EU competence to adopt restrictive measures against individuals and the relationship between article 75 TFEU and article 215 TFEU

Masterproef van de opleiding
‘Master in de rechten’

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The writing of this dissertation was very exciting to me since it was the first time ever that I had to undertake such profound research on a subject matter. It has given me the opportunity to gain valuable insights into something that captured my attention from the moment I read about it.

I have chosen to write my paper in English given the fact that I will study in England next year. I must say that this has been a challenge, but at the same time it was a personal enrichment to write in another language than my native language.

I would like to thank my master thesis promoter, prof. Peter Van Elsuwege, for his inspiring lectures, which have certainly increased my interest for European law and played an important part in my decision to write about this specific topic. Throughout the entire process, I have always been able to communicate with him on structural and substantive difficulties for which I am very grateful.

I would also like to express my gratitude to my mother, my father, Christel and my brother for their support throughout my studies and their continuous believe in my capabilities.
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1. Introduction

1. This paper aims at offering a critical, in depth and up to date analysis of the competence of the EU in the adoption of economic and financial sanctions against individuals. The ultimate question is whether the Treaty of Lisbon was able to meet with the legal basis problems that characterized the pre-Lisbon period.

This question cannot be answered without an all-embracing description of the journey that the EU has made to eventually end up with the situation as it appears today.

It seems appropriate to start by examining the nature of the EU sanctions in general and their gradual evolution from state sanctions to individual sanctions. An analysis of the link between the UN and the individual sanctions imposed by the EU is also of vital importance to form a frame from which we can depart to the actual discussion on competence.

In order to have a good overview on the evolution of the EU competence in the adoption of restrictive measures against individuals, the paper is divided into two major parts. The first one is the pre-Lisbon part in which I will focus on three problems surrounding individual sanctions. The first individual sanctions were targeted against people and entities related to a third state. Since there was no explicit legal basis for their adoption, the EU had to use the legal basis for state sanctions.

2. It was only later that sanctions against individuals not related to a third state made their arrival. The continuing lack of explicit competence forced the EU to come up with an even more pragmatic approach. It is this last stage in the evolution of individual sanctions that will be split up into the two main EU sanctioning regimes that target individuals, namely the UN based sanctions regime and the autonomous European sanctions regime. The first problem concerning the lack of explicit legal basis will be illustrated in the UN based sanctions regime by the Kadi-cases which expose the most important arguments both in favour and against the pragmatically chosen legal basis.

Aside from these core competence issues, there were also two related problems marking the pre-Lisbon era. The first one is related to the constitutional structure of the EU. The pillar structure prevented the adoption of sanctions including direct consequences against internal terrorists.

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1 'Individual sanction', 'targeted sanction' and 'smart sanction' are all used interchangeably throughout this paper and the word 'individual' means both natural and legal persons.
The second problem concerns the difference in, or even lack of, judicial review between the different pre-Lisbon instruments used for the adoption of individual sanctions. They will be briefly discussed in the part on the UN based sanctions regime and more thoroughly in the part on the autonomous European sanctions regime.

3. In the second major part, I will look into the competence of the EU to adopt individual sanctions in the post-Lisbon era. I will put forward the view that the introduction of two new legal bases, providing for explicit competence in this matter, solve one of the major problems present before the entry into force of the Treaty of Lisbon, but at the same time introduce some important new difficulties. It became an almost impossible task to delimitate between the two new articles, yet the European Court of Justice (hereinafter ‘ECJ’) had to bring in a verdict in a case between the European Parliament and the Council. Nevertheless, it seems that there are other solutions possible which will be examined in detail, followed by a discussion on possible remaining ‘grey areas’.

This paper will end with a conclusion on whether the new provisions in the Treaty of Lisbon had the effect of providing a clearer legal basis, irrespective of the introduction of two explicit legal bases.

4. It seems to me that there are two major reasons why someone would be interested to read this dissertation. First of all, the imposition of individual sanctions is very topical. At the exact moment of writing this paper, the EU is adopting sanctions against high-level Russian and Crimean officials. These people are assumed to have been involved in the military occupation of Crimea and responsible for the fatal escalation of violence in Ukraine. The sanctions include travel bans, asset freezes and a ban on the export of equipment likely to be used for repression in Ukraine.2

Secondly, the choice for a certain legal basis determines the scope of EU competence, it decides on the decision-making process and indicates which institutions are involved. The result is a profound insight in how certain policies work.3

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2. Evolution of the sanctions regimes

2.1. Types of sanctions

5. The EU applies restrictive measures or sanctions⁴ within the framework of its Common Foreign and Security Policy (hereinafter: ‘CFSP’) in pursuit of the specific CFSP objectives set out in the Treaty on the European Union (hereinafter: ‘TEU’). CFSP belongs to the external action of the EU and its objectives include the preservation of peace, the consolidation of democracy, the rule of law, human rights and international law.⁵

It seems appropriate, as a preliminary remark, to refer to the cooperation between the EU and the UN regarding the adoption of sanctions. The EU implements all sanctions imposed by the UN. In addition, it may reinforce UN sanctions by applying stricter and additional measures. Finally, where the EU deems it necessary, it may decide to impose autonomous sanctions.⁶

EU sanctions do not have a punitive nature and they are always part of a more comprehensive policy towards the target, involving political dialogue and complementary efforts. They can be targeted against third states or individuals.⁷

6. State sanctions (of an economic nature) can be defined as instruments that a state or a group of states uses to exercise pressure in order to produce a change in the political behavior of another state or group of states.⁸ This in contrast with commercial sanctions which attempt to change a third state’s illegitimate commercial behavior.⁹

Individual sanctions on the other hand, do not target entire states but rather specific persons, groups and entities. Either they occur in state sanctions as they are deemed to be responsible for the policy or the behavior of that third state, or they may stand alone when targeting individuals not related to a third state but involved in activities that the EU or the UN may regard as endangering their security such as terrorist activities.

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⁴ These terms are used interchangeably throughout the entire paper
⁵ Article 21(b) and (c) TEU
7. There are currently 35 sanctions regimes in force. A majority of thirty-three regimes target third countries and individuals and entities associated with that third country. Yet, there are also two regimes imposing sanctions on individuals and entities suspected of having links with terrorist activities.

Sanctions may comprise diplomatic sanctions, suspension of cooperation with a third country, boycotts of sport or cultural events, trade sanctions, financial sanctions such as prohibitions on financial transactions and restrictions on investment. However, the most frequently used measures, adopted by both the United Nations Security Council (hereinafter: ‘UNSC’) and the EU, are arms embargoes, restrictions on admission and economic and financial sanctions such as asset freezes.

Arms embargoes are generally applied to prevent that arms and related material would be carried into conflict areas or be used for repression or aggression against another country. They do not only target states, but they may also be targeted against individuals or entities. The objective of an arms embargo against individuals, as approved by the Al-Qaida sanctions committee, which will be discussed below, is to “Prevent the direct or indirect supply, sale or transfer, to these [the listed] individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities”.

Restrictions on admission include visa or travel bans. This means that member states of the EU or the UN have to do everything in their power to prevent a person or entity to enter into or transit through their territory. The purpose of a travel ban is different, depending on the target. When travel bans are imposed on individuals linked to a country, they are for the most part a way of preventing them from continuing their luxury lifestyles. They may no longer be able to travel to the US, Europe or Asia for holidays, schooling or shopping. When travel bans target individuals and entities not linked to a country, such as terrorists, then they have a different objective then the prohibition of luxury.

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10 Text of the European Commission - restrictive measures in force (article 215 TFEU), retrieved from http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf: The list includes only 34 sanction regimes (the sanctions against Russia are not yet included in the list as it was only updated until 29 January)
8. Economic and financial sanctions are the subject of this dissertation. They can consist of export and/or import bans, bans on performing certain services, prohibition on investments, payments and capital movements, freezing of funds, prohibition on making funds and economic resources available, etc. These kind of sanctions also have to be applied by all persons and entities doing business in the EU, even non-EU nationals and entities, and also by EU nationals and entities falling under the law of an EU member state but doing business outside the EU.  

2.2. From state sanctions to ‘smart sanctions’

9. Already since 1963 the UNSC has been adopting resolutions containing sanctions against states. The first mandatory sanctions regimes were targeted against Southern Rhodesia, as a reaction against the white minority’s declaration of independence from the UK, and against South Africa for its apartheid regime.  

Since then, the UNSC has imposed sanctions on a large number of other countries including Afghanistan, Angola, Eritrea, Ethiopia, Haiti, Iraq, Liberia, Libya, Rwanda, Sierra Leone, Somalia, Sudan, the former Yugoslavia, Guinea-Bissau and Central African Republic.  

Such sanctions clearly became a popular way to maintain international peace and security. However, they have undergone tremendous changes over the past decades.

10. In the 1990’s the UNSC had imposed sanctions against Iraq as a reaction to its invasion of Kuwait and its program for the development of weapons of mass destruction. The comprehensive trade embargo had the harrowing consequences that the price for a family’s food supply for one month increased 250-fold in the first 5 years and the deaths of 100,000 up to 227,000 young children.

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17 http://www.un.org/sc/committees/  
19 S/RES/0661 (1990), of 6 August 1990  
The sanctions against Iraq made two things crystal clear. On the one hand, state sanctions could no longer be justified because of their humanitarian consequences. The most affected was the innocent population of the targeted state instead of the people that the sanctions actually intended to hit. On the other hand, it was obvious to everyone that these sanctions were actually ineffective. In the case of Iraq, the sanctions did not have the intended effect and Saddam Hussein did everything in his power to make weapon inspections impossible.

Therefore, the UNSC decided to focus more on sanctions that would directly affect individuals and entities responsible for the policies that the sanctions intended to change. Individual sanctions, were thus merely a way to address the shortcomings of state sanctions. They aimed at maximizing the target’s compliance with the sanctions, while minimizing the population’s suffering and were therefore called ‘targeted’ or ‘smart’ sanctions. The Court of First Instance (hereinafter: ‘CFI’), now the General Court, has defined them as targeted and selective sanctions that ‘reduce the suffering endured by the civilian population of the country concerned, while none the less imposing genuine sanctions on the targeted regime and those in charge of it.’

11. Besides the negative consequences for the internal economy of the targeted country, state sanctions also had the negative effect of disturbing the international economy since companies were no longer able to trade with the targeted country.

Consequently, state sanctions including comprehensive trade embargoes were replaced by more sophisticated sanctions including sectorial trade and arms embargoes, asset freezes, travel bans, restrictions of admissions, diplomatic sanctions etc. against government officials, their families and supporters.

This shift in the adoption of sanctions was also in line with a global development of putting more emphasis on accountability in international affairs. There was a growing consensus that decision makers had to be held personally responsible for the impact that their policies had.28

One of the first targeted sanctions was imposed against the UNITA (The National Union for the Total independence of Angola) in 1993 for resuming the war in Angola after an agreement was reached between the three rebel movements that did not agree with the governing regime in that country.29 However, the idea of targeted sanctions was not new. Already during World War I, the British government had adopted a list including entities which individuals and companies could no longer trade with.

Even so, it was only in the 1990’s that they became a popular way to move a state into a certain direction without affecting innocent civilians.30

2.3. Individual sanctions as a counter-terrorism tool

12. Originally, sanctions against individuals were merely a way to address the above mentioned shortcoming of state sanctions. Therefore, the first individual sanctions targeted the political elites of countries where they would previously have been adopted in the form of state sanctions. The idea was to move the pressure from the entire state to the people directly responsible for that state’s policy that the sanctions intent to change.31

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By focusing on individual government leaders and organized groups and networks, the UN, and later also the EU, tried to achieve an impact on the development of peace and security by deterring, undermining and changing unwanted political behavior.32

However, their traditional objective changed as they evolved from being merely a way to obtain a certain behavior of a state into an instrument capable of remedying today’s international challenges, such as the global fight against terrorism.

13. The nature of individual sanctions changed alongside with what is considered to be a threat to the peace within the meaning of article 39 UN Charter33 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”). Besides the political situation in a country, these threats or breaches of peace and acts of aggression can include, for example, terrorism.

To this end, the representative of Canada in the UNSC in 2000 explained that smart sanctions may be used “not only against abusive national decision-makers, but also against terrorists, rebel movements, modern-day warlords and other non-state decision actors that perpetuate or profit from human suffering.”34

The evolution towards targeting terrorism through the use of targeted sanctions was further intensified by the war on terror that started after the events of 9/11.35 Terrorism is generally seen as a phenomenon that is not linked to a particular territory. This means that the targeting of terrorists was only possible through the adoption of sanctions against non-state actors.36

33 C. ECKES, “EU Counter-Terrorist policies and Fundamental Rights. The Case of Individual Sanctions” (Oxford, Oxford University Press, 2009), p. 16
The EU has defined terrorist offences as ‘certain acts which given their nature or context may seriously damage a country or an international organisation and with the aim of seriously intimidating a population or unduly compelling a government or international organisation to perform or abstain from performing an act or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation.’

14. The importance of targeted sanctions in the war on terror is illustrated by resolutions 1267 and following. They imposed sanctions against individuals and entities associated with Al-Qaida, Osama Bin Laden and the Taliban and established the most comprehensive system of targeted sanctions set up by UNSC so far. Therefore, they will be discussed in more detail below.

2.4. Choosing individual sanctions over state sanctions?

15. Aside from the negative humanitarian consequences of state sanctions, there is another reason why there is a much greater support for individual sanctions. Usually, it is easier to reach a consensus to target a political leader or an alleged terrorist than to target an entire country. Mostly because of the difficult economic considerations that the sanctioning states have to take into account. If the sanctioning state has direct or indirect trade relations with the sanctioned state, it cannot be excluded that a general trade sanction not only further harms the economy of the sanctioned state itself, but also the economy of the sanctioning state.

Therefore, it seems logical that the decision on whether or not to impose a sanction on another state depends largely on an assessment of the sanction’s impact on its own economy. This may also be the case for sanctions against political leaders in a situation where the sanctions do not have their intended effect and the leader manages to retaliate on the sanctioning state by cutting of economic trade relations.

However, sanctions against terrorists have a rather insignificant economic impact on the sanctioning state and will not require such considerations.

16. State sanctions and individual sanctions also have a different impact on their target. In certain cases, sanctioned states appear to be less dependent on the sanctioning states than individuals.

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Even when they are hit by an economic blockage/embargo from the sanctioning states, they can still manage to fill their economic needs by trading with states that either do not implement or insufficiently enforce the blockage/embargo.  

Although it was the critique on state sanctions that urged the UNSC to start adopting individual sanctions, the latter have raised considerably more concerns than the former.

First of all, targeted sanctions are frequently the subject of questions relating to human rights violations. Especially when it comes to the sanctioning of potential terrorists. One of the major criticisms is that, under the pretext of the war on terror, they insufficiently protect human rights at the UN level, the level of the EU and at the level of the member states. Although these potential violations are not the subject of this dissertation, they seem too important to ignore as they are extremely topical and ubiquitous in the legal doctrine on targeted sanctions.

Besides the concerns about human rights, there have been a number of individuals who have contested the validity of the legal acts adopting targeted sanctions. These will be discussed in the course of this dissertation.

17. Another major problem harassing targeted sanctions are unintended side effects. For example, targeted arms embargoes can lead to a change in local security dynamics in a way that is not controlled by the sender. Targeted financial sanctions and targeted commodity sanctions on the other hand, may lead to job loss, economic difficulties etc.

One of the main reasons for these side effects is the fact that targeted sanctions may work in theory, but when they are put into practice it seems very hard to realize success.

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It seems that the senders of targeted sanctions especially neglect or underestimate the implementation problems that arise when confronted with a complex social reality.

In a first phase targeted sanctions have to deal with problems relating to their adoption such as political will, negotiation, content of the sanctions etc. In a second phase, they will have to deal with implementation difficulties. It is possible that the target does not comply with the sanctions because it may have found a way to easily avoid the sanctions, or because it encounters that the sender does not enforce them, or even for the trivial reason that it has not been informed about its inclusion on the sanctions list.\textsuperscript{45}

3. UN sanctions against individuals

18. When discussing the competence of the EU in the adoption of individual sanctions it is inevitable to also touch upon the competence of the UN in this matter. It is impossible to fully exclude the UN because of its inextricable link with the EU’s sanctioning mechanism, as explained more in detail below.

The UN uses economic sanctions to accomplish the overall goal of maintaining international peace and security. This is the UNSC’s primary responsibility.\textsuperscript{46}

According to the aforementioned article 39 of the UN Charter, the UNSC has the competence to decide what events amount to ‘a threat to peace, breach of peace or act of aggression’ and according to article 41 the security council ‘may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’\textsuperscript{47}


\textsuperscript{47} Art. 39 and 41 UN Charter.
While there has been controversy about whether or not this mandate covers the adoption of individual sanctions, article 41 is considered to be flexible when it comes to the application of measures that address evolving threats to international peace and security. 48

19. Given the subject of this paper, two UN sanctions regimes are of great importance and will be discussed hereunder.

The first regime is defined under resolutions 1267, 1333 and 1390. Under this regime it is the UN itself who identifies terrorist suspects and obliges its member states to sanction them. These resolutions must be regarded as the UN’s most comprehensive system of targeted sanctions so far. 49

The second regime is found under resolution 1373 and is part of the UN’s general call to fight terrorism. This regime allows its member states to draw up their own terrorist lists and thus identify their own suspects. Its importance arises from its contribution to the shift in the EU’s legal basis for the adoption of individual sanctions. 50

3.1. UN lists of terrorist suspects – resolutions 1267, 1333 and 1390

20. In 1999 the Security Council adopted resolution 1267 as a reaction to the disobedience of the Taliban to stop sheltering and training terrorists as imposed by previous resolutions and was a direct consequence of the bombing of two US embassies in Nairobi and Dar es Salaam. 51 The Security Council repeated its previous demands but now insisted that indicted terrorists would be brought to justice and in particular asked that ‘the Taliban turn over Osama Bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.’ 52

49 M. LUKIC, “The security Council’s targeted sanctions in the light of recent developments occurring in the EU context”, 3 Belgrade Law Review (2009), p. 242, retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2020073; other UNSC resolutions including targeted sanctions were imposed on f. ex. North-Korea and Iran for continuing to develop their nuclear programs and nuclear testing, on Libya for serious human rights abuses, attacks and violations of international law on its population, etc. for more information see http://www.un.org/sc/committees/
50 Note reference mark 54
52 S/RES/1267 (1999), of 15 October 1999, para. 2
The resolution included sanctions such as an arms embargo of the Afghan air traffic and the freezing of funds and other financial and economic resources belonging to the Taliban or where they could benefit from.\textsuperscript{53}

21. Resolution 1267 is also very important for another reason: the establishment of a new sanctions committee, called the ‘1267 committee’ or the ‘Taliban sanctions committee’. This subcommittee of the Security Council decides on who to include on the sanctions list ‘based on information provided by states and regional organisations’ and keeps the list up to date.\textsuperscript{54} It also obliges the member states to execute these sanctions by freezing all financial assets and other economic and financial resources of those listed.\textsuperscript{55}

The Taliban was clearly not impressed by the UN sanctions and did not lend an ear to them. As a reaction, the Security Council adopted resolution 1333 which strengthened the existing sanctions regime and targeted an additional group of persons: individuals associated with Al-Qaeda. On this matter the UNSC decided that all states had to take measures ‘to freeze without delay funds and other financial assets of Osama Bin Laden and individuals and entities associated with him as designated by the committee, including those in the Al-Qaeda organisation.\textsuperscript{56}

Resolution 1333 was in fact an expansion of resolution 1267 including a few new elements.\textsuperscript{57}

22. Following the events of 11 September 2001, the UNSC concluded in a very general way that acts of international terrorism constitute a threat to international peace and security and adopted a new resolution that strengthened the resolution 1267 and 1333 sanctions system.\textsuperscript{58}

Resolution 1390 is the so called anti-Taliban resolution.\textsuperscript{59} It renewed the sanctions against the Taliban and Al-Qaeda and expanded the existing sanctions regime by an arms embargo and travel restrictions.

