



INSIGHT

SIMPLE ABSTENTION AND CONSTRUCTIVE ABSTENTION IN THE CONTEXT OF INTERNATIONAL ECONOMIC SANCTIONS: TWO TOO SIMILAR SIDES OF THE SAME COIN?

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ABSTRACT: Constructive abstention, provided for in art. 31(2) TEU, has been conceived of as an instrument applicable to CFSP acts. As art. 215 TFEU establishes an integrated regime in which CFSP decisions and TFEU regulations are interdependent on each other, the issue arises as to whether the scope of constructive abstention can be extended to cover not only the CFSP decision but also its implementing regulation. This *Insight* argues that constructive abstention should apply not only to the CFSP act, but also to the regulation. In turn, this conclusion calls for reflection on the scope and consequences of the duty of loyal cooperation in the context of restrictive measures and, more generally, on the effectiveness of constructive abstention in this field.

KEYWORDS: article 31(2) TEU – article 215 TFEU – restrictive measures – constructive abstention – CFSP – duty of loyal cooperation.

I. INTRODUCTION: FRAMING THE PROBLEM

On 6 October 2022, the eighth sanctions package against Russia was adopted.¹ Unlike the previous ones, the restrictive measures were not decided unanimously, as emerges from indiscretions published in the Belgian daily *L’Echo* “*la Belgique s’est abstenue de voter*

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¹ See Council Decision (CFSP) 2022/1909 of 6 October 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine; Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine. This package introduces new EU import bans worth seven billion euro to curb Russia’s revenues, as well as export restrictions, which will further deprive the Kremlin’s military and industrial complex of key components and technologies and Russia’s economy of European services and expertise. The sanctions also deprive the Russian army and its suppliers from further specific goods and equipment needed to wage its war on Ukrainian territory. The package also lays the basis for the required legal framework to implement the oil price cap envisaged by the G7.



les nouvelles sanctions contre la Russie par crainte de leur impact sur la sidérurgie".² This episode provides an opportunity to reflect on simple abstention and constructive abstention in the field of international economic sanctions, which are based on a Common Foreign and Security Policy (CFSP)/TFEU set of provisions.

The field of economic sanctions, as provided for by art. 215 TFEU, constitutes the only EU policy that explicitly combines the foreign policy competence and the substantive competences of the EU.³ The adoption of economic sanctions entails a sequence of acts based on different and perhaps irreconcilable decision-making procedures: a CFSP decision to be taken through intergovernmental mechanisms determines the conditions for the adoption of restrictive measures to be taken through the procedure laid down in art. 215 TFEU. The role of art. 215 TFEU is precisely to establish a link – the only one expressly provided by the Treaties – between the political and the substantive dimensions of the EU. The complexity of this legal paradigm is at the origin of a number of legal issues, some of which still remain unsolved.⁴ One of these issues concerns the constructive abstention of a Member State in relation to a CFSP decision: can such an abstention affect the adoption of the regulation under art. 215 TFEU?

II. SIMPLE AND CONSTRUCTIVE ABSTENTIONS AS FLEXIBILITY MECHANISMS UNDER CFSP

Although CFSP decisions must be taken unanimously,⁵ the TEU provides for certain mechanisms to ensure flexibility in the decision-making process. Among those mechanisms,⁶

² V Georis, 'La Belgique s'est abstenue de voter les sanctions contre la Russie' (6 October 2022) L'Echo www.lecho.be.

³ As is well known, art. 75 TFEU also provides a legal basis for the adoption of restrictive measures. Unlike art. 215 TFEU, which is based on a combination of CFSP and material policies acts, art. 75 TFEU is fully drawn up within the substantive competences.

