

FEATURE › SANCTIONS

Sanctions listing to lifting

The pariah status of sanctions list designation is prompting targeted parties to fight for removal, with some notable successes in the European Court of Justice.

Katherine Buckle of QEB Hollis Whiteman and **Lennart Poulsen** of 9 Bedford Row examine possible lines of attack.

Following the end of the Cold War, the employment of economic sanctions has frequently been heralded as a humanitarian alternative to war, their purpose being to change the targeted state's behaviour to elicit conformity with international legal and ethical standards, while avoiding military conflict.

Since the early 1990s, however, the unwanted consequences of such sanctions have been criticised; mainly, the impact on innocent civilians within the targeted state which, many now agree, outweighs the ethical purpose of their imposition. Moreover, there is a growing acknowledgment in the international community that economic sanctions rarely influence the desired change in an offending state's behaviour. A typical example is the case of Iraq where, following international sanctions imposed after the Gulf War, malnutrition caused by poverty and import restrictions was estimated to have killed around 100,000 to 200,000 children below the age of five between 1991 and 1998. [1]

This situation led to a shift in strategy and the adoption of 'targeted' sanctions such as those imposed by the United

States (US) and the European Union (EU) on high-ranking officials in Russia following the recent Crimean conflict in 2014. This approach targeted only those selected individuals, government officials and private citizens who were considered to have been involved, at some level, in the military invasion of Ukraine by Russian troops and the subsequent annexation of Crimea by the Russian Federation.

While most commentators agree that this is a more ethical approach than previous sanctions policies, even targeted sanctions are not without their ethical problems. These problems are multifarious and are not discussed at length here. Rather, this article looks at how an individual or entity upon whom sanctions have been imposed can legally challenge the decision.

The EU sanctions regime

Within the EU, sanctions (often referred to as “restrictive measures”) are imposed either by the EU on its own initiative or by implementing binding Resolutions of the United Nations Security Council. Sanctions imposed separately by the EU may target governments of third-party countries or non-state entities (such as corporate institutions) or individuals. They may comprise arms embargoes, asset freezes, trade restrictions and travel bans.

The application and enforcement of EU sanctions is the responsibility of individual Member States in coordination with the European Commission (Commission). Such measures are not intended to interfere with national legal systems where individual entities or individuals have violated the law of that country. Rather, they are designed to target government policies that have prompted the decision to impose sanctions as well as those individuals most responsible for the offending behaviour.

In the context of the Crimean conflict, for example, both the US and the EU adopted a staged approach to coordinate their efforts when imposing sanctions against Russian and Ukrainian officials. Both published similar (albeit separate) official lists naming the “designated persons” affected.

It is important that sanctions are adequately designed to address the specific situation of the targeted country, entity or individual. Recent cases brought before the European Court of Justice (ECJ) have, however, demonstrated that balancing the need for the imposition of sanctions with the rights of the “designated person” – most significantly, the standard of evidence required by the imposing authority and the right of a designated person to make representations – is not straightforward.

Legal challenges to a designation

decision

In July 2013, the European Court of Justice (ECJ) lifted an asset freeze and travel ban on Saudi businessman Yassin Kadi. [2] Mr Kadi had been included in a United Nations (UN) sanctions list shortly after the September 11 attacks for allegedly financing al-Qaeda, a claim he rejected. The ECJ concluded that the EU authorities had failed to provide “sufficient evidence” to prove its allegations and had violated Mr Kadi’s right to a fair hearing and independent judicial review.

This followed an earlier decision that same year where the ECJ had struck down sanctions following a successful challenge by Iran’s Bank Mellat. [3] The Council

introduced the restrictive measures against the Iranian commercial bank with the intention of applying pressure on the Islamic Republic of Iran to end proliferation of sensitive nuclear activities and the development of nuclear weapon delivery systems. The bank was said to have provided banking services to UN and EU listed entities or those connected to such listed entities. The ECJ held that the EU had failed to provide sufficient evidence that

the entities were tied to Iran's nuclear programme or were state-owned – a decision that, only months later, would guide the ECJ decision in *Kadi*.

The decisions in *Bank Mellat* and *Kadi* give an indication of some of the possible legal challenges available to those affected by sanctions within the EU. While each case is considered on its own facts, the following are illustrative of potential challenges a designated person might consider:

- (i) the right to know the evidence against them and an opportunity to make representations;
- (ii) sufficient context and specificity of reasons;
- (iii) where direct evidence is lacking, the connection between the “designated person” and the alleged criminal or unacceptable behaviour; and
- (iv) overall fairness and proportionality.

