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The Legal Basis and Conditions for the Lawfulness of the Freezing Measures in the Anti-Terrorism Policy of the EU

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List of acronyms

CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EC	European Community
EU	European Union
UN	United Nations
UK	United Kingdom of Great Britain and Northern Ireland
USA	United States of America

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1. Introduction

International terrorism has been a threat to peace and security of the international community for a long time, but only the terrorist attacks of 11 September 2001 showed how vulnerable even a superpower like the USA is towards terrorist attacks. This raised a new dimension of awareness for the dangers of international terrorism and it was recognised as the most serious security threat to most states in the world. In the aftermath of these attacks the UN, EU and individual states accelerated their efforts to combat international terrorism and the term “War on Terror” was born. The most drastic measure was certainly the invasion in Afghanistan by the forces of the USA and its allies in order to remove the safe haven to Osama bin Laden and the Al-Qaeda network and their use of the Afghan territory as a base of operation for terrorist activities. However, additional, less drastic counterterrorism measures and strategies were developed. Within the EU an anti-terrorism policy was introduced in 2001 and extended after terrorist bomb attacks took place in Madrid in 2004 and London in 2005. These two attacks on home territory made the EU realise that it was also a target of international terrorism.

A very central counterterrorism measure of the EU anti-terrorism policy is the preventive freeze of funds and other economic resources of persons, groups and entities that are suspected to support and promote terrorism. By freezing these funds and economic resources it is believed that terrorists would lack the financial means to plan, prepare and conduct terrorist attacks and that consequently terrorist attacks can be prevented. Not surprisingly, there are voices which doubt the efficiency of the freeze of funds as it is almost impossible to show a causal link between freezing funds and a prevented terrorist attack. But this problem is not addressed in this thesis. This Bachelor thesis is rather dealing with legal issues that arise in the context of freezing funds as part of the EU anti-terrorism policy. It has to be taken into account that the freeze of funds is not a sentence following a conviction by a competent court for the violation of a law, but a precautionary measure of administrative nature which allows the competent authorities to freeze funds and other economic resources of alleged terrorists to prevent them from engaging in terrorist activities in the future. Freezing someone’s entire funds and economic resources preventively is obviously a very drastic measure which interferes with the person’s rights and restricts his life heavily in many ways. This raises the question of justification and from a legal view also of legality. It has to be determined under which conditions is it justified to preventively freeze someone’s funds and what is the right balance between the individual’s right and the population’s interest in security. This is a very central and controversial debate in the context of any anti-terrorism measure as it concerns the entire society and the assessment relies very much on subjective factors.

The objective of this thesis is to work out what the conditions for a justified precautionary freeze of funds actually are and how the balance between the rights of the persons affected and the population’s security need is determined in the EU. In order to do so it is necessary to consult the European case law which consists of the judgments of the European Courts, the General Court, formerly known as Court of First Instance (CFI)¹ and the Court of Justice (ECJ), because it is binding in its entirety and therefore constitutes the law in action. By providing a thorough and systematic overview of the European case law on the funds-freezing measure and furnishing it with a critical evaluation, information about this topic can be delivered to the public in a comprehensible way. Currently, it seems as though only experts know of the existence of the precautionary freeze-of-funds measures in the context of the EU anti-terrorism policy, although they affect the entire European population. These measures are supposed to protect the European citizen from terrorist attacks, but at the same time have drastic impacts on the alleged terrorists who are affected by these measures. It is important that European citizens are informed about controversial measures taken by the EU such as the

¹ With the entry into force of the Treaty of Lisbon on 1 December 2009, the Court of First Instance was given the name General Court. However, throughout this thesis the term Court of First Instance or the abbreviation CFI is used, because at the time when the court ruled on the quoted cases, this was its official name.

freezing measure so that a critical, mature European public can develop. Maybe this thesis can contribute a little bit to this.

In order to achieve the objective two central research questions are stated and answered in the course of this thesis. The first is directly derived from the objective and goes as follows: What are the conditions for the formal and substantive lawfulness of freezing funds of alleged terrorists under European law? Because respect for the concerned person's fundamental rights forms part of the conditions for the formal and substantive lawfulness of an administrative act such as the freeze of funds, the following sub-question can also be addressed in the context of the first central research question: What kind of balance is struck between the fundamental rights of the alleged terrorists whose funds are frozen and the population's interest in safety? For the sake of completeness in the context of the lawfulness of the freezing measure, this thesis also tackles the problem of whether the Treaties, that is, the constitution of the EU, provide a sufficient legal basis which allow its institutions to pass the legislation on which the freezing measure is based. Consequently, the Treaties have to include provisions which empower the EU institutions to implement freezing measures in order to combat and prevent terrorism. So the second central research question goes as follows: Is there a sufficient legal basis in the Treaties for the adoption of legislation to preventively freeze funds of alleged terrorists? There are two facts which each raise an independent sub-question and a dependant sub-question. Independent sub-questions means that these questions can be answered independently from the central research questions, but are necessary to be answered for a proper understanding of the matter. Dependant sub-questions, however, are directly aiming at the central research questions and are adding a further dimension to them. Firstly, there are two different freezing measures in European law, one implemented by Regulation 881/2002 and the other by Regulation 2580/2001. The independent sub-question is: Why are there two different freezing measures and how do they differ? The dependant sub-question is: Are there differences in the legal basis and in the conditions for the formal and substantive lawfulness between the two freezing measures? Secondly, the ECJ repealed the CFI's judgments on the freezing measure pursuant to Regulation 881/2002. So the independent sub-question is: Why did the ECJ repeal the CFI's judgments on the freezing measure pursuant to Regulation 881/2002? The dependant sub-question goes: How do the CFI's and the ECJ's judgments differ with regard to the legal basis and the conditions for the formal and substantive lawfulness of the freezing measure?

In order to answer these questions it is firstly necessary to explain why there are two different freezing measures in European law and what the differences are. This is done in chapter 2 by briefly introducing the key features and development of the two freezing measures. Only equipped with this knowledge, the discussion of the legal basis and the conditions for the lawfulness can be fully understood. In chapter 3 the first central research question about the legal basis is addressed by analysing the relevant case law. Taking account of the sub-questions, it is examined whether differences for the legal basis of the two freezing measures exist and whether the two European courts ruled differently on that matter. Chapter 4 focuses on the second central research question about the formal and substantive lawfulness of the freeze of funds. According to the sub-questions the case law is divided into three groups: The CFI's judgments on the freezing measure pursuant to Regulation 881/2002, the ECJ's judgments in the same cases on appeal and the CFI's judgments on the freezing measure pursuant Regulation 2580/2001. For all three groups the conditions of the formal lawfulness and then those of the substantive lawfulness are worked out and finally compared and evaluated. In this context it is also examined in what way the balance between the individual's fundamental rights and the population's interest in safety is struck. In chapter 5 the results are summed up, conclusions drawn and an outlook for the further development of the freezing measures is given.

In terms of methodology an extensive analysis of the relevant case law has been conducted. All cases concerning the freeze of funds pursuant to Regulation 881/2001

respectively Regulation 467/2001 and Regulation 2580/2001 taking proceedings before the European Courts (either on first instance or on appeal) were considered and the judgments reviewed. These are in total 13 cases which were heard before the CFI and two cases which were heard on appeal by the ECJ. As stated above, the cases were categorised by court and regulation on which the freeze is based. For the purpose of evaluating the judgments relevant secondary literature was consulted.

2. Background of the freeze of funds under European law

In this chapter the following independent sub-question is answered: Why are there two different legal provisions in European law which allow the competent authorities to freeze the funds and other economic resources of persons, groups and entities suspected to commit or support terrorist acts? In order to become familiar with the two freezing mechanisms, their development is briefly explained, their implementation in the Community law is described and key features are mentioned and compared. The two provisions in European law to freeze funds are Regulation 881/2002 and Regulation 2580/2001.

2.1. The freeze of funds pursuant to Regulation 881/2002

The practice to freeze funds in the EU started before the terrorist attacks of 11 September 2001 and it was only indirectly linked to the fight of terrorism. On 15 October 1999 the Security Council of the UN passed Resolution 1267 which was directed against the Taliban who then controlled most of the Afghan territory. In the resolution the Security Council condemned the continuing sheltering and training of terrorists and planning of terrorist acts taking place on the territory of Afghanistan. Besides, it criticised the Taliban's safe haven for Osama bin Laden which allowed him and his associates to provide a network of terrorist training camps on the Afghan territory and use the country as a base from which to sponsor international terrorism. In the belief that the suppression of international terrorism is essential for the maintenance of international peace and security, the Taliban were demanded to turn over Osama bin Laden immediately so that he can be brought to court. As a means of pressure towards the Taliban regime to comply with this demand, all states were, inter alia, required to freeze the funds or other financial resources of the Taliban and their undertakings and to make sure that their nationals or others living on their territory cannot make available funds to or for the benefit of the Taliban. In addition to that, the Security Council decided to set up a committee, the so called Sanctions Committee, which is inter alia responsible for designating the funds or other financial resources and ensuring that the states comply with their obligation to freeze them. In order to give legal effect to the resolution at Community level, the Council adopted Common Position 1999/727/CFSP concerning the restrictive measures against the Taliban on 14 November 1999 and Regulation 337/2000 concerning a flight ban and the freeze of funds and other financial resources with respect to the Taliban on 14 February 2000. The latter was adopted on the legal basis of Articles 60 EC and 301 EC².

Because the Taliban of Afghanistan did not comply with the demands of Resolution 1267, the Security Council adopted Resolution 1333 on 19 December 2000 in order to increase the pressure on the Taliban to fight the terrorist activities taking place on the Afghan territory and to turn over Osama bin Laden. Therefore, inter alia, the freeze of funds and other financial assets was extended to Osama bin Laden, the Al-Qaeda network and others associated with either of them. The Sanction Committee was ordered to keep a list of individuals and entities, whose funds and other financial resources should be frozen. The list was to be based on

² All numbers of articles employed in the course of this thesis refer to the EC-Treaty and EU-Treaty in the version after the Nice reform. After the Lisbon Treaty came into force on 1 December 2009, the treaties were renumbered and renamed. The EC-Treaty is now called Treaty on the Functioning of the European Union (FEU-Treaty). Article 60 EC is now Article 75 FEU and Article 301 EC is now Article 215 FEU. In the course of this thesis the new numbers of the articles in the FEU-Treaty and EU-Treaty are given for each article.

information provided by the states and regional organisations and to be reviewed after twelve months. In order to comply with the new resolution, the EU took action and passed Common Position 2001/154/CFSP on 26 February 2001 and Council Regulation 467/2001 repealing Council Regulation 337/2000 and 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 on 6 March 2001. This regulation was also adopted on the basis of Articles 60 EC and 301 EC. It provided a legal definition of funds and financial resources in Article 1 and Annex I contained the list of names of individuals and entities designated by the Sanctions Committee and whose funds and other financial resources should be frozen. To keep the list aligned with the consolidated list maintained by the Sanctions Committee, the Commission was able to amend or supplement the list in the annex of Regulation 467/2001 by the adoption of regulations.

On 16 January 2002 the Security Council passed a further resolution, Resolution 1390 which maintained the freeze of funds mechanism with respect to the Taliban, Osama bin Laden and Al-Qaeda, although the USA and its allies had intervened in Afghanistan and ended the rule of the Taliban regime. It was argued that the Taliban did not comply with the prior resolutions and that they, in conjunction with Osama bin Laden and Al-Qaeda, still constituted a threat in terms of terrorism; hence it was still necessary to freeze their funds. The Council adopted Common Position 2002/402/CFSP and Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation 467/2001 on 27 May 2002, which are both still in force today. The regulation contains the same definitions of funds and other financial resources as the previous Regulation 467/2001 and Annex I contains again the list of persons and entities identified by the Sanctions Committee. Because the measures implemented by Regulation 881/2002 are not directly linked to the territory of Afghanistan anymore as the Taliban lost their power due to the invasion, the Council implement the regulation on the basis of Articles 60 EC and 301 EC in conjunction with Article 308 EC³. The point is, that Article 301 EC provides legal grounds for the adoption of restrictive measures with regard to third countries, but the Taliban are not connected to any country anymore.