\textsuperscript{53} S/RES/1267, para. 4
\textsuperscript{54} S/RES/1333 (2000), of 19 December 2000, 8(c) and S/RES/1390 (2002), of 16 January 2002, 2 and 5(a)
\textsuperscript{56} S/RES/1333 (2000) 8 (c)
\textsuperscript{57} SC Res. 1333, 19 December 2000, para. 8c.
From this point on no UN member could grant these persons entry or transit through its territory. Every supply, sale or transfer of arms and related material was forbidden and every financial asset had to be frozen.60

This resolution was the continuation of the adoption of individual sanctions by the UN, that had already started with resolutions 1267 and 1333. However, it distances itself from these previous resolutions in two ways.

First of all, while resolutions 1267 and 1333 targeted individuals linked with a state (Afghanistan), resolution 1390 distances itself from that link as it was adopted after the collapse of the Taliban, following the armed intervention of the international coalition in Afghanistan in 2001.61 Therefore, the persons and entities listed no longer had a direct connection with the territory or the governing regime of Afghanistan.62 It is clear to see that what started in 1999 as the adoption of sanctions against the government of Afghanistan, gradually melted into the broader framework of the fight against terrorism.63

Second, unlike resolutions 1267 and 1333, resolution 1390 did not include a provision saying that when the Taliban complied with the UNSC’s demands the sanctions would be lifted. This clearly shows that there has been a shift from a sanction regime aimed at achieving a particular goal (to turn over Osama Bin Laden so that he could be brought to justice) to a sanction regime that has the much broader purpose of incapacitating him and his associates though an arms embargo and the freezing of all their assets.64

23. Since then, a series of other resolutions65 have amended this sanctions system to clarify and intensify the imposed restrictions, but also to provide allowance for certain exemptions.


Resolution 1452 of 20 December 2002, for example, includes exemptions from asset freezes for basic living costs, while resolution 1617 of 29 July 2005 is an important one because it alters the listing and delisting procedures and determines how to interpret the term ‘associated with’ (Al-Qaida and the Taliban). 66

3.2. The UN’s general call to fight terrorism – resolution 1373

24. In the immediate aftermath of the so-called 9/11 attacks, the Security Council decided to introduce a sanction regime that would allow its individual member states a larger autonomy.

By adopting Resolution 1373, the UN called out to its member states to fight terrorism through the identification of organisations and individuals suspected of terrorism themselves. In other words, they received the competence to draw up their own lists of presumable terrorists instead of merely copying UN lists. 67

What is interesting is that this ‘autonomous’ sanctioning regime has not been altered since its adoption. Resolution 1373 may thus be regarded as an exception that was adopted as a direct consequence of the gravity of the so-called 9/11 terrorist threat. 68

25. It lays out wide-ranging strategies to combat terrorism and in particular the fight against the financing of terrorism. 69 It contains, among other things, the obligation for the member states to freeze funds and other financial assets or economic resources, to refrain from any form of active or passive support to entities or people involved in terrorist acts. Besides that, it calls upon its member states to cooperate, exchange information and become parties to the relevant international conventions and protocols relating to terrorism. 70

69 Common position of 27 December 2001 on the application of specific measures to combat terrorism 2001/931/CFSP
This sanctions regime also has a committee, but unlike the 1267-committee, it only supervises states’ compliance with resolution 1373 and does not draw up or impose terrorist lists. This committee is called the ‘counter-terrorism committee’ and was set up by the UNSC.  

3.3. **Link with European sanctions against individuals**

26. Individual sanctions at UN level are adopted under Chapter VII of the UN Charter for the purpose of restoring international peace and security wherever there is a threat to peace.  

Art. 48, §2 of that Charter states that ‘all decisions made under chapter VII shall be carried out by the members of the UN directly and through their action in the appropriate international agencies of which they are members’.

The EU itself is not a member of the UN and as a consequence thereof, it is not bound by the obligation of this provision, nor by the obligations of the UNSC resolutions. However, its member states, that are also members of the UN, chose to implement their UN obligations through the use of the EU. In particular within the framework of its common foreign and security policy in pursuit of the specific CFSP objectives as mentioned above.

27. Consequently, the EU fulfils the duties of its member states in their capacity as members of the UN, and implements all sanctions imposed by the UN. Therefore, it seems logical that the same evolution from state sanctions to individual sanctions is noticeable in the sanctioning regime of the EU. The increased adoption of individual sanctions by the UN as a corollary of the 2001 attacks in New York also inevitably affected the EU’s sanctioning policy because of that same link with the UN regime. At that point, the Council saw that it was time to make some changes and therefore decided to evaluate its existing sanction practice and policy.

Based on those results, it decided to adopt three documents: The ‘basic principles on the use of restrictive measures (sanctions)’ in 2004, the ‘Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy’ in 2003 and ‘The EU Best Practices for the Effective Implementation of Restrictive Measures’ in 2008.

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In the first document the Council set out its view of sanctions and how and when it would use them and called for the adoption of targeted sanctions. The second and third documents provided technical guidelines on how to draft, implement and monitor these restrictive measures.  

28. When it comes to individual counter-terrorism sanctions, the EU obligation concerns UNSC resolution 1267, 1333 and 1390 on the one hand and resolution 1373 on the other hand. The approach that the EU used for this implementation will be discussed below under the competence of the EU in the adoption of individual sanctions.

Having briefly touched upon the practice of implementation of UNSC resolutions by the EU it is easy to make the link with the two types of EU sanctions against individuals, since they are the reflection of the two UN sanctions against individuals.

4. Evolution of the EU competence in the adoption of individual sanctions

4.1. Pre Lisbon

29. Even though there is a lot of literature on the adoption of individual sanctions, only a fraction of that amount has been written about the legal basis of this issue. Nevertheless, it has important implications. The choice of the appropriate legal basis determines the scope of EU competence, decides the decision-making process for the adoption of EU legislation and indicates whether sanctions against terrorists should be considered as a matter belonging to the internal or external action of the EU.

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4.1.1. Sanctions against third states

30. The first sanctions that the EU imposed were targeted against third states. Initially, there were two possibilities. The EU could either adopt sanctions against third states based on a UNSC resolution or alternatively in the exercise of autonomous EU powers.

The autonomous EU sanctions regime was originally established as a consequence of the difficulties that its member states experienced when implementing UNSC resolutions. It was common practice that the EU member states, that were also member of the UN, would implement these resolutions individually by using national implementing measures rather than through the EU. However, after a while it became clear that this method lacked the desired effect as national implementing measures were often different in content and implemented at different times. For this reason the EU member states decided to implement their UN obligations through the EU.\(^77\)

31. Before the introduction of the Maastricht Treaty, the EU used a two-phased procedure to implement these economic sanctions against third states either adopted autonomously, or as an implementation of a UNSC resolution.

First, a European Political Cooperation decision was established to provide political direction and to facilitate coordinated action with regard to economic sanctions.

Second, depending on the nature of the measure, this decision had to be implemented by the member states themselves or by the Community through the common commercial policy set out in former article 133 EC.\(^78\)

32. Examples of the first sanctions regimes implemented through a community measure are the economic sanctions targeted against the USSR following the invasion of Afghanistan in 1980, against the USSR following the imposition of martial law in Poland in 1981 and against Argentina following the invasion of the Falkland Islands in 1982.\(^79\)


It was only since the introduction of the Maastricht Treaty that specific legal bases were introduced on which the EU could adopt restrictive sanctions against third states. Originally, they were introduced as articles 228a and 73g in the Treaty establishing the European Community (hereinafter ‘TEC’). Later on they were replaced by articles 60 and 301.

The new article 301 TEC stated the following:

“Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.”

It is clear that the two-phased procedure had survived the Maastricht Treaty. Article 301 TEC required the adoption of a common position or a joint action within CFSP in a first phase and the implementation of that CFSP instrument by a regulation in a second phase. This will be explained in more detail below.

A literal reading of this article would bring us to the conclusion that this provision essentially had a limited scope. First of all, not all sanctions could be adopted on the basis of this article. It only applied to sanctions that “interrupt or reduce economic relations”. Sanctions that did not contain this objective had to be implemented by entities other than the Community, for example, individual member states. Second, it seems that the use of this article was only appropriate for the implementation of sanctions against “countries”. Based on this view, sanctions that targeted subjects other than countries, such as individuals, should have been excluded. Finally, only “third countries” fell under the scope of this article. This meant that sanctions against EU member states could never be implemented through this legal basis.


82 Note reference mark 36-41 ; C. Eckes, “EU counter-terrorist sanctions against individuals: problems and perils”, 17(1) European foreign affairs review (2012), p. 118

However, in practice, the scope of this article is not as restrictive as it seems. This will be discussed under the heading ‘sanctions against individuals linked with a third state’.  

35. In addition to article 301 TEC, the Maastricht Treaty also introduced a specific legal basis for sanctions relating to financial transactions: article 60 (1) TEC. This specific provision included a cross-reference to article 301 TEC and was merely to be seen as a lex specialis of the latter article. It stated the following:

“If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.”

In any way, when it came to the adoption of sanctions against ‘states’ in its traditional and restrictive interpretation, either art. 301 or art. 60 TEC provided for the right legal basis, regardless of whether they were implementing a UNSC resolution or were adopted though autonomous EU powers. This new procedure was first used for the adoption of economic sanctions against Libya in 1993.

Having established the two main articles that set out the two-tier procedure, we can look into this procedure more thoroughly.

4.1.1.1. First phase: Council common position

36. In a first phase, all economic and financial sanctions against third states needed the adoption of a common position or a joint action (now council ‘decision’) unanimously adopted under the CFSP and on the basis of article 15 of the Treaty on the European Union (hereinafter ‘TEU’ and article 15 is now replaced by article 29 TEU). Although article 301 TEC also provided for the adoption of a joint action, in practice only the common positions were used.

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84 Note reference mark 44
87 Article 301 TEC also mentioned the possibility to adopt a ‘joint action’ but in practice it was never used
88 Article 29 of the Treaty on the European Union has the same content as article 15 TEU
As this dissertation is for the most part divided into a ‘pre-Lisbon’ section and a ‘post-Lisbon’ section, the term ‘common position’ as indicated by article 15 TEU will be used in the former section while the term ‘decision’ as indicated by article 29 TEU will be used in the latter.

Article 15 TEU stated ‘The Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.’

Although there are no substantial differences with the new article 29 TEU, besides the replacement of the word ‘common position’ by the word ‘decision’, they are embedded in a different institutional structure since the Lisbon Treaty abolished the former pillar structure.

37. The reason for the adoption of a CFSP instrument was set out above. Sanctions against third states relate to the objectives of peace and security covered by the CFSP. Common positions were adopted on the basis of the EU Treaty and required unanimity within the Council before they could be adopted.  

Regarding the subject of this paper, only the common positions under article 15 TEU in the second pillar (CFSP) are of importance. However, to be complete, it must be mentioned that it was also possible to adopt common positions under article 34 (2a) TEU in the so-called third pillar. In that case they defined the approach of the Union in a specific Justice and Home affairs matter (hereinafter ‘JHA’). Although it is uncertain whether one common position can deal with both CFSP and JHA matters, we will see that the Council has adopted such cross-pillar common positions anyway. This will be discussed when examining the EU’s autonomous sanctions regime.

38. There is uncertainty about the effects of these specific common positions imposing sanctions. Some authors, like Eeckhout, claim that they have a legislative character as they entail a strong necessity for the member states to synchronize their national policies.

89 The Maastricht Treaty created a European Union based on three pillars: 1. The European Communities, 2. The Common Foreign and Security Policy and 3. Cooperation in the field of Justice and Home Affairs
93 Professor of EU law at University College in London
Others however, still believe that they are merely political acts that delineate the right paths for the member states. In any way, they are not supposed to have direct effect in the member states. This is clearly reflected in the TEU as common positions did not fall under the jurisdiction of the ECJ as we will discuss in more detail below.

However, according to the duty of sincere cooperation in article 4(3) TEU, member states have to comply with these common position as they ‘shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’.

Before the actual adoption of the common position by the Council, it had to be examined and discussed by the relevant Council groups such as the Council group responsible for relations with the third country concerned, the foreign relations counsellors working group (RELEX) and the committee of permanent representatives (COREPER).

4.1.1.2. Second phase: Council Regulation

The second step depended on the nature of the measure. When the common position introduced economic and financial sanctions such as asset freezes, import and export restrictions and bans on investment and credit, the commission was required to make a proposal for a council regulation adopted by a qualified majority and on the legal basis of articles 301 and 60 TEC in order to implement this common position.

Regulations are normative acts that were, before the entry into force of the Treaty of Lisbon, adopted by the Council on the basis of the TEC. They are directly applicable in the domestic orders of the member states and do not need national implementation measures, although they are not prevented from doing so.

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Unless they would alter, obstruct or obscure the direct effect or the nature of the regulation.99

The member states (and the Commission) are however responsible for their application and enforcement.100 They have the task to implement these regulations in a proper and timely manner by imposing criminal charges when persons or entities infringe these community measures.101

The adoption of a regulation in the second phase made sure that a political CFSP objective could become binding community legislation and that the sanctions could actually be imposed on the third country.102

However, when the common position introduced an arms embargo or restrictions on admission such as visa or travel bans, it was up to the member states to implement these common positions through their national legislation. In the case of an arms embargo, the member states had to enforce the common position through their export control legislation and in the case of admission restrictions through their legislation on admission.103

40. An interesting example to illustrate this practice is a common position adopted in 2006 that set out a multiplicity of restrictive measures to be adopted against Myanmar. Some measures in that common position were implemented by a regulation, adopted on the basis of articles 301 and 60 TEC such as import restrictions, an export ban, a ban on financing and technical assistance, the asset freeze and the ban on investment and credit. All the other measures such as the arms embargo, the travel bans and measures against the Myanmar diplomatic representations were implemented by the member states themselves.104

41. Having established the two-phased procedure for the adoption of economic sanctions against third states set out in articles 60 and 301 TEC, we can identify an inter-pillar construction in the case in which a CFSP common position had to be implemented via community legislation.\textsuperscript{105} Indeed, according to article 301 TEC, all restrictive measures first needed the adoption of a common position under CFSP in the second pillar and depending on the measure, they required the adoption of a Council regulation in the first pillar. In practice this means that the common position adopted in the TEU could establish a range of measures in the TEC, including those that in principle fell outside the TEC’s scope.\textsuperscript{106} The second article to provide such a ‘bridge’ between pillars is article 60 TEC as it refers back to the procedure in article 301 TEC.\textsuperscript{107}

Interestingly, economic and financial sanctions are the only area where express provision is made for such a transition between the first and the second pillar.\textsuperscript{108}

42. Having tackled the question on the EU’s competence to adopt sanctions against third states, the question is how the EU managed to implement sanctions that have other targets?

\textbf{4.1.2. Sanctions against individuals linked with a third state}

43. As mentioned before, the UN and the EU started adopting sanctions against individuals because they were a better way to tackle those who were directly responsible for certain misbehavior and at the same time lessened the effect that overall state sanctions have had on entire populations. The initial demonstration of this new practice was given by the UN when it became clear that its comprehensive trade sanctions against Iraq had severe humanitarian consequences for the entire population.\textsuperscript{109}

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\textsuperscript{107} I. GOVAERE, “The external relations of the EU. Legal aspects”, in: D. MAHNKE, A. AMBOS and C. REYNOLDS (Eds.), \textit{European foreign policy. From rhetoric to reality}, (Brussels: Peter Lang, 2004), p. 110
\textsuperscript{109} Note reference number 10
\end{flushright}
Confronted with these new targeted sanctions, the EU had to find a legal basis to implement these ‘smart’ or ‘targeted’ sanctions. However, this was a problem since the primary legal framework of the EU did not provide for an explicit legal basis to adopt these kind of sanctions.\textsuperscript{110}

44. A solution for this specific problem was found rather quickly by the Commission and the Council. They agreed on a broader interpretation of the concept of ‘third state’ and argued that the combination of art. 301 and 60 TEC could also be used specifically for smart sanctions.\textsuperscript{111} Hence, the EU adopted the first sanctions against individuals through the same procedure as that for sanctions against third states by adopting a common position in a first phase and then, depending on the type of sanctions, a regulation in a second phase. Consequently, resolutions 1267 and 1333 were respectively implemented through common position 1999/727/CFSP and 2001/154/CFSP and regulations 337/2000 and 467/2001

However, according to some authors, like Christina Eckes\textsuperscript{112}, it seems rather ‘counter-intuitive’ to suggest that common positions are indeed the right instrument for the adoption of specific measures that target individuals. She argues that we can neither derive this use from the wording of article 15 TEU, which indicates that common positions are used to define an approach rather than adopting such specific measures, nor from its practice since common positions are generally used to adopt measures such as travel bans, conclusion of international conventions, implementation of decisions of international tribunals, prohibition of trade in arms, etc.\textsuperscript{113}

45. The idea was to target individuals that were related to the government of a third state to move that third state’s behavior in another direction, provided that those targeted measures focused on the interruption or reduction of economic relations with that third state.\textsuperscript{114} They included not only states decision makers but also entities which or persons who physically controlled part of the territory of a third country, entities which or persons who effectively controlled the government apparatus of a third country and persons and entities associated with them and financially supporting them.


\footnotetext{112}{Associate Professor in EU law at the University of Amsterdam and senior researcher at the Amsterdam Centre for European Law and Governance}

\footnotetext{113}{C. ECKES, “EU counter-terrorist sanctions against individuals: problems and perils”, 17(1) European foreign affairs review (2012), p. 116}

On top of that, it seemed to be irrelevant whether those individuals resided and/or were citizens in/of that third country or not.\textsuperscript{115}

The EU’s restrictive measures against the Milosevic regime in the Federal Republic of Yugoslavia (FYR) at the end of the 1990’s give good insights in this broad interpretation of ‘third state’.\textsuperscript{116} In 1999, the Council took measures through the known procedure against the FYR consisting of a freeze of funds and a ban on investment, for constantly violating human rights. One year later, these sanctions were repealed because of the change of government and the comeback of democracy. However, the sanctions against Milosevic and his associates were maintained as they continued to constitute a threat to the consolidation of democracy in the FYR.\textsuperscript{117} Even though these sanctions were not targeted against a third state in the strictest sense, they were still adopted on the legal basis for state sanctions as Milosevic and his associates had a sufficient link with the territory of FYR.\textsuperscript{118}

46. Also in the “Minin” case, the CFI uses this broad interpretation to address the legal basis problems that characterized individual sanctions.\textsuperscript{119}

In this case the CFI had to examine EU sanctions freezing the funds of the former Liberian president Charles Taylor and persons and entities associated with him. The sanctions were adopted through the traditional procedure of first adopting a common position\textsuperscript{120}, which was an implementation of a UNSC resolution, followed by a regulation\textsuperscript{121} on the basis of articles 60 and 301 TEC.

Leonid Minin, an alleged arms dealer who was suspected of having Charles Taylor as one of his customers, was not particularly happy with the obligation of the member states to freeze his funds claiming that he was no longer able to look after his son or pursue activities as manager of a timber import-export company.\textsuperscript{122} He contested his inclusion in the sanctions list and brought an action for annulment before the CFI.

