EU Sanctions, Security Concerns and Judicial Control

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I. Introduction

While the European Court of Justice has in the past been faced with certain situations relating to security concerns,[1] the problem of security has become more tangible in connection with EU sanctions policies. It should be recalled that especially since the 1990s, the development of an EU external relations policy has been matched by a gradual movement from sanctions undertaken by individual Member States towards a veritable EU sanctions policy.[2] Sanctions against third States and other parties are normally taken by the EU, acting, as it were, on behalf of the Union and its Member States. There is a range of instruments and mechanisms that can be used in this respect, such as suspending the operation of an autonomous regulation relating to financial assistance, suspending the operation of an international agreement (notably on the basis of a human rights clause inserted in a number of bilateral trade and cooperation agreements)[3] and, last but not least, adopting restrictive measures affecting economic and financial relations with third States. Such restrictive measures may imply,

1 Just to mention a few examples, see Judgement of 17 October 1995, *Werner,* C-70/94*,* EU:C:1995:328; Judgement of 17 October 1995, *Leifer,* C-83/94, EU:C:1995:329; Judgement of 14 January 1997, *Centro-Com,* C-124/95, EU:C:1997:8.

2 P. J. Kuijper, "Trade Sanctions, Security and Human Rights and Commercial Policy", in M. Maresceau (ed), *The European Community's Commercial Policy after 1992: The Legal Dimension* (Dordrecht: Martinus Nijhoff, 1993), 387; E. Paasivirta, A. Rosas, "Sanctions, Countermeasures and Related Actions in the External Relations of the EU: A Search for Legal Frameworks", in E. Cannizzaro (eds), *The European Union as an Actor in International Relations* (Alphen aan den Rijn: Kluwer Law International, 2002), 207.

3 See, e.g. A. Rosas, "The European Union and Fundamental Rights/Human Rights", in C. Krause, N. Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku: Åbo Akademi University Institute for Human Rights, 2012), 481, at 507-512.

inter alia, the freezing of funds, prohibitions or restrictions on conducting a business or restrictions on free movement.

It is above all in the context of restrictive measures that security concerns may become acute. Under Article 215 of the Treaty on the Functioning of the European Union (TFEU), such measures may be adopted on the basis of a decision adopted under the Common Foreign and Security Policy (CFSP). This possibility, which was, in a somewhat more restricted form, envisaged already in the Treaty of Maastricht (1992),[4] implies, according to Article 215, paragraph 1, TFEU,a Council CFSP decision providing for "the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries", followed by the adoption, also by the Council, of a legally binding act, normally in the form of a regulation. The CFSP decision is as a rule adopted unanimously whilst the regulation adopted under Article 215, paragraph 1, TFEU only requires a qualified majority in the Council. Article 215, paragraph 2, TFEU, unlike the provisions preceding the Treaty of Lisbon, makes it clear that such restrictive measures may also be taken against "natural or legal persons and groups or non-State entities".[5]

The adoption of restrictive measures addressed to natural or legal persons engenders tension in the EU's legal order: while sanctions may be necessary to pursue a legitimate policy objective of the EU, they might also severely affect individuals' rights. The next section discusses the balancing of these concerns in the judicial practice.[6] To contribute to an appropriate balance between judicial protection and security concerns, the General Court and the Court of Justice recently introduced new procedures, which are presented in section III.

4 See Articles 73g and 228a of the Treaty establishing the European Community (TEC), based on Article G of the Treaty on European Union (TEU) of 1992, amending the Treaty establishing the European Economic Community.

5 As the provisions preceding Article 215 TFEU did not contain a similar clause on non-State entities, including private persons, the first sanctions against Al Qaida were also grounded in the then Article 308 TEC (now Article 352 TFEU).

