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Abstract: *This paper presents and analyses the most recent judgment of the General Court of the European Union regarding certain international sanctions imposed in Brussels to combat terrorism. It goes through the rationale used by the judges to apply the standard established in 2017 by the CJEU on the review that needs to be undertaken by the Council in maintaining existing sanctions on terrorism and attempts to draw conclusions on the novelties that this judgment will bring to the work that EU Member States have to do in upcoming reviews.*

Keywords: *international sanctions, restrictive measures, terrorism, European union law, review of listings*

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1. Introduction

On 24 November 2021, the General Court of the European Union (hereinafter the General Court or Court) dismissed an action brought by the Liberation Tigers of Tamil Eelam (LTTE) against the Council to annul two Decisions[1] and related Regulations[2] maintaining LTTE on the list (hereinafter referred to as the listing) of entities subject to international sanctions (restrictive measures) for involvement in terrorism.[3]

In its judgment, the General Court looked at all 6 pleas put forward by the applicant[4] and although it did find some issues with the reasoning presented by the Council to maintain the listing, it dismissed all of them. The focus of the analysis made by the Court was essentially on the statement of reasons and evidence used by the Council to underpin the two decisions extending the listing of the LTTE. The various pleas presented by the LTTE were specific and challenged separate points of the listing decisions, such as the fulfilling by the entity of the definition of a terrorist organization or that related to what constitutes a terrorist act, whether the right of defence was respected or whether the Council satisfied the obligation to state reasons. However, they all revolved around the same essential question, whether those two decisions that were challenged were sufficiently substantiated so as to prove the legality of the listing under the relevant EU law. The Court thus verified whether the criteria established in the basic legal act (Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism[5] (hereinafter CP931)) for listing and maintaining an entity on the list, as interpreted by the relevant case law, were respected by the Council.

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[1] Council Decision (CFSP) 2019/25 of 8 January 2019 amending and updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2018/1084 (OJ 2019 L 6, p. 6) and Council Decision (CFSP) 2019/1341 of 8 August 2019 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision 2019/25 (OJ 2019 L 209, p. 15).

[2] Council Implementing Regulation (EU) 2020/19 of 13 January 2020 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 Implementing Regulation (EU) 2019/1337 (OJ 2020 L 8 I, p. 1) and Council Implementing Regulation (EU) 2020/1128 of 30 July 2020 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 Implementing Regulation 2020/19 (OJ 2020 L 247, p. 1).

[3] Judgment of the General Court, 24 November 2021, *European Political Subdivision of the Liberation Tigers of Tamil Eelam (LTTE) v. Council*, T-160/19, ECLI:EU:T:2021:817.

[4] Ibidem, paras 98-105.

[5] OJ 2001 L 344, p. 93.

It is the purpose of this paper to first present the rationale used by the Court to dismiss the arguments put forward by the applicant, review the central line of thinking, as well as most important conclusions, and then outline some of the landmarks that this judgment has set for the future practice in the field.

The judgment also tackled certain questions of admissibility but it is not our intention here cover that part.[1] While of course issues of admissibility are relevant for future Council practice and case law, this study looks only at the substance of how the restrictive measures are adopted and maintained in this area.

2. Presentation and Review of the Judgment

Before going into the summary of the assessment made by the General Court, we find it important to first briefly recall the basic law as regards EU restrictive measures against terrorism. The initial listing of a person or entity under CP931 is grounded on what is generically known as a "decision of the competent authority".[2] What this means is that an authority (administrative or judicial)[3] (irrespective of whether it belongs to an EU Member State or a third country),[4] competent in the field of combating terrorism, adopts a decision against the person or entity that is to be listed, for a conviction, prosecution

[1] T-160/19, paras 37-97.

[2] In accordance with the first paragraph of Article 1(4) of CP931, the list of persons, groups or entities involved in terrorist acts "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".

[3] Article 1(4) of CP931 states that "competent authority" means "a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area". The possibility that the "competent authority" may be administrative is confirmed by the relevant case law. In *Stichting Al Aqsa v Council of the European Union*, C-539/10 P, Judgment, 15 November 2012, EU:C:2012:711, paragraph 75, the CJEU considered that "the Sanctieregeling [Order on Terrorist Sanctions 2003, Stcrt. 2003, no. 68, p. 11, adopted by the Dutch Minister for Foreign Affairs on the basis of Sanctiewet 1977 (Dutch Law of 1977 on Sanctions) by ordering the freezing of all funds and financial assets of Stichting Al Aqsa] was adopted by a competent authority within the meaning of the second paragraph of Article 1(4) of Common Position 2001/931".

