to adopt a new decision under the CFSP to that effect. When a measure under the CFSP requiring the adoption of restrictive measures already exists, that measure not having been repealed, annulled or amended, it cannot be required that a new decision under the CFSP should be adopted under Chapter 2 of Title V of the EU Treaty. Such an approach would be contrary to the principle of continuity of acts laid down in Article 9 of the Protocol (No 36).
- 99 The Council also maintains that it does not follow from the fact that listed persons and entities may now bring an action for the annulment of decisions taken in the sphere of the CFSP imposing restrictive measures on them that any amendment to an existing regulation must necessarily be preceded by the adoption of a new CFSP decision.

#### Findings of the Court

- 100 With regard, in the first place, to the lack of a proposal compatible with the Treaties, it is true that the Commission's term of office ended on 31 October 2009 and that the Commission remained in office until 10 February 2010, pending the completion of the process of appointing the new Commission, in accordance with the provisions of the Treaty of Lisbon. The contested regulation was adopted between those two dates, namely, on 22 December 2009.
- 101 Nevertheless, even if, after the Commission's term of office expired on 31 October 2009, that body's powers were limited to dealing with current business, the institution could undertake the formal amendment of its proposal for a regulation of 22 April 2009 in respect of its legal basis.
- 102 As the Commission stresses, such a step was essential if the Union legislature was to continue with the pending procedure after the Treaty of Lisbon entered into force.
- 103 It may be observed here that, so far as concerns those legislative proposals of the Commission whose legal basis could not, in view of the nature and scope of the measures, simply be replaced by a new basis, the proposals were, in accordance with the communication of 2 December 2009 mentioned at paragraph 93 above, withdrawn and were to be replaced by new proposals.
- 104 As regards the Parliament's argument that a joint proposal by the High Representative and the Commission was necessary, it is to be found that on 14 December 2009 the High Representative officially endorsed the proposal for a regulation of 22 April 2009.

- 105 Article 215 TFEU requires no more than a joint proposal of the Commission and the High Representative, and does not make it necessary for the High Representative to present a separate statement of reasons or to supplement that in the Commission's proposal.
- 106 With regard, in the second place, to the lack of a decision under the CFSP, it is appropriate to examine the question whether, in view of the entry into force of the Treaty of Lisbon, the contested regulation could be adopted on the basis of Common Position 2002/402, which served as the basis for Regulation No 881/2002.
- 107 It must be recalled that, in accordance with Article 9 of the Protocol (No 36), the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the EU Treaty before the entry into force of the Treaty of Lisbon are to be preserved until those acts are repealed, annulled or amended in implementation of the Treaties.
- 108 The legal effects of Common Position 2002/402 have thus been preserved after the Treaty of Lisbon entered into force for so long as that measure is not repealed, annulled or amended.
- 109 As the Advocate General stated at point 102 of his Opinion, lest Article 9 of the Protocol (36) be rendered largely redundant, the fact that the EU Treaty no longer provides for common positions but for decisions in matters relating to the CFSP does not have the effect of rendering non-existent those common positions adopted under the EU Treaty before the Treaty of Lisbon entered into force.
- 110 In those circumstances, although the legal contexts of those two classes of legal acts are not the same, common positions not repealed, annulled or amended after the Treaty of Lisbon entered into force may be considered to correspond, for the purpose of implementing Article 215 TFEU, to the decisions adopted in accordance with Chapter 2 of Title V of the EU Treaty to which that article refers.
- 111 It follows that the second plea must be rejected as being unfounded.
- 112 None of the pleas put forward by the Parliament in support of its action being well founded, that action must, in consequence, be dismissed.

### **Costs**

- 113 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the Parliament has been unsuccessful, the latter must be ordered to pay the costs. Pursuant to the first subparagraph of that article, the interveners in these proceedings are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Parliament to pay the costs;**
- 3. Orders the Czech Republic, the French Republic, the Kingdom of Sweden and the European Commission to bear their own costs.**

[Signatures]