Smart Sanctions, Fundamental Rights and Extracontractual Liability for Damages

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Summary: This paper analyses the problem of the EU non-contractual liability for the damages caused by the counter-terrorism measures – so called smart sanctions in the form of freezing the assets of the individuals allegedly associated with the terrorism and the approach of the Court of Justice to this sanctions. It deals with the actual case-law, concretely the judgement in the case T-341/07 Sison III.

Keywords: EU counter-terrorism measures, smart sanctions, freezing of assets, legality, Court of Justice, non-contractual liability of the EU.

One of the well-established streams of current EU case law is a line of EU Court of Justice's ("CJEU") rulings on counter-terrorism measures – so-called smart sanctions, mainly consisting in freezing the assets of individuals associated with terrorism. Substantial part of this case law deals with legality of these EU sanctions in terms of (non) compliance with fundamental rights, eventually resulting in invalidation of such measures. Legality of these measures is subject to CJEU's judicial review. Should such a sanction be found illegal, civil consequences of such illegality, e.g. EU liability for damages caused by the asset freezing, may follow. Conditions of such non-contractual liability are elaborated in the CJEU judgment in Case T-341/07 Sison III.[1] Importance of the judgment lies in the fact that it upholds a very limited willingness of the CJEU to grant non-contractual EU liability even in quite obvious circumstances. We will first analyze the judgment and then re-think the relationship of the EU's liability and its values and objectives.

1. Facts of the case

Even though we are dealing with the ninth CJEU decision at the request of applicant Sison, at least two other judgments are of major significance in this

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[1] Judgment in Case T-341/07 Jose Maria Sison v Council of 23 November 2011.

context: judgment in Case T-47/03 Sison I and an interlocutory judgment in Case T-341/07 Sison II.[2] The General Court has so far repealed any and all EU sanctions against the applicant.[3] The reason for these cancellations is linked to the fact that the asset freezing was based on decisions of Dutch courts[4] related to the status of Mr. Sison as a refugee, not linked to any criminal prosecution for terrorism, a condition for imposition of smart sanctions. The EU Council while freezing assets of Mr. Sison by a sanctions regulation has been mislead by the Dutch court judgments in the sense that they mention Mr. Sison as a Filipino citizen with residence in the Netherlands, leader of the Communist Party of Philippines and its armed wing New People's Army, which has conducted a series in Philippines terrorist acts.

2. Condition of sufficiently serious breach of an EU rule

The General Court in paragraph 29 of the judgment points out that according to settled case law, three conditions of EU liability for damages are (1) unlawful conduct alleged against the EU institutions, (2) actual damage and (3) existence of a causal link between that conduct and the damage;[5] it also notes that these conditions are cumulative (para 29). It is not the purpose of this article to analyze all the conditions of EU liability for damages; we will deal with only one of them: the *sufficient seriousness of the EU rule breach*.

The General Court's ideological starting point while defending this additional condition is the difference between the action for annulment and action for damages. In connection with the afore mentioned condition the General Court stresses that the reason for existence of non-contractual liability claim for compensation is not any harm, but only that originating in a sufficiently

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[2] Judgment Sison II has the same ref. No. as the judgment examined in this article.

[3] Cf. Council decision 2007/445, Council Decision 2007/868 implementing Article 2, paragraph 3 of Regulation No 2580/2001 and repealing Decision 2007/445, Council Decision 2008/343, amending Decision 2007/868, Council decision 2008/583 implementing Article 2, paragraph 3 of Regulation No 2580/2001 and repealing Decision 2007/868, Council Decision 2009/62, implementing Article 2, paragraph 3 of Regulation No 2580/2001 and repealing Decision 2008/583 and Council Regulation 501/2009 implementing Article 2, paragraph 3 of Regulation No 2580/2001 and repealing Decision 2009/62, in so far as those acts relate to the plaintiff.