Violation of right to make representations

Before imposing sanctions, the relevant authority must examine, carefully and impartially, whether the allegations are well-founded. In doing so it must also consider any observations or representations made by the designated person against the imposition of sanctions. Failure to do this could result in a successful challenge to have the sanctions lifted.

Lack of specificity of reasons (and evidence in support of those reasons) Prior to the decisions in *Bank Mellat* and *Kadi*, the ECJ tended to apportion more weight to common failings such as a general lack of supporting evidence. However, these cases have highlighted the importance of the court's duty to more thoroughly investigate whether a designated person's rights have been infringed on a case-by-case basis.

In *Kadi*, as mentioned above, the ECJ found that the reasons relied on by the imposing authority against Mr Kadi were not sufficiently specific to justify the adoption of restrictive measures against him. In assessing whether an authority's reasons are sufficiently detailed and specific, the ECJ stated in *Kadi* that a court should consider the “accuracy”, “relevance” and “probative value” of all the information relating to the situation, the identities and roles of those involved in

the situation (people and business entities) and the nexus with the targeted person in the context of the specific allegations against him.

In the March 2012 decision in *Tay Za v Council* C376-10, the ECJ held that the fact that the designated person was the son of a successful businessman in Burma was an insufficient basis for presuming that he must be connected with the political regime, and was therefore insufficient to establish his nexus with the regime's illegal activities. The ECJ held in its judgment that sanctions should be aimed primarily at the leaders of targeted countries and those who have an "obvious" connection with them. It follows that this would preclude listing individuals merely on the basis that they are presumed to have benefitted privately from their connection with targeted members of the offending regime.

The three cases discussed above, all of which were decided between March 2012 and July 2013, appeared to influence more recent decisions. For instance, several judgments handed down by the ECJ annulled the designation of several Iranian banks that had been placed on the EU's sanctions list due to a lack of sufficient evidence against them as well as the failure to afford them a proper opportunity to review and make representations on the evidence against them.

One of the problems for those seeking to challenge a decision is that the ECJ does not follow the doctrine of judicial precedent, as do most common law jurisdictions. This means previous decisions do not always provide a reliable guide as to what future decisions might hold.

This problem was highlighted when the ECJ, in a recent judgment, appeared to depart from the position in *Tay Za*, *Bank Mellat* and *Kadi* regarding the requirement for a sufficiently solid factual basis to impose sanctions. In *Anbouba v European Council* (April 2015) [4], the ECJ relied on the "presumption" that leading Syrian businessmen, seemingly only by virtue of the fact that they occupy a position of prominence in society, supported the Syrian regime. The ECJ applied the reasoning set out in Advocate General Bot's Opinion in January 2015, which provided that, since Mr Anbouba, as president of a major agricultural food business, had not disputed the fact that he held a leading position in Syrian economic life, this was sufficient to make the presumption that he provided economic support to the Syrian regime.

Nexus between offending behaviour and designated person Historically, a designated person would usually have been "associated" with members of a political regime. Over recent years the ECJ has widened its definition of "associated". In its April 2015 decision in *Tomana and Others v Council and Commission* T-190/12, for example, the ECJ seemed to broaden its definition of "associates" to include those

whose jobs are unconnected with government, thereby opening the door for them to be targeted directly for acts for which only a government (or member thereof) would previously have been held accountable.

Fairness and proportionality

This avenue of challenge has had limited success as courts are afforded a wide discretion in determining what is fair and proportional in the given circumstances.

Conclusion

The issues discussed highlight a few of the avenues through which those facing sanctions might challenge the decision in court within the EU.

It should be noted that only a selection of challenges are covered and recent case law is far from consistent. For instance, the apparent shift in evidential burden to the applicant, who faces the ominous task of proving that he does not support a regime upon which sanctions have been imposed, will no doubt be one of several areas that will (and should) form the basis of future discussion on this topic. With several cases relating to sanctions against Ukrainian and Russian individuals and entities awaiting hearings before the ECJ, the debate continues.

Notes

1. Boomer, M., “The Effectiveness and Ethics of Economic Sanctions”, Seven Pillars Institute for Global Finance and Ethics, dated 16 July, 2014.
<http://sevenpillarsinstitute.org/essays/effectiveness-and-ethics-of-economic-sanctions>

2. *Commission and Others v Kadi* C-584/103. *Bank Mellat v Council* C-496/104. C-605/13 P [2015] All ER (D) 178 (Apr) and C-630/13 P

[2015] All ER (D) 178 (Apr), [2015] All ER (D) 177 (Apr)

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