

# The Adoption of 'Targeted Sanctions' and the Potential for Inter-institutional Litigation after Lisbon

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## Abstract

This article analyses the post-Lisbon legal framework for the adoption of restrictive measures against individuals or non-State entities – so-called 'targeted sanctions' or 'smart sanctions'. It is argued that the procedural differences to adopt targeted sanctions in the framework of the EU's counter-terrorism activities (Art. 75 TFEU) and with regard to the implementation of the Common Foreign and Security Policy (Art. 215 TFEU) increase the potential for inter-institutional litigation. This is particularly the case because the boundaries between the EU's competences in the Area of Freedom, Security and Justice (AFSJ) and the Common Foreign and Security Policy (CFSP) are blurred. This is illustrated with the discussions surrounding the adoption of amendments to Regulation 881/2002 imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban after the entry into force of the Treaty of Lisbon. The European Parliament contests the adoption of those amendments on the basis of Art. 215 (2) TFEU and argues that only Art. 75 TFEU is the appropriate legal basis given the counter-terrorism objective of the measure at stake. This article discusses the different options to find an appropriate solution for this inter-institutional competence battle and argues that the Court's new possibilities to rule on the duty of consistency may help find a way out.

## Keywords

CFSP; Coherence; Lisbon Treaty; Sanctions

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IN AN ATTEMPT TO MITIGATE THE NEGATIVE HUMANITARIAN CONSEQUENCES OF traditional trade sanctions against third states, the United Nations Security Council decided in the 1990s to focus more on so-called "targeted" or "smart" sanctions. The latter include specific measures designed to tackle certain sectors or people rather than the entire economy and population of a state.<sup>1</sup> They typically include measures such as arms embargoes, visa bans and the freezing of financial assets. The global fight against terrorism after the 2001 attacks in New York further increased the need to adopt restrictive sanctions against individuals or non-state actors. The European Union could not escape this trend.<sup>2</sup> In 2003, the Council embarked upon an examination of its sanctions practice

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<sup>1</sup> D. Cortright, G. A. Lopez and E. S. Rogers, "Targeted Financial Sanctions: Smart Sanctions that do work", in: D. Cortright and G.A. Lopez, *Smart Sanctions. Targeting Economic Statecraft* (Oxford, Rowan and Littlefield, 2002), p. 23.

<sup>2</sup> A. W. de Vries and H. Hazelzet, "The EU as a New Actor on the Sanctions Scene", in: P. Wallenstein and C. Staibano, *International Sanctions. Between Words and Wars in the Global System* (London and New York, Frank Cass, 2005), pp. 95-107.

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and policy, which resulted in the adoption of "guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (CFSP)"<sup>3</sup> as well as a document presenting the "basic principles on the use of restrictive measures (sanctions)".<sup>4</sup>

The application of the EU's sanctions regime in practice, either with regard to the implementation of UN Security Council resolutions or in the pursuit of an autonomous counter-terrorism policy of the Union, quickly revealed a number of significant challenges.<sup>5</sup> First, targeted sanctions require close cooperation between the United Nations, the EU and its Member States and raise questions about the relationship between international law and European law. Second, the protection of fundamental rights and, in particular, the right to effective judicial review for individuals targeted by restrictive measures constitutes a major issue for a Union based on the rule of law. Third, the sanctions regime cuts across the horizontal (between EU institutions) and vertical (between the EU and the Member States) division of competences. Depending on the exact nature of the restrictive measures and the areas or targets covered by them, different decision-making procedures and legal instruments apply. For instance, restrictions on admission (visa or travel bans) instituted within the framework of the CFSP are enforced on the basis of Member States' legislation on admission of non-nationals. Sanctions providing for the reduction or interruption of economic relations, on the other hand, are implemented on the basis of Union (previously Community) regulations.<sup>6</sup>

The anti-terrorist cases before the Court of First Instance (now the General Court) and the Court of Justice, in particular the seminal *Kadi* and *Al Barakaat* judgments, tackled many of the above mentioned fundamental questions. The scope and importance of the issues at stake explains the countless number of academic comments and reflections on the consequences of the Court's approach.<sup>7</sup> However, whereas the scholarly debate essentially focused on the protection of individual rights versus the effectiveness of the international fight against terrorism, the competence question received far less attention.<sup>8</sup> In an influential article on economic sanctions and individual rights, Halberstam and Stein even suggested that the legal base aspect of *Kadi* may be nothing more than "a tempest in a teapot".<sup>9</sup>

It is true that the discussions about the legal basis for the adoption of restrictive measures against individuals may, at first sight, look somewhat artificial. After all, the Court of First

<sup>3</sup> Council of the European Union, 15579/03, 3 December 2003; later updated on the basis of document 15114/05, 2 December 2005.

<sup>4</sup> Council of the European Union, 10198/1/04, 7 June 2004.

<sup>5</sup> M. Nettesheim, "UN Sanctions against Individuals. A Challenge to the Architecture of European Union Governance", 44 *CML Rev.* (2007), pp. 567-600.

<sup>6</sup> For a recent practical illustration of the implementation of targeted sanctions on the basis of Member State and EU action, see Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, *OJ* (2011) L 58/53. Articles 4 and 5 of this CFSP Decision instruct the Member States to take the necessary measures for the inspection of cargo to and from Libya in their territory and to prevent the entry into, or transit through, their territories of persons linked with the Libyan regime. The EU, on the other hand, implemented Article 6 of the same Decision relating to the freezing of all funds, financial assets and economic resources of the persons concerned by adopting Council Regulation 204/2011 of 2 March 2011, *OJ* (2011) L 58/1.

