



HOUSE OF LORDS

European Union Committee

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Mr Frans Timmermans
First Vice-President
European Commission
1049 Brussels, Belgium

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Ms Federica Mogherini
Vice-President/High Representative
European Commission
1049 Brussels, Belgium

Dear Mr Timmermans,

Commission response to the Sub-Committee's report: "The legality of EU sanctions"

Thank you for your response to our report "The legality of EU sanctions", 11th Report of Session 2016-17, (HL Paper 102) published 2 February 2017. It was considered by the EU Justice Sub-Committee at its meetings of 18 July and 12 September 2017.

In the report, at paragraphs 103 and 104, we concluded on the process of relisting individuals post-annulment, that:

"We recognise that the General Court has upheld the practice of re-listing individuals or companies on amended statements of reasons after the annulment of the original listing, but conclude that this practice gives rise to a perception of significant injustice, namely that there is no effective remedy against sanctions listings. Put in non-legal language, the judgment of the General Court is of no consequence because further sanctions are imposed before it comes into effect. The Council should bear this in mind when considering whether to re-list a targeted individual or company after the original listing has been annulled.

Were listings to be better substantiated in the first place, there would be less need for re-listing. A codified standard of proof would help to ensure that listings are better substantiated in the future".

In reply, you argued that the Committee's view "does not reflect either the manner in which [C]EU judgments] are regarded nor the Union's re-listing practice". In defence of this position, you suggested that the risk that once an annulment is effective that "an individual is able to transfer all or part of his assets" out of the EU gives rise, in turn, to the "potential risk" of asset flight. Adding that: "an individual is not re-listed on an identical basis once a listing has been annulled nor is re-listing systematic".

We were disappointed with this aspect of your reply and, therefore, sought the views of Maya Lester QC who gave evidence to us during our inquiry. (A copy of her supplementary evidence to the inquiry can be viewed on the Sub-Committee's website.)

Ms Lester QC suggests that once the European Court has made a decision to annul a listing decision then “an effective remedy” would be to remove the individual from the list “unless there were a compelling reason not to do so”. In her view, the fact that the European Court “almost always” suspends for two months the effect of an annulment decision in order to afford the Council an opportunity to remedy the illegality identified in the Court's judgment, “does not ... decrease the perception of injustice identified by the Sub-Committee, and highlights the potential for this practice to result in remedies being ineffective”.

Turning to the post-annulment risk of asset flight, Ms Lester QC brings four main concerns to our attention. First, with regard to the two month post-annulment suspension of de-listing orders, Ms Lester argues with “great respect to the European Commission” that this “is not ... compatible with the rule of law” because:

- (i) the Court almost always delays the effect of an annulment order “without there being any evidence as to whether or not an individual or entity has any assets in the European Union that could be dissipated”; and,
- (ii) in many cases individuals are added to the EU sanctions lists “not because of a risk that if they are not listed their assets will be used / dissipated for a particular nefarious purpose ... but because (for example) they are associated with the Government of a regime on which the EU has imposed sanctions, or because they used to be employed by a company connected with a particular regime”. For this reason she argues that it is “difficult to see why the potential risk of asset dissipation outside the EU ... could justify delaying an annulment order”.

Second, Ms Lester QC points out that the practice of re-listing individuals does not occur only during the two-month post-judgment phase. In her view, “often” the Council or the Commission will re-list an individual “before a Court judgment has been given but *after* the written or oral stage of the Court proceedings have closed” (emphasis in original). This leaves the individual with no choice “but to bring an additional costly and lengthy application for annulment in the European Court, regardless of whether or not the Court delays the effects of the annulment order”.

Third, whilst Ms Lester QC acknowledges as “correct” your assertion that re-listing is not “systematic”, in her view, re-listing after annulment is “very common”. In her support, she cites the evidence given to us during our inquiry by Michael Bishop, Senior Legal Adviser to the Council, who could recall only two or three cases in recent times where the Council had not re-listed an individual. In light of the Senior Legal Adviser's evidence to our inquiry, can you tell us how often since the Kadi II judgment in 2013, those who have successfully challenged their listing in the EU's Courts, are re-listed post-annulment?

Four, Ms Lester QC accepts your statement that individuals are not always re-listed on an “identical basis”. However, as she correctly points out, our concern was not with re-listings being identical, instead the report focussed on the denial of an effective remedy. As Ms Lester QC puts it in her reply to us, this is “because the basis for the re-listing is ... the same allegations as the original listing expressed with slightly different words, or on criteria

or allegations or evidence that could have been relied on at the time of the original listing but were not". Citing the House of Commons EU Scrutiny Committee, her concern is that re-listings of this kind might in some cases be "an artificial legal device to prolong restrictive measures that have a weak foundation".

We have written in similar terms to the UK Government. We look forward to considering, in due course, your response to Ms Lester QC's concerns with your reply to our report.

A handwritten signature in black ink that reads "Helen A Kennedy". The signature is written in a cursive style with a clear, legible font.

Baroness Kennedy of The Shaws on behalf of Lord Boswell of Aynho
Chairman of the European Union Committee