⁴ See E Cannizzaro, 'The EU Antiterrorist Sanctions' in P Eeckhout, M Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2017) 531 ff. One of these issues concerns the asymmetrical jurisdiction conferred on the ECJ by the Treaties. While the regulations adopted on the basis of art. 215 TFEU are subject to full judicial review, the Court has only jurisdiction "to review the legality" of CFSP restrictive measures pursuant to the so-called "claw-back" clause enshrined in art. 275(2) TFEU. Whereas the Treaty of Lisbon thus created a limited competence for the Court in relation to CFSP decisions targeting persons, the precise contours of that competence are not fully clear. For a discussion see P Van Elswege, 'Upholding the Rule of Law in the Common Foreign and Security Policy: *H v. Council*' (2017) CMLRev 841 ff; SØ Johansen, '*H v Council et Al.* - A Minor Expansion of the CJEU's Jurisdiction over the CFSP' European Papers (European Forum Highlight of 7 October 2016) www.europeanpapers.eu 1297 ff.

⁵ See art. 31(1) TEU according to which "[D]ecisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise." The unanimity rule is at the heart of the traditional "intergovernmental" image of CFSP. Indeed, it is safe to assume that the inclusion of CFSP in the Treaty of Maastricht was only possible because of the absence of majority voting, or more generally speaking, the inapplicability of the "Community method".

⁶ Over time, some flexibility has been introduced into CFSP through the provision of qualified majority voting (QMV) and the extension of enhanced cooperation to CFSP by the Lisbon Treaty. On the one hand,

the provisions on abstention, simple and constructive, offer a cooperative and flexible solution in the face of disagreements in the adoption of CFSP decisions, in that the diverging positions of Member States can be maintained without the need to halt the entire process.

Moreover, while sharing the characteristic of not preventing the adoption of the CFSP act, the two types of abstention have different consequences on the position of the abstaining State.

According to art. 238(4) TFEU, a “simple” abstention “shall not prevent the adoption of acts of the Council for which unanimity is required”. This stipulation implies that simple abstention, therefore, not only does not hinder the adoption of the act at stake, but also does not prevent this act, if adopted, from binding the abstaining Member State. A simple abstention produces, therefore, consequences just on the political level: it expresses a political dissent which, nevertheless, does not preclude the act from producing legal effects *vis-à-vis* the abstainer.⁷ Abstention, in this sense, is like the dissenting vote that a Member State may express in the context of a majority vote (simple or qualified): dissent not only does not prevent the adoption of the act (provided that the *quorum* is reached), but does not even mitigate its effects, which apply to all Member States, including to those that dissented. As regards the eighth sanctions package against Russia, it is reasonable to assume that Belgium, after abstaining under art. 238(4) TFEU in relation to the CFSP decision, exercised its dissenting vote on the adoption of the regulation based on art. 215 TFEU. Both conducts clearly did not have the effect of rendering the two acts inapplicable to Belgium.⁸

pursuant to the current art. 31(2) TEU, the Council uses QMV: *i*) when adopting a decision defining a Union action or position on the basis of a European Council decision relating to the Union's strategic interests and objectives (cf. article 22(1) TEU); *ii*) when adopting any decision implementing a decision defining a Union action or position; and *iii*) when appointing an EU Special Representative in accordance with art. 33 TEU. On the other, enhanced cooperation, which was designed to allow some Member States, using the EU framework and institutions, to cooperate further among themselves in cases where the others do not wish to do so, has been extended by the Lisbon Treaty to cover the entire realm of CFSP (art. 331(2) TFEU), including defence. The Lisbon Treaty also removed the “emergency brake” procedure, albeit not completely. Furthermore, the Treaty provided for a new *passerelle* which allows participants in an enhanced cooperation to decide in the Council to switch from unanimity to QMV and from a special legislative procedure to the ordinary legislative procedure (art. 333(2) TFEU), except in defence matters (art. 333(1) TFEU). See, for a discussion, S Blockmans, ‘Ukraine, Russia and the Need for More Flexibility in EU Foreign Policy-Making’ (CEPS Policy Briefs n. 320-2014).

⁷ This means that Member States opposing a measure must actively use their veto and cannot rely on mere abstentions to prevent the adoption of a measure. On this perspective “there seems to be no legally relevant advantage in using this opportunity [simple abstention], since it follows from the text of this provision that the abstaining member state(s) will nonetheless be bound by the adopted decision” (RA Wessel, *The European Union's Foreign and Security Policy. A Legal Institutional Perspective* (Kluwer Law International 1999) 143). See also PJ Loewenthal, ‘Article 238 TFEU’ in M Kellerbauer, M Klamert and J Tomkin, *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1730 ff.

