Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 6 June 2012[1]

Joined Cases C-539/10 P and C-550/10 P

Stichting Al-Aqsa
v
Council of the European Union
and
Kingdom of the Netherlands
v

Stichting Al-Aqsa

(Appeals — Common foreign and security policy — Restrictive measures against certain persons and entities with a view to combating terrorism — Freezing of assets — Common Position 2001/931/CFSP — Article 1(4) and (6) — Regulation (EC) No 2580/2001 — Article 2(3) — Conditions under which a person or entity may be kept on the list of persons and entities whose assets have been frozen — Decision of a competent national authority — Cessation of application of a national measure)

I – Introduction

1. This appeal concerns the freezing of assets held by Stichting Al-Aqsa as part of European Union measures to combat terrorism.

2. The threats posed by terrorism have prompted the United Nations, the European Union and its Member States to adopt restrictive measures. The purpose of those measures is to deprive persons and entities suspected of supporting terrorist activities of their financial freedom by freezing their assets.

3. In the light of United Nations Security Council Resolution 1373 (2001) of 28 September 2001,[2] the Council of the European Union, in its Common Position 2001/931/CFSP,[3] set out the basic principles governing the application of a system of measures to combat terrorism.

4. Under that system, where the European Union is in possession of information which indicates that an authority has taken a decision concerning the instigation of investigations or prosecution for a terrorist act, the person concerned may be included on a list of persons and entities whose assets have been frozen.[4] The first such list was annexed to the abovementioned Common Position.

1 — Original language of the Opinion: German; Language of the case: Dutch.

2 — The resolution can be found at http://www.un.org/Docs/scres/2001/sc2001.htm.

3 — Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, OJ 2001 L 344, p. 93.

4 — Article 1(4) and Article 2 of Common Position 2001/931.

5. Closely connected, from the point of view of its content, to that system outlined in Common Position 2001/931 is Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.[5] It is regarded as a measure necessary at European Union level in order to further implement the objectives of Common Position 2001/931 and is intended to complement administrative and judicial procedures regarding terrorist organisations in the European Union and third countries.[6] Accordingly, Article 2(3) of Regulation No 2580/2001 requires the Council to establish, review and amend a list of the persons and entities whose assets are to be frozen, in accordance with the criteria laid down in Common Position 2001/931.[7] The Council presented its first list under Article 2 of Regulation No 2580/2001 as early as 27 December 2001, and, therefore, at the same time as that regulation.

6. In the course of a regular review of that list, the Council is required to verify whether there are still grounds for keeping the persons and entities concerned on the list and for continuing to freeze their assets. If those grounds cease to exist, the list must be amended accordingly. In performing that duty, the Council regularly adopts legal acts, in implementation of Regulation No 2580/2001, by which it first reviews the list applicable at the relevant time and then replaces it with a new list.

7. The review and, where appropriate, amendment of the aforementioned lists are at the centre of the present joined cases. More specifically, these cases are concerned in particular with the question of the extent to which the Council is required to take into account the factual and legal situation in the Member State concerned and how that situation has developed when deciding whether a person or entity is to continue to be included on the list and whether its assets are to remain frozen.

II – Legal context

A – *Common Position 2001/931*

8. Article 1 of Common Position 2001/931 provides:

‘…

4. 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.

5. …

5 — OJ 2001 L 344, p. 70. The ‘shared regime’ (a term coined by C. Ohler in paragraph 5 of this commentary on Article 75 TFEU in Streinz, R. , *EUV/AEUV*, 2nd edition, Verlag C.H. Beck, Munich 2011), comprising the combination of anti-terrorism measures under the Common Position, on the one hand, and the Regulation, on the other hand, is explained by the fact that, in accordance with the Treaty of Maastricht, the former Treaty on European Union and the Treaty establishing the European Community provided for parallel legal bases in this sphere.

6 — See in this regard recitals 5 and 6 in the preamble to Regulation No 2580/2001 and paragraph 8 of the judgment of 11 July 2007 in Case T-327/03 *Al-Aqsa* v *Council* (‘*Al-Aqsa I*’).

7 — Article 2(3) of Regulation No 2580/2001 refers to Article 1(4), (5) and (6) of Common Position 2001/931.

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.'

B – *Regulation No 2580/2001*

9. Article 2 of Regulation No 2580/2001 [8] provides:

'1. Except as permitted under Articles 5 and 6:

(a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen;

(b) …

2. …

3. The Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931/CFSP; such list shall consist of:

(i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;

(ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;

(iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in points (i) and (ii); or

(iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in points (i) and (ii).'

