



EUROPEAN PARLIAMENT

2009 - 2014

*Committee on Legal Affairs
The Chair*

4.12.2009

Mr Juan Fernando López Aguilar
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on the legal basis of:

1. the Proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (COM(2009)0187 – C7-0011/2009 – 2009/0055(CNS))
2. the Proposal for a Council Regulation amending Council Regulation (EC) No 314/2004 concerning certain restrictive measures in respect of Zimbabwe (COM(2009)0395 – 2009/0111(CNS))
3. the Proposal for a Council Regulation imposing certain specific restrictive measures directed against certain natural and legal persons, entities and bodies in view of the situation in Somalia (COM(2009)0393 – C7-0129/2009 – 2009/0114(CNS))

Dear Mr López Aguilar,

By letter of 16 November 2009 you asked the Committee on Legal Affairs pursuant to Rule 37(2) to consider whether the legal bases of the above Commission proposals were appropriate.

In your letter, you raised a legal basis question relating to the three proposals referred to above. You stated that your committee had been informed by the Commission and the Swedish Presidency that, after the entry into force of the Lisbon Treaty, those proposals would be based on Article 215, coming under Title IV "Restrictive measures" of Part Five

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"External Action by the Union" of the TFEU. You added that under that new legal basis consultation of Parliament would not be mandatory.

You went on to ask the committee whether it could answer the following questions pursuant to its competence for legal basis questions:

- "1. Taking into account the aim and the content of the three proposals, which is the correct legal basis after the entry into force of the Treaty of Lisbon?
2. Could a double legal basis (Articles 75 and 215 of the TFEU) be taken into consideration for at least one of the proposals?
3. Could you clarify the notion of 'optional consultation' of the European Parliament (following the European Council 'Stuttgart Declaration on the European Union' of 19 June 1983 where such an optional consultation was foreseen in international matters even in the silence of the Treaties)?"

General considerations

All European Union acts must be founded upon a legal basis laid down in the Lisbon Treaty. The legal basis defines the Union's competence *ratione materiae* and specifies how that competence is to be exercised, namely the legislative instrument(s) which may be used and the decision-making procedure.

The choice of the correct legal basis is important, because, on the one hand, according to the case law of the Court of Justice the choice of legal basis is of constitutional significance as the Union is governed by the principle of conferral of powers, meaning that the Union can act only where the Treaty empowers it to do so.¹ On the other hand, it is important for the European Parliament since it determines its role in the legislative process.

According to the case law, the choice of legal basis is not subjective. The case law establishes a consistent set of criteria that should be applied when choosing the appropriate legal basis for a particular act. The choice of legal basis must be based on objective factors which are amenable to judicial review, such as the aim, object and the content of the legislative act in question.² The fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted are irrelevant.³

The legal basis proposed pre-Lisbon

Originally, Articles 60, 301 and 308 of the EC Treaty were proposed as the legal basis for the three measures. This is now only of historical interest in view of the entry into force of the Lisbon Treaty on 1 December.

Article 60

1.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

¹ Opinion No 2/00 of 6 December 2001 on the Cartagena Protocol [2001] ECR I-9713.

² See, for instance, Case C-269/97 *Commission v. Council* [2000] ECR I-2257, para. 43.

³ Case C-269/97 *Commission v. Council* [2000] ECR I-2257, para. 44.

Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.

(...)

Article 301

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.

Article 308

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.

The legal basis post-Lisbon

The Commission and the Swedish Presidency propose to adopt the three measures at issue on the basis of Article 215 TFEU, which reads as follows.

Part five - External Action by the Union

Title IV Restrictive Measures

Article 215

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards¹.

For its part, the Committee on Civil Liberties, Justice and Home Affairs asks whether that

¹ Emphasis supplied.

legal basis might be used in conjunction with Article 75 TFEU:

Part three - Union Policies and Internal Actions

Title V Area of Freedom, Security and Justice

Chapter 1 General provisions

Article 75 (ex Article 60 TEC)

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define 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.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards¹.

Aim and content of the proposed measures

1. Proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (COM(2009) 187 final)

On 27 May 2002, the Council adopted Regulation (EC) No 881/2002, which implements elements of UN Security Council Resolutions 1267(1999) and 1390(2002) and in particular freezes the funds and economic resources of individuals and entities included in a list drawn up by the UN for this purpose.