6 Further on this issue, see the chapters by Sara Poli and by Hugo Flavier in this volume.

II. The Balancing of Judicial Protection and Security Concerns in the Case Law of the European Court of Justice

As is well known, in *Kadi I*, which concerned a case of alleged terrorist activities, the Court of Justice affirmed with emphasis its duty to "ensure the review, in principle the full review, of the lawfulness of all [Union] acts in the light of fundamental rights …., including review of [Union] measures which... are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations".[7]

Whilst fundamental rights such as the right to effective judicial protection ride high in this judgment, the Court did acknowledge that in the fight against terrorism, security concerns are relevant when dealing with the right to be heard. Not only must restrictive measures, when adopted for the first time, take advantage of a surprise effect and thus apply with immediate effect, but "overriding considerations to do with safety or the conduct of the international relations of the [Union] and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters".[8] In such a scenario, it is the task of the Union judicature to apply "techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice".[9]

It is in this context interesting to note that the Court of Justice has more recently underlined that the fight against terrorism and against serious crime constitute objectives of general interest and that Article 6 of the EU Charter of Fundamental Rights states that everyone has the right "not only to liberty but also to security".[10] In this context, the Court has added that "the protection of national security and public order also contributes to the

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7 Judgement of 3 September 2008, *Kadi and Al Barakaat* ("*Kadi I*"), C-402/05 P & C-415/05 P, EU:C:2008:461, para 326. See also A. Rosas, "Counter-Terrorism and the Rule of Law: Issues of Judicial Control", in A. M. Salinas de Frías a.o. (eds), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), 83.

8 *Id.*, para 342.

9 *Id.* para 344.

10 Judgement of 8 April 2014, *Digital Rights Ireland*, C-293/12 & C-594/12, EU:C:2014:238, para 42.

protection of the rights and freedoms of others".[11] It is in other words not only a question of public security in the abstract but of ensuring that the right to security of each and everyone be respected.[12]

Especially in *ZZ* and *Kadi II*, [13] the Court of Justice had the opportunity to develop its reasoning on how to balance the requirements of security and effective judicial protection and on what techniques could be used in this respect. In *ZZ*, the Court, in the context of a request for a preliminary ruling and thus with a national court as addressee, affirmed that it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with State security.[14] On the other hand, the fundamental right to an effective legal remedy would in principle be infringed "if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views".[15] The adversarial principle could on the other hand be derogated from in exceptional circumstances, and under strict conditions:

> "However, if, in exceptional cases, a national authority opposes precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision taken under Article 27 of Directive 2004/38, by invoking reasons of State security, the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle (see, by analogy, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, paragraph 344)".[16]

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11 Judgement of 15 February 2016, *J.N.,* C-601/15 PPU, EU:C:2016:84, para. 53.

12 A similar approach has been adopted by the Human Rights Committee, acting under the International Covenant on Civil and Political Rights, with respect to Article 9 (liberty and security of person) of the Covenant, see, eg M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel, 2005), 213.

13 Judgement of 4 June 2013, *ZZ,* C-300/11, EU:C:2013:363; Judgement of 17 July 2013, *Commission and Others* v *Kadi* ("*Kadi II*"), C-584/10 P, C-593/10 P & C-595/10 P, EU:C:2013:518.

14 Judgement of 4 June 2013, *ZZ*, *supra* note 13*,* para. 54.

15 *Id.*, para 56.

16 *Id.*, para 57.

> "In this connection, first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective".[17]
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> "Accordingly, it is incumbent upon the national court with jurisdiction, first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him".[18]

In *Kadi II*, the Court of Justice applied the approach taken in *ZZ* at the level of the Union judicature.[19] In this context, the Court specified that when striking an "appropriate balance" between the right to effective judicial protection and the security of the EU and its Member States or the conduct of their international relations, "it is legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question".[20] It should be noted that the Court does not here mention the use of "special advocates" as an example of techniques to be used, in other words advocates or other lawyers appointed by the Court of Justice to assist it in assessing confidential material submitted by intelligence services (but who are not allowed to divulge such material to the other party such as an alleged terrorist).[21] In *ZZ,* again, the Court of Justice did not refer to examples at all but more generally to "techniques and rules of procedural law" (which, perhaps, at the national level could include the use of "special advocates").

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17 *Id.*, para 65.

18 *Id.,* para 68.

19 Judgment of 17 July 2013, *Commission and Others* v *Kadi* ("*Kadi II*"), *supra* note 13, paras 125-129.

20 *Id.*, para 129.

21 The system of "special advocates" is in use in the United Kingdom in particular, see, eg House of Commons, Constitutional Affairs Committee, Seventh Report, Session 2004-05, Chapter IV.