\textsuperscript{116} P. VAN ELSEWEGE, “The adoption of ‘targeted sanctions’ and the potential for inter- institutional litigation after Lisbon”, 7(4) \textit{Journal of Contemporary European Research} (2011), p. 491
\textsuperscript{118} T. TRIDIMAS, J.A. GUTIÉRREZ-FONS, “EU law, international law and economic sanctions against terrorism: The judiciary in distress?”, research papers in law, college of Europe, Brugge, nr. 3/2008, p. 5
\textsuperscript{119} Case T-362/04 \textit{Leonid Minin v Commission of the European Communities} (2007) \textit{ECR II}-002003
\textsuperscript{120} Common position 2004/487 of 29 April 2004 concerning further restrictive measures in relation to Liberia [2004] \textit{OJ} L 162/116
\textsuperscript{122} Ibid Case T-362/04, para. 54
One of his arguments was that articles 60 and 301 TEC did not constitute an adequate legal basis for the adoption of sanctions against individuals, because they were intended to address third countries. He claimed that the Community had no competence to adopt these measures since the contested legal basis had to be interpreted in a strict manner.\(^{123}\)

47. The CFI rejected this strict interpretation of articles 60 and 301 TEC since ‘Charles Taylor and his associates continue to be able to undermine peace in Liberia and in neighbouring countries, the restrictive measures adopted against them have a sufficient link with the territory or the rulers of that country to be regarded as seeking to interrupt or to reduce, in part or completely, economic relations with a third country, for the purpose of Articles 60 EC and 301 EC. Therefore, the Community has the power to adopt the measures in question on the basis of those provisions.’\(^{124}\)

This means that the CFI accepted the use of articles 60 and 301 TEC to impose sanctions against Charles Taylor and his associates, even though they were no longer part of the state’s bureaucracy or government since Charles Taylor was no longer the President of Liberia. The only condition was that they might still influence a third state’s behavior, in this case using misappropriated funds and property to interfere in the restoration of peace and stability in Liberia and the region.\(^{125}\)

48. This practice seems to continue after the entry into force of the Treaty of Lisbon. The “Bushra Al-Assad” case and the “Yanukovych” case are good examples to illustrate this. They became the subject of sanctions adopted on the basis the successor of articles 60 and 301 TFEU. This means that we can no longer say speak of a ‘broad interpretation of article 60 and 301 TFEU’, yet the broad interpretation maintains under the new article. This clearly demonstrates how topical the discussions on these kind of sanctions still are.

Bushra Al-Assad, the sister of the Syrian president Bashar Al-Assad, was added to the EU sanctions lists on 23 March 2012 by Council decision 2013/255 and Council regulation 363/2013 of 22 April 2013.

\(^{123}\) Ibid Case T-362/04, para. 59
\(^{124}\) Ibid Case T-362/04, para. 74
They imposed an asset freeze and a ban on entering the EU’s territory on the listed individuals and entities. The information given in the sanctions lists that provided the reasons for her listing were the following: ‘Sister of Bashar Al-Assad and wife of Asif Shawkat, Deputy Chief of Staff for Security and Reconnaissance. Given the close personal relationship and intrinsic financial relationship to the Syrian President Bashar Al-Assad and other core Syrian regime figures, she benefits from and is associated with the Syrian regime.’

She contested her inclusion in these lists before the General Court arguing to be just a housewife, holding no public or economic position and therefore does not play a role in the Syrian regime. The General Court dismissed her complaint by applying its well-known broad interpretation of third state and concluded that "The mere fact that Ms al-Assad is the sister of the Syrian president is sufficient to be able to regard her as being linked to the leaders of Syria" and to enforce this view, the court added that "It is well known that power has traditionally been exercised on a family basis in Syria."

49. The justification for the Council to also apply sanctions on family member of individuals related to the government apparatus of a third state was upheld in that the targeted individuals could otherwise use family members to circumvent the measures.

The Council applied the same method of sanctioning family members in the Council decision 2014/119 and council regulation 208/2014 of 5 March 2014 in which two of Yanukovych’s sons were listed next to the former president of Ukraine himself. The lists also included family members of other persons related to the regime. These sanctions are slightly different from the sanctions related to president Assad since they were imposed after the regime fell.

The implications of the listings of both Bushra Al-Assad and members of the Yanukovych family will be further discussed under Chapter 4 – Remaining grey areas.

50. To conclude, the EU was unprepared for this new evolution in the adoption of sanctions. In the case of economic and financial sanctions against individuals, the treaties did not provide for an explicit legal basis. Therefore, the Union sanctions regime developed on the basis of an expansionist view of articles 301 and 60 TEC.

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128 Ibid Case T-202/12, Para. 96
131 http://euobserver.com/foreign/123787
The procedure for the adoption of individual sanctions, which was the same as that for state sanctions, started with the adoption of a CFSP common position followed by an implementation on the part of the member states or the European community, depending on the nature of the measure.  

In summary, as we have seen, the Council and the European Courts applied an extremely broad interpretation of these articles so that anyone who was part of the governing regime of a third state or closely connected to it would be targeted by sanctions originally imposed on the third state in its entirety. The aim of this practice was to put pressure on a third state so that it would change its behavior without specifically punishing people or entities not responsible for it.

4.1.3. Sanctions against individuals not linked with a third state

51. In addition to the objective of targeted economic sanctions to put pressure on an individual or entity directly or indirectly linked to a third state in order to produce a change in that third state’s policy or behavior, they became also one of the key instruments in the fight against terrorism.

The UN and the EU are facing acts of terrorism since several decades. Already in the 1960’s and 1970’s they have been taking action to counter terrorism. Even though there was some form of European cooperation within the predecessor of the third pillar, it was mostly up to the member states to take measures against terrorist organisations at their national level.

52. This was the situation before the so-called 9/11 attacks in the US. In almost all doctrine on counter-terrorism, 9/11 is regarded as a benchmark for both the UN and the EU’s policies in this matter. The 2001 terrorist attacks in New York (and later also the attacks in Madrid and London) have profoundly increased the awareness of terrorism at both international and European levels.

53. The EU has always regarded its action in the field of counter-terrorism as an added value to member state action. This was made clear in the EU’s counter-terrorism strategy of 2005 that stated that ‘member states have the primary responsibility for combating terrorism and the EU can add value in four main ways’ namely by ‘strengthening national capabilities, facilitating European cooperation,

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developing collective capability and promoting international partnership.” Especially since 9/11, the EU has made great efforts to coordinate member states policies, harmonise national legislation and support operational work exercised by national authorities, without supplanting the efforts made by its member states.\(^{136}\)

Moreover, immediately after the 9/11 attacks the heads of state and government gathered in a special council meeting which established concrete measures in the fight against terrorism. In this particular meeting, the combat against the funding of terrorism was seen as a decisive aspect in the fight against terrorism.\(^{137}\) The cutting of funds and other economic resources of individuals and entities suspected of (supporting) terrorism was seen as one of the most advanced and result driven measures.\(^{138}\) The reason is obvious. When terrorist groups have their financial resources cut off, then their operations become increasingly difficult.\(^{139}\)

In 2001 the G8 established its Financial Action Task Force (“FATF”) recommendations on terrorism funding which became the basis for a coordinated EU response in anti-terrorism funding.\(^{140}\)

54. With regard to the subject of this dissertation, 9/11 was not only important for the development of the EU’s counter-terrorism policy, it also established a change in the legal basis that the EU had used so far to adopt individual sanctions.

Before 9/11, the UN had already adopted resolutions 1267 and 1333, which were subsequently implemented by the EU by using its ongoing practice of extensively interpreting articles 60 and 301 TEC. Immediately after the events of 9/11, the UN adopted resolution 1373, authorizing its member states to identify organisations and individuals suspected of terrorism and establishing the EU’s autonomous anti-terrorism sanctions regime. It was only when the EU started to implement this resolution, in order to create a system for the sanctioning of individuals not related to a third state, that the limits of its broad interpretation of articles 60 and 301 TEC became clear.\(^{141}\)

\(^{135}\) The European Union counter-terrorism strategy, Doc. 14469/4/05 of 30 November 2005, p. 4


\(^{140}\) [http://www.fatf-gafi.org/pages/aboutus](http://www.fatf-gafi.org/pages/aboutus)

55. The Commission first proposed to adopt the implementing regulation on the sole legal basis of article 308 TEC (now article 352 TFEU). It found that ‘the treaty does not provide, for the adoption of this regulation, powers other than those under article 308.’

The importance of this article had gradually increased in the pre-Maastricht period where it was repeatedly used to complement other articles to provide the EU’s agreements with third countries of an appropriate legal basis. Article 308 was to be situated under part six – general and final provisions of the TEC and contained the following:

‘If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.’

In practical terms this meant that article 308 TEC enabled the Community to adopt measures, with a view to attaining one of the objectives of the Community, despite the fact that the TEC did not provide the necessary powers.

56. Eventually, the Commission decided to amend its original proposal, following a discussion in the Council and the European Parliament, and suggested to use the triple legal basis of articles 60, 301 and 308 TEC. As a result, the EU proceeded with its traditional two-phased approach of first adopting a common position within the CFSP and secondly a community regulation. In this case, two common positions were introduced for its implementation, namely common positions 2001/930 and 2001/931. The latter is the most relevant one and was adopted on the double legal basis of articles 15 and 34 TEU as further discussed below. Regulation 2580/2001 implemented this common position and was the first regulation ever, including sanctions against individuals not related to a third state, adopted on the triple legal basis of articles 301, 60 and 308 TEC.

142 Communication from the Commission, “Proposal for a Council Regulation on specific restrictive measures directed against certain persons and entities with a view to combating international terrorism”, COM(2001) 569 final


Resolution 1390 was adopted a few months later, in 2002, and was in fact a revision of the existing sanctions regime against persons and entities associated with Osama Bin Laden, Al-Qaeda and the Taliban. Since it was adopted after the collapse of the Taliban, this sanctions regime targeted individuals that were no longer connected to the government of Afghanistan.\textsuperscript{146}

For the implementation of this resolution, the Council agreed to the Commission’s proposal to follow the precedent of regulation 2580/2001 and use the triple legal basis of article 301, 60 and 308 TEC.\textsuperscript{147} Consequently, resolution 1390 was adopted by common position 2002/402\textsuperscript{148} and regulation 2002/881.\textsuperscript{149}

57. Indeed, it was the UN’s post 9/11 fight against terrorism that launched the EU’s practice of sanctioning individuals not linked to a third state by the adoption of the above mentioned resolutions 1390 and 1373. Even though resolution 1373 was adopted before resolution 1390, the first EU action in his field was based on the latter rather than the former.\textsuperscript{150}

From this point onwards, all economic sanctions against individuals not linked to a third state had to be adopted using the triple combination of art. 60, 301 and 308 TEC. This included both the individual sanctions based on UN lists, as well as those based on autonomous EU lists. Whether article 308 TEC could be used in addition to articles 60 and 301 TEC or not was one of the questions that was raised in the Kadi cases, first before the CFI and later also before the ECJ.\textsuperscript{151} This case will be extensively discussed under the UN based sanctions regime.

Since article 60 and 301 TEC were still part of the legal basis, the procedure for the adoption of individual sanctions was be the same as the procedure for state sanctions.

\textsuperscript{146} T. TRIDIMAS, “Terrorism and the ECJ: empowerment and democracy in the EC legal order”, Queen Mary University of London School of Law Legal studies Research paper (2009) 12, p. 104
\textsuperscript{149} Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L 139/9
\textsuperscript{151} C. ECKES, “EU Counter-Terrorist policies and Fundamental Rights. The Case of Individual Sanctions”(Oxford, Oxford University Press, 2009), p. 81-82
First the adoption of a common position within the second pillar (CFSP), followed by a Council regulation adopted in the first pillar to implement this common position. However, the adding of article 308 TEC had brought along two major differences in the decision-making procedure. First of all, the adoption of the regulation including individuals not linked with a third state required unanimity amongst the member states in the Council instead of qualified majority voting. Second, after the Commission made its proposal for this Council regulation and before unanimity voting in the Council the European Parliament had to be consulted.

58. As already pointed out before, the EU adopts counter-terrorism sanctions based on both EU autonomous lists and UN lists. The adoption procedure and the instruments used are for the most part the same. The listing procedure is of course slightly different as UN lists are originally adopted at UN level and EU lists at EU level.

The following chapters examine both sanctions regimes. They are subdivided according to their adoption procedure followed by specific case-law to illustrate some of the problems that characterized each regime in the pre-Lisbon period.

4.1.3.1. UN based sanctions regime

59. The UN based regime for sanctions against terrorists is set out in UNSC resolution 1390. This resolution succeeds resolutions 1267 and 1333 and contains a sanctions list that is to be implemented at EU level. As already explained above it is the 1267 committee that has been given the task to draw up the list of persons and entities associated with Osama Bin Laden, including those in the Al-Qaida organisation and to keep this list up to date. In practice the EU simply copies this list and its amendments with no margin of discretion.

The most recent version of the listing procedure is set out in the updated 1267 committee guidelines. When a state submits a listing request, it has to give as much information as possible to support its request. It must be noted that a prior criminal charge or conviction is not a condition to be considered for listing. After having received the request, the committee processes it within 10 days.

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154 Note reference mark 21
When the committee decides to list someone, its decision is communicated through different channels.  

60. For reasons of completeness, it should also be mentioned that the listing and delisting procedures have been frequently criticized for their lack of transparency. Although the guidelines intended to meet with these concerns, they appeared to be ineffective as it seems that, in practice, it is not always clear how anyone is eventually included in the list.

To implement this resolution, including its sanctions list, the EU adopted in a first phase common position 2002/402/CFSP on the legal basis of article 15 TEU. This common position repeals all former common positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP. It makes a direct reference to the UN sanctions list and contains an exact copy of that list.

61. In a second phase, the EU adopted regulation 881/2002 replacing former regulation 467/2001 which in turn replaced regulation 337/2000. The legal basis for the adoption of this regulation was the new combination of articles 60, 301 and 308 TEC. The annex to this regulation is based on the list of the common position and thus de facto identical to the UN list.

Regulation 881/2002 freezes the funds and economic resources of all persons and entities listed in the annex to the regulation and prohibits the member states granting, selling, supplying or transferring, directly or indirectly, technical advice, assistance or training related to military activities.

Although the regulation itself has not been replaced since its adoption, article 7 empowers the Commission to amend or supplement its annex following a decision of the 1267 Committee.

So far, the list has been amended 210 times, with the last amendment being made on 10 January 2014.

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159 Common position 2002/402/CFSP, article 5
160 Common position 2002/402/CFSP, article 1
162 Council regulation (EC) No 881/2002, preamble
62. However, not all 210 amendments are made by the Commission. There are also a few amendments made by the Council. Two of these Council regulations adopt a new listing procedure for those who are listed by the UN and the EU from then on, but also for those who have already been listed in the past.166

In fact, these council regulations, renewing the listing procedure, were a direct consequence of the ECJ decision in the Kadi case.167 One of the most important amendments made by a council regulation168 is the obligation for the 1267 committee to provide the commission with a ‘statement of reasons’ before it takes its decision to list a person, body, entity or group for the first time. Consequently, according to the regulation, it is the Commission’s task to communicate its decision about the listed person and to provide him with an opportunity to express his views. When the listed person makes observations, the Commission must review its decision and the results of this review must be communicated to both the listed person and the Sanctions Committee.169 As a result, the EU’s action in the field of its UN based regime went from ‘automatic compliance’ with the UN resolutions to a more ‘controlled compliance’.170

4.1.3.1.1. The Kadi cases

63. As already explained above, the 2001 terrorist attacks have to be regarded as a yardstick in both the UN and the EU’s counter-terrorism policy. At the same time they stand for a shift in the EU’s sanctions system, under the direction of the UN, to start adopting sanctions against individuals not related to a third state and using an additional legal basis for their implementation. It is therefore not too surprising that litigation before the European Courts relating to the EU’s regimes of individual sanctions has increased since 2001.171

168 Council regulation 1286/2009
169 Council regulation 1286/2009, article 7(a)
170 C. ECKES, “Controlling the most dangerous branch from afar: Multilayered counter-terrorist policies and the European judiciary”, 8 Amsterdam Law School Legal Studies Research Papers (2011), p. 6
Most of these cases raise three important questions. The first one relates to the complicated constitutional architecture of the Union’s pillar structure and concerns the question as to whether the European Community was competent in adopting individual sanctions on the basis of articles 60, 301 and 308 TEC. The second question examines the relationship between international law and European law and the third one concerns alleged violations of fundamental rights.\(^{172}\)

64. The *Kadi* cases are usually regarded as constituting the most important case-law on individual sanctions in the pre-Lisbon period. They give answers to the former three major questions but with regard to the subject of this dissertation we will only discuss the findings that relate to the European Community’s competence. Especially since this has not received as much attention as the other mentioned topics, for example the questions on fundamental rights violations.\(^{173}\)

At this point it seems useful to refer to other case-law related to the EU’s competence on individual sanctions. Important cases such as the Segi case, the Ompi case and the Sison case will be discussed when examining the EU’s autonomous sanctioning regime. They all involve at least one of the three important questions, but as is the situation with the Kadi cases, we will focus on the competence questions. Dwelling on to other areas of these cases would certainly lead us to far.

**A. The Kadi facts**

65. Kadi was a multimillionaire Saudi businessman whose assets were frozen because he was suspected of funding the 9/11 attacks in the United States through a charitable foundation called ‘Muwafaq’.\(^{174}\)

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Al Barakaat International Foundation is a Swedish organisation that included a large number of commercial services, mainly in Somalia, such as a banking service, a service that provided for money transfer, telecom services etc. 175

Both Kadi and Al Barakaat International Foundation were placed on annex I of regulation 467/2001, on implementation of UNSC resolution 1333, for supporting terrorism. They both remained on the list when a further regulation in 2002 (regulation 881/2002) repealed the former regulation as an implementation of UNSC resolution 1390. This resolution required all member states to freeze the funds and other financial resources of individuals and entities identified on its annexed list. Kadi and Al Barakaat contested their inclusion in the list arguing that they were never involved in (the financing of) terrorism and therefore brought actions for annulment against this regulation before the CFI and later for the ECJ. 176 The view of the CFI will only be discussed in the light of the Kadi case, while both the Kadi and the Al-Barakaat cases will be considered when examining the view of the ECJ.

B. The question of competence in Kadi

66. When it was time for the EU to implement UNSC resolution 1390, the Council opted for the, already familiar, triple legal basis of articles 60, 301 and 308 TEC. In the Kadi case, the question was raised whether or not the EU had the competence to adopt economic sanctions against individuals and what the right legal basis would be. Some may say that this is a moot point because the Court of First Instance, the Advocate General Maduro and the European Court of Justice did not disagree on the EU’s competence itself, they just had a different view on the interpretation of the possible legal bases. 177

Kadi first contested his inclusion in the annex to regulation 881/2002 on 22 September 2005 before the CFI. 178 He asked for an annulment of the latter, raising four pleas in law. Three pleas related to an alleged breach of fundamental rights and one plea concerned the accusation that the Council lacked competence to adopt the contested regulation.

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67. The CFI started by explaining that in its view, the legal basis of articles 60 and 301 TEC, that was used to adopt regulation 467/2001 (implementing UNSC resolution 1333) could only be used to adopt individual sanctions against individuals or organisations unrelated to the territory or the governing regime of a third country ‘in so far as such measures actually seek to reduce, in part or completely, economic relations with one or more third countries’.179 This means that, in the CFI’s opinion, article 60 and 301 TEC were only qualified to adopt sanctions against individuals linked with a third country.

