

PAVEL SVOBODA\*)

## SISON III: EU NON-CONTRACTUAL LIABILITY FOR DAMAGES AND THE SO-CALLED SMART SANCTIONS

### Abstract:

In its judgment T-341/07 Sison III, the General Court made the conditions of EU non-contractual liability in relation to the so-called smart sanctions even stricter than under ordinary circumstances. It construed the condition of sufficient seriousness of a breach by EU institutions in a way that even in cases with no room for discretion this liability does not occur quasi-automatically but only if the decision-making institution fails to act as “an administrative authority, exercising ordinary care and diligence”:

such administration may be – due to the circumstances – even wrong. Thus 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. The article also examines the question whether it is in line with EU constitutional principles to have a different set of conditions for EU as its Member States’ extra-contractual liability and a different set for individuals.

### Keywords:

EU extra-contractual liability, sufficient seriousness of a breach, smart sanctions, violation of fundamental rights

EU case law on counter-terrorism measures – so-called smart sanctions, mainly consisting in freezing assets of individuals associated with terrorism, has recently been established as a perennial repertoire of the EU Court of Justice (“CJEU”).<sup>1)</sup> Substantial part of this case law concerns legality of these EU sanctions in terms of (non) compliance with human rights, eventually resulting in invalidation of such measures. Should such a sanction be found illegal, civil consequences of such illegality, eg 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.<sup>2)</sup> 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.

\*) The author thanks for valuable comments to JUDr. Martin Smolek, Ph.D. and JUDr. Emil Ruffer, Ph.D.

<sup>1)</sup> Cf. eg SVOBODA, P., Kadi 2010: další kapitola protiteroristické judikatury CJEU [Kadi 2010: Another chapter of CJEU counterterrorist case law]. *Právní rozhledy* 24/2010, p. 887 and further references therein.

<sup>2)</sup> Judgment in Case T-341/07 Jose Maria Sison v Council of 23 November 2011.

## 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 context: judgment in Case T-47/03 Sison I and an interlocutory judgment in Case T-341/07 Sison II.<sup>3)</sup> The General Court has so far repealed any and all EU sanctions against the applicant.<sup>4)</sup> The reason for these cancellations is linked to the fact that the asset freezing was based on decisions of Dutch courts<sup>5)</sup> 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 misled 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 of terrorist acts in Philippines.

## 2. Condition of sufficiently serious breach of an EU rule

The General Court in paragraph 28 of the judgment points out that according to settled case law, 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;<sup>6)</sup> it also notes that these conditions are cumulative (para 29). Is not the purpose of this article to analyze all the conditions of EU liability for damages;<sup>7)</sup> we will only focus on one of them: on *sufficient seriousness of the EU rule breach*.<sup>8)</sup>

---

<sup>3)</sup> Judgment Sison II has the same ref. No. as the judgment examined in this article.

<sup>4)</sup> That is 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, decision Rady 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.

<sup>5)</sup> Judgment of Rad van State (Council of State) of 17 December 1992 and the judgment of the Rechtbank (District Court) in the Hague of 11 September 1997.

<sup>6)</sup> The 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.

<sup>7)</sup> Cf. eg SVOBODA, P.: *Úvod do evropského práva* [Introduction to European Law]. Praha: C. H.Beck, Praha 2011, 4th edition, pp. 179-182.

<sup>8)</sup> For a broader context of the importance of discretion in the ECHR case law, cf. BOUČKOVÁ P., Na okrajích stránek Evropské úmluvy: uvážení a konsensus států v současné judikatuře Evropského soudu pro lidská práva [At edges of the European Convention pages: Consensus and discretion of States in the present case law of the European Court of Human Rights], *Jurisprudence* 1/2012, p. 3.