10. The exceptions referred to in Article 2(1) provide in essence that the frozen assets may be unfrozen in so far as they are required to cover the essential human needs of the persons concerned or their family members, [9] and that, subject to certain conditions, further specific authorisations to unfreeze funds may be granted. [10]

III – Background to the dispute

11. Since 2003, Stichting Al-Aqsa ('Al-Aqsa') has been engaged in judicial proceedings [11] to challenge the freezing of its assets and a number of consecutive measures which were directed against it by the Council in this regard and on the basis of which it was included and continues to be included on the relevant lists drawn up by the Council.

8 — This regulation has been amended on several occasions and the version now applicable is that amended by Council Implementing Regulation (EU) No 610/2010 of 12 July 2010 (OJ 2010 L 178, p. 1).

9 — Article 5 of Regulation No 2580/2001.

10 — Article 6 of Regulation No 2580/2001.

11 — See, *inter alia*, *Al-Aqsa I* and Case T-348/07 *Al-Aqsa* v *Council* [2010] ECR II-4575, 'the judgment under appeal'.

12. The measures adopted by the Council are based ultimately on a Netherlands ministerial regulation of 7 April 2003, the Sanctieregeling terrorisme 2003 (Regulation on sanctions for the suppression of terrorism of 2003),[12] which, in the light of its central significance to the freezing of Al-Aqsa's assets, must be examined first.

13. The Sanctieregeling terrorisme 2003 had been adopted on the basis of the Netherlands Sanctiewet 1977 (Law on sanctions of 2007), taking into account the aforementioned UN resolution. Adopted effectively as an interim measure,[13] that ministerial regulation froze the assets of Al-Aqsa, pending the entry into force of a corresponding act of EU law,[14] on the ground that Al-Aqsa had provided funds to an organisation which supported terrorism.[15]

14. In proceedings for interim measures brought in the Netherlands, Al-Aqsa had requested that the application of that ministerial regulation be suspended. However, by order of 3 June 2003,[16] the Rechtbank te 's-Gravenhage (District Court, The Hague), after inspecting the confidential documents produced by the Netherlands General Intelligence and Security Service, had held there to be sufficient evidence to support the conclusion that, as the statement of reasons in the Sanctieregeling terrorisme 2003 stated, Al-Aqsa had used its funds to support a terrorist organisation,[17] and did not therefore allow Al-Aqsa's application for suspension of the enforcement of the asset-freezing measure.

15. However, the Sanctieregeling terrorisme 2003 was repealed with effect from 3 August 2003,[18] the reason given for its repeal being that, following the adoption of the Council Decision 2003/480/EC of 27 June 2003 implementing Article 2(3) of Regulation No 2580/2001,[19] that regulation had been 'superseded' now that Al-Aqsa was included on a Council list relating to the freezing of assets.

16. Following the repeal of the Netherlands ministerial regulation, Al-Aqsa none the less remained on the aforementioned Council list, and on the subsequent lists, because the Council saw no grounds for making any amendment in relation to Al-Aqsa.

17. By letter of 23 April 2007 and again by letter of 29 June 2007, the latter relating to Council Decision 2007/445/EC,[20] the Council, in order to comply with its duty to state the reasons for keeping Al-Aqsa on the list, gave the following reasons:[21] '… The [Netherlands] Ministers for Foreign Affairs and for Finance decided … to freeze all assets belonging to [Al-Aqsa]. That decision was endorsed by the order … delivered on 3 June 2003 by the President of the Civil Law Section of the Rechtbank 's-Gravenhage. The order stated that [Al-Aqsa] must be regarded as an organisation supporting Hamas and enabling the latter to commit or facilitate terrorist activities. A decision was therefore taken in respect of [Al-Aqsa] by a competent authority … The Council is therefore convinced that the reasons that justified inclusion of [Al-Aqsa] on the [list] are still valid.'[22]

12 — *Staatscourant* of 7 April 2003, No 68, p. 11; for further details, see *Al-Aqsa I*, paragraphs 16 to 21.

13 — According to the statement of reasons for the ministerial regulation; see paragraph 17 of *Al-Aqsa I* and paragraph 175 of the judgment under appeal.

14 — Article 2 of the Sanctieregeling terrorisme 2003.

15 — The statement of reasons in the Netherlands ministerial regulation refers to organisations which support terrorism in the 'Midden-Oosten' (Middle East). It should be pointed out here that the Dutch term 'Midden-Oosten', unlike the German 'Mittlerer Osten', also covers countries which in German usage are deemed to form part of the 'Naher Osten' (Near East).

16 — This order is reproduced in extract in paragraph 125 of the judgment under appeal.

17 — See *Al-Aqsa I*, paragraphs 18 to 21.

18 — With regard to the 'Intrekking Sanctieregeling terrorisme 2003', see *Staatscourant* of 1 August 2003, No 146, p. 9, and paragraph 170 of the judgment under appeal.

19 — OJ 2003 L 160, p. 81.

20 — Decision of 28 June 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC (OJ 2007 L 169, p. 58).

