CHALLENGING THE APPLICATION OF EU SANCTIONS/RESTRICTIVE MEASURES

Introduction

When faced with fresh upheaval in the world, the first "weapon" the EU reaches for today are the so-called "targeted" sanctions. Though there is a significant overlap between traditional sanctions falling short of a full trade embargo, e.g. those which prohibit dealings in a commodity such as petroleum with specified states, the innovation presented by modern economic sanctions is the listing of particular individuals. Such listed persons are prohibited from travelling to the EU, funds owned or controlled by them in bank accounts with EU banks are frozen and those persons within the scope of the EU regulations are prohibited from "making available directly or indirectly to or for the benefit of" listed persons "funds or economic resources".

In the context of the civil rights of the listed persons, such listings can be the legal equivalent of a drone strike. There is no warning to the relevant individual, traditionally he or she receives no notice of the listing and there is a marked reluctance on the part of the EU Institutions and Member States to divulge the information (if any) which led to the listing. From one day to the next they are stripped of essential rights of access to property, to their assets and to freedom of movement. Whereas few would dispute the right of the EU to impose such restrictions on Al Qaeda, on the Gaddafis of this world or on police chiefs observed to be engaged in violent repression of demonstrations, the impact of economic sanctions on other listed individuals and on third parties has provoked little informed public debate. It is almost as if the EU had carved out a form of Guantanamo Bay within its legal system in which third country nationals and businesses can be classified by an EU Member State behind closed doors as "undesirable" and therefore undeserving of civil rights.

The reality is of course that most listings involve some form of collateral damage. The damage will range from damage to the listed party to damage to the business interests of those, including EU parties, whose business consists of dealing with the listed party. The exclusive EU distributor of the listed Syrian airline whose business closes down forthwith and the children of the African Minister fighting for human rights in his own country who have to leave school in the UK because of their father's listing depend entirely on the robust governance to be put in place by the EU to guard against mistakes and mis-judgments in listings. The same applies to a funder of the Syrian rebels, placed on the sanctions list because of his historic links to the Assad regime. The listing placed him under effective house arrest for fear of his life because the persons listed became immediate targets for rebel forces. The problem is that there is little or no evidence of robust governance having been put in place. The diplomatic missions of Member States do their best to identify those to be listed but there is also evidence of EU reliance on roving "consultants" who waft in and out of hotels in the troublespots of the world to bring back to Brussels collective tittle tattle on which listing decisions can then be made.

Drawing on the experience of advising and representing both third parties and listed persons, this article seeks to draw out some of the legal principles applicable both to third parties affected by sanctions and to listed persons themselves.

Third Parties

Various issues arise for third parties including standing to challenge sanctions, the jurisdictional reach of sanctions outside the EU, the interpretation of sanctions and the practical impact of sanctions for those persons neither listed nor doing business with listed persons.

Standing to challenge sanctions

The first question from a company whose business has effectively been abolished by the imposition of sanctions is to ask the procedure for overturning such sanctions. This is not straightforward. The standard test of standing in Article 263 TFEU requires an applicant for judicial review of EU measures to establish "direct and individual concern", i.e. that the applicant is uniquely affected by the measure in question. Addressees of decisions (e.g. listed persons) satisfy that test whereas those dealing with listed persons do not. The Lisbon Treaty sought to relax slightly this test of standing by providing that a person challenging a regulatory act which does not entail implementing measures need only establish direct concern. Regulations providing for restrictive measures do not entail implementing measures but they are nevertheless plainly legislative acts and it has been held that the term "regulatory act" applies to acts of general application other than legislative acts.

In the absence of standing before the EU Courts, there may be cases where national legislation implements not only the Council Decision which precedes the EU regulation but also parts of the EU regulation itself. In that case, there may be something of which to seek judicial review in the national courts so as to raise the partial invalidity of the EU regulation. This would normally be the case for example for the UK statutory instrument which imposes criminal sanctions albeit that examples of the application of criminal sanctions are very rare. If jurisdiction can be established before a national court, that court is obliged to refer issues relating to the validity of EU regulations to the European Court of Justice.

Jurisdictional scope of EU sanctions

In accordance with well-established principles of public international law, the EU plainly has jurisdiction to legislate for EU nationals (natural and legal persons) and also for those within the territorial jurisdiction of the EU. However it is not permissible as a matter of public international law to legislate for the acts of third country nationals in third countries.

