

EU Sanctions and the Rule of Law

The Ukrainian Crisis

- ◆ Legal Basis, Structures, Procedures, Case Law
- ◆ Impact on Contractual Agreements

Dr. Klaus Peter Follak

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Shaping Instruments and Targets: 32 Years' History and Development

- The Cold War
 - USSR and the Poland Crisis 1982 – Council Regulation (Art.133 EC)
autonomous
- The Falkland War
 - EEC European Political Cooperation – 1982 Council Regulation (Art.133 EC)
autonomous
- Iraq
 - Following UN Security Council Resolution UNSC 661 (1990)
- Fighting Terrorism
 - The aftermath of September 11, 2001: following UN Security Council Resolution UNSC 1373
- Iran
 - Following UN Security Council Resolutions since 2006 (UNSC 1696)
- Ukrainian Crisis

EU Sanctions – Established Instruments and Targets Based on the Common Foreign and Security Policy (Lisbon Treaties)

- Designated individuals, legal persons, bodies and entities
 - Freezing assets
 - Visa restrictions
- Ban on certain economic sectors and transactions
 - Goods (traditional embargo)
 - Investments
 - Financial Sector
 - ◆ Financial support of banned transactions
 - ◆ Capital markets
 - ◆ Payments
 - ◆ Designated financial institutions

EU Sanctions and Law of Nations / Public International Law

- Implementing UN Security Council Resolutions
 - Legally binding for UN Member States, implementation by national legislation
 - EU is not a UN subject – implementation by Member States within the EU Treaties framework
- Autonomous Sanctions
 - No general „ius commercii“ or ban on discrimination
 - ◆ Generally permitted political instrument
 - ◆ In particular cases: legitimate repression to fight breach of international law
 - Exceptionally illegal
 - ◆ UN Charter Art.2 para.4: threat or use of force (only military)
 - ◆ UN Charter Art.2 para.7: essential intervention
 - ◆ Breach of agreements under public international law (WTO)
 - ◆ Essential violation of human rights, full judicial hearing, due process of law
 - ◆ Violation of third countries' sovereignty over territorial area or citizens or national legal persons/entities

Sanctions: Legal Basis at EU Level

- Exclusive competence of the EU as opposed to Member States

- Free capital movements and payment applied to non-Member States (Art. 64 para.1 TFEU)
- Trade policy (Art. 3 para.1 Lit e) TFEU)



Sanctions on non-Member States require specific legal basis in the EU Treaties

- Fighting terrorism: ban on financing terrorism Art. 75 TFEU = lex specialis (non-state persons or entities)
- Regularly Part of Common Foreign and Security Policy under Title V TEU, in particular Art. 29 TEU: Council Decision
 - Right of veto declaring vital reasons of national policy (TEU Art. 31 para.2) by Council Members

EU Sanctions: Established Procedures re. Decisions and Implementation

- Step 1: Common Foreign and Security Policy (CFSP) Council Decision (Art. 29 TEU)
 - Legally binding for Member States (Art. 288 s.3 TFEU), lacking general force of law
- Step 2: Council Regulation based on Art.215 TFEU („Restrictive Measures“)
 - Direct force of law in all Member States (Art.288 s.2 TFEU)
 - Art. 215 para.1: interruption or reduction, in part or completely, of economic and financial relations with one or more third countries
 - Art. 215 para.2: restrictive measures against individuals or legal persons and groups or non-State entities.

Flexibility for further developments- scaling up or down

- Basic Council Decision + basic Council Regulation to be amended as the case may be using the 2-step procedure

Structure of Ukraine-Related EU Sanctions: 3 Lines

- 1 Sanctions on designated individuals/legal persons/entities
 - Basic Regulation (EU) 269/2014, latest amendment 959/2014 (12th Sept)
 - Freezing assets („blacklisting“)
- 2 Sanctions re. transaction types / economic segments / business fields
 - Basic Regulation (EU) 833/2014, latest amendment 960/2014 (12th) Sept
 - Goods (traditional embargo)
 - Support of banned transactions (services, financial support)
 - Financial transactions / financial instruments
 - ◆ Investments
 - ◆ Investment services (purchase, sale, underwriting, listing)
- 3 Sanctions re. Crimea/Sevastopol
 - Basic Regulation (EU) 692/2014, extension 825/2014
 - Goods with related origin
 - Related transactions (infrastructure, energy)