The main amendments concern the following issues:

- **the definition of “terrorist group”** in Article 2(1) of Council Framework Decision 2002/475/JHA on combating terrorism is widened. To this end, Annex I of the proposal covers natural and legal persons, entities, bodies and groups designated by the UN Security Council or by the Sanctions Committee as being associated with Usama bin Laden, the Al-Qaida network and the Taliban;
- **better information:** the Commission should be able to take a decision before informing the person, entity, body or group concerned of the reasons for listing. The reasons for listing should, however, be notified to that person, entity, body or group without delay after the decision has been published so as to give the person, entity, body or group concerned an opportunity to make his, her or its point of view known effectively. While the Commission should endeavour to notify the reasons for listing directly to the person, entity, body or group concerned, such notification may not be possible in some cases

¹ Emphasis supplied.

owing to incomplete contact details or the complete absence thereof. In such cases, a notice should be published in the *Official Journal* to inform those concerned of the applicable procedures;

- **prohibition of all kinds of assistance to military activities:** a new article stipulates that it shall be prohibited to provide, directly or indirectly, technical advice, assistance or training related to military activities, including in particular training and assistance related to the manufacture, maintenance and use of arms and related materiel of all types, to any natural or legal person, entity, body or group listed in Annex I;
- **amendment to the UN Security Council list:** where the United Nations decide to de-list a natural or legal person, entity, body or group or to amend the identifying data of a listed person, entity, body or group, the Commission is to amend Annex I accordingly;
- **treatment of classified information:** if the United Nations or a State submits classified information, the Commission shall treat such information in accordance with Decision 2001/844/EC, ECSC, Euratom of 29 November 2001 and, where applicable, the agreement on the security of classified information concluded between the European Union and the submitting State. Documents classified at a level corresponding to EU Top Secret, EU Secret or EU Confidential must not be released without the consent of the originator;
- **processing data relating to criminal offences:** the Commission may process relevant data relating to criminal offences committed by listed natural persons and to criminal convictions or security measures concerning such persons only to the extent that such processing is necessary for the preparation of a statement of reasons and review of the views on it expressed by the natural person concerned, subject to appropriate specific safeguards. Such data shall not be made public or exchanged.

2. Proposal for a Council Regulation amending Council Regulation (EC) No 314/2004 concerning certain restrictive measures in respect of Zimbabwe (COM(2009) 395 final)

On 18 February 2002, the Council decided to impose restrictive measures in respect of Zimbabwe in response to serious violations of human rights, including violations of the freedoms of opinion, association and peaceful assembly, in that country (Common Position 2002/145/CFSP). In view of its continuing concern about the human rights situation in Zimbabwe, the Council subsequently adopted Common Position 2004/161/CFSP to extend and amend the restrictive measures in respect of Zimbabwe.

Common Position 2004/161/CFSP stipulated that the freezing of funds and economic resources would apply to “individual members of the Government of Zimbabwe and any natural or legal persons, entities or bodies associated with them” as listed in the Annex to the Common Position. By means of Common Position 2008/632/CFSP, the Council broadened this scope by adding “any other natural or legal persons whose activities seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe”.

Regulation (EC) No 314/2004 implements the restrictive measures provided for in Common Position 2004/161/CFSP. That regulation provides for the freezing of funds and economic resources of natural and legal persons, entities and bodies that are not linked to the governing regime of Zimbabwe. The purpose of Regulation (EC) No 314/2004 is to bring an end to the

serious violations of human rights in Zimbabwe by applying restrictive measures against the Government of Zimbabwe, those who bear prime responsibility for and those who commit such violations.

Moreover, a provision provides clarity on the handling of classified information which may be provided in support of decisions taken in respect of the Annex to Common Position 2004/161/CFSP.

In order to create maximum legal certainty within the Community, the names and other relevant data with regard to natural or legal persons, entities and bodies whose funds and economic resources are to be frozen in accordance with Regulation (EC) No 314/2004 should be made publicly known. Processing by the Commission of relevant data relating to criminal offences committed by listed natural persons and to criminal convictions or security measures concerning such persons should be authorised subject to appropriate specific safeguards.

3. Proposal for a Council Regulation imposing certain specific restrictive measures directed against certain natural and legal persons, entities and bodies in view of the situation in Somalia (COM(2009) 393 final)

The proposal sets out to impose restrictive measures on certain persons and entities in view of the situation in Somalia.

On 20 November 2008, the UN Security Council adopted Resolution 1844(2008) confirming the general and complete arms embargo against Somalia and introducing further restrictive measures against those who provide support for acts that threaten the peace, security or stability of Somalia and those who have acted in violation of the arms embargo or who obstruct the delivery of humanitarian assistance to Somalia. The additional restrictive measures concern restrictions on admission and financial restrictive measures against individuals and entities designated by the competent United Nations Sanctions Committee. In addition to the general arms embargo in force, the resolution introduces a specific ban on the direct or indirect supply, sale or transfer of weapons and military equipment and a specific ban on the provision of related assistance and services, to individuals and entities listed by the Committee.

