European Criminal Justice under the Lisbon Treaty

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Before the entry into force of the Treaty on European Union of 1991, the cooperation in matters of internal security took place at the level of international relations between particular Member States – in the legal sense, outside the European Communities.[1] The Treaty on European Union formed the architecture of European integration by attaching different forms of intergovernmental cooperation to Community policies. In this way, the three-pillar system was established. The cooperation between the EU Member States was described as "the cooperation in the fields of justice and home affairs." This area includes police and judicial cooperation in criminal matters (Title VI of the Treaty on European Union).[2]

The Lisbon Treaty entered into force on 1 December 2009. It introduced changes in many areas. One of them was criminal law. In this article, I will analyze the changes brought about by the Lisbon Treaty[3] in the field of criminal justice and also in connection with priorities of the Stockholm Programme, which was adopted by the European Council during its meeting of 10-11 December 2009.[4]

The main goal of the Lisbon Treaty reform was the belief that it should focus on the establishment of a uniform legal and systemic-institutional framework for this area.[5] It also stressed the necessity to distinguish the legislative and operational tasks implemented in the area of freedom, security and justice.[6]

Disappearance of Third Pillar

One of the basic elements of the reform that requires attention is the abolishment of the pillar system[7] and the inclusion of the provisions regarding police and judicial cooperation in criminal matters in the Treaty Establishing the European Community (renamed the Treaty on the Functioning of the European Union). At the same time, some specific elements currently characteristic of these issues (e.g., the role of the European Court of Justice) were maintained. Thus, Title IV of the Treaty Establishing the European Community – "Visas, asylum, immigration and other policies related to free movement of persons" – was replaced by the new Title V[8] of the Treaty on the Functioning of the European Union – "Area of freedom, security and justice" – that will comprise five chapters: "General provisions," "Policies on border checks, asylum and immigration," "Judicial cooperation in civil matters," "Judicial cooperation in criminal matters," and "Police cooperation".

Furthermore, in my opinion, we have a different situation on the basis of the Lisbon Treaty, which we can describe as a mix of parallel worlds: a mixture of "old" & "new." What does it mean? On the basis of Article 10 (1) of the Protocol to the Lisbon Treaty, we have 5-year transitional periods. Any new measures are subject to the new Lisbon Treaty rules. The Protocol on transitional provisions to the Lisbon Treaty in Article 10 (4) & (5) states that the UK may notify the Council that it does not accept the European Court of Justice's (ECJ) new jurisdiction regarding *unamended* third pillar measures. All such acts will then cease to apply to the UK when the transitional period expires. In this situation, the question is how long this situation will last and which consequences it will have? Perhaps it will be work for ECJ.[9]

The legal instruments of the former third EU pillar, which regulate the aspects of judicial and police cooperation in criminal matters (adopted under the Treaty on European Union before the entry into force of the Treaty of Lisbon), shall be preserved until these acts are repealed, annulled, or amended in the implementation of the Treaties.

Delimitation of Competences

One of the tasks of the Lisbon Treaty was to organize the delimitation of competences between the European Union and the Member States. Thus, the Treaty on the Functioning of the European Union is to

constitute a basis for the functioning of the EU in order to determine the areas, frameworks, and conditions on which they exercise their powers.

The provision of the new Article 4(2) of the Treaty on the Functioning of the European Union includes the area of freedom, security and justice among the shared competences of the EU and the Member States, i.e., both the EU and the Member States may legislate and adopt legally binding acts. In such a legal situation, this means that the Member States shall exercise their competences to the extent that the EU has not exercised its competence or to the extent that the EU has decided to cease exercising its competence.

The point of departure with regard to the delimitation of competence is the provision of the new Article 67 of the Treaty on the Functioning of the European Union. Pursuant to its provisions, the establishment of the area of freedom, security and justice is to be carried out with respect to the fundamental rights and different legal systems and legal traditions of specific Member States.[10] The Treaty of Lisbon then effects a delimitation of tasks between the EU and the States that is rather precise in comparison to the provisions previously in force, determining only the powers of the Member States.