21 — This statement of reasons also formed the basis of the other measures contested by Al-Aqsa in Case T-348/07 (see, in this regard, paragraph 46 of the judgment under appeal).

22 — See paragraphs 4 and 10 of the judgment under appeal.

IV – Procedure at first instance and judgment under appeal

18. Al-Aqsa considered the Council's statement of reasons, as reproduced in point 17 above, to be unsound and brought before the General Court an action against the Council seeking the annulment of five consecutive measures adopted by the Council, on the same grounds of substance, with a view to continuing the freeze on Al-Aqsa's assets ('the contested measures'),[23] in so far as they concern Al-Aqsa, and, in addition, a declaration that Regulation No 2580/2001 is not applicable to it and an order requiring the Council to pay the costs.

19. In the judgment under appeal, the General Court held in essence as follows in relation to the third plea in law advanced by Al-Aqsa:[24]

'164 The Court has … held that the Council … may not disregard subsequent developments [arising out of] investigations or … prosecution …

…

168 In *Sison II* [[25]] … the Court … envisaged a situation in which police or security enquiries are closed without giving rise to any judicial consequences, because it proved impossible to gather sufficient evidence … The Court held that it would be unacceptable for the Council not to take account of such matters, which form part of the body of information having to be taken into account in order to assess the situation … To decide otherwise would be tantamount to giving the Council and the Member States excessive power to freeze a person's funds indefinitely, beyond review by any court and whatever the result of any judicial proceedings taken.

169 The same considerations must apply where a national administrative measure freezing funds or proscribing an organisation as terrorist is withdrawn by the body that has issued it or been annulled by a judicial ruling …

170 In the present case, it is common ground that the Sanctieregeling was repealed on 3 August 2003, which was almost immediately after the entry into force, on 28 June 2003, of the initial Community measure freezing the applicant's funds.

171 It is true in that regard that the contested decision [[26]] claims to be based not on the Sanctieregeling itself, but merely on the order of the court hearing the application for interim measures … However … it is not possible in this case to take into consideration the order of the court hearing the application for interim measures in isolation and without having regard at the same time to the Sanctieregeling.

172 It is appropriate to recognise therefore that since the repeal of the Sanctieregeling within the Netherlands legal order, the order of the court hearing the application for interim measures, which, as was pointed out above, forms an inseparable whole with the Sanctieregeling, can no longer provide a valid basis for a Community measure freezing the applicant's funds.

23 — To be precise, those measures were, first, Decision 2007/445; secondly, Council Decision 2007/868/EC of 20 December 2007 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2007/445 (OJ 2007 L 340, p. 100); thirdly, Council Decision 2008/583/EC of 15 July 2008 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2007/868 (OJ 2008 L 188, p. 21); and fourthly, Council Decision 2009/62/EC of 26 January 2009 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2008/583 (OJ 2009 L 23, p. 25) and Council Regulation (EC) No 501/2009 of 15 June 2009 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2009/62 (OJ 2009 L 151, p. 14).

24 — See paragraphs 164 to 181 of the judgment under appeal.

25 — Case T-341/07 *Sison* v *Council* [2009] ECR II-3625.

26 — That is to say, Decision 2007/445, the first of the contested measures.

173 By that order, the court hearing the application for interim measures simply refused to suspend the effects of the Sanctieregeling by way of an interim ruling. The Sanctieregeling definitively ceased to have any legal effects as a result of its repeal. The same must necessarily apply, in consequence, to the legal effects attaching to the order of the court hearing the application for interim measures, all the more so since that order contained only an interim ruling, without prejudice to a subsequent substantive ruling at the end of the proceedings.

174 In that regard, the Court also considers that the order of the court hearing the application for interim measures cannot, merely for the purposes of implementing Regulation No 2580/2001, have legal effects separable from those of the Sanctieregeling, effects that in the present case will continue to exist in Netherlands law despite the repeal of the Sanctieregeling. It is not moreover compatible with the general scheme of that regulation, a feature of which is the precedence that matters of national procedure must have in the Council's assessment, for the Sanctieregeling, which no longer has any effects within the Netherlands legal order, to continue to have effect indirectly and indefinitely within the Community legal order, by means of the order of the court hearing the application for interim measures.

175 The same applies all the more since the order of the court hearing the application for interim measures, delivered in proceedings brought by the applicant, is contingent upon the Sanctieregeling. It is apparent from the statement of reasons of the Sanctieregeling that it had been adopted "pending the adoption of a Community decision" and that it was to be repealed "as soon as such a decision enters into force" … According to the explanations given by the Kingdom of the Netherlands at the hearing, the Sanctieregeling was repealed solely as a result of concern on the part of the Netherlands Government to avoid an overlap between a national measure and a Community measure freezing the applicant's funds. It follows that the Sanctieregeling would have been repealed in any event immediately after the adoption of the initial Community measure freezing the applicant's funds, whether or not the applicant had instituted interlocutory proceedings or substantive proceedings.