On 17 January 2002 the Security Council adopted a further resolution to improve the freezing mechanism. Upon request of the concerned natural or legal person, the competent authority of the respective state can approve derogations and exemptions from the freeze of funds which allow the party concerned to use its funds to cover basic expenses. Before the adoption of that resolution only the Sanctions Committee was able to grant exemptions or had to give its consent. In order to amend Regulation 881/2002 in that regard, Council Regulation 561/2003, passed on 27 March 2003, inserted Article 2a into Regulation 881/2002.

These are the provisions which are currently in place and applied when the funds and economic resources of suspected individuals, groups or entities are frozen. Currently⁴ the Sanctions Committee's consolidated list consists of 137 individuals associated with the Taliban, 256 individuals associated with Al-Qaeda and 108 entities and other groups or undertakings associated with Al-Qaeda. This is a total of 393 individuals and 108 entities whose funds and economic resources are frozen. In order to keep the list in Annex I of Regulation 881/2002 updated, the Commission has adopted 119 Commission Regulations so far, the last on 25 January 2010.

The listing and de-listing procedure has been widely criticised in the past for its lack of transparency and fairness. Although the Security Council has addressed the challenges by passing resolutions seeking to improve the procedure of listing and de-listing, Fromuth's (2009) summary that "the 1267 regime contains minimal allowance for due process: decisions to list or de-list a party are by Committee consensus; little information about the grounds for

³ Article 308 EC is now Article 352 FEU

⁴ As on 26/01/10

being listed is shared with the listed parties; listees are not represented before the Sanctions Committee; and no judicial review or remedy is available”, can still be regarded as true. Critics say that it is easy to get on the list, but hard to get removed, as in the first eight years of existence of the list only eleven people and 24 organisations were removed. In order to get on the list a state needs to submit a name and the Sanctions Committee decides in a unanimous vote, according to unspecified criteria and secret proceedings, whether to include the person or not (Bures, 2009). The procedure for de-listing has been improved steadily, but still bears many shortcomings. Before the adoption of Resolution 1730 in 2006, blacklisted persons and entities were not able to send a request for de-listing directly to the Sanctions Committee. They had to contact the state of their citizenship or residence and ask them to submit their matter to the Sanctions Committee. Now, they are able to submit a request for de-listing directly to a Focal Point. This is certainly an improvement in terms of the due process, but it is the listed person or entity to justify its request for de-listing and to deliver the relevant information or evidence that show that either the listing was a mistake or that the criteria for being included in the list are no longer existent. Apart from the difficulties to prove that the conditions for a de-listing are fulfilled in front of the authority which induced the listing and the fact that the inclusion was often based on secret intelligence information which are not made available to the listed person or entity, it has to be borne in mind that this does not constitute a judicial review or that a judicial remedy is available. Because of the lack of these remedies, the denial of access for affected parties to the listing and de-listing procedures and the fact that states continue to have maximum discretion over who should be included in or removed from the list, the recent changes are criticised as little more than window-dressing (Bures, 2009). Not surprisingly, the EU has been heavily criticised for both legal and human rights reasons for the de jure acceptance of an external terrorist list, whose listing and de-listing procedure it cannot control (Bures, 2009).

2.2. The freeze of funds pursuant to Regulation 2580/2001

The second freezing mechanism, which exists in European law is also the implementation of a Security Council resolution. On 28 September 2001 the Security Council adopted Resolution 1373, which was an immediate reaction to the terrorist attacks on the World Trade Center in New York and the Pentagon in Washington D.C. on 11 September 2001. The Security Council condemned these attacks and expressed its determination to prevent all such acts in the future. It further stated that these acts, like any act of international terrorism constituted a threat to international peace and security and that there was a need to combat this threat by all means. One measure the states are obliged to implement in order to fight international terrorism is the freeze of funds and other economic resources of persons involved in terrorist activities or the funds and other economic resources of entities owned or controlled by such persons. On 27 December 2001 the EU adopted two common positions, 2001/930 CFSP on combating terrorism and 2001/931 CFSP on the application of specific measures to combat terrorism, and Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, in order to implement the resolution at Community level. For the adoption of Regulation 2580/2001 Articles 60 EC and 301 EC in conjunction with Article 308 EC were employed as legal basis, like in the case of Regulation 881/2002. Regulation 2580/2001 is meshed with Common Position 2001/931CFSP as the regulation refers to definitions and the procedure for maintaining the list of those whose funds are to be frozen stated in the common position. In Article 1(1) of that common position it says that it applies “to persons, groups and entities involved in terrorist acts and listed in the Annex”. Article 1(2) and 1(3) explain what should be understood by “persons, groups and entities involved in terrorist act” an by “terrorist acts”. Article 1(4) states that “[t]he list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of

whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.” According to Article 1(6) the list in the annex shall be reviewed on regular intervals and at least once every six months to make sure that there are still grounds to keep the persons, groups or entities on the list. Article 2(1) of Regulation 2580/2001 demands that all funds, other financial services and economic resources belonging to, held by or owned by a person, group or entity which is included in the list of 2001/931/CFSP have to be frozen and that no funds, other financial assets or economic resources are allowed to be made available to, or for the benefit of the persons, groups or entities included in that list. Exemptions are only allowed according to the provisions of Article 5 and 6 of that regulation. Article 2(3) lays down that it is the Council’s task to establish, review and amend the list of persons, groups and entities acting by unanimity and according to the provisions established in Article 1(4), (5) and (6) of Common Position 2001/931/CFSP. The first list was established by Council Decision 2001/927/EC of 27 December 2001. The last update of this list took place on 22 December 2009 by the adoption of Council Decision 2009/1004/EC. Currently the list consists of 25 persons and 29 groups and entities. Persons and entities listed in the annex of Regulation 881/2002 are not included in this list.

This freezing mechanism has some advantages in comparison to that basing on Regulation 881/2002, but bears also many shortcomings and difficulties. First of all, the EU itself can determine who should be included in the list and Article 1(4) of Common Position 2001/931/CFSP sets out specific criteria which justify an inclusion. But still, the procedure of listing and de-listing has also been criticised on grounds of transparency and human rights protection. In practice, the criteria for inclusion were handled vaguely and it was up to the Member States to decide which names they would forward for the list. Because of the international dimension of terrorism, the EU institutions rely heavily on information of intelligence services in the Member States to be able to identify the persons, groups and entities to be included in the list. This led to the situation that listings took place without an examination of the Council of the reasons of the Member States which proposed the listing, because the reasons were not required or given. A further issue of criticism is that the Council’s discussions on the list take place in secret (Bures, 2009).

Another challenge of the freezing mechanism is a rather complicated legal situation with regard to competence due to the three pillar model of the European Union. Common Position 2001/931/CFSP has in itself no legal force and needs to be implemented either by the EU by acts of law in the first pillar or by the Member States. One problem is that it is assumed that the EU has the power under Articles 60 EC and 301 EC to freeze funds of “international” terrorists by giving effect to an EU foreign policy measure within the first pillar, but it lacks any power to implement a mechanism to freeze the funds of “domestic” terrorists (Peers, 2003, p. 238). Common Position 2001/931/CFSP contains a list which includes both groups of suspected terrorists, but they are either classified “EU internal” or “EU external”. With regard to the previous group, the Member States are requested to take measures such as freezing the funds on the basis of national law. The names of individuals, groups and entities of the latter group are transferred into the annex of Regulation 2580/2001 which allows to freeze their funds at EU level within the first pillar. In order to update the list in the annex of the regulation, the Council needs to adopt decisions. In consequence, there are de facto two EU lists, the complete list and the list of “international terrorists” only which constitutes the annex of Regulation 2580/2001.

In a nutshell, both freeze-of-funds mechanisms are facing a lot criticism in terms of transparency and the protection of fundamental rights. The administrative procedure which leads to the inclusion in the list is in both cases opaque as it takes place in secret and heavily relies on confidential information which, as a rule, is not disclosed.

With regard to the sub-question of why there are two different provisions which allow the freeze of funds of alleged terrorists in European law, it can be said that in both cases the EU was obliged to implement Security Council resolutions which were adopted in two different contexts. The first freeze-of-funds measure was originally a means to put pressure on the Taliban regime to fight terrorism on the Afghan territory and to hand over Osama bin Laden, but then developed into a counterterrorism measure as regards the Taliban, Osama bin Laden and the Al-Qaeda network. The second freezing measure was a response to the terrorist attacks of 9/11 and de facto extended the freeze of funds to any kind of international terrorism. So the central differences between the two freezing measures are firstly the addressees and secondly the discretion the EU enjoys when implementing and applying the freezing measures. With regard to freeze of funds pursuant to Regulation 881/2001 the funds of persons, groups and entities associated with the Taliban, Osama bin Laden and the Al-Qaeda network can be frozen and the EU enjoys hardly any discretion as the Sanctions Committee designates the funds to freeze. Concerning the freezing measure pursuant to Regulation 2580/2001, the funds and economic resources of any person, group or entity engaged in terrorism or associated to terrorists, apart from those covered by Regulation 881/2002, can be frozen and the EU enjoys broad discretion in the determination of whose funds shall be frozen.

3. Case law on the legal basis of Regulations 881/2002 and 2580/2001

In this chapter it is examined how the European courts have dealt with the legal basis on which Regulations 881/2002 and 2580/2001 were adopted. Hence this allows to answer the first central research question if there is a sufficient legal basis in the Treaties for their adoption. Additionally the two sub-questions if there is a difference in the legal basis of the two freezing measures and if the CFI and the ECJ ruled differently on that matter can be answered.

There is no unanimous opinion on the question whether the EU had the power to adopt the regulations on the basis of Articles 60 EC and 301 EC in conjunction with 308 EC. General Advocate Poiares Maduro (para. 12) explained in his opinion on the *Kadi* case that Articles 60 EC and 301 EC would provide a sufficient legal basis alone for the adoption of the regulations. Contrary the applicants who contested the freeze of their funds claimed that the Community was not competent to adopt the regulations because there was no sufficient legal basis at all. In the following it is presented how the CFI in first instance and the ECJ on appeal ruled on this matter.

3.1. The CFI

The CFI has given a ruling on the alleged incompetence of the Council to adopt Regulation 881/2002 or Regulation 2580/2001 in four cases so far. In *Kadi* the applicant originally pledged for annulment of Regulation 467/2001 inter alia because the Council lacked competence and the regulation was adopted ultra vires in that it was adopted on the basis of Articles 60 EC and 301 EC. But after the applicant had brought action to court, Regulation 467/2001 was repealed by Regulation 881/2002 and the applicant declared to withdraw from this ground of annulment. Nevertheless the Court decided to consider on its own motion whether the Council was competent to adopt the contested regulation on the basis of Articles 60 EC, 301 EC and 308 EC because it regarded that question as a matter of public policy (*Kadi*, paras. 60-61). In *Yusuf & Al Barakaat* (paras. 80-83) the applicants also contested Regulation 467/2001 which was then repealed by Regulation 881/2002. They reasoned that Articles 60 and 301 EC authorise the Council to adopt measures directed against third countries and not against nationals of Member States residing in a Member State. Besides, they were not included in the list by the Sanctions Committee due to their connection with the Taliban regime but rather because the Security Council sought to fight international

terrorism in general as it constituted a threat to international peace and security. Hence, Regulation 467/2001 was not aimed at a third country but at individuals with the aim to combat international terrorism. Furthermore, this interpretation of Articles 60 EC and 301 EC amounted to treat Community nationals like third countries, which is contrary to the principle of lawfulness as expressed in Articles 5 EC⁵ and 7 EC⁶. With regard to the consequences of the repeal by Regulation 881/2002 the applicants stated that Article 308 EC alone or taken in conjunction with Articles 60 EC and 301 EC did not entitle the Council to impose sanctions on citizens of the Union because this was not an objective of the EC for the purpose of Article 308 EC.

