

# Institutional law II

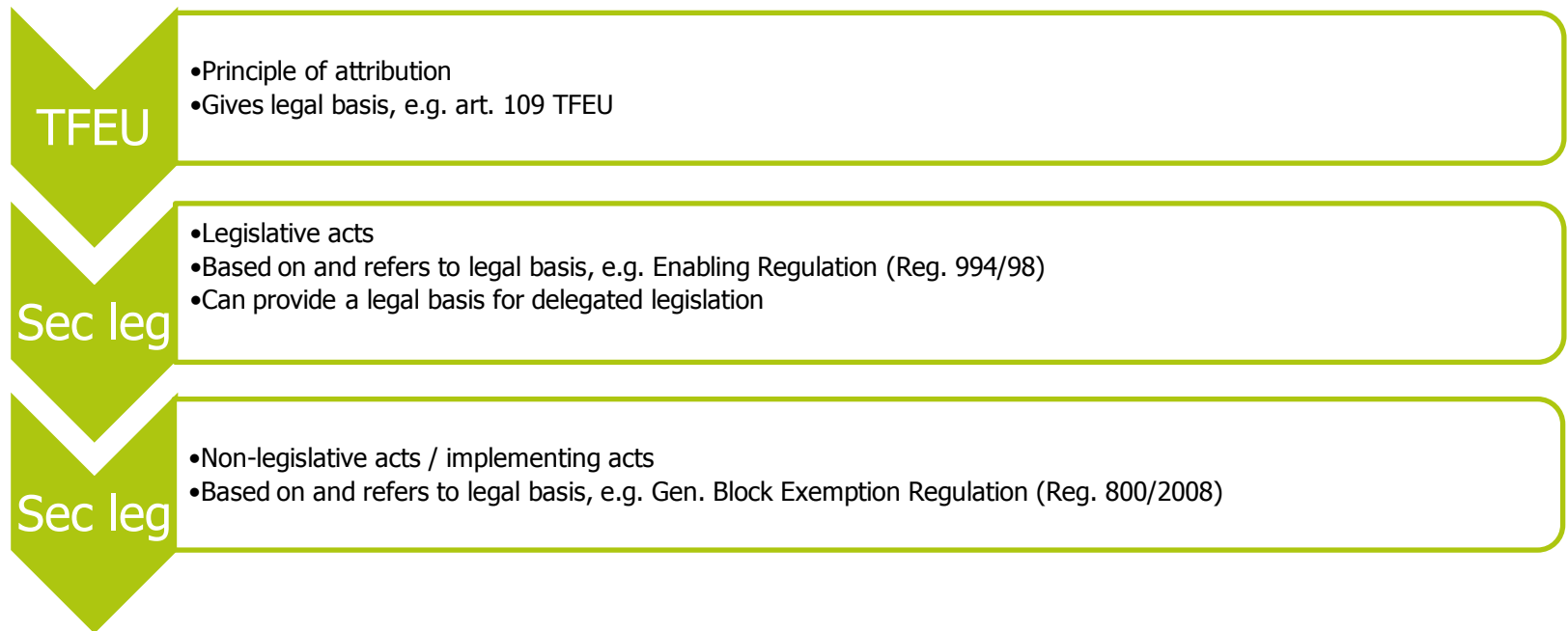
A legal basis for freezing the assets of Osama bin Laden and his clan

14 February 2013

# Legal basis

- Expression of the notion of legality of government acts
- Government (on whatever level) cannot act when the competence is not explicitly given by legislation
- So the TFEU gives the EU competence to draft and adopt legislation in specific fields (e.g. the internal market, the environment, state aid, trans-European networks, public health)  
→ **principle of attribution** (legality)
- The legal basis is chosen by the European legislator (Council and/or EP) on the initiative of the European Commission depending on the subject matter to be regulated
- Sometimes amended by the legislator during the legislative process or challenged after adoption by a MS or the EP

# System and level



# Examples

- Art. 46 TFEU: free movement of workers
- Art. 59 TFEU: free movement of services
- Art. 109 TFEU: state aid
- Art. 114 TFEU: internal market
- Art. 133 TFEU: the use of the euro
- Art. 169 TFEU: consumer protection
- Art. 192 TFEU: environment
- Art. 218 TFEU: international treaties

# Legal basis in the Treaty

## Article 109 TFEU

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

# Enabling Regulation

COUNCIL REGULATION (EC) No 994/98

of 7 May 1998

on the application of Articles 107 and 108 of the Treaty establishing the European Community to certain categories of horizontal State aid

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 109 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

