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Review of European Union Sanctions on Terrorism. Recent Developments in Case Law: the LTTE Case

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Abstract: *The purpose of this paper is to analyse the recent case law of the Court of Justice of the European Union with regard to the restrictive measures to combat terrorism. It will attempt to outline the primary conclusions drawn from this case law, as well as to evaluate the diverging views between the General Court and the Grand Chamber on the interpretation of the EU legal act governing terrorism sanctions. Departing from this debate, the paper will highlight the consequences of the prevailing views rendered by the Grand Chamber and how these will affect the future practice of EU in the field.*

Key-words: *international sanctions, terrorism, European Union law.*

1. Introduction

On 26 July 2017, the Court of Justice of the European Union dismissed the appeal submitted by the Council and confirmed the annulment of certain EU legal acts as far as they concerned the listing as a terrorist organization of the Liberation Tigers of Tamil Eelam (LTTE) at EU level.[2]

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[2] Judgement, 26 July 2017, *Council v Liberation Tigers of Tamil Eelam (LTTE)*, C-599/14 P, EU: C:2017:583, paragraph 91.

Although it arrived at the same conclusion as the General Court,[1] namely that the Council had failed to provide sufficient reasons for the listing,[2] the CJEU did not concur in full with the reasoning behind the judgement rendered by the General Court.[3] One element of divergence referred to the mechanism for maintaining an entity on the list of those to which the restrictive measures applied. While the General Court considered that retaining an entity on the list requires a decision by a 'competent authority'[4] (as defined by Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism),[5] the Grand Chamber ruled that the Council could maintain an entity on the list if it concluded that there is an ongoing risk of that entity being involved in terrorist activities,[6] including by relying on open source materials and regardless of a new or revised decision by a 'competent authority'.[7]

Indeed, there are other important conclusions to be drawn from the two judgements, such as the fact that the Council can rely on decisions of competent authorities in third countries[8] or that the Council must argue why it considers human rights standards are respected in that third country,[9] and, regardless of the reasoning, the final outcome was that the Council breached the obligation to state reasons. However, the difference in the rationale used by the two courts makes the initial annulment an issue of procedure while the latter an issue of substance. In this regard, the difference is of particular interest to the way lawmakers (i.e. the Council) will have to draft statements of reasons in the future.

In light of these observations, it is the purpose of this paper to analyse how the two courts have viewed the process of retaining an entity on the list and the consequences the prevailing second rationale given by the Grand Chamber will have on future review processes of EU listed terrorist entities.

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[1] Judgement, 16 October 2014, *Liberation Tigers of Tamil Eelam (LTTE) v. Council*, T-208/11 and T-508/11, EU: T:2014:885, paragraph 190.
[2] C-599/14 P, paragraphs 38, 55, 79, 85.
[3] *Ibid* paragraphs 62-74.
[4] T-208/11 and T-508/11, paragraphs 157, 162.
[5] OJ 2001 L 344, p. 93
[6] C-599/14 P, paragraph 54.
[7] *Ibid* paragraphs 71, 72.
[8] T-208/11 and T-508/11, paragraphs 126-129.
[9] *Ibid* paragraphs 141, 142, C-599/14 P, paragraphs 24-37.

2. Relevant EU Law Provisions and their Interpretation by the two Courts

2.1. Common Position 2001/931/CFSP

In accordance with the first paragraph of Article 1(4) of Common Position 2001/931/CFSP,[1] 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". Thus, in order for the Council to include certain persons, groups or entities on the list, three conditions have to be met cumulatively:

(i) there is a decision of a competent authority regarding the persons, groups or entities concerned;

(ii) that decision should concern either the initiation of investigations or prosecution for a terrorist act, attempting to perpetrate, participate in or facilitate such an act; or a conviction for a terrorist act, attempting to perpetrate, participate in or facilitate such an act;

(iii) such a decision must be based on serious and credible evidence or clues.