<sup>7</sup> S. Poli and M. Tzanau, "The Kadi Rulings: A Survey of the Literature", *Yearbook of European Law* (2009), pp. 533-558.

<sup>8</sup> Exceptions are: M. Cremona, "EC Competence, 'Smart Sanctions' and the *Kadi* Case", *Yearbook of European Law* (2009), pp. 559-592; A.D. Casterleiro, "The Implementation of Targeted Sanctions in the European Union", in: A.D. Casterleiro and M. Spornbauer, *Security Aspects in EU External Policies*, EUI Working Papers (2009) 1, pp. 39-50; T. Tridimas, "Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order", 34 *EL Rev.* (2009), p. 103; C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights. The Case of Individual Sanctions* (Oxford, Oxford University Press, 2009), pp. 78-126.

<sup>9</sup> D. Halberstam and E. Stein, "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order" 46 *CML Rev.* (2009), p. 36.

Instance, the Advocate General and the Court of Justice in *Kadi and Al Barakaat* did not disagree on the competence to act at the EU level but rather on the interpretation of the relevant treaty provisions and their respective objectives and limitations. Nevertheless, the importance of this issue cannot be underestimated. In the pre-Lisbon constellation, the Court's judgment clarified the complicated "constitutional architecture" of the Union's pillar structure, based upon "the coexistence of the Union and the Community as integrated but separated legal orders".<sup>10</sup> Taking into account the formal abolition of the pillar structure and the introduction of a single legal personality for the Union, the question arises how the Treaty of Lisbon affects the findings of the Court in *Kadi and Al Barakaat*.

Of particular significance is the introduction of a specific legal basis for the adoption of restrictive sanctions against individuals in the framework of the EU's counter-terrorism activities (Art. 75 TFEU) and for the implementation of the CFSP (Art. 215 TFEU). The relationship between both provisions is far from clear and illustrates the more fundamental question about the balance between delimitation and consistency of the EU's external action after the collapse of the pillar structure.<sup>11</sup> In order to tackle this issue, the legal framework of the EU's sanctions regime before the entry into force of the Treaty of Lisbon (II) will be compared with the Lisbon provisions concerning the adoption of restrictive sanctions (III). In order to clarify the link between Articles 75 and 215 TFEU, the new legal framework for the EU's external action will be analyzed (IV) in the light of the pending inter-institutional conflict between the European Parliament and the Council concerning the adoption of amendments to Regulation 881/2002 imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (V).<sup>12</sup>

### **The adoption of restrictive sanctions against individuals in the pre-Lisbon legal context: a pragmatic approach**

Before the entry into force of the Treaty of Lisbon on 1 December 2009, the primary legal framework of the EU did not include any explicit provisions for the adoption of sanctions against individuals. Hence, the Union's sanctions regime developed in practice on the basis of an expansionist use of the provisions regarding economic sanctions against third states. Pursuant to old Article 301 EC, the interruption or reduction, in part or completely, of economic sanctions with one or more third countries required a prior Common Position or Joint Action adopted under the CFSP and was to be decided by the Council on the basis of qualified majority voting and on a proposal from the European Commission. In addition, Article 60 (1) EC provided for a specific legal basis allowing the Council to adopt "in the cases envisaged in Article 301 [...] the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned". Hence, the EU's pre-Lisbon sanctions regime implied a two-stage process, starting with the adoption of a CFSP act and, depending on the nature of the measure and the division of competences, implementation on the part of the Member States and/or the European Community. Issues such as travel restrictions, diplomatic sanctions and arms embargoes<sup>13</sup> required direct Member State action whereas import and export restrictions, a ban on financial and

<sup>10</sup> ECJ, Joint Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, [2008] ECR I-6351, para. 202.

<sup>11</sup> P. Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency", 47 *CML Rev.* (2010), pp. 987-1019.

<sup>12</sup> Action brought on 11 March 2010 – *European Parliament v. Council*, Case C-130/10. At the time of writing, the opinion of the Advocate General and the judgment of the court were still pending.

<sup>13</sup> On the basis of Article 346 TFEU (ex Art. 296 TEC), Member States may take adopt measures which are connected with the production of or trade in arms, munitions and war material.

technical assistance, asset freezes and a ban on investment and credit, implied the adoption of a Community regulation on the joint legal basis of Articles 301 and 60 EC.<sup>14</sup>