After consulting the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

the Commission should be enabled to declare by means of regulations, in areas where the Commission has sufficient experience to define general compatibility criteria, that certain categories of aid are compatible with the common market pursuant to one or more of the provisions of Article 92(2) and (3) of the Treaty and are exempted from the procedure provided for in Article 93(3) thereof;

- (5) Whereas group exemption regulations will increase transparency and legal certainty; whereas they can be directly applied by national courts, without prejudice to Articles 5 and 177 of the Treaty;

# GBER

## COMMISSION REGULATION (EC) No 800/2008

of 6 August 2008

declaring certain categories of aid compatible with the common market in application of Articles 107 and 108 of the Treaty (General block exemption Regulation)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty establishing the European Community to certain categories of horizontal State aid<sup>(1)</sup>, and in particular Article 1(1) points (a) and (b) thereof,

Having published a draft of this Regulation<sup>(2)</sup>,

After consulting the Advisory Committee on State Aid,

regards aid in favour of SMEs, in the form of investment aid in and outside assisted areas, in the form of risk capital schemes and in the area of research, development and innovation, in particular in the context of the implementation of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises<sup>(3)</sup>, and as regards the extension of the scope of that Regulation to include aid for research and development, the implementation of Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001<sup>(4)</sup>, the implementation of the Commission communication on State aid and risk capital<sup>(5)</sup> and the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises<sup>(6)</sup>, as well as the implementation of the Community framework for State aid for research and development and innovation<sup>(7)</sup>.

- (3) The Commission has also gained sufficient experience in the application of Articles 87 and 88 of the Treaty in the fields of training aid, employment aid, environmental aid, research and development and innovation aid and regional aid with respect to both SMEs and large enterprises, in particular in the context of the implementation of Commission Regulation (EC) No 68/2001 of

# Legal basis - consequences



<http://www.usedcranes.net/>

- There is an EU Directive concerning e.g. waste. But NL wants to take more stringent measures. Is that allowed?



DIRECTIVE 2010/75/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 24 November 2010

on industrial emissions (integrated pollution prevention and control)

(Recast)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

Acting in accordance with the ordinary legislative procedure <sup>(3)</sup>,

Whereas:

(1) A number of substantial changes are to be made to Council Directive 78/176/EEC of 20 February 1978 on waste

emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations <sup>(7)</sup>, Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste <sup>(8)</sup>, Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants <sup>(9)</sup> and Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control <sup>(10)</sup>. In the interests of clarity, those Directives should be recast.

(2) In order to prevent, reduce and as far as possible eliminate pollution arising from industrial activities in compliance with the 'polluter pays' principle and the principle of pollution prevention, it is necessary to establish a general framework for the control of the main industrial activities, giving priority to intervention at source, ensuring prudent management of natural resources and taking into account, when necessary, the economic situation and specific local characteristics of the place in which the industrial activity is taking place.

**DIRECTIVE 2010/63/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**of 22 September 2010**  
**on the protection of animals used for scientific purposes**  
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure <sup>(2)</sup>,

Whereas:

(1) On 24 November 1986 the Council adopted Directive 86/609/EEC <sup>(3)</sup> in order to eliminate disparities between

and other scientific purposes <sup>(4)</sup>. By becoming party to that Convention, the Community acknowledged the importance of the protection and welfare of animals used for scientific purposes at international level.

(4) The European Parliament in its resolution of 5 December 2002 on Directive 86/609/EEC called for the Commission to come forward with a proposal for a revision of that Directive with more stringent and transparent measures in the area of animal experimentation.

(5) On 15 June 2006, the Fourth Multilateral Consultation of Parties to the European Convention for the protection of vertebrate animals used for experimental and other scientific purposes adopted a revised Appendix A to that Convention, which set out guidelines for the accom-

# Legal basis - consequences

1. Dir. 2010/17/EU: art. 192 TFEU → Environment. Ordinary procedure. Art. 193 TFEU: minimum harmonisation
  2. Dir. 2010/63/EU: art. 114 TFEU → Internal market. Also ordinary procedure. No minimum harmonisation. More stringent measures only allowed under strict conditions and after approval of the EC
- It depends on the legal basis whether the NL can take more stringent measures
  - Art. 114 TFEU but NL takes more stringent measures without approval of the EC: infringement procedure

# Subject matter is not regulated on EU level

- If there is no secondary EU legislation on the subject matter, then national measures have to be in conformity with the Treaty provisions

# Case C-130/10



Wikimedia.org

# Case

- EP brings the Council before the ECJ in order to have Reg. 1286/2009 annulled (action for annulment)
- Main argument: incorrect legal basis

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-Qaida 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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 60, 301 and 308 thereof,

Having regard to Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP <sup>(1)</sup>,

Having regard to the proposal from the Commission <sup>(2)</sup>,

Having regard to the opinion of the European Parliament <sup>(3)</sup>,

Whereas:

who are associated with them and have participated in the financing, planning, facilitation, preparation or perpetration of terrorist acts.

