Risks of doing business in sanctioned countries

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Public Law analysis: Katherine Buckle, a barrister at QEB Hollis Whiteman Chambers, points out that aside from the wider issue of the effectiveness of sanctions, the European Court of Justice's (ECJ's) decision in Anbouba v European Council raises significant concerns for those conducting business in countries upon which sanctions have been imposed.

Original news

Anbouda v European Council: C-605/13 P [2015] All ER (D) 178 (Apr) and C-630/13 P [2015] All ER (D) 178 (Apr), [2015] All ER (D) 177 (Apr)

The Court of Justice of the European Union dismissed the appeal bought by Mr Anbouba by which he had requested that the court set aside the judgment of the General Court of the European Union in which the General Court had dismissed his action for annulment of various decisions and regulations made by the European Council concerning restrictive measures against Syria in so far as his name appeared on the lists of the persons to whom the restrictive measures decided upon under those acts applied.

Briefly, what was the background to this case?

Mr Anbouba, a Syrian national, was added by the European Council to the list of sanctioned persons on 2 September 2011 on the grounds of his position as president of an agro-industry company, and for providing 'economic support for the Syrian regime'. He applied to the General Court of the European Union in Luxembourg to annul the Council's decision.

On 13 September 2013, the General Court upheld the EU sanctions, citing three reasons:

- the court found that Mr Anbouba's right of defence was not infringed by including him on the list because, despite not receiving individual notification of his inclusion, he was able to bring an action before the European Court
- the Council had given specific enough reasons for including him
- the Council had not erred in its assessment that Mr Anbouba should be included

The General Court found that it was reasonable for the Council to assume that, as a leading businessman in Syria, he supported the Syrian regime on the basis that he could only have succeeded in business if he was receiving favours from the Assad regime and providing some support in return. Notably, the Advocate General of the ECJ, Yves Bot, criticised the court's reliance on this presumption earlier this year. Mr Anbouba appealed to the ECJ.

What were the key issues raised in this appeal?

In reaching its decision not to remove Mr Anbouba from the sanctions list, the General Court found that, given the authoritarian nature of the Syrian regime and the state's tight control over the Syrian economy, the Council could rightly presume that, as a leading businessmen in Syria who is active in numerous sectors, he could not have prospered had he not provided economic support for the Assad regime.

Mr Anbouba argued on appeal that the General Court failed to comply with the rules relating to the burden of proof as regards restrictive measures by accepting the existence of a presumption of support for the Syrian regime in his regard. He claimed that the presumption was disproportionate to the aims of the sanctions and that it was irrebuttable in nature since he could not deny being a business head in Syria and that it was, in practical terms, impossible for him to prove the negative that he does not provide support for the Syrian regime. He further argued that, as the Council could not rely on such a presumption, it had to provide the General Court with additional evidence in support of his inclusion on the lists of persons subject to such measures which it failed to do.

What did the ECJ decide and why is the ruling significant?

The ECJ refused to annul the actions leading to Mr Anbouba's inclusion on the sanctions list. The court held Mr Anbouba to be one of the most important heads of business in Syria and found that his businesses had prospered under the Syrian regime. While it recognised that there was no express presumption in the Council's decisions or regulations relating to Mr Anbouba's inclusions on the sanctions list, it agreed with the view of the General Court that:

'[...] the heads of the leading Syrian businesses could be classified as persons associated with the Syrian regime, since the commercial activities of those businesses could not prosper without enjoying the favour of that regime and providing it with a degree of support in return'.

The court found that the inclusion of Mr Anbouba on the sanctions list was proportionate to the protective nature of the restrictive measures imposed in relation to Syria in light of the broad discretion of EU legislature regarding foreign policy.

While a different factual scenario, the court's reliance on the presumption in relation to Mr Anbouba is arguably at odds with the condition it laid down in *Tay Za v Council*: C-376/10 P in which it did not permit the presumption that those successful in business in Burma/Myanmar must be connected to the regime.

What are some of the challenges surrounding the imposition of restrictive measures, and how does this case further our understanding?

This decision highlights the practical difficulties facing those challenging their inclusion on sanctions lists, in that it appears to pass the evidential burden from the Council to provide additional evidence in support of his inclusion on the lists of persons subject to such measures to the applicant, who faces the near impossible task of proving that they do not support a regime upon which sanctions have been imposed. It is difficult to think of precisely what type of evidence could support such a challenge.

What practical lessons can those advising take away from this case?

Aside from the wider issue of the effectiveness of sanctions, this decision raises significant concerns for those conducting business in countries upon which sanctions have been imposed. Arguably, if successful in business, a person may fall foul of the presumption that, by virtue of their success, they must have entered into a mutually beneficial relationship with the government of that country. If a person wishes to continue conducting business in that country, it is essential to keep rigorous records which show the final recipients or users of funds, products and property emanating from their company in order to be able to support their claim that they do not support the sanctioned regime.

Katherine Buckle's practice areas encompass crime (including international crime), business crime, extradition, and regulatory.

Interviewed by Kate Beaumont.

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