In connection with this 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 serious breach of a rule “intended to confer rights on individuals” (para 33).<sup>9)</sup> 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).<sup>10)</sup> 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;<sup>11)</sup> yet to meet this condition, not any breach of the rule is sufficient even if there is no room for discretion by the respective institution, if the matter is complicated (paras 36-40):<sup>12)</sup> 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 respective institution has a quasi-automatic consequence of extra-contractual liability.<sup>13)</sup> Clarification of this condition for the case at stake is crucial: if the Council is to

---

<sup>9)</sup> Cf also 5/71 Zuckerfabrik Schoppenstedt, bod 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 about milk quotas the CJEU has recognized liability of the Community.

<sup>10)</sup> Cf. T 351/03 Schneider Electric, para 125; T 212/03 MyTravel Group, para 42, a Artegodan, para 55.

<sup>11)</sup> Cf. C 282/05 P Holcim, para 47.

<sup>12)</sup> Cf. C 312/00 P Commission v. Camar a Tico, para 54; T 198/95, 171/96, 230/97, 174/98, 225/99 Comafra, para 34.

<sup>13)</sup> Cf. eg. BOBEK M., BRÍZA P., KOMÁREK J., *Vnitrostátní aplikace práva Evropské unie* [National application of EU law], C.H.Beck Praha 2011, p. 300 and case law cited therein. 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).

implement UN Security Council resolutions by a secondary act, thereby fulfilling the implementation duty instead of EU Member States (see especially Article 25,<sup>14)</sup> 103<sup>15)</sup>,<sup>16)</sup>, 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).<sup>17)</sup>

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 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 the 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.<sup>18)</sup> However, reflection of the legal norms violation intensity – “sufficient seriousness” – should in our opinion already be a criterion for reviewing the validity of the rule, not only of its liability consequences.

---

<sup>14)</sup> 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.*”

<sup>15)</sup> 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.*”

<sup>16)</sup> 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.*”

<sup>17)</sup> In the case of autonomous EU sanctions lists the Council acts 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, ie, 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.

<sup>18)</sup> 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, paragraph 50).

The central question of the 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 there is a “*fundamental rule of law protecting an individual*” before whether there was possibly a “*sufficiently serious breach*”.

Therefore, the General Court first notes that the case indeed concerns a “*fundamental rule of law, protecting an individual*” – of the plaintiff Sison. The damages claim<sup>19)</sup> concerns 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 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 on a penalty (paras 62-65 points), leading to the conclusion that the Council can not 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.<sup>20)</sup> 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 in itself is therefore not legally challenged by the applicant, and therefore the General Court continues to examine whether there has

---

<sup>19)</sup> 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).

<sup>20)</sup> 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).

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 imposed on the plaintiff under conditions exceeding the limits specified in the Sanctions Regulation, that is “*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 EU contractual liability depends therefore on the sufficient seriousness of the breach 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. Non-contractual liability, values and objectives of the EU

Although the Sison III ruling is very well justified, especially by numerous references to settled CJEU case law where each argument is acceptable on individual basis, as these arguments run down into the main stream of grounds, reader’s questions rise on the actual direction of that stream – on the philosophy of that settled case law. Those question marks have their basis in that part of CJEU’s case law which ties liability for damage caused by breach of EU law, by both the EU,<sup>21)</sup> and the Member States,<sup>22)</sup> by a condition of “sufficient seriousness” of such violations; however, surprisingly such a condition is not required for illegality of the EU Act which caused the damage. Perhaps these doubts also assailed the General Court which defends itself against them in paragraph 81 of the above 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).*”<sup>23)</sup>

These doubts are twofold and may be formulated as follows:

- (a) 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

---

<sup>21)</sup> See above.

<sup>22)</sup> Cf. C-6&9/90 Francovich, para 40.

<sup>23)</sup> The General Court refers to the ECHR judgment of 30.06.2005 in the matter *Bosphorus v Ireland*, paras 88, 163 and 165.



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,<sup>24</sup>) but some such fundamental rights violations may not be serious enough in order to award the victim due compensation.

On the one hand, under Article 2 TEU respect for human rights is one of the EU values. On the other hand, the first EU goal listed in Article 3 TEU is to promote peace, securing of which is a primary objective and competence 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 (eg 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 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.