The CFI examined the alleged lack of a legal basis in respect of Regulation 467/2001 too, because “the Court considers it appropriate to set out first the grounds on which it judges them to be unfounded on any view, since those grounds constitute one of the premisses of its reasoning applied to the examination of the legal basis of the contested regulation” (*Yusuf & Al Barakaat*, para.107). In the cases of *Ayadi* and *Sison* in which the Council’s competence to adapt Regulation 881/2002 respectively 2580/2001 was also doubted by the applicants, the CFI referred to its judgments in the cases of *Kadi* and *Yusuf & Al Barakaat*. This shows that the CFI did not make any difference between the legal basis of Regulation 881/2002 and Regulation 2580/2001 and that both are treated absolutely identically in that respect.

With regard to the adoption of Regulation 467/2001, the CFI ruled that Articles 60 EC and 301 EC were a sufficient legal basis for its adoption. The CFI stated that there was the necessary link to a third country, namely Afghanistan, which was controlled and governed by the Taliban. The measures implemented by Regulation 467/2001 such as the freeze of funds of individuals, groups and entities sought to reduce the economic relations with a third country, which is in line with the provisions of Articles 60 EC and 301 EC (*Kadi*, paras. 88-89). In *Yusuf & Al Barakaat* (para. 118) the CFI further elaborated that the addition of Osama bin Laden was necessary as he was very closely linked to the Taliban and wielded power over Afghanistan. This did not mean that the primary goal of Resolution 1333 and therefore also of Regulation 467/2001 was to fight international terrorism as the applicants claimed, but to interrupt or reduce economic relations with the third country Afghanistan, because its leadership, the Taliban, supported Osama bin Laden and international terrorism. In contrast to the classical trade embargos, the CFI reasoned, the measures of Regulation 467/2001 were “smart sanctions” which reduced the suffering of the civil population, but targeted on the regime, their entities and people associated with it only. This was not contrary to the wording of Articles 60 EC and 301 EC and justified by considerations of effectiveness and by humanitarian concerns (*Kadi*, paras. 90-91). In *Yusuf & Al Barakaat* (para. 115) the CFI also pointed out that it did not matter where the targeted individuals resided or of what nationality they were. It was only of importance that they were linked to the rulers or regime of the country to be sanctioned. If there were any limitations of that kind, the sanctions would turn out to be ineffective.

Addressing the competence of the Council to adopt Regulation 881/2002, the CFI stated that both Articles 60 EC and 301 EC in conjunction and Article 308 EC alone, would not be a sufficient legal basis. Concerning Articles 60 EC and 301 EC, there was no sufficient link to a third country because the Taliban were not in power of Afghanistan after the invasion by the USA and its allies (*Kadi*, paras. 92-97; *Yusuf & Al Barakaat*, paras. 125-133). As regards Article 308 EC, it could only be applied if there was no specific provision in the EC-Treaty which allowed the adoption of a specific measure and if the measure attains to fulfil an objective of the Community. According to the CFI the first condition was fulfilled as there was no provision which allowed the freeze of funds in order to fight terrorism, but not the second as none of the objectives set out in Articles 2 EC⁷ and 3 EC⁸ seemed to be capable of

⁵ Article 5 EC was in substance replaced by Article 5 FEU

⁶ Article 7 EC was in substance replaced by Article 13 FEU

⁷ Article 2 EC was in substance replaced by Article 3 FEU

being attained by the measure at issue. The CFI rejected the explanation given in the preamble to Regulation 881/2001, that the measures fell under the scope of the Treaty with a notably view to avoiding the distortion of competition. The CFI reasoned that it was unconvincing that there was a risk of a distortion of competition which the regulation sought to prevent, because firstly the competition rules of the EC-Treaty were addressed to undertakings and Member States when they disturb equal competition between undertakings and secondly the CFI could not think of any reasons why the competition between undertakings could be affected by the implementation of the freezing measure, irrespective whether implemented at Community or at national level. The CFI further elaborated that it did not see a plausible and serious danger of discrepancies in the application of the freezing measure from one Member State to another if they were implementing the resolution at national level, because the resolution entailed precise and detailed definitions and obligations which did not allow much space to manoeuvre. Furthermore, the CFI made clear that the wider objective of safeguarding international peace and security could not be an objective which allowed the application of Article 308 EC, because this was an objective of the CFSP which is an integral part of the EU-Treaty. It was not possible to implement objectives of the EU-Treaty within the Community sphere because the Community and Union are, although integrated, still separate legal orders and it was against the intention of Article 308 EC to allow the institutions to attain Union objectives under the Community sphere with Community instruments, as this would contradict the entire pillar structure of the EU (*Kadi*, paras. 98-121; *Yusuf & Al Barakaat*, paras. 134-157).

Nevertheless the CFI held that Articles 60 EC and 301 EC in conjunction with Article 308 EC were a sufficient legal basis for the adoption of Regulation 881/2002 and Regulation 2580/2001. The CFI explained that Articles 60 EC and 301 EC had a bridge function which was intentionally introduced at the Maastricht revision of the Treaties to connect Community actions of imposing economic sanctions with the objectives of the EU-Treaty in the sphere of external relations. Because 60 EC and 301 EC implemented objectives of Article 2 EU⁹, action by the Community was actually action by the Union which was implemented under the Community pillar after the Council adopted a common position or joint action under the CFSP. To support its reasoning, the CFI referred to Article 3 EU¹⁰ which obliged the Union to ensure the consistency of its external relations, security, economic and development policies. It was the Council's and Commission's responsibility to ensure the consistent implementation of these policies, each in accordance with its respective powers. In the CFI's point of view, it was possible that, like with all powers provided for by the EC-Treaty, the powers could be insufficient to attain a specific objective. This could be the operation of the common market, but also with regard to Articles 60 EC and 301 EC, to impose economic and financial sanctions to attain the objective of a CFSP, which was purposely introduced into the EC-Treaty. Therefore there were good reasons to justify the application of Articles 60 EC and 301 EC in conjunction with Article 308 EC for the sake of the requirement of consistency laid down in Article 3 EU if Articles 60 EC and 301 EC did not provide the necessary power to attain the objectives in the field of economic and financial sanctions. In the present case, the CFI explained, the Member States passed a common position which went beyond the scope of Articles 60 EC and 301 EC allowing the interruption or reduction of economic relations to one or more third countries, because they decided to impose economic and financial sanctions on individuals and entities without a sufficient link to a third country. But still, the common position aimed to attain an objective of the CFSP which was defined in Article 11 EU¹¹, the fight against international terrorism and its funding. The CFI concluded, that in this situation it was legitimate to supplement the powers conferred by Articles 60 EC and 301 EC upon the

⁸ Article 3 EC was in substance replaced by Articles 3 to 6 FEU and 8 FEU.

⁹ Article 2 EU is now article 3 EU.

¹⁰ Article 3 EU was in substance replaced by Article 7 FEU and by Articles 13(1) EU and 21 EU.

¹¹ Article 11 EU is now Article 24 EU.

Community by Article 308 EC, because it allowed the Community to adapt to the development that no longer only states could be a threat to international peace and security but also persons, groups, entities and undertakings. Hence in the CFI's opinion, the supplementation of Article 308 EC did not widen the scope of Community powers beyond the general framework created by the provisions of the Treaties (*Kadi*, paras. 122-135; *Yusuf & Al Barakaat*, paras. 158-170).

3.2. The ECJ

In the joint cases *Kadi & Al Barakaat* the ECJ confirmed that the Council was competent to adopt Regulation 881/2002 on the basis of Articles 60 EC and 301 EC in conjunction with Article 308 EC, but it ruled that the CFI had erred in law when it justified the adoption on the basis of the bridge function of Articles 60 EC and 301 EC, which introduces objectives of the Union into the legal framework of the Community.

The ECJ confirmed the CFI's view that there was a bridge function between the economic measures which can be applied due to Articles 60 EC and 301 EC and the EU objectives within the sphere of external relations including the CSFP. But neither the wording of the provisions of the EC-Treaty nor its structure provided any foundation of the view that the bridge could be applied to other articles such as Article 308 EC. The wording of Article 308 EC contradicted its application to objectives of the Union as the envisaged action had to relate to the "operation of the common market" and intend to attain "one of the objectives of the Community". Besides, the concept of the coexistence of Community and Union as integrated but separate legal orders did not allow an extension of the bridge to other articles of the EC-Treaty than to those with whom it explicitly created a link. Finally the ECJ stated that the principle of conferred powers did not allow the use of Article 308 EC in order to widen the scope of the Community powers beyond its legal framework and therefore Article 2 EU could not be a basis for a widening as suggested by the CFI (*Kadi & Al Barakaat*, paras. 197-204).

But contrary to the CFI, the ECJ held the view that Regulation 881/2002 was actually attaining an objective of the Community. It reasoned that the objective of the regulation was to immediately prevent persons associated with Osama bin Laden, Al-Qaeda or the Taliban from having control over any financial or economic resources in order to impede the financing of terrorist activities, an objective which could be made to refer to one of the Community's objectives. The ECJ explained that Articles 60 EC and 301 EC had the purpose to give the Community the power to impose restrictive measures of economic nature in order to implement actions decided under the CFSP. Therefore Articles 60 EC and 301 EC were the "expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument" (*Kadi & Al Barakaat*, paras. 222-227). In other words, for the ECJ the objective of Regulation 881/200 is in first place to impede restrictive measures of economic nature and Articles 60 EC and 301 EC constitute the Community's objective to adopt restrictive measures of economic nature through the use of a Community instrument. As a consequence of the ECJ's reasoning, Regulation 881/2002 attains an objective of the Community and Article 308 EC can be applied for its adoption. Because the ECJ declared that the freeze of funds was a restrictive measure of economic nature, it considered the economic nature as a natural link to the operation of the common market. To underline that argument the EC explained that if the freeze of funds mechanism was implemented by the Member States unilaterally, the multiplication of the national measures could have had an impact on the common market in three ways. Firstly, the trade between Member States could be affected especially as regards the movement of capital and payments. Secondly, it could affect the exercise by economic operators of their right to establishment. Thirdly, these measures could create distortions of competition because any differences of the measures among the Member States could advantage or disadvantage the competitive situation of certain economic operators, although there was no economic reasons for this advantage or disadvantage (*Kadi & Al Barakaat*,

paras. 228-230). Unfortunately the ECJ did not explain how this should look in practice so the validity of this reasoning appears to be a bit doubtful. However, in the ECJ's view this proved that the condition of a link to the operation of the common market was given as demanded by Article 308 EC and that the notion in the fourth recital of Regulation 881/2002 that Community legislation was necessary "notably with a view to avoiding distortion of competition" was justified and important in this context. Finally, the ECJ pointed out that through adding Article 308 EC to the legal basis, the European Parliament was involved into the legislative process which would not have been the case if the regulation was only adopted on Articles 60 EC and 301 EC (*Kadi & Al Barakaat*, paras. 231, 235). So in the ECJ's point of view the increased democratic legitimacy of the regulation through the supplement of Article 308 EC is a further good reason for its use as legal basis.