(4) These measures fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned. For the purpose of this Regulation, the territory of the Community is deemed to encompass the territories of the Member States to which the Treaty is applicable, under the conditions laid down in that Treaty.

(5) In order to create maximum legal certainty within the Community, the names and other relevant data with regard to natural or legal persons, groups or entities whose funds should be frozen further to a designation

# Legal basis (1)

## Art. 60 EC:

“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.”



## Legal basis (2)

### Art. 301 EC:

“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.”

# Legal basis (3)

## Art. 308 EC:

“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.”

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-Qaida 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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 60, 301 and 308 thereof,

Having regard to Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP <sup>(1)</sup>,

Having regard to the proposal from the Commission <sup>(2)</sup>,

Having regard to the opinion of the European Parliament <sup>(3)</sup>,

Whereas:

who are associated with them and have participated in the financing, planning, facilitation, preparation or perpetration of terrorist acts.

- (4) These measures fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned. For the purpose of this Regulation, the territory of the Community is deemed to encompass the territories of the Member States to which the Treaty is applicable, under the conditions laid down in that Treaty.
- (5) In order to create maximum legal certainty within the Community, the names and other relevant data with regard to natural or legal persons, groups or entities whose funds should be frozen further to a designation

COUNCIL REGULATION (EU) No 1286/2009

of 22 December 2009

amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 215(2) thereof,

Having regard to Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them <sup>(1)</sup>,

Having regard to the joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission,

Whereas:

881/2002 should be amended to provide for a listing procedure ensuring that the fundamental rights of the defence and in particular the right to be heard are respected.

- (5) The revised procedure should include providing to the listed person, entity, body or group the reasons for listing as transmitted by the UN Al Qaida and Taliban Sanctions Committee, so as to give the listed person, entity, body or group an opportunity to express his, her or its views on those reasons. The purpose of Regulation (EC) No 881/2002 is to freeze the funds and economic resources of persons, entities, bodies and groups included in the Al Qaida and Taliban list drawn up by the UN. As the relevant UN Security Council Resolutions provide that such freezing has to take place 'without delay', such a measure must, by its very nature, take advantage of a surprise effect.

# Legal basis (1)

**Art. 215 (2) TFEU** (former art. 301 EC):

“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.”

## Legal basis (2)

“procedure referred to in paragraph 1”:

### **Art. 215 (1) TFEU:**

“[...] 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.”

# In sum

- Reg. 881/2002 (27 May 2002)
  - Freezing of funds and other financial resources of persons and entities on the annex
  - Legal basis: art. 60, 301 and 308 EC
  - EP is consulted (cf. art. 308 EC)
- Reg. 1286/2009
  - Extra procedural safeguards when adding to the annex, e.g. right to be heard and stating of reasons (fundamental rights)
  - Legal basis: art. 215 (2) TFEU
  - Inform EP

# EP

- EP is of the opinion that that the correct legal basis is art. 75 TFEU
  - Art. 75 TFEU replaces art. 60 EC
  - Whereas art. 60 EC referred to the procedure of art. 301 EC, art. 75 TFEU prescribes the ordinary procedure
- ➔ Dispute is mainly about safeguarding of the prerogatives of the EP



# Art. 75 TFEU

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.

# ECJ Judgment 19 July 2012

- The dispute is about an incorrect choice of legal basis
- The choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure (par. 42)
- Various (but equal) aims → more legal basis ...
- ... unless incompatible (on procedural level)

# ECJ Judgment 19 July 2012

- Art. 75 and 215 TFEU are, as legal basis, incompatible and cannot be used both at the same time
- It is necessary to examine the wording of Article 215 TFEU, the context of which that provision forms part, and the objectives it pursues, in relation to those pursued by Article 75 TFEU, before determining, in the light of the purpose and content of the contested regulation, whether Article 215(2) TFEU constitutes the correct legal basis for the regulation (par. 55)
- Art. 215(2) TFEU is appropriate, regarding the ambit of this provision and the purpose and content of the contested regulation
- The fact that art. 75 TFEU better safeguards the EP's prerogatives is not a factor for choosing art 75 as a legal basis

# Dictum

- Regulation 1286/2009 is adopted on the correct legal basis.
- Action for annulment is dismissed