European Court of Justice

Regarding judicial cooperation in criminal matters and police cooperation, the ECJ has a new competence to review EU and national legal instruments of judicial and police cooperation in criminal matters, on the one hand, due to the disappearance of the pillar structure. The ECJ is required to ensure the equal application of EU law across Member States, as well as being responsible for interpreting that law. On the other hand, the EJC has no jurisdiction to review the validity and proportionality of operations carried out by the police or other law enforcement services of the Member States or to review the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. The trouble is that the provisions on police and judicial cooperation in criminal matters very often apply to actions that are subject to internal security and law and order issues. However, the ECJ has not had an opportunity to comment on the extent of the above-mentioned limitation. For this reason, the ECJ will soon face the need to specify more precisely the framework of this exclusion, probably referring to its previous jurisprudence by interpreting the old Article 39(3) or Article 46 of the Treaty Establishing the European Community.

Professor Steve Peers explained that the extended remit of the ECJ has two key implications: “First, that the ECJ now has jurisdiction over all Member States’ national courts and tribunals. For example, a member of the judiciary in any court in any Member State, hearing a first instance criminal proceeding or an action against the police, could send a question to the ECJ. For instance, if somebody

was trying to resist the execution of a European arrest warrant their defence counsel could argue that the national implementation of the *Framework decision on the European arrest warrant* is somehow defective and therefore that the arrest warrant could not be executed. Prosecutors have also sought to use the court, for example by reference to the *Framework decision on the rights of victims in criminal proceedings* to toughen up national law in favour of victims. Secondly, the Commission has now the option to sue Member States in the ECJ for infringing EU criminal law legislation adopted after the entry into force of the Treaty of Lisbon”.[11]

One will also notice a change with respect to the raising of preliminary questions by the national courts. All the courts of the Member States under the Treaty of Lisbon have a chance to submit preliminary questions in accordance with the current Article 267 of the Treaty on the Functioning of the European Union. This means the abolishment of the former rule that gave this right only to courts whose rulings were final and against which there is no judicial remedy.[12]

Uniform Legal Acts

One of the most significant changes set out in the Treaty of Lisbon is the introduction of uniform instruments within the whole area of EU legislation, including the area of freedom, security and justice.[13] The legal acts that have been implemented correspond to the former instruments of regulations, directives, and decisions. This change is particularly important for judicial and police cooperation in criminal matters, as the achievement of uniformity of the catalogue and the legal character of the legal acts of the EU. It results in the granting of direct consequences for norms in this field, which had previously been excluded in accordance with the principles of the pre-Lisbon legal status on the basis of the provisions of Article 34(2) of the Treaty on European Union.[14]

It needs to be stressed that the legal acts in question, regulating the aspects of police and judicial cooperation in criminal matters, are within the jurisdiction of the Court of Justice of European Communities and under the control of the European Council with regard to the fulfillment of the obligations set out in the Treaty (current Article 258 of the Treaty on the Functioning of the European Union) by the Member States.

Legislative procedures

After the entry into force of the Treaty of Lisbon, acts are basically adopted by means of a common legislative procedure, which is based on the former procedure of co-decision. It is one of the most important consequences of the alteration in the pillar structure. In practice, it means increased participation on the part of the European Parliament and the European Commission in the legislative process.

