

KEY POINTS

- ▶ Targeted sanctions are only lawful if they comply with the “fundamental principles” of European law, and are subject to judicial review by the European Court.
- ▶ Some Iranian banks have been successful in challenging their designations in the European Courts, on the basis that the Council’s reasons for listing them are too vague and unsupported by evidence.
- ▶ The European Council has recently imposed more far-reaching and less “targeted” sanctions on Iran’s financial sector.
- ▶ A number of important issues are likely to arise in the numerous applications and appeals now pending before the European Courts.

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Targeted sanctions and sanctions targeted: Iranian banks in the European Court

The European Union (EU) has imposed restrictive measures on the Iranian banking sector, as part of its sanctions regime directed at Iran’s nuclear programme. A number of Iranian banks have brought challenges in the General Court of the EU to their designation in European targeted sanctions measures. The European Council has lodged appeals against those judgments and imposed more far-reaching and less “targeted” sanctions on Iran’s financial sector. This article summarises the scope of EU sanctions against Iran’s banking sector, analyses the European Court’s approach to sanctions challenges, and identifies the issues that are likely to arise in the future.

EUROPEAN UNION SANCTIONS AGAINST THE IRANIAN BANKING SECTOR

The United Nations Security Council has imposed sanctions on Iran since 2008. It has called on UN member states to “exercise vigilance” over the activities of Iranian banks operating in their territories, and has required its member states to impose asset freezes on Bank Sepha and East Export Bank.

The European Union’s sanctions against Iran go further than the UN. The EU’s sanctions programmes consist of a number of legal instruments (Decisions and Implementing Regulations that are directly applicable in member states) that impose asset freezes and travel bans throughout the EU, and more general restrictions on certain types of trade and transactions. The objective of the EU’s sanctions against Iran is to apply pressure on the Iranian Government to end its nuclear proliferation and ballistic missiles programme.

In June 2008, the European Council (the institution responsible for EU sanctions) froze all funds and economic resources owned, held or controlled by a list of designated Iranian entities within the territory of the EU, and prevented

funds or economic resources from being made available to them. The European Council has since then added to the list of designated entities, banks and individuals. Iranian banks (along with other entities and individuals) may be added to the sanctions list if they have been “identified” by the Council as being “engaged in, directly associated with or providing support for” Iran’s nuclear proliferation activities or if they are “owned or controlled by” an entity in that category.

There are now approximately 15 Iranian banks subject to asset freezing measures as a result of EU listings, plus their subsidiaries. These are principally commercial banks, and banks in which the Council considers the Iranian State has a shareholding (eg Bank Saderat and Bank Mellat). In January 2012 the Council designated the Central Bank of Iran. The Council may now add entities simply if they provide “support” to the Government of Iran.

In addition to these “targeted” sanctions measures, EU sanctions also impose financial restrictions that are of general application rather than targeted against identified banks. In October 2010, Regulation 961/2010 imposed a requirement that all transfers of funds

above €10,000 to and from an Iranian person or entity must be subject to notification and authorisation procedures. The Regulation also placed EU banks under reporting obligations in respect of Iran-related transactions, and prevented them from establishing a correspondent banking relationship with an Iranian bank.

These measures have become more far-reaching. In December 2012, Regulation 1263/2012 imposed a general prohibition on the transfer of funds between EU banks and Iranian credit and financial institutions (including subsidiaries and banks controlled by persons or entities domiciled in Iran). In principle, there are exceptions to this prohibition (for example, for personal remittances and transfers regarding healthcare or foodstuffs) that are subject to notification and authorisation obligations depending on the size of the transfer. For example, a healthcare-related transfer above €10,000 requires notification to the competent authority of the member state and a transfer above €100,000 requires prior authorisation.

These general prohibitions bring EU sanctions closer to the US sanctions regime, which imposes a prohibition on transactions by US banks (and other US persons), and non-US banks owned or controlled by US entities, with Iranian financial institutions. Certain banks (including Bank Saderat and Bank Melli Iran) have been designated as “Specially Designated Nationals”, and any non US company that provides significant financial or other support for the benefit of those entities may itself be made subject to US sanctions, which purport to have extra-territorial effect outside the US.

