

# The EU's highest court decides two appeals concerning EU sanctions against Iran

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The Court of Justice of the EU ("CJEU") yesterday (28 November 2013) gave judgment in two appeals by the Council of the EU against judgments of the General Court ("GC") annulling the asset freezes imposed by the Council on two Iranian companies, Manufacturing Support & Procurement Kala Naft Co. ("Kala Naft") and Fulmen, and Fulmen's majority shareholder and chairman, M. The CJEU set aside the judgment of the GC in *Kala Naft* and maintained its designation, but dismissed the appeal in *Fulmen*.

The appeal in *Fulmen* in particular has been watched closely because it was the first case in which the GC found in favour of persons designated, as part of the EU's sanctions against Iran over concerns about aspects of the latter's nuclear programme, because of the lack of evidence upon which the designations were made. Since then, the GC has annulled the designations of a number of other persons on similar grounds.

However, the judgment in *Kala Naft* may cause some concern because the CJEU interpreted the criteria for designation much more widely than the GC, which has generally taken a relatively narrow view.

## Fulmen

Fulmen and M were initially designated in July 2010 and subsequently re-designated. It was alleged that Fulmen had engaged in activities in connection with the Qom/Fordoo nuclear site. The GC annulled the designations on the basis that the Council had not adduced evidence to substantiate this allegation.

In rejecting the Council's appeal, the CJEU made clear that the EU Courts must ensure that a person or entity is designated on a sufficiently solid factual basis by verifying the allegations contained in the statement of reasons for that designation. The CJEU then explained (referring extensively to its recent decision in the long-running *Kadi* litigation) how the Courts should do so:

- The burden is on the EU authorities to demonstrate that the allegations are well founded; the designated person is not required to prove a negative.
- To uphold a designation, the Courts must find that at least one of the reasons, which is sufficient in itself to support the designation, is well founded.
- In doing so, the Courts will, where necessary, request the EU authorities to produce relevant information or evidence, **whether it is confidential or not**.
- If the EU authorities claim that overriding considerations relating to EU or Member State security or to the conduct of their international relations precludes the disclosure of some

evidence or information, the Courts must determine whether the reasons relied on by the authority as grounds to preclude disclosure are well founded.

- If the reasons do not preclude disclosure of the information or evidence, in whole or in part, the Courts shall request (**but not require**) disclosure of that material to the designated person. If the authorities decide not to disclose it, the Courts must base their decision solely on the material available to them, including the observations and exculpatory evidence from the designated person. If that material is insufficient to substantiate a reason, that reason must be disregarded by the Courts.
- If the reasons do preclude disclosure of the information or evidence, the Courts must strike a balance between the designated person's rights and those flowing from the security of the EU or its Member States or the conduct of their international relations. The CJEU did not provide an exhaustive list of possible ways in which the balance may be struck, no doubt because this will depend on the facts of the case. However, the CJEU did say that it may entail providing a summary of the information or evidence to the designated person. In any event, the Courts must decide what value to attach to the confidential information or evidence in light of the designated person's inability to respond to it.
- In this case, no evidence or summary of evidence was provided by the Council and so the Courts could not determine whether the designations were well founded.

The CJEU has now made it clear that, where a designated person disputes the allegations made against it, the Council must produce substantiating evidence or at least a summary of that evidence; otherwise the designation will be annulled.

## Kala Naft

Kala Naft was also initially designated in July 2010 and subsequently re-designated. Kala Naft was alleged to have engaged in activities in support of Iran's nuclear programme and, in particular, it was alleged that Kala Naft trades equipment in the

oil and gas sector that could be used for the nuclear programme. In upholding Kala Naft's challenge to its designation, the GC held that the Council infringed Kala Naft's rights because one reason given for the designation was too vague and by failing to reply to Kala Naft's request for access to the Council's file. As the file did not contain any evidence or information other than the allegations contained in the statement of reasons for Kala Naft's designation, the GC also went on to consider those allegations. The GC found that Kala Naft was not involved in nuclear proliferation in the context of the EU sanctions and that the Council had failed to produce evidence to substantiate the allegations made.

In upholding the Council's appeal, the CJEU made several further important findings of general application to sanctions cases:

- The Council and the European Commission argued that a government organisation could not rely on fundamental rights protection and guarantees under EU law. The CJEU robustly rejected this argument. The Council has made a similar argument in a number of sanctions cases before the GC, presumably to avoid getting into the merits of the case. That argument now appears to have been finally decided.
- The EU sanctions regime has established a link between key goods and technology in the Iranian oil and gas industry and nuclear proliferation. The Iranian oil and gas industry may therefore be subjected to sanctions, particularly where a person is involved in the procurement of those key goods and technology. Furthermore, the CJEU held that the criterion under which Kala Naft was initially designated (that is, providing "support" for nuclear proliferation) implied a lesser degree of connection to Iran's nuclear activities than "engagement in" or "direct association with" those activities. In reaching this conclusion, the CJEU noted that the UN and the EU had referred to the risks that the Iranian oil and gas industry presented with regard to nuclear proliferation, both by virtue of the revenue it generated for Iran and the use of equipment and materials which have much in common with those used for certain sensitive nuclear fuel activities.
- The Council did not have to find that an entity had engaged in any conduct prior to a decision to freeze funds; a mere risk (such as "the reference to a general objective disclosed by the statutes of that entity") may be sufficient. In this case, Kala Naft had stated in its application to the GC that it is the central purchasing body for the Iranian national oil company. The Council was therefore entitled to find that Kala Naft was involved in the procurement of prohibited goods and

technology and, in particular, of equipment for the oil and gas sectors that can be used for Iran's nuclear programme, and that ground alone was sufficient for designation. The Council was not required to prove Kala Naft's activities by means of other evidence. Neither did it matter that the substantiating evidence in this case was provided by the designated person, because the statement of reasons was sufficient for Kala Naft to respond.

- Interestingly, in considering proportionality, the CJEU said that it is important to bear in mind the numerous reports by the IAEA, the large number of resolutions of the UN, and the various measures taken by the EU. In this case, the sanctions were proportionate because of the progressive nature of the UN and EU sanctions, which was justified by the lack of success. This suggests that proportionality arguments, which are already difficult to win on in the EU Courts, may get even more difficult as a sanctions regime ratchets up.

Stephenson Harwood LLP acts for a number of designated entities and individuals challenging their designations under EU sanctions, including Persia International Bank Plc, the UK subsidiary of two Iranian private commercial banks. On 6 September 2013, the GC annulled the bank's initial designation in July 2010 and subsequent re-designations in October 2010, December 2011 and March 2012.

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