Voting process and the issue of the emergency brake

The main change is the voting procedure – not unanimity in such cases but qualified majority voting in the Council (more substantive areas are included in the common legislative procedure that, at the voting stage in the Council, makes it possible to adopt a decision by a qualified majority) and, consequently, limitation of the application of the procedure of unanimity with regard to securing national law systems against the interference of the EU law. An emergency brake mechanism was established by the Member States in the Treaty of Lisbon.[15]

In accordance with the rules set out in the new Article 82 (3) of the Treaty on the Functioning of the European Union, the emergency brake mechanism should be understood as follows: in cases involving judicial cooperation in criminal matters and police cooperation, when a member of the Council is of the view that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft legislation be referred to the European Council. This mechanism is also applicable to situations where the approximation of criminal laws and regulations of the Member States proves to be essential in ensuring the effective implementation of EU policies in an area that has been subject to harmonization measures. Referral of the decision to a higher level of the European Council is also possible in the case of lack of agreement (required unanimity) by adopting legal measures on the establishment of the European Public Prosecutor's Office[16] or operational cooperation between the police.[17]

In these cases, the legislative procedure is suspended. After discussion and in the case of a consensus, the European Council shall refer the draft instrument back to the Council within four months of this suspension, which means that suspension of the normal legislative procedure ends.

Enhanced Cooperation

In the pre-Lisbon legal status, the Council's decisions regarding the legislative procedure within the area of freedom, security and justice, as defined by the Treaty of Amsterdam, are made unanimously. The establishment of the emergency brake and enhanced cooperation in the Treaty of Lisbon is of great importance – including political importance – to some of the Member States. After entry into force of the Treaty of Lisbon provisions, where there is no consent in the Council, enhanced cooperation may be established if at least nine Member States, which inform the European Parliament, Council, and Commission, agree. Under the new Article 86 of the Treaty on the Functioning of the European Union, enhanced cooperation may also be established in case of a disagreement in the European Council regarding the establishment of the European Public Prosecutor's Office. In these cases, one recognizes that the authorization to undertake enhanced cooperation, which is required pursuant to the provisions of new Article 20 (2) in relation to new Article 329 of the Treaty on the Functioning of the European Union, was granted, and the rules on enhanced cooperation can be applied without any formal-legal obstacles.

Actors in the European Union

1. European Parliament

The role of the European Parliament changed and was strengthened. This allows room for further development of this institution of the EU. What is more, the European institutions must foster international dialogue. In this context, the role of the national parliaments has changed. They should participate in the actions taken by the EU by applying the rule regarding information for national parliaments (Protocol on the role of national parliaments in the EU) and by supervising institutions like Eurojust or Europol and respecting the rule of subsidiarity.

The provisions of the Treaty of Lisbon also concern the strengthening of the European Parliament in the area of freedom, security and justice, e.g., by extension of the number of fields in which the acts will be adopted in the normal legislative procedure, that is with the participation of the Council and the European Parliament.

National parliaments

Democratic control over the area of freedom, security and justice was widened through the strengthening of the role of national parliaments. The European Parliament will have the right to supervise the activity of the EU in this field. In accordance with the new Article 69 of the Treaty on the Functioning of the European Union, the national parliaments will have the competence to issue opinions on the compliance of the proposals and legislative initiatives submitted under the framework of the area of judicial and police cooperation in criminal matters with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality. Under Article 6 of the Protocol, this power means that any chamber of a national parliament may, within eight weeks from the date of transmission of a draft legislative act, send to the President of the European Parliament, the Council, and the Commission a reasoned opinion stating why it considers the draft in question not to be compliant with the principle of subsidiarity. Each national parliament shall consult the regional parliaments having legislative powers. Article 7 of the Protocol stresses the fact that each national parliament shall have two votes (in the case of a bicameral parliamentary system each chamber receives one vote) in the process of preparing a reasoned opinion regarding draft legislative acts as defined by Article 3 of the Protocol. When the reasoned opinions on a draft legislative act representing at least 1/4 of all the votes allocated to the national parliaments, demonstrate non-compliance with the principle of subsidiarity, the draft should be reviewed. This procedure

is applicable to that for draft legislative acts in the area of freedom, security and justice. In the case of other subject areas, the number of votes necessary to initiate a procedure of consultation with the author (the Commission, the European Parliament, a group of Member States, etc.) of a given initiative or act shall be 1/3 of all votes. This procedure is laid down in Article 7 of the Protocol, which ideally leads to full compliance of the draft act with the principle of subsidiarity.