A degree of clarity is provided in this regard by the scope clause at the end of every restrictive measures regulation. Thus such sanctions are said to apply to the nationals of Member States and to legal persons incorporated or constituted under the laws of Member States, wherever they are situated. They also apply to the territory of the EU including its airspace and on board aircraft or vessels under the jurisdiction of Member States.

A comment is necessary on the concept of the "*territory of the EU*". The territorial scope of application of the EU Treaties is dealt with in Article 355 TFEU and includes provision that the Treaties apply to the "*European territories for whose external relations a Member State is responsible*". In fact, whilst EU law does have some limited application to territories such as the Channel Islands and Gibraltar in accordance with the Treaty of Accession of the UK, the current UK practice in respect of its dependencies such as the Cayman Islands and the Virgin Islands is to adopt an Order in Council which seeks to extend the restrictive measures in EU instruments to such

territories. The Channel Islands carry out a similar process through their own legislatures. The effect is a de facto extension of the impact of EU sanctions to such territories, not as a matter of EU law but as a matter of either English or local law.

There is one additional claim to jurisdiction in such clauses in respect of legal persons "in respect of any business done in whole or in part within the [EU]". Though closer to the limit of what is lawful under international law, this would appear to be a blend of territorial and effects-based jurisdiction. Though acts may be carried out in third countries, if they are part of a transaction which is partially carried out within the EU, there is some basis for such a claim though the scope of the "business" and the degree of nexus required with the EU are areas of uncertainty.

What is not permissible as a matter of international law is the version of the scope clause which appears in some of the older restrictive measures regimes which apply EU sanctions to legal persons "doing business within the EU". Such a claim to jurisdiction is truly exhorbitant. It purports to apply to third country nationals doing business either purely internally or also with nationals of other third countries. In essence, it would apply EU sanctions to the entire world provided that one party also does business within the EU. Applying the principle of EU law that the EU must respect international law in the exercise of its powers, the scope of such a clause must arguably be limited to the doing of business within the EU which occurs as part of the transaction with the listed person. That is however little comfort for the third country national listed on the EU sanctions list whose third country clients desert him on the basis that they are either are doing or hope to do business with the EU.

Such an extravagant claim to jurisdiction by the EU is all the more surprising given the existence of Regulation 2276/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country. In short the US enacted in 1996 *inter alia* the Iran and Libya Sanctions Act of 1996 which, in the view of the EU, purported to regulate the activities of natural and legal persons under the jurisdiction of Member States. As a result judgments of courts applying such US sanctions are not enforceable and EU parties are prohibited from complying with the US sanctions on pain of criminal sanctions. EU parties are also granted the right to recover damages from parties giving effect to the US sanctions.

Using sanctions as a defence to a claim for payment

Equally extravagant in jurisdictional terms are the arguments raised by debtors that they are 'unfortunately' unable to comply with their legal obligations because they are prohibited from doing so.

The first issue is to analyse whether they are caught by the sanctions at all. In principle, third country nationals carrying on business outside the EU are not themselves caught by the EU sanctions though, in particular where the EU sanctions implement UN sanctions, they may be caught by other national implementation of the UN sanctions regime.

The second issue is to examine the applicable law. Contrary to the assumptions of many, the mere choice of English law does not bring a party within the scope of EU sanctions. The true interpretation of the prohibition is that those parties *within the scope of the relevant sanctions*

regulation will not directly or indirectly make available to listed persons funds or economic resources.

In addition, a court applying English law would apply the rule of contract that the law of England will not require an act to be done in performance of an English contract if such act would be unlawful by the law of the country in which the act *has to be* done. That rule however does not purport to give extra-territorial effect to English or EU sanctions. Rather, it gives rise to an issue of interpretation (where does performance have to be carried out?) and to the application of the rules of public policy, including sanctions rules, of the place of performance so identified.

Thirdly, choice of English jurisdiction is different. The courts of England and Wales form part of the United Kingdom and are therefore bound by the duty of sincere cooperation. Accordingly if a contract between two non-EU parties were litigated before the courts of any EU state, it is the court which is obliged to give effect to the sanctions. Many jurisdiction clauses provide for a non-exclusive choice of jurisdiction, in particular in loan agreements. The fact that the hands of EU courts are tied by the sanctions rules may well make litigation in a non-EU forum more attractive where non-compliance with the EU sanctions regime is a possible risk.