The CFI therefore agreed with the Council and the Commission that those two articles alone did not constitute an adequate legal basis for such measures, because after the collapse of the Taliban regime there was no longer a sufficient link between the targeted individuals and entities on the one hand and Afghanistan on the other hand.180

The CFI continued its quest for the right legal basis and stopped to examine the adequacy of the sole basis of article 308 TEC. Even though it found that the first condition was clearly fulfilled – the absence of a specific provision in the TEC providing for the adoption of these kind of measures – the second was not. The imposition of financial and economic sanctions such as the freezing of funds did not fall under the scope of articles 2 and 3 TEC and was therefore not to be seen as one of the objectives of the Community.181 Since article 308 TEC enabled the Community to adopt measures in order to attain one of the objectives of the Community, not the Union, it did not apply (on its own).

68. Having established the inadequacy of articles 60 and 301 TEC on the one hand and article 308 TEC on the other, the CFI accepted the Council’s view that ‘article 308 TEC in conjunction with Articles 60 EC and 301 EC, gives it the power to adopt a Community regulation relating to the battle against the financing of international terrorism conducted by the Union and its Member States under the CFSP and imposing, to that end, economic and financial sanctions on individuals, without establishing any connection whatsoever with the territory or governing regime of a third country.’182

To this end, the CFI explained that articles 60 and 301 TEC constitute a ‘bridge’ between Community measures (regulation) and objectives of the Union (in a common position or joint action).

179 Ibid Case T-315/01, para. 89
180 Ibid Case T-315/01, para. 93-97
181 Ibid Case T-315/01, para. 99-103 and 121
182 Idem, para. 122
This bridge was in the CFI’s view rather broad as it argued that ‘It must be held that Articles 60 EC and 301 EC are wholly special provisions of the EC Treaty, in that they expressly contemplate situations in which action by the Community may be proved to be necessary in order to achieve, not one of the objects of the Community as fixed by the EC Treaty but rather one of the objectives specifically assigned to the Union by Article 2 EU, namely, the implementation of a common foreign and security policy.’\textsuperscript{183}

The CFI explained that when the provisions of the TEC (articles 60 and 301) did not give the Community institutions the necessary powers to attain one of the Union’s objectives, in this case fighting international terrorism through economic and financial sanctions on individuals and entities with no sufficient connection to a third country, then the use of article 308 TEC was justified in the light of the Union’s pursuit for consistency in its external action laid down in article 3 TEU.\textsuperscript{184}

In practical terms this meant that articles 60 and 301 TEC were to achieve Union (CFSP) objectives by using their Community powers. When they lacked the powers to do so and are were therefore not able to achieve these Union objectives, then the CFI argued that the use of article 308 TEC was justified for the sake of consistency of the Union’s external action. Article 308 TEC was in fact seen as some sort of remedy to satisfy the shortcomings of articles 60 and 301 TEC.

Even though the CFI accepted the interpretation of articles 60 and 301 TEC in that they would import CFSP objectives entirely into the Community pillar (broad interpretation of ‘the bridge’), it refused the Commission’s argument that the fight against international terrorism was to be seen as a residual competence under article 308 TEC and thus in fact a Community objective. In other words, the CFI could easily accept that a Union objective would find its way in the Community pillar through the bridge or articles 60 and 301 TEC, but did not take it as far as agreeing that the fight against international terrorism (containing both economic and financial sanctions) would become a Community objective.\textsuperscript{185}

\textsuperscript{183} Idem, para. 124


69. Advocate General Poiares Maduro rejected this approach of the CFI, while agreeing with the Commission that articles 60 and 301 TEC provided a sufficient legal basis for the adoption of those sanctions.\(^{186}\) He did not agree with the CFI’s interpretation of articles 60 and 301 TEC that they could not be used to interrupt or reduce economic relations with individuals within those third countries. He argued that the only requirement for the application of those articles was that the measures interrupted or reduced economic relations with third countries.\(^{187}\)

Since, according to the Advocate General, ‘economic relations with individuals and groups from within a country are part of economic relations within that country’, he concluded that ‘by affecting economic relations with entities within a given country, the sanctions necessarily affect the overall state of economic relations between the Community and that country’.\(^{188}\)

In Maduro’s view, economic relations with third counties were inextricably linked with economic relations with individuals or groups of that country. Therefore, articles 60 and 301 TEC provided a sufficient and appropriate legal basis.\(^{189}\)

Moreover, he stated that the CFI’s narrow reading of article 301 TEC failed to acknowledge the overall objective of this provision which is to provide an answer to threats to international peace and security.\(^{190}\)

70. On 3 September 2008, both Kadi and Al Barakaat contested the CFI’s judgments in Kadi v. Council and Commission and Yusuf and Al Barakaat international foundation v. Council and Commission before the ECJ.\(^{191}\) They asked to set these judgments aside as well as annul the contested regulation 881/2002. On the grounds of appeal relating to the legal basis of the regulation, the ECJ agreed with the CFI on the combined legal basis of articles 60, 301 and 308 TEC and thus rejected the Advocate General’s reasoning on the sufficiency of articles 60 and 301 TEC.\(^{192}\) However, its reasoning differed from that of the CFI.\(^{193}\)

\(^{186}\) Case C-402/05 P, Kadi v. Council (Opinion of AG Maduro), opinion delivered on 16 January 2008, para. 11
\(^{187}\) Ibid, para. 12
\(^{188}\) Ibid, para. 13
\(^{189}\) D. HALBERSTAM and E. STEIN, “the United Nations, the European Union, and the Kind of Sweden: Economic sanctions and individual rights in a plural world order”, 46 CML Rev. (2009), p. 25
\(^{190}\) Ibid, para. 14
\(^{191}\) Judgment of the Court (grand chamber) of 3 September 2008 in Joint cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, [2008] ECR I-6351
\(^{192}\) Ibid, para. 166-169
\(^{193}\) T. TRIDIMAS, “Terrorism and the ECJ: empowerment and democracy in the EC legal order”, Queen Mary University of London School of Law Legal studies Research paper (2009) 12, p. 106
Whereas the CFI held that the combination of art. 60 and 301 TEC was perfect to import CFSP objectives entirely into the community pillar to make them binding legislation (through regulations), the ECJ refused to accept such a broad interpretation and argued that this bridge could only be used to import specific CFSP objectives regarding economic sanctions. 194

After having established a smaller bridge between the CFSP and the Community, the ECJ continued by giving three arguments against the use of article 308 TEC.

First of all, it refused the sole use of article 308 TEC for the same reasons as the CFI did. Using article 308 TEC as the single legal basis would have the effect that the Community would adopt a regulation with a view to attaining one of the Union objectives instead of Community objectives. According to the ECJ, this did not fall within the use of this article. 195

Second, article 308 TEC could never be used in a way that it would also help to achieve Union objectives and thus extend the existing bridge in articles 60 and 301 TEC. Making new or extending existing bridges would not be in line with the constitutional architecture of the treaties. 196

Lastly, neither article 308 TEC nor article 3 TEU could not serve as a basis for granting more powers to the Community than originally given out by the TEC. This practice would be in conflict with the principle of conferred powers. 197

71. Despite these arguments against the use of article 308 TEC, the ECJ decided to add it to the legal basis of articles 60 and 301 TEC anyway. It argued that article 308 TEC must not be added to the other articles for the sake of consistency, but because both of its conditions are fulfilled.

First, there was a community objective, which according to the ECJ must not be sought for in the regulation itself, because then the use of article 308 TEC would be sufficient on its own, but in articles 60 and 301 TEC. According to the ECJ they are ‘the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures (the contested regulation) through the efficient use of a Community instrument’. 198

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194 Ibid, para. 197
195 Ibid, para. 197-201
196 Ibid, para. 202
197 Ibid, para. 203-204
198 Ibid, para. 226
To demonstrate that the second condition was also fulfilled, namely that the regulation had to relate to the operation of the common market, the ECJ stated the following: ‘If economic and financial measures (...) were imposed unilaterally by every member state, the multiplication of those national measures might well affect the operation of the common market. Such measures could have a particular effect on trade between member states, especially with regard to the movement of capital and payments, and on the exercise by economic operators of their right of establishment. In addition they could create distortions of competition, because any differences between the measures unilaterally taken by the member states could operate to the advantage or disadvantage of the competitive position of certain economic operators’.  

Finally, the ECJ regards the involvement of the European parliament as an additional argument to add article 308 TEC to the legal basis.

72. In conclusion, both the CFI and the ECJ agreed on the reasons to refuse article 308 TEC as a single legal basis, but how they eventually came to the conclusion of using the same triple legal basis is different. The CFI first established a large bridge and then added article 308 TEC for the sake of consistency. The ECJ accepted the idea of a bridge but interpreted it more narrow and then added article 308 TEC through its theory of the ‘implicit underlying objective’.

4.1.3.1.2. Reflections on the triple legal basis of articles 60, 301 and 308 TEC

73. In Yusuf201 en Kadi before the CFI and Kadi en Al Barakaat before the ECJ, the European Courts accepted the triple legal basis of articles 60, 301 and 308 TEC for the adoption individual sanctions.

In the literature the question remains whether or not this combination of articles really established a solid legal basis in the pre- Lisbon period. The legal doctrine has thrown itself at this subject by raising questions such as ‘Was the combination of articles 60 and 301 TEC enough?’ or ‘was the addition of article 308 TEC a necessity?’ And if so, ‘did article 308 TEC really heal the shortcomings of articles 60 and 301 TEC?’

Below we will discuss the main arguments both in favour and against the chosen legal basis.

199 Ibid, para. 229-230
200 Ibid, para. 235
A. Did the legal basis of articles 60 and 301 TEC suffice to adopt individual sanctions?

74. The first question is whether or not the combination of articles 60 and 301 TEC alone provided a sufficient legal basis for the adoption of individual sanctions. Both the CFI\textsuperscript{202} and the ECJ\textsuperscript{203} rejected this view because of the limited scope of article 301 TEC. They used a textual argument to refuse the combination of these articles on their own.

Indeed, a literal reading of article 301 TEC would indicate that it should only be used for the implementation of sanctions against “countries”, not for sanctions that target subjects other than countries, such as individuals.\textsuperscript{204}

However, it is still worth having a discussion on because not everyone shared this opinion. AG Maduro, for example, but also authors like Tridimas and Gutierrez-Fons argued in favour of the sole use of these articles and stated that the adding of article 308 TEC was unnecessary.\textsuperscript{205}

Yet, the Advocate General’s reasoning might be called into question. He argued that economic relations with third countries are linked with economic relations with individuals and entities within those third countries, irrespective of their link with the governing regime or territory. This way, both kind of sanctions could fall under the scope of articles 60 and 301 TEC as far as they intended to interrupt or reduce the economic relations with that third country. In the case of Kadi however, the sanctions aimed at freezing his funds to stop him from financing terrorism, not at interrupting or reducing economic relations with a third country.\textsuperscript{206}

Aside from the textual arguments, there are also substantive arguments both in favour of and against the use of articles 60 and 301 TEC.

\textsuperscript{203}Joint cases C-402/05 P and C-415/05 P, \textit{Kadi and Al Barakaat}, [2008] ECR I-6351, para. 168
\textsuperscript{206}D. HALBERSTAM and E. STEIN, “the United Nations, the European Union, and the Kind of Sweden: Economic sanctions and individual rights in a plural world order”, 46 CML Rev. (2009), p. 28
75. Since analogy is a very common form of reasoning in legal matters, the question could be raised if this kind of reasoning could also be applied here. The argument of analogy is used to apply existing legal rules to situations that do not directly fall under these rules.  

When it comes to applying article 301 TEC to individuals through an analogical reasoning we could argue that the first condition is fulfilled. The reason why article 301 TEC did not speak of individuals is because the UN had not yet adopted sanctions against individuals, therefore this is an 'unintentional gap' and not a conscious choice to leave individual sanctions out of the EU's competence.  

However, because of certain differences, some more fundamental than others, between state sanctions and individual sanctions it is unclear whether or not it is to be assumed that the legislator would also have regulated the adoption of individual sanctions when he regulated the adoption of state sanctions in article 301 TEC. Therefore, we will have to examine whether individual sanctions have the same political and economic dimension as state sanctions.

76. From a political point of view, it is important to understand that state sanctions can have far reaching effects on both the state targeted and the targeting state, which in this case is the EU. The targeting state will take economic and political considerations into account before adopting sanctions because its economy and political relations with the targeted state and maybe even allies of that state could possibly be damaged. On the one hand, one could argue that individual sanctions do not raise the same concerns at all. On the other hand, a more nuanced opinion might be appropriate here. When talking about individual sanctions, we have to make a distinction between individuals linked to a state and individuals not linked to a state. In my opinion, sanctions against individuals linked to a state raise the same concerns since they often have a large control over that country’s policy. However, when it comes to sanctions against individuals not linked to a state, this reasoning cannot be prolonged.

The economic dimension of article 301 TEC is to be found in its original objective to enforce the creation of a common commercial policy. This means that the EU has to take a uniform approach to trade with third states. In the case of economic and financial sanctions it means that every EU member state has to adopt the same approach towards the implementation of sanctions. Sanctions against an entire state can obviously achieve this common approach. Sanctions against individuals may or may not achieve this, depending on the individual.

207 F. MACAGNO and D. WALTON, “Argument from analogy in Law, the classical tradition and recent theories”, 42(2) Philosophy and rhetoric (2009), p. 154-182
If it concerns individuals who are sanctioned because of their political beliefs and have nothing to do with the economy then of course this does not influence the common commercial policy. However, when it concerns large entities, or groups practicing economic activities then it does have an impact.210

77. An argument in favour of the sole use of articles 60 and 301 TEC could be the existing link between the UN and the EU sanctions regimes. The majority of both state sanctions and individuals sanctions adopted in the EU implement UNSC resolutions including these sanctions. Since state sanctions were implemented through article 301 TEC, why shouldn't the EU be able to also adopt individual sanctions on this already familiar legal basis?

Article 301 TEC requires a CFSP decision and CFSP decisions are, according to former article 11 TEU (now article 24 TEU), intended to preserve peace and strengthen international security in accordance with the principles of the UN Charter. The promotion of international peace and security as a principle of the UN Charter,211 is thus reflected in the general framework of the EC treaty and more specifically in articles 60 and 301 TEC. Consequently, we could argue that the UN and the EU are linked due to their pursuit for the same objective.212

The commission agreed with this view in Kadi and Barakaat where she stated that ‘the fact that similar words are used in Article 41 of the Charter of the United Nations and in Article 301 EC shows that the authors of that latter provision clearly intended to provide a platform for the implementation by the Community of all measures adopted by the Security Council that call for action by the Community.’213

However, the wording of article 301 TEC and its setting suggest otherwise. Article 301 TEC does not refer to the UN or its Security Council directly and its location in the EC Treaty separates it from the CFSP in the EU Treaty. Consequently, we could argue that there is in fact no real correlation between article 41 of the UN Charter and article 301 TEC.214

211 Article 1 UN Charter
212 C. ECKES, “EU Counter-Terrorist policies and Fundamental Rights. The Case of Individual Sanctions” (Oxford, Oxford University Press, 2009), p. 86; Sison, para. 95
213 Joint cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, [2008] ECR I-6351, para. 136
Also, if we would agree on the interpretation that article 301 TEC adopts all measures that the UNSC requires, then the EU would allow the UNSC to directly determine its action. The fact that the EU sanctions are indeed, for the most part, an implementation of UNSC sanctions allows the UNSC to indirectly determine the EU’s action, but never directly.\textsuperscript{215}

78. Tridimas and Gutierrez-Fons put forward four arguments in favour of the sole use of articles 60 and 301 TEC. First, they refer to the textual argument of Advocate General Maduro stating that nowhere in the text of article 301 is the adoption of individual sanctions excluded. Their second argument relates to its historical interpretation and was already mentioned when examining the possibility of an analogical reasoning. According to them, the authors of the treaty never had the intention to exclude the possibility of adopting individual sanctions. The reason why it was not included is because at that time individual sanctions were not yet in the picture. With the third and fourth arguments, which are connected to each other, they are trying to prove how a teleological and evolutionary interpretation can lead to the statement that articles 60 and 301 TEC are sufficient.

According to both authors, the choice for individual sanctions was initially inspired by the aim to lessen the humanitarian consequences of comprehensive state sanctions and to increase their effectiveness. If these are the reasons, they wonder why articles 60 and 301 would not be sufficient? Of course this is a political argument and not a legal one, but Tridimas and Gutierrez-Fons argue that this is not an issue and in fact is in line with the objective of the already politically tinted article 301 TEC since it aims to regulate political CFSP objectives.\textsuperscript{216}

79. A last possible argument in favour of the sole use of articles 60 and 301 TEC is based on the CFI’s reasoning in the Minin case. Even though Charles Taylor and his associates did no longer control the government, the sanctions regime was pursued on the basis of articles 60 and 301 TEC because the CFI argued that ‘Charles Taylor and his associates continue to undermine peace in Liberia and neighbouring countries’ and that ‘the restrictive measures adopted against them have a sufficient link with the territory or the rulers of that country to be regarded as seeking to interrupt or to reduce, in part or completely, economic relations with a third country, for the purpose of Articles 60 EC and 301 TEC. Therefore, the Community has the power to adopt the measures in question on the basis of those provisions.’\textsuperscript{217}

\textsuperscript{215} C. ECKES, “EU Counter-Terrorist policies and Fundamental Rights. The Case of Individual Sanctions” (Oxford, Oxford University Press, 2009), p. 86


\textsuperscript{217} CFI, Case T-362/04, Leonid Minin v Commission [2007] ECR II-2003, para. 74
If the CFI would have followed the same reasoning, with an even broader interpretation of these articles, in the Kadi case then maybe there would have been less critique on its final judgment. However, bringing the adoption of counter-terrorism sanctions under articles 60 and 301 TEC through an extremely broad interpretation would probably be seen as a bridge too far.

B. Did article 308 TEC heal the shortcomings of articles 60 and 301 TEC?

80. Since both the CFI and the ECJ ruled that articles 60 and 301 TEC were not a solid legal basis on their own to adopt individual sanctions, then the question must be raised whether the adding of article 308 TEC would provide a solution.

First of all, might we not ask if it is indeed appropriate to add an article such as 308 TEC to a combination of articles 60 and 301 TEC? This is an article that can only be used in combination with other articles which are not able to adopt the measure on their own because they only partially cover the subject matter. In the case of individual sanctions, authors like Christina Eckes argue that articles 60 and 301 TEC do not even partially cover the subject matter because they only cover sanctions against third states for the reasons mentioned above.

Nonetheless, if we would assume that article 308 TEC would be a solid additional legal basis, then we would have to take into account the CFI’s reasoning in Kadi.

81. The CFI characterized Articles 60 EC and 301 EC as ‘wholly special provisions of the EC Treaty’ because they made it possible to establish Union objectives through Community instruments and therefore serve as bridges between the former first and second pillar.

Since the CFI treated this bridge as a highly exceptional situation in which the distinction between the pillars disappears, it may be argued that when article 308 TEC is seen as an additional legal basis to this already exceptional situation, then this would lead to a general use of community instruments for Union purposes and this would be incompatible with the separation of the pillars.

In support of this view, an argument could be made that a combination of articles 301 and 308 TEC must be avoided because it has blurry boundaries.

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Indeed, the CFI stated that the bridge from Community to Union was limited to economic sanctions but at the same time she permitted that the adding of article 308 TEC would extend the scope of article 301 TEC to individual sanctions, which have some characteristics of criminal law.

Therefore, one could wonder how few measures will in the end be excluded from article 301 TEC if even criminal law can find its way in?

82. This unclear boundary and possible extension of the scope of Community competences is even further enhanced by the fact that the TEU did not provide for clear boundaries to the actions that the Union could take under the CFSP because of the 'catch-all' approach in article 11 TEU (now article 24 TFEU). This article stated that ‘The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy’. Consequently, the Community would become competent to adopt measures in all areas covered by CFSP.