In addition, in the area of freedom, security and justice, national parliaments shall have the following competences:

- The right of national parliaments to be informed of the content and results of the evaluation of the implementation (by the authorities of the Member States) of the policies of the EU with regard to Title IV of the Treaty on the Functioning of the European Union (new Article 70 of the Treaty on the Functioning of the European Union);
- The right to be informed of the proceedings of a standing committee set up to ensure that operational cooperation with regard to internal security is promoted and strengthened (new Article 71 of the Treaty on the Functioning of the European Union);
- The right to evaluate the operations of Eurojust (new Article 85 (1) of the Treaty on the Functioning of the European Union);
- The right to evaluate the operations of Europol (new Article 88 (2) of the Treaty on the Functioning of the European Union).

European Council

In the area of freedom, security and justice, the European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice – the new Article 58 of the Treaty on the Functioning of the European Union. These acts may, however, take the form of programs or strategies and be of great political importance.

Eurojust and Europol

The Treaty of Lisbon changed the mission of Eurojust and Europol. The provisions of the Treaty of Lisbon strengthen the position of Eurojust and Europol through the incorporation of legislative regulations that explicitly determine their status and the range of their operations in the new Article 85 (Eurojust) and the new Article 88 (Europol) of the Treaty on the Functioning of the European Union.

On the basis of the Treaty of Lisbon, the role of Eurojust was reinforced for the coordination and cooperation between judicial authorities in Member States. This means that Eurojust has more operational capacity to act and to resolve conflicts of jurisdiction. Eurojust shall have the competence to initiate criminal investigations as well as propose the initiation of prosecutions conducted by competent national authorities, particularly those regarding offences against the financial interests of the European Union, as well as the right to coordinate those investigations.

Eurojust will become a central player in the European judicial area.[18] To do this, Eurojust needs to be properly equipped. Its rules underwent a first change last year.[19] In 2009, the Council Decision No. 2002/187/JHA of 28 February 2002 was changed by Council Decision No. 2009/426/JHA. The amendments open new possibilities for the EU Member States as regards their regulating of relationships with Eurojust. On the basis of Council Decision No. 2009/426/JHA, national members have reinforced powers. The 2009 Decision on Eurojust provides for the possibility to claim the powers of the College, a national member in Eurojust, participa-

tion in Eurojust operations through an On-Call Coordination and Eurojust National Coordination System.[20] The 2009 Decision on Eurojust creates new possibilities, but the manner of their use remains with the EU Member States that have the powers to implement them according to their own legal regimes. In this context, the role of the Commission is also important to improve efforts to get these new rules in place. The Commission should supervise the implementation of the new rules in certain Member States.[21] The important thing is to make sure that criminal investigators can do their job. Further new rules giving Eurojust new powers to directly initiate investigations as well as new rules to regulate its internal structure shall be considered.

The Treaty of Lisbon confirms the mission of Europol, which is the agency of the EU that handles criminal intelligence in preventing and combating organized crime and terrorism. Europol has the prerogative to coordinate the cooperation between national law enforcement authorities regarding the investigations and operational actions against organized crime and terrorism. Europol's mission concerns not only the collection, storage, processing, and analysis of information forwarded by the authorities of the Member States or third countries, but also the coordination, organization, and implementation of investigative and operational action carried out in liaison and in agreement with the competent authorities of the Member States or third States, depending on the number of territories on which the actions are carried out. The application of coercive measures shall then be the exclusive responsibility of the competent national authorities (new Article 88 of the Treaty on the Functioning of the European Union).