[4] Judgment, 26 July 2017, *Council v Liberation Tigers of Tamil Eelam (LTTE)*, C-599/14 P, EU:C:2017:583, paras 24-37, Judgment of the General Court, 16 October 2014, *Liberation Tigers of Tamil Eelam (LTTE) v. Council*, T-208/11 and T-508/11, EU:T:2014:885, paras 126-129.

or initiation of investigations for involvement in a terrorist act[1], as defined by the basic law.[2]

CP931 also includes a provision regarding the review process of the listings. According to Article 1(6) the "names of persons and entities on the list […] shall be reviewed […] to ensure that there are grounds for keeping them on the list". This provision has been interpreted by the CJEU as establishing a different mechanism for "maintaining" a person or entity on the list as compared to the initial designation.[3] In particular, the Grand Chamber ruled that when the Council adopts decisions maintaining a person or entity on the list, it is in fact "retaining" the exiting listing, thus does not have to follow the mechanism in Article 1(4). In its words, the review process "presupposes […] that there is an ongoing risk of the person or entity concerned being involved in terrorist activities, as initially established by the Council on the basis of the national decision on which that original listing was based".[4] Consequently, Articles 1(6) should not be interpreted in the context of Article 1(4) – the "grounds" in the former are not the same in legal meaning as the basis for drawing up the list in the latter – but as a separate mechanism, where the Councils needs to evaluate the existence of an "an ongoing risk" of the person or entity subject to the review being involved in terrorist activities.[5] In this sense, it may be inferred from the same case-law that, during the review, the

[1] The definition of a "terrorist act" is provided by Article 1(3) of CP931 and includes the following cumulative conditions: it must be an intentional act; by its nature or circumstances, the act must be likely to seriously harm a country or an international organization; the act must match the definition of an offense under the national law of the State in which the decision is issued; it has to be committed for one of the enumerated purposes: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) threatening to commit any of the acts listed under (a) to (h); (j) directing a terrorist group; (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

[2] For further details on the interpretation of Article 1(4) of CP931, *see* C-539/10 P, para 69.

[3] C-599/14 P, para 54.

[4] Ibidem, para 61.

[5] For a review on the case law of the CJEU on the matter *see* Radu Mihai Șerbănescu, "Review of European Union Sanctions on Terrorism. Recent Developments in Case Law: The LTTE Case", *Revista Română de Drept Internațional*, Nr. 18/2017, pp. 49-60.

Council may rely on open-source incidents, meaning it is not only restricted to findings of competent authority decisions.[1]

Turning now to the judgment rendered by the General Court at the end of last year, we will not go through each individual plea and its respective assessment, as with many of them the EU judiciary confirmed previous conclusions and applied them to the case before it or used the same reasons to dismiss more than one. What is really central to this judgment is the analysis of the Court in relation to the third plea, namely the allegation that the Council failed to carry out a review in accordance with Article 1(6).[2] We will of course not ignore the rest of the substance, but will only treat it in short as compared to what we consider the main plea.

Referring first to the elements that have been reaffirmed, the General Court rejected the argument that the acts committed by the LTTE were legal as they were undertaken in accordance with International Humanitarian Law during an armed conflict. In this sense, it recalled that the two branches of law (EU and IHL) are separate and not dependent on one another. As such, CP931 does not make a distinction as to when the acts are committed and, in any event, conduct during an armed conflict may constitute an act of terrorism.[3] Similarly, the Court recalled that the reference in Article 1(4) to "precise information or material" relates not to the substance of competent authority decisions condemning / proscribing a person or entity, meaning evidence on involvement in terrorist acts, but on the existence of the decision itself.[4]

The Court also reiterated that administrative decisions, such as, in this case, the Home Secretary's decision of 2001, on which the initial listing of the LTTE is based, may be considered a competent authority decision under Article 1(4) despite the fact that they are not criminal decisions or adopted in the context of criminal proceedings.[5] Nonetheless, while still on the subject of competent authority decisions, it is important to note that the judgment of French authorities[6] (also invoked by the Council as a basis for the listing) was not accepted as a competent authority decision. Of course, the conclusion has nothing to do with qualifying the Court of Cassation as a criminal judiciary,

[1] C-599/14 P, paras 71, 72.
[2] T-160/19, paras 166-246.
[3] Ibidem, paras. 294-298.
[4] Ibidem, paras. 148-153.
[5] Ibidem, paras. 112-121.
[6] Judgment of the Tribunal de Grande Instance de Paris (Regional Court, Paris) of 23 November 2009, upheld by the judgment of the Cour d'Appel de Paris (Court of Appeal, Paris) of 22 February 2012 and the Judgment of the Cour de Cassation (Court of Cassation) of 10 April 2013.

but with the fact that the judgment was adopted in 2009, several years after the LTTE was initially listed under CP931,[1] namely in 2006.[2]

