Judicial scrutiny and EU Sanctions against individuals

Expanded listing criteria, limited safeguards and scrutiny

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On February 21, the eve of Russia's invasion of Ukraine, the EU adopted sanctions against five individuals linked to the "so-called elections" in Crimea. Two days later, following Russia's deployment of troops to the Donbas region of Ukraine, the EU adopted a far-reaching sanctions package that, inter alia, expanded the list of sanctioned individuals to include all 351 members of the Russian Duma and 27 others.

This post considers EU law on sanctions against individuals and how it has been applied in response to the war in Ukraine. The EU has agreed on eight sanctions packages to date, covering the five main types of targeted sanctions including those on the banking system, commodities, strategic and luxury sectors, and diplomatic sanctions. A fifth category includes sanctions against high-profile individuals and entities. Sanctions in these areas have progressively escalated over the first eight months of the war.

The EU sanctions against Russia: Asset freezes and travel restrictions

EU sanctions against Russia are some of the most comprehensive sanctions that the EU has enacted against another state and those linked to its government. While there are differences in scale, and the profiles of those involved, this does not necessarily represent a new approach for the EU. EU sanctions against Iran and Syria consist of sector-wide measures and individual designations. There are currently 289 persons and 70 entities that have been designated under the Syria sanctions regime.

Asset freezes, travel restrictions, as well as other sanctions apply to 1,239 individuals and 116 entities as a result of Russia's military aggression against Ukraine. The scale of these sanctions is comparable to the regimes of other leading allies. The UK for example has listed 1,425 financial sanctions targets as well as 161 entities in its regime relating to Russia.

Asset freezes and travel restrictions are two of the main sanctions taken by the EU against individuals. Asset freezes cover all funds and economic resources owned or controlled by listed parties. It is further prohibited to make funds and economic resources available to listed individuals. Ownership entails the possession of more than 50 percent of the proprietary rights. Control of an entity is a trickier concept, but criteria listed for this include for example: 1) having the right to appoint or remove a majority of the members of the supervisory body, or 2) having the right to exercise a dominant influence over an entity. If any of the criteria are satisfied, a rebuttable presumption of control is established.

Travel restrictions usually come in the form of an outright ban on listed individuals entering or transiting through the EU. As with asset freezes, these may be subject to certain limited exemptions including where an international intergovernmental organisation is hosted within the EU. Exemptions are set out in individual travel ban instruments and can include giving evidence at a trial, which may be considered if an individual were to contest their listing.

EU sanctions have generally been taken against high-profile individuals many of whom are members of or closely connected to the government. Other countries have similar listing criteria with, for example, Australia targeting individuals or entities of "economic or strategic significance to Russia". EU sanctions currently apply to individuals and entities related to the Russian government including members of parliament, members of the National Security Council, people linked with the defence sector (generals, manufacturers etc.), propagandists, businesspeople, and

people linked with specific incidents in the war (e.g. atrocities in Bucha, the recruitment of mercenaries, and referendums in occupied Ukrainian regions). On 20 October, sanctions were extended to three Iranians and one Iranian entity linked to the provision of Unmanned Aerial Vehicles (UAVs) to Russia.

'Propagandists' that have been listed include media personalities such as Russia 1 anchor Vladimir Solovyov and others deemed to be "spreading disinformation". The propagandist label would also seem to include political philosopher/ strategist Aleksandr Dugin and pro-war musicians. Singer Yulia Chicherina was filmed taking down the Ukrainian flag in occupied Enerhodar, while fellow singer Nikolay Rastorguev performed at a propaganda rally, donated money to the war, and is a member of Public Council of the Ministry of Defense of the Russian Federation (akin to an advisory board).

The listing of prominent businesspeople has been a consistent feature of EU sanctions and was previously used against the Syrian regime. Restrictive measures have targeted Syrian businesspeople operating on a level well below that of the Russian oligarchs targeted today. The listing for some of these Syrian businesspeople made no reference to their links to the Syrian government.[1]

As such, it may be seen as no surprise that oligarchs such as Roman Abramovich have been listed. His listing reads that he has very good relations with the president and is a "major shareholder of the steel group Evraz, which is one of Russia's largest taxpayers". Abramovich's UK listing gives five reasons including: i. supporting the government through his involvement with Evraz plc.; ii and iii. His association with Putin and Alisher Usmanov.

Roman Abramovich has contested his EU listing and is seeking its annulment in an action brought on 25 May 2022. Abramovich claims that his listing infringes Article 94(1) and Articles 7(1)(b) and (c) of Regulation (EU) 2017/1001. Arguments listed include the claim that the Council Decision/ Regulation infringes: 1) the principle of proportionality and the principle of equal treatment, 2) fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, 3) the obligation to state reasons, and 4) that there is a manifest error of assessment as to the Council's reasons.