176 Such a mechanism in turn fails to take into account the general scheme of Regulation No 2580/2001, which makes the adoption of a Community fund-freezing measure conditional upon either the commencement and active continuation of national proceedings seeking, directly and chiefly, the imposition on the person concerned of measures of a preventive or punitive nature, in connection with the combating of terrorism and by reason of that person's involvement in terrorism … or the delivery and implementation of a decision convicting the person concerned for such deeds.

177 In the case under consideration, the fund-freezing decision, taken initially at national level, is justified "pending the adoption of a Community decision", and the Community measure is justified in turn by the adoption of the national decision, which is immediately repealed. Such a mechanism is inevitably tainted by circular logic.

178 Far from being able to continue to take the order of the court hearing the application for interim measures as its basis, the Council should have drawn the logical conclusion from the repeal of the national fund-freezing measure and found that there was no longer any "substratum" in national law that justified to the required legal standard keeping the equivalent Community measure, and doing so whatever judicial proceedings were brought against the repealed national measure.

…

180 In the circumstances of this case, the main feature of which is the repeal of the Sanctieregeling, it is necessary on the contrary to acknowledge that the Council overstepped the bounds of its discretion by continuing to include the applicant indefinitely in the list at issue, when

periodically reviewing the latter's situation pursuant to Article 1(6) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001, solely on the ground that the decision of the court hearing the application for interim measures has not been challenged, in the Netherlands legal order, by the judicial body hearing an appeal in interlocutory proceedings or by the judicial body competent to adjudicate on the substance, whilst the administrative decision whose effects that court had been asked to suspend has in the meantime been repealed by the body which issued it.

181 This is all the more so because, as the applicant submitted at the hearing and was not challenged by the other parties, since the repeal of the Sanctieregeling, apart from giving effect to the contested decision under national law, the competent Netherlands administrative and judicial authorities have not taken any action to impose on the person concerned measures of a preventive or punitive nature in connection with the combating of terrorism and by reason of that person's involvement in terrorism.

…

184 In those circumstances, there is no need to rule on the claim that Regulation No 2580/2001 should be declared unlawful, pursuant to Article 241 EC (see, to that effect, *Al-Aqsa [I]*, paragraphs 66 and 67; see also Case C-91/05 *Commission* v *Council* [2008] ECR I-3651, paragraph 111).'

20. In the light of the foregoing, the operative part of the judgment under appeal reads as follows:

'[The General Court hereby:]

'1. Annuls … Decision 2007/445/EC …, … Decision 2007/868/EC …, … Decision 2008/583/EC …, … Decision 2009/62/EC … and Regulation … No 501/2009 … in so far as those acts concern [Al-Aqsa];

2. Dismisses the application as to the remainder;

3. Orders the Council … to bear, in addition to its own costs, the costs of [Al-Aqsa];

4. Orders the Kingdom of the Netherlands and the European Commission to bear their own costs.'

V – Procedure before the Court of Justice, forms of sought by, and main arguments of, the parties to the appeal proceedings

21. Al-Aqsa (Case C-539/10 P) and the Kingdom of the Netherlands (Case C-550/10 P) have each brought an appeal against the judgment under appeal. By order of the President of the Court of 4 February 2011, those two cases were joined for the purposes of the written and oral procedures and the judgment.

A – *Case C-539/10 P*

22. In the appeal proceedings, Al-Aqsa claims in Case C-539/10 P that the Court should:

— set aside the judgment under appeal in so far as the appellant puts forward grounds of appeal and arguments directed against the grounds of that judgment, and give a new ruling upholding the claims put forward at first instance on improved grounds as compared with those on which the judgment under appeal is based;

— order the Council to bear the costs of both sets of proceedings.

23. By way of grounds for its claims, Al-Aqsa argues in essence that, in its judgment, the General Court included a number of legal considerations on the basis of which certain pleas put forward were rejected as unfounded. Thus, the General Court held inter alia that, for the period during which it was in force, the Sanctieregeling, in conjunction with the order of the court hearing the application for interim measures, satisfied the requirements governing the freezing of assets laid down in Common Position 2001/931. [27] Al-Aqsa takes issue with those findings and fears that it will be adversely affected if the judgment under appeal acquires the force of *res judicata* on unchanged grounds, given that, in the light of the General Court's findings, it is reasonable to expect that the Netherlands will adopt new legal acts on which the Council may in turn rely in order to introduce further measures freezing Al-Aqsa's assets. First, the General Court exceeded its powers of review by determining itself which item of evidence was to be regarded as constituting a 'decision' within the meaning of Article 1(4) of Common Position 2001/931. Furthermore, the General Court erred in finding that the Sanctieregeling, whether or not in conjunction with the order of the court hearing the application for interim measures, could be regarded as a decision within the meaning of Article 1(4) of Common Position 2001/931. Finally, the General Court exceeded its powers in so far as it interpreted the order itself; in any event, it made a manifest error of assessment in interpreting that order. Consequently, the contested measures must be annulled on improved grounds as compared with those on which the judgment under appeal is based.