⁸ In the words of the Prime Minister of Belgium Alexander De Croo “*la Belgique s’est abstenue de voter lors de la prise de décision de l’Union européenne sur le huitième paquet de sanctions contre la Russie mais*

Constructive abstention under art. 31(2) TEU would have led to a quite different scenario.⁹ Through the “constructive abstention”, a Member State, without preventing a CFSP decision from being adopted, is nevertheless not obliged to implement it.¹⁰ Constructive abstention thus aims to prevent Member States unwilling to commit to a CFSP action from necessarily finding themselves obliged to prevent the decision from being adopted, having no alternative but to vote against it. In general terms, the mechanism of constructive abstention aims to reconcile the position held by the majority of Member States with the reservations and concerns of others.¹¹ Despite the practical value of this voting arrangement, Member States have hardly used it.¹² Only recently has it been used twice.¹³

la Belgique ne s'est pas opposée aux nouvelles sanctions pour ne pas “casser la solidarité européenne”. “Un tel veto aurait été sans précédent, pour notre pays, dans la genèse des sanctions contre la Russie” in V Georis, ‘La Belgique s’est abstenue de voter les sanctions contre la Russie’ cit.

⁹ According to art. 31(2) TEU, “[W]hen abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. [...]” See T Ramopoulos, ‘Article 31 TEU’ in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 243 ff.

¹⁰ The second subparagraph of art. 31(2) TUE clarifies that, “[w]hen abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration”. The latter is not an obligation but rather offers each Member State with a discretionary power to offer an explanation for its position.

¹¹ In general terms constructive abstention may be a truly useful instrument in the adoption of decisions on CSDP actions which divide EU countries. If these divisions could be reduced and reconciled to the extent of rejection of participation in a decision instead of rejection of a complete initiative for an EU undertaking, abstention rather than obstruction offers the exit route from a potential stalemate. This solution would permit Member States potentially or actually facing political difficulties domestically or having specific interests in the area of suggested CSDP operation to sustain their position and, at the same time, avoid conflict with other members eager to see more EU action on particular matters. See C Törö, ‘Accommodating Differences within the CSDP: Leeway in the Treaty Framework?’ in S Blockmans (ed), *Differentiated Integration in the EU - From Inside Looking Out* (Centre for European Policy Studies 2014) 57 ff.

¹² Constructive abstention was used in 2008 by Cyprus concerning the decision to establish the CSDP mission EULEX Kosovo (Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO).

¹³ The first time, in application of art. 5 of the European Peace Facility (Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528), Ireland, Malta and Austria have abstained from providing lethal weapons to Ukraine (see Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force), “due to what seems to be legal barriers enshrined in their constitutions” (A Fotiadis and N Schmidt, ‘The European Peace Facility, an Unsecured Gun on EU’s Table’ (29 March 2022) Investigate Europe www.investigate-europe.eu). Constructive abstention was then used by Hungary in relation to the Council’s decision to establish an EU military assistance mission in support of Ukraine (see Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine). As stated by the foreign minister Szijjártó, “Hungary was the only one not to vote on this proposal. It used the option of constructive abstention” (A Tidey, ‘EU Countries Agree to Train Ukrainian Soldiers as Part of New Mission’ (17 October 2022) Euronews www.euronews.com).

III. CONSTRUCTIVE ABSTENTION AND INTERNATIONAL ECONOMIC SANCTIONS: CONSTRUCTIVE ABSTENTION AS LIMITED TO THE CFSP ACT...

While the rationale for constructive abstention is clear, its application to the decision process established by art. 215 TFEU raises some questions concerning the interplay between the CFSP decision at stake and a TFEU act. Under this provision, the adoption of restrictive measures requires a CFSP decision followed by a regulation adopted by qualified majority. While the CFSP act is adopted by unanimity with the possible constructive abstention of one (or more) Member State(s), the regulation must be adopted by qualified majority. It follows that those Member States which constructively abstained on the adoption of the CFSP act, with the consequence that they are not obliged to apply it, are bound by the regulation adopted under art. 215 TFEU even if they voted against. This creates the paradoxical situation whereby a Member State is not bound by the CFSP act, but, nevertheless, is bound by the restrictive measures subsequently adopted by the Council. An attempt will be made to solve this *conundrum*.