The EU's restrictive measures against the Milosevic regime in the Federal Republic of Yugoslavia (FYR) at the end of the 1990s perfectly illustrate the Council's liberal interpretation of the relevant EC Treaty provisions. In response to the use of force against the Kosovar Albanian community in Kosovo and the unacceptable violation of human rights, the EU imposed economic and financial sanctions as well as a visa ban for senior FYR and Serbian representatives.<sup>15</sup> Significantly, a Council Regulation implementing the freezing of funds in relation to Mr. Milosevic and his associates remained in force even after the change of government on the ground that those persons continued to represent a threat to the consolidation of democracy in the FYR.<sup>16</sup> Hence, even though Articles 301 and 60 EC only referred to "third countries", this did not prevent the Council to adopt targeted sanctions against individuals. In the *Minin* case, an associate of former Liberian president Charles Taylor opposed this practice and argued that Articles 301 and 60 EC could "not constitute an adequate legal basis for the purposes of adopting punitive or preventative measures affecting individuals and producing direct effect on them".<sup>17</sup> The Court of First Instance, however, concluded that the restrictive measures adopted against Charles Taylor and his associates had "a sufficient link with the territory or the rulers of Liberia" to be regarded as "seeking to interrupt or reduce, in part or completely, economic relations with a [...] third country".<sup>18</sup> Also in later judgments, both the Court of First Instance and the Court of Justice accepted that "the adoption of measures against a third country may include the rulers of such a country and the individuals and entities associated with them or controlled by them, directly or indirectly".<sup>19</sup> Even a bank can fall within this definition when there is a link with the aim to put pressure on a third state. This was, for instance, the case with sanctions against Iran, which included the freezing of funds of banks suspected of providing financial and technical assistance for the nuclear and missile-development programme of this country.<sup>20</sup>

The limits of this far-reaching interpretation of the notion "economic sanctions against a third state" became obvious in the context of the EU's counter-terrorism policy. The revision of sanctions against persons and entities associated with Usama bin Laden, Al-Qaida, and the Taliban, following the fall of the Taliban regime in Afghanistan in 2002, no longer provided for a link with the governing regime of a third country.<sup>21</sup> In the absence of a specific legal basis for this new type of targeted sanctions, the Council adopted the amended regulation on the joint legal basis of Articles 60, 301 and 308 EC. The addition of the "flexible legal basis" or "supplementary competence" of Article 308 EC (now Art. 352 TFEU), turned out to be particularly controversial. The use of this provision was a popular solution to complement the limited express provisions on the external relations of the

<sup>14</sup> A good example of the EU's sanctions regime in the pre-Lisbon period concerns the restrictive measures adopted against Burma/Myanmar in 2006/2007. See: Cremona, *supra* note 8, p. 565.

<sup>15</sup> Common Position of 19 March 1998 on restrictive measures against the Federal Republic of Yugoslavia, OJ (1998) L 95/1 and Common Position of 7 May 1998 concerning the freezing of funds held abroad by the Federal Republic of Yugoslavia (FRY) and Serbian Governments, OJ (1998) L 143/1.

<sup>16</sup> Council Regulation (EC) No 2488/2000 of 10 November 2000 maintaining a freeze of funds in relation to Mr. Milosevic and those persons associated with him and repealing Regulations (EC) Nos 1294/1999 and 607/2000 and Article 2 of Regulation (EC) No 926/98, OJ (2000) L 287/19.

<sup>17</sup> CFI, Case T-362/04, *Leonid Minin v. Commission* [2007] ECR II-2003, para. 59.

<sup>18</sup> *Ibid.*, para. 72.

<sup>19</sup> *Supra* note 10, para. 61.

<sup>20</sup> Joined Cases T-246/08 and T-332/08, *Melli Bank plc v. Council*, [2009] ECR II-2629, para. 69.

<sup>21</sup> Significantly, the initial UN resolutions requiring all States to freeze funds and other assets owned by the Taliban, Usama bin Laden and the Al-Qaeda organisation were implemented in the EU by means of CFSP Common Positions and EC Regulations based on Articles 301 and 60 (1) EC. See: Common Position (CFSP) 1999/727, OJ (1999) L 294/1 and Council Regulation (EC) 337/2000, OJ (2000) L 43/1 and Common Position (CFSP) 2001/154, OJ (2001) L 57/1 and Council Regulation (EC) 467/2001, OJ (2001) L 67/1.

European Economic Community in the early stages of the European integration process. In the pre-Maastricht period, its combination with ex Article 113 EEC (now 207 TFEU) on common commercial policy was particularly fruitful for the conclusion of economic and co-operation agreements with third countries.<sup>22</sup> However, the use of this provision is not without limitations. It can only be used when no other articles of the Treaty give the institutions the necessary powers to adopt the measure at stake and when Community action proved necessary to attain, in the course of the operation of the common market, one of the objectives of the Community. The latter preconditions complicated its use for the adoption of restrictive measures against individuals. This was clearly illustrated in *Kadi*, where the Court of First Instance, the Advocate General and the Court of Justice all came to different conclusions about the legal basis for adopting smart sanctions against non-state actors.

According to the CFI, Article 308 EC could, in itself, not be used to pursue the safeguarding of international peace and security, i.e. an objective of the European Union and not of the European Community. However, in combination with Articles 60 and 301 EC this was deemed to be possible. Despite the coexistence of the Union and the Community as “integrated but separate legal orders”, the explicit bridge between the two foreseen in Articles 60 and 301 EC was, in the opinion of the CFI, sufficient to use Article 308 EC in order to extend the scope of application of the latter provisions.<sup>23</sup> The Advocate General, for his part, suggested a broad interpretation of Articles 60 and 301 EC alone as a sufficient basis for all types of economic sanctions.<sup>24</sup> The ECJ, however, ruled out this option by referring to the text of those provisions and by pointing out that the “essential purpose and object” of the contested regulation was the fight against terrorism and not the adoption of economic sanctions against a third state.<sup>25</sup> It also rejected the reasoning of the CFI that Article 308 EC could be used in combination with Articles 60 and 301 EC to achieve CFSP objectives derived from the EU Treaty. Nevertheless, it accepted that this combination of legal grounds was possible for other reasons. The objective to ensure the efficient use of a Community instrument to implement restrictive measures of an economic nature as well as the link of those measures with the operation of the common market explained, in the view of the ECJ, why the *Al-Qaida* Regulation was adopted on the correct legal basis of Articles 60, 301 and 308 EC together.