As regards the *first condition*, the second paragraph of Article 1(4) of Common Position 2001/931/CFSP 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". Thus, a 'competent authority' is either a judicial authority or other authority having competence to initiate investigations or prosecution for a terrorist act or for attempting to perpetrate, participating in or facilitating such a terrorist act, or to convict for any of these acts. Examples of competent authorities other than judicial authorities can be found in the case law of the CJEU. In one instance, the Court 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

[1] Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, OJ 2001 L 344, p. 93

Article 1(4) of Common Position 2001/931".[1] In this sense, the Court considered that "the protection of the persons concerned is not called into question if the decision taken by the national authority does not form part of a procedure seeking to impose criminal sanctions, *but of a procedure aimed at the adoption of preventive measures*"[2] (*emphasis added*).

As regards the *second condition*, it is not strictly necessary to have a conviction, with the alternative that the EU listing may also be adopted on the basis of a decision to initiate the prosecution or even the investigation (a stage prior to the prosecution) for a terrorist act or participation in one form or another in the commission of such act.

The definition of a 'terrorist act' is provided by Article 1(3) of Common Position 2001/931/CFSP 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. [3]

Concerning the *third condition*, the purpose of the formulas 'precise information' and 'serious and credible evidence or clues' is to protect the targeted persons, groups or entities, by ensuring that their inclusion on the list the dispute can be dealt with only on a sufficiently solid factual basis.

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[1] Judgment, 15 November 2012, *Stichting Al Aqsa v Council of the European Union*, C-539/10 P, EU:C:2012:711, paragraph 75.

[2] *Ibid* paragraph 70.

[3] (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.

The rationale behind this objective was explained by the CJEU, when it considered that "*in the absence of means on the part of the European Union to carry out its own investigations* regarding the involvement of a given person in terrorist acts, *that requirement aims to establish that evidence or serious and credible clues exist* of the involvement of the person concerned in terrorist activities, *regarded as reliable by the national authorities and having led them*, at the very least, to adopt measures of inquiry, without requiring the national decision to have been taken in a specific legal form or to have been published or notified"[1] (*emphasis added*).

Common Position 2001/931/CFSP also provides for a review process. Article 1(6) establishes that the "names of persons and entities on the list […] shall be reviewed […] to ensure that there are grounds for keeping them on the list".

2.2. Landmarks of the Interpretation given by the General Court in the LTTE case

In its judgment of 16 October 2014, the General Court has confirmed and clarified a number of the elements outlined in the previous section.

One argument that was raised by the LTTE was that the acts the entity was being accused of cannot be qualified as terrorist acts since they were committed during an armed conflict and thus are lawful acts of war in accordance with international humanitarian law.[2] The General Court considered that situations of armed conflict do not exclude the application of the law on terrorism.[3] Essentially, Common Position 2001/931/CFSP makes no distinction between the fact that an act has or has not been committed in the context of an armed conflict.[4] Thus, the applicability of one branch of law does not render one or all other branches of law inapplicable. Accordingly, the legality of measures adopted by the Council against a group pursuant to Common Position 2001/931/CFSP depends on the fulfillment of the conditions and requirements laid down in the EU legal act. In any event, the perpetration of terrorist acts during an armed conflict is covered and outlawed by international humanitarian law.[5]

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[1] C-539/10 P, paragraph 69.
[2] T-208/11 and T-508/11, paragraph 45.
[3] *Ibid* paragraph 56.
[4] *Ibid* paragraph 57.
[5] Article 33 of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

As regards the understanding of 'competent authority', the General Court rejected LTTE's argument that the decision should be taken by the judicial authorities, recalling previous case law.[1] In the same sense, the General Court expressly clarified that decisions of non-EU Member States can form the basis of EU listing. It reminded that Common Position 2001/931/CFSP was adopted in the implementation of UN Security Council Resolution 1373 (2001), which obliges all States to take necessary measures to prevent terrorist acts, including through exchanging information and, moreover, Common Position 2001/931/CFSP does not contain any limitation on the nationality of the competent authorities.[2] However, the General Court did point out that the decisions of competent authorities must comply with certain conditions, including the protection of the rights of defence and the right to effective judicial protection.[3] It went on to consider that the Council did not verify the fulfillment of these conditions as far as the Indian decision was concerned but did so in relation to the UK decision[4] (the LTTE listing was based on: (i) the proscription by the Government of India in 1992 under the Unlawful Activities Act 1967 and later inclusion in the list of terrorist organisations under the Schedule to the Unlawful Activities Prevention (Amendment) Act 2004 and (ii) the decision of the UK Secretary of State for the Home Department ('the Home Secretary') of 29 March 2001 under Section 3(3)(a) of the UK Terrorism Act 2000).