3.3.Comparison and evaluation

Comparing the ruling of the CFI and ECJ, both courts concluded that the Council had the competence to adopt Regulation 881/2002 and Regulation 2580/2001 on the basis of Articles 60 EC and 301 EC in conjunction with Article 308 EC. Both courts also agreed on the fact that an adoption solely on the basis of Articles 60 EC and 301 EC had not been possible. The justification is completely different, yet contradictory. The CFI came to the conclusion that Regulation 881/2002 did not attain to achieve any of the objectives of the Community and that its implementation had de facto no impact on the common market and competition. But it found that it was justified to apply the bridge function established between the measures of Articles 60 EC and 301 EC and certain objectives of the Union to Article 308 EC in the present case. The ECJ rejected that approach as it was an unlawful widening of the Community's powers and against the wording of Article 308 EC. The rejection is comprehensible, but the ECJ's own justification for Articles 60 EC and 301 EC in conjunction with Article 308 EC as legal basis for the adoption of Regulation 881/2002 is not necessarily comprehensible and appears to be slightly doubtful and contrived. Firstly, to declare that the objective of Regulation 881/2002 was to impede restrictive measures of economic nature is unconventional because the restrictive measures rather appears to be the means for achieving the actual objective, to fight international terrorism starting from the Taliban, Osama bin Laden and the Al-Qaeda network. This is also what the CFI identified as objective of the regulation. Secondly, it is surprising "how easily the Court of Justice is willing and able to 'find' new 'implicit' objectives, which, obviously, substantially opens up the scope of Articles 60 and 301 EC to an unforeseeable extent" (Lavranos, 2009, p. 355). Thirdly, although it cannot be doubted that the freeze of funds has an economic component, it remains unclear in what way this "economic nature" is supposed to impact the common market and competition in the drastic way the ECJ stated. The CFI took the opposite view and declared that it did not see any grounds for the assumption that the freezing mechanism could lead to any distortions of competition in the EU. These contradictory justifications show that there is apparently no unambiguous legal basis for the adoption of Regulation 881/2002 and Regulation 2580/2001 under the EC-Treaty. Either it is necessary to widen the Community's competencies by referring to objectives of the EU through the bridge function of Articles 60 EC and 301 EC as the CFI did, or the economic aspect of the regulations has to be overemphasised and an implicit objective of the EC-Treaty has to be found so that the adoption fits within the Community's legal framework, a solution found by the ECJ. It appears as though both courts saw the necessity to adopt the regulations to fight international terrorism and were therefore willing to accept some inconsistencies in their reasoning and interpretation. Lavranos (2009, p. 255) clearly prefers the interpretation of the CFI as for him the line of argumentation of the ECJ "appears to be artificial, convoluted and at the end much less convincing than the Court of First Instance's reasoning". In his point of view the CFI's explanation of the bridge function of Articles 60 EC and 301 EC and the single institutional framework argument for synchronising the EU's and EC's policies are reasonable and

consistent. Furthermore he perceives that it is more honest and convincing to clearly state that the implementation of Regulation 881/2002 took place in the context of the “War on Terror”, than arguing that economic objectives are supposedly pursued (Lavranos, 2009, p. 255 f.). It is remarkable that both courts rejected General Advocate Maduro’s opinion that Articles 60 EC and 301 EC in themselves constitute a sufficient legal basis for the adoption of Regulation 881/2002. The European policymakers were aware of the problem of the legal basis and hence introduced a specific provision, Article III – 322 (2), in the Constitutional Treaty to expressly enable the Council to adopt legislation of restrictive measures against natural or legal persons and groups or non-state entities (Garbagnati Ketvel, 2006, p. 107). This provision was then also introduced in Article 215 (2) of the Treaty on the Functioning of the European Union and is therefore in power now. Furthermore, former Article 60 EC which is now Article 75 TEU was amended so that it explicitly refers to the objective of combating and preventing terrorism and it provides the Council with competence to implement measures such as the freeze of funds. Consequently, if nowadays a regulation such as Regulation 881/2002 or 2580/2001 was adopted, Article 75 TEU alone or in conjunction with Article 215 TEU would undoubtedly provide a sufficient legal basis.

With regard to the research questions it has firstly be noted that the European case law does not differ between the legal basis of Regulation 881/2002 and Regulation 2580/2001 because in *Sison*, the only case in which the applicant contested the legal basis of Regulation 2580/2001, the CFI referred to its judgment on *Kadi* and *Yusuf & Al Barakaat*. In those cases the legal basis of Regulation 881/2002 was contested. However, it has to be taken into account that these two judgment were repealed by the ECJ inter alia due to the CFI’s ruling on the legal basis and that the ECJ did not explicitly state that its reasoning with regard to the legal basis of Regulation 881/2002 also applies to the legal basis of Regulation 2580/2001. However, this can be assumed as there are no reasons which contradict this assumption. Secondly, it was observed that although both courts confirmed that Articles 60 EC and 301 EC in conjunction with Article 308 EC constitute a sufficient legal basis for the adoption of the regulations, they both came up with a different and contradictory explanation for the use of this legal basis and both have its own weaknesses. The CFI’s explanation of the bridge widens the scope of Community powers, the ECJ said unlawfully, and contradicts the wording of Article 308 EC, but was considered to be honest convincing by commentators. The ECJ’s reasoning on appeal avoided these problems but created new ones as its reasoning overemphasises the economic nature of the freezing measure and relies on the finding of an implicit objective, which makes the reasoning appear to be contrived and hence unconvincing. A commentator pointed out that the use of implicit objectives also constitutes a widening of the Community powers to an unforeseeable extent. It seems as if the European judicature acknowledged the necessity of the freezing measure to combat and prevent terrorism and was therefore willing to bend things into shape so that a legal basis was applicable. So thirdly, the answer to the central research question is that according to the case law there is a sufficient legal basis for the adoption of Regulations 881/2002 and 2580/2001, namely Articles 60 EC and 301 EC in conjunction with Article 308 EC. However, the reasoning for its application is not convincing at all.

4. The case law on the lawfulness of the freezing measures and interference with fundamental rights

This chapter addresses the second central research question relating to the conditions for the formal and substantive lawfulness of the freezing measures and the sub-questions if there are differences between the conditions for the lawfulness between the freeze of funds pursuant to Regulation 881/2002 and pursuant to Regulation 2580/2001, and why the ECJ repealed the CFI’s judgments on the freeze of funds pursuant to Regulation 881/2002. That is why the

judgments ruling on the lawfulness of the freezing mechanism are categorised into three different groups. The first group includes the judgments of the CFI on the lawfulness of the freezing mechanism pursuant to Regulation 881/2002, the second group includes the ECJ's judgments in the same cases on appeal and the third group consists of judgments of the CFI on the lawfulness of the freezing mechanism pursuant to Regulation 2580/2001.

The judgments of all three groups are analysed in a consistent way. In a first step the conditions are worked out which must be fulfilled for the act to freeze funds to be formally lawful. In this context it is examined in what way procedural requirements laid down by the respective regulation have to be followed and in what way general procedural rights have to be respected. In a second step the conditions for the substantive lawfulness are scrutinised. Similar to the conditions for the formal lawfulness it is firstly examined how the provision of the regulation have to be applied and then how the freeze of funds interferes with fundamental rights. It has to be taken into account that these issues can only be addressed in so far as they were dealt with by the courts. In a third step the judgments are compared and evaluated, especially with respect to the balance struck between the need for security and respect of the individual's fundamental rights so that the sub-question addressing this matter can also be answered.

4.1. The CFI with regard to the freeze of funds pursuant to Regulation 881/2002

So far there have been five cases ruled by the CFI in which the applicants contested the freeze of their funds pursuant to Regulation 881/2002. It has to be noted that the proceedings in *Orthman* took place after the ECJ had repealed the CFI's judgments on the four other cases. As a consequence, the CFI ruled in line with the ECJ's guidelines set up in the cases on appeal and therefore was not considered in the analysis of the CFI's ruling in cases contesting the freeze of funds pursuant to Regulation 881/2002 as this judgment differs from the others. In the cases of *Kadi, Yusuf & Al Barakaat* and *Ayadi* the applicants contested the formal lawfulness of Regulation 881/2002 as they pleaded for a breach of their fundamental rights such as the right to a fair hearing and the right to an effective judicial review. In *Ayadi* the CFI referred to its judgments in *Kadi* and *Yusuf & Al Barakaat*.

Before the CFI considered itself to be able to rule on the alleged infringement of fundamental procedural rights, it first examined the relationship between international law and Community law in order to determine in what way these procedural rights apply. Briefly, it held that firstly, the Community was not allowed to infringe the obligations imposed on its Member States by the Charter of the UN or impede their performance and that secondly, the exercise of its power was bound by the Treaty to adopt the necessary measures which enable its Member States to fulfil these obligations (*Kadi*, para. 204; *Yusuf & Al Barakaat*, para. 254). Under this precondition of the absolute primacy of international law, the CFI determined the scope of the review of legality it had to carry out. Although the EU was based on the rule of law insofar as its Member States and institutions could not avoid reviewing whether their acts were in conformity with the Treaty (*Kadi*, para. 209; *Yusuf*, para. 260), the CFI pointed out that the judicial review with regard to Regulation 881/2002 was subject to structural limits. The reason was that when the Council adopted the regulation it merely implemented a Security Council resolution and hence acted under circumscribed powers and had no autonomous discretion (*Kadi*, paras. 213-214; *Yusuf & Al-Barakaat*, paras. 264-265). Consequently a review of the lawfulness of the regulation would also be an indirect review of the lawfulness of the Security Council resolution (*Kadi*, para. 215; *Yusuf*, para. 266). Bearing in mind the primacy of international law, the CFI concluded that in the present cases the resolutions at issue fell outside the ambit of the CFI's judicial review and that the CFI had no authority to call into question, even indirectly, their lawfulness in the light of Community law (*Kadi*, para. 225; *Yusuf & Al Barakaat*, para. 276). Nonetheless, the CFI felt entitled to check the lawfulness of the regulation and, indirectly, of the resolution it is giving effect to, with regard to *jus cogens*, defined by the CFI as "a body of higher rules of public international law

binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible” (*Kadi*, para. 226; *Yusuf & Al Barakaat*, para. 277).

4.1.1. Formal lawfulness

Under these preconditions, the CFI started to check whether the applicants’ fundamental procedural rights were infringed, starting with the right to a fair hearing. The CFI pointed out that a distinction had to be made between being heard by the Sanctions Committee before the inclusion in the list took place and being heard by the Council before it adopted the regulation (*Kadi*, para. 254, *Yusuf & Al Barakaat*, para. 305). With regard to the right to a fair hearing on the European level, the CFI explained that it was settled case law that persons threatened to be the target of a punishment had the right to make known their views to the competent authority, even in the absence of rules governing the proceeding for a hearing. But the CFI continued that this applied only in fields such as competition law, anti-dumping action, state aid, disciplinary law and the reduction of financial assistance, fields in which the EC was provided with extensive powers of investigation and inquiry and wide discretion. Following settled case law, there was a correlation between the respect for procedural rights and the exercise of discretion enjoyed by the competent authority. In the context of adopting Regulation 881/2002 the Council had no discretion and consequently did not need to hear the parties concerned (*Kadi*, paras. 254-259; *Yusuf & Al Barakaat*, paras. 305, 325-328). Concerning the inclusion in the list by the Sanctions Committee, the CFI observed that the provisions did not foresee the right to be heard for the party concerned, but that there was a mechanism for re-examination of cases in place. In *Yusuf & Al Barakaat* (para. 308) the CFI concreted that a hearing prior to the inclusion in the list could not take place anyway because it would be liable to jeopardise the effectiveness of the sanctions because the freeze of funds by its very nature had to take advantage of the surprise and immediate effect. However, in the CFI’s opinion the presence of the re-examination mechanism sufficiently respected the right to be heard, although this mechanism did not allow the person concerned to be heard directly by the Sanctions Committee and the affected people relied on the diplomatic protection by the state of citizenship or residence (*Kadi*, paras. 261-262). According to the CFI, the restriction to the right to be heard in terms of not hearing the parties concerned directly and in person, was not unlawful in international law. It was normal and justified that the right to be heard was adapted to the multi-level administrative freezing procedure in place and also Community law recognised such procedural adaptations in the context of economic sanctions against individuals. Furthermore, the CFI stressed that the people concerned could seek judicial remedy before a domestic court if states refused to submit their cases to the Sanctions Committee to re-examine their case (*Kadi*, paras. 265-270; *Yusuf & Al Barakaat*, paras. 312-317). In *Yusuf & Al Barakaat* (para. 318) the CFI also sought to illustrate the effectiveness of the re-examination process. It explained that three of the original five applicants who contested the freeze of their funds were removed from the list after the Swedish state had submitted their cases to the Sanctions Committee for a review. Concerning the problem that parties concerned were effectively not able to make known their view on the correctness and relevance of the information and evidence adduced against them once they were classified confidential and therefore not communicated to them, the CFI held that because the freeze of funds was only a temporary precautionary measure, a communication of the information and evidence was not necessary if the Security Council or Sanctions Committee took the view that the communication would militate international security (*Kadi*, paras. 273-274; *Yusuf & Al Barakkat*, paras. 319-320).