CHALLENGING SANCTIONS DESIGNATIONS IN THE EUROPEAN COURTS

Individuals and entities listed in EU restrictive measures are entitled to challenge their designation in the European Courts; the General Court of the European Union (which used to be called the Court of First Instance), with an appeal to the European Court of Justice. These “applications for annulment” are European judicial review proceedings; the Court will review the inclusion of an individual or company in a sanctions measure, and annul it (in so far as the measure applies to that individual or company) if its inclusion breaches European law.

The European Courts developed the relevant principles in a series of cases concerning the procedural fairness of designations in counter-terrorist sanctions measures; in *Kadi* (a challenge to EU measures implementing a UN Security Council Resolution that included Mr Kadi on the grounds of alleged connections to Al Qaida) and in three cases concerning the designation of the *People’s Mojehadin of Iran*, also in the EU’s counter-terrorist sanctions measures.

The Court’s starting point in these cases is that targeted sanctions are decisions made by European institutions that impose restrictive measures on individuals and companies. They are therefore only lawful if they comply with the “fundamental principles” of European law, and are subject to judicial review by the European Court. This means the following:

- **First**, the Council must give adequate “reasons” for designating an individual or company at the time of designation; ie reasons that are not “excessively vague” but which permit the person or entity to understand why he, she or it has been included.
- **Second**, the Council must not rely on unsupported allegations against an individual or company, but must provide evidence (including any incriminating evidence) in support of a designation. This may not be a requirement for the first occasion on which a person or

company is listed, because of the importance of maintaining the “surprise effect” and avoiding asset dissipation, but applies to subsequent decisions to re-list, where there is no need for a surprise because assets are already frozen.

- **Third**, the Council must respect a target’s “rights of defence”, which means his/her/its right to know the case against them and to have an opportunity to comment on it.
- **Fourth**, the Council must not commit a “manifest error of assessment” in deciding whether the evidence is sufficient to justify listing an individual or company and whether he/she/it falls within the listing criteria relevant to the sanctions regime in question (whether they can be said to be “providing support for nuclear proliferation”, for example). In more recent cases, the Court has said that the Council must check the relevance and validity of the evidence.
- **Fifth**, restrictive measures must not be an unjustified or disproportionate restriction on the fundamental rights of an individual or entity, including the right to respect for property and reputation.
- **Sixth**, applicants have the right to “effective judicial protection”. Judicial review of designations in sanctions measures extends to the matters of fact and law relied on by the Council, and to the evidence and information on which a listing decision is based.

The Court found in favour of the *People’s Mojehadin of Iran* and *Kadi*, since both were initially designated in counter-terrorist sanctions measures without being given any reasons, evidence, or opportunity for comment. Both were subsequently re-listed, and both challenged their re-listings in applications for annulment (*PMOI* eventually won its case, and *Kadi II* is still pending before the ECJ, although both have now been de-listed by the EU in any event and, in Mr Kadi’s case by the UN).

Since those early cases (ie since 2008), the Council always gives some kind of

reason for each designation in the annex. Some applicants have won and some have lost their cases in Luxembourg, depending principally on the quality of the Council’s reasons and evidence.

APPLICATION OF PRINCIPLES IN IRANIAN BANKING CASES

In part because of the significant expansion of the EU’s sanctions programmes, in particular against Iran, there have been a large number of challenges by Iranian banks, entities, and individuals, and a number are currently pending before the Court.

Many cases brought on behalf of Iranian companies have so far been successful. Applying the principles summarised above, the General Court has annulled the designations *HTTS Hanseatic Trade Trust & Shipping, Fulmen, Manufacturing Support & Procurement Kala Naft Co, CF Sharp Shipping Agencies Pte Ltd, Oil Turbo Compressor, Qualitest FZE and Turbo Compressor Manufacturer*. In those cases, the Court found the reasons given to be too vague to justify the Council’s conclusion that the entities were supporting Iran’s proliferation programme (eg an assertion that the entity is “involved in procurement” of prohibited goods, is a “front company”, or “acts on support of” a company, with no explanation of how or in what respects), that the allegations were factually incorrect (and the Council had not checked the correct position), or because the applicant had refuted the Council’s reasons and the Council had not provided any evidence to support its position.

A number of banks have brought similar challenges. Some have won, some have lost.

Examples of banks whose de-designation cases have *not* succeeded are as follows.

The Court upheld the designation of *Bank Melli Iran* (finding that the grounds on which it was alleged to have facilitated purchases of goods for Iran’s nuclear programme were sufficiently specific) and its UK subsidiary *Melli Bank Plc*. The Court upheld the Council’s approach of presuming that wholly owned subsidiaries

Feature

Biog box

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of designated Iranian companies may be subject to pressure to circumvent sanctions on their parent, although in the case of less than wholly owned subsidiaries, the Council must perform a case by case analysis of whether that is so.