Finally, turning to the matter of the review process, the General Court affirmed that the statement of reasons "must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power to review its lawfulness".[5] Analyzing LTTE's statement of reasons, the Court notes that, in the first part, the Council lists a number of acts which it regards as terrorist acts within the meaning Article 1(3) of Common Position 2001/931/CFSP, based on information found in the press or on the internet.[6] In the words of the Court "*instead of taking,* for the factual basis of its assessment*, decisions adopted by competent authorities that have taken into consideration the specific acts and acted on the basis of those acts, and then verifying that those acts are indeed 'terrorist acts'* and that the group concerned is indeed 'a group', as defined in Common

[1] T-208/11 and T-508/11, paragraphs 104-117.
[2] *Ibid* paragraphs 125-129.
[3] *Ibid* paragraph 141.
[4] *Ibid* paragraph 142.
[5] *Ibid* paragraph 159.
[6] *Ibid* paragraphs 169, 187.

Position 2001/931, in order to decide, on that basis and in exercising its broad discretion, whether to adopt a decision at EU level, *the Council does the reverse in the grounds for the contested regulations*" (*emphasis added*).[1] "*It begins with assessments which are, in actual fact, its own assessments*, classifying the LTTE as a terrorist from the first sentence of the grounds […] *and imputing to it a series of acts of violence which the Council took from the press and the internet*" (*emphasis added*).[2] Then, "only after those remarks […] the Council refers to decisions of national authorities".[3] In conclusion, the General Court considered that this approach was contrary to the two-tier system established by Common Position 2001/931/CFSP.[4] Consequently, it decided to annul LTTE's listing on the ground that the Council had breached the obligation to state reasons.

The central landmark that can be drawn from the rationale presented above is that the annulment was based on issues of procedure and not substance. The General Court took issue with the way the Council chose to fulfill the listing requirements provided by Common Position 2001/931/CFSP. It did not consider that LTTE was not a terrorist organization or that it did not commit the acts enumerated by the Council, but rather that invoking those acts, even if they fell under the definition of terrorist acts, could not be used as such in the statement of reasons because that is not how the procedure of Common Position 2001/931/CFSP works. It calls for a decision of a 'competent authority' that decided upon such or other acts that fall under the said definition. What this means is that the Council did not fail on providing reasons as to LTTE being a terrorist organization, but failed on the way it went about showing that LTTE was a terrorist organization. What the Council should have done was to search for a 'competent authority' decision (which can be of a third state, but which must be in conformity with EU human rights standards) that identifies LTTE as committing terrorist acts. As worded by the General Court, "the Council exercises the functions of the 'competent authority' within the meaning of Article 1(4) of Common Position 2001/931, which […] is neither within its competence according to that common position nor within its means".[5]

In arriving at this landmark, the General Court treated both the listing requirements and those for the review and relisting process as a whole. This means that the initial listing, as well as subsequent listings must follow the

[1] *Ibid* paragraph 191.
[2] *Ibid* paragraph 192.
[3] *Ibid* paragraph 195.
[4] *Ibid* paragraph 203.
[5] *Ibid* paragraph 198.

same procedure. The conclusion is drawn by interpreting Article 1(6) of Common Position 2001/931/CFSP in the context of the entire Article 1, including Article 1(4). In the view of this paper, the General Court was correct to consider that the word 'grounds' in Article 1(6) should relate to the listing grounds called for in Article 1(4). The Council must have meant for the 'grounds' in Article 1(6) to be understood as described in Article 1(4). Apart from the contextual interpretation, one should also look at the wording of Article 1(4). It begins with "[t]he list in the Annex shall be drawn up […]", without reference to when the list is drawn up (initially or after the review process), thus not limiting the provision to the initial listing alone. If it was the intention of the Council to do so it would have expressly made that distinction in order to clarify that the initial listing required a certain procedure (competent authority decision, terrorist acts, etc.), while relisting after review necessitated other 'grounds'.

