ANUULING THE SANCTIONS BY COURTS, LEGAL AND ECONOMIC IMPACTS

Gist of the news

Presstv.ir reported on September 19, 2014 that:

A top European court has struck down restrictions imposed by the European Union against the Central Bank of Iran (CBI) on an alleged charge of circumventing US-led sanctions against the Islamic Republic.

In a judgment on Thursday, the Luxembourg-based EU's Court of Justice said it "annuls…the EU March 23, 2012 [ruling] concerning restrictive measures against Iran in so far as it listed Central Bank of Iran."

"The reasons relied on are so vague and lacking in detail that the only possible response was in the form of a general denial," the court ruled on Thursday, adding that "those reasons therefore do not comply with the requirements of the case-law."

It said the charge leveled against the CBI is "insufficient in the sense that it does not enable either the applicant or the Court to understand the circumstances which led the [European] Council...to adopt the contested act."

The Financial Times reported one day earlier that:

"The EU's initial freeze on the assets of Iran's central bank has been struck out in court, calling into question the bloc's use of confidential sources to support its international sanctions.

The Court of Justice in Luxembourg ruled that the case against the Iranian central bank from January 2012 was based on confidential evidence from one unidentified member state, against which Tehran could not mount a defence."

Maya Lester who acts for the Central Bank of Iran reported in the European Sanctions Blog that:

"The Bank was at that time listed on the grounds of "involvement in activities to circumvent sanctions". The General Court said that that reason simply copied out one of the criteria for listing, but was insufficient for the Bank to defend itself or for the Court to exercise judicial review, because it gave no indication of why that reason applied to the Bank, "no details of the names of persons, entities or bodies, listed on a list imposing restrictive measures, whom the applicant assisted in circumventing sanctions or of when, where and how that assistance took place. The Council does not refer to any identifiable transaction or to any particular assistance"."

In this report, the following issues are analyzed:

a. History of the sanctions imposed on the Central Bank of Iran;

b. Main aspects of the EU March 23, 2012 ruling concerning restrictive measures against Iran;

c. Arguments of the court to annul the EU March 23, 2012 ruling;

d. Legal consequences of the court decision;

e. Economic consequences of the court decision; and

f. Further steps to be taken in respect of the court decision.

History of the sanctions imposed on the Central Bank of Iran

The main text concerning the international sanctions imposed on the Central Bank of Iran is the UNSCR 1929 (2010) whose preamble includes the following paragraph:

Welcoming the guidance issued by the Financial Action Task Force (FATF) to assist States in implementing their financial obligations under resolutions 1737 (2006) and 1803 (2008), and recalling in particular the need to exercise vigilance over transactions involving Iranian banks, including the Central Bank of Iran, so as to prevent such transactions contributing to proliferation-sensitive nuclear activities, or to the development of nuclear weapon delivery systems …

Further, article 10(1)(a) of the Council Decision 2010/413/CFSP of 26 July 2010 imposed certain sanctions on the Central Bank of Iran:

1. In order to prevent the transfer to, through or from, the territories of Member States, or the transfer to or by nationals of Member States, entities organized under their laws (including branches abroad), or persons or financial institutions in the territories of Member States, of any financial or other assets or resources that could contribute to Iran's proliferation-sensitive nuclear activities, or the development of Iran's nuclear weapon delivery systems, financial institutions under the jurisdiction of Member States shall not enter into, or continue to participate in, any transactions with:

(a) banks domiciled in Iran, including the Central Bank of Iran…"

Article 20(1)(b) of the same Council Decision added that:

"1. All funds and economic resources which belong to, are owned, held or controlled, directly or indirectly by the following, shall be frozen:

(b) persons and entities not covered by Annex I that are engaged in, directly associated with, or providing support for, Iran's proliferation-sensitive nuclear activities or for the development of nuclear weapon delivery systems, including through the involvement in procurement of the prohibited items, goods, equipment, materials and technology, or persons or entities acting on their behalf or at their direction, or entities owned or controlled by them, including through illicit means, or persons and entities that have assisted designated persons or entities in evading or violating the provisions of UNSCR 1737 (2006), UNSCR 1747 (2007), UNSCR 1803 (2008) and

UNSCR 1929 (2010) or this Decision, as well as other members and entities of IRGC and IRISL and entities owned or controlled by them or acting on their behalf or providing insurance or other essential services to them, as listed in Annex II; …" (*emphasis added*).