The Court of Justice, in *Kadi II*, also made it clear that if the competent Union authority finds itself unable to provide the information and evidence required, "it is then the duty of the [Union Courts] to base their decision solely on the material which has been disclosed to them" and if the material provided is insufficient to allow a finding that a reason is well founded, the Union Courts shall disregard that reason as a possible basis for the contested decision to list or maintain a listing of a person.[22] So under exceptional circumstances, all material need not necessarily be disclosed to the person concerned (such as the alleged terrorist) but the material which is not disclosed must at any rate be submitted to the judge for evaluation.

Especially since the judgment in *Kadi I*, the case law of the Union Courts relating to restrictive measures has become both rich and extensive. Without going into this case law in any greater detail, the following statistics may be mentioned. Whilst in 2006 five actions of annulment were brought before the General Court, the more recent figures are as follows: 93 new cases in 2011, 59 in 2012, 41 in 2013, 69 in 2014, 55 in 2015 and 28 in 2016.[23] Clearly a less number of cases were brought on appeal before the Court of Justice. In 2015, for instance, the Court decided seven such cases. These figures do not cover cases brought under the preliminary ruling procedure (Article 267 TFEU) but they are quite few as compared to actions for annulment (Article 263 TFEU).[24]

Many of the direct actions have led to the annulment of the sanctions decision in whole or in part. In the *Kadi II* judgment, in particular, the Court of Justice, partly drawing upon earlier case law,[25] had occasion to specify, *inter alia*, the obligation to state reasons, holding that a decision to maintain the name of an individual on a sanctions list requires in all circumstances that the statement of reasons "identifies the individual, specif-

22 Judgement of 17 July 2013, *Commission and Others* v *Kadi* ("*Kadi II*"), *supra* note 13, para 123.

23 Court of Justice of the European Union, *Annual Report 2016: Judicial Activity* (Luxembourg, 2017), 208.

24 One example of a request for a preliminary ruling is Judgement of 4 June 2013, *ZZ, supra* note 13. Another example is Judgement of 28 March 2017, *Rosneft,* C-72/15, EU:C:2017:236.

25 See, e.g. Judgement of 16 November 2011, *Bank Melli Iran* v *Council,* C-548/09 P, EU:C:2011:735; Judgement of 15 November 2012, *Al-Aqsa,* C-593/10 P & C-550/10 P, EU:C:2012:711; Judgement of 15 November 2012, *Council* v *Bamba,* C-471/11 P, EU:C:2012:718.

ic and concrete reasons why the competent authorities consider that the individual concern must be subject to restrictive measures".[26] The Court further stated that the Council is under an obligation to examine, "carefully and impartially", whether the alleged reasons are well-founded and the decision is taken "on a sufficiently solid factual basis".[27] Whilst the Council has a "broad discretion" with respect to the defining of the general criteria which should be adopted for the purpose of applying restrictive measures,[28] the reasons and proof provided to demonstrate that a person or entity fall under the general criteria is subject to a more intense judicial scrutiny.

If the Council (which is normally the defendant in these cases) has not been able to satisfy those requirements, the sanctions decisions have been annulled. And, in line with what was said in *Kadi II*, as quoted above, the Council cannot rely on a claim that the evidence concerned comes from confidential sources and cannot, consequently, be communicated to the General Court. For instance, in *Fulmen*, the Court of Justice stated that "since the competent European Union authority refused to produce evidence to the Courts of the European Union, it is for those Courts … to base their decision solely on the material which has been disclosed to them".[29] And since the only information available to the Courts was the claim made in the statement of reasons, which was not substantiated by the production of any other information or evidence, both the General Court and the Court of Justice concluded that the persons concerned were not in a position to defend themselves against the allegations and that the Union Courts were not in a position to determine whether the acts at issue were well founded. The appeal was consequently dismissed and the General Court's judgment to annul the decisions and regulations imposing restrictive measures was upheld.

It may be instructive to compare this outcome with that of the *Kala Naft* ruling. Both cases concerned undertakings which were part of sanctions against Iran designed to prevent nuclear proliferation; the judgments were

26 Judgement of 17 July 2013, *Commission and Others* v *Kadi* ("*Kadi II*"), *supra* note 13 para 116.

27 *Id.,* paras 114 and 119.