2.3. Landmarks of the Interpretation given by the Grand Chamber in the LTTE case

The main argument advanced by the Council in the appeal it filed against the initial annulment was that, for maintaining a person or entity on the list following the six months' review, such decision should not be based solely on considerations of national decisions but can indicate other sources, as well. [1]

The Grand Chamber considered that the General Court had misinterpreted Article 1(6) of Common Position 2001/931/CFSP, arguing that the provision does not limit the 'grounds' for maintaining the listing to the content of 'competent authority' decisions.[2] In its words, Article 1 "draws a distinction between the initial entry of a person or entity on the list at issue, referred to in paragraph 4 thereof, and the retention on that list of a person or entity already listed, referred to in paragraph 6 thereof".[3] The distinction "is attributable to the fact that […] *the retention of a person or entity on the list* at issue is, in essence, an extension of the original listing and *presupposes*, therefore, 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

[1] C-539/10 P, paragraphs 41, 57.
[2] *Ibid* paragraphs 58-62.
[3] *Ibid* paragraph 58.

listing was based" (*emphasis added*).[1] Thus, the Council may use other sources apart from the finding of competent authorities.[2]

Having pointed to the error of interpretation made by the General Court, the Grand Chamber went on to analyze the statement of reasons in its substance. It noted that after 2010 there was a lack of new elements to justify keeping LTTE on the list of terrorist entities.[3] Accordingly, although it accepted the argument raised by the Council with respect to grounds for keeping an entity on the list, it maintained the decision to annul the listing because the material, even which obtained from sources other than competent authorities, did include evidence purporting a risk of involvement in terrorist activities by LTTE.[4]

The essential landmark of the appeal judgment is that the procedure for the review process is different from that of the initial listing. While the initial listing follows the requirements of Article 1(4) of Common Position 2001/931/CFSP, including the existence of a 'competent authority' decision, the relisting must respect the conditions of Article 1(6), which in the interpretation of the Grand Chamber means the existence of an "ongoing risk of the person or entity concerned being involved in terrorist activities". In the view of this paper, it is not clear how the Court arrived at this conclusion. The judgement simply argues that the relisting is an extension of the previous listing and that it requires a risk of involvement in terrorist activities. Recalling that Article 1(4) begins with "[t]he list in the Annex shall be drawn up […]" without distinction as to when it is drawn up, it appears that the outcome of the review process is rather a relisting (as the term was repeatedly used in this paper) than an extension of the previous listing. As the Grand Chamber pointed out, the requirement for a 'competent authority' decision "seeks to ensure that, i*n the absence of any means at the disposal of the European Union that would enable it to carry out its own investigations* regarding the involvement of a person or entity in terrorist acts, the Council's decision on the *initial* listing is taken on a sufficient factual basis"[5] (*emphasis added*). It would at least be odd to believe that if the EU lacked means to investigate the involvement of a person or entity in terrorist acts for an initial listing, it would suddenly have the means to investigate the 'risk' of involvement in terrorist activities in order to extend a listing.

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[1] *Ibid* paragraph 61.
[2] *Ibid* paragraphs 71, 72.
[3] *Ibid* paragraphs 77, 78.
[4] *Ibid* paragraphs 79-81.
[5] *Ibid* paragraph 45; judgment of 15 November 2012, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, C-539/10 P and C-550/10 P, EU:C:2012:711, paragraphs 69, 79 and 81.