In Omπi (Omπi stands for ‘Organisation des Modjahedines du people d’Iran’) the CFI rejected an influence the other way around by stating that: 'the Community does not act under powers circumscribed by the will of the Union or that of its member states when, as in the present case, the Council adopts economic sanctions measures on the basis of articles 60, 301 and 308 TEC’. It continued by saying that this point of view is 'the only one compatible with the actual wording of article 301 and 60 TEC'.

83. However this approach in which Community competences were overextended due to article 308 TEC was not a definite one since it did not have everyone’s blessing. On appeal in Kadi and Al Barakaat, the ECJ rejected the view of the CFI and said that the adding of article 308 TEC could never justify this general use of Community instruments for Union purposes. the ECJ argued that this would entail an expansion of the scope of Community competences and thus a situation in which the Community would confer powers to itself which is in breach with the principle of conferral.

Even though the ECJ probably had a point here, its own vision on the additional legal basis might also reveal some cracks. The ECJ accepted the use of this article because it argued that both of its conditions were fulfilled.

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221 Case T- 306/01, para. 159
224 Case T-228/02, People’s Mojahedin Organisation of Iran v Council, [2006] ECR II-4665, para. 106
The first condition held that there was in fact an ‘underlying Community objective’ of making it possible to adopt the measures pursued by articles 60 and 301 TEC through a regulation. However, in the legal doctrine there are authors like Halberstam and Stein, supported by Tridimas and Gutierrez-Fons saying that there are two major problems with this view.  

84. The primary problem is the fact that while the ECJ commenced its reasoning from the point of view that sanctions against individuals did not fall under the scope of articles 60 and 301 TEC, its theory of the ‘implicit underlying objective’ suggests otherwise. Since in this case, articles 60 and 301 TEC had to transfer a common position containing individual sanctions, and this seems to be their underlying community objective, this inevitably leads to the conclusion that individual sanctions do fall under the scope of those two articles.

Secondarily, that this underlying Community objective actually focuses on the implementation of the Union objective in the common position, even though it does so through the regulation which the ECJ uses to establish its underlying Community objective.  

Another argument against the combination of articles 60, 301 and 308 TEC came from a resolution of the European parliament and was used by Sison to reinforce its plea that the Community lacked competence to adopt regulation 2580/2001.

85. The European Parliament doubted that 'an effective coordination of a European anti-terrorist policy is possible under the present structure of the Union' and 'that the new dimensions in the fight against terrorism urges the Convention on the future of Europe to explore how to avoid the present EU three-pillar division and create the necessary legal basis to allow the EU to freeze assets and cut off funds of persons, groups and entities of the EU involved in terrorist acts and included in the EU list'.  

The arguments in favour of adding article 308 TEC to the combination of articles 60 and 301 TEC are generally, in my opinion, based on the use of a teleological interpretation in combination with the taking into account of international developments.


If we ought to conclude, on the basis of the above mentioned arguments, that the combination of articles 60, 301 and 308 TEC were in se not the right legal bases for the adoption of individual sanctions, then maybe their use could still be justified on the basis of other grounds.

Articles 60 and 301 were originally introduced by the Maastricht Treaty as articles 228a and 73g EC. At that time the concept of individual sanctions was only starting to develop so understandably they were not included in these articles. However, over the past decade the use of individual sanctions has increased because it has become clear that not only states, but also terrorists and terrorist groups impose security threats.229

86. A teleological interpretation of articles 60 and 301 TEC would be one way to overcome the difficulties that arise with the expansion of their scope to individuals. This is a technique where a rule is interpreted in the light of its aim and according to Miguel Poiares Maduro also in the light of the broader context of the EC (now EU) legal order.230 A situation that does not fall under the scope of an article, may therefore eventually be included anyway. Authors like Tridimas and Gutierrez-Fons supported this technique to demonstrate that the community was competent to adopt individual sanctions without having to add article 308 TEC.231

Another argument in favour of the method of teleological interpretation is that the constitutional Treaty would have amended these articles and included an explicit reference to individual sanctions. This clearly demonstrates that the idea is to meet with advancing international developments and in this specific case individual sanctions.232

If a teleological interpretation of articles 60 and 301 TEC would not be enough to overcome the differences between state sanctions and individual sanctions, then the use of the additional legal basis of article 308 TEC could be justified by the need for the Community to stay in touch with international developments.

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231 Supra para. (stukje een beetje naar boven)
87. In *Sison*, the Council clearly supports this view stating that article 308 TEC was added because that way ‘the Community has been able to keep pace with the development of international practice, which has been to adopt ‘smart sanctions’ aimed at individuals and entities who pose a threat to international peace and security, having regard in particular to the altered political circumstances after 11 September 2001’.\(^\text{233}\)

In other words, the Council argued that rejecting article 308 TEC and therefore not being able to adopt individual sanctions, would be in breach with international developments and would not reflect real-world requirements and demands.\(^\text{234}\)

88. Finally, one last argument in favour of the Community’s competence to adopt sanctions against individuals, with or without the adding of article 308 TEC, is the fact that the Treaty of Lisbon has now settled this dispute and provides for an explicit legal basis.\(^\text{235}\)

### 4.1.3.2. Autonomous European sanctions regime

89. It is only since the introduction of resolution 1373, in 2001, that the EU was able to adopt sanctions against individuals not related to a state on an autonomous basis. This resolution contains a general obligation for the UN member states to combat the financing of terrorism. On that basis, member states receive the autonomy to independently identify terrorist suspects, who are then listed and sanctioned by the EU.\(^\text{236}\)

The big difference with the UN based sanctions regime, is that terrorists are not identified at UN level but at the EU level.\(^\text{237}\) Consequently, the EU has a lot more discretion than in the first sanctions regime where she merely reproduces the UN lists.\(^\text{238}\)

Needless to say is that this autonomous sanctions regime against terrorists does not harm the EU’s autonomous sanctions regime against states and affiliated individuals.\(^\text{239}\)

\(\text{\textsuperscript{233} Case }\text{T-47/03, José Maria Sison v Council of the European Union [2003] ECR II-73, para. 94}\)


\(\text{\textsuperscript{235} D. Halberstam and E. Stein, “the United Nations, the European Union, and the Kind of Sweden: Economic sanctions and individual rights in a plural world order”, 46 CML Rev. (2009), p. 23}\)

\(\text{\textsuperscript{236} C. Eckes, “Sanctions against individuals-Fighting Terrorism within the European Legal Order”, 4(2) EuConSt (2008), p. 208}\)


\(\text{\textsuperscript{238} C. Eckes, “EU Counter-Terrorist policies and Fundamental Rights. The Case of Individual Sanctions” (Oxford, Oxford University Press, 2009), p. 3}\)
In order to implement resolution 1373, the EU used its traditional two-tier procedure. First it adopted a common position (2001/931) within CFSP, laying down the general framework for the adoption of the sanctions, then a Council regulation (2580/2001) imposing the actual sanctions. The result is a comprehensive system of sanctioning individuals, groups and entities suspected of (financing) terrorism.\textsuperscript{240}

Below I have added a more in-depth description and sometimes also a discussion on their adoption procedure, from the initial listing to the final imposition of sanctions completed with the relevant case law of the CFI and the ECJ.

4.1.3.2.1. **Common position 2001/931CFSP**

First of all, the listing procedure of the autonomous EU regime is different than that of the UN based regime as the names are included on the list at the EU level rather than at the UN level.

Article 1(4) of common position 2001/931/CFSP lays down the listing procedure and reads as follows:

‘The 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.

Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.

For the purposes of this paragraph ‘competent authority’ shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.’

This text does not put forward clear criteria to add someone to the list but when reading this article, we can identify the main elements.


92. First a ‘competent authority’ has to take a decision concerning natural or legal persons, groups or entities who have committed or attempted to commit, participate in or facilitate terrorist acts. Consequently, a prior conviction is also in this sanctions regime not a precondition to be listed. Moreover, a person, group or entity may be eventually listed as soon as a competent authority takes a decision on the instigation of an investigation.

Second, the member states can use this decision to propose the adding of a name to the list within the Council working party CP 931 WP. This is an ad hoc forum in which officials from the ministries of foreign affairs of the member states and sometimes representatives from the intelligence services reside.

To support their proposal, they bring forward all the information needed. After a consultation with the other government officials, it is the Council that takes the final decision on any listing by unanimity. The list is then annexed to common position 2001/931.

The common position includes an obligation to review the list at regular intervals and at least once every six months to make sure that the entities and individuals are not kept on the list without reasons.

93. Even though I intend to be brief about this, it seems all too important to ignore two of the main critiques on the listing procedure at this stage. First of all, in contrast to the guidelines of the 1267 committee, the working party has not developed such (public) documents. Consequently, we have no idea which procedure or what criteria the first selection of names on the list is made. Moreover, there is no known procedure for delisting or even to submit complaints.

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243 A permanent organ established by the Council in 2007 and replacing the ‘clearing house’
246 C. ECKES, "EU Counter-Terrorist policies and Fundamental Rights. The Case of Individual Sanctions" (Oxford, Oxford University Press, 2009), p. 48
247 Common position 2001/931/CFSP article 1 (6)
Secondly, this first selection made by the working party is rarely, if at all subjected to further examination before it is presented to the Council. The reason perhaps lies in the weak scrutiny of the provisional list provided by COREPER which is responsible for preparing the work of the Council.  

94. To conclude, it is clear that the listing procedure lacks transparency and possibilities for review and we should also give a moment’s thought to the rather large autonomy given to the working party due to the weak control of COREPER.

Common position 1373, adopting autonomous European lists of terrorist suspects is an extraordinary common position since it is a cross-pillar instrument based on a combined legal basis of article 15 TEU in the former second pillar (Title V) and article 34 TEU in former the third pillar (Title VI). This is a clear difference to the adoption of the UN based regime in which common position 2002/402 was adopted on the single legal basis of article 15 TEU.

The reason for this double legal basis is that one part of the list contains names of EU external or ‘foreign linked’ terrorists, adopted on the basis of second pillar competence (CFSP) and the other part of the list contains names of EU internal or ‘home’ terrorists, adopted on the basis of third pillar competence.

95. As a consequence, only EU external terrorists could be the subject of a ‘common position or a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy’ and therefore fall within the scope of article 301 and 60 TEC. This means that they were the only ones captured by an implementing regulation in the first pillar and only their funds were frozen by the Community.

On the question of who is part of this group of ‘EU external terrorists’ Cremona states that ‘both people or organisations with connections outside the EU who may conduct terrorist operations in the EU as well as externally, and people or organisations of EU nationality or residence who may be involved in terrorist operations outside the EU’ fall within the group of EU external terrorists.

250 Now the Area of Freedom, Security and Justice
253 Professor at the European University Institute in Florence
On the other hand, terrorists whose activities are wholly internal to the EU do not have a ‘foreign element’, sanctions could therefore not be adopted on the basis of article 15 TEU in the second pillar and thus fell outside the scope of articles 301 and 60 TEC. They were adopted on the basis of article 34 TEU in the third pillar.

Due to the absence of a provision in the treaties that provided for a bridge between the third and the first pillar, it was not possible to adopt a regulation. Subsequently, their funds were not frozen by the Community, but by the member states. This meant that being included in the part of the list reserved for home terrorists could never have direct legal consequences in the pre-Lisbon period. The only obligation for the member states regarding EU internal terrorists is set out in article 4 of common position 2001/931 that states that ‘member states shall afford each other the widest possible assistance in preventing and combating terrorist acts’ and ‘fully exploit their existing powers in relation to any of the organisations or individuals listed in the annex to the common position.’ To this end, Council decision 2003/48/JHA implemented article 4 as it provides for third pillar measures to strengthen police and judicial cooperation in order to combat terrorism. These measures include the exchange of information between member states themselves and between them and Europol and Eurojust.

Being included as an EU internal terrorist in a common position that was adopted through the EU’s autonomous sanctioning regime had one obvious effect as well as one possible negative effect. The obvious one is that this individual was being shamed as a result of being identified on a terrorist list. The possible one is that when this identification had more serious consequences, there was no opportunity to challenge their inclusion in the list, nor the legality of the common position itself.

In actual fact this was a specific problem that marked the pre-Lisbon period. Under the EU Treaty, as revised by the Treaty of Amsterdam, the powers of the ECJ were listed exhaustively in former article 46 TEU (now article 275 TFEU). Title VI in the third pillar was one of the areas in which the ECJ had jurisdiction. Albeit, only under the conditions laid down in former article 35 TEU.

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259 Article 35 TEU
260 Article 46, (b) TEU
Although this article clearly gave jurisdiction to the ECJ to give preliminary rulings and review third pillar instruments such as framework decisions and decisions in article 35(1) and 35(6) TEU, it did not do this for common positions.\textsuperscript{261} As a result, common positions could never fall under the Court’s jurisdiction, neither when adopted as a CFSP instrument\textsuperscript{262}, nor when adopted as a third pillar instrument.

Furthermore, the decision to list these EU internal terrorists in a common position rather than a decision excluded the involvement of the European Parliament. This meant that they had no democratic guarantees next to the absence of judicial review.\textsuperscript{263}

98. An interesting case to illustrate this lack of judicial review for EU internal terrorists is the “Segi” case.

Segi was a French organisation, alleged to have participated in terrorist activities for its presumed connection with the terrorist organisation ETA.

After the European Court of Human Rights refused jurisdiction because there was no actual violation of fundamental rights, Segi brought a claim for damages before the CFI, arguing that it had suffered damages due to its listing in common position 2001/931.\textsuperscript{264} It contested that the use of article 34 TEU to adopt this common position was only for the purpose of depriving it from the right to judicial review and democratic control by the parliament. Indeed, common positions did not fall under the scope of articles 35(1) and 35(6), as mentioned above, so that the Community courts did not have jurisdiction. The common position had in the same way deprived the European Parliament of expressing its views since it was not allowed to do so for common positions in the third pillar.\textsuperscript{265}

Therefore, Segi argued this was a deliberate encroachment on the powers conferred on the Community.

99. The CFI dismissed this action due to a manifest lack of jurisdiction. It argued that it only had jurisdiction in so far as the action was based on an encroachment of the powers of the Community.

\textsuperscript{262} Article 46 TEU did not establish jurisdiction for CFSP instruments such as common positions
\textsuperscript{264} E. SPAVENTA, “Fundamental rights and the interface between the second and third pillar”, in: A. DASHWOOD and M. MARESCAU (Eds.), Law and practice of EU external relations, (Cambridge: CUP, 2010), p. 147
In this case it held that this was not the fact since article 34 TEU was in fact the right legal basis for the adoption of that part of the common position of relevance for Segi. After having established that it had no competence to review measures adopted in the second pillar as a result of the scope of article 46 TEU, nor to review the legality of a common position adopted on the basis of article 34 TEU in the third pillar, the CFI went on by looking at whether or not the contested common position could be caught by an action for damages.

It ruled that this was not the case since ‘It follows from Article 46 EU that, in the context of Title VI of the EU Treaty, the only judicial remedies envisaged are contained in Article 35(1), (6) and (7) EU, and comprise the reference for a preliminary ruling, the action for annulment and the procedure for settling disputes between Member States.’

Having determined the fact that it had no jurisdiction to rule on an action for damages, the CFI continued by saying that a preliminary ruling on the validity of a listing would also not be possible since it concerned a common position and not a decision under article 34 TEU.

The CFI further rejected Segi’s claim concerning the misuse of procedure to deprive it from judicial review and democratic control as the procedure followed by the council and the choice for a common position under article 34 TEU fell within its system of division of powers.

100. The ECJ on the other hand, extended the scope of article 35 TEU to make preliminary rulings on the validity of common positions possible. Her reasoning was that article 35(1) could not be read in a stringent way and interpreted the possibility for a preliminary ruling very broadly by stating that ‘the right to make a reference to the Court of Justice for a preliminary ruling must exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties. Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret article 35 (1) narrowly.’

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266 Case T- 338/02, Segi et al v. Council[2004] ECR II-1647, para. 33
267 T. TRIDIMAS, “The European Court of justice” in: P. LYNCH, N. NEUWAHL and W. REES (Eds.), Reforming the European Union from Maastricht to Amsterdam, (Essex: Person education limited, 2000), p. 75
268 Case T- 338/02, para. 36
269 Case T- 338/02, para. 38
272 Case C-355/04, Segi and others v. Council, [2007] ECR I-1657, para. 53
The Court further stated that it had to be possible to make a common position subject to a review by the ECJ because a Common position has a scope going beyond that assigned by the EU Treaty to that kind of act. 273

The ECJ thus found that insofar as common position 2001/931 was intended to create legal effects in relation to third parties it had to be made the subject of a preliminary ruling under article 35 (1) TEU.

The ECJ even allowed actions for annulment brought by the commission or a member state against such acts and under the conditions of article 35 (6) TEU274, although this did not mean that the ECJ also welcomed jurisdiction for such actions brought by private parties against Union lists.275

101. The Segi case was very significant in that the ruling of the ECJ made it possible for applicants to contest a common position indirectly before the ECJ in the pre-Lisbon period.276

The “Gestoras pro amnistia” case is identical to the Segi case. This concerned a Basque organisation that also claimed to have suffered damages due to its listing in common position 2001/931 that was adopted on the double legal basis of articles 15 and 34 TEU. It was presumably added to the list for its connection with the terrorist organisation ETA.277

Segi and Gestoras pro Amnistia were not the only ones that contested their inclusion in European terrorist lists. Since 2001, the European Courts have been confronted with many individuals and entities claiming annulment of these lists. Not only regulations 881/2002 and 2580/2001 have been challenged before the courts, but in addition common position 2001/931 and further common positions and Council decisions updating the EU lists.

102. The “Ompi” case is one case in point and is discussed here because when it comes to the question on competence, it connects in a certain way to the Segi case.

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274 Case C- 355/04, para. 55
Ompi was first included in the UK’s national terrorist list by the UK Secretary of State for the Home Department. As a reaction, Ompi brought an action against that decision before the Organisation Appeal Commission and the High Court of Justice. A few months later, the UNSC adopted resolution 1373. Subsequently common position 2001/931 and regulation 2580/2001 were adopted to implement that resolution.

At first, Ompi was not included in these lists. It was only later, when common position 2001/931 was updated by common position 2002/340 and 2002/462, that Ompi could not escape its inclusion in the lists. Council decision 2002/460 implemented these common positions and had the unwanted effect of freezing Ompi’s assets.\(^\text{278}\)

As a result, Ompi asked the CFI to annul all the Council common positions and decisions that had included Ompi in the EU terrorist list. The acts that were initially challenged were common positions 2002/340 and 2002/462 and Council decision 2002/460.\(^\text{279}\) However, these acts were repeatedly repealed and replaced after the application was lodged and eventually the CFI had to rule on common position 2005/936 and Council decision 2005/930.\(^\text{280}\)

103. The question on competence was in fact only raised in the application for annulment of common position 2005/936. Ompi claimed that this act was wrongfully based on articles 15 and 34 TEU, while it should have been based on provisions of the EC Treaty. The Council had thus, according to Ompi, disregarded Community competences in order to deprive it from judicial protection against that common position. Even though the CFI was found to have limited jurisdiction to rule on this action because Ompi had claimed an infringement of community competences, it concluded that this action for annulment was unfounded. The CFI argued that there was no infringement of Community competences since articles 60 and 301 TEC themselves provide for the prior adoption of a common position in order for them to be applicable. In other words, the Council relied on community competences to adopt this common position instead of breaching community competences.\(^\text{281}\)

\(^{279}\) Case T-228/02, People’s Mojahedin Organisation of Iran v Council, [2006] ECR II-4665, para. 2-17
\(^{281}\) Case T-228/02, para. 56-60
As far as the action for annulment against Council decision 2005/930 goes, the question of competence was not raised here. This action concerned the alleged infringement of fundamental procedural rights. In that regard, the CFI made a distinction with the Yusuf and Kadi cases.

