

11 Résumé

Smart sanctions represent a new kind of restrictive measure used for fighting against terrorism and its financing. Even though it is not proved that this special kind of restrictive measure can actually prevent committing of terrorist acts it can be assumed that cutting off the terrorists from their financial resources can at least make committing terrorist acts more difficult.

Taking rule of law into account it is necessary for restrictive measures not to intervene unreasonably into individual rights and interests even though those restrictive measures are seeking protection of general interests. Primarily it is required to prevent negative effect of restrictive measures on innocent civil inhabitants. The strength of smart sanctions rests in the point that they do not cause inappropriate humanitarian disasters as comprehensive sanction may do. The impact of smart sanction shall conceive only targeted individuals or entities. To fulfill this aim it is essential to take into consideration the interests of targeted individuals and entities. There shall be considered two main interests of the targeted individuals and entities. Firstly the restrictive measure shall be adopted on adequate legal basis. Secondly the fundamental rights of targeted individuals and entities shall be preserved. There have been certain doubts whether the Community has had the capacity to adopt measures against non-state actor. This issue has been solved by ECJ in affirmative by reference to combined effect of articles 60, 301 and 308 TEC. With respect to the Lisbon treaty the imposition of restrictive measure upon non-state actors has been expressly solved by virtue of article 75 and article 215 paragraph 2 TFEU. However there occurs a new issue relating to the problem whether article 75 or article 215 TFEU shall be used as legal base for certain restrictive measure. Although it seems that article 75 TFEU shall be used for restrictive measures relating to the fight against terrorism and article 215 TFEU shall be used for the rest of restrictive measures the actual position of EU institutions does not fulfill this expectation.

Concerning the fundamental rights of targeted individuals and entities the main message from ECJ provides that the protection of fundamental rights is the main constitutional value on which the Community and now the Union stands. Whilst the CFI was willing to differ under certain conditions from those constitutional values in

favor of the international legal order the ECJ never accepted such interference with constitutional values of the Community/Union. In other words as long as certain rights are ensured by the EU legal order it is required to comply with such rights although the Union or earlier the Community acts with the view to reflect the requirements of United Nations. For its position approving the primacy of the international legal order based on UN over the community legal order the CFI did not really deal with the alleged breach of fundamental rights concerning the right to defense especially right be heard, right to effective judicial remedy and right to property. Vice versa the ECJ approved such fundamental rights and from now on in any case a restrictive measure with direct effect on an individual or entity is adopted the above mentioned fundamental rights have to be granted. To the relation between the legal order based on UN and the Community/Union legal order it needs to be said that the ECJ only repeated its earlier judgments as it approved that the Community had its own distinct legal order that it was not subordinated to any other legal order. Also the EU has its own legal order with its own hierarchy. Even though it may be appropriate for the EU institutions to feel respect before acts of the UN because the member states of EU are member states of UN as well the EU institutions shall in the case where the acts of UN do not comply with the fundamental values of the Union always protect and respect those values.

The judgment of ECJ in *Kadi and Al Barakaat* acknowledging the fundamental rights of individual and entities targeted by restrictive measures shall be considered as being fair and positive. The positive acceptance of this decision resulted in subsequent changes in the legal system of imposing smart sanctions not only at the level of EU but also at the level of UN besides the UN stipulated to carry a review of the names on the black list. ECJ judgment and the subsequent changes in the system imposing smart sanctions once again recall that there are many different interests and values that are protected by EU legal order but that those interests can get into conflict. In *Kadi and Al Barakaat* played role such important interest as the protection of international peace and security. Second not less important interest was relating to protection of fundamental rights of individuals and entities targeted by smart sanctions. In such case where there are two important interests getting in conflict the court shall not simply favor one of those two. The court shall balance those interests because any other approach would not be acceptable in the community governed by rule of law.