24. The Council of the European Union, the European Commission and the Kingdom of the Netherlands contend in essence that Al-Aqsa's appeal should be dismissed as inadmissible because it is not directed against the operative part of the judgment under appeal and seeks only an amendment of the grounds of that judgment. In the light of Article 56 of the Statute of the Court of Justice, which provides that an appeal may be brought only by a party which has been unsuccessful at least in part in its submissions, the appeal is therefore inadmissible.

25. In its reply, Al-Aqsa takes the view in this regard that it was not successful in all of its submissions at first instance, given that the claim that Regulation No 2580/2001 should be declared inapplicable to it was in any event not upheld. Article 56 of the Statute does not therefore preclude its appeal. So long as Regulation No 2580/2001 has not been declared inapplicable to it, it must constantly expect that new measures will be imposed on it by the Council.

B – *Case C-550/10 P*

26. The Kingdom of the Netherlands, the form of order sought by which is supported, in essence, by the Commission, claims that the Court should:

— set aside the judgment under appeal and refer the case back to the General Court; and

— order Al-Aqsa to pay the costs.

27. By way of grounds for its appeal, the Kingdom of the Netherlands submits in essence that the General Court misinterpreted Article 1 of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001 in finding that, following the repeal of the Sanctieregeling, the order of the court hearing the application for interim measures can no longer serve as the basis for keeping Al-Aqsa on the EU asset-freezing list. The Council makes no formal application in that respect but makes it clear by its response to the appeal that it does not wish to contradict the Netherlands submissions.

27 — See in particular paragraphs 63 to 69, 85 to 90 and 102 to 106 of the judgment under appeal.

28. Al-Aqsa contends that the appeal should be dismissed and the appellant ordered to pay the costs; in addition, it reiterates the forms of order already sought in Case C-539/10 P.

VI – Legal assessment

A – *Case C-539/10 P*

1. Inadmissibility of the appeal

29. I consider the appeal brought by Al-Aqsa to be inadmissible.

a) Claim not admissible

30. It is clear from the statement of appeal that Al-Aqsa's appeal is directed 'against the grounds [of the] judgment [under appeal]' and seeks to obtain 'improved grounds as compared with those on which the judgment under appeal is based'.

31. Such a claim fails not least to satisfy the requirements laid down in Article 113(1) of the Rules of Procedure of the Court of Justice,[28] which provides that an appeal must seek to set aside, in whole or in part, the *decision* of the General Court, that is to say, effectively, the operative part of that decision and the grounds on which it is based.

32. The grounds of appeal advanced are directed against pleas in law in which Al-Aqsa was unsuccessful at first instance. However, Al-Aqsa was none the less ultimately successful because the judgment under appeal was consistent with the third plea in law and the contested measures were therefore declared invalid in so as far as they concern Al-Aqsa. An appeal directed against only some – non-material – grounds of a judgment, on the other hand, is inadmissible.[29]

b) No interest in bringing proceedings: no adverse consequences for Al-Aqsa should the judgment under appeal acquire the force of *res judicata*

33. Furthermore, there are no apparent adverse consequences that would befall Al-Aqsa should the judgment under appeal acquire the force of *res judicata*. Al-Aqsa's argument to that effect is unconvincing.

34. After all, in any future proceedings against any new measure freezing its assets, Al-Aqsa would be at liberty to repeat those pleas in law in which it was unsuccessful at first instance and could not be barred from doing so on the ground that the judgment under appeal has acquired the force of *res judicata*.

28 — See in this regard Case C-263/09 P *Edwin* v *OHIM* [2011] ECR I-5853, paragraphs 81 to 85.

29 — Order of the President of the Court in Case C-363/98 P(R) *Emesa Sugar* v *Council* [1998] ECR I-8787, paragraphs 44 to 46; see also Wägenbauer, B., *EuGH VerfO, Satzung und Verfahrensordnungen EuGH/EuG*, Verlag C.H. Beck, Munich 2008, Article 56 of the Statute of the European Court of Justice, paragraph 6.