In these cases, the list annexed to regulation 881/2002 was nothing more than a copy of the UN list attached to resolution 1390. There was no way for the Community to examine the listing of these individuals. So, even if there was something wrong with the decision according to the Community rules, there could never be a review of the decision since the community cannot examine the decision in the first place. Therefore the Community standards on the protection of fundamental rights did not apply.  

However, in the Ompi case, the CFI argued that these community standards did apply to Ompi as its listing was not the consequence of a UN decision. On the contrary, it was the EU that autonomously included Ompi to its terrorist list after the decision of the UK Secretary of State for the Home Department. As de CFI made a distinction in jurisdiction of the European Courts between UN lists and EU lists, it created a de facto double standard of protection of fundamental rights within EU law. However, uniformity was restored in 2008 by the ECJ.

Subsequently, the CFI looked at whether the right to a fair hearing had been respected. To that end, it distinguished the initial decision to freeze funds from subsequent decisions that merely maintain the freezing. In this case, Ompi had asked for an annulment of common positions 2002/340 and 2002/462 which are the subsequent decisions of common position 2001/931.

The CFI ruled that any subsequent decision to freeze funds must be preceded by the possibility of a further hearing and, where appropriate, notification of any new evidence. In Ompi’s case, the CFI ruled that this right was not respected and therefore annulled the contested Council decision. The Common positions were not annulled because, as already mentioned, these acts do not fall within the Court its jurisdiction.

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282 T. TRIDIMAS, “Terrorism and the ECJ: empowerment and democracy in the EC legal order”, Queen Mary University of London School of Law Legal studies Research paper (2009) 12, p. 118
283 T. TRIDIMAS, “Terrorism and the ECJ: empowerment and democracy in the EC legal order”, Queen Mary University of London School of Law Legal studies Research paper (2009) 12, p. 118
285 Ibid, para. 131; Summary of Ompi ruling by the Commission http://ec.europa.eu/dgs/legal_service/arrets/02t228_en.pdf
After the judgment in Ompi I judgment, the Council decided to continue to include Ompi in the terrorist list.

The CFI said in Ompi II that the Council was indeed competent to do so, but that it was under an obligation to meet the requirements of article 1(4) of common position 2001/931. This is to verify that a competent national authority had taken the decision to (continue to) include someone to the list. It ruled that this was not the case since the ‘proscribed organisation appeal commission’ argued that the decision of the UK Secretary of State for the Home Department to continue to include Ompi on the UK terrorist list was unreasonable and even ‘perverse’. Therefore, the listing was annulled.

A few months later, the CFI had to rule for the third time on Ompi’s listing and once again annulled its listing, but now because the Council did not submit the relevant information on which it had based its listing decision to the European Courts.

105. It is clear that the ECJ’s findings in the Ompi case law have had significant repercussions. It set in motion a series of new challenges of individuals and organisations against their inclusion in the EU terrorist lists. In all these cases, the applicants alleged infringements of essential procedural requirements and the CFI annulled the contested Council decisions every time.

4.1.3.2.2. Council Regulation 2580/2001

106. In order to implement common position 2001/931, the Council adopted regulation 2580/2001 on the basis of articles 60, 301 and 308 TEC.
This regulation only concerns EU external terrorists and provides for the freezing of assets of the persons identified in the list and prohibits the provision of financial services to such persons.294

107. In the “Sison” case, the CFI had to rule on the question if articles 60, 301 and 308 TEC were the right legal bases to adopt regulation 2580/2001. Sison had argued that the Council was not competent to adopt this regulation on the legal basis of articles 60, 301 and 308 TEC. On the one hand she found that articles 60 and 301 TEC only authorize the adoption of sanctions against third states and not against individuals and organisations. On the other hand she claimed that the Council’s power to unilaterally list individuals and organisations could not be justified since it gives the Council a judicial role and powers in criminal matters which is not provided for in the treaties. 295

The CFI however did not agree with Sison’s view and stated that articles 60, 301 and 308 TEC did constitute the right legal bases for the adoption of regulation 2580/2001. Initially, the CFI identified the similarities between the contested regulation and regulation 881/2001. Then, it referred to the cases of Yusuf and Kadi where regulation 881/2001 was rightfully adopted on the basis of articles 60, 301 and 308 TEC. Furthermore, it dismissed the argument that the Council had arrogated to itself a judicial role with criminal powers because the sanctions were not of a criminal nature. Finally, it concluded that this case was very similar to the Yusuf and Kadi cases and therefore it rejected Sison’s accusations on the same grounds.296

108. Now that the two sanction regimes have been set out, it seems appropriate to point at certain differences between the adoption of UN lists and autonomous EU lists. First, the autonomous EU regime identifies targets at member state level, while the targets in the other regime are identified at UN level. Second, the legal basis for the adoption of common positions is different. The autonomous EU list uses the double legal basis of articles 15 and 34 TEU, while the UN lists does not allow for third pillar involvement and only use article 15 TEU so that the common position is entirely external in its scope.297 Finally, in the autonomous EU regime, the list of targets is not included in regulation 2580/2001 itself, but in separate Council regulations that implement article 2(3) of that regulation. The UN based regime on the other hand, works with Commission regulations.298

295 Case T-47/03, José Maria Sison v Council of the European Union [2003] ECR II-73, para. 89- 91
296 Ibid Case T-47/02, para. 98- 102
4.1.4. Conclusion

109. The adoption of individual sanctions in the pre-Lisbon period brought along three major problems. First, the treaties did not provide for an explicit legal basis. Second, the inter-pillar structure of the treaties complicated the adoption of an efficient implementation system of targeted sanctions. This was illustrated by the difficulties that arose for internal terrorists within the EU autonomous sanctions regime. Third, the lack or difference in judicial review between the listed persons and entities supplemented the whole sanctions system with an arbitrary element.

The first individual sanctions were adopted by the EU through a broad interpretation of articles 60 and 301 TEC. That way it used its traditional two-phased procedure not only for the explicitly mentioned third countries, but also for individuals and entities sufficiently linked to the government or territory of a third country. The basic assumption was to make that third country change its behavior or policy by targeting the people responsible for it. However, as we have seen in the Milosévic and Minin cases, this reasoning of having a sufficient link was interpreted rather broadly as the legal basis was still used after the collapse of the challenged regime. Apparently, the only condition was that they would maintain their influence on the third state’s behavior. The Bushra Al-Assad and Yanukovych listings illustrated that the same reasoning continues to exist under the current Treaty provisions.

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110. It was only when the UN adopted two UNSC resolutions in its increased fight against terrorism that the limits of the EU’s implementation of individual sanctions so far was revealed and article 308 TEC was added to the legal basis of articles 60 and 301 TEC.

Adopting sanctions against individuals having no sufficient link with the governing regime or territory of a third country on the basis of the latter two articles was seen as one step too far. This triple legal basis was in fact a pragmatic solution for the fact that there was absolutely no provision for the adoption of these kind of sanctions. This is the practice of using provisions that were, according to its wording and objectives, clearly not intended to do this. The Kadi cases before the CFI and the ECJ clearly showed that the chosen legal basis was not favourably received by everyone and identified its main problems.

299 Note reference number 45-46  
300 Note reference number 48  
301 Note reference number 56-57  
303 Note reference number 65-72
111. Aside from the lack of explicit legal basis, there were also some difficulties concerning sanctions against internal terrorists adopted in the autonomous EU sanctioning regime. Since they could not fall under the scope of CFSP, they had to be adopted on the basis of third pillar instruments. Therefore, common position 2001/931 was adopted on the double legal basis of articles 15 and 34 TEU. As a result, they were not subjected to a Council regulation under articles 60 and 301 TEC so that their inclusion in the sanctions list had no direct consequences in the legal orders of the member states. Their feasibility depended on the cooperation between member states on the basis of article 4 of common position 2001/931. As member states were not able to put pressure on them through coercive, operational measures and the cooperation between member states already took place before the actual listing\(^{304}\), the added value of the EU’s autonomous sanctions regime for internal terrorists was almost non-existent.

The absence of direct legal consequences of the sole use of a common position was reflected in the fact that article 35 TEU did not provide the ECJ with any jurisdiction over common positions in the third pillar.\(^{305}\) However, in Segi the ECJ rejected this lack of jurisdiction and argued that common positions in the third pillar could be referred to the ECJ through a preliminary procedure on the condition that this common position intended to create effects towards third parties.\(^{306}\) Even so, the provisions of the TEU discriminated internal terrorists towards external terrorists on the matter of direct jurisdiction before the ECJ, even though they suffered equal reputation damage due to being publicly alleged of supporting terrorism.\(^{307}\) While this difference continued to exist throughout the entire pre-Lisbon period, the difference in jurisdiction between listings on UN lists and EU lists was restored by the ECJ in 2008.

112. The pillar structure had the result that it became possible to adopt measures that affected the targeted individuals and entities in a profound way while at the same time rejecting democratic control and jurisdiction of the European Courts.\(^{308}\)

Leaving the member states in charge of individual sanctions could have been proposed as a possible solution to overcome the competence problems as well as the absence of enforceable sanctions against internal terrorists in the pre-Lisbon period.

\(^{304}\) C. ECKES, “Sanctions against individuals-Fighting Terrorism within the European Legal Order”, 4(2) EuConst (2008), p. 49

\(^{305}\) Note reference mark 97

\(^{306}\) Note reference mark 100


However, this would possibly have led to a creation of safe havens for the financing of terrorism when not all member would implement the sanctions in the same manner and as a consequence disturb the idea of creating a level playing field.\textsuperscript{309}

The competence problems in the pre-Lisbon period should have been solved with the introduction of two new legal bases in the Lisbon Treaty. Yet, they have been replaced by other issues that are at least as important.\textsuperscript{310}

4.2. \textbf{Post Lisbon}

4.2.1. \textbf{Introduction of two explicit legal bases}


With regard to the adoption of sanctions, the Treaty of Lisbon tried to meet with the ongoing evolution towards smart sanctions and at the same time remedy the legal basis problems that characterized the pre-Lisbon period.\textsuperscript{311}

To that end, the Treaty introduced two explicit legal bases for the adoption of sanctions against individuals and non-state actors: article 75 TFEU and article 215(2) TFEU. Together they explicitly provide for the adoption of three types of sanctions, whereas the EC Treaty only explicitly provided for one type of economic sanctions (against third states) in articles 60 and 301.\textsuperscript{312}

Article 75 TFEU replaces the former article 60 TEC and allows for the adoption of measures necessary to achieve the objectives of the EU’s Area of Freedom, Security and Justice (hereinafter: “AFSJ”), as regards preventing and combating terrorism and related activities.


\textsuperscript{311} In the European Parliament’s report of 20 February 2002, one of the key documents in preparation if the Treaty of Lisbon, the Committee on foreign affairs pointed out that the treaty would provide new legal bases for sanctions against non-state entities and for the prevention of terrorism amongst others relating to urgent financial support for third countries, humanitarian aid, combating climate change, etc.

114. It provides an explicit legal basis for the adoption of ‘a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-state entities.’\(^\text{313}\) This framework is to be adopted by the Council and the Parliament through the ordinary legislative procedure. Implementation is by a Council act on a proposal from the commission and without involvement of the European Parliament.\(^\text{314}\)

This new article differs considerably from article 60 TEC, since it does not refer back to the procedure in article 215 TFEU, whereas article 60 did refer back to article 301 TEC. As a corollary, their adoption procedures are different and article 75 TFEU establishes inter alia an autonomous sanctioning regime for the EU against EU-internal terrorists, as part of the new created AFSJ. Indeed, article 75 TFEU remedies the former impossibility to adopt autonomous financial sanctions against EU-internal terrorists.\(^\text{315}\)

115. Article 215 TFEU replaces former article 301 TEC and is part of the CFSP. Where article 75 TFEU provides for the adoption of sanctions against individuals specifically in the field of terrorism, article 215 TFEU provides for two other types of sanctions. On the one hand, sanctions against third countries and on the other hand, sanctions against individuals. Indeed, article 215 TFEU now expressly grants the Council the power to adopt sanctions against individuals, groups and non-state entities on the basis of the same procedure as that of sanctions against third states.\(^\text{316}\)

The new article 215 TFEU and the former article 301 TEC are very much alike since the former maintains the same two-phase procedure as the latter: the adoption of a CFSP decision in a first phase (‘a measure pursuant to chapter 2 of Title V TEU’) followed by a Council decision adopted with a qualified majority. However, this Council decision is now, contrary to article 301 TEC, adopted on a joint proposal from the High Representative and the Commission.\(^\text{317}\)

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\(^{313}\) Art. 75 (1) TFEU


116. The relationship between article 75 TFEU and 215 TFEU is unclear. They were originally introduced in the Treaty establishing a constitution for Europe (hereinafter ‘the Constitutional Treaty’) as articles III-160 and III-322. The former was the predecessor of article 75 TFEU and the latter that of article 215 TFEU.\textsuperscript{318}

The old articles show much resemblance to the new ones as the Constitutional Treaty already gave them an explicit legal basis for the adoption of restrictive measures against individuals and non-state actors.

However, article III-160 was located under Section 4 ‘Capital and Payments’ whereas article 75 TFEU is now placed under Chapter 1: ‘General Provisions’ in Title V: ‘Area of Freedom, Security and Justice’.\textsuperscript{319} Article 215 TFEU on the other hand is located under the heading ‘restrictive measures’ as was article III-322.

Even though they both provide for the adoption of the same sort of sanctions, there are a few identifiable differences. Article 75 TFEU has a more narrowly defined scope as it concerns capital movements and payments to prevent and combat terrorism, while article 215 TFEU is more generally defined.\textsuperscript{320} The idea of article 75 TFEU was to create the possibility of adopting individual sanctions to use specifically within the framework of the EU’s fight against terrorism where measures need to be adopted fast, whereas the sanctions provided for in article 215 TFEU can be used in all other cases.\textsuperscript{321}

117. Besides that, article 215 TFEU belongs to the CFSP, whereas article 75 TFEU is placed within the AFSJ. This is reflected in their procedural differences. In article 75 TFEU, the Council and the European Parliament act in accordance with the ordinary legislative procedure, as set out in article 294 TFEU, without a prior CFSP decision. Article 215 TFEU on the other hand, prescribes a two-phased procedure, similar to that of article 301 TEC, in which a decision is unanimously adopted under CFSP in a first phase and implemented by qualified majority in the council on a joint proposal from the high representative and the commission in a second phase.\textsuperscript{322}

\textsuperscript{318} Treaty establishing a Constitution for Europe, articles III-160 and III-322
\textsuperscript{319} In the presidency conclusion of the Council of the European Union on 21 Jun 2007 it was already said that ‘article 60, as amended by the 2004 IGC, will be transferred towards the end of the Chapter on general provisions in the Title on the Area of Freedom, Security and Justice.’
\textsuperscript{320} M. CREMONA, “EU external action in the JHA domain”, in: M. CREMONA, J. MONAR and S. POLI (Eds.), The external dimension of the European Union’s Area of Freedom, Security and Justice, (Brussels: P.I.E. Peter Lang, 2011), p. 100
\textsuperscript{322} Art. 215 TFEU
It is mostly because of these differences in the involvement of the different institutions that the choice for the right legal basis becomes crucial. Even though the second phase of their procedures is more or less the same, this is not the case for the first part of the procedure as article 75 TFEU prescribes the adoption of an administrative framework with full involvement of the European Parliament, while article 215 TFEU requires the prior adoption of a Council common position where the European Parliament merely has to be informed.323

The choice for one of the two legal bases also has consequences for the geographical application of the measures. Where the EU member states do not have the possibility to opt-out of measures adopted under article 215 TFEU, the UK and Denmark do have this option for article 75 TFEU. However, the UK tends to opt-in on it.324

118. For reasons of completeness it should also be mentioned that the pre-empting effect of article 75 TFEU is different from that of article 215 TFEU. The former article is a shared competence. In this case this means that member states can no longer act as soon as the EU has adopted an administrative framework, which has not yet been done so far. Article 215 TFEU on the other hand represents neither an exclusive nor shared competence so that the member states can adopt national measures as long as their content is not contrary to the objectives of the CFSP.325

As important it is to distinguish article 75 TFEU and 215 TFEU from each other, we will see that the Treaty of Lisbon makes it equally difficult to effectively do so.

4.2.2. Delimitation problems after the Treaty of Lisbon

119. On the one hand, the Treaty of Lisbon clearly remedies the former legal basis problems regarding the adoption of sanctions against individuals with the introduction of articles 75 and 215(2) TFEU. On the other hand, the Treaty seems to replace the old problems by introducing new ones as a corollary of the adoption of new provisions on EU external action.

The Treaty aims at increasing coherence and consistency of the EU’s external action by introducing some major institutional innovations such as the abolition of the pillar structure (art. 1 TEU), a single set of foreign policy objectives (art. 21 TEU) and new institutional actors like the High Representative for Foreign Affairs and Security Policy and the European External Action Service.\(^{326}\) However, according to article 24(1) TEU the CFSP remains ‘subject to specific rules and procedures’\(^{327}\) so that it distinguishes itself from the rest of the EU’s external action.

The structure of the treaties clearly illustrate this division as all substantive areas of the EU’s external action are laid down in part V of the TFEU, while the CFSP provisions are included in title V of the TEU. Moreover, even within this Title V there is a chapter including specific provisions on the CFSP.\(^{328}\)

120. We could argue that the CFSP in a certain way remains a separate pillar of the EU for the following reasons. First of all, the CFSP puts more emphasis on the role of the European Council, the Council and the High representative, while the other policies accentuate the role of the Commission and the European Parliament. Secondly, it is not possible to adopt legislative acts within CFSP as opposed to other policies, only ‘decisions’ taken by unanimity.\(^{329}\) Thirdly, the flexibility clause in article 352(4) may not be used to achieve CFSP objectives. Finally, the Treaty of Lisbon has only given limited jurisdiction of the ECJ in the field of CFSP, admittedly more than in the pre-Lisbon period, which will be discussed in more detail below.\(^{330}\)

All of these differences clearly illustrate the importance of delimitation between CFSP and non-CFSP. In this case, the importance to distinguish article 75 TFEU from article 215 TFEU.\(^{331}\)

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\(^{327}\) Art. 24(1) TEU ; P.J. CARDWELL (Ed.), EU external relations law and policy in the Post-Lisbon era, (The Netherlands, The Hague, TMC Asser Press/Springer, 2012), p. 113


\(^{329}\) Art. 24(1) and 31(1) TEU


However, this separation of the CFSP should not be exaggerated as it is subject to the same foreign policy objectives as the rest of the EU’s external action following the Treaty of Lisbon’s strive for more coherency and consistency in this policy field. Unfortunately, this is also one of the reasons why it became so difficult to delineate the CFSP as we will examine below. Indeed, the new provisions on the EU’s external action in the Treaty of Lisbon significantly hinder the framing of the CFSP and therefore also its distinction with other policies such as AFSJ.

121. First of all, the Treaty introduces a new article 40 TEU that replaces article 47 of the former EU Treaty. The latter article states that ‘nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent treaties and acts modifying or supplementing them.’