Standing Committee for Internal Security (COSI)

The former cross-border operational cooperation between the authorities of certain Member States as well as the specialized authorities of the EU in the context of police cooperation or border security is sometimes considered ineffective, intransparent, or even not legitimate. For this reason, in order to strengthen uniform coordination and control, a separate coordinating structure in the Council, in the form of a standing Committee for Internal Security (COSI), has been set up under the new Article 71 of the Treaty on the Functioning of the European Union. Its mission is to strengthen and promote operational cooperation in the area of internal security. In accordance with the preliminary provisions, the Standing Committee is to strengthen and help the coordination of concrete actions in this area. The main emphasis is on the promotion of legislative operations in the area of freedom, security and justice, the coordination of anti-terrorist actions of the EU, the exchange of information, personal data protection, or the external aspects of actions in this field. The implementation of the regulations determining the status of the COSI requires an appropriate decision concerning the aspects of the range of competence of the Committee, its composition, and functioning.

European Public Prosecutor's Office[22]

The European Public Prosecutor's Office, in accordance with the provisions of the Treaty of Lisbon, could be established after a unanimous decision of the Council and after the consent of the European Parliament. It would be responsible mainly for investigating, prosecuting, and bringing to judgment the perpetrators of offences against the EU's financial interests (new Article 86 (2) of the Treaty on the Functioning of the European Union). The European Council was also granted the legal possibility to adopt a decision on the extension of the powers of the European Public Prosecutor's Office. In accordance with the provision of Article 86 (4) of the Treaty on the Functioning of the European Union, it may extend the powers of this authority to include serious crime having a cross-border dimension.[23]

The European Public Prosecutor's Office could be set up "on the basis of" Eurojust, and, as one of the strongest and most powerful institutions within the area of freedom, security and justice, it may boost the

integration actions in this field. The latter depends on how the European Public Prosecutor Office would be created on the European level and on the level of particular Member States.[24] We can list a few possibilities. Firstly, the European Public Prosecutor's Office could be created *from* Eurojust. This means that we could have an old institution under a new name. Eurojust could disappear. Secondly, the European Public Prosecutor Office could be created *on the basis of* Eurojust. This means that we could have two separate institutions – Eurojust and the European Public Prosecutor's Office. In this context, the question is how they could share the competences to fight against criminals? We will see in the future what it will look like. The conditions for creating the European Public Prosecutor's Office are specified in the Treaty on the Functioning of the European Union.[25]

These steps could lay the foundation for the creation of the European Public Prosecutor's Office, as foreseen in the Lisbon Treaty. It would be necessary to lay the groundwork carefully but solidly, building on strong mutual trust and fully involving all potential stakeholders.

Anti-Terrorism Measures

The Treaty of Lisbon also laid down a provision regarding the strengthening of measures combating terrorism and related activities. In accordance with Article 75 of the Treaty on the Functioning of the European Union – where necessary to achieve the objectives of the area of freedom, security and justice as regards terrorism – the European Parliament and the Council shall define the 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 adoption of these arrangements establishes a legal basis for more effective combating of terrorism, e.g., through financial restrictions. The entry into force of this provision on the level of the primary law will also end the controversies surrounding this instrument in the ECJ.[26]

Conclusions

The changes prepared in order to establish a uniform area of freedom, security and justice at the level of the EU should be considered positive. Another positive result of the planned changes is the introduction of greater flexibility to this area as far as the implementation of particular measures designed to implement the Treaty provisions is concerned. The rules of enhanced cooperation in certain fields make it possible for a greater number of Member States interested in specific aspects of the area of freedom, security and justice to meet similar objectives. This does not rule out that, in the future, cooperation will be extended and other interested States will join. On the basis of the Treaty of Lisbon, new opportunities like strengthening Eurojust, Europol, as well as the possibility to create European Prosecutor have been created.