35. The force of *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question,[30] and, therefore, in the present case, only to the findings relating to the ultimately successful third plea in law. Moreover, any action brought against a new measure adopted by the Council in respect of Al-Aqsa would not be directed either at the same facts or at the same subject-matter, but rather at an entirely different set of circumstances shaped by the new measure. Consequently, there should be no fear of any bar on grounds of *res judicata*.

c) Appeal not admissible on the ground that the claim for a declaration as to the non-applicability of Regulation No 2580/2001 to Al-Aqsa was not granted

i) No claim to that effect

36. Furthermore, there is no need to determine whether Al-Aqsa, as it submits in its reply, was entitled to bring an appeal because the General Court did not allow its claim for a declaration that Regulation No 2580/2001 is inapplicable to it. For, on the one hand, that issue was raised only in its reply and, on the other hand, it bears no discernible relation to the claim actually put forward by Al-Aqsa or the grounds given for it.

ii) No 'unsuccessful' submissions within the meaning of Article 56 of the Statute

37. For the sake of completeness, however, it must be pointed out that such an appeal would not have been granted anyway. It cannot be said that Al-Aqsa was 'unsuccessful' in its submissions within the meaning of Article 56 of the Statute of the Court of Justice. For, as is clear from paragraph 184 of the judgment under appeal, the General Court did not reject Al-Aqsa's plea as to the illegality of the aforementioned regulation but refrained entirely from examining it on the ground that the contested measures were in any event to be annulled in so far as they concern Al-Aqsa.

38. Given the irrelevance of this issue to the judgment under appeal, the approach taken by the General Court cannot be criticised. It is true that the operative part of the judgment is misleading in so far as it suggests that Al-Aqsa was in part unsuccessful in its submissions. However, it is readily apparent from an assessment of the operative part of the judgment under appeal in the light of paragraph 184 of that judgment that the intended meaning is simply the same as that of paragraph 66 of *Al-Aqsa I*, to which, moreover, express reference is made, and the provisions of the operative part of the latter judgment, which is to say that there was no need to examine the plea as to the illegality of Regulation No 2580/2001.

2. Interim conclusion

39. In light of all the foregoing, the appeal brought by Al-Aqsa must be dismissed.

B – *Case C-550/10 P*

40. I take the view that the appeal brought by the Kingdom of the Netherlands, by which it seeks to have the judgment under appeal set aside, is admissible but unfounded.

41. In so far as the fact that, in Case C-550/10 P, Al-Aqsa repeats the claims already put forward in Case C-539/10 P is to be regarded as a counter-appeal, that counter-appeal must be dismissed as inadmissible on the same grounds as its appeal in Case C-539/10 P.

30 — Case C-277/95 P *Lenz* v *Commission* [1996] ECR I-6109, paragraph 50.

1. Appeal brought by the Netherlands is unfounded

42. No error in law can be inferred from the contested findings in the judgment under appeal that relate to the third ground of appeal. After all, the General Court rightly points out in paragraph 178 of the judgment under appeal that 'far from being able to continue to take the order of the court hearing the application for interim measures as its basis, the Council should have drawn the logical conclusion from the repeal of the national fund-freezing measure and found that there was no longer any 'substratum' in national law that justified to the required legal standard keeping the equivalent Community measure'.

43. The soundness of that assessment by the General Court becomes apparent when account is taken of the scheme of the measures to combat terrorism provided for in the EU legislative acts and that scheme is set alongside the factual and legal situation at issue in the judgment under appeal.

a) Scheme of the restrictive measures to combat terrorism

44. It is important to point out first of all that the EU measures to combat terrorism at issue are not a matter for the discretion of the Council, but are closely linked to the national legal position in the Member States.

45. In this regard, the asset freezing measures introduced by the Council are adopted in two stages, in accordance with Article 2(3) of Regulation No 2580/2001 in conjunction with Article 1 of Common Position 2001/931.

46. In order for the Council to be able to take any action at all, Article 2(3) of Regulation No 2580/2001 in conjunction with Article 1(4) of Common Position 2001/931 first of all requires that there should be a *decision* based on serious and credible evidence which has been taken by a competent authority of a Member State in connection with the 'instigation of investigations or prosecution for a terrorist act' ('the decision to prosecute').

47. It is only on the basis of such a decision to prosecute, or *a fortiori* on the basis of a conviction for the relevant act, that the Council may take any action at all and, where a person has already been included on its list, must, as a second stage, verify by means of a regular review *whether there are ' grounds for keeping* [the person or entity concerned] on the list', in accordance with Article 2(3) of Regulation No 2580/2001 in conjunction with Article 1(6) of Common Position 2001/931.

48. The Council enjoys a wide margin of discretion in making that assessment. However, in the light of the schematic link between the restrictive measures adopted by the Council and the decision to prosecute taken by the competent authority of the Member State in question, it none the less becomes clear from what point the Council must necessarily take the view that there are no longer any grounds for keeping the person concerned on the list: that is to say, where, in the light of the factual and legal situation in the State in which the competent authority is located, the view simply can no longer be taken that the as yet unconvicted person or entity concerned continues to be the subject of investigations. After all, it is ultimately those investigations alone which justify the measure adopted by the Council.