The combination of Articles 301, 60 and 308 EC provided a pragmatic solution to the absence of a specific competence for the adoption of sanctions against private individuals but could not avoid the impression that this practice went beyond the clear wording and objectives of those provisions. In particular, the reasoning of the ECJ that targeted sanctions affect the operation of the internal market – and therefore fall within the scope of ex Art. 308 EC (Art. 352 TFEU) – is at least somewhat artificial.<sup>26</sup>

A specific problem in the pre-Lisbon context concerned the lack of Community competences to adopt restrictive measures against individuals and terrorist organisations whose activities are wholly internal to the EU (so-called ‘home terrorists’).<sup>27</sup> The latter do not fall within the scope of CFSP and, therefore, the EU institutions could not rely on the bridge between Community and Union competences to adopt implementing measures

<sup>22</sup> See: M. Maresceau, “Bilateral Agreements Concluded by the European Community”, *The Hague Academy of International Law Recueil des Cours* 309 (2004), p. 187.

<sup>23</sup> CFI, T-315/01, *Kadi v. Council and Commission*, [2005] ECR II-3649, para. 123-125.

<sup>24</sup> AG Maduro in Case C-402/05 P, *Kadi v. Council and Commission*, para. 11-16.

<sup>25</sup> ECJ, Joint Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, [2008] ECR I-6351, para. 169.

<sup>26</sup> For a critical analysis of the Court’s approach, see: C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights. The Case of Individual Sanctions* (Oxford, Oxford University Press, 2009), pp. 78-126; T. Tridimas, “Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order”, 34 *ELRev.* (2009), pp. 107-108.

<sup>27</sup> A clear example is that of *Segi*, an alleged terrorist organisation fighting for Basque independence. See: Case C-355/04, *Segi and others v. Council* ECR [2007] I-1657.



on the basis of a Community regulation. In relation to 'home terrorists', the Council could only rely on third pillar instruments (police and judicial cooperation in criminal matters) without having a possibility to introduce direct legal consequences such as the freezing of assets and bank accounts. This type of action remained a competence of the individual Member States.<sup>28</sup> In other words, the EU's pillar structure significantly complicated the efficient implementation of targeted sanctions in the pre-Lisbon period.

### **A double explicit legal basis for the adoption of restrictive measures against individuals after Lisbon**

In an attempt to update the treaties to the new practice of smart sanctions, the Treaty of Lisbon explicitly foresees in the adoption of restrictive measures against individuals and non-State actors in Articles 75 TFEU (ex Art. 60 EC) and 215 (2) TFEU (ex. 301 EC). In contrast to Articles 60 and 301 EC, new Articles 75 TFEU and 215 TFEU no longer include any cross-reference. To the contrary, both provisions have a different aim and function within the legal framework of the Union. Article 75 TFEU allows for the adoption of measures necessary to achieve the objectives of the Area of Freedom, Security and Justice (AFSJ), as regards preventing and combating terrorism and related activities. It provides an explicit legal basis for "administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities". In other words, it is a legal basis of its own right, which remedies the former impossibility to adopt autonomous financial sanctions against EU-internal terrorists (cf. *supra*). Article 215 TFEU, on the other hand, belongs to Part V of the TFEU on the Union's external action and allows for the implementation of CFSP decisions providing for the interruption or reduction of economic and financial relations with one or more third countries. Significantly, Article 215 (2) TFEU explicitly provides for a possibility to adopt restrictive measures against natural or legal persons and groups or non-State entities.

Of particular importance are the procedural differences for the adoption of smart sanctions under the respective provisions. With regard to Article 215 (2) TFEU, a unanimously adopted CFSP decision is implemented by qualified majority in the Council on a joint proposal from the High Representative and the Commission. The European Parliament only has to be informed about the adopted measures. The situation is different under Article 75 TFEU where the Council and the European Parliament act in accordance with the ordinary legislative procedure, and without a prior CFSP decision.<sup>29</sup>

The legal complexities resulting from the ambiguous relationship between Articles 75 and 215 (2) TFEU became obvious in the context of the amendments to Regulation 881/2002/EC imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban. In the wake of the *Kadi* judgment of the ECJ, the Commission proposed to adopt those amendments on the basis of Articles 60, 301 and 308 EC.<sup>30</sup> Following the entry into force of the Treaty of Lisbon, the Commission announced that the proposal was to be adopted on the single legal basis of Article 215 (2) TFEU implying that the European Parliament was no longer to be

<sup>28</sup> E. Spaventa, "Fundamental Rights and the Interface between the Second and Third Pillar", in: A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge, CUP, 2008), p. 132.

<sup>29</sup> The ordinary legislative procedure is laid down in Article 294 TFEU and principally implies that the Council and the European Parliament co-decide on a proposal from the Commission.