Common Position 2009/138/CFSP confirmed the restrictive measures which had been applied since 2002 and made provision for additional measures against individuals and entities identified by the United Nations Sanctions Committee. However, some of the measures provided for by Common Position 2009/138/CFSP, namely the prohibition on providing technical and financial assistance to the individuals and entities listed by the UN Sanctions Committee and the freezing of funds and economic resources of the said individuals and entities, fell within the scope of the EC Treaty. Council Regulation (EC) No 147/2003 imposed a general ban on the provision of assistance, training or financial assistance related to military activities to any person, entity or body in Somalia.

The proposal provides that all funds and economic resources belonging to, or owned, held or controlled by natural or legal persons, entities or bodies listed in the regulation shall be frozen. No funds or economic resources shall be made available, directly or indirectly, to them.

Annex I lists natural and legal persons, entities and bodies designated by the UN Security

Council or by the Sanctions Committee in conformity with UN Security Council Resolution 1844 (2008).

By way of derogation, the competent authorities in the Member States, as listed in Annex II, may authorise, under such conditions as they deem appropriate, the release of certain frozen funds or economic resources or the making available of certain funds or economic resources, if the competent authority concerned has determined that the funds or economic resources are necessary to satisfy the basic needs of persons listed in Annex I, and their dependent family members, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, etc.

The proposal also stipulates that it shall be prohibited to provide, directly or indirectly, any of the following to any natural or legal person, entity or body listed in Annex I: any technical assistance related to military activities or to the supply, sale, transfer, manufacture, maintenance or use of goods and technology included in the Common Military List of the European Union. It prohibits the financing or financial assistance related to military activities.

The judgment in the Kadi case

In Case C-402/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*¹, the Court of Justice upheld the legal basis of Articles 60, 301 and 308 TEC for 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, but recognised the need for the protection of the appellants' fundamental rights, who had alleged that their right to a fair hearing and to effective judicial protection had been violated.

Articles 75 and 215 of the Lisbon Treaty

The Lisbon Treaty provides for a clear distinction between sanctions deriving from the autonomous EU-managed lists, which fall under Article 75 of the TFEU and are related to the internal action of the Union, and those from the UN Sanctions Committee, which fall under Article 215 of the TFEU and are related to the external action of the Union.

In the case of Article 75, the ordinary legislative procedure applies. Parliament and the Council are competent to "define 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", but the Council alone may adopt specific operational measures.

In the case of Article 215, the Council is to act by a qualified majority, upon a joint proposal from the High Representative of the Union of Foreign Affairs and Security Policy and the Commission. It is under a duty only to inform Parliament. Article 352 TFEU, which replaces Article 308 TEC, no longer has any relevance since paragraph 4 thereof provides that it is not applicable in the context of the CFSP.

As regards the proposals under consideration, it is considered that the proposals for Council regulations concerning certain specific restrictive measures in respect of Zimbabwe and

¹ [2008] ECR I-6351.

certain specific measures directed against natural and legal persons, entities and bodies in view of the situation in Somalia must be based solely on Article 215 TFEU, since they are concerned with relations with specific third countries and are designed to address situations prevailing in third countries.

However, as far as concerns the proposal for a Council regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, it is at least arguable that Article 75 constitutes the proper legal basis, since the objective is preventing and combating terrorism and related activities by non-State entities. Moreover, in this context, it is difficult to draw the distinction between "external" and "internal" threats, since operatives of such organisations may be involved in terrorism within the EU and may even be Union citizens. The combating of terrorism, which is the aim and purpose of this proposal, does not only involve external action on the part of the EU.

Moreover, terrorism violates the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms of persons residing in the EU territory¹. The importance of the combating of terrorism as an internal goal of the EU is explicitly enshrined in Article 75 of the Lisbon Treaty. This shows the intention of the Member States to cooperate in imposing measures, such as the freezing of funds, financial aspects and economic gains, for the purposes of the fight against terrorism. Terrorism can take place inside the EU territory and, thus, it can be argued Article 75 as a *lex specialis* in relation to Article 215, for the *ratione materiae* of combating terrorism, should constitute the legal basis for this proposal for a regulation.

However, it is completely out of the question for the two legal bases of Articles 215 and 75 TFEU to be combined, since they involve incompatible legislative procedures. In the case of Article 215, the Council acts by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy, and the European Parliament is merely informed. In the case of Article 75, the European Parliament and the Council act by means of regulations in accordance with the ordinary legislative procedure.

