Brussels lists, Luxembourg de-lists? Sanctions de-designation cases in the European Court

The European Court has recently been accused of assisting nuclear proliferators by de-listing Iranian banks and companies, and has been criticised by some in the U.S. government for detracting from the global enforcement of sanctions regimes. Maya Lester explains the recent glut of sanctions cases at the Court, and why in her view these criticisms are unjustified.

The European Union has a large number of sanctions regimes with various foreign policy aims: attempting to prevent the financing of terrorism, to stem Iran's nuclear proliferation programme, to pressurise repressive regimes to stop violating the rule of law and human rights (eg Zimbabwe, Syria), to freeze funds misappropriated from the State by a former regime (Egypt, Tunisia).

Despite their different aims, these measures all have the same legal form – decisions made by the Council of the European Union ('the Council'), and implementing regulations, which are directly applicable in Member States of the European Union. These 'targeted sanctions' all contain lists of individuals and companies in their annexes, that are the 'targets' of the asset freezes, travel bans, and other prohibitions they enact.

All of the people and companies included in the annexes have standing (*locus standi*) to challenge their designations in the General Court of the European Union (with an appeal to the European Court of Justice) in Luxembourg, as long as they do so within two months of the measure's publication. The General Court (which used to be called the 'Court of First Instance') has jurisdiction to hear these 'actions for annulment' (European judicial review), and to annul a designation if it breaches European law. The defendant is the Council (the body that decides who is on and off the lists), and sometimes the European Commission and Member States intervene in the proceedings to support the Council.

There was a trickle of sanctions de-listing cases between 2006 and 2010, a steady stream in 2011, a flood of them in 2012, and there is likely to be a deluge in 2013-2014. This increase can be explained by a number of factors: the EU's increasing use of economic sanctions as a key part of its Common Foreign and Security Policy, the Court's willingness to review listings in the formative cases, the provision of licences to unfreeze frozen funds to pay legal fees, and the feeling of some on the lists that they have been included wrongly or unfairly.

There was a trickle of sanctions de-listing cases between 2006 and 2010, a steady stream in 2011, a flood of them in 2012, and there is likely to be a deluge in 2013-2014.

The basic principles

The European Court set out the basic principles in the early cases brought by the *People's Mojahedin of Iran* (known as the MEK in the USA) and *Yassin Kadi*. The Court applies largely the same principles today; the more recent cases puzzle through what the principles mean and how they should apply to different sanctions situations.

The Court's starting point 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 in order to check that they do. This means the following:

1) The Council must give adequate 'reasons' for an individual's designation at the time of designation; reasons that are not 'excessively vague' but which permit the person or company to understand why he, she or it has been included.
2) The Council must not rely on unsupported allegations against an individual or company, but must provide evidence (including incriminating evidence) in support of a designation. There may not be a requirement to provide evidence before 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 there is for subsequent decisions to re-list, where there is no need for a surprise.
3) 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.
4) 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 'responsible for violating the rule of law' or for 'misappropriating State funds' or '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.

5) Restrictive measures must not be an unjustified or disproportionate restriction on an individual's fundamental rights, including the right to respect for property and reputation.
6) Applicants have the right to 'effective judicial protection'. Judicial review of 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.

How have these principles been applied?

Applying these principles, 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 challenged their re-listings in subsequent applications for annulment. *PMOI* eventually won its case, and *Kadi II* is still pending before the ECJ. In the meantime, both were de-listed by the EU in any event, and Mr Kadi by the UN too, following an application to the UN Ombudsperson of the Security Council's 1267 Committee).

Since those early cases (ie since 2008), the Council always gives some kind of reason for each designation in the annex (sometimes, for example in the Egyptian and Tunisian sanctions, identical reasons for everyone on the list). Some applicants have won and some have lost their cases in Luxembourg, depending principally on the quality of the Council's reasons. The following are examples of cases going each way.

The Court upheld the designation of Bank Melli Iran, finding that the grounds on which it is alleged to have facilitated purchases of goods for Iran's nuclear programme were sufficiently specific. It also upheld the listing of and its UK subsidiary Melli Bank Plc; the Court approved the Council's approach of presuming that wholly owned subsidiaries of designated Iranian companies may be subject to pressure to circumvent sanctions on their parent, whereas in the case of less than wholly owned subsidiaries, the Council must perform a case-by-case analysis of whether that is likely. The Court of Justice (overturning the General Court) upheld Nadiany Bamba's designation on the basis that the Council had sufficiently explained how she was 'obstructing the process of peace and reconciliation' in the Ivory Coast. The General Court has similarly said that the reasons given for listing other people on the EU's Ivory Coast sanctions are sufficiently specific therefore recently rejected applications by Simone Gbagbo and Marcel Gossio.