The introduction of this article was inspired by the fear that the intergovernmental nature of the CFSP would contaminate the supranational decision-making and placed the EC Treaty in a hierarchically superior position over the EU Treaty. The Small Arms and Light Weapons judgment (ECOWAS judgment) illustrates this effect of article 47 TEU in a profound way. In this case the ECJ had argued that when a measure pursued both a CFSP and a non-CFSP objective without one being incidental to the other, that the measure had to be adopted on the sole non-CFSP legal basis. The reason for this precedence had to be found in article 47 TEU which did not allow a measure to be taken on a CFSP legal basis when it could have properly been adopted on the basis of the EC Treaty.

Article 40 TEU abandons this approach and contains the following:

“The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.”

333 Case C-91/05, Commission v Council (ECOWAS) [2008] ECR I-3651 ; ‘ECOWAS’ stands for Economic Community of West-African states
This article reflects a change in the relationship between the former EC and EU treaties, now the TEU and the TFEU. There is no longer a hierarchical relationship between the former EC Treaty and the former EU Treaty and in particular between non-CFSP and CFSP provisions. Both the EU competences under the TFEU as well as the CFSP competences are equally protected against encroachments from one another.  

122. Although they are now considered to be equal, article 40 TEU clearly emphasizes the special nature of the TEU-based CFSP and the fact that it is separated from the other TFEU-based policy fields.

Article 1(3) TEU replaces the former article 1(3) of the EU Treaty and supplements this view of equality as it states that: “The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union. Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.”

As article 40 TEU, read in combination with article 1(3) TEU, elevates CFSP to an equal level of protection it is no longer possible to delimitate between CFSP and non-CFSP on this basis.

123. Secondly, the European Court of Justice can no longer apply its traditional centre of gravity test due to the lack of specific CFSP objectives. Article 21(2) TEU has replaced these specific CFSP objectives by overall objectives for the entire EU external action. The fact that they indeed apply to CFSP is set out in article 23 TEU. The only article that could ultimately be used to determine the scope of the CFSP is article 24(1) TEU which is intended to identify the EU’s competence in CFSP matters.

It states that: “The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.”

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337 P. VAN ELSEWEGE, “EU External action after the collapse of the pillar structure: In search of a new balance between delimitation and consistency”, 47(2) CML Rev. (2010), p. 1002-1003
338 Articles 21, 23 and 24(1) TEU
Unfortunately, this article is defined rather broadly as it refers to ‘all areas of foreign policy’ and is not further specified in the TFEU. Some authors like Eeckhout propose to specify this provision by looking at the specific CFSP objectives before the Treaty of Lisbon was adopted.340

124. Despite the introduction of overall objectives for the EU’s external action, it may be possible to apply the centre of gravity test anyway. Again by making use of these specific CFSP objectives. In fact, article 21(2) TEU unites two kind of objectives. On the one hand, the CFSP objectives of the former article 11(1)TEU such as the preservation of peace, prevention of conflicts and strengthening of international security and on the other hand the external policies of the former EC such as development cooperation, trade, environmental protection and humanitarian aid. The aim and content of the measure in question would then decide if it has to be adopted on a CFSP or non-CFSP legal basis.341

Since the above mentioned provisions in the TEU make sure that the CFSP no longer has its own specific objectives, but is now guided by the general principles and objectives of EU external action as a whole, the Court also can no longer attribute the leading objective of a measure as an objective belonging to CFSP.342 However, some objectives in article 21(2) TEU have a more mixed nature so that there is no clear-cut answer.343

Having a clear-cut answer seems to be particularly difficult in the case of counter-terrorism measures. It becomes very hard for the ECJ to decide if these measures have to be adopted under CFSP or not as it is not always clear whether they belong to the EU’s counter-terrorism policy as part of the newly created AFSJ or to the CFSP that promotes international peace and security.344

342 P. Van Elsuwege, “EU External action after the collapse of the pillar structure: In search of a new balance between delimitation and consistency”, 47(2) CML Rev.(2010), p. 1003-1004
A traditional centre of gravity test is in this case particularly difficult as their leading objective does not only concern the external action of the EU, but also the development of AFSJ. Both dimensions are thus to be seen as equally important and cannot be separated in practice.  

125. The development of the AFSJ in the Treaty of Lisbon was the logical consequence of an ongoing evolution that had already started in 1999. It seems very difficult to identify its overall policy objective since the current treaties have merely brought together a range of incompatible objectives. Even though they are mostly related to the internal security of the EU, we cannot escape the observation that AFSJ is also closely linked to the EU’s external policies such as the CFSP because threats to the internal security of the EU often originate outside the EU.  

The Treaty of Lisbon does not explicitly provide the AFSJ with an external dimension that would cover these kind of issues. This means that there are no explicit external objectives. However, article 21 TEU implicitly refers to the AFSJ’s external dimension saying that the overall external objectives are to be pursued by the Union ‘in the development and implementation of the different areas of the Union’s external action (...) and of the external aspects of its other policies’. This means that the AFSJ is also responsible for pursuing the objectives of the EU’s external action. This observation, in combination with the fact that the AFSJ uses other external policies such as CFSP to pursue its objectives, establishes a clear link between the AFSJ and the CFSP.  

It is this link between the external dimension of the AFSJ and the CFSP, their lack of specific policy objectives and the introduction of new provisions on external action by the Treaty of Lisbon that make it an almost impossible task to delimitate CFSP from AFSJ.  

126. We could argue that the Treaty of Lisbon makes the advantages of the two explicit legal bases undone by making it so difficult to choose between article 75 and 215 TFEU.

345 P. V. ELSUWEGE, “EU External action after the collapse of the pillar structure: In search of a new balance between delimitation and consistency”, 47(2) CML Rev. (2010), p. 1011  
Nevertheless, the choice for one of the two possible legal bases has significant implications as it decides on whether or not the specific rules and procedures of the CFSP apply.

When a measure is adopted under the CFSP, there is almost no participation of the European Parliament and the emphasis lies on the involvement of the European Council, the Council and the High representative. Having briefly touched upon the limited role of the ECJ within CFSP in a previous paragraph, this will now be discussed in more detail.

The Treaty of Lisbon has largely extended the ECJ role in AFSJ. It has full competence to deliver preliminary rulings, rule on annulment proceedings, judge on alleged infringements of member states and hear claims for damages. Consequently, there is full jurisdiction of the ECJ over acts adopted on the basis of article 75 TFEU.\(^{349}\)

127. Unfortunately, the Treaty did not follow the same direction for the CFSP. According to the newly introduced article 275 TFEU, the ECJ does not have jurisdiction with respect to CFSP decisions.\(^{350}\)

Nevertheless, there are two major exceptions to this rule.

First of all, the ECJ does have competence to monitor compliance with article 40 TFEU. Secondly, it may review the legality of sanctions adopted against individuals.\(^{351}\) The latter is an exception that was partially introduced as a follow of the Kadi case-law. From now on the ECJ has jurisdiction to review the legality of a CFSP act directly and not only of the measure adopted on the basis of that CFSP act.\(^{352}\) Thus, contrary to the pre-Lisbon period, it becomes possible for the ECJ to review both regulation and CFSP common positions.

128. The exceptions in article 275 TFEU clearly illustrate how closely intertwined the AFSJ and CFSP acts are. The first exception allows the ECJ to delineate the scope of the CFSP and therefore indirectly also that of other EU competences such as the AFSJ.


\(^{350}\) Article 275(1) TFEU

\(^{351}\) G. GARGANTINI, “European cooperation in counter-terrorism and the case of individual sanctions”, 3(3) Perspectives on federalism (2011), p. 173 ; article 275(2) TFEU

The introduction of the second exception was not only a direct consequence of the Kadi case-law but the Segi and Gestoras Pro Amnistas cases also opened the way for judicial control of CFSP acts. In that case the ECJ argued to have jurisdiction for preliminary rulings on CFSP common positions, while at the same time not explicitly allowing private parties to bring actions for annulment before the ECJ. Even though Segi has contributed to the enlargement of the ECJ’s jurisdiction in CFSP, it is remarkable that article 275 TFEU, by referring to article 263 §4 TFEU, only allows the ECJ to hear annulment proceedings of CFSP acts brought by private parties and does not allow national courts to ask preliminary questions. 353

Although the ECJ has direct jurisdiction both under article 75 TFEU and 215 TFEU, in practice it seems that this is certainly not guaranteed. Sanctions against individuals adopted to change a third state’s behaviour or policy after the Treaty of Lisbon indeed enjoy this right as they are adopted on the basis of post-Lisbon instruments. However, counter-terrorism sanctions that are currently being adopted on the basis of the autonomous sanctions regime as well as the UN based sanctions regime are still founded on pre-Lisbon instruments. Indeed, while the lists of terrorist suspects are regularly updated, they are still based on pre-Lisbon instruments such as common positions 2001/931 and 2002/402 as well as regulation 881/2002. 354

129. This means that sanctions adopted on the basis of those common positions cannot be subjected to the jurisdiction of the ECJ even though the ECJ has been given jurisdiction to do so by the Treaty of Lisbon. At this point, a reference to Segi seems appropriate since only preliminary references are possible against those common positions including individual (terrorist) sanctions. 355

It must be said that even though the ECJ’s role in the area of CFSP is rather limited, it is extremely important as it is responsible for defining its scope and therefore delineate CFSP from other areas. 356

4.2.2.1. Inter-institutional conflicts: Case 130/10 European Parliament v. Council

130. This case exposes the complexities arising from the new legal framework of EU external action after the entry into force of the Lisbon Treaty, and more specifically the difficult relationship between article 75 TFEU and 215 TFEU.

Council Regulation 881/2002 imposing restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaida network and the Taliban was adopted on the triple legal basis of articles 60, 301 and 308 TEC.

In 2009, the Commission proposed to amend this regulation on that same legal basis,357 following the ECJ judgment in the Kadi case.358

131. Later that year, the Treaty of Lisbon entered into force and the Commission proposed to adopt the amendments on the basis of article 215 (2) TFEU, including a small role for the European Parliament. The Committee on Legal Affairs of the European Parliament immediately contested this and argued that article 75 TFEU was the right legal basis since the proposed regulation had the objective of ‘preventing and combating terrorism and related activities by non-state entities’.359 Nevertheless, Regulation 1286/2009 of 22 December 2009 was adopted on the legal basis proposed by the Commission and the European Parliament reacted with an action for annulment before the ECJ.360

132. The parliament first stated that the choice of legal basis must rely on objective factors, amenable to judicial review, including the aim and content of the measure. Since the contested regulation was only an amendment of regulation 881/2002 it had to be adopted on the same legal basis since their content and aim stay the same. The Parliament argued that, content wise, the regulation did not in any way change the nature of its predecessor since it merely reformulates or clarifies its provisions.

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358 Council Regulation 1286/2009 introduced a listing procedure which respected the fundamental rights of the defense and the right to be heard. The listed person, entity, body or group is to be informed of the reasons for listing by the 1267 Committee and has to be given an opportunity of expressing a view on those reasons
360 Action brought on 11 March 2010 – European Parliament v Council, Case C-130/10
When looking at the objective of the regulation, the parliament said this is clearly the combating and financing of terrorism, just like regulation 881/2002. Therefore, the regulation should have been adopted on the legal basis of article 75 TFEU.\(^{361}\)

133. The Council on the other hand, argued that the purpose of the contested regulation, just like that of regulation 881/2002, is to combat international terrorism and financing in order to maintain international peace and security. Accordingly, the regulation was rightly adopted on the basis of article 215 TFEU as it fell within the sphere of the CFSP and not the AFSJ.\(^{362}\)

In order to endorse this statement, the Council made a division between ‘internal’ and ‘external’ terrorists and argued that the treaties, before the entry into force of the Lisbon Treaty, did not provide a specific legal basis for the adoption of measures against ‘internal terrorists’. Therefore, regulation 881/2002, which was adopted before the entry into force of the Lisbon Treaty, could only have provided measures against ‘external terrorists’. As a corollary, both the contested regulation and regulation 881/2002 did not fall within the scope of the provisions intended to create an area of freedom security and justice but fell within the common foreign and security policy.\(^{363}\)

134. Advocate General Bot upheld the view of the Council and accepted article 215 (2) TFEU as the only possible legal basis. He argued that article 215(2) constituted the appropriate legal basis for ‘measures intended to support action by third States to combat terrorism in their territory (...) since they fall by their very nature within the scope of the CFSP’, ‘measures directed against persons and entities expressly designated by the Security Council’ and finally also for ‘the implementation by the European Union of measures decided upon by the Security Council for which the designation of the persons and entities concerned is left to the discretion of the Member States’.\(^{364}\) Article 75 TFEU on the other hand would then only be used for the adoption of autonomous EU sanctions.\(^{365}\)

The commission explained why its proposal for a Council Regulation amending Regulation 881/2002 referred to articles 60, 301 and 308 TEC. The Reason was that when she proposes an amending act, she uses the provisions that formed the basis for the adoption of the original act. When examining the legal consequences of the entry into force of the Treaty of Lisbon for that act, it came to the conclusion that article 215 TFEU covered all relevant aspects of former articles 60, 301 and 308 TEC, so that the use of article 215 TFEU was the most logical choice.\(^{366}\)

\(^{361}\) Case C-130/10, European Parliament v Council, judgment of 19 July 2012, para. 12-14

\(^{362}\) Ibid, para. 17-18

\(^{363}\) Ibid, para. 21-22

\(^{364}\) Opinion of Mr. Advocate General Bot in Case C-130/10, para. 81

\(^{365}\) Opinion, para. 82

\(^{366}\) Case C-130/10, para. 25
The Commission continued by arguing that articles 215 and 75 TFEU cannot be used as joined legal bases for the contested regulation because they lay down different procedural and decision making conditions. Moreover, it stated that article 215 TFEU is the only possible legal basis because of its link with a CFSP decision due to the UNSC.\textsuperscript{367}

It explained this by emphasizing that one of the crucial differences between article 215 and 75 TFEU can be found in the need of a link to decisions in the sphere of CFSP, taken in the interests of international peace and security, whatever the precise geographical location or the scope of the terrorist threat at issue. The Commission concluded that, when restrictive measures relating to terrorism must be adopted under the TFEU following a CFSP decision further to a Security Council Resolution, article 215 TFEU is the only possible legal basis.\textsuperscript{368}

135. The ECJ first examined the possibility of a double legal basis and came to the conclusion that this was not possible due to procedural incompatibilities.\textsuperscript{369} This meant that the ECJ had to choose between one of the two articles. To be able to do so, the Court needed to examine both their scopes in a first phase and then apply its findings on the case in a second phase.

The Court started by recognizing the parties shared opinion that the legal basis of the contested regulation must correspond to that of regulation 881/2002, adopted on the basis of articles 60, 301 and 308 TEC. Thus, the legal basis had to enclose the content of the former triple legal basis.\textsuperscript{370}

Then, the Court looked at the scope of article 215 TFEU. It stated that this article mirrors the content of articles 60 and 301 TEC as it provides for the interruption or reduction, in part or completely, of economic relations with one or more third countries just like article 301 TFEU and contains a reference to financial relations to cover the areas previously within the scope of Article 60 TEC.\textsuperscript{371}

Furthermore, article 215 TFEU does no longer require the use of article 308 TEC to adopt measures against individuals that were not linked to the governing regime of a third country.\textsuperscript{372}

\textsuperscript{367} Ibid, para. 27
\textsuperscript{368} Ibid, para. 27
\textsuperscript{369} Ibid, para. 45
\textsuperscript{370} Ibid, para. 50
\textsuperscript{371} Case C-130/10, para. 51-52
\textsuperscript{372} Ibid, para. 53
136. Hereafter, the ECJ determined that article 215 TFEU was clearly part of the EU’s external action as article 215(1) TFEU provides for the adoption of economic sanctions against third states and article 215(2) TFEU for the adoption of economic sanctions against natural or legal persons and groups or non-state entities.\textsuperscript{373} Moreover, article 215(2) TFEU expressly provides for a bridge between decisions taken under the CFSP and the adoption of economic sanctions taken on the basis of the TFEU, whereas article 75 TFEU does not constitute a link with the CFSP.\textsuperscript{374}

The ECJ concluded that nothing in the wording of article 215(2) TFEU excludes the adoption of restrictive measures designed to combat terrorism.\textsuperscript{375}

After having established the scope of article 215 TFEU, the Court looked at that of article 75 TFEU and determined that, in contrary to article 215 TFEU, it does not establish any parallels with former articles 60 and 301 TEC. According to the ECJ, it does not provide for the interruption or reduction, in part or completely, of economic relations with one or more third countries but instead refers to the adoption of a framework for administrative measures with regard to capital movements and payments, when this is necessary to achieve the objectives set out in Article 67 TFEU. This clearly showed that the purpose of article 75 TFEU differs from that in articles 60 and 301 TEC.\textsuperscript{376} It explained that article 75 TFEU, is intended to combat terrorism and its financing but, in contrary to article 215 TFEU, it is part of the EU’s AFSJ and not the CFSP.\textsuperscript{377}

After having rejected the precedence of article 75 TFEU for being a more specific legal basis than article 215(2) TFEU\textsuperscript{378}, the ECJ determined that the contested regulation implements a UNSC resolution intended to preserve international peace and security and therefore falls within the scope of the CFSP.\textsuperscript{379}

137. The ECJ used the presence of a direct link with a UNSC Resolution and whether the focus of the sanctions is on preserving international security or internal security as the criteria to delimitate between article 75 TFEU and 215(2) TFEU. The former article is situated in the sphere of AFSJ and focuses on the EU’s internal security, therefore it is limited to the adoption of autonomous sanctions (in principle against external and internal terrorists). The latter article applies in the case of a prior CFSP decision and is intended to preserve international security. It forms the basis for the UN based sanctions regime.

\textsuperscript{373} Ibid, para. 57-58
\textsuperscript{374} Ibid, para. 59
\textsuperscript{375} Ibid, para. 60
\textsuperscript{376} Ibid, para. 54
\textsuperscript{377} Ibid, para. 61
\textsuperscript{378} Ibid, para. 66
\textsuperscript{379} Ibid, para. 67
The ECJ found that Council Regulation 1286/2009 implemented UNSC resolution 1390 and therefore also its specific international obligation of preserving peace and international security. Consequently, the regulation required a prior CFSP decision and as a result Council Regulation 1286/2009 had to be adopted on the single legal basis of article 215(2) TFEU.

4.2.2.2. Proposals for delimitation between AFSJ and CFSP

138. In what follows, I will discuss possible solutions for the problems surrounding the delimitation between article 75 TFEU and 215 TFEU in the adoption of sanctions against individuals suspected of terrorist activities.

The first possibility would be to use article 75 TFEU for the adoption of sanctions against internal terrorists and 215(2) TFEU for external terrorists. However, there are two problems with this approach. First, there have to be concrete criteria to decide what characterizes someone as an internal or external terrorist? This seems particularly important as external terrorists are sometimes identified as persons engaged in activities (wholly) outside the EU, but sometimes also as non-EU citizens or those that are not resident in the EU. The same applies to internal terrorists. Second, it seems almost impossible to distinguish on the basis of internal and external aspects because of the cross-border nature of terrorism. Terrorist organisations operating outside the EU may suddenly decide to attack in the EU and vice versa.

Another possible downside of this approach is that it would needlessly complicate the adoption of individual sanctions as requires a separation of internal and external terrorists in both the UN-lists and the EU autonomous lists.

139. The second possibility for delimitation is the one for which the ECJ chose in the case of the European Parliament v Council. That is to use article 75 TFEU for the autonomous EU sanctioning regime (1373 regime) and article 215(2) TFEU for the implementation of UN sanctions (1267 regime). It seems that this delimitation in which each of the two EU sanctioning regimes is adopted under its own legal basis is self-evident.

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Moreover, if article 75 TFEU would be used to adopt autonomous EU sanctions it would be possible for the EU to offer the legal safeguards and judicial review, as promised in art. 75 TFEU, because she could decide on this by herself.