According to a formalistic approach, which understands the CFSP decision and the regulation based on the TFEU as autonomous and separate acts, constructive abstention could only produce its effects in relation to the CFSP decision. In this sense, the Court of Justice has already expressed the view that, although linked by the “bridge” offered by art. 215 TFEU,¹⁴ the two acts are to be viewed as autonomous and each of them is to be adopted according to its own procedure.¹⁵ Following this reasoning, the CFSP act is a precondition for the adoption of the restrictive measures by the Council, by a qualified majority, on a joint proposal of the High Representative for Foreign Affairs and Security Policy and the Commission.

In this perspective, a constructive abstention has a limited effect, as it can only release the abstaining Member State from the obligation to apply the CFSP act. Constructive abstention would not, on the other hand, extend to the regulation, which would be fully binding on the abstaining Member State(s).

This reading is certainly in line with art. 40 TEU. This provision, in its current wording, seems to maintain the rationale of the pre-Lisbon system, based on the distinction between the CFSP, which retains the exclusive competence to pursue political objectives,

¹⁴ The expression “bridge” was first used in *Kadi I* (joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation* ECLI:EU:C:2008:461 para. 197). The Court considered that art. 215 TFEU constitutes “a bridge ... constructed between the actions of the Community involving economic measures under arts 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP.”

¹⁵ See case C-548/09 P *Bank Mellé* ECLI:EU:C:2011:735 para. 71.

and the TFEU policies, which are to pursue the substantive objectives respectively assigned to them.¹⁶

However, this reading is not entirely convincing, especially if the autonomy of the two acts on the formal level is not matched by their autonomy on the substantive level, as in the case of restrictive measures.¹⁷ Indeed, it is difficult to hold that a State is simultaneously bound and not bound by the same regulatory requirement, depending on whether the conduct is imposed by a CFSP act or a TFEU regulation.¹⁸ On the substantive level, the autonomy approach, taken to its extreme consequences, leads to a normative conflict¹⁹ or, at the very least, to a contradictory situation.

Against this background, art. 215 TFEU can hardly be seen as a mere legal mechanism that links two autonomous acts, each based on its own legal basis and each adopted through its own procedure, as the Court seems to assume in the *Bank Mellî* judgment.²⁰ Suggestive as it may be, the analogy of the “bridge” fails to explain how to avoid a conflict between the CFSP act and the TFEU regulation when these provide for prescriptions that cannot be complied with simultaneously.²¹

In other words, and more generally, the formal autonomy of the two acts does not guarantee the smooth functioning of the procedure laid down by art. 215 TFEU. In particular, it does not guarantee the coherence of the two components of the “bridge” constructed by that provision.

IV. ... AND CONSTRUCTIVE ABSTENTION APPLYING TO TFEU REGULATIONS

In the *Bank Refah* judgment,²² the paradigm of autonomy between the two acts seems to waver, since the Court held that the “bridge” between the two spheres of competence

¹⁶ Pursuant to art. 40 TEU the Court has the jurisdiction to determine the boundaries between CFSP and non-CFSP in its border-policing role. For a closer analysis on art. 40 TEU, I refer to my work *Politica estera e azione estera dell'Unione* (Editoriale Scientifica 2012).

¹⁷ On this regard, see E Cannizzaro, ‘The EU Antiterrorist Sanctions’ cit. “[H]aving asserted the formal autonomy of the two acts which formed the sequential procedure established by art. 215, the Court abstained from dealing with the insidious issue of their substantial autonomy and did not seize the opportunity to clarify the respective roles of the two components of the ‘bridge’ constructed by that provision.”