On the other hand, the Court annulled the designation of Pye Phyo Tay Za on the Burmese European sanctions list because the Council could not apply a presumption that he was 'associated with the regime' of Burma/Myanmar simply because he was the son of a designated businessman. More recently, the General Court has annulled the designations of a number of companies and financial institutions included in the EU's sanctions against Iran, for example HTTS Hanseatic Trade Trust & Shipping, Fulmen, Manufacturing Support & Procurement Kala Naft Co, CF Sharp Shipping Agencies Pte Ltd, Oil Turbo Compressor, Turbo Compressor Manufacturer, Iran Transfo, Qualitest FZE, Sina Bank, Bank Mellat, and Bank Saderat.

In those cases, the Court has found either that the reasons given were too vague to justify the Council's conclusion that the entities were supporting Iran's proliferation programme (e.g. an assertion that the entity is 'involved in procurement' of prohibited goods, is a 'front company', or 'acts in support of' a company, with no explanation of how or in what respects), or that the allegations were factually incorrect (and the Council had not checked the position), or because the applicant has refuted the Council's reasons and Council had not provided any evidence to support its position (a 'manifest error of assessment'). Appeals to the Court of Justice are pending against a number of these judgments (including *Fulmen, Bank Mellat,* and *Bank Saderat*).

The Court has been criticised for annulling some politically sensitive designations and for second-guessing the Council's judgment as regards discretionary matters of foreign policy.

Analysis

The Court has been criticised by some (including in the U.S. government) for annulling some politically sensitive designations (Iranian banks in particular) and for second-guessing the Council's judgment as regards discretionary matters of foreign policy.

My view (perhaps shaped in part by having acted for a number of applicants in these cases) is that this criticism is largely misplaced. The Court is performing the vital role of upholding the rule of law and due process in the face of a designation process that is not entirely transparent, and which has far-reaching effects on the businesses, reputations and lives of designated individuals and entities. In its sanctions jurisprudence, the Luxembourg court protects fundamental rights just as robustly as the European Court of Human Rights in Strasbourg.

A number of interesting and important issues are likely to arise in the numerous applications and appeals now pending before the European courts, including the following:

1) The meaning of 'effective judicial review' and the standard of review. The Court will have to decide whether to apply the same principles and standard of review to sanctions regimes with different purposes (counter-terrorist sanctions, regime sanctions, non-proliferation sanctions), and to sanctions that derive from the United Nations or are imposed 'autonomously' by the European Union. 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,

and should steer clear of the 'merits' of a designation decision (as opposed to its procedural fairness). The Fourth Chamber of the General Court (which has decided most of the Iran sanctions cases) has recently expressed the view in the Iran Transfo case that the Court should apply the same intensity of judicial review should apply whether the sanctions are aimed at changing the policy of a regime (such as Iran) or at terrorist conduct.

Remedies and procedural issues are the subject of ongoing debate. Applications for damages against the EU institutions for wrongful listings are pending.

2) 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 is confidential or national security-sensitive and cannot be disclosed. 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. There will be issues about how the Council assesses evidence (to what standard, and from what sources) in the case of politically sensitive sanctions against those alleged to have misappropriated State funds in Arab Spring countries (eg Tunisia and Egypt) and against individuals alleged to be responsible for violating the rule of law in non-EU countries (such as Zimbabwe).
3) There are pending challenges to the scope of the Council's competence as regards its Common Foreign and Security Policy. To what extent the Council is permitted to designate individuals who are not alleged to be connected with the State (as it has done in the case of Zimbabwe) not alleged to be involved in nuclear proliferation but simply connected with the government of Iran, or members of former regimes no longer in power.
4) Remedies and procedural issues are the subject of ongoing debate. Applications for damages against the EU institutions for wrongful listings are pending; none have succeeded so far. 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)*. There are also a number of pending judicial review claims in the High Court in London, which raise the issue of the extent to which national courts may give remedies for the role of Member States in the EU sanctions process.
5) A final point concerns the less 'targeted' form of sanctions increasingly imposed by the Council, in particular as regards Iran and Syria; general prohibitions on certain types of trade or transaction. It remains to be seen to what extent those may be the subject of challenge, or whether the (ironic) result of the case law summarised in this article is that sanctions will become more, rather than less, targeted, and if so whether the Court will intervene.

Maya Lester is a barrister at Brick Court Chambers. She has appeared in the European courts and in the United Kingdom in a number of the cases referred to in this article. You can follow her blog on European sanctions law at www.europeansanctions.com *(which she writes with Michael O'Kane of Peters & Peters) for updates on cases, comments and amendments to sanctions regimes.*