Transactions may be prohibited or subject to permission

Ukraine-Related EU Sanctions: General Issues

- Scope of application
 - ◆ EU territory
 - ◆ Aircraft/vessel subject to EU jurisdiction
 - ◆ EU nationals (wherever active)
 - ◆ Legal person/entity constituted under laws of EU Member Country (wherever active)
 - ◆ Business done in whole or in part within EU (by whomever)
- Implementation
 - ◆ Penalties under national legislation, enforced by national authorities
 - ◆ Affected claims/contracts incl. related damages & guarantees not enforceable
 - ◆ Competent authorities to be designated by Member States
- Circumvention prohibited
 - ◆ Participating in related activities, knowingly + intentionally, or acting as a substitute
- Notifications
 - ◆ By Member States: info which might affect effective implementation
 - ◆ By individuals/legal persons/entities: info on frozen assets and accounts

Ukraine-Related EU Sanctions: Sanctions on designated individuals/legal persons/entities

Designation criteria set by Council Decision + Regulation

Blacklist determined by Council Decision + Annex to Regulation

Freezing assets

Funds

Economic resources

Full range of financial assets

Assets which may be used to
obtain funds, goods or services



Belonging to/held/controlled
by a designated person or
entity

(Making) available, directly or
indirectly, to the benefit of a
designated person or entity

Ukraine-Related EU Sanctions

Re. Transaction Types / Economic Segments / Business Fields

Restrictions / targets: goods and transactions

Military goods

Dual use goods

Technology (oil,
energy)

Capital markets:
Securities/financial
instruments with
maturities over 30
days issued by
designated entities

Delivery
Technical aid
Financial aid

Delivery
Technical aid
Financial aid

Delivery
Technical aid
Financial aid

Purchase and sale
investment services

- reception/transmission of orders
- Execution of orders
- Dealing on own account
- portfolio management
- Investment advice
- Underwriting / placement
- Service re. admission to trading on regulated market / multilateral trading facility

EU Sanctions: Judicial Review at EU Level

- EU sanctions and related implementation measures are subject to judicial review – Art. 215 para.3 TFEU (as opposed to non-justiciable „acts of state“)
 - exclusive competence of the European courts re. EU law
 - Non-state parties: first instance = General Court, appeal = Court of Justice

EU Sanctions: Judicial Review at EU Level

Annulment of Listings

- Established court practice developed in terrorism- and Iran-related cases
 - Respondent: EU Council
 - Considerations:
 - ◆ Satisfactory verification of listing criteria - burden of proof upon Council
 - ◆ Right of defence and right to effective judicial protection
 - ◆ Infringement of right to property and principle of proportionality
 - ◆ Interim suspensions have not been granted to date
 - ◆ Retro-active review of the position of delisted entities: legally protected interest recognised

EU Sanctions: Judicial Review at EU Level

Claims on Damages

- Legal basis: Art. 266 and Art. 340 TFEU (non-contractual liability of the EU)
 - „...the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.“
 - „the institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.“
- Conditions of EU liability according to settled case law*:
 - Unlawful conduct by an EU institution
 - Actual damage / loss
 - Causal link between unlawful conduct and damage
 - Sufficiently serious breach of a law intended to confer rights on individuals
- The Courts have rejected all applications for damages in sanction cases to date

*key ruling: T341/07 23.11.2011, „Sison III“

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EU Sanctions: Judicial Review at National Level

- Contractual claims under national jurisdiction affected by sanctions
 - Euro law issues to be brought forward to European Courts
- Conduct by national authorities
 - Involvement in listing procedures (proposals to EU Council etc.)
 - ◆ Autonomous Council decision
 - causality questionable
 - legally protected personal interest questionable
 - Exercise of discretion
 - ◆ Interpretation of European law within competence of European Courts
 - Autonomous national legal basis (separate from EU law)
 - Essential constitutional rights

EU Sanctions: Conflicts of Law Problems

- EU individuals or legal persons seeking to freeze assets
 - Assets located in third countries - entitlement under applicable local laws?
 - Protection against liabilities to banned persons under EU law – enforcement by third country courts?
- Contractual provisions such as illegality, force majeure, frustration
 - Parties required to comply with sanctions under applicable jurisdiction?
 - Place of performance of particular obligations and applicable jurisdiction
- Contracts not enforceable under EU law before third country courts of jurisdiction
- Third country branches
 - separate entity rule?
- Conflicts with third country sanction regimes

Outlook: Contracting Parties Beware!

- Impact of potential sanctions on contractual agreements
 - Choice of jurisdiction
 - Choice of court
 - Places of performance (chain of transaction activities)
 - Definition of frustration, force majeure, default etc.
- In-depth due diligence and documentation
 - Investigation on counterparties and direct/indirect shareholders, controlling rights etc.
 - Investigation on subject matter of transaction
 - Investigation on jurisdictions affected
 - Investigation on institutions involved in payments