49. That said, it is apparent from the scheme of Article 1 of Common Position 2001/931, to which Regulation No 2580/2001 refers, that the Council is required to make a definitive determination of the status of investigations on the basis of a formalised criterion. For, on the one hand, it must take into account whether it is safe to assume that there continues to be a legally valid decision taken by a competent authority on the basis of serious and credible evidence, and, on the other hand, it must examine whether, in addition, that decision is still actually being implemented, that is to say whether investigative measures are still being conducted on the basis of it.

50. In this regard, the Council's regular review of the list protects the person or entity concerned against two risks which are intolerable in a State governed by the rule of law: first, the risk that his/its name continues to appear on the list even though the investigative measures directed against him/it have been terminated, unsuccessful or have yielded no evidence but this is not reflected in a corresponding decision closing the investigations which exonerates that person or entity, and, secondly, the risk that his/its name continues to appear on the list even though the decision to prosecute itself ceases to apply on account of an *actus contrarius* on the part of the competent authority or pursuant to a judicial decision. In the latter event, the Council has a mandatory obligation to amend the list.

51. After all, in accordance with the spirit and purpose of Common Position 2001/931, to which Regulation No 2580/2001 refers and which lays down the condition of a decision taken by a competent authority on the basis of serious and credible evidence, any grounds justifying restrictive measures on the part of the Council can no longer be said to exist once such a decision ceases to apply.

52. It is clear from the foregoing submissions that, contrary to the argument advanced by the Netherlands, there were no longer any grounds for keeping Al-Aqsa on the Council's list.

b) Absence of a decision within the meaning of Article 2(3) of Regulation No 2580/2001 in conjunction with Article 1(4) of Common Position 2001/931

53. Once the ministerial regulation had ceased to apply, the order of the court hearing the application for interim measures, which was henceforth the only possible point of reference for the Council, was effectively left in limbo, did not itself make any mention of the instigation of investigative measures against Al-Aqsa and could not therefore constitute a 'decision' within the meaning of Article 2(3) of Regulation No 2580/2001 in conjunction with Article 1(4) of Common Position 2001/931.

i) The order does not have the status of a 'decision' once the ministerial regulation ceases to apply

54. The view that the order of the Netherlands court hearing the application for interim measures, viewed in isolation once the ministerial regulation has ceased to apply, must still be regarded as a 'decision … [which] concerns the instigation of investigations or prosecution for a terrorist act' within the meaning of Article 2(3) of Regulation No 2580/2001 in conjunction with Article 1(4) of Common Position 2001/931 is untenable even on the assumption that the Council enjoys a wide margin of discretion.

55. On the one hand, the assessments and findings contained in the ministerial regulation can no longer be attributed to the order once the aforementioned regulation has ceased to apply. To this extent, the order has effectively been divested of the basis on which it was founded.

56. After all, it is true that, after examining the case-file, the Netherlands court formed the view that, in 2003, Al-Aqsa and certain terrorist groups had maintained contacts which ruled out any grounds for disapplying the ministerial regulation. However, that judicial *assessment of the facts* for 2003, which, moreover, makes no specific reference to the status of any investigations or to any related decision, cannot be construed *as being a decision* concerning the instigation of investigations within the meaning of Common Position 2001/931 and Regulation No 2580/2001.

57. Nor can the proceedings which resulted in the order of the Netherlands court, when viewed in isolation, be regarded as proceedings seeking, directly and chiefly, the imposition on the person or entity concerned of measures of a preventive or punitive nature, in connection with the combating of terrorism and by reason of that person's involvement in terrorism. Indeed, the proceedings initiated before the Netherlands court by Al-Aqsa, viewed in isolation, had precisely the opposite purpose.

58. On the other hand, the Netherlands order also does not contain any reference to any ongoing decision to prosecute Al-Aqsa in the Netherlands which is independent of the ministerial regulation. On the contrary, even after several years, the investigations into Al-Aqsa have clearly not achieved any significant results in the Netherlands. [31]

59. Accordingly, when viewed on its own and in itself, the order does not satisfy the requirements applicable to a decision to prosecute which are laid down in Regulation No 2580/2001 and Common Position 2001/931. Even when combined with the ministerial regulation, the order would struggle to fall within the meaning of 'decision' as that term is used in Common Position 2001/93; as it is, such a classification appears impossible.

ii) Minimum requirements applicable to the meaning of 'decision' as that term is used in Regulation No 2580/2001 and Common Position 2001/931

60. Even on the basis of a joint consideration of the (at that time still applicable) ministerial regulation and the order of the court hearing the application for interim measures, it took considerable effort, formal legal considerations aside, to classify the combination of the Netherlands order and the ministerial regulation as a 'decision' within the meaning of the aforementioned EU legislation.