With respect to the right to an effective judicial review, the CFI emphasised that it was only able to review the lawfulness of the regulation with respect to *jus cogens*, which excluded a check of the substantive lawfulness of the freeze of funds. Because the Security Council did not set up an international court which had jurisdiction to do a complete judicial review, there was no judicial remedy available. According to the CFI, the lack of a judicial

remedy was not per se contrary to *jus cogens*, because the right to access a court in international law was not absolute, as for example international organisations enjoyed immunity from the jurisdiction of domestic courts. So the CFI argued that the restriction for individuals to access a domestic court in order to challenge a resolution adopted by the Security Council under Chapter VII of the Charter of the UN is inherent in the right as it is guaranteed by *jus cogens*. In the CFI's point of view the limitation to the access to a court was justified on two grounds, firstly the nature of the decision taken by the Security Council and secondly by the legitimate objective pursued. The essential public interest of international peace and security outweighed the right of the individual to have his case heard by a court, in particular because the freeze of funds was only a timely limited measure which was reviewed every twelve or 18 months. The CFI pointed out that in the absence of a competent international court, the re-examination procedure available constituted a reasonable method of affording adequate protection of the applicant's fundamental rights as recognised by *jus cogens* (*Kadi*, para. 282-290; *Yusuf & Al Barakaat*, para. 337-345).

4.1.2. Substantive lawfulness

Because the CFI ruled that it was not competent to review the substantive lawfulness of the freeze of funds, the CFI's check of the substantive lawfulness of the freezing measure is limited to a possible infringement of the party's concerned right to property and a possible violation of the principle of proportionality under *jus cogens*. The CFI ruled on this matter in *Kadi*, *Yusuf & Al Barakaat* and *Hassan*.

The CFI started its argumentation by pointing out that through the amendment by Regulation 561/2003, Regulation 881/2002 provided derogations and exemptions from the freeze of funds. These derogations and exemptions allowed to leave those funds unfrozen which are necessary to cover basic expenses, but also other extraordinary expenses, which illustrated that neither the purpose nor the effect of the measure to freeze funds was to submit the persons concerned to inhuman and derogating treatment (*Kadi*, paras. 239-240; *Yusuf & Al Barakaat*, paras. 290-291). The CFI continued by referring to Article 17 (2) of the Universal Declaration of Human Rights, which states that "no one shall be arbitrarily deprived of his property". The CFI concluded from that provision that the only condition for an unlawful infringement of the right for respect of property under *jus cogens* was an arbitrarily deprivation of property. According to the CFI, the freeze of funds pursuant to Regulation 881/2002 was not an arbitrarily deprivation of property because it constituted a means to fight the threats to international peace and security caused by terrorist acts, which was an objective of fundamental public interest for the international community (*Kadi*, paras. 243-247; *Yusuf & Al Barakaat*, paras. 294-298). In addition to that, the freeze of funds was a "temporary precautionary measure" which unlike confiscation did not affect the very substance of the right to property as it only affected the use of it (*Kadi*, para. 248; *Yusuf & Al Barakaat*, para. 299). Besides, the decision to freeze funds was regularly reviewed by the Sanctions Committee and a procedure for re-examination was in place (*Kadi*, paras. 249-250; *Yusuf & Al Barakaat*, paras. 300-301). Basing on these observations the CFI came to the conclusion that the freeze of funds of persons, groups and entities suspected to be linked to the Taliban, Osama bin Laden or the Al-Qaeda network could not be considered to be an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned (*Kadi*, para. 251; *Yusuf & Al Barakaat*, para. 302).

In the cases of *Ayadi* and *Hassan* the CFI addressed the applicants' pleas that the derogations were ineffective respectively that the freeze of funds was a measure of excessive strictness. The CFI acknowledged the fact that the freeze of funds had a very profound impact on the lives of the people concerned as it stated that the freeze of funds was a drastic measure which was also capable of preventing the affected persons from leading a normal social life and making them wholly dependent on the public assistance of their respective states. Furthermore, it was a natural effect that measures imposing sanctions such as the freeze of

funds had consequences affecting the property and the freedom to pursue a trade or business, which could even go so far as to cause harm to persons who were in no way responsible for the situation which led to the adoption of the sanctions. In this instance the CFI referred to the case of *Bosphorus* in which the ECHR ruled that such effects on uninvolved persons could be legitimated in European law by a public-interest objective of fundamental importance to the international community. In the CFI's opinion the fight on terrorism, which threatened international peace and security, was an objective of fundamental importance to the international community and therefore legitimating the drastic impacts of the freeze measure on the people concerned (*Ayadi*, paras. 121-124; *Hassan*, paras. 97-100).

The CFI relativised the impact of the frozen funds by stressing that the provisions of Regulation 881/2002 did not necessarily prevent the applicants from leading a satisfactory personal, family and social life because due to the derogations and exemptions, the use of funds for strictly private use, such as a house to live in or a car, was not forbidden per se (*Ayadi*, para. 126; *Hassan*, para. 102). In the case of *Ayadi* the CFI further emphasised that Regulation 881/2002 also did not necessarily prevent the person concerned from carrying on business or trade activities, whether as employee or self-employed person, as the regulation in substance only concerned the receipt of the income of such activities and because there were no provision forbidding or regulating economic activities themselves. The measure to freeze funds was not intending to prevent persons from acquiring funds or economic resources, but preventing them from making use of them for other than strictly personal use. The CFI further argued that Article 2a of Regulation 881/2002 could allow to leave unfrozen those funds and economic resources which were necessary to carry on professional activities and the receivable funds for such activities. With regard to Mr Ayadi the CFI stressed that the grant of a taxi driver's licence and the hiring of a car, as economic resources, and money earned, as funds, could in theory be object of the derogations to the freeze of funds. It could be necessary in that context for the competent authority to ensure that the money earned did not exceed the amount which was necessary to cover basic expenses. However, it would not be legitimate for the competent authority to deny Mr Ayadi the grant of a taxi driver's licence without assessing his needs (*Ayadi*, paras. 128-132).

4.2. The ECJ with regard to the freeze of funds pursuant to Regulation 881/2002

The applicants Kadi, Al Barakaat, Hassan and Ayadi appealed on points of law and hence the ECJ opened the cases *Kadi & Al Barakaat* and *Hassan & Ayadi* on appeal to rule inter alia whether the applicants' rights to a fair hearing, to an effective judicial review and to property were respected in the context of freezing their funds pursuant to Regulation 881/2002.

Like the CFI, the ECJ firstly examined the relationship between international and Community law. But in contrast to the CFI, the ECJ developed its reasoning from the observance that the Community was based on the rule of law and that neither its Member States nor its institutions were able to avoid the review of conformity of their acts with the EC-Treaty, which included a system of legal remedies and procedures to allow the ECJ to review acts of the institutions (*Kadi & Al Barakaat*, para. 281). This immediately shows that the ECJ followed a totally different approach than the CFI, pointing out that compliance of acts with the Treaties is the most important objective and that the observance of that compliance is the ECJ's most important task. To support its view the ECJ continued its reasoning by stating that international agreements were not able to affect the allocation of powers fixed by the EC-Treaty or the autonomy of the Community's legal order. Having said this, the ECJ pointed out that according to settled case law, fundamental rights were an integral part of the general principles of European law and that it was the ECJ's job to ensure observance of them. Therefore respect for human rights was a condition for the lawfulness of any Community act and measure. Basing on these observations the ECJ drew the conclusion that obligations imposed on the Member States by international agreements were not able to

prejudice the institutional principles of the EC-Treaty, which included the principle that all acts had to respect fundamental rights (*Kadi & Al Barakaat*, paras. 282-285).

The ECJ continued its reasoning by applying these primarily considerations in the context of the freezing mechanism. The ECJ held that the Community had to review the lawfulness of Community acts giving effect to resolutions adopted by the Security Council, but not the latter, also not with respect to *jus cogens*. This statement is clearly addressed to the CFI, which took the view that it could only review the lawfulness of decisions to freeze funds in the light of *jus cogens*, since otherwise it would not respect the principle of primacy. The ECJ claimed contrarily that an implementing act being in contrast to higher rules of Community law did not challenge the primacy of resolutions in international law (*Kadi & Al Barakaat*, paras. 286-289). On the basis of these considerations the ECJ examined whether the principle of primacy could prevent the Community judicature from conducting any judicial review of the internal lawfulness of Regulation 881/2001 in the light of fundamental rights, as the CFI ruled, although the judicial review was a constitutional guarantee forming part of the very foundation of the Community. On the one hand the ECJ stressed the Community's obligations under international law which included that the Community had to respect international law in the exercise of its powers and the measures adopted had to be interpreted, and its scope limited, in the light of international law. Plus, if the Community implemented resolutions of the Security Council adopted under Chapter VII of the Charter of the UN, it was obliged to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the UN relating to such an implementation. On the other hand the ECJ pointed out that the UN did not impose any particular model for the implementation of resolutions adopted under Chapter VII of the Charter, because the implementation had to be in accordance with the domestic legal orders of the UN's member states. Consequently the states had a free choice among different possible models for the transposition of resolutions into their domestic legal orders (*Kadi & Al Barakaat*, paras. 290-298).

For the ECJ it followed that the duties imposed on the Community and its Member States by international law, especially in the context of the implementation of resolutions adopted under Chapter VII of the Charter, did not exclude a judicial review of the internal lawfulness of Regulation 881/2002 in the light of fundamental rights as guaranteed by Community law. Furthermore, the immunity from judicial review of regulations such as Regulation 881/2002 due to the principle of primacy, could not find a basis in the EC-Treaty (*Kadi & Al Barakaat*, paras. 299-300).

Lastly the ECJ sought to prove the claim that there were indeed no provisions in the Treaties which justify the exclusion of a judicial review of Regulation 881/2002 as regards fundamental rights. It reasoned that although Article 234 EC¹² allowed derogations even from primary law and that Article 297 EC¹³ would permit obstacles to the operation of the common market if Member States were obliged to adopt measures for the purpose of maintaining international peace and security, no derogations from the principles of liberty, democracy and respect for human rights and fundamental freedoms, foundations of the Union as enshrined in Article 6 (1) EU¹⁴, were possible (*Kadi & Al Barakaat*, paras. 301-303). In addition to that, the ECJ took the point of view that immunity for the contested regulation could not be deduced from the hierarchy in the European law order, because acts giving effect to a resolution adopted under Chapter VII did not enjoy primacy over primary European law, but only over secondary law (*Kadi & Al Barakaat*, paras. 305-309). Finally the ECJ declared that the re-examination mechanism of the Sanctions Committee was, despite all recent amendments and improvements, no equal substitute to a proper judicial review and hence no justification for the immunity of Regulation 881/2002 from Community judicature (*Kadi & Al Barakaat*, paras. 318-321).

¹² Article 234 EC is now Article 267 FEU

¹³ Article 297 EC is now Article 347 FEU

¹⁴ Article 6 EU is still Article 6 EU

These considerations resulted in the ECJ's conclusion that the CFI erred in law when it denied to have competence to review the lawfulness of Regulation 881/2002 in the light of fundamental rights and that it set aside the CFI's judgments.

