EU EMBARGOES and SANCTIONS[1]

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The European Union (EU, made of its 15 Member States and the European Community acting together) approaches embargoes under the angle of trade - not in the perspective of non proliferation. The reason is simple - the EU is not a state : it has only the competences its constituent States have granted to it. In this breakdown, non-proliferation remains a national responsibility. But the EU has extensive powers in taking restrictive measures against 3d States for the trade in goods and services, and over financial flows. The Term 'EU embargo' covers a wide range of situations, representing an approach that is common, but of varying intensity, mostly due to tensions between EC or EU competence, on one hand, and that of the MS, on the other.

The common approach by the EC, then EU, has been reluctant and has taken years to build up (1978-1993).

Intensity of the measures involved varies in both directions : an EC regulation is directly applicable and binding for all national authorities, and therefore very effective throughout the European Union. This coexists, on the other end, with situations of 'soft law'-voluntary approach that leave room for individual national approaches, sometimes at the expense of homogeneity.

1. History

1.1. The difficulty to bring about the common approach was due to the fact that EU Member States accepted that trade was a Community competence but argued that unilateral measures of economic coercion were not plain trade, but mainly political measures. Consequently, there was no legal basis for the Community to adopt them. In fact, some of the first embargoes cited as a legal basis the then article 224 (a provision allowing MS to take- individually measures derogating from the Treaty, and consulting between them in order not to affect the functioning of the common market). That solution was questionable, as that Article did not give the EC any powers, and in fact the measures remained national in essence (Rhodesia 1975, Argentina 1982).

[1] *Contribution to the 4th international conference on export controls, Warsaw, 31/9-3/10/2002.. The views expressed are strictly personal.*

1.2. Eventually, with the development of the European Political cooperation, the understanding was reached that a political decision was needed for the Community to be able to act on the basis of Common Commercial Policy.

1.3. The practice materialised in the Maastricht Treaty, (in what now became Articles 301 and 60 EC Treaty) at the end of 1993.

2. Construction

2.1. EU Embargoes are preceded by a Common position, intended to state the political decision. It is binding on the Member States and on the European Community. It is meant to indicate who (of the Community and the Member States) does what.

2.2. The Common position is followed up by a Regulation, intended to exercise community competence, now made possible. Competence is open case by case, and stops when the basis (the Common Position) is abolished.

3. Object of EU embargoes

Typically, they follow scrupulously the prescriptions of the corresponding UN Security Council resolutions, where available. In the (much less frequent) cases where embargoes are decided autonomously, their object includes

- **Goods** (arms and dual use goods are subject of specific provisions, see below.

- **Services**, most significantly financial and transport ones: payments related to goods, Technical services (assistance) related to goods, and/or their maintenance.

- **Flight bans**

- **Export credit** and investment embargoes

- **Denial** (or slow down) of development aid

- **Visa bans** and freezing of funds – now given prominence because of the fight against terrorism.

4. Focus on goods and services related to them.

4.1. General goods

4.1.1. They come under exclusive Community competence. Any restrictive measures are taken by the Community, national measures are not tolerated. Even if they pursue a foreign policy or security objective, national measures have to respect the Common Commercial Policy. (European Court of Justice in CentroCom judgement, 1998). Such policy is given a very wide meaning: not only licences, but even a non-commercial measure, such as the non release of (otherwise releasable) funds for the payment of an exporter in order to purportedly avoid abuse, can be a measure having equivalent effect to an export quota, and therefore prohibited by art. 1 of the Common exports regime. Security concerns may be addressed through Art 11 of Community Reg. 2603/69.

4.1.2. Type of goods covered : Typically, comprehensive commercial embargoes follow closely the scope the UNSC resolutions imposing them. Autonomous embargoes tend to be selective; they include:

4.1.2.1. To former Yugoslavia : oil and derivatives ; goods serving internal repression ; goods, services, technology and equipment suitable for repairing damage caused by air strikes to YU assets ; infrastructure and equipment enabling YU to pursue policy of internal repression . Restrictive measures were lifted in Oct. 2000.