The Council Decision 2012/35/CFSP of 23 January 2012 imposed the following sanctions on the Central Bank of Iran:

"7. Paragraphs 1 and 2 shall not apply to a transfer by or through the Central Bank of Iran of funds or economic resources received and frozen after the date of its designation or to a transfer of funds or economic resources to or through the Central Bank of Iran after the date of its designation where such transfer is related to a payment by a non-designated financial institution due in connection with a specific trade contract, provided that the relevant Member State has determined, on a case-by-case basis, that the payment is not directly or indirectly received by a person or entity referred to in paragraph 1" (Article 1(7)(c)) (*Emphasis added*).

3. The Council Implementing Regulation (EU) No 945/2012 of 15 October 2012 in its Annex included the name of the Central Bank of Iran on the list of the entities whose names had to be added to the list set out in Annex IX to Regulation (EU) No 267/2012. Article 23(2)(d) of the Regulation (EU) No 267/2012 made it clear that:

"2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex IX shall be frozen. Annex IX shall include the natural and legal persons, entities and bodies who, in accordance with Article 20(1)(b) and (c) of Council Decision 2010/413/CFSP, have been identified as…

(d) being other persons, entities or bodies that provide support, such as material, logistical or financial support, to the Government of Iran, and persons and entities associated with them."

Main aspects of the EU ruling concerning restrictive measures against Iran

Paragraph 11 of the Judgment of the General Court (First Branch) issued on September 18, 2014 in case T‑262/12 states that:

"On the adoption of Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation No 961/2010 (OJ 2012 L 88, p. 1), the listing of the applicant in Annex VIII to Regulation No 961/2010, in the version amended by Implementing Regulation No 54/2012, was revoked in order to be replaced by the applicant's listing, for the same reasons as stated in paragraph 9 above, in Annex IX to Regulation No 267/2012 (the list in that annex, together with the list in Annex II to Decision 2010/413, as amended by Decision 2012/35; 'the contested lists'), with effect from 24 March 2012" (*Emphasis added*).

Paragraph 9 of the same Judgment reads as follows:

"The listing of the applicant in the abovementioned lists was based on the following ground: Involvement in activities to circumvent sanctions."

Paragraph 15 of the Judgment clarifies the matter more:

"By Council Decision 2012/635/CFSP of 15 October 2012 amending Decision 2010/413 (OJ 2012 L 282, p. 58), the reasons for the applicant's listing in Annex II to Decision 2010/413, as amended by Decision 2012/35, were supplemented as follows: Involvement in activities to circumvent sanctions. Provides financial support to the Government of Iran."

Finally, paragraph 18 of the Judgment puts forward the final version of the reasons for the applicant's listing in Annex II to Decision 2010/413:

"By letter of 10 December 2012, the Council informed the applicant that its inclusion in the contested lists was based on a proposal for its listing submitted by a Member State, which could not be identified on grounds of confidentiality. The content of that proposal, as set out in the Council's cover note bearing reference 17576/12, enclosed with the letter of 10 December 2012, was worded as follows: 'The activities of [the applicant] help to circumvent the international sanctions against Iran. This measure [the restrictive measure imposed on the applicant] could substantially reinforce the diplomatic pressure currently being brought to bear on Iran'." (*Emphasis added*)

Arguments of the court to annul the EU March 23, 2012 ruling

The second and the third pleas of the Central Bank of Iran are of special importance in this case. As explained in paragraph 63 of the Judgment:

"The second plea claims a breach of the obligation to state reasons. The third plea claims a breach of the principle of respect for the rights of the defense and of the right to effective judicial protection."

The court agrees with these two pleas in paragraphs 76-81 of the decision by raising the following arguments:

1. According to settled case-law, the purpose of the obligation to state the reasons on which an act adversely affecting an individual is based is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the Courts of the European Union and, secondly, to enable those Courts to review the legality of that act.

2. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the person concerned to ascertain the reasons for the measures and to enable the court having jurisdiction to exercise its power of review.

3. The statement of reasons must identify the actual and specific reasons why the Council considers, in the exercise of its discretion, that that measure must be adopted in respect of the person concerned.