[4] Judgment of Raad van State (Council of State) of 17 December 1992 and the judgment of the Rechtbank (District Court) in the Hague of 11 September 1997.

[5] The General Court refers here to Case C 120/06 P and C 121/06 P FIAMM, para 106 and case law cited therein, and to CJEU judgments T 351/03 Schneider Electric, para 113, and T-47/03 Sison I, para 232.

serious breach of a rule "*intended to confer rights on individuals*" (para 33).[6] This is so because the majority of EU acts – including counterterrorism – has economic consequences, and should therefore "*avoid the risk of having to bear the losses claimed by the persons concerned obstructing the institution's ability to exercise to the full its powers in the general interest, whether that be in its legislative activity, or in that involving choices of economic policy or in the sphere of its administrative competence, without however thereby leaving individuals to bear the consequences of flagrant and inexcusable misconduct*" (para 34).[7]

The probability that a sufficiently serious breach is at stake is the greater the smaller the discretion of the institution and the more accurate formulation is carried out in the provision;[8] yet to meet this condition, not any breach of the rule is not enough even if there is no room for discretion by the respective institution, if the matter is complicated (paras 36–40):[9] CJEU must take into account the complexity of the case, so that EU liability can only be based on "*the finding of an irregularity that an administrative authority, exercising ordinary care and diligence, would not have committed in similar circumstances*" (T-429/05 Artegodan, paras 59–62). The General Court expressly states in this context that "*the case-law does not establish any automatic link between, on the one hand, the fact that the institution concerned has no discretion and, on the other, the classification of the infringement as a sufficiently serious breach"* (para 36). However, the vast majority of the previous case law is based on the exact opposite: a breach of EU law with a zero discretion left to the institution in question has a quasi-automatic consequence of extra-contractual liability.[10] Clarification of this condition for the case at stake is crucial: if the Council is to implement UN Security Council resolutions by a secondary act, thereby fulfilling the implementation duty instead of EU Member States (see especially

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[6] Cf also 5/71 Zuckerfabrik Schoppenstedt, point 11; 9,11/71 Grands moulins de Paris; 43/72 Merkur; 83/76 Bayerische HNL; C-104/89 & C-37/90 Mulder, where in a dispute on milk quotas the CJEU has recognized liability of the Community.

[7] Cf. T-351/03 Schneider Electric, para 125; T-212/03 MyTravel Group, para 42, a Artegodan, para 55.

[8] Cf. C-282/05 P Holcim, para 47.

[9] Cf. C-312/00 P Commission v. Camar a Tico, para 54; T-198/95, 171/96, 230/97, 174/98, 225/99 Comafrica, para 34.

[10] This is important even for Member States non-contractual liability for breach of EU law in respect of which the case law is far more casuistic, but the conditions of which have to be consistent with the EU contractual liability: *„[…]conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances."* (C-352/98 P Bergaderm, para 41).

Article 25,[11] 103[12])[13], space for discretion within the conditions set in Article 2, paragraph 3 of Regulation No 2580/2001 in conjunction with Article 1, paragraph 4 of Common Position 2001/931 is indeed non-existent: otherwise, the proposal for inclusion in the so-called autonomous EU list is not adopted (para 57).[14]

When analyzing this argument we should not forget that the whole subject of anti-terrorist case law is an alleged violation of fundamental rights of individuals. Simplified logic of many readers would have assumed that almost any interference with a fundamental law should be conceptually sufficiently serious, otherwise it would not be a fundamental right. But with this the General Court disagrees: even in cases of interference with fundamental rights it is necessary to ascertain whether the breach is sufficiently serious (para 44). If – according to the General Court – all fundamental rights should be absolute, if any violation or, respectively, restriction thereof was sanctionable, if it was not possible eg to distinguish between the essence / existence of ownership rights on one hand side and restrictions on its exercise on the other (such as freezing assets), hardly any anti-terrorist sanction could be imposed at all.[15] However, reflection of the legal norms violation intensity – "sufficient seriousness" – should in our opinion aleready be a criterion for reviewing the validity of the rule, not only of its liability consequences.