4.1.2.2. To Zimbabwe (the most recent example) : material for internal repression.

4.1.3. Embargoes are introduced by the words : ‘ it is prohibited to, knowingly and intentionally, sell, supply, export or send, directly or indirectly...’. The formulation is extensive and covers transit.

4.1.4. The Community regulation is an effective instrument. It has direct applicability and direct effect for the 15 EU Member States.

4.2. Arms

4.2.1. Article 296 of the European Community Treaty has entertained a long controversy as to whether the Community could regulate their trade. The European Court of Justice gave some indications, but has avoided a judgement on the issue, saying only that it was quite exceptional and should be interpreted restrictively. It remains certain that the Member States can at any time taken measures concerning the trade of arms, even if they derogate from any (possible) community rules;

4.2.2. Nevertheless, according to Article 296 EC, Member States may act only within the framework of a list of military goods adopted by the Council. The difficulty lies in the fact that such list was adopted back in 1958 and was never revised since. Today it is largely obsolete , and there is a need to bring in line law and reality.

4.2.3. Scope:

4.2.3.1. Older embargoes were introduced by the words ‘embargo on arms , munitions and ‚military equipment'. A footnote used to contain some further details : ‘weapons designed to kill and their ammunition, weapons platforms, non weapon platforms and ancillary equipment’. Existing contracts were affected by the embargo only where covered by Art. 103 of the UN charter. Equally, it has not been possible to lay down an EU provision as to whether an EU arms embargo covered transiting goods ; this remained a matter for the legislation of each Member State to settle.

4.2.3.2. The adoption of the European Code of Conduct for arms exports (1998) gave a new impetus to the scope of EU arms embargoes. The reference list is now the "Common list of military equipment "annexed to that Code of conduct *(see Official Journal of the EU, C191 of 8.7.2000, p. 2).* Besides, recent arms embargoes are formulated more thoroughly, now including the *" supply or sale of arms and related material, weapons ammunition, military vehicles, and paramilitary equipment."* The Transit issue is now addressed ("*irrespective of origin").*

4.2.4. Such developments do not exclude conflicts of competence between the Community and the EU member States. Not all items included in the EU common list may be embargoed by the Member States. Standard EU policy is that exports of goods for

paramilitary, public order, internal security purposes should be controlled for human rights reasons (i.e. on the basis of the second criterion of the Code of Conduct - respect for human rights). But for those items, competence lies with the Community. Recognising this fact, the EU Council has asked the Commission to bring forward a proposal. This is not materialised for the time being.

4.3. Dual use items

4.3.1. As there are important overlaps between embargoes list and dual use list, the same conflict of competence arises here. For a long time "Who does what?" remained an issue. It is important to stress that the 1958 list does not contain any dual use goods- therefore legally speaking the situation remained in the limbo for very long, at the expense of legal certainty as to the permissible national action.

4.3.1.1. On what grounds, for example. a Member State could refuse a national licence for another Member State's export transiting though its territory of an allegedly 'dual use' item if that item was not on the 1958 list?

4.3.1.2. How could the exporter assess the legality of the first Member State's attitude with respect to Article 296 EC Treaty?

4.3.2. The introduction of the CFSP in the end of 1993 eased the tensions : a hybrid act saw the light in March 1995, whereby all the regulatory framework was laid down by Community regulation, and the list was drawn up by a CFSP act, which reflected the Member States commitments in the non-proliferation regimes.

4.3.3. Conflict over competence was settled by the European Court of Justice in favour of the Community in a string of cases: Werner, Leifer, Centro-Com. (1995-1997).