28 See, e.g. Judgement of 21 April 2015, *Anbouba* v *Council,* C-630/13 P, EU:C:2015:247, para 42 and case law cited.

29 Judgement of 28 November 2013, *Council* v *Fulmen and Mahmoudian*, C-280/12 P, EU:C:2013:775, para 78.

given on the same day (28 November 2013).[30] In the latter case, the Court of Justice set aside the General Court's judgment and dismissed the action for annulment brought by *Kala Naft*, as the information and evidence communicated by the Council was considered sufficient to back up the listing. As demonstrated by this case, the fact that sanctions decisions are, in principle, subject to a "full" judicial control does not imply that the targeted persons or entities always, or even in most cases, succeed in obtaining the annulment of the restrictive measures. In fact, in 2015 most actions for annulment of Council decisions brought before the General Court were declared inadmissible or dismissed and this may be due to the fact that there seems to have been a gradual improvement in the formulation of sanctions decisions, including the reasons presented for the listings of persons or entities.

III. The New Security Rules of the Court of Justice of the European Union: Towards a Better Balancing of Security and the Rule of Law?

One of the main problems raised by the practice relating to restrictive measures is that the Council has not so far been able to communicate to the Union Courts any information which has been classified as secret or confidential – normally because the Member State providing or invoking such information has blocked its submission to the Union Courts. As this has been perceived as a major problem, the General Court and the Court of Justice undertook in 2014 to prepare procedural rules with a view to remedying the situation. The preparatory work was carried out in a joint working group of the two Courts,[31] which took as a point of departure the approach taken in the cases of *ZZ* and *Kadi II* referred to above.[32]

It was decided to start with the Rules of Procedure of the General Court, which were more generally subject to the preparation of a complete recast. With the agreement of the Court of Justice, and approval by the Council, the General Court established its new Rules of Procedure on 4

30 Judgement of 28 November 2013, *Council* v *Kala Naft,* C-348/12P, EU:C:2013:776.

31 The working group consisted of representatives of the two Rules of Procedure Committees. It was chaired by the present author, who at the time was also chairman of the Rules of Procedure Committee of the Court of Justice.

32 See *supra* note 13.

March 2015. This included the adoption of Article 105 of the Rules of Procedure of the General Court,[33] which governs that Court's "treatment of information or material pertaining to the security of the Union or to that of one or more of its Member States or to the conduct of their international relations". Whilst the new Rules of Procedure entered into force on 1 July 2015, the application of the provisions of Article 105 was made dependent on the publication and entry into force of a decision of the General Court relating to internal security rules for protecting the information or material produced in accordance with Article 105 from any outside access.[34] As these internal security rules were published on 24 December 2016, they entered into force the following day and Article 105 thus became applicable as of 25 December 2016.

It was from the outset obvious that Article 105 of the Rules of Procedure, and the internal security rules of the General Court, had to be matched by corresponding rules for the Court of Justice. In the preparation of such rules for the Court of Justice, it was decided to limit, at least at this stage, the exercise to cases of appeal from decisions of the General Court. At the same time, it was realized that a provision would have to be added to Article 105 of the Rules of Procedure of the General Court, guaranteeing that confidential information or material in the hands of the General Court would remain subject to the security rules of the General Court until the deadline for an appeal has expired, and in case of an appeal, be made available to the Court of Justice on the conditions laid down in the security rules. On 15 March 2016, the General Court submitted for the approval of the Council draft amendments to Article 105, paragraph 10, of its Rules of Procedure and the Court of Justice submitted corresponding amendments for the insertion of an Article 190a relating to the treatment, in the context of the appeals procedure, of information or material produced before the General Court in accordance with Article 105 of its Rules.[35] In parallel, the General Court and the Court of Justice adopted their respective internal security rules, which in fact had been prepared jointly and are practically identical in content. These rules, however, could not enter into force before the two Courts were in a position to establish definitively the afore-

33 OJ 2015 L 105/1.

34 See Article 105, paragraph 11, and Article 227, paragraph 3, of the new Rules of Procedure of the General Court; Decision of the General Court 2016/2387/EU of 14 September 2016, OJ 2016 L 355/18.