4.2.1. Formal lawfulness

In the context of the review of the formal lawfulness the ECJ checked whether the applicants' right to be heard and the right to effective judicial review were respected when their funds were frozen. The ECJ first of all stated that the right to effective judicial review was a general principle of the Community and hence also applicable in the context of the freezing mechanism. Furthermore, the obligation to state reasons was closely linked to the right to an effective judicial review. In the context of freezing funds, the Council was therefore obliged to communicate the reasons for the decision to include a person or entity in the list, ideally when it took that decision or at least as swiftly as possible after the decision had been taken so that the party concerned was able to exercise its right to take action against that measure within the periods prescribed. The ECJ explained that the obligation to state reasons ensured firstly that the person or entity affected by the freeze of funds was able to defend his rights and to decide whether there was a point to seek judicial review, and secondly that the Community judicature was able to carry out a review of the lawfulness of the contested act. The ECJ confirmed the CFI's view that it was however not possible for the competent authority to give a statement of reasons before the party concerned had been entered in the list for the first time, because it was likely to jeopardise the effectiveness of the measure. For the same reasons it was also not possible to hear the affected person, group or entity prior to the inclusion in the list. The ECJ acknowledged that in the context of fighting international terrorism, there could be overriding considerations which militated against the communication of certain matters to the persons or entities concerned and consequently also against them being heard on those matters. But the ECJ emphasised that this did not mean that restrictive measures such as the freeze of funds could escape all judicial review by the claim that the evidence and material adduced against the party concerned could not be disclosed for the purpose of national security and fighting terrorism. In such cases it was rather for the Community judicature to apply techniques during the proceedings which accommodate both, the legitimate security concerns about the nature and sources of the information considered in the decision to freeze funds and the need to accord the individual a sufficient measure of procedural justice (*Kadi & Al Barakaat*, paras. 335-344).

4.2.2. Substantive lawfulness

In both cases on appeal before the ECJ the question whether the measure to freeze the applicants' funds was substantively lawful could not be answered because the Council did not provide the applicants with any statement of reasons why their funds were frozen. Therefore the ECJ was not able to review the substantial lawfulness and could do no other than to detect an infringement of the right to judicial review. Although this infringement of the applicants' rights led to the annulment of the contested decision, the ECJ still considered in the case *Kadi & Al Barakaat* whether Mr. Kadi's right to property was also infringed by the freeze of his funds pursuant to Regulation 881/2002. In contrast to the CFI, the ECJ examined that matter in the light of European law.

The ECJ began its reasoning by referring to settled case according to which the right to property was a general principle of Community law. However, it had to be taken into account that the right to property was not absolute and had to be seen in relation to its function in society. Therefore it was possible for the right to property to be restricted if the purpose of the restriction corresponded to objectives of public interest pursued by the Community and if the restriction did not constitute a disproportionate and intolerable inference in relation to the aim pursued, impairing the very substance of the right guaranteed (*Kadi & Al Barakaat*, para. 355). As regards the restriction to the right of property caused by the freeze of funds, the ECJ

explained, the freezing measure was a “temporary precautionary measure” which was not supposed to deprive someone from his property, but which nonetheless constituted a considerable restriction to the use of it, which was especially true in the case of Mr Kadi as his funds had been frozen since 20 October 2001 (*Kadi & Al Barakaat*, para. 358). In order to justify a restriction to the right to property, there needed to be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Besides, a fair balance between the demands of the public interest and the interest of the individual had to be struck. However, the ECJ stressed that the legislature enjoyed a wide appreciation with regard to choosing the means of enforcement and ascertaining whether the consequences of enforcement were justified in the public interest for the purpose of achieving that object of law in question (*Kadi & Al Barakaat*, para. 360). Concerning the freeze of funds pursuant to Regulation 881/2002 the ECJ mentioned three reasons for its justification. Firstly, the ECJ referred to the judgment in *Bosphorus* and the fact that when the Community was implementing resolutions of restrictive measures of economic nature, the importance of the aim pursued could justify negative consequences even towards uninvolved persons. In this context the ECJ pointed out that the fight against international terrorism and in particular against the Taliban, Osama bin Laden and the Al-Qaeda network was an objective of general and fundamental interest to the international community (*Kadi & Al Barakaat*, paras. 361-363). The ECJ further emphasised that secondly derogations and exemptions from the freeze of funds were possible and that thirdly a re-examination mechanism was in place as the decision to freeze funds had to be reviewed periodically and parties concerned were also able to submit a request for re-examination directly to the Focal Point (*Kadi & Al Barakaat*, paras. 364-365). Hence, in general the restrictive measure to freeze funds pursuant to Regulation 881/2002 constituted a restriction of the right to property which was justified and legitimate (*Kadi & Al Barakaat*, para. 366). But according to the ECJ a further condition for the restriction of the right to property in European law was that the applied procedure allowed the person concerned to put his case to the competent authorities. The ECJ ruled with regard to Mr Kadi that in his case the adoption of Regulation 881/2002 took place in a way which did not provide him with any guarantee allowing him to put his case to the competent authorities, in a situation in which the restriction to his right to property had to be considered to be severe due to the general application and actual continuation of the freeze. Therefore the ECJ ruled that the restriction to his right to property was unjustified (*Kadi & Al Barakaat*, paras. 367-370).

4.3. The CFI with regard to the freeze of funds pursuant to Regulation 2580/2001

The CFI has determined the conditions for the formal lawfulness of the funds freezing pursuant to Regulation 2580/2001 in various cases. In the cases *OMPI* and *Sison I* the CFI concerned itself in detail with the application of procedural rights such as the right to be heard, the obligation to state reasons and the availability of a judicial remedy. In the judgments in the cases *Al-Aqsa*, *PKK* and *KONGRA-GEL*, the CFI basically referred to the explanations made in *OMPI* and *Sison I*. In the case of *OMPI II* the voting procedure of the Council for including persons, groups or entities in the list was claimed to be unlawful by the applicant, so the CFI checked if the procedural provisions of Regulation 2580/2001 were infringed in that context. As regards the substantial lawfulness of the freezing mechanism, the CFI set out the conditions for the lawfulness in its judgments in the cases *PMOI I*, *Sison II* and *PMOI II*.

4.3.1. Formal lawfulness

Basing on a statement made by then Minister of State to the Foreign and Commonwealth Office of the United Kingdom Lord Malloch-Brown to the House of Lords, the applicant in *OMPI II* claimed that the Council had a procedure in place which only allowed to vote on the whole list, without providing for the possibility of a vote on particular individuals or

organisations when periodically re-examining the funds freezing measure, which vitiated the decision-making process in such a serious way that it constituted a misuse both of powers and procedures and a violation of Article 2(3) of Regulation 2580/2001 and of Article 1(6) of Common Position 2001/931. Referring to the statement of and the documents provided by the Council, saying that each member of the Council was able to express his view on every single entry in the list and that if a member opposed the inclusion of a single person or group on the list, the demanded unanimity would not be given and hence the person or group concerned would not continue to be included in the list, the CFI found that the voting procedure in place was in accordance with the law and consequently rejected the applicant's plea in law (*OMPI II*, paras. 27-35). Having in mind that the decisions on the list take place in secret and have been heavily criticised for their lack of transparency, the statement of former Minister of State Lord Malloch-Brown raises further doubts on the legitimacy of the decisions taken by the Council, although the CFI found that there was no evidence for an unlawful voting process.

With respect to the right to be heard, the CFI explained that in the context of the freezing measure several different decisions on different levels were taken and that the applicability of the right to be heard varied in the different situations. The first distinction had to be made between the initial decision to freeze funds and the subsequent decision to maintain the funds frozen after the periodical review. The second distinctions related to the level because decisions to freeze funds took place at two levels, the Member State and the Community level. At Member State level a judicial authority decided to instigate investigations or prosecution based on serious and credible evidence or clues and at Community level the Council decided to include the party concerned in the list and periodically reviewed the decision (*OMPI*, paras. 114-117; *Sison*, paras. 161-164). Therefore the CFI declared that there was only a limited purpose of the right to a fair hearing at Community level. This was in particular true when the Council took an initial decision to freeze funds. The Council had to inform the party concerned about the material and information indicating the instigation of investigations or prosecution by a competent national authority and allow him to make known his views on that material. But the question of whether the instigation of the investigations or prosecution was lawful or based on serious and credible evidence was not subject of that hearing because the Council had, due to the concept of sincere cooperation between the Community institutions and the Member States constituted in Article 10 EC¹⁵, to rely on the assessment of the competent national authority. These issues could rather be raised by the party concerned at a hearing on this matter at Member State level. Only information or evidence which had not been assessed by a national authority before had to be subject to a notification and hearing at Community level. When a subsequent decision to maintain the freeze of funds was taken, the Council needed to inform the party concerned about the material justifying the maintenance of the freeze and to give him the opportunity to make known his views (*OMPI*, paras. 118-126; *Sison*, paras. 165-173). However, the CFI also acknowledged limitations to the right to a fair hearing. As in *Kadi*, the CFI explained that it was not possible to notify and hear the party concerned before his funds were frozen because this would completely jeopardise the measure's effectiveness. The Council was obliged to notify the person affected concomitantly or immediately after the freeze of funds took place so that he was in a position which allowed him to defend his rights, in particular in legal proceedings. In addition to that, persons affected by the freezing measure had to have the opportunity to request an immediate re-examination of the initial decision to freeze their funds. The CFI recognised that such a hearing after the freeze took place is not automatically required, because the party concerned could also immediately bring the matter before the CFI, which ensured that a fair balance is struck between the observance of the individual's fundamental rights and the need to take preventive measures in fighting international terrorism. In the context of a subsequent decision to freeze funds these restrictions did not

¹⁵ Article 10 EC is in substance replaced by Article 4 EU

apply and the Council had to give the party concerned the opportunity to a prior hearing because as the funds were already frozen, and it was not necessary to take advantage of a surprise affect anymore (*OMPI*, paras. 127-131; *Sison*, paras. 174-178). The CFI further pointed out that because the freezing measure was a precautionary and temporary measure to fight international terrorism, overriding considerations concerning the security of the Community, its Member States or their international relations could preclude the communication of certain evidence and consequently restrict the right to a fair hearing. The CFI emphasised that these restrictions were in line with the constitutional traditions common to the Member States and with the case law of the ECHR (*OMPI*, paras. 133-135; *Sison*, paras. 180-182).

Next the CFI addressed the obligation to state reasons for acts adversely affecting a person and how it applies to the freezing measure pursuant to Regulation 2580/2001. It stated that there were two purposes for that obligation. On the one hand, the person affected should be provided with sufficient information which allowed him to determine whether the act was well-founded or vitiated by an error of law which could be contested before a court and on the other hand, it allowed the Community judicature to review the lawfulness of the decision. As a consequence, derogations from the obligation to state reasons were only possible for compelling reasons. The CFI explained that in the context of the freezing measure the parties concerned had often no opportunity to be heard and therefore the statement of reasons was the more important as it was the only safeguard enabling the party concerned to make use of legal remedies to challenge the lawfulness of the decision to freeze their funds (*OMPI*, paras. 138-140; *Sison*, paras. 185-187). In the cases of *PKK* and *KONGRA-GEL* the CFI consequently declared that it was impossible to send a statement of reasons after proceedings before the Community courts had started as this would clearly prejudice the right of defence and not comply with the principle of equality of the parties before the Community judicature (*PKK*, paras. 66-68; *KONGRA-GEL*, paras. 99-101). Having said this, the CFI determined what the requirements of a statement of reasons were. In principle the party concerned had to be notified by the statement of reasons at the same time as the funds were frozen. The statement had to include the matters of fact and law which constituted the legal basis of the Council's decision and the considerations which finally lead to the decision to freeze the funds. The grounds had to indicate the actual and specific reasons why the Council considered the rules applicable to the party concerned. The CFI explained that it was not sufficient for the Council only to refer to the provisions which allowed the inclusion in the list, because it had discretion whether to include a person in the list after a competent national authority had decided to instigate investigations or prosecution and hence the actual reasons for the inclusion were of great importance. That meant that the statement for an initial decision to freeze funds had to address what kind of investigations or prosecution had been instigated and, if applicable, which information not reviewed by a national authority existed that was considered in the decision-making process. The statement for a subsequent decision to freeze funds had to address the reasons why the Council considered the maintenance of the freeze justified. It was not necessary though, to specify all matters of fact in the statement (*OMPI*, paras. 141-146; *Sison*, paras. 188-193). In *Al-Aqsa* the CFI added that in cases where a subsequent decision to freeze funds relied in essence on the same information and evidence as the previous, a mere statement to that effect was sufficient, especially when the party concerned was a group or entity (*Al-Aqsa*, para. 54). The CFI pointed out that the same overriding considerations with respect to public security which restricted the right to be heard were also valid in the context of the obligation to state reasons and therefore could prevent the Council from stating all relevant information and evidence. The CFI also showed awareness of the interests of the party concerned in this context as it explained that a detailed publication of the charges levelled against a person, group or entity was capable of causing damage to the reputation. In order to avoid this, the CFI determined that only the operational part of the decision to freeze funds and a general statement of reasons needed to be published in the Official Journal

whereas the specific statements of reasons had to be delivered to the party concerned by another appropriate means (*OMPI*, paras. 147-148; *Sison*, paras. 194-195).