¹⁸ See, for a discussion on the definition of “conflict”, J Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge, 2004) 164 ff.

¹⁹ According to J Pauwelyn, *Conflict of Norms in Public International Law* cit. 175-176, “[E]ssentially, two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other.”

²⁰ *Bank Mellî* cit. para. 71.

²¹ See W Karl, ‘Conflict Between Treaties’ in R. Bernhardt (ed), *Encyclopedia of Public International Law* (vol. IV Elsevier Amsterdam 2000) 936. See also W Jenks, ‘The Conflict of Law-Making Treaties’ (1953) BYIL 401, 426; E Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) EJIL 395 ff.

²² Case C-134/19 P *Bank Refah Kargaran* ECLI:EU:C:2020:793. See M E Bartoloni, “Restrictive Measures” under Art. 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the *Bank Refah* Judgment’ (European Forum Insight of 27 January 2021) European Papers www.europeanpapers.eu 1359 ff.

creates a regime of restrictive measures in which there is no need to distinguish, as regards judicial protection, sanctions based on regulations from those based on CFSP acts.²³ In the words of the Court, if the European judicature has jurisdiction to rule on an action for damages with regard to restrictive measures set out in regulations based on art. 215 TFEU,²⁴ the necessary coherence of the system of judicial protection “requires that, in order to avoid a lacuna in the judicial protection of the natural or legal persons concerned, the Court [...] must also have jurisdiction to rule on the harm allegedly caused by restrictive measures provided for in CFSP Decisions”.²⁵

This ruling clarifies that actions for damages can be brought against restrictive measures irrespective of their legal basis, be it a CFSP act or a regulation. This finding derives from the need to ensure the coherence of the system of judicial protection.²⁶ In stressing the importance of the “coherence of the system”,²⁷ the Court in *Bank Refah* construes art. 215 TFEU in such a way, that this provision, far from establishing a sequence of autonomous acts, establishes an integrated, albeit *sui generis*, regime in which CFSP decisions and regulations are interdependent from each other.²⁸

Following this line of thought, it is reasonable to assume that constructive abstention could apply not only to the CFSP act, but also to its implementing regulation. If the coherence of the system demands that CFSP act be subject to TFEU remedies, this argument should also work the other way round. The legal mechanisms applicable to CFSP should therefore be applicable to their implementing regulation as well. In other words, once the Court has recognised that, in the area of sanctions,²⁹ CFSP and TFEU components

²³ As is well known, in *Bank Refah* the Court was requested to determine whether a CFSP decision establishing restrictive measures can be challenged through an action for damages, as it is the case with regard to the regulations adopted on the basis of art. 215 TFEU.

²⁴ *Bank Refah* cit. para. 37.

²⁵ *Ibid.* para. 39.

²⁶ If the rationale for this solution is therefore based on the need to preserve the unity and coherence of the sanctioning regime, this implies that, in contexts where there is no such a need, the right to compensation could not be invoked. This would happen, for example, within the context of EU Common Security and Defence Policy (CSDP) military missions for purported human rights violations occurring in the context thereof. See, for a different approach, P Van Elsuwege and J De Coninck, ‘Action for Damages in relation to CFSP Decisions pertaining to Restrictive Measures: A Revolutionary Move by the Court of Justice in *Bank Refah* Kargaran?’ (9 October 2020) EU Law Analysis eulawanalysis.blogspot.com.

²⁷ *Bank Refah* cit. para. 39.

²⁸ For the limited purpose of the present contribution, there is no need to enter into this very complex discussion and to determine the various possible implications deriving from this reconstruction.

²⁹ The model provided for by art. 215 TFEU inspired, in other areas, practical arrangements designed to establish an informal coordination between the CFSP and other EU substantive policies. An example is provided by the rules governing the operation of the European satellite radio-navigation system (see Council Decision 2014/496/CFSP of 22 July 2014 on aspects of the deployment, operation and use of the European Global Navigation Satellite System affecting the security of the European Union and repealing Joint Action 2004/552/CFSP and Regulation (EU) No 512/2014 of the European Parliament and of the Council of 16 April 2014 amending Regulation (EU) No 912/2010 setting up the European GNSS Agency). Provided that

must be reconciled in a legally coherent framework, it is precisely the need for coherence that demands that the various restrictive measures, irrespective of their CFSP or TFEU nature, be subject, as far as possible, to the same rules.