Interpreting EU sanctions

In so far as the provisions being interpreted are within EU regulations and not, for example, incorporated by reference into national legislation for application to overseas territories, the usual EU canons of interpretation apply, i.e. that one must look at the literal, historical, contextual and the purposive interpretation.

However, the most powerful tool of construction is generally that of context, both broad and narrow. The broader context against which the provisions of a regulation are to be interpreted is provided by the Council Decision and also, in the case of EU sanctions applying UN sanctions, the relevant UN Resolution. Prior to the Lisbon Treaty, the Council Common Position which preceded the sanctions regulation was an instrument of inter-governmental cooperation outside EU law and not subject to judicial review. Now the EU Common Foreign and Security Policy is provided for in Title V of the Treaty on European Union. In practice the Council Decision and the Council Regulation are closely coordinated with the former providing for some matters (such as travel bans) and the Council Regulation dealing with those matters within the scope of the Treaty on the Functioning of the European Union such as the asset freeze and the prohibition on the making available of funds or economic resources.

Other assistance on interpretation is provided by the Council's own guidance to itself on restrictive measures such as its Guidelines on implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy. In common with the approach of the Court in relation to the Commission's guidelines in the competition sector, in principle the Council may not depart from its guidelines on the basis that parties applying the guidelines have a legitimate expectation that the Council will adhere to the stated interpretation or scope of the provisions for the future.

The standard form of sanctions against listed persons prohibits any making available directly or indirectly any funds to a listed person and purports to freeze the funds and economic resources of

the named persons. The object is not expropriation but a blocking of access for the period of application of the restrictive measures against that person. There is a certain analogy with an interlocutory or freezing injunction. That said, a prohibition on the making available of funds effectively closes down that part of a third country national's business which is within the scope of the sanctions. Funds to be credited to listed persons may be so credited on condition that the fresh funds will also be frozen.

It is beyond the scope of a brief overview such as this to provide a full analysis of the caselaw interpreting the EU sanctions. It is sufficient to observe that the standard definitions in the EU regulations of funds, economic resources and freezing are drafted in the widest possible terms. Thus for example an application to the Land Register for registration of a transfer of ownership to listed persons was held to be barred as was the supply of a sintering furnace to Iran with possible applications in a missile programme, even though the furnace had not been commissioned. This was on the grounds that the ban was intended to be preventive and to prevent the risk of nuclear proliferation. Accordingly the possibility of a use contrary to the objectives of the regulation was sufficient. In the latter case, the Court expressed the view that an indirect making available was present where the person or entity in question has acted "on behalf of, under the control or on the instructions of" a listed person.

The practical impact of sanctions for third parties

The final point is to stress that the enforcement mechanism is essentially private. Criminal sanctions are provided for but seldom applied. By way of example, US Office of Foreign Asset Control was recently estimated to be 4-5 years behind on enforcement but there have been several large fines on US banks for failure to apply the US sanctions. In essence the freezing provisions constitute an instruction to banks that there be no dealings by listed persons with their accounts and no access to finance of any kind. However banks have evidently not found it easy to deal with the issue of sanctions. It seems difficult to follow why as the issue is in principle no different from an account being subject to a freezing injunction. However the frequent changes to the list of persons affected and the ban on the indirect provision of funds which includes the agents of listed persons raises a certain number of due diligence issues for banks. In short many banks simply refuse to deal with any customers from countries in which individuals have been listed.

This issue creates a blockade for payments affecting genuine trade, aid agencies and payments for professional assistance and converts so-called "targeted" sanctions into a financial blockade for all within the affected country, at least so far as the EU is concerned. Given that Article 63 TFEU mandates the liberalisation of capital movements not only within the EU but also between Member States and third countries, the situation in London and several other EU cities whereby it is generally not possible to receive a payment from any customer of any bank based in Syria, Libya etc is difficult to justify as a matter of law. Though the EU fundamental freedoms are primarily addressed to Member States, it is well established that they extend to rules which regulate in a collective manner activities with a cross-border impact. In that light, it is arguable that a generalised payment embargo adhered to by all UK clearing banks is a restriction on the free movement of capital. If the argument were established up to that point, justification of restrictions requires them to be limited to what is necessary to achieve the legitimate aim. Given the targeted nature of EU sanctions on particular

individuals, it would be surprising if a court were to accept that a blanket payments freeze from all accounts in the sanctioned country is proportionate.