While completely pertinent in relation to the logic of time – one cannot justify an act, reasoning on an event that has not yet occurred – this entire debate about competent authority decisions begs the question why are we still looking at Article 1(4) and the initial listing if we are assessing a review Decision? If we are ruling on the legality of decisions adopted in 2019, "retaining" an entity on the list, and thus acting strictly under the mechanism in Article 1(6), so distinct from that in Article 1(4), as the CJEU has so creatively established, it feels at least odd that so much time has been spent by all the parties arguing or challenging the existence of a competent authority decision.[3] For the LTTE, obtaining relief on this point would only mean that the initial designation – long repealed – would have been illegal.[4] If the Council obtained relief, it would only be a confirmation for the legality of the first listing in 2006. For both parties, the crux of the matter remains the legality of the review process and the decision retaining the listing, in other words an evaluation on whether Article 1(6) was respected.

The case law has made clear the review process ends with an extension of the listing and not a relisting.[5] If we are not doing a relisting, that is we are not "drawing up" the list as provided by Article 1(4) because we are in the realm of Article 1(6) and checking whether to "retain" the entity, the debate should go straight to review the existence of an "ongoing risk". Consequently, it is our view that it is irrelevant to argue for or against an infringement of Article 1(4) when the challenge concerns a listing that has been retained, and the Court could have simply rejected the argument in a few lines. In fact, the General Court itself used the distinction to reject an argument from the applicant claiming that conduct considered by a UK authority decision of 2019[6] did not fall under the definition of terrorist acts, pursuant to Article 1(3) of CP931. The Court held that "according to Article 1(6) thereof, as interpreted by the Court of Justice, in order to maintain the LTTE on the fund-freezing lists, the Council need not establish that that organisation committed

[1] T-160/19, paras 139-144.
[2] Common Position 2006/380/CFSP updating Common Position 2001/931 and repealing Common Position 2006/231/CFSP (OJ 2006 L 144, p. 25).
[3] Indeed, a competent authority decision may be relevant for the review process as well and was accepted as such by the case law of the CJEU, however, the analysis here was only concerned with the initial listing.
[4] Of course, a discussion might be warranted here on the possibility of obtaining damages, but this goes beyond the purposes of this paper.
[5] C-599/14 P para 61.
[6] A decision of the Home Secretary of March 2019, maintaining the proscription of the LTTE in the United Kingdom, on the ground that the organisation was otherwise concerned in terrorism within the meaning of section 3(5)(d) of the UK Terrorism Act 2000.

terrorist acts within the meaning of Article 1(3) of that common position, but rather that there was an ongoing risk of it being involved in such acts".[1]

Referring now to the novel part of the judgment, it is appropriate present the assessment of the Court with regard to Article 1(6). After reiterating the relevant principles,[2] the judgment took the two decisions under review separately.

The Court dealt with the newer of the two and saw that the ongoing risk of involvement in terrorist acts was based on a UK authority decision of 2019, adopted just a few months prior to the EU Decision. Since this was a very recent decision and which relied on events that occurred in 2018, namely "that the Sri Lankan police had arrested individuals in the course of transporting explosive devices and the LTTE paraphernalia including flags",[3] the General Court considered it sufficient to determine ongoing risk. This conclusion comes as a confirmation of the fact that competent authority decisions may play a role, should they be recent enough, in demonstrating ongoing risk.

It is also interesting to flag here that the Court did not find the need to check these events against the definition of terrorist acts in Article 1(3). Indeed, the Court did mention that its conclusion was "subject to the response to be given to the first plea below",[4] namely whether the LTTE is a terrorist organization, in other words, whether the acts attributable to it fall under the relevant definition. Nonetheless, when it did get to that assessment and referred to the UK decision of 2019, as already pointed out, it waived away the argument put forward by the applicant, reminding that pursuant to Article 1(6) we are looking for ongoing risk of involvement in a terrorist act not the existence of such an act.

When dealing with the older of the two challenged decisions, the Court was no longer satisfied with the UK authority decision invoked by the Council (adopted in 2014).[5] The Court did not take issue with the fact the said decision had been adopted 5 years prior to the EU relisting, but rejected it because "no

[1] T-160/19, para 276.
[2] Ibidem, paras. 168-174.
[3] Ibidem, paras. 184-187.
[4] Ibidem, para 188.
[5] In June 2014, the Home Secretary had decided to maintain the proscription on the basis that the group in question was otherwise concerned in terrorism within the meaning of section 3(5)(d) of the UK Terrorism Act 2000, given that it could reasonably be assumed that the group existed and retained a military capability and network coupled with the intent to conduct terrorist attacks in the future if it is perceived to be in the organisation's interest to do so. The Home Secretary concluded that this corresponded to the aim set out in point (ii) of the first subparagraph of Article 1(3) of Common Position 2001/931 and the terrorist acts set out in subpoints (f) and (i) of point (iii) of the first subparagraph of Article 1(3) thereof (points 5 and 17 of Annex A to the statement of reasons).

dates were provided for the events on which the Home Secretary relied".[1] What may be inferred from this is that, although competent authority decisions that are used to substantiate and Article 1(6) extension only have to demonstrate ongoing risk (do not have to refer to events that constitute terrorist acts), they do need to reference conduct, clearly framed in time, that would lead the Council to assess the ongoing risk.