<sup>30</sup> Proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al Qaida network and the Taliban, COM (2009) 187 final, 22 April 2009.

consulted on the adoption of sanctions that relate to individuals.<sup>31</sup> Immediately, the Committee on Legal Affairs of the European Parliament contested this course of events and suggested Article 75 TFEU as the proper legal basis for the proposed regulation “since the objective is preventing and combating terrorism and related activities by non-State entities”.<sup>32</sup> This position was later confirmed in a European Parliament resolution<sup>33</sup> and resulted, after the adoption of Council Regulation No 1286/2009 on the basis of Article 215 (2) TFEU,<sup>34</sup> in an action for annulment before the Court of Justice.<sup>35</sup> Before entering into the discussion about the potential solution to this type of inter-institutional conflict, it is necessary to analyse the new legal framework of EU external action after Lisbon.

### EU external action after the collapse of the pillar structure<sup>36</sup>

In an attempt to increase the coherence and consistency of its policies, the Treaty of Lisbon introduced a number of significant innovations such as the formal abolition of the pillar structure (Art. 1 TEU), a single legal personality for the Union (Art. 47 TEU), a single set of foreign policy objectives (Art. 21 TEU) and new institutional actors (President of the European Council, High Representative for Foreign Affairs and Security Policy, External Action Service). Perhaps even more important than the institutional adaptations to increase the coherence of the EU's external action is the introduction of a new delimitation rule to distinguish between CFSP and non-CFSP external actions of the Union. Article 40 TEU lays down that the implementation of the CFSP shall not affect the application of the other EU competences and *vice versa*.

This new rule stands in stark contrast to the hierarchic relationship between the pillars under the old treaty regime, where, inspired by a fear of intergovernmental contamination of supranational decision-making, several provisions underlined the primacy of EC competences.<sup>37</sup> Former Article 47 EU in particular aimed to protect the *acquis communautaire* against any encroachment on the part of the EU Treaty.<sup>38</sup> In the *ECOWAS* judgment, the ECJ found that for measures pursuing two aims which are inextricably linked without one being incidental to the other – in this case development cooperation and CFSP – priority should be given to the non-CFSP legal basis. Whenever an act could be adopted on the basis of the EC Treaty it turned out impossible to adopt an act with a

<sup>31</sup> Communication from the European Commission to the European Parliament and the Council, “Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures”, COM (2009) 665 final, 2 December 2009.

<sup>32</sup> European Parliament Committee on Legal Affairs, Opinion on the legal basis of the proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, JURI\_AL(2009)430917, 4 December 2009, p. 8.

<sup>33</sup> European Parliament resolution of 19 December 2009 on restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, in respect of Zimbabwe and in view of the situation in Somalia, OJ (2010) C 286 E/5.

<sup>34</sup> 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 Osama bin Laden, the Al-Qaida network and the Taliban, O.J. 2009, L 346/42.

<sup>35</sup> Action brought on 11 March 2010 – *European Parliament v. Council*, Case C-130/10.

<sup>36</sup> For a more detailed analysis, see: P. Van Elsuwege, “EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency”, 47 *CML Rev.* (2010), pp. 987-1019.

<sup>37</sup> See ex Article 47 EU in conjunction with ex Art. 1 (3) and 2 EU.

<sup>38</sup> Case C-91/05, *Commission v. Council* (ECOWAS), [2008] ECR I-3651, para. 31-33; Dashwood, “Article 47 TEU and the relationship between first and second pillar competences” in Dashwood and Maresceau (Eds.), *Law and Practice of EU External Relations* (Cambridge, 2008), pp. 70-103.

similar content on the basis of the EU Treaty, irrespective the nature of the Community competences.<sup>39</sup>

The new provisions on EU external action, introduced with the Treaty of Lisbon, have far-reaching implications for the existing case law and significantly affect the previous delimitation rules. First, the presumption in favour of using non-CFSP powers whenever possible is no longer valid. The CFSP is elevated to an equal level of protection as a result of Article 40 TEU in combination with Article 1 (3) TEU. Second, as a result of competence overlaps and the intertwined character of different foreign policy areas, the Court's traditional analysis of the 'aim and content' of a measure is not well-suited to distinguish between CFSP and non-CFSP actions. The interconnection between the EU's external policies is emphasised in Article 21 TEU, which includes a comprehensive list of objectives for the entire range of EU external action, and in Article 23 TEU, which states that the EU's activities in the field of CFSP are guided by the general principles and objectives of EU external action as a whole. In line with this approach, Article 24 (1) (ex 11, as amended) TEU no longer includes any references to CFSP objectives. Accordingly, it seems particularly difficult to apply a centre of gravity test. Hence, the question is how the Court can delineate between CFSP and non-CFSP external action in disputes such as the one between the European Parliament and the Council on the correct legal basis for the adoption of restrictive sanctions against individuals linked with Al-Qaida, the Taliban and Usama bin Laden. In other words, do those measures essentially belong to the EU's counter-terrorism policy in order to establish an AFSJ or do they mainly aim to promote international peace and security as part of the CFSP?