61. The reason for this is not least the fact that neither the ministerial regulation, which was by nature an *asset-freezing measure*, nor the order of the court hearing the application for interim measures, which was concerned not with the instigation of investigations but with an *application to suspend enforcement* of the freezing of funds provided for in the ministerial regulation, could be described as constituting the '*instigation of investigations* or prosecution for a terrorist act' in the strict sense of that phrase.

62. None the less, in its statement of reasons for keeping Al-Aqsa on the list, the Council referred exclusively to those two legal acts adopted in the Netherlands. The judgment under appeal was therefore right to describe the basis on which the decision was taken in the Netherlands as 'contingent', [32] 'circular' and 'tainted'. [33]

iii) Interim conclusion

63. There is in this case, in any event now that the Netherlands ministerial regulation has ceased to apply, no national decision to prosecute which, in order to be capable of being relied on as a basis by the Council, must be given in national proceedings seeking, directly and chiefly, the imposition on the person concerned of measures of a preventive or punitive nature, in connection with the combating of terrorism and by reason of that person's involvement in terrorism.

64. The question whether any proceedings seeking to impose preventive or punitive measures on any significant scale were and continue to be conducted in the Netherlands at all after Al-Aqsa had been included on the Council's list and the ministerial regulation had been deemed 'superseded' and repealed, seems debatable in the light of the factual and legal situation obtaining at the material time, and, in any event, the Council could not assume that that was the case without exceeding its discretion.

31 — See paragraph 181 of the judgment under appeal.

32 — See paragraph 175 of the judgment under appeal.

33 — See paragraph 177 of the judgment under appeal.

c) Consequences of the absence of a decision under Article 2(3) of Regulation No 2580/2001 and Article 1(6) of Common Position 2001/931

65. Once the ministerial regulation had ceased to apply, a thorough new examination of the measure imposed on Al-Aqsa by the Council should have been conducted with a view to identifying a decision within the meaning of Article 1(4) of Common Position 2001/931 which was capable of providing grounds for keeping Al-Aqsa on the list in question. No such examination was undertaken.

66. Since continued use of the aforementioned statement of reasons by the Council, which was now able to rely solely and exclusively on the Netherlands order, was no longer adequate, the Council exceeded its discretion in keeping Al-Aqsa on the list, which fact inevitably gave rise to the annulment of the contested measures to the extent sought by Al-Aqsa.

67. In the absence of a meaningful decision by a competent authority, the Council's decision to keep Al-Aqsa on the list on unchanged grounds could not be upheld,[34] in the light of Article 2(3) of Regulation No 2580/2001 in conjunction with Article 1(6) of Common Position 2001/931.

d) Considerations relating to fundamental rights

68. The foregoing also seems to be the inevitable conclusion in the light of fundamental rights.

69. It is true that the Charter of Fundamental Rights is not applicable *ratione temporis* to the facts of these cases, with the result that reliance should be placed on the establishment of fundamental rights as general principles of EU law.

70. Taking into account the severity of the interference with the right of ownership to which a person is exposed where his assets are frozen solely on the basis of suspicion and investigative measures directed against him, it seems appropriate that, if such interference is to be justified at all, it should be made subject to very strict conditions.[35]

71. In order to have due regard for the fundamental requirement to guarantee the right of ownership, the Council therefore has a duty to examine carefully whether a decision justifying the freeze exists, whether that condition continues to be satisfied and, in the event, for example, that the original decision ceases to apply, to make keeping the person or entity concerned on the list contingent on the existence of a new decision which also justifies the freeze. However, unlike, for example, in Case C-27/09 P,[36] that was not the case here.

2. Interim conclusion

72. Consequently, the appeal brought by the Netherlands must also be dismissed.

VII – Costs

73. Since the appeals have been unsuccessful, it seems appropriate, in accordance with the first subparagraph of Article 69(3) of the Rules of Procedure of the Court of Justice, which is applicable to appeal proceedings by virtue of Article 118 thereof, that each party to the proceedings should bear its own costs.

34 — See paragraphs 159 to 165 of the judgment under appeal.

35 — On the significance of the proportionality test in the case of interference resulting from measures to prevent nuclear proliferation, see C-380/09 P *Melli Bank* v *Council* [2012] ECR, paragraph 44 et seq.

36 — See in this regard Case C-27/09 P *France* v *People's Mojahedin Organization of Iran* [2011] ECR I-13427, paragraph 20.

VIII – Conclusion

74. In the light of all the foregoing, I propose that the Court should:

(1) dismiss the appeals;

(2) order Stichting Al-Aqsa, the Kingdom of the Netherlands, the Council of the European Union and the European Commission each to bear their own costs.