This in contrary to sanctions implementing UNSC resolutions, where it is uncertain if the EU can offer legal safeguards and judicial review when the UN regime itself does not make allowance for it.\(^{383}\)

140. An additional argument to choose for this delimitation is that it would be possible to adopt autonomous financial sanctions against EU internal terrorists thanks to article 75 TFEU for the first time. This way there would be no more cases in which individuals are the subject of a CFSP common position but not of a further operational measure.\(^{384}\) However, these kind of sanctions may just as well be the only ones where article 75 TFEU would end up with, since it is not excluded that autonomous sanctions against EU-external terrorist could also be adopted on the basis of article 215(2) TFEU.

First of all, the wording of article 215(2) TFEU does not limit its use to the adoption of UN-lists. Second, sanctions against external terrorists have a foreign policy link which brings them into the sphere of CFSP and ultimately within the scope of article 215(2) TFEU.\(^{385}\)

However, the transferal of measures from one legal basis to another on the basis of the source of the terrorist threat (or other criteria used to distinguish internal from external terrorists) might lead us back to the difficulties arising from such an approach. External terrorists can take action within the EU’s borders which potentially brings all action against them within the scope of AFSJ and therefore article 75 TFEU. In contrary, internal terrorists can act outside the EU so that sanctions potentially fall within CFSP and therefore article 215 TFEU.

141. This criterion of who initiated the sanctions to distinguish article 75 TFEU from article 215 TFEU could reveal the rationale behind the introduction of article 75 TFEU. The EU has always had competence to adopt autonomous sanctions against EU external terrorists through the use of the procedure in article 301 TEU (pre-Lisbon) and, as explained in the previous paragraph, therefore also article 215 TFEU (post-Lisbon). Consequently, article 75 TFEU was actually introduced to give the EU competence to adopt autonomous sanctions against EU internal terrorist without requiring a prior CFSP decision as was the case in the pre-Lisbon period.\(^{386}\)

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\(^{383}\) ‘The Lisbon treaty’ paper Leiden University


\(^{386}\) P. VAN ELSEWEGE, “The interface between the Area of Freedom, Security and Justice and the Common Foreign and Security Policy of the European Union: Legal Constraints to Political Objectives”, in: R.L.
The problem with this delimitation on the basis of counter-terrorism sanctions is that sanctions against individuals aiming to change the policy or behavior of a third country do not fall under the scope of these two articles since they are not linked to terrorism. Nevertheless, this problem could easily be solved by placing these types of sanctions under the first paragraph of article 215 TFEU and sanctions based on UN lists under its second paragraph.

The scope of article 215 TFEU in this solution is clearly different from the one in the first solution. Delimitation based on the origin of the list makes it possible to adopt sanctions against EU internal terrorists on the basis of article 215(2) TFEU, because this article is the successor of article 301 TEC and even in the pre-Lisbon period it was common practice to adopt individual sanctions against internal terrorists on that basis.

However, when the delimitation is based on another rule, then it becomes impossible to adopt these kind of sanctions on the basis of article 215(2) TFEU. The reason lies in the fact that this article requires the adoption of a CFSP decision and these cannot include sanctions against internal terrorists that are not based on UN lists. This is perfectly illustrated by the EU’s practice in the pre-Lisbon period to adopt common position 931/2001 on the double legal basis of article 15 and 34 TEU in which internal terrorists were included in the latter third pillar instrument.

Article 75 TFEU on the other hand would then only be used for the adoption of sanctions that have nothing to do with UNSC resolutions. The difficulty here is that it might not be a great idea to use the existence of a prior UNSC resolution as the decisive criterion for distinction. First, not only the first EU sanctions regime that implements UN lists is based on a UNSC resolution (1267), but also the autonomous EU sanctions regime refers back to a UNSC resolution (1373). Second, using this delimitation criterion would mean that sanctions against political leaders of third countries based on a UNSC resolution would be adopted on another legal basis than nearly identical sanctions not based on a UNSC resolution. Therefore, this criterion might not be the best way to go.387

143. The last option is to regard article 75 TFEU as the “lex specialis” and article 215 TFEU as the “lex generalis”.\(^{388}\) As a result, all counter-terrorist measures would be adopted under article 75 TFEU. This includes both the autonomous sanctions as the UN-based sanctions. The justification for this approach can be found in the fact that article 75 TFEU specifically refers to terrorism, while article 215 TFEU does not.

The use of article 75 TFEU would then immediately improve the transparency of the legislative process due to the Parliament’s co-decision powers.\(^{389}\) However, in *European Parliament v Council*, the ECJ rejected the European Parliament’s argument that only article 75 TFEU would protect the individuals’ fundamental rights since both articles provide equal protection irrespective of the involvement of the European Parliament.\(^{390}\)

So then what happens with the latter article? Article 215 TFEU could be regarded as a replacement of article 301 TEC and cover only state sanctions in its first paragraph and more targeted sanctions against individuals sufficiently linked with the territory or the rulers of a third state in its second paragraph. The advantage of this approach is that every type of targeted sanctions would be adopted on its own legal basis.\(^{391}\) Even sanctions targeted against individuals sufficiently linked to a third country would have their own legal basis.

144. As an alternative for the above listed solutions, questions could be raised regarding the feasibility of a joint legal basis of articles 75 and 215 TFEU.

Firstly, we could wonder if a combination of articles 75 and 215 TFEU could be possible for the adoption of financial sanctions against individuals simply because the joint legal basis of former articles 60 and 301 TEC was accepted before the entry into force of the Lisbon Treaty. The problem with this is that the wording of article 75 TFEU does not support this interpretation as it looks nothing like the former article 60 TEC. It does not refer back to article 215 TFEU whereas the previous article did refer to article 301 TEC.


\(^{390}\) Case C-130/10, para. 36-37

On top of that, its procedure is totally different from that in article 215 TFEU and it refers to the objectives of the AFSJ as set out in article 67 TFEU.\textsuperscript{392}

Having rejected this first possible opening for a joint legal basis, we will have to consider other possibilities. First of all, a combination of legal bases should only be examined when the measure in question includes two aims or components that are equally important.

When one aim is clearly more important than the other, it does not require a second legal basis.\textsuperscript{393} This seems to be the case with restrictive measures to counter terrorism. In the pre-Lisbon period, the ECJ excluded the possibility of joint legal bases under article 47 TEU in the ECOWAS/SALW judgment because it stated that the content of this article simple precluded this. If it was possible to adopt a measure on the basis of the EC Treaty then it could not be adopted on the basis of the EU Treaty.\textsuperscript{394}

Although the ECJ did not further elaborate on that, Advocate General Mengozzi did. He argued, on the basis of long-standing case law of the ECJ, that a dual legal basis of CFSP and non-CFSP competences was only possible if the procedures provided for in both legal bases were not incompatible and would not undermine the rights of the European Parliament.

He concluded that the procedures were indeed incompatible since this would lead to the impossible combination of the then so-called cooperation procedure (now the ordinary legislative procedure), which entailed a qualified majority voting in the Council, and a procedure requiring unanimity in the Council.\textsuperscript{395}

145. However, the ECJ adopted a more liberal approach in recent case-law. In \textit{International Fund for Ireland} it did not reject a combination of the ordinary legislative procedure and unanimity in the Council. Also in \textit{Kadi and Al Barakaat} the ECJ accepted the combination of articles 60 and 301 TEC, requiring qualified majority voting in the Council without involvement of the European Parliament, and article 308 TEC, providing unanimity and consultation of the European Parliament.\textsuperscript{396}

\textsuperscript{392} C. Eckes, “EU counter-terrorist sanctions against individuals: problems and perils”, 17(1) \textit{European foreign affairs review} (2012), p. 121-122
\textsuperscript{395} Case C-91/05 Commission v Council (SALW) of 20 May 2008 ECR I-3651, opinion AG Mengozzi delivered on 19 September 2007, footnote 76
Moreover, a double legal basis would respect procedural and institutional balance between CFSP and non-CFSP external action provided for in article 40 TEU.

It is also in line with the EU’s strive for more coherence and consistency in its external action, set out in article 7 TFEU and article 21(3) with regard to the relationship between the different EU institutions.  

146. Despite the arguments in favour, the ECJ recently rejected the use of a joint legal basis of articles 75 and 215 TFEU in European Parliament v. Council. It referred to its previous case law and argued that a double legal basis was impossible in this case due to the incompatibility of the procedures.  

4.2.3. Remaining grey areas?

147. It is only when the idea of a double legal basis of articles 75 and 215 TFEU is rejected that the question on delimitation between the two is raised.

Although there are several possibilities to distinguish them from each other, there are certain situations that are not even captured once a delimitation is made. These ‘grey areas’ remain to exist both between article 75 and 215 TFEU and between the two paragraphs of article 215 TFEU.

4.2.3.1. Between article 75 TFEU and article 215 TFEU

148. It seemed that the last solution provides for the best distinction between article 75 TFEU and 215 TFEU. However, a division in which all counter-terrorism sanctions are based on article 75 TFEU and all general foreign policy sanctions on article 215 TFEU, appears to be affected by the same problem that all other solutions have to deal with. The fast evolving character of terrorism. It seems that what we understand under the concept of terrorism can appear as fast as it can disappear.

The result is that certain measures might initially be adopted on the basis of one of the two articles, but because of the changing circumstances eventually be transferred to the other one.

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399 Case C-130/10, European Parliament v Council [2012] para. 47-49
The sanctions Regulation against Somalia can illustrate this ambiguous situation. The legal basis for this regulation was found in article 215 (1) and (2) TFEU as it includes sanctions against Somalia as well as against persons and entities ‘engaging in or providing support for acts that threaten the peace, security or stability of Somalia’ and was adopted as an implementation of a UNSC resolution.\textsuperscript{400}

All persons and entities listed in that regulation are related to ‘Al-Shabaab’ which has only recently been designated as a terrorist organisation. If the EU were to use the type of sanctions as the distinctive criterion then sanctions against these persons and entities would have to be adopted on the basis of article 75 TFEU.\textsuperscript{401} However, when the EU would choose to distinguish on the basis of the initiator of the sanctions (UN or EU) the situation is slightly different. In this case, the foreign policy sanctions would originally be adopted on the basis of article 215 (1) TFEU and as they change into counter-terrorism sanctions they remain, be it under its second paragraph, under the scope of article 215 TFEU.

The reason is that in this case it concerns UN based sanctions which are also adopted under that article. However, what would happen when the EU would start to adopt autonomous sanctions against Al-Shabaab because it is threatening its internal security? In that case, the sanctions would have to be adopted on the basis of article 75 TFEU.

149. The same thing happened when the Taliban regime collapsed.\textsuperscript{402} The existing EU sanctions transformed into counter-terrorism sanctions as they were no longer targeted against individuals associated with a third country (Afghanistan). Subsequently, resolution 1390 had to be implemented on a different legal basis from the previous resolutions.

However, the need for a change in the legal basis could also emerge from the opposite situation. If the EU imposed sanctions on a terrorist organisation on the basis of article 75 TFEU and suddenly this organisation takes over the territory of a third country and becomes the de facto government, shouldn’t the counter-terrorist sanctions then be replaced by foreign policy sanctions on the basis of article 215 (1)? After all, the EU would impose sanctions on individuals and entities related to the government of a third state.

\textsuperscript{400} Council Regulation (EC) No 356/2010 of 26 April 2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia [2010] OJ L 105/1
Nevertheless, questions could be raised about the extent to which that territory could be regarded as a ‘state’. In this matter, it seems interesting to refer to article 1 and article 3 of the Montevideo Convention on the Rights and Duties of States. Article 1 of that Convention states that: ‘The state as a person of international law should possess the following qualifications: a. A permanent population, b. A defined territory, c. A government and d. The capacity to enter into relations with the other states.’ Article 3 on the other hand, declares that ‘The political existence of the state is independent of recognition by the other states.’

This is called the ‘declarative theory of statehood’ and means that the existence of a state is a fact and does not depend on recognition by other states. Since the EU has accepted both the definition of a state and the declarative theory of statehood in the Badinter Committee, it seems at least plausible that the legal basis would indeed have to be replaced by the one that covers foreign policy sanctions. On the other hand, we could ask ourselves if the illegal character of that government would not prevent this from happening.

The third solution in which all counter-terrorism measures are adopted under the scope of article 215(2) TFEU may provide a good answer to this specific problem since both foreign policy sanctions and counter-terrorism sanctions, giving effect to UNSC resolutions, could be adopted on the basis of article 215 TFEU. However, there are downsides to this delimitation and in European Parliament v Council, the ECJ clearly did not choose for this solution but opted for delimitation on the basis of the initiator of the sanctions.

There could be a way to delimitate between article 75 TFEU and article 215 TFEU that complies with the decision of the ECJ and at the same time limits the remaining grey areas to a minimum.

Suppose that we would depart from the delimitation on the basis of the type of the sanction. One of the results of this approach was that sanctions against individuals sufficiently linked with a third state found its own legal basis in article 215(2) TFEU. If we would assume that this means that article 215(2) TFEU is in fact capable of adopting such sanctions, then we could take this thought with us when delimitating on another legal basis, for example the one that the ECJ used. The result would be as follows. Article 215(1) TFEU would be used to adopt sanctions against third states. article 215(2) TFEU would be used to adopt sanctions against internal and external terrorists based on UN list and even sanctions against external terrorists based on autonomous EU lists.

403 A Treaty of the Organisation of American states, signed in 1933
Article 75 TFEU would only be capable to adopt sanctions against EU internal terrorists identified on autonomous EU lists. The advantage of this distinction is that in case of changing circumstances, it will only be the latter sanctions that will require a change in their legal basis from article 75 TFEU to article 215 (2) TFEU.

152. Nevertheless, grey areas will continue to exist irrespective of the delimitation criteria. Indeed, the overall result is that the borderline between article 75 TFEU and article 215 TFEU can never be determined in a definite way because there is always the possibility of changing circumstances.405

4.2.3.2. Between article 215 (1) TFEU and article 215 (2) TFEU

153. Other situations that remain somewhat vague under the current treaty provisions relate to the continuation of the “Minin” case law under article 215 (1) TFEU.

Sanctions against individuals and entities can be adopted on the basis of that article as long as they might influence a third state’s behavior even when they are in theory no longer related to the territory or government of that third country. This was illustrated by both the Bushra Al-Assad case and the Yanukovych case in a previous chapter.

Questions could be raised as to what the limits of this interpretation are. At what point can we argue that there is no longer a sufficient link with a state’s territory or governing regime so that even a broad interpretation of article 215 (1) TFEU seems far-fetched? Using article 215 (2) TFEU would also not provide a solution since it only applies to non-state actors, such as terrorists, who threaten the peace and security. Unless of course if these situations are expressly codified under his article which is the case when we would make a distinction between article 75 TFEU and article 215 TFEU on the basis of the type of sanctions (as set out above).

Especially the Yanukovych case is very interesting in this regard since there is uncertainty whether or not the former president himself and people related with his regime still pose a threat to peace and security in Ukraine now that the his regime collapsed? Is there still a link with the CFSP which is indispensable for the use of article 215 TFEU? In the comparable minin case the CFI found that this was in fact the case for Charles Taylor and his associates.

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5. Conclusion

154. This dissertation aimed at providing an answer to the question whether or not the Treaty of Lisbon was able to solve the problems that characterized the pre-Lisbon period regarding the competence of the EU to adopt restrictive measures against individuals.

On the surface it seems that the Treaty of Lisbon improved the pre-Lisbon situation regarding the adoption of individual sanctions since it addressed the main problems that characterized this period. The lack of explicit legal basis was properly solved by the introduction of article 75 TFEU and article 215(2) TFEU, the lack of jurisdiction in CFSP matters was picked up by the exceptions in article 275 TFEU and the connected problems regarding the pillar structure were solved by abolishing the pillar structure.

155. Unfortunately, the Treaty has also introduced new problems. First of all, the newly introduced legal bases are more complex than they appear at first sight. Despite the fact that they remedy the former lack of explicit legal basis, it seems to be an almost impossible task to distinguish between the two new legal bases. Due to the Treaty of Lisbon’s pursuit for coherence and consistency in the EU’s external action it became very difficult to delimitate CFSP matters from non-CFSP matters. Yet, delimitation seems all the more important as the CFSP remains in practice a separate pillar and is characterized by different rules and procedures. In my opinion, the question as to what extent the two explicit legal bases provide for an added value in comparison with the previous situation is legitimate.

Since article 75 TFEU and article 215(2) TFEU are characterized by procedural differences, it was only a matter of time before it came to an inter-institutional conflict between the EU institutions involved in the sanctioning process. In June 2012, the ECJ ruled on the relationship between article 75 TFEU and article 215 TFEU and decided to delimitate on the basis of the initiator of the sanctions. The former article was responsible for the adoption of autonomous EU sanctions, while the UN-based sanctions fell under the scope of the latter article. Nevertheless, there are a few other solutions that may provide for a better delimitation between those two articles, although each characterized by their own strengths and weaknesses.

156. A second major difficulty relates to the jurisdiction of the ECJ in CFSP matters. The introduction of article 275 TFEU should have solved the problems occurring before the entry into force of the Treaty of Lisbon, but so far it seems to be ineffective.

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406 Note reference mark 119-120
407 Note reference mark 138-146
Although it extended the jurisdiction of the ECJ in CFSP matters, we still seem to depend on pre-
Lisbon realizations such as the possibility of preliminary rulings on common positions (now
decisions). Both the autonomous and the UN-based sanctions regimes are still based on common
positions 2001/931 and 2002/402 so that listings cannot be challenged in direct actions. Therefore, the
introduction of new post-Lisbon instruments seems necessary. However, the Council and the
Commission are rather restraint to adopt new instruments since this would imply more legal
challenges.\textsuperscript{408}

The problems surrounding home terrorists listed by the EU seem to be solved by the establishment of
an autonomous sanctioning regime for internal terrorists in article 75 TFEU. As a consequence, the
EU is no longer unable to adopt sanctions against those terrorists as article 75 TFEU does not require
the prior adoption of a CFSP decision. This also means that internal terrorists are in principle able to
challenge their listing before the European Courts. However, the same problem of being stuck in the
past appears. The absence of an administrative framework under the AFSJ prevents internal terrorists
from exercising their rights granted by the Treaty of Lisbon.

Finally, in order to answer this paper’s research question, we will have to take into account the
fact that certain measures cannot as easily be put under the scope of one of those two legal bases
because of circumstances out of their control. Moreover, there are also situations that seem to slip
through the nets of both paragraphs of article 215 TFEU or even fall completely out of the scope of
that article due to an uncertain CFSP link.\textsuperscript{409}

I am convinced that there are criteria to delimitate in a way that these grey areas are reduced to a
minimum. However, if we have learned anything about the evolution of the EU competence to adopt
restrictive measures against individuals, it seems that we will have to wait for the European Courts to
adjudicate on this. The Yanukovych listings will most probably be the subject of proceedings before
the European Courts\textsuperscript{410}, as will other listings on an ambiguous legal basis. As long as the European
Courts do not adjudicate on these remaining grey areas, the uncertainty will continue to exist and we
will remain in the dark.

Theoretically speaking, the Treaty of Lisbon certainly remedies most of the problems that occurred
before its entry into force. In practice however, it seems that its improvements are reversed due to the
introduction of new difficulties that are at least as problematic as the former ones.

\textsuperscript{408} Note reference mark 128-129; C. ECKES, “EU counter-terrorist sanctions against individuals: problems and
perils”, 17(1) European foreign affairs review (2012), p. 123-124
\textsuperscript{409} Note reference mark 148-153
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