As regards the right to a judicial review, the CFI held that this right was ensured in the context of the freezing mechanism pursuant to Regulation 2580/2001, because parties concerned were able to bring action before the CFI pursuant to Article 230 EC¹⁶. The same article assigned jurisdiction on actions for annulment brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC-Treaty or any rule relating to its application or the misuse of power to the CFI. Therefore the CFI was inter alia entitled to ensure that the legal conditions for applying Regulation 2580/2001, either to freeze funds initially or subsequently, were fulfilled. This included reviewing the assessment of the facts and circumstances relied on as justifying the decision to freeze funds and to review the evidence and information on which that assessment was based. Apart from this review of the substantial lawfulness, the CFI had also to review the formal lawfulness as it had to check if the rights of the defence were respected, if a sufficient statement of reasons was given and, should the need arise, if the overriding considerations relied on by the Council to disregard these rights were well-founded (*OMPI*, paras. 152-154; *Sison*, paras. 199-201). However, there were also limitations to the CFI's scope of review. Because the Council had broad discretion in the context of taking decisions to freeze funds basing on Regulation 2580/2001, the CFI's review of the lawfulness of the decision to freeze funds was restricted to checking whether the rules of the governing procedure and the obligation to state reasons were complied with, facts were materially accurate and no manifest error of assessment of the facts or a misuse of powers had taken place (*OMPI*, para.159; *Sison*, para. 206). The CFI stressed the importance of the right to a judicial review by stating that in cases where the parties concerned had no chance to be heard, the judicial review was the more important as it was the only safeguard of a fair balance between the need to combat international terrorism and the protection of fundamental rights of individuals concerned. Therefore a strict judicial review was necessary which meant that the court had to be able to review the lawfulness and merits of the measure to freeze funds without the Council being able to raise objections that information were either secret or confidential (*OMPI*, paras. 155-156; *Sison*, paras. 202-203).

4.3.2. Substantive lawfulness

There are in total only three cases in which the substantive lawfulness of the measure to freeze funds was reviewed in the sense that the court reviewed whether the conditions as laid down by the regulation were fulfilled to either initially or subsequently freeze funds. The review of the substantive lawfulness is very closely linked to the obligation to state reasons and the right to judicial review. The review of the substantive lawfulness is de facto a review of the statement of reasons or the carrying out of the right to judicial review. Consequently, a review of the substantial lawfulness can only be conducted if a statement of reasons exists and the judicature is entitled and capable to carry out that review. With regard to the statement of reasons one has to distinguish between the obligation to state reasons, which is an essential procedural requirement, and the validity of the reasoning, which falls within the ambit of the substantive lawfulness of the act. Basically, to be formally lawful an act needs to be furnished with a statement of reasons and to be substantively lawful an act needs to be furnished with a valid statement of reasons.

The CFI's explanations as regards the substantive lawfulness of the decision to freeze funds basically followed the court's reasoning in the cases of *OMPI* and *Sison* with regard to the obligation to state reasons and the right to a judicial review. So in the following it is only briefly explained how the CFI defined and determined the conditions for implementing Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation 2580/2001, the

¹⁶ Article 230 EC is now Article 263 FEU

burden of proof incumbent on the Council in that context and the scope of judicial review in such matters.

The CFI pointed out that Article 2(3) of Regulation 2580/2001 was the provision which determined the matters of fact and law which are capable of affecting the application of the fund-freezing measure to a person, group or entity as it stated that the Council was to establish, review and amend the list of persons, groups and entities to which that regulation applied, in accordance with the provisions laid down in Article 1(4) to (6) of Common Position 2001/931. These provisions determine that the list must be drawn up on the basis of precise information or material in the relevant file, which indicate that a competent authority instigated investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act, based on serious and credible evidence or clues, or that a condemnation for such deeds took place in the respect of the party concerned. A review of that list had to take place at least every six months to ensure that the grounds for an inclusion still exist (*OMPI I*, para. 130, *Sison II*, para. 92, *OMPI II*, para. 50). Basing on these provisions, the CFI pointed out that due to the two level dimension of the freezing measure, the verification that a national authority had instigated investigations or prosecutions meeting the above mentioned definition was an essential precondition for the initial decision to freeze funds, whereas the verification of the consequences of that decision at the national level is decisive in the context of a subsequent decision to freeze funds (*OMPI I*, para. 131, *Sison II*, para. 93, *OMPI II*, para. 51).

Consequently the burden of proof for the Council when adopting an initial decision to freeze funds was limited to the obligation to prove that there were precise information or material in the relevant file which indicated that a decision by a national authority meeting the definition laid down in Article 1(4) of Common Position 2001/931 had been taken with regard to the person concerned. In the context of subsequent decisions to freeze funds the Council carried the burden to prove that the freezing of funds was still justified under consideration of all the relevant circumstances of the case and with a special emphasis on the action taken upon that decision of the competent national authority (*OMPI I*, para. 135, *Sison II*, para. 96, *OMPI II*, para. 54).

With regard to the scope of judicial review of the substantive lawfulness of the act to freeze funds, the CFI emphasised that the Council enjoyed a broad discretion in particular concerning the assessment of the considerations of appropriateness on which such decisions were based. Nonetheless, the CFI had to review whether the evidence relied on was factually accurate, reliable and consistent and whether it was able to substantiate the conclusion drawn therefrom. The CFI was restricted not to substitute its own assessment of what was appropriate for that of the Council (*OMPI I*, para. 136, *Sison II*, para. 97, *OMPI II*, para. 55).

4.4. Comparison and evaluation

It is apparent that the CFI clearly distinguished between the funds-freezing mechanism of Regulation 881/2002 and Regulation 2580/2001 and developed a very different case law for both spheres. The distinction is caused by the different degree of discretion enjoyed by the Community institutions. Under Regulation 2580/2001 the Community has a broad discretion as it is competent to identify the persons, groups and entities of whom the funds should be frozen independently whereas under Regulation 881/2002 the Community does not enjoy any discretion in this respect because this regulation was adopted to enable the Community to freeze the funds of persons, groups and entities identified by the Sanctions Committee. Whereas the CFI ruled that it was competent to review the lawfulness of the freeze of funds pursuant to Regulation 2580/2001 under Community law, it denied that competence with regard to the freezing measure of Regulation 881/2002 because the review of the decision to freeze funds in the absence of any discretion for the Community would indirectly imply a review of the resolution to which the Community sought to give effect. According to the CFI, such an indirect review of the resolution in the light of Community law was not possible,

because the resolution was adopted under Chapter VII of the Charter of the UN and therefore had primacy over Community law. But the CFI found, that it was competent to review the freezing measure in the light of *jus cogens* as these provisions of international law were binding on and had to be respected by the Security Council. However, it has to be taken into account that the standards of fundamental rights protection are much lower in the light of *jus cogens* than under European law which resulted in bizarre and incomprehensible conditions in reality. In the cases *Kadi, Yusuf & Al Barakaat, Hassan* and *Ayadi* the applicants' funds were frozen pursuant to Regulation 881/2002 without allowing them to make known their views and notifying them of the reasons for the freeze of their funds. The CFI ruled that this did not constitute an infringement of the applicants' fundamental rights with regard to *jus cogens* so that the applicants' action was rejected. In the cases *Sison, OMPI, PKK, KONGRA-GEL* and *Al-Aqsa* the applicants' funds were frozen pursuant to Regulation 2580/2001. Again the applicants had no opportunity to make known their views on the freeze of their funds and were not notified of the reasons. But because Community law was applicable, the CFI found that the applicants' rights to defence were infringed and consequently annulled the freeze of their funds. So the degree of fundamental rights protection de facto was solely determined by the terrorist organisation which was supported. To support the Taliban, Osama bin Laden or the al-Qaeda network resulted in less protection of the fundamental rights than supporting any other terrorist organisation. Lavranos (2009, p. 346) considers that distinction to be "totally arbitrary". This can certainly be confirmed as there is no objective reason justifying that differentiation. And this is not the only criticism which can be named in respect of the CFI's ruling in cases concerning the freeze of funds pursuant to Regulation 881/2002. It is said that a review of Security Council resolutions in the light of *jus cogens* actually does not make sense because the provisions of *jus cogens* do not constitute the only limitations to the Security Council's power when adopting resolutions under Chapter VII of the Charter of the UN as also provisions of the Charter must be respected (Zgonec-Rozej, 2009, p. 309). This leads to a further problem, namely that *jus cogens* is a category which is notoriously difficult to identify (Garbagnati Ketvel, 2006, p. 111). It is also controversial whether a regional court such as the CFI is entitled to review Security Council regulations adopted under Chapter VII of the Charter. So far, it has only been suggested that it should be for the International Court of Justice to determine whether non-compliance with a mandatory resolution is justified (Garbagnati Ketvel, 2006, p. 111).

In *Kadi & Al Barakaat* the ECJ decided that the community judicature was not competent to review the lawfulness of Security Council resolutions at all. However, in contrast to the CFI, the ECJ found that it was competent to review the lawfulness of the freezing measure pursuant to Regulation 881/2002 in the light of European law without violating the principle of primacy enjoyed by resolutions adopted under Chapter VII of the Charter under international law. This difference is explained by different perspectives taken by the courts with regard to the relationship between the Community and the international legal order. Whereas the CFI took an international law perspective which gave supremacy to the UN legal order over the Community legal order, the ECJ took a European law perspective which is characterised by the view that the distinct and separate European law order coexists next to the international law order without being subordinated to the latter (Lavranos, 2009, p. 247 ff.). By creating that isolation of the European legal order from the international legal order and limiting the judicial review to the Community acts giving effect to resolutions, the ECJ is able to respect the principle of the rule of law in the EU without compromising the principle of primacy of UN Charter obligations. This "approach of reciprocal concessions" works as long as it is possible to implement Security Council resolutions in conformity with EU fundamental rights. This also means that the ECJ's commitment to accept the primacy of UN Charter obligations ends in the absence of discretionary power to implement these measures in a fundamental rights-friendly way, because in cases of conflict the fundamental rights prevail (Posch, 2009, p. 4). The ECJ's approach is ultimately premised on three key

principles. The first is the autonomy of the EU legal order, the second the constitutionality of the EU legal order and the third the centrality of fundamental rights to the operation of that legal order (Cardwell, French & White, 2009, p. 233). Consequently, the ECJ showed that it is willing to protect the fundamental rights of persons affected by the freezing measure to the maximum extent, especially the right to be heard and the right to judicial review are of such a fundamental nature that they must be respected in any situation. The CFI in contrast disregarded these fundamental rights completely as it refused any judicial review (Lavranos, 2009, p. 84 ff.). Although some people welcomed that the CFI acknowledged the primacy of the UN legal system over the Community legal order (Cardwell, French & White, 2009, p. 234), Lavranos (2009, p. 358) is probably right in pointing out that to achieve a high standard of protection of fundamental rights it is worthwhile to neglect the consistent implementation of Security Council resolutions throughout the world. It is also to be welcomed that the ECJ's ruling brought the degree of protection of fundamental rights enjoyed by parties concerned by the freeze of funds pursuant to Regulation 881/2002 into line with the degree of protection of fundamental rights enjoyed by those affected by the freezing mechanism of Regulation 2580/2001, as this differentiation was not plausible at all.