It should further be noted that the two articles contain an identical provision: *The acts referred to in this Article shall include necessary provisions on legal safeguards*. It is considered that none of the three proposals at issue comply with this requirement as they stand. Furthermore, in the light of the judgment in *Kadi* and of the need for coherence and consistency which should characterise all EU legislative acts when it comes to respect for fundamental rights, it is considered that the provisions on legal safeguards referred to in the two articles should at least be coordinated and there is a strong argument for the creation of a mechanism involving both the Council and Parliament in order to secure such coordination.

Given that this requirement for necessary provisions on legal safeguards is not satisfied and that all the proposals are proposals of the Commission and not of the High Representative of the Union of Foreign Affairs and the Security Policy and the Commission, the proposals are defective and cannot be adopted on the basis of Article 215.

The question of "optional consultation"

¹ See Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA)

The involvement of the European Parliament in the common foreign and security policy is restricted. However, in the past informal involvement of the European Parliament has been secured in several respects. *The Solemn Declaration on European Union* signed by the Heads of State and Government at Stuttgart on 19 June 1981 introduced *optional* consultation of the European Parliament.¹ Paragraph 2.3.7 of that Declaration states that

[i]n addition to the consultations provided for in the Treaties with respect to certain international agreements, the Opinion of the European Parliament will be sought before:

- the conclusions of other significant international agreements by the Community,*
- the accession of a State to the European Community.*

The existing procedures for providing the European Parliament with confidential and unofficial information on progress in negotiations will be extended, taking into account the requirements of urgency, to all significant international agreements concluded by the Communities.

This declaration was unilateral and voluntary. Given that the Lisbon Treaty secures the European Parliament's participation in the conclusion of international agreements and that Article 215 TFEU expressly provides that the European Parliament should be only informed, the only possible conclusion to be drawn is that the Member States specifically intended to restrict the involvement of the European Parliament with regard to the measures provided for in Article 215 TFEU. Optional consultation of Parliament is nothing more than what it says, namely a voluntary decision on the part of the Council to consult Parliament where it is under no obligation to do so. There is therefore no legal basis for optional consultation of Parliament in the context of Article 215 TFEU.

In the absence of consultation of Parliament and given the existence of the identical provision in Articles 75 and 215 to the effect that *the acts referred to in this Article shall include necessary provisions on legal safeguards*, Parliament could endeavour to persuade the Council to enter into an inter-institutional agreement under Article 295 TFEU on the coordination of such safeguards. Such an agreement could be legally binding as a result of the Lisbon Treaty. However, whether such an agreement could be reached is a political and not a legal matter.

This would ensure not only a degree of participation of the European Parliament but also the furtherance of the objectives of the European Union as enshrined in the Lisbon Treaty, in particular ensuring the highest standard of human rights protection and the principle of representative democracy. It should further be borne in mind that, according to Articles 7 and 8 TFEU, the European Union should ensure consistency between its policies and activities and the elimination of inequalities, taking all of its objectives into account.

The committee considered the above questions at its meeting of 3 November 2009.

At that meeting the Committee on Legal Affairs accordingly decided unanimously, by 13 votes in favour with no abstentions², to recommend as follows:

¹ Solemn Declaration on European Union (Stuttgart, 19 June 1983), Bulletin of the European Communities, June 1983, No 6, pp. 24-29. http://www.ena.lu/solemn_declaration_european_union_stuttgart_19_june_1983-2-7725.pdf

² The following were present for the final vote: Luigi Berlinguer (acting Chair, rapporteur for opinion), Raffaele

1. The proper legal basis for the *proposal for a Council Regulation amending Council Regulation (EC) No 314/2004 concerning certain restrictive measures in respect of Zimbabwe (COM(2009) 395 final)* and the *proposal for a Council Regulation imposing certain specific restrictive measures directed against certain natural and legal persons, entities and bodies in view of the situation in Somalia (COM(2009) 393 final)* is Article 215 TFEU.
2. However, in order to adopt a measure under Article 215 TFEU, a number of conditions have to be satisfied:
 - (a) there should be a decision on the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union;
 - (b) the measure should be based on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission;
 - (d) the measure should include necessary provisions on legal safeguards.

These conditions are not satisfied and so the proposals in question are defective.
3. The proper legal basis for the *proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (COM(2009) 187 final)* is Article 75 TFEU.
4. A dual legal basis consisting of Articles 75 and 215 TFEU is out of the question because they provide for two incompatible legislative procedures.
5. There is no legal basis for optional consultation of Parliament in the context of Article 215 TFEU.

Yours sincerely,

Klaus-Heiner Lehne

Baldassarre (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Evelyn Regner (Vice-Chair), Rainer Wieland, Tadeusz Zwiefka, Bernhard Rapkay, Alexandra Thein, Diana Wallis, Cecilia Wikström, Dimitar Stoyanov, Kurt Lechner, Eva Lichtenberger.