Should the above conclusion be indeed true and should it guide the General Court in its decision-making, this would mean quite a serious deviation from the EU value anchoring as declared, inter alia, in Article 3 TEU. However, can this reasoning be actually traced in the subtext of the Sison III judgment? It should be noted that according to the reasoning of the General Court a violation of fundamental rights cannot be caused only by imposition of restrictive measures provided for in Regulation No 2580/2001 as such, but the violation would lie only in the very fact that such restrictive measures *"were imposed on him, by*

---

<sup>24</sup>) The entire above cited Kadi case law concerns this problem. The author is aware of inter-temporal 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 realistically achievable.

*the contested acts, 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 ... by Article 2(3) of Regulation No 2580/2001, read in conjunction with Article 1(4) of Common Position 2001/931*” (para 78). The General Court thus introduces a special category of fundamental rights’ violation, which lies “only” in a deviation from the limits of the rules laying down conditions for legitimate restrictions on fundamental rights and such infringement is not considered sufficiently serious to warrant an award of damages under the EU non-contractual liability. The lack of seriousness of a (secondary) fundamental rights’ violation is based on and is inextricably bound up with insufficient seriousness of (primary) illegality of the breach of conditions set out in the sanctions regulation.<sup>25)</sup>

(b) Why should the EU and Member States face lighter conditions for non-contractual liability for breach of EU law than natural and legal persons?

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. Eg, the main reason for recognition of its direct effect and primacy over Member States’ law is based on fact that EU law affects the status of persons more than international law.<sup>26)</sup> 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 an effort has so far prevailed to ensure that EU law-based claims are not discriminated against by national procedural law – ie that such claims be recoverable under the same procedural requirements as claims based on national law<sup>27)</sup> (principle of equivalence<sup>28)</sup>) 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 card 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.

---

<sup>25)</sup> If a breach of a sanctions regulation would be found sufficiently serious, then under the logic of the General Court necessarily it would have to encompass a sufficiently serious breach of fundamental rights. In this case, however, damages would be awarded for a breach of the sanction regulation and violation of fundamental rights would no longer have to be examined.

<sup>26)</sup> Cf. eg 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.

<sup>27)</sup> Cf. C-261/95 Palmisani.

<sup>28)</sup> Cf. 240/87 Deville, C-20/92 Hubbard.



It could be valuable to add the view of the ECtHR on the question as formulated in the cases of *Matthews*<sup>29)</sup> and *Bosphorus* mentioned above (a State cannot justify violation of the ECHR by arguing that it has in the respective area delegated its powers to an international organization), a view which could be more favorable for Mr. Sison than the approach of the General Court: one cannot exclude an ECtHR intervention, whereby Member States may become liable for damage caused to Mr. Sison, when such a damage is not made good by the EU itself.

#### 4. Conclusion

The General Court in its judgment *Sison III* has made the conditions for EU non-contractual liability 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 liability does not occur quasi-automatically but only if the decision-making institution 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.<sup>30)</sup>

However, some doubts remain: if we somewhat simplify the situation, by the general availability of sanction 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, if the intensity of the violation of legal standards – “sufficient seriousness” – should be upheld as a criterion for judicial review, in our view it should already be made use of in the review of the rules at stake, not only in the stage of its liability consequences. On the other hand, it should be noted that the General Court in its judgment *Sison III* found no violation of fundamental rights with regard to the “special” condition of sufficient seriousness of the fundamental rights’ breach (para 80), although it may be criticized that this issue could have been given more atten-

---

<sup>29)</sup> Case No. 24833/94 *Matthews v UK* (1999).

<sup>30)</sup> Cf. in particular C 120/06 P a C 121/06 P *FIAMM a FIAMM Technologies*, where the reason for not awarding of the non-contractual liability was a denial of direct effect of the General Agreement on Tariffs and Trade (GATT 1994)

tion. At the same time the General Court dealt with a difference of purpose between actions for annulment and actions for damages (albeit fairly briefly); it is probably aware of the discrepancy between different standards for annulment and damages, nevertheless it inclined to the opinion that *“it is not the purpose of an action for damages to make good damage caused by all unlawfulness”* (para 32).