A number of Iranian banks have recently won their cases in the Fourth Chamber of the General Court (the Chamber to which most Iran sanctions cases have so far been assigned). The following are three examples.

In *Sina Bank's* case, the Court held that the assertion that the bank was "closely linked to the interests" of the Iranian leadership was too vague and imprecise, and that the Council had failed to specify the means by which the bank was alleged to provide support for nuclear proliferation.

In *Bank Mellat*, the Court held that some of the Council's reasons were again too vague (eg that the bank had "engaged in a pattern of conduct which supported and facilitated Iran's nuclear programme"). Interestingly, the Court also held that the Council had failed to assess the accuracy of evidence justifying its assertion that the bank is owned by the Iranian State; the Court held that the Council had acted on a mistaken factual premise. The Bank had disputed the accuracy of a number of the Council's reasons, and the Council had not responded.

The Court took a similar approach in *Bank Saderat Iran*. The Council alleged that the bank had processed letters of credit on behalf of two entities that were the subject of restrictive measures. The Court held that one of the reasons given was too vague (although others were not), the Council had produced no evidence from which to conclude that the relevant transactions were linked to nuclear proliferation, and had not checked the relevance and validity of the evidence it relied on in response to evidence from the Bank challenging the accuracy of the Council's reasons.

The Council has appealed to the ECJ against these judgments. The banks remain listed while these appeals are pending.

ANALYSIS

A number of important issues are likely to arise in the numerous applications and appeals now pending before the European Courts.

- **First**, the European Court will have to consider what approach to apply to challenges to the less "targeted" form of sanctions increasingly imposed by the Council in respect of Iranian banks. *Bank Mellat* has brought an application to annul the comprehensive prohibition on the transfer of funds between EU banks and Iranian banks introduced in December 2012. The *Central Bank of Iran* has challenged the Council's ability to list banks on the grounds that they provide support to the Government of Iran, and the proportionality of listing a country's Central Bank.
- **Second**, the Court will have to consider the extent of the Council's duty to provide evidence and to verify its relevance and accuracy. The Council has said that some evidence it receives from member states and from non-EU countries, in particular concerning Iranian financial institutions, is confidential or national security sensitive and cannot be disclosed. The Court will have to consider how to approach the issue of classified evidence. If the Court were to diverge from its current approach that a designation may not be justified on the basis of evidence that the Council will not disclose, there may be significant implications for rights of defence.
- **Third**, the meaning of "effective judicial review" and the standard of review. The Court of Justice will have to decide whether the General Court's approach to judicial review is correct, and whether to apply the same principles and standard of review to sanctions regimes with different purposes (non-proliferation sanctions, counter-terrorist sanctions, regime sanctions) and to sanctions that derive from the United Nations or are imposed "autonomously" by the EU.

Advocate General Bot has recently expressed the view in his opinion in *Kadi II* that, at least as regards EU sanctions that implement designations in United Nations Security Council resolutions, the Court of Justice should apply a less intrusive review of the "merits" of a designation decision (as opposed to its procedural fairness).

- **Fourth**, remedies and procedural issues are the subject of ongoing debate. Applications for damages against the EU institutions for wrongful listings are pending. Where applicants are de-listed by the Council before the Court gives judgment on their annulment applications, the Court's approach of finding that they have no continuing interest in having their designations annulled may change (following an opinion by Advocate General Bot in *Abdulrahim*).

These cases raise difficult issues, concerning as they do both the rights of defence of the sanction's targets, the important foreign policy goals of the EU, and questions about the true impact and effect of sanctions against Iran, its Government and its people.

The Iranian banking cases analysed above have attracted some controversy; the Court has been criticised by some (including by some in the US Government) for annulling politically sensitive designations of Iranian banks and for second guessing the Council's judgment as regards discretionary matters of foreign policy.

It remains crucial that the Court should uphold the rule of law and due process in the face of a designation process that is not transparent, and which has far reaching effects on the businesses, reputations and lives of designated entities. The Court has refused to uphold designations where the bank in question has not been shown the case against it or given an opportunity to respond. In its sanctions jurisprudence, the Luxembourg Court protects fundamental rights just as robustly as the European Court of Human Rights in Strasbourg. ■