4.3.4. Lessons are drawn in 2000.

A new scheme is introduced based on a Community regulation only, (Regulation 1334/2000, OJ L 159 of 30.6.2000, p.1) . The approach is a trade one, but allows the Member States to take national measures upon delegation by the Community. The legal consequences of the change are important as to the judicial review : national measures are now subject to a proportionality test by the Court whereas, under the previous system, CFSP measures were

not subject to judicial review and, if Article 296 was invoked, only improper use could be controlled. The relationship between trade in dual use goods, now an exclusive Community competence, and non-proliferation, competence of the Member States, can certainly gain in consistency if a way was found for the Community to participate in the Wassenaar arrangement.

5. Exemptions

5.1. Non-arms: exemptions of humanitarian nature are granted for essential goods and medical supplies.

5.2. Arms: typical exemptions from embargoes for humanitarian end-use include peacekeeping operations and in cases where refusal of a licence would be inconsistent with the purpose of the embargo. In many cases a consultation procedure is launched by the national authority contemplating the granting of the licence. At the end of the consultation period, the national authorities take a decision taking due account of the views expressed.

5.3. Funds and financial services: humanitarian exemptions are typical.

6. Penalties in case of non-compliance

They depend on national measures, for criminal competence lies with the EU Member States. The EU can prescribe sanctions (effective and proportionate) but it is the Member States that criminalise non-compliance and determine the penalties. Some of the Member States have laws of general scope covering infringements of all EU embargoes ; in this case the effect is immediate. Other Member States consider that they must establish the criminal offence only on a case by case basis (every time the EU takes a restrictive measure) ; in that case, voting a national law may take some time, during which a possible infringement can remain without sanction.

7. Multiplier effect : the association of acceding countries, streamlining their policies in view of accession

7.1. As a matter of standard policy, the 13 countries candidate for accession to the EU associate themselves to EU common positions declaring the embargoes with binding effect. That carries increased

weight in the case of Arms embargoes (many of the acceding states are important arms exporters). As a result, an EU arms embargo becomes an important non-proliferation instrument.

7.2. What is the degree of response of the associated / acceding States ?

Last year's study found that, on the whole, those States are rigorous in applying the embargoes they have subscribed to. Some cases of obvious violations have been found, especially in the arms sector. The EU-expressed position is that they are isolated incidents, which have led the States concerned to react to the risk of losing international credibility. Despite the difficulties because of the economic transition, the administrative ability to enforce procedures and make safeguards etc. national authorities have come to great lengths in demonstrating an exemplary conduct. The political dialogue between EU and the acceding countries has worked very well in strengthening their resolve. The situation today is certainly satisfactory.

8. Response to new challenges

As a response to terrorism, the EU has taken an important policy stance on 19 September 2001 (the EU action plan) ; by December of the same year it had in place an arsenal of two common positions and one Community regulation on combating terrorism. EU embargoes are now geared accordingly. The system is complemented by criterion six of the EU code of conduct which , since 1998, urges the Member States (and the Community, for the part it is competent) to take into account the record of the buyer country with regard to support or encouragement of terrorism and compliance with international commitments in that field.

To the extent that, in the fight against terrorism, the focus shifts from countries as such to targeted individuals, groups and entities, the EU system needs to be fine-tuned. In fact, under articles 301 and 60 of the EC Treaty, restrictive measures may be taken only with respect to third countries. EU measures taken against individuals or groups without a specific territorial reference have been challenged in the European Court of Justice (eight cases pending so far), whereby one of the argument of the applicants is that the Community has not been granted the power to take measures against private persons.

9. Conclusion

Experience gained over the recent ten to twelve years shows that EU member states have come a long way in using a common approach and

common means in imposing embargoes, first in the UN ambit, then, ever more assertively, as autonomous policy tools. When compared to the old approach, progress introduced with the Common foreign and security policy is startling. Even in cases where EU involvement is not obvious, (because of the limits inherent to the system of the attribution of competence), Member States have acquired the instinct of acting together. Although the system is necessarily patchy, prone to tensions, and has varying degrees of efficiency, it's inherent characteristics and the multiplier effect of binding 28 exporting countries makes it a very important instrument in support of non-proliferation policies. Response to new challenges is firmly in place - sometimes with considerable foresight, even if difficulties may occasionally arise.