The rationale for sanctioning businesspeople may be less clear particularly where the connection to the government is considerably looser than in relation to state officials for example. On this point, Michael Bishop told the House of Lords' EU Justice Sub-Committee that the reason for targeting prominent businessmen is "not because they are necessarily doing bad things…but because the policy idea is that the Governments in those countries depend on those people's support [in order to survive]". This ability under Article 215(2) TFEU to list "any person" has been criticised as eroding the difference between the private and the public as well as individual and collective forms of responsibility (Nanapoulos, Chapter 6.I.)

The aim of listing individuals, including businesspeople with no explicit link to the government, is to apply coercive pressure on them. Elites such as businesspeople support the governments in targeted countries even if it is indirectly through the provision of taxes.

Even if fairness is not an overriding consideration in relation to these individuals, effectiveness should be. Listings should not be perceived by those targeted as being unduly unfair. To this end, listings should be communicated to individuals listed. They should be informed that their listing is subject to periodic review, which should take place every six months. Individuals should be informed that they may be delisted and the required actions to be taken in order to be delisted. This may increase the likelihood of these individuals at least questioning their actions, role, and policy preferences.

The likelihood of overturning sanctions

There are serious doubts as to whether such listings could be overturned as the Court's review of sanctions under Article 275 has been limited to procedural ques-

[1] E.g. One individual is described as a "Leading businessperson operating in Syria, with interests and/or activities in the engineering, construction and oil and gas sectors. He holds interests in and/or has significant influence in a number of companies and entities in Syria…" See COUNCIL DECISION (CFSP) 2022/849 of 30 May 2022 amending Decision 2013/255/CFSP concerning restrictive measures against Syria.

tions. EU sanctions against individuals contain 'war-like' elements. They target 'enemies' who need not have breached any legal norm, as well as secondary targets (those associated with high-ranking officials etc.) (Nanapoulos, Chapter V, 4.B.).Nonetheless, there are certain safeguards in place, including that the listing criteria are valid and the right of those listed to due process. Individuals may also contest their listing on the basis of having been mistakenly identified or there being insufficient evidence for the claims in their listing. In *Safa Nicu v Council*, the Court of Justice upheld a claim for compensation where the Council had listed a company (based on a proposal by a Member State), in the context of restrictive measures against Iran, but could not substantiate its finding as to their involvement in nuclear proliferation. There also appears to be some prospect of a successful challenge for those listed as a result of their links to high-profile individuals following the removal of Saodat Narzieva, sister of Alisher Usmanov, and Olga Ayziman, ex-wife of Mikhail Friedman, from the EU sanctions list.As sanctions relate to the EU's security interests, their legal basis is the EU Common Foreign and Security Policy (CFSP) rather than the Common Commercial Policy (Art. 207 TFEU). This basis in security policy is key to understanding the difficulty individuals have in overturning sanctions listings. The main aim of these sanctions is to strengthen international security rather than being grounded in an economic aim. The key provision is Article 29 TEU on restrictive measures. This provision affords wide discretion to the Council to take political decisions in the area of foreign and security policy. Decisions introducing sanctions on this basis require unanimity and so each Member State has a veto.

The basis for these measures is the CFSP and, as is the norm in international law when dealing with national security, there is limited judicial review of decisions and wide discretion is afforded to the Council to take political decisions here. The court has only struck down individual sanctions on due process grounds. It does not see itself as the arbiter of whether a person should be listed, viewing this as a policy decision of the Council.

Where the Council takes restrictive measures on trade and investment with Russia, a EU legislative act is required to give effect to the political decision taken. These acts are adopted by qualified majority under Article 215 TFEU, requiring 55 percent of Member States (15/27) representing 65 percent of the total EU population. In practice, this is a fait accompli once the unanimous Council Decision has been adopted. Nonetheless, this two-step procedure entails the obligatory adoption of two separate but connected legal acts for the enactment of economic sanctions regimes.

The review of the CJEU

The CJEU has reduced scope to review decisions taken on the basis of Article 29 TEU, which concerns restrictive measures. Article 275 TFEU provides that "The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions." Article 275(2) introduces two exceptions to allow the court to intervene. These include exceptions 1) to ensure compliance with the separation of competences among the EU's institutions, and 2) to review the legality of measures taken against natural or legal persons. However, the Court's review of sanctions under Article 275 has been limited. Where the courts have struck down individual sanctions, they have only done so on due process grounds. The courts have not considered substantive questions such as whether the designation of an individual is necessary in terms of the ends pursued or whether the criteria for designation have been drawn up in an appropriate manner.

Conclusion

Consequently, there are questions surrounding the level of judicial scrutiny of EU sanctions, the broad powers of the Council, and lack of formal oversight from the EU Parliament even in this sensitive area of foreign policy. This is particularly the case where the Council relisted individuals in 57 percent of cases under the Iran and Syria sanctions regimes where the Court had struck down their original listing on proce-

dural grounds (the Council kept them on sanctions lists in an additional 5 percent of cases).

Listings were overly vague in the past and this was remedied in the aftermath of the Kadi ruling. However, there is a risk today that listings may be overly broad and that the Council wins more cases as a result of using broader listing criteria. Therefore, a greater level of oversight may also be called for where the Council broadens or introduces new listing criteria for individual designations.

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