Listed Persons and Sanctions

Though the remarks which follow relate to listed persons, there are two reasons why commercial entities have an interest in such matters. The first is that the best form of recourse for a commercial entity dealing with a listed party would generally be to support legal proceedings by the listed person to annul the listing. The second is that an increasing number of commercial entities both in the EU and elsewhere (e.g. CF Sharp Shipping Agencies, Singapore; HTTS Hanseatic Trade Trust and Shipping GmbH etc) have been listed in recent years due to their perceived close links with certain listed entities.

Today, there generally is an attempt by the Council to notify persons in third countries placed on the EU sanctions list together with basic information with regard to the avenues of recourse which are twofold. Prior to seeking to exercise any recourse, the very first step would normally be to ask the Council to disclose any evidence relied on.

The first avenue is an administrative challenge before the Council in which a listed person files a dossier casting doubt on the summary reasons relied on in the EU regulation and, if possible, building a positive case on the contribution of the person to human rights, human dignity and respect for international law. This is not a transparent process but is sometimes successful.

The second avenue is a legal challenge. It would frequently be filed in tandem with the administrative process because legal proceedings before the General Court of the EU are subject to long delays. Also the time for applying for judicial review is two months from the relevant act albeit that it can be argued that relisting or refusals to delist are a further act. If damages are to be sought, it is generally the first listing which is causative and therefore which needs to be attacked.

As regards the grounds of challenge, it took some years for the EU courts to get the measure of sanctions but with its decisions in respect of the *Modjahedin* and the Philippine resident, Mr Sison, the General Court commenced a line of cases reviewing the listings of individuals of which the decision of the Grand Chamber of the Court of Justice in *Kadi II* is currently the most authoritative. A review of this caselaw is beyond the scope of this overview but the important principles include the following:

- Listed persons are entitled to reasons for their listing at the time of listing
- The evidence relied on as the basis of listing, or at the very least a summary of the evidence, must be disclosed to the listed person
- The individual must be placed in a position in which he may effectively make observations on the grounds advanced against him as regards relisting decisions
- On judicial review, the Court must not restrict itself to whether the reasons are cogent but must verify whether at least one of the reasons for listing is substantiated by sufficient factual material relied upon and shown to the court
- Each reason for listing is therefore to be examined seriatim so that the Court takes a view on whether that particular reason is substantiated by the evidence produced

- Objections to the production of evidence on grounds of national security are to be verified by the EU courts

If successful either in the administrative procedure or the judicial review proceedings in being removed from the sanctions list, the question of any remedy arises. This is almost inevitably a remedy against the EU for the listing as opposed to against the Member State for implementing the listing. As such, the criteria in Article 340 TFEU apply, i.e. the rule in question must be one for the protection of individuals, the breach must be sufficiently serious and there must be a direct causal link with the loss suffered by the claimant. In the context of proceedings in the General Court in which all material is to be adduced in the written pleadings and may not be supplemented, these are challenging requirements, especially the causation issue which is subject to a searching analysis by the Court. The result is that so far no cases have been successful in recovering damages. However the "substantial negative impact" as regards the serious disruption of the working and family life of the listed person and the public opprobium and suspicion of that person which those measures provoke mean that damages must in principle be available.

Conclusion

Gradually the courts are establishing the limits of the powers of the EU Council and its External Action Service to impose sanctions. In a sense, the courts are indicating the shape and form of the rules of governance which should have been applicable from the very beginning to such intrusive measures. The very idea that individuals are listed on the basis of a request from the UN, the US or a Member State without more is offensive to basic notions of justice. The collapse of civil society in the states to which restrictive measures are frequently applied means that there is a heightened obligation on the EU to ensure that its services do not become simply a tool to be manipulated in the local civil strife, a weapon to be wielded in order to settle personal grudges. The starting point should be that the EU must not subject third country nationals to any measures which it would not feel comfortable applying to nationals of its Member States. But given the power vested in the EU by virtue of its position as a bloc of western democracies and therefore expected to lead by its example, it seems arguable that the EU should take even more care in the listing of foreign nationals than would be taken for the application of analogous measures against citizens of its Member States.

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