### Potential solutions to inter-institutional conflicts about the legal basis for the adoption of restrictive sanctions against individuals

#### *Possible criteria to distinguish between the AFSJ and the CFSP*

One option to solve the above mentioned dilemma is to apply the more general rule (*lex generalis*) only when action under a more specific provision (*lex specialis*) is not possible.<sup>40</sup> Taking into account that the scope of Article 75 TFEU is more defined, relating to administrative measures restricting capital movements and payments of individuals in order to prevent and combat terrorism, whereas Article 215 TFEU provides for all types of restrictive measures and also measures against third countries, this model suggests that Article 75 TFEU and not Article 215 (2) TFEU is the appropriate legal basis for amending Regulation 881/2002 EC. This argument is reinforced by the finding of the Court in *Kadi* that "the essential purpose and object of the contested regulation is to combat international terrorism [...] and not to affect economic relations between the Community and each of the third countries where those persons or entities are."<sup>41</sup> However, the application of Article 75 TFEU is confined to achieve the EU's internal security objectives laid down in Article 67 TFEU. It is, in other words, questionable whether a broad definition of the EU's counter-terrorism competences can include sanctions against individuals operating outside the EU's borders without affecting the Union's CFSP competences protected under Article 40 (2) TEU. This is particularly the case when those sanctions are adopted to implement UN Security Council resolutions.

<sup>39</sup> Case C-91/05, *supra* note 38, para 58-62; Van Elsuwege, "On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the ECOWAS judgment of the European Court of Justice", 15 *Columbia Journal of European Law* (2008), 531-548.

<sup>40</sup> M. Cremona, "Defining Competence in EU External Relations: Lessons From the Treaty Reform Process" in Dashwood and Maresceau (Eds.), *Law and Practice of EU External Relations* (Cambridge, 2008), p. 46.

<sup>41</sup> ECJ, Joint Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat*, [2008] ECR I-6351, para. 169.



Proceeding from the perspective that the AFSJ and the CFSP represent the EU's internal and external security policies, it may well be argued that Article 215 TFEU, as part of the EU's external action, is used as a legal basis for sanctions against third states and persons engaged in activities outside the EU whereas Article 75 TFEU can be used exclusively for adopting measures against persons who are active inside the EU. This distinction reflects the old differentiation between sanctions adopted under the second and third pillar respectively (cf. *supra*). In practice, however, it appears very difficult if not impossible to distinguish between internal and external aspects of security. Terrorist organisations do not stop at the borders of the Union or its Member States and often have links all around the globe. The *Al Qaida* network and its alleged links with terrorist attacks in Spain and the United Kingdom provide a perfect example. At the least, it is arguable that terrorist organisations operating from outside the Union not only threaten the international peace and security but also the internal area of freedom, security and justice. Hence, any distinction on the basis of the internal or external dimensions of the targeted sanctions appears somewhat artificial. Moreover, this would be contrary to the comprehensive approach to counter-terrorism laid down in the European security strategy<sup>42</sup> and the Stockholm Programme on the implementation of the AFSJ.<sup>43</sup>

A more appropriate solution could be to distinguish between two types of sanctions against individuals suspected of terrorist activities. In this scenario, Article 75 TFEU serves as the legal basis for sanctions adopted in the context of the EU's autonomous counter-terrorism strategy whereas Article 215 TFEU would apply for financial sanctions based on UN-lists.<sup>44</sup> This option has the advantage of clarity but nothing in the wording of Article 215 TFEU restricts its application to the implementation of UN Security Council resolutions. Hence, it is perfectly possible to adopt autonomous sanctions in addition to UN sanctions in one and the same legal instrument.<sup>45</sup> The only precondition is the prior adoption of a decision falling within the scope of CFSP. Taking into account the rather general definition of CFSP, including "all areas of foreign policy and all questions relating to the Union's security",<sup>46</sup> a link with UN Security Council resolutions may in itself be regarded as sufficient to trigger the application of Article 215 TFEU. Moreover, autonomous EU actions against terrorists operating outside the EU's borders automatically have a foreign policy link that bring them at least potentially within the scope of Article 215 TFEU. This would limit the use of Article 75 TFEU to autonomous financial sanctions against EU-internal terrorists.

Based upon a comparison of the scope *rationae materiae* of Articles 75 and 215 TFEU, it may also be argued that not the source of the terrorist threat (internal vs. external) or the initiator of the sanctions (EU vs. UN) but the type of sanctions (counter-terrorist vs. foreign policy) determines the choice of legal basis. This would imply the use of Article 75 TFEU for counter-terrorist sanctions and Article 215 TFEU when restrictive measures are connected to the political situation in a third country. This interpretation suggests that Article 215 (2) TFEU codifies the *Minin* line of case law allowing for sanctions against persons having a sufficient link with the territory or the rulers of a given country (cf. *supra*). From this perspective, Articles 75 and 215 TFEU are complementary in nature. The latter includes a general rule applicable in respect to a well-defined geographical area outside the EU

<sup>42</sup> A Secure Europe in a Better World, European Security Strategy, Brussels, 12 December 2003, <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

<sup>43</sup> European Council, "Stockholm programme – an open and secure Europe serving and protecting citizens", *OJ* (2010) C 115/ 6.

<sup>44</sup> Eckes, *supra* note **Error! Bookmark not defined.**, p. 123.

<sup>45</sup> A good example are the sanctions adopted against the Ghadaffi regime in Libya, which included in separate annexes those entities and persons designated by the UN Security Council or the UN Sanctions Committee and the persons and entities subject to the EU's autonomous sanctions policy. See: Council Regulation (EU) No. 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya, *OJ* (2011) L 58/1.