V. CONSTRUCTIVE ABSTENTION AND THE DUTY OF LOYAL COOPERATION: TOO A HEAVY BURDEN IN THE CONTEXT OF SANCTIONS?

While art. 31(2) TEU relieves the abstaining Member States from the obligation to apply the decision at stake, it does not do the same as regards their obligation of loyal cooperation. On the contrary, art. 31(2) TEU specifies that “[i]n a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision.”

The rules of CFSP decision-making leave no doubt as to the prevalence of external solidarity over internal interests. The Treaty does not allow the Member States abstaining from the implementation of a properly adopted CFSP decision to disregard its binding effects. All EU Member States, whether giving or withholding their support, need to comply with EU commitments as a whole and must therefore refrain from any action that might go against that decision.

The proper functioning of constructive abstention is thus based on two needs that are not always easy for the abstaining State to reconcile. On the one hand, there is the right of that Member State not to apply the decision at stake; on the other hand, there is its duty not to prevent its effective implementation.

For some CFSP decisions, it is not too difficult for the abstaining Member States to combine these different needs. This was certainly the case with the recent constructive abstentions of Austria, Ireland, and Malta in relation to the supply of lethal weapons to Ukraine,³⁰ as well as the constructive abstention of Hungary in relation to the EU military assistance mission in support of Ukraine.³¹ In these cases, constructive abstention has the limited effect of relieving the abstaining Member States of the economic contributions arising from the decisions taken.³² It is difficult to argue that a mere non-participation in the costs of assistance measures would affect the action of the Union as a whole. In this case, the duty of loyal cooperation seems thus to be respected.

such a regime can be regarded as a unified regime, the question remains whether the *Bank Refah* judgment may have broader implications, going beyond the specific situation relating to the restrictive measures.

³⁰ See Council Decision (CFSP) 2022/338 cit.

³¹ See Council Decision (CFSP) 2022/1968 cit.

³² See the provision provided for by art. 5 of the Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility cit., according to which “[i]n cases where a Member State has abstained in a vote and made a formal declaration in accordance with the second subparagraph of Article 31(1) TEU regarding an assistance measure which allows for the supply of military equipment, or platforms, designed to deliver lethal force, that Member State shall not contribute to the costs of that assistance measure.”

On the contrary, in the field of sanctions it appears more difficult for the abstaining Member State to reconcile its right not to apply a decision with the duty not to prevent its implementation. The application of constructive abstention to implementing regulations under art. 215 TFEU implies that the abstaining Member State is relieved of its obligation to comply with specific restrictive implementing measures that, more often than not, impose bans on the import or export of certain products.³³ In this perspective, it is reasonable to assume that, unlike the right not to contribute to the costs of an assistance measure, the right not to apply measures prohibiting the import or export of certain goods compromises, by definition, the overall effectiveness of the sanctioning measures implemented by other Member States.

Suffice it to observe that under the rules of the internal market, a product subject to an import ban could, after its entry into the territory of the abstaining Member State, benefit from free movement within the EU. Unless one assumes that the Member State in question commits itself to taking all the necessary measures to “compensate” for the non-implementation of the sanctions or, alternatively, that the other Member States are allowed to take protective measures to prevent “traffic diversions”,³⁴ it is difficult to believe that the effectiveness of the sanctions would not be affected.

VI. CONCLUDING REMARKS

Against this background, it is difficult for the abstaining Member States to reconcile their right not to apply a decision imposing restrictive measures with their duty not to prevent its execution.