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2. It should be stressed that, since the entry into force of the Treaty of Amsterdam, the notion of the EU third pillar was understood as the rules of police and judicial cooperation in criminal matters. Other issues, such as the conditions of entry, movement, and residence of persons on the territory of the EU (i.e., immigration, asylum, and visa policy, as well as customs cooperation) were transferred to the first EU pillar (Community) under Title IV and Title X of the Treaty Establishing European Communities. Moreover, the Protocol integrating the Schengen acquis into the framework of the EU was annexed to the Treaty of Amsterdam.↩
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4. The Stockholm Programme: A chance to put fundamental rights protection right in the centre of the European Agenda, Fundamental Rights Agency.↩
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7. S. Griller, J. Ziller, The Lisbon treaty: EU constitutionalism without a constitutional treaty?, p. 88-89.↩
8. In the Lisbon Treaty, it said Title IV but in the final consolidated version it is Title V↩
9. The Future of European Criminal Justice under the Lisbon Treaty, conference material in the author's collection.↩
10. J. Barcz, *Przewodnik po Traktacie z Lizbony – Traktaty stanowiące Unię Europejską*, Warsaw 2008, p. 51.↩
11. House of Commons, Justice Committee, Justice issues in Europe, Seventh Report of Session 2009–10, *Report, together with formal minutes,* Ordered by the House of Commons.↩
12. J. Engstrom, Recent and potential future developments in judicial protection in the European Area of Freedom, Security and Justice, ERA Forum, 05.03.2009, p. 489.↩
13. The previous legal system is described in C. Herma, Reforma systemu aktów prawa pochodnego UE w Traktacie z Lizbony, Europejski Przegląd Sądowy, 2008, no. 5, pp. 22-34.↩
14. J. Barcz, Poznaj Traktat z Lizbony, Piaseczno, grudzień 2007, p. 33.↩
15. D. Kietz, R. Parkers, *Justiz- und Innenpolitik nach dem Lissabonner Vertrag*, Diskussionspapier – Forschungsgruppe EU-Integration 2008/13.Mai 2008, Stiftung Wissenschaft und Politik (SWP), http://www.sewpberlin. org/common/get_document.php?asset_id=5000↩
16. Article 69e (1) – new Article 86 TFEU.↩
17. Article 69f (3) – new Article 87 (3) TFEU.↩
18. Ch. van den Wyngaert, Eurojust and European Public Prosecutor in the Corpus Iris Model: Water and Fire? (w:) N. Walker (red.), Europe's Area of Feedom, security and Justice, Oxford 2004, p. 5.↩
19. The status of the national members of Eurojust was one change in the process of strengthening the power of Eurojust. It was the result of the experiences gained by Eurojust over the years, opinions collected during seminars held since 2006 (Revision of the 2002 Decision on Eurojust during following seminars: Vienna Seminar September 2006, EJN "Vision paper" December 2006, Eurojust Contribution March 2007, Eurojust Questionnaire June 2007, Commission Communication October 2007, Lisbon Seminar October 2007, Council Conclusions 6 December 2007, initiative taken by representatives of 14 Member States UE January 2008), in particular postulates of practitioners like Olivier de Baynast – General Prosecutor from Amiens (The Council of the European Union, Report of the seminar: "A Seminar with 2020 Vision: The Future of Eurojust and the European Judicial Network", Vienna, 25-26 September 2006, 14123/06, LIMITE, EUROJUST 48, EJN 24, COPEN 108).↩
20. President of Eurojust from 2008-2009 – Jose Luis Lopes de Mota, Seminar in Trier, "The future of Europa criminal justice under the Treaty of Lizbon, Innovations for Eurojust", seminar in Trier, 11-12.02.2008, www.era.int/web/en/html/nodes_main/4_1649_459/4_2153_462/events_2008/5_1625_6358.htm↩
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23. It could also be pointed out that there has been a debate as to whether the European Public Prosecutor should have a wider criminal law mandate than the financial sphere only, J Monar, "Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the 'Area of Freedom, Security and justice'?" European Constitutional Law Review 1 (2005) p. 226.↩
24. Differences on the position of the prosecutor in Member States of the European Union are shown in the report citing research which was conducted from 2004-2005 by the research team lead by P. Taka – P. Tak (red.), Tasks and Powers of the Prosecution Services in the EU Member States, 2004; L. Paprzycki, Prokurator Europejski – organ europejskiego postępowania karnego, Palestra, no. 3 - 4, 2009, pp. 65-66.↩
25. In short, however, it could be noted that it has been observed that the relationship between this prosecutor and the existing prosecution network of Eurojust is somewhat blurred. See, in general, e.g., H. G. Nilsson. 'Eurojust – the beginning or the end of the European Public Prosecutor?', *Europarättslig Tidskrift* (2000), 601, and C. Van den Wyngaert, 'Eurojust and the European Public Prosecutor' in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice,* 224 (2004), and S Peers *EU Justice and Home Affairs* Ch 9 (2006). G. Persson, *Gränslös straffätt,* available at http:// www.sieps.se/publ/rapporter/2007/2007_4_en.html
A. Suominen, The past, present and future of Eurojust, Maastricht Journal of European and Comparative Law, 2008, Volume 15, nr 2, p. 230.↩
26. For example: Kadi case, Joined Cases C-402/05 P and C415/05 P, 3 September 2008, in which the European Court of Justice decided that the Court of First Instance (Case T- 306/01 Yusuf and Al Barakaat international Foundation v Council and Case T- 315/01 Kadi v Council and Commission, 21 September 2005) erred in law, and moreover annulled the Council Regulation 881/2002 freezing the assets of Yassin Abdullah Kadi, and the Al Barakaat International Foundation. This sets a precedent that led to the potential dismissal of every subsequent challenge in the European Union Courts bought by individuals or groups designated as associates of the Taliban or Al Qaida (Statewatch 2008). It could furthermore trigger more challenges to the listing by the European Union of other terrorists. The main complaints of Kadi and the Al Barakaat Foundation, after the Court of First Instance had rejected all their complaints, were the lack of competence of the Council to adopt these regulations and the infringements by the sanction regimes of their fundamental rights. Whereas the Court of First Instance had ruled that the Court did not have the competence to review Security Council decisions, the Court of Justice concludes that Community Courts must ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to