<sup>46</sup> Art. 24 (1) TEU

territory. Article 75 TFEU, on the other hand, allows for the adoption of financial sanctions against individuals involved in terrorist activities which potentially affect the EU's internal security and this irrespective whether the anti-terrorist measures are adopted autonomously by the Union or for the implementation of UN Security Council resolutions. The observation that the European Parliament challenges only the sanctions against the *Al-Qaida* network but not Council Regulation 356/2010 imposing restrictive sanctions against certain natural and legal persons, entities and bodies in Somalia, reflects this approach. Taking into account that the application of Article 75 TFEU is limited to the prevention and combating of terrorism in order to establish an AFSJ, this distinction appears logical.

However, a division between general foreign policy sanctions based on Article 215 TFEU and specific counter-terrorism sanctions under Article 75 TFEU cannot conceal the continued existence of certain grey zones. After all, terrorism is a volatile concept. For instance, the persons and entities listed in the EU sanctions Regulation against Somalia are all related to *Al-Shabaab*, which has recently been designated as a 'terrorist organisation' in many countries and which is suspected of close links with *Al Qaida*.<sup>47</sup> Or, to give another example, the Taliban used to belong to the official government of Afghanistan but are now linked together with Usama bin Laden and Al Qaida in the context of the EU's counter-terrorism strategy. In other words, the borderline between terrorist activities and other acts threatening the (international) peace and security is not always very clear and may evolve. As a result, the borderline between Articles 75 and 215 TFEU can never be straightforward.

### *The option of a double legal basis and the consistency of the EU's external action*

Proceeding from the interconnection between terrorism and security and between the internal and external dimensions of security, it is at least arguable that the restrictive sanctions against persons linked with Usama bin Laden, Al Qaida and the Taliban pursue both the objectives of the AFSJ and of the CFSP. Because both dimensions appear to be equally important and cannot be separated in practice, the question is whether recourse to a dual legal basis might be an appropriate solution. According to the Court's established case law, recourse to a dual legal basis can exceptionally provide a way out on the condition that procedures laid down for the respective legal bases are not incompatible and do not undermine the rights of the European Parliament.<sup>48</sup> Whereas a combination between qualified majority voting and unanimity in the Council appears to be excluded,<sup>49</sup> the Court's conclusions in *Opinion 1/08* and *International Fund for Ireland* reveal that this rule is not absolute.<sup>50</sup> Taking into account the very unusual provision of Article 40 TEU, which prescribes a balance between the procedural and institutional characteristics of the EU's CFSP and non-CFSP external competences as well as the duty of consistency (Art. 7 TFEU), a compromise solution of a double legal basis including CFSP and non-CFSP provisions seems, therefore, not by definition excluded. Such a compromise would, on the one hand, respect the external competences of the European Parliament and, on the other hand, confirm the principle of unanimous decision-making in the Council.

<sup>47</sup> *Al-Shabaab* is designated as a terrorist organisation in the United States, Australia, Canada and the United Kingdom. See: [http://www.nctc.gov/site/groups/al\\_shabaab.html](http://www.nctc.gov/site/groups/al_shabaab.html).

<sup>48</sup> Case C-300/89, *Titanium dioxide* [1991] ECR I-2867, para. 17-21; Case C-178/03 *Commission v. Parliament and Council* [2006] ECR I-107, para. 57.

<sup>49</sup> Case C-338/01, *Commission v. Council* [2004] ECR I-4829, para. 58.

<sup>50</sup> S. Adam and N. Lavranos, Case note on Opinion 1/08, 47 CML Rev. (2010), p. 1535; Case C-166/07, *European Parliament v. Council of the European Union* [2009] ECR I-7135, with case note of T. Corthaut, "Institutional Pragmatism or Constitutional Mayhem?", *CMLRev.* (2011), pp. 1271-1296.

The different roles of the European Parliament in the decision-making process (co-decision with the Council in the context of Article 75 TFEU and only a right of information under Article 215 TFEU) are not problematic either. On several occasions, the Court confirmed that a legal basis providing for a limited or even no formal role for the Parliament is compatible with the co-decision procedure.<sup>51</sup> The Court argued that such a combination reinforces the democratic legitimacy of decision-making and ignored the implications for the Council, which is deprived of its exclusive legislative competence.<sup>52</sup> Recourse to a double legal basis would at least have the advantage of respecting the envisaged balance between the EU's CFSP and non-CFSP competences as laid down in Article 40 TEU. Moreover, any other solution, i.e. the adoption of the restrictive measures on the single legal basis of either Article 75 TFEU or Article 215 TFEU, seems to be based on artificial criteria which are difficult to reconcile with the objective of policy coherence in the EU's external action. The latter is expressly mentioned in Article 21 (3) TEU and is reflected in the EU's institutional practice after Lisbon.<sup>53</sup> First, EU sanctions implementing CFSP decisions are adopted on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.<sup>54</sup> Second, the Court of Justice is given jurisdiction to adjudicate on the duty of consistency. Until the entry into force of the Lisbon Treaty, respect for this obligation was basically entrusted to the political institutions with the Court's role confined to protecting the *acquis communautaire* against any encroachment from intergovernmental influences.<sup>55</sup> Hence, a certain bias in favour of division of competence questions rather than to concerns of consistency could be observed.<sup>56</sup> The new treaty rules may help to rebalance this situation, potentially leading to an increased acceptance of a dual legal basis as a compromise solution to inter-institutional conflicts. In contrast to the pre-Lisbon situation, when the triple legal basis of Articles 60, 301 and 308 EC appeared problematic due to the Court's unconvincing reasoning (cf. *supra*), a combination of Articles 75 and 215 (2) TFEU seems less problematic in light of the increased attention to the duty of consistency.