Another landmark, which is a consequence of the previous one, is that during the review and extension process (the term extension will now be used instead of relisting, taking into account the interpretation of the Grand Chamber), the Council may rely on public source material, including the press or the internet. Indeed, the Grand Chamber did not expressly refer to public sources or the press or the internet. It simply made reference to 'other sources'. It is the understanding of this paper that the general formula used in the judgment implies any other sources than 'competent authority' decisions, thus including public sources such as the press or the internet.

3. Consequences of the Recent Case Law in the LTTE case

Without repeating too much what has already been presented in the previous section, a number of conclusions can be drawn from the case law in the LTTE case.

- the applicability of international humanitarian law does not render EU law on sanctions inapplicable;
- decisions adopted by 'competent authorities' of non-EU Member States may be used to underlie the listing of terrorist persons or entities at European Union level;
- if the Council chooses to invoke decisions adopted by 'competent authorities' of non-EU Member States as a basis for EU listings, it must verify that those states ensure human rights standards equivalent to those of EU Member States and, in the affirmative, provide evidence of this conclusion;
- there is a distinction between the requirements for an initial listing and those for keeping a person or entity on the list. In order to keep a person or entity on the list the Council needs to prove that there is an ongoing risk of that person or entity being involved in terrorist activities;
- when deciding to extend the listing of a person or entity, the Council may use other sources than decisions of 'competent authorities', including material available to the public, such as the press or the internet, in order to prove the existence of a risk of involvement in terrorist activities.

Before concluding, a number of remarks should be made regarding the final two consequences.

First, it has to be underlined that during the review and extension process, the Council does not have to look for new terrorist activities in relation to a given person or entity. The emphasis should be placed on the 'risk' of involvement in such activities, not the 'activities' themselves. Thus, no new terrorist acts must be committed in order for an entity to be retained on the list. An assertion to the contrary would be absurd and conflicting with the very purpose of Common Position 2001/931/CFSP and EU sanctions regimes in general. These measures were and are adopted with a preventive purpose in mind,[1] in this case the fight against terrorism and the financing of terrorism.[2] The listing of an entity implies and asset freeze. This does not mean that the ownership of these assets is changed. A listing is not a punitive measure. Once that entity is delisted, it will have full access to the frozen assets.[3] Accordingly, a lower burden of proof lies on the Council.

Second, it is the view of this paper that the Council no longer needs to include in the statement of reasons elements of 'competent authority' decisions when extending a listing. If there is a differentiation between the initial listing and keeping an entity on the list and the latter does not have to follow the requirements of Article 1(4) of Common Position 2001/931/CFSP, then once the first 6 months review process passes, the Council may completely ignore those requirements in relation to a given entity and invoke solely other sources (of course, as long as these sources prove a risk of involvement in terrorist activities). Indeed, the Council may retain in the statement of reasons a section on the initial listing, but this should be judged only in relation to the legal act that first listed the given entity and not subsequent EU legal acts.

4. Conclusions

Although not apparent to the debate, the issues discussed by Court refer to the respect for human rights. In fact, the entire legal debate surrounds the central objective of guarantying human rights when adopting restrictive measures.

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[1] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Polic, paragraphs 4-6, available on 28 December 2017, at http://data.consilium.europa.eu/doc/document/ST-11205-2012-INIT/en/pdf.

[2] Common Position 2001/931/CFSP, preambular paragraphs (1)-(4).

[3] Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures, paragraph 32, available on 28 December 2017, at http://data.consilium.europa.eu/doc/document/ST-15530-2016-INIT/en/pdf.

The recent developments in the case law regarding the LTTE have brought about valuable lessons for the future practice of EU restrictive measure to combat terrorism and the respect for the rights of those targeted.

Essentially, a number of aspects have been made clear with regard to the interpretation of Common Position 2001/931/CFSP. These clarifications will further pave the way the European Union takes in supporting its international sanctions to combat terrorism.

However, these clarifications will also give rise to new questions. It is likely that future debates before European courts will focus on what constitutes a risk and what is the necessary threshold that must be reached in order to prove a risk of involvement in terrorist activities.