The central question of judgment, therefore, is whether in this case was *"sufficiently serious breach of a fundamental rule of law protecting an individual."* In examining this question it is first necessary to determine whether

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[11] Art. 25 of the UN Charter: "*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'*"

[12] Art. 103 of the UN Charter: "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."*

[13] The CJEU recognized this in para 293 of the cited judgment Kadi: "*Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations*."

[14] In the case of autonomous EU sanctions lists the Council acys on the basis of previous decision of a competent national authority of an EU Member State and can only assess whether (i) the relevant decision has been taken by a competent authority, and (ii) to verify its consequences, i.e., whether grounds for freezing the funds persist. If both conditions are met, the Council has no discretion to decide on inclusion of the individual on the EU sanctions list.

[15] Cf. C 402/05 P and C 415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission ("Kadi"). Violation and (legal) limitation of a fundamental right are two different things – breach is an illegal interference of public authorities, whereas on the contrary restrictions are permissible as long as they do not breach the respective legal conditions (see Sison III, para 50).

there is a " *fundamental rule of law protecting an individual*" before that there was possibly the *"sufficiently serious breach*."

Therefore, the General Court first notes that the issue really is *the "fundamental rule of law, protecting an individual"* – plaintiff Sison. The damages claim[16] concerns the infringement of Article 2/3 of Regulation No 2580/2001 in conjunction with Article 1/4 of Common Position 2001/931, allowing the Council to impose restrictions on the rights of individuals in the fight against terrorism, which governs the conditions under which such restrictions are allowed. Therefore, the basic object of these provisions is „*to protect the interests of the individuals concerned, by limiting the cases of application, and the extent or degree of the restrictive measures that may lawfully be imposed on those individuals*." (para 51).

Then the General Court approaches the question of whether there was possibly a "*sufficiently serious breach*" of such a rule. Here, the General Court pointed to the difficulty of interpretation of a vague provision of a penalty (paras 62–65 points), difficulty of aggravated concluded that the Council cannot be blamed for "*irregularity that an administrative authority, exercising ordinary care and diligence, would not have committed in similar circumstances, can render the Community liable*" (para 39).

After the General Court did not find sufficient seriousness of the breach of the Council sanctions regulation (para 74), it goes on to examine the alleged violation of EU fundamental rights.[17] Along with the General Court let us emphasize that the applicant did not attack the smart sanctions regime as a whole as this system in general has indeed been found compliant with fundamental rights by the CJEU several times previously (paras 76–77). The EU right to adopt smart sanctions itself is therefore not legally challenged by the applicant, and therefore the General Court continues to examine whether there has been a "*sufficiently serious breach*", it states that a sufficiently serious breach of fundamental rights would have to consist in the fact that smart sanctions were

[16] In this context it is significant that in paragraph 25 of Sison III, because of res judicata the General Court dismissed the action for damages as inadmissible in so far as it sought compensation for damage allegedly caused by the acts contested in a case in which judgment T-47 / 03 Sison v Council ("Sison I") was delivered. Thus, plea for an award of damages remained only non-compliance with statutory conditions set out in Article 2, paragraph 3 of Regulation No 2580/2001 and Article 1, paragraph 4 of Common Position 2001/931 as established by the General Court (see Sison II para 122). Pleas alleging infringement of the obligation to state reasons and manifest error of assessment of the facts, have been rejected by the General Court (para 71 and 89 of the Sison II judgment).

[17] The General Court did not rule on the pleas alleging infringement of the proportionality principle and breach of general principles of EU law and fundamental rights in its judgment Sison II (see para 43 of Sison III, referring to paras 123 and 138 of Sison II).

imposed on the plaintiff under conditions exceeding the limits specified in the Sanctions Regulation, i.e. „*in conditions not consistent with those laid down, specifically in order to limit the opportunities of interference by public authorities in the exercise of those rights*" (para 78). Any contractual liability of the EU depends therefore on the seriousness of the breach sufficient of the sanctions regulation, as „*the alleged breach of the applicant's fundamental rights being inseparable from that illegality and arising from it alone*" (para 80). Given that the said sufficient seriousness was refuted above, an EU non-contractual liability cannot be granted to the plaintiff in this case.