4. Article 46(3) of Regulation No 267/2012 also requires the Council to give individual and specific reasons for fund freezing measures adopted under Article 23(2) and (3) of that regulation and to communicate them to the persons, entities and bodies concerned.

5. The Council must, as a general rule, fulfil its obligation to state reasons, by means of an individual communication, mere publication in the Official Journal of the European Union not being sufficient.

6. The statement of reasons required by Article 296 TFEU and by Article 46(3) of Regulation No 267/2012 must be adapted to the provisions under which the fund freezing measures were adopted.

7. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

8. In particular, the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him.

Finally, clauses 89-92 of the Judgment argue in favor of the second plea of the Central Bank of Iran:

"89 The statement of reasons set out in paragraph 82 above does not expressly indicate to which of the listing criteria laid down in Article 23(2) of Regulation No 267/2012 it is related. Nonetheless, taking into account the reference to 'activities to circumvent sanctions', the statement of reasons in the contested act can readily be construed as referring to the second criterion, which rests precisely on the idea of providing 'assistance' to the circumvention of sanctions. On the other hand, in the absence of any reference to any provision by the applicant of 'support' to nuclear proliferation or to any 'involvement' on its part in the procurement of prohibited goods and technology, that statement of reasons cannot be related, as the Council contends, to the first criterion mentioned in paragraph 85 above. Further, where the Council observes, in paragraph 26 of the statement of defense, that the 'support' or 'involvement' of the applicant in nuclear proliferation or in the procurement of prohibited goods and technology is 'necessarily' a consequence of its 'position as "banker to the Iranian Government"', that is, in practice, a reference to factors which are not present in the statement of reasons in the contested act and which therefore cannot be taken into consideration as part of that statement of reasons, in accordance with settled case-law (see, to that effect, Case *T-390/08 Bank Melli Iran v Council*, paragraph 80 and the case-law cited)."

"90 In the light of the foregoing, it must be held that the statement of reasons in the contested act may only be taken into consideration as regards the second criterion, to which it implicitly but necessarily refers."

"91 To the extent that the statement of reasons in the contested act is based on the second criterion mentioned in paragraph 85 above, it is however insufficient, in the sense that it does not enable either the applicant or the Court to understand the circumstances which led the Council to consider that the second criterion was satisfied in the case of the applicant and, accordingly, to adopt the contested act. That statement of reasons appears to be no more than a reproduction of the second criterion itself. It contains nothing in the form of specific reasons why that criterion is applicable to the applicant. That statement of reasons gives no details of the names of persons, entities or bodies, listed on a list imposing restrictive measures, whom the applicant assisted in circumventing sanctions or of when, where and how that assistance took place. The Council does not refer to any identifiable transaction, or to any particular assistance. In the absence of any other details, that statement of reasons is clearly insufficient to enable the applicant to determine, having regard to the second criterion, whether the contested act is well founded and to state a defense before the Court, and to enable the Court to exercise its power of review."

"92 Consequently, the second plea in law, claiming a breach of the obligation to state reasons, must be upheld and, without there being any need to examine the other pleas or complaints raised by the applicant, the contested act must be annulled." (*Emphasis added*)

What are the legal consequences of the court decision?

The Financial Times on September 18, 2014 refers to three legal consequences of the court decision that need to be analyzed in more detail:

1. In the Iran case, however, the EU said there would be "no practical consequences" because there were further later provisions against Iran that would remain in force, ensuring the embargo on the central bank remained.

The sanctions imposed on the Central Bank of Iran are composed of different layers of complicated measures that can be assimilated to a sticky cobweb to catch all of those who dare enter into the forbidden area. For example, the following legal texts impose specific sanctions concerning the activities that are or may become related to the functions of the Central Bank of Iran:

a. Council Decision 2012/635/CFSP (OJ L 282, 16.10.2012);
b. Council Decision 2012/35/CFSP (OJ L 19, 24.1.2012) - Corrigendum (OJ L 31, 3.2.2012);
c. Council Decision 2012/829/CFSP (OJ L 356, 22.12.2012) - Corrigendum (OJ L 268. 10.10.2013); and
d. Council Regulation (EU) No 1263/2012 (OJ L 356, 22.12.2012).