The application of constructive abstention to implementing regulations under art. 215 TFEU may indeed have the effect of making the duty of loyal cooperation so burdensome as to *de facto* prevent the abstaining Member State from evading the application of the sanctioning measures.³⁵ This ultimately means that constructive abstention will

³³ For an example, the list of products cannot be imported from Russia includes among others: crude oil and refined petroleum products; coal and other solid fossil fuels; steel, steel products and iron; gold, including jewellery; cement, wood, paper and plastics; seafood and liquor (e.g. caviar, vodka); cigarettes and cosmetics. See European Council and Council of the European Union, *EU Sanctions Against Russia Explained* www.consilium.europa.eu.

³⁴ Against the abstaining State, the other Member States collectively could adopt discriminatory measures restricting the free trade of sanctioned products within the internal market. Restrictions could be justified, according to art. 36 TFEU, on grounds of public policy which may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. In this case it is reasonable to assume that this fundamental interest is *in re ipsa*, that is, in the “collective” need to safeguard the effectiveness of sanctions. For the same reasons, it is also reasonable to assume that Member States would be relieved of the burden of proving that the restrictive measure is appropriate, necessary, and proportionate.

³⁵ Cf. RA Wessel and R Böttner, ‘Article 31’ in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) “[a]t first sight this opens the possibility of so-called “coalitions of the able and willing”. Since the introduction of this possibility CFSP actions no longer depended on the

hardly attain its objective, which is that to ensure to the abstaining Member State the right not to apply the adopted measures.

This conclusion may perhaps explain why, in the context of restrictive measures, States tend not to rely on constructive abstention, but prefer to resort to alternative instruments: simple abstention, if expressing a purely political disagreement appears sufficient (as in the case of Belgium);³⁶ close negotiations aimed at a “watered-down compromise”, where certain sanctions are not acceptable *tout court* (as recently happened with Hungary).³⁷

In general terms, the difficulty of applying constructive abstention in the context of sanctions exemplifies the difficulty of finding balanced mechanisms capable of reconciling, through the filter offered by the principle of loyal cooperation, two requirements that are not easy to combine: facilitating the CFSP decision-making procedure as much as possible, on the one hand; preserving a system having its *raison d'être* on the unanimous consensus of States, on the other. These two requirements actually prove to be practically irreconcilable whenever the duty of loyal cooperation, due to the very stringent effects it exerts in the context of sanctions, makes it impossible for the abstaining Member State not to participate in the implementation of restrictive measures.

It does not therefore appear unreasonable to conclude that, in the field of sanctions, simple abstention and constructive abstention turn out to be two too similar sides of the same coin: both have the purpose of allowing the abstaining State to express its dissent with respect to a given measure, without, however, removing it from the effects of the measure itself.³⁸

approval and implementation of all Member States, and this more flexible approach allowed for smaller groups of States to engage in a certain action or to adopt a position. On closer inspection, however, non-participation through the issuing of a formal declaration did not at all deprive the abstaining Council member from the binding effect of the adopted decision. After all, the decision taken by the Council remains a “Union decision”. While the abstaining State may not be obliged by and asked to actively implement this decision, it has to accept that “the decision commits the Union”.

³⁶ V. Georis, ‘La Belgique s’est abstenue de voter les sanctions contre la Russie’ cit.

³⁷ As is well known, the sixth sanctions package against Russia was the subject of intense negotiations that significantly reduced the initial proposal of a total ban on the import of all Russian oil into Europe. Some Member States, and in particular Hungary, in addition to the ban on the purchase, import and transfer of crude oil and derivatives without a step-by-step approach of between six (for crude oil) and eight months (for refined products), had, inter alia, advocated a temporary exception for pipeline imports into Member States which, due to their geographical situation, suffer from a specific dependency on Russian supplies and have no viable alternative options. See, e.g., K Than and A Komuves, ‘Hungary Cannot Support New EU Sanctions against Russia in Present Form, Orban Says’ (6 May 2022) Reuters www.reuters.com.

³⁸ In terms of its effects, constructive abstention is not very different from simple abstention: just as simple abstention does not remove the abstaining Member State from the binding effects of the decision, similarly, constructive abstention does not prevent the abstaining State from being, instead, *de facto* bound to apply the sanctions.