3. Objections to General Court's arguments

We disagree with the logic of General Court's arguments. We propose that the judicial reflection of EU law breach intensity (sufficient seriousness of the breach) be already part of the legality – validity review. We take this standpoint basicly for three reasons: plain logics, conflict with EU values and conflict with the protection of an individual as the basis of the entire EU law legitimacy.

3.1. Plain logic

If we follow the existing logic reasoning of the General Court, any violation of primary law (including fundamental rights, such as the right to effective judicial protection, para 81) is serious enough to cause annulment of a secondary act (regulation, directive or decision), although this may cause a breach of the EU Member States' commitments under the UN Charter (in particular Articles 25 and 103) for the implementation of security Council resolutions in the fight against terrorism, but some violations of fundamental rights may not be serious enough so that the victim be paid compensation. In our view, already this sole argument makes the entire approach of the General Court to this question inacceptable.

a. Conflict with EU values and objectives

The above raised question marks were perhaps also shared by the General Court which defends itself against them in para 81 of the Sison III judgment: „*neither the Charter of Fundamental Rights of the European Union nor the ECHR, which both guarantee the right to effective judicial protection, preclude that the Community's non-contractual liability be made subject, in circumstances such as those of this case, to the finding of a sufficiently serious breach of the fundamental rights invoked by the applicant. With more particular regard to*

the rights guaranteed by Protocol No 1 to the ECHR, the European Court of Human Rights has, furthermore, taken account of 'the various inherent limitations imposed by the elements of the action to be established'(Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, ECHR judgment of 30 June 2005, Reports of Judgments and Decisions, 2005-VI, §§ 88, 163 and 165)."[18]

As the current CJEU case-law stays, any violation of primary EU law (including fundamental rights, such as the right to effective judicial protection, cf. para 81) is serious enough for the EU to cancel a secondary act (regulation, directive or decision), even if the EU may cause a breach of Member States' obligations under the Charter of the United Nations (especially the above quoted Articles 25 and 103) to implement the Security Council resolutions on the fight against terrorism,[19] but some such fundamental rights violations may not be serious enough in order to award the victim due compensation.

However, under Article 2 TEU respect for human rights is one of the EU values and the first EU goal listed in Article 3 TEU is to promote peace, securing of which is a primary objective and competetnce entrusted by the UN members to the UN Security Council; Article 24 of the UN Charter leaves no doubt about it: *„In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."* Let us stress that the UN Charter is the pinnacle of international law and moreover under Article 21(1) TEU „[*t*]*he Union's action on the international scene shall be guided by … the respect for the principles of the United Nations Charter and international law."*

If we hereby accept that a fundamental rights' breach is serious enough to cause cancellation of EU secondary legislation (e.g. parts of sanction regulations), serious enough to cause the CJEU to ignore the obligation of EU Member States to comply with UN Security Council resolutions adopted under Chapter VII of the UN Charter (threat to international peace and security), thus disregarding absolute priority of such resolutions over other obligations under international law, but may NOT be serious enough to ensure that an individual received financial compensation, then we can with a slight exaggeration

[18] The General Court refers to the ECHR judgment of 30.06.2005 in the matter Bosphorus v Ireland, paras 88, 163 and 165.