In any event, the Court then had to turn to 3 incidents[2] included by the Council in the statement of reasons for the listing of the LTTE, which allegedly prove the existence of an ongoing risk. What follows is in large part an assessment of whether the events are made out, the conclusion being that the first and third may be invoked, while the second should be rejected. However, what is relevant for this paper is the end of the evaluation, which is concerned with whether the two (accepted) incidents justify maintaining the LTTE on the list. The General Court treated them together and, even if it did agree that propaganda materials and foreign currency may be evidence of mere political activity, when looked at together with an assassination attempt in mind, found that the Council was justified in concluding that there was an ongoing risk of the LTTE being involved in terrorist acts.[3] In the words of the Court "it becomes more worrying", when the events are combined. While this part of the judgment is quite brief and does not speak explicitly of a standard to be used for equating open-source incidents to ongoing risk, it is the opinion of this paper that the level of justification does not have to be too high. In this sense, we particularly like the word "worrying" as the feelings expressed by the judges. This statement is very serious. When it comes to terrorism, a worry should be enough to maintain measures of prevention. As the General Court later recalled and agreed CP 931 was adopted in implementation of UN Security Council Resolution 1373(2001), which calls on Member States to

[1] T-160/19, para. 190.

[2] - the dismantling in Malaysia in May 2014 of [an] LTTE-related cell that led to the seizure of propaganda materials and an amount of foreign currency. Considering the material in question, Malaysian law enforcement authorities have investigated and confirmed the attempt to revive the LTTE activities' ('the first incident');

- 'the dismantling in Sri Lanka in 2014 of a cell led by Kajeepan Selvanayagam (alias Gobi, a former member of [the LTTE] intelligence wing) with the recovery of stashed arms. Police officers were shot at during the operation and one of them injured. Gobi was later killed during a subsequent confrontation with the army. 26 suspects were arrested and so far 4 have been convicted' ('the second incident');

- 'the foiled conspiracy in January 2017 to assassinate M.A. Sumandiran, Member of the Parliament. Explosives and other peripheries were recovered from some of the suspects who are so far indicted before the High Court of Colombo. The linkage with [the LTTE] can be established by the fact that the same suspects are also prosecuted for disseminating propaganda material in support of the LTTE' ('the third incident').

[3] T-160/19, paras. 237, 238.

complement international cooperation by taking additional measures "to prevent"[1] and suppress the financing and preparation of any acts of terrorism.[2]

The General Court goes on to reject several other arguments, including alleged breaches of the obligation to state reasons[3], the rights of the defence and of the right to effective judicial protection[4], mostly invoking its reasoning as regards fulfilment of the listing criteria. The Court also tackles the point of an alleged infringement of the principles of proportionality and subsidiarity.[5] Since this deals more generically with the legitimacy of imposing restrictive measures, we will not tackle with it here.

3. Consequences of the Judgment

There are several takeaways from this judgment:

- Simply stating a recent decision of competent authority will not suffice to substantiate an Article 1(6) retaining of a listing;
- A recent decision of competent authority would be sufficient to argue ongoing risk of involvement in terrorist acts if the statement of reasons contain concrete information regarding conduct and when this conduct occurred;
- Open-source incidents clearly do not have to prove actual terrorist conduct; individually or taken together such incidents should demonstrate / create / reach the level of a "worry" that a terrorist act could occur.

It must be underlined however that the judgment has not been appealed by the LTTE. It is thus final, however, the landmarks set-out above are still subject to the review of the Grand Chamber should these points be raised in another case before it.

[1] S/RES/1373 (2001), OP 3(c).
[2] T-160/19, para 296.
[3] Ibidem, paras 320-343.
[4] Ibidem, paras 344-387; see also Carmen Achimescu, Les rapports entre les systèmes juridictionnels européens dans la perspective de l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme, https://www.revistadrepturileomului.ro/assets/docs/2014_3/NRDO%202014_3_achimescu.pdf and Le contrôle des actes des organisations internationales devant le juge de Strasbourg, https://www.revistadrepturileomului.ro/assets/docs/2014_2/NRDO%202014_2_achimescu.pdf
[5] Ibidem, paras 302-319; for the analysis of the principle of subsidiarity, see Carmen Achimescu, *Principiul subsidiaritatii in domeniul protectiei europene a drepturilor omului*, C.H. Beck, 2015

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