WHAT ARE THE ODDS OF VLAD PLAHOTNIUC'S SANCTIONS BEING LIFTED?

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Vlad Plahotniuc has challenged the Council's decision to impose sanctions, i. e. visa ban and asset freeze, in view of actions destabilising the Republic of Moldova. The first argument claims that there were significant mistakes made when assessing whether there was enough factual evidence to justify listing the applicant in accordance with the contested Decision and Regulation. The second argument asserts that the applicant's rights under the Treaty on European Union (specifically, Article 6, Article 2, and Article 3) and the Charter of Fundamental Rights of the EU (specifically, Articles 47 and 48) were violated. In order to analyse the prospects of the challenge, it is important to first analyse procedural aspects and relevant precedents established by the CJEU.

JURISDICTION OF THE COURT

The Court has jurisdiction to review the legality of the decisions imposing restrictive measures against a natural or legal person.[1] It is important to note, however, that when conducting the review, the Court does not concern itself with the facts of the matter.[2] In other words, the Court does not issue any judgement on whether or not the designation is fair, necessary or proportional. In this sense, a broad discretion is given to the Council to pursue the Union's foreign policy interests without the meddling of the Court. Instead, the CJEU focuses on whether or not the due process rights are observed by the Council in individual cases. These procedural rights derive from the right of defence and right of judicial protection.[3] The right of defence entails the right to be heard and the right to have access to the file with the evidence against oneself. The right of effective judicial protection involves an explicit statement of reasons and factual evidence that needs to be provided to the Court in order to enable it to rule on a particular issue.[4] The following section will further elaborate on the judicial findings of the Court and make reference to relevant case-law.

PRECEDENTS

[1] Treaty on the Functioning of the European Union, art 275, para 2.
[2] Elena Chachko, 'Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence' (2019) 44 Yale Journal of International Law.
[3] ibid.
[4] ibid.

Access to information has been recognized by scholars as one of the major factors hampering effective judicial review with regards to individual sanctions.[5] This entails that neither the CJEU, nor the defendants have access to all the relevant information pertaining to the case. This, in turn, makes it extensively difficult for the Court to rule on the merits of the case and, thus, exercise full judicial review.[6] That is, to rule on whether the reasons stated meet the designation criteria and whether there is enough supporting evidence for those reasons.

In the *Fulmen* case, concerning individual listings under the sanctions against nuclear proliferation in Iran, the Court ruled that in cases concerning listings emanating from a Member State, the Council must present the relevant information to the Court to substantiate their designation. The Council, thus, may not rely on classified information from Member State authorities in imposing restrictive measures against an individual, if that Member State is not willing to disclose the information to EU courts. In absence of access to this information, the listings can be deemed unlawful by the Court and struck down, albeit with a possibility of re-listing if the Council amends its procedure.

In another case, *Islamic Republic of Iran Shipping Lines (IRISL) v. Council,* The Court yet again struck down sanctions against the entities involved based on the error in assessment of evidence.[7] In this case, the Court ruled that the Council did not provide relevant evidence to substantiate the listing and rejected the Council's claim that it could not disclose the information to the Court given the classified nature of the files pertaining to nuclear proliferation.[8]

Reliance on confidential information affects not only the possibility of effective judicial review, addressed above, but also the defence rights of the designated entities.[9] In this sense, the Council is required to provide a statement of reasons to substantiate the designations made pursuant to the UNSC decisions. However, in *Kadi II,* the Court found that the statement of reasons requirement was fulfilled in a superficial and formal manner, thus, the defendant did not have access to the file with evidence against him, which constituted a breach of Mr. Kadi's defence rights.[10] This occurred as a result of the fact that Mr. Kadi was presented with a mere summary of reasons, thus preventing him from being able to build up a compelling defence to the allegations against him.[11]

BROADENING OF THE LISTING CRITERIA

Due to the process-oriented approach of the Court, the Council is allowed to re-list an individual or entity in the event that the procedural issues regarding a particular designation are amended.[12] Notably, in the *IRISL* judgement, which was previously

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[5] Christina Eckes, 'EU Counter-Terrorist Sanctions: The Questionable Success Story of Criminal Law in Disguise' [2013] Colin King & Clive Walker (eds.), Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets.
[6] Christina Eckes, 'EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions' (2014) 51 Common Market Law Review 869.
[7] Ibid.
[8] Case T-489/10, *Islamic Republic of Iran Shipping Lines (IRISL) v. Council*, judgment of 16 Sept., 2013.
[9] Eckes, 'EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions' (n 23).
[10] Joined Cases C-584, C-593 & C-595/10 P, *Commission and Others v. Kadi* (Kadi II appeal), judgment of 18 July 2013
[11] Ibid.
[12] ibid.

mentioned, the Court specifically ruled that the Council is allowed to amend the listing criteria, if the existent criteria are not in line with or fail to achieve its policy goals. [13]This enables the Council to broaden the listing criteria of a particular regime and have a wider discretion with regards to designating entities.

In the *IRISL* case, the Council needed to provide compelling evidence to support the fact that *IRISL* had a direct link to nuclear or missile proliferation. This was difficult to prove, as the Council could not disclose the confidential evidence to the Court. In the aftermath of the judgement, the Council expanded the listing criteria to encompass a wider range of actors, including those who, for example, offer "support, such as material, logistical or financial support, to the Government of Iran".[14] Broadening of the designation criteria significantly lowered the evidentiary threshold that the Council needed to meet. Hence, the Court upheld the designation of the *IRISL* on the new amended criteria.

A study, focusing on restrictive measures against Iran and Syria, shows that in the aftermath of the wide number of cases lost by the Council due to lack of sufficient evidence, the Council began to broaden its designation criteria.[15] It is important to note that this could have taken place both as a way to circumvent significant judicial scrutiny, and a way to exert even more political pressure on the regimes in Syria and Iraq, which was in line with the Union's interests at the time.[16] However, there is enough reasons to believe that the Council's strategy to broaden designation criteria in order to prevent judicial invalidation of sanctions has been successful. It significantly decreased the number of cases lost before the Court, because a mere listing of reasons would now be sufficient to substantiate a particular designation based on amended criteria, which, for example, only require the Council to prove a "sufficient link". [17]

BOTTOM LINE

While it is difficult to make a prediction regarding the outcome of the case, it is important to note that restrictive measures have become increasingly resilient to judicial review in recent years due to the wider reliance on open-source materials to substantiate listings and the Council's practice of formulating broader listing criteria, as explained above, as well as increased protection for procedural rights awarded to designated entities. Additionally, it is worth noting that even in the unlikely event of a successful challenge, there still exists a possibility of re-listing Vlad Plahotniuc, granted that the Council would decide to amend its criteria, as was consistent with other listings declared illegal by the Court in the past. The final outcome would, however, depend on the specific arguments presented, the strength of the evidence, and the legal interpretation by the court handling the case.

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[13] Case T-489/10, *Islamic Republic of Iran Shipping Lines (IRISL) v. Council*, para 64
[14] Eckes, 'EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions' (n 6).
[15] Chachko (n 2).
[16] ibid.
[17] ibid.

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