EUROPEAN COMMISSION

Brussels, 23.01.2018
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Dear Lord Boswell of Aynho,

The Commission would like to thank the House of Lords for its letter of 14 September requesting further information notably as regards the process of relisting individuals post-annulment by the General Court. The Commission welcomes the House of Lords' interest in the use of sanctions as a tool within the EU's Common Foreign and Security Policy.

Before turning to the particular points raised in the House of Lords' letter, the Commission would like to take this opportunity to recall some general principles related to EU restrictive measures ("sanctions").

First, as the House of Lords is aware sanctions are used as one of a number of options to pursue the European Union's Common Foreign and Security Policy. EU sanctions regimes have different objectives but the most prominent sanctions regimes address serious security threats to the Union and its citizens. The Union and its Member States are charged with the responsibility of preserving the security of their citizens.

Secondly, the legal rights of persons and entities subject to sanctions are ensured both through the possibility of legal review and the process for imposing and renewing sanctions. In this context, any decision to amend the reasoning/re-list a person or entity must be agreed by all 28 Member States who, in turn, must be satisfied that the decision respects fundamental rights and other procedural guarantees.

Finally, a decision to re-list a person or entity is taken on a case by case basis following careful assessment of the jurisprudence of the EU courts. In particular, before the Council decides to re-list a person or entity whose listing has been annulled by the EU courts, the Council must be satisfied that the new listing remedies the defects in the previous listing and meets the requirements set out by the court in its judgment.

Turning to the particular observations from Ms Maya Lester QC in the order set out in the House of Lords' letter, the Commission would like to make the following observations.

The Lord Boswell of Aynho
Chair of the European Union Select Committee
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The purpose of the rule whereby the effects of an annulment judgment by the General Court should be suspended for a period of two months and ten days is to ensure that the Council has time to consider the judgment against it and possible responses. This may include submitting an appeal, re-listing where the legal defects may be remedied or taking no action. The rule applies to all appeal cases from the General Court and is not limited to annulments of individual designations. As such the rule is essential to the meaningful exercise by the Council of its right to appeal. Were the judicial system to act otherwise, the result would be in many cases to render any subsequent judgment largely meaningless. Where designations of individuals are concerned, not only would there be a risk of an asset flight, but also of the EU financial system being used to transfer funds for illegal purposes. In such circumstances, the effect of any decision subsequently to re-impose restrictive measures following a successful appeal would be very limited indeed.

Moreover it should be recalled that, while the application of an asset freeze can have preventive objectives in certain circumstances (e.g. terrorism), in many circumstances the primary purpose of applying an asset- freeze is not to prevent the use of those resources "for a particular nefarious purpose" but rather to apply pressure directly and indirectly to achieve a change in the policy or behaviour for which the sanctions have been imposed. It is also perfectly possible that even if a listed person or entity holds no assets at the time of the Court's judgment, assets might be transferred to him/her through the EU financial system at a later date.

With regard to Ms Lester's second point on timing of re-listings, the Commission notes that where the Council concludes that there is additional evidence and/or grounds for re-listing, and that the listing is proportionate and justified, it is good administrative practice to amend the reasoning/re-list as soon as possible. This may occur after the written or oral stage of the Court proceedings have closed and can be as a result of information or arguments arising from those proceedings.

Were the decision to amend the reasoning/re-list to be delayed, there would be two possible outcomes. First, the Council could wait for the judgment and only decide to amend/re-list after the judgment has been delivered. This would mean that the Council did not amend the listing when it became aware of additional information or arguments but only at a later point. This would require the applicant to bring completely new proceedings.

Alternatively, the Council would decide not to amend/re-list the person or entity despite being in possession of additional information and arguments that would render the listing legally justified (including on grounds of proportionality), and where the Council had concluded that maintaining the listing was necessary for the policy objectives relating to the regime concerned. Such a decision would, in our view, risk failing to discharge the responsibilities to maintain the Union's Common Foreign and Security Policy noted above.

In terms of the additional cost incurred by new legal proceedings arising from an amended or new listing, successful parties may recover their reasonable costs.

As regards the substance of re-listings, the Commission would like to stress that, each decision on amending the reasoning or re-listing is taken on its facts, and must be agreed by all Member States.

We regret that the Commission does not retain aggregated figures on how often since the Kadi II judgment in 2013 those who have successfully challenged their listing in the EU courts are re-listed post-annulment. However, the disaggregated information is publicly available from the judgments of the EU courts and the legislation adopted by the Council.

It should be noted