35 Council documents 7212/16 of 17 March 2016 and 7507/16 of 1 April 2016.

mentioned amendments to Article 105 of the Rules of Procedure of the General Court, and the new Article 190a of the Rules of Procedure of the Court of Justice respectively.[36]

The new regime is characterized by eight main features.

In the first place, the security regime covers in principle all situations where a main party wishes to base his claims on information or material the communication of which to the other main party would in his view "harm the security of the Union or that of one or more of its Member States or the conduct of their international relations" and is thus not limited to cases of restrictive measures (Article 105, paragraph 1 of the Rules of Procedure of the General Court);[37] the limitation to actions for annulment, however, will imply that the new provisions will normally concern actions against restrictive measures.

Secondly, even where the General Court has decided that the information or material produced before it, while relevant for the case at hand, is not to be regarded as confidential, that information or material must be returned to the party concerned if the latter objects to its communication to the other party; it can then not be taken into account in the determination of the case (Article 105, paragraph 4, of the Rules of Procedure of the General Court).

Thirdly, if the General Court has decided that the information or material is not only relevant but is also to be considered confidential vis-à-vis the other main party, it shall "weigh the requirements linked to the right to effective judicial protection, particularly observance of the adversarial principle, against the requirements flowing from the security of the Union or of one or more of its Member States or the conduct of their international relations" (Article 105, paragraph 5). To accommodate these requirements, the General Court shall specify the procedures to be adopted, "such as the production … of a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof and enabling the other party, to the greatest extent possible, to make its

36 The establishment of these amendments, as the Rules of Procedure in general, requires the approval of the Council, see Article 253, paragraph 6, and Article 254, paragraph 5, TFEU.

37 The production of such information or material may also be requested by the General Court in the form of a measure of inquiry, see Article 105, paragraph 2, of the Rules of Procedure of the General Court.

views known" (Article 105, paragraph 6, of the Rules of Procedure of the General Court).

Fourthly, the possibility to communicate confidential information to "special advocates",[38] or to specially appointed members of the General Court, whilst being considered in the context of the preparatory work, is not mentioned as an example. It was considered that this technique could be difficult to apply at the Union level (how, for instance, would the "special advocates" be appointed?); some doubts were also expressed as to whether this technique offers a satisfactory solution for ensuring the defence of the party subject to restrictive measures.

Fifthly, the party which has produced the information or material is entitled to withdraw it within two weeks after service of the decision of the General Court pursuant to paragraph 5 and in that case it shall not be taken into account in the determination of the case (Article 105, paragraph 7 of the Rules of Procedure of the General Court).

Sixthly, where the confidential information or material which has not been withdrawn in accordance with the above rules is deemed by the General Court to be "essential" in order for it to rule in the case, it may, by way of derogation from the adversarial principle and "confining itself to what is strictly necessary, base its judgment on such information or material, but taking into account the fact that a main party has not been able to make his views on it known" (Article 105, paragraph 8, of the Rules of Procedure of the General Court).

In the seventh place, in case of an appeal, such confidential information or material which has not been communicated to the other main party should be made available by the General Court to the Court of Justice, on the conditions laid down in the internal security decisions and should not in this case be communicated to the parties before the Court of Justice. The information should be returned to the party that produced it before the General Court as soon as the decision closing the proceedings before the Court of Justice has been served, unless the case is referred back to the General Court (Article 190a of the Rules of Procedure of the Court of Justice).

Finally, the internal security regime provided for in the two decisions of the General Court and the Court of Justice, respectively, will be particularly rigid, based on the approach followed by the political EU institutions

38 See *supra,* note 21.

with regard to secret (rather than confidential) information. The information or material which has been classified as confidential and which has not been returned to the party concerned would stay in a closed "tunnel" and only be consulted, without using electronic means, in the premises specifically provided for and regulated in detail in the security rules.

As the new regime for treating confidential information only entered into force at the end of the year 2016, it is too early to foresee to what extent it will be used in actual practice. The two Union Courts are determined to make it work, at least as far as they are concerned, and they will be able to guarantee that information classified as confidential and held by them will be kept secret. It is to be hoped that the Council, the Commission and the Member States will trust the new procedures and that the new system will contribute to an appropriate balance being struck between quite legitimate security concerns and the requirements of the rule of law.