[19] The entire above cited Kadi case law concerns this problem. The author is aware of intertemporal provisions in the decisions in question, taking recourse to Article 264(2) TFEU and temporarily maintaining a freeze of assets, thus giving the Council and the Commission time to issue a new proper sanction act; CJEU demands for meeting the burden of proof in this case, however, are so high they are not in our view realisticly achievable.

conclude that money is an EU objective and value of higher level of protection, because it is subjected to stricter criteria than the goal of maintaining international peace.

b. Conflict with the protection of an individual as the basis of the entire EU law legitimacy

Everything that gives legitimacy to quasi-constitutional EU standards, is based on the protection of fundamental rights or weaker position of the individual, not on sovereignty of Member States or the importance of the EU. E.g., the fact that EU law affects the status of persons more than international law, is the main reason for recognition of its direct effect and primacy over Member States' laws.[20] How should this primacy be rhymed with the fact that compensation based on non-contractual liability is easier in situations without application of EU law than with it? While in the procedure-law area so far an effort has prevailed to ensure that EU law-based claims are not discriminated against by national procedural law – i.e. that such claims be recoverable under the same procedural requirements as claims based on national law[21] (principle of equivalence[22]) and not to deprive individual rights, based on EU law, of efficiency (principle of effectiveness – effective judicial protection), the condition of sufficient seriousness turn the car upside down: the right to compensation under EU law is more difficult to obtain not because of national law but because of EU law itself.

It could be valuable to add the view of the ECtHR on the question as formulated in the cases of *Matthews*[23] *and the above mentioned Bosphorus* (a state cannot justify violation of the ECHR by arguing that it has in the respective area delegated its powers to an international organization), which could be more favorable for Mr. Sison than the approach of the General Court: one cannot exclude an ECtHR approach, whereby Member States may become liable for damage caused to Mr. Sison, when such a damage is not made good by the EU itself.

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[20] Cf. e.g. Art. 1 TEU: „*This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.*"; Art. 2 TEU: „*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*"; Art. 3(1) TEU: „*The Union's aim is to promote peace, its values and the well-being of its peoples.*" ect.

[21] Cf. C-261/95 Palmisani.

[22] Cf. 240/87 Deville, C-20/92 Hubbard.

[23] Case No. 24833/94 Matthews v. UK (1999).

4. Conclusion

The General Court in its judgment Sison III has made the conditions for non-contractual liability of the EU more detailed in relation to the so-called smart sanctions.

As to the condition of sufficient seriousness of a breach by EU institutions, the General Court confirmed its previous case law, so that even in cases with no room for discretion this lability does not occur quasi-automatically but only if the decision-making instituion fails to act as "*an administrative authority, exercising ordinary care and diligence"*: such administration may be due to the circumstances even wrong. The reason for this requirement is an effort not to discourage the EU institutions from taking smart sanctions by a threat of a duty to compensate eventual damages. The judgment confirmed that if awarding non-contractual liability of the EU is difficult in general, in international-law situations it is even harder to obtain it.[24]

However, some doubts remain: if we somewhat simplify the situation, by the general availability of an act's annulment because of violation of fundamental rights (while the freezing is maintained until a new sanction regulation is adopted) and by the unavailability of compensation for such damage, the General Court indicates that for the EU is not so difficult to admit violation of fundamental rights on the EU side, but the problem is to admit its obligation to pay damages: this comparison does not cast good light on the credibility of European incantations of human rights and the rule of law.

Thus, our conclusions are the following:

1) We consider the condition of "sufficient seriousness" illegitimate because of conflict with EU values and goals and because of conflict with protection of an individual as the basis of the entire EU law legitimacy; the General Court's ideological starting point – the difference between the action for annulment and action for damages [„*it is not the purpose of an action for damages to make good damage caused by all unlawfulness*" (para 32)] – seems to us purposeful and highly unconvincing.
2) Should the condition at stake be upheld as a criterion for judicial review, in our view it should already be made use of at the stage of legality review, not only in the stage of its liability consequences.

[24] Cf. in particural C-120/06 P a C-121/06 P FIAMM a FIAMM Technologies, where the reason fot not awarding of the non-contractual liability was a denial of direct effect of the General Agreement on Tariffs and Trade (GATT 1994).