## Conclusion

The rules for the adoption of restrictive sanctions against individuals or non-State actors clearly illustrate the constitutional complexities of the European Union. In the pre-Lisbon period, the implementation of the Union's counter-terrorism strategy and UN Security Council resolutions required actions under the three pillars and from the Member States depending upon the specific nature of the sanctions at stake. Economic sanctions, in particular, turned out to cut across the Union's pillar structure requiring a combination of Member State, EU and Community measures. The evolution towards a practice of targeted sanctions against individuals and non-State actors required pragmatic solutions. In this respect, the Court of Justice played a crucial role in clarifying the division of competences between the different institutional actors. First, based upon a purposive interpretation of the provisions on economic sanctions against third states, the Court accepted that also measures against the rulers of those states as well as individuals and entities associated with them or controlled by them could be adopted. Second, in *Kadi and Al Barakaat*, the

<sup>51</sup> Case C-178/03, *Commission v. Parliament and Council* [2006] ECR I-107, para. 59; Case C-155/07, *Parliament v. Council* [2008] ECR I-8103, para. 77-79.

<sup>52</sup> See in this respect Opinion of Advocate General Kokott in Case C-178/03, para. 61 and Case C-155/07, para. 89.

<sup>53</sup> On the notions of consistency and coherence in the EU's external action, see: C. Hillion, "Tous pour un, un pour tous! Coherence in the External Relations of the European Union", in Cremona (Ed.), *Developments in EU External Relations Law* (Oxford, 2008), pp. 10-36.

<sup>54</sup> According to Art. 18 (4) TEU, the High Representative "shall ensure the consistency of the Union's external action."

<sup>55</sup> Ex Art. 3 EU juncto Art. ex 46 EU and 47 EU.

<sup>56</sup> C. Hillion and R. Wessel, "Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?", 46 CML Rev. (2009), p. 581.

ECJ clarified that also measures against non-State actors could be adopted by making use of the so-called flexible legal basis (ex Art. 308 EC) in combination with the rules on economic sanctions against third states (ex Art. 60 and 301 EC). Third, for sanctions against non-State actors operating inside the Union, the competences on police and judicial cooperation formed the appropriate legal basis even though the treaties did not allow for any legislative action in this area and thus required action by the Member States.

For a number of reasons, the pre-Lisbon pragmatic approach turned out to be unsatisfactory. In particular, the absence of a specific legal basis to target non-State actors constituted an important hurdle for the effective implementation of UN Security Council Regulations. The exceptional use of a triple legal basis made the adoption of the required measures possible but nevertheless seriously complicated the decision-making procedure<sup>57</sup> and raised questions about the legitimacy of the EU's actions.<sup>58</sup> Moreover, the distinct procedures for the adoption of sanctions within the framework of the Union's CFSP, implemented on the basis of binding Community instruments, and within the context of the EU's autonomous strategy against internal terrorist groups, which required implementation at the Member State level, were difficult to justify in terms of policy coherence.

In order to remedy the identified problems, the Treaty of Lisbon introduced a specific legal basis for the adoption of restrictive measures against individuals under both the chapter on the AFSJ (Art. 75 TFEU) and for the implementation of the CFSP (Art. 215 (2) TFEU). Whereas this was a logical evolution in order to provide the Union with the necessary powers for an effective implementation of its counter-terrorism policy, on the one hand, and for the implementation of UN Security Council resolutions, on the other hand, the different decision-making procedures under both policy areas raise new challenges of coherence. In particular, the absence of a formal role for the European Parliament in the area of CFSP in comparison to its position as a co-legislator with regard to the AFSJ increases the potential for inter-institutional litigation after Lisbon. This is clearly illustrated with the dispute about the legal basis for the amendment of Regulation 881/2002/EC imposing restrictive sanctions against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.

A comparison of the wording and scope of Articles 75 and 215 TFEU reveals that both provisions allow for the adoption of restrictive sanctions against individuals, either in the context of the AFSJ or with regard to the implementation of CFSP decisions. Obviously, a certain overlap between both provisions is unavoidable. Actions of international terrorist networks such as *Al Qaida* threaten both the internal and external security of the Union. Nevertheless, it may be possible to apply the more specific provision of Article 75 TFEU in case of counter-terrorism measures and to reserve Article 215 TFEU for sanctions related to the political situation in a given third country. Whether or not the sanctions result from an autonomous EU decision or from the implementation of UN resolutions would then be regarded as a formal distinction which does not as such affect the choice of legal basis. According to the Court's settled case law, the latter essentially depends on the aim and content of the measure at stake.<sup>59</sup> Nevertheless, the use of a double legal basis as a compromise solution to solve inter-institutional conflicts may not be excluded in light of the increased attention to the consistency of the EU's external action.

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<sup>57</sup> Under former Articles 60 and 301 EC, the Council could adopt sanctions by qualified majority voting whereas the addition of Article 308 EC implied a unanimity requirement.

<sup>58</sup> See, in particular, Eckes and Tridimas, *supra* notes **Error! Bookmark not defined.** and 26.

<sup>59</sup> See e.g. Case C-295/90, *Parliament vs. Council* [1992] ECR I-4193, para. 13.