resolutions adopted by the Security Council (C-402/05 and C-415/05, par. 326). Indeed, the Court ruled that the rights of the defense, in particular the right to be heard, and the right to judicial review were not respected. Especially the failure of the European Council Regulation to include procedures to communicate the evidence justifying the inclusion of names of persons or entities infringed fundamental rights. Although, the Court ruled that the Council was competent to adopt the freezing measures, the lack of guarantee enabling Mr. Kadi to put his case to the competent authorities, led to the unnecessary infringement of his right to property. Because of the serious and irreversible effect of the annulment, the Court orders that the effects of the regulation are to be maintained for a period of three months, in order to allow the Council to remedy the infringements found. Similar statements in the following cases:
case T-318/01, Omar Mohamed Othman v. Council in which Council Regulation No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban was annulled, and repealing Regulation No 467/2001, in so far as it concerned Mr Omar Mohammed Othman; (para. 85) "the Council neither communicated to the applicant the evidence used against him to justify the restrictive measures imposed on him nor afforded him the right to be informed of that evidence within a reasonable period after those measures were enacted, the applicant was not in a position to make his point of view in that respect known to advantage. Therefore, the applicant's rights of defence, in particular the right to be heard, were not respected."; case T-341/07, Sison and others v. Council; case European Parliament v. Council (Blacklists), C-130/10, in which the European Parliament brings an action for annulment of Council Reg. No 1286/2009 (amending Regulation No 881/2002) imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network, and the Taliban. The European Parliament claims the invalidity of the contested regulation because it does not have Article 75 TFEU as a legal basis. In the alternative, the European Parliament considers that the conditions to adopt the contested regulation under the procedure laid down in Article 215 TFEU were not fulfilled.↩

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