It is further believed that the ECJ's judgment can lead to further improvements of the freezing mechanism at UN level. Posch (2009, p. 5) believes that the judgment in *Kadi* stands for a bottom-up process in which regional courts pressure the Security Council to change its policy towards fundamental rights, because the ECJ's insistence on fundamental rights made it harder for the Security Council to adhere to violations of fundamental rights. Lavranos (2009, p. 357) thinks, that this judgment forces the Security Council in general, and its permanent members the UK and France in particular, to work towards an improvement of the UN review procedures by incorporating sufficient procedural guarantees and efficient review mechanisms. Zgonec-Rozej (2009, p. 311) advises the Security Council to improve its sanctions regime in order to enhance its authority and the effectiveness of the counterterrorism sanctions regime.

The case law established by the CFI and ECJ also forced the EU institutions to adapt their course of action with respect to administering the two freezing mechanisms at Community level, to comply with the conditions defined by the courts. As regards the freeze of funds pursuant to Regulation 2580/2001, the Council started to provide the parties which are concerned by the freezing mechanism with a statement of reasons and the opportunity make known their views, after the CFI had given its judgments in the cases *OMPI* and *Sison*. In the cases *PMOI*, *Sison II* and *PMOI II*, the CFI confirmed that the procedure to freeze funds which is currently in place was formally lawful and respecting the fundamental procedural rights of the party concerned in a sufficient way. With regard to the freeze of funds pursuant to Regulation 881/2002, the EU also changed its procedure after the ECJ gave its judgment on *Kadi & Al Barakaat* by notifying narrative summaries of reasons provided by the Sanctions Committee to the parties concerned and giving them the opportunity to make known their views on it. Mr. Kadi and Al Barakaat were both provided with narrative summary of reasons and given the opportunity to make know their views in order to repair the procedural infringements detected by the ECJ. After considering them, the Commission considered in both cases that it was justified to keep their funds frozen. Mr Kadi therefore took again legal actions before the Community judicature. It will be interesting to see whether the court will consider the amended procedure to be formally lawful.

As regards the central research questions about the lawfulness of the freezing measure and the sub-questions the analysis conducted in this chapter leads to the following answers.

Firstly, the CFI initially differentiated between the two freezing measures with respect to the conditions for the lawfulness due to the different amount of discretion enjoyed by the Council and its interpretation of the relationship between international and Community law. With respect to Regulation 881/2002 fundamental rights were only protected in the light of

jus cogens which meant that the right to a fair hearing and to judicial review did not have to be respected because of the overriding objective to fight terrorism as it constitutes a serious danger to international safety. Consequently, the safety concerns clearly outweighed the respect for fundamental rights.

Secondly, the ECJ repealed the CFI's judgments on Regulation 881/2002 because it took a different view of the relationship between international and Community law which allows the application of Community law. The balance between security and fundamental rights was adjusted in favour of the fundamental rights. A hearing, the obligation to state reasons and a full judicial review became conditions for the lawfulness of the freezing measure. Whereas the hearing and the statement of reasons can be constrained by overriding safety considerations, the right to judicial review is absolute and supposed to guarantee that a fair balance between the security needs and the respect for fundamental rights is established.

Thirdly, since the ECJ's repeal the conditions for the formal lawfulness of both freezing measures are identical and the aforementioned conditions apply to both of them. The conditions for the substantive lawfulness are only determined with regard to Regulation 2580/2001 so far. With regard to an initial decision to freeze funds, a competent national authority has to have instigated investigations or prosecution in respect of the party concerned as defined in Regulation 2580/2001 and Common Position 2001/931, and it is the Council's burden to prove that this has happened. With respect to a subsequent freeze, there have to be reasons which justify the continuous freeze of the funds and the burden of proof is again incumbent on the Council.

5. Conclusions and outlook

In order to answer the two central research questions of whether there is a sufficient legal basis in the Treaties to adopt Regulation 881/2002 and Regulation 2580/2001 and what the conditions for the lawfulness of the freezing measures pursuant to these regulations are, it was firstly necessary to answer the sub-question why there are two funds freezing mechanisms in European law and how they differ. The reason is that both are the implementation of Security Council resolutions at Community level. The freezing measure of Regulation 881/2002 is a means to combat the Taliban, Osama bin Laden and the al-Qaeda network for engaging in international terrorism and the freezing measure of Regulation 2580/2001 was an immediate reaction to the terrorist attacks of 9/11 and seeks to fight international terrorism in general. The decisive difference is that with respect to the freezing measure pursuant to Regulation 881/2002, the EU has no discretion in deciding whose funds shall be frozen as the Sanctions Committee designates the funds to freeze whereas with respect to the freezing measure pursuant to Regulation 2580/2001 the EU enjoys a broad discretion in that respect as it maintains its own list of persons, groups and entities whose funds are to be frozen.

With this information in mind, the central research question asking if there was a sufficient legal basis for the adoption of the two regulations was answered by analysing the relevant case law. It showed that both courts confirmed the view that Articles 60 EC and 301 EC in conjunction with Article 308 EC constitute a sufficient legal basis. However, the fact that the CFI and ECJ each came up with totally different and mutually contradictory explanations for these articles constituting the legal basis for the two regulations illustrates that the choice of this legal basis is disputable and raises doubts whether the EU was actually competent to implement the fund freezing measures at Community level. It seems as though the courts were willing to show a lot of goodwill and creativity in order to find a justification for the legal basis because they acknowledged the importance and necessity of the fund freezing measures in order to pursue the objective of protecting the population by combating and preventing international terrorism. It is not useful in that regard that General Advocate Maduro offers a third opinion on the appropriate legal basis. He claims that Articles 60 EC and 301 EC on its own constitute a sufficient legal basis, a view which was rejected by both

courts. Although repealed by the ECJ and rejected by General Advocate Maduro, the CFI's explanation that the bridge function of Articles 60 EC and 301 EC justifies the application of Article 308 EC in the given context seems to be a more comprehensible and honest approach than the ECJ's approach of implicit underlying objectives and the overemphasis of the economic nature of the freezing measure. Although these explanations explicitly concern the legal basis of Regulation 881/2002, they are also valid for the legal basis of Regulation 2580/2001 and therefore the sub-question about a difference between the legal bases of the two regulations has to be denied.

Moreover, the other central research question on the conditions for the formal and substantial lawfulness of the funds freezing measures and the closely linked sub-question about what kind of balance is struck between the need for security and the respect of the fundamental rights of the party concerned was tackled. Before these two questions can ultimately be answered, the answer to the sub-question if there is a difference between the conditions for the lawfulness of the two freezing measures has to be given. The case law revealed that the CFI initially determined the conditions for the lawfulness differently. Concerning the freeze of funds pursuant to Regulation 2580/2001, it is obvious that the conditions for the formal and substantive lawfulness were defined in a way which is supposed to protect the party's concerned fundamental rights to a high extent. The opportunity to be heard, a specific statement of reasons and a judicial review of the decision to freeze funds are conditions for the formal lawfulness of the freezing measure. However, it has to be considered that the hearing and statement of reasons are subject to constraints. If the communication and disclosure of sensitive material and information militates against security interests and needs, the Council will not be obliged to notify and hear the party concerned on this information and material and it will not have to mention this information and material in the statement of reasons. Besides, the party concerned cannot be heard prior to an initial freeze of funds because the absence of the surprise effect is liable to jeopardise the effectiveness of the freezing measure. These limitations are sought to be compensated by the access to a full and strict judicial review so that a fair balance between the security needs and the fundamental rights can be struck. It is therefore necessary that even disclosed and sensitive information and material is made accessible to the European courts in order to enable them to assess if the freeze of funds is lawful. Otherwise the right to a judicial review is not respected and the freeze of funds unlawful. In terms of substantive lawfulness the conditions vary whether it is an initial or subsequent decision to freeze funds. In the first case the condition for the freeze is that a national competent authority instigated investigations or prosecution on actions related to terrorism in respect of the party concerned as defined in Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation 2580/2001. The Council carries the burden of proof that such an instigation of investigations or prosecution took place. In the latter case the existence of reasons which justify the maintenance of the freeze of funds is a necessary condition. It is the Council's burden of proof to deliver the material and evidence for the justification of the continuous freeze of funds.

The conditions for the lawfulness of the freeze of funds pursuant to Regulation 881/2002 were in stark contrast to those of Regulation 2580/2001 because the CFI came to the conclusion that the party's concerned fundamental rights were only protected in the light of *jus cogens*. This was explained by the fact that the EU had no discretion when implementing the freezing measure and hence the application of Community law was not possible as this would be contrary to the principle of primacy enjoyed by Security Council resolutions adopted under Chapter VII of the UN Charter. As a consequence, a hearing of the party concerned, a statement of reasons for the freeze of funds and the availability of a judicial review were not conditions for the formal lawfulness of the freezing measure. The existence of the re-examination measure at UN level was considered to be a sufficient protection of the concerned party's fundamental rights. The right to property had only to be respected in a very limited way. The only condition for the substantive lawfulness was that the party concerned

was not arbitrarily deprived of his property, which was not considered to be the case as the freezing measure pursued the objective of combating and preventing international terrorism and was only a temporary restriction to the use of the property without affecting its very substance. It is obvious that the safety objective was clearly prevailing over the concerned party's fundamental rights as there was hardly any protection of the latter. The reasons are twofold. Firstly, that the Security Council did not introduce any mechanisms for the protection of the party's concerned rights at UN level, especially the heavily criticised lack of any legal remedy has to be mentioned, and secondly that the CFI denied the application of the fundamental rights standards as guaranteed by Community law.

The ECJ repealed the CFI's judgments concerning the freezing measure of Regulation 881/2002, a fact which leads to the answer on the sub-question of why and in what way the ECJ repealed the CFI's judgments. The ECJ defined the relation between the international legal order and the European legal order differently than the CFI. In literature it is said that the ECJ took the European perspective of law which is characterised by the de facto isolation of the European legal order from the international legal order so that the principle of primacy of resolutions adopted under Chapter VII of the Charter has no impact on the arrangement of European law. This allows the application of European law and its standards of fundamental rights protection in the context of the freezing measure pursuant to Regulation 881/2002. As a consequence, exactly the same conditions for the formal lawfulness apply for both freezing measures now. This has to be highly appreciated as the different conditions and consequently degree of fundamental rights protection between the two freezing measures made no sense from a practical point of view. It will be interesting to see how the European judicature will review the substantial lawfulness of the freezing measure pursuant to Regulation 881/2002. In the context of Regulation 2580/2001 the judicature was able to deduce the conditions for the substantive lawfulness from Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation 2580/2001. But these conditions cannot be applied in the context of Regulation 881/2002 as the Sanctions Committee relies on different provisions enshrined at UN level, which define the conditions for a freeze of funds. It can be assumed that the Commission will basically have to show, based on the information and material provided by the Sanctions Committee, that a sufficient link to the Taliban, Osama bin Laden or the Al-Qaeda network exists to justify the freeze of funds. To give a definitive answer on this matter, it is necessary to await the first ruling of the Community judicature on the substantive lawfulness of the freezing measure pursuant to Regulation 881/2002. The preconditions that the judicature can review the substantial lawfulness are supposed to be given because the Commission changed the procedure resulting in the freeze of funds by notifying the reasons for the freeze to the party concerned and allowing him to make known his views in this respect, which should be sufficient to repair the procedural damages found by the ECJ. This constellation bears the problem that the regional courts of the EU de facto review the decisions of the Security Council. It is very doubtful whether the European courts have or should have the competence to do so. But this is still better than to disregard the concerned party's fundamental rights, which would be the alternative. This problem could have been avoided if the Security Council had furnished the freezing measure with sufficient legal remedies and a court for judicial review at international level.

Respect for the right to property is also a condition for the substantive lawfulness of the freezing measures. The ECJ ruled that the restrictions to the right to property imposed by the temporary precautionary measure of freezing funds is in general legitimated and justified by the international community's fundamental interest in combating international terrorism to maintain peace and security. However, the individual concerned must be furnished with legal safeguards and remedies. It will be exciting to see for how long the argument that the freeze of funds is only a temporary precautionary measure not affecting the very substance of the right to property can be maintained. It is likely that the competent authorities will try to keep the persons, groups and entities suspected of fostering terrorism on the list as long as possible,

because in the past both the Sanctions Committee and the Council have pursued a very conservative de-listing policy.

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