To make the issue even more complicated, sometimes judgments of the General Courts have annulled, or amended some of the above Council Decisions or Regulations. For example, in the case of T-565/12 the National Iranian Tanker Company has lodged an

application "for annulment of (i) Council Decision 2012/635/CFSP of 15 October 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2012 L 282, p. 58), in that the applicant was listed in Annex II to Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39) and (ii) Council Implementing Regulation (EU) No 945/2012 of 15 October 2012 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran (OJ 2012 L 282, p. 16), in so far as that regulation concerns the applicant."

The noteworthy part of the application is the last qualification that specifies the scope of the application: "in so far as that regulation concerns the applicant." The General Court decides in paragraph 67 of its decision that:

"In the light of all the foregoing, without it being necessary to examine the third and fourth pleas in law, the contested decision and regulation must be annulled, in so far as they concern the applicant" (*emphasis added*).

This means that as long as the Central Bank of Iran has not brought a case against the Council of the European Union and a General Court has not issued a decision in favor of the CBI, the Council Decision 2012/635/CFSP shall remain in force "in so far as it concerns the CBI".

As a result, an appropriate analysis of the sanctions imposed on the CBI requires establishing corresponding links between the sanctions included in the above three Council Decisions and one Council Regulation on the one hand, and the functions of the CBI on the other hand. In the meantime, it can be confirmed in all certainty that a court decision may not remove all layers of the sanctions because the purpose of imposing them was to stop the CBI to pass through different layers of the sanctions easily and rapidly.

2. The basis for EU sanctions is coming under increasing pressure.

The entities and individuals whose names appear on the list of the sanctions have lodged cases against the Council of the European Union before European courts and in some cases, they have won their battles although winning few battles is far away from winning the war. The main weaknesses of the Council Decisions as explained by the Reuters (http://www.reuters.com/article/2013/07/15/iran-nuclear-courts-idUSL5N0F83S520130715) are:

1) At the heart of the issue is the refusal by EU governments to disclose evidence linking their targets to Iran's nuclear work. Doing so in court, they say, may expose confidential intelligence, undermining efforts to combat the programme.

2) Lawyers for the Iranians argue there simply is no evidence that proves any link to the nuclear programme - a view supported by British judges who did review some secret material this year.

3) To safeguard its sanctions policy and its economic pressure on Iran, the EU may have to present evidence - including sensitive intelligence - in court. But because of rules governing pan-European courts, all evidence would then become public which may damage clandestine operations and unravel the process of devising sanctions.

4) Lawyers for the Iranian plaintiffs paint the conflict as a human rights issue, praising the Luxembourg court for decisions they say amount to taking a stand against government abuse.

5) In a case brought by the Mellat Bank, the Britain's Supreme Court judges "ruled that measures against the bank were "arbitrary" and "irrational" - exposing the possibility that even secret evidence governments may share with the courts might not be enough to justify sanctions".

By putting all of the above elements together one can see that the legal basis of the sanctions imposed on the Iranian entities and individuals may come under even more pressure because the arguments that are used in a case and have resulted in success may be raised in similar cases resulting in a trend of debasing the current or even future sanctions. The report cited from the reuters.com summarizes the situation clearly:

"While the net of sanctions may have only been cut in a few places at this stage, dozens of other cases are in the pipeline. The concern among EU officials is that if a few more knots are untied, the entire sanctions netting could start to unravel."

3. The right to appeal, or to apply for any other reviewing measure

The right to appeal or to apply for reviewing measures may include any of the following steps:

FIRST STEP: Denial of legal grounds – The Statement of *Europäisch-Iranische Handelsbank AG* reads as follows:

In accordance with Council Implementing Regulation (EU) No. 503/2011 of 23 May 2011 *Europäisch-Iranische Handelsbank AG* (eihbank) has been listed in Annex VIII of Regulation (EU) No. 961/2010 of the Council of the European Union, despite the fact that regular audits by the German regulatory authorities and auditing companies of the transactions executed via this bank have given no grounds for objections…. Accordingly we see no legal grounds for our listing in Annex VIII of the above-mentioned regulation, and eihbank has taken legal steps against this measure.

SECOND STEP: Implementing of the Decisions - The Statement of the *Persia International Bank Plc* ("PIB") reads as follows:

Due to re-listing of PIB, any depositor who wish to withdraw their deposit continue to be subject to a license issued by HM Treasury. A copy of the HM Treasury license application for withdrawal of deposit with PIB is available at: http://www.persiabank.co.uk/HM_Treasury_Supplement_No.2-09Sep10.pdf

THIRD STEP: Appeal based on procedural ground – In the case of *Bank Mellat against HM Treasury*, according to the *duhaimelaw.com*:

With respect to the procedural grounds of appeal, the Court allowed the appeal because the Bank received no notice of the Order and had no opportunity to make submissions in respect of it. As noted by the Court, it is one of the "plainest principles of justice" that a person, including a legal person, be entitled to an opportunity of being heard before a tribunal when the tribunal is by law invested with the power to affect that person. Relying upon *R. v. Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, the Court held that fairness required that the Bank be given an opportunity to make representations before the Order was issued and that applied even though the power to issue the Order arose from secondary legislation.

FOURTH STEP: Appeal based on substantive ground – It is reported at the same website that:

With respect to the substantive grounds, the Court held that the Order was unlawful, inter alia, because it had no rational connection with the objective of frustrating Iran's weapons program – the nuclear proliferation problem, and the associated problem of using the banking system to facilitate prohibited transactions, was not limited to Bank Mellat but was an inherent risk of banking and the risk posed by the Bank was no different than that posed by other banks. The Court also held that the Order was disproportionate to any contribution it could have made to the stated objective.

e. What are the economic consequences of the court decision?

According to the Financial Times:

But even if Iran were to win a big case on central bank sanctions that would not guarantee that the rest of the blocked funds would immediately enter back into circulation.

Iran is cut out of the Swift international currency clearing system so transfers would remain difficult. Western banks such as BNP Paribas and HSBC have also faced heavy fines for dealing with Tehran, and some bankers say they would be reticent about returning to business with the Iran.

In other words, the sanctions imposed on the Central Bank of Iran have different layers. A court decision can remove one layer but the other layers will remain in force until one of the following two happens:

a) The CBI brings cases before the court to have all of the sanctions removed and succeeds in all of them; or

b) The negotiations between P5+1 and Iran results in a final agreement to remove all of the sanctions either in several phases (most probably) or in one go.

Until then, the economic impact of winning a case against those entities that have imposed sanctions on the CBI will be minimal and mostly psychological.

Further steps to be taken

According to Maya Lester who acts for the Central Bank of Iran (http://europeansanctions.com/author/mayalester/) on September 18, 2014:

The Court declined to decide whether the additional reason given for the Central Bank's listing that was added in October 2012 (namely that it "provides financial support to the Government of Iran") was lawful. The Court will rule on that issue in another application brought by the Central Bank challenging those subsequent measures, in which an oral hearing will be held in Luxembourg on 30 September 2014.

We may refer to next ruling of the Court in our News & Analysis report of October 7, 2014.

Concluding remarks

The Central Bank of Iran, like many other Iranian persons and entities, has been subject to the sanctions imposed on it by the UN, the EU, and the USA. These sanctions have created a network of barriers and limitations that stop the CBI from carrying out certain activities or at least have made them extremely difficult. To remove or to rescind these sanctions, the CBI has lodged cases against the EU authorities in order to prove that the imposed sanctions are devoid of legal basis. Despite its success in some of these cases, little or no change has taken place in overall positioning of the CBI in the international financial market. Sanctions are imposed as a sign of the intention of the international community to "encourage" Iran to respect the rules set by the UN, the EU, and the USA. Therefore, the only way out of the current impasse is to succeed in the international talks with the P5+1.

The history of these talks with Iran shows that both sides and sometimes the third parties have tried to find a common ground to expedite the process of reaching a final agreement. The Tehran Declaration of May 17, the Russian Step-by-Step Proposal of July 12, 2011, and the 2012 Proposals are just three examples of these efforts. Despite all of the initiatives taken by both sides and the third parties, it seems "very far and very close" to reach an agreement, as stated recently by the Minister of Foreign Affairs of Iran. The parties agreed on a "Joint Plan of Action" on January 20, 2014 and extended the period of talks to give each other more time to look into different ways of political rapprochement. The main question that remains is that whether the parties could benefit from the current round of negotiations to put aside their disagreements in order to build a solid basis for their future relationship or not. We will follow the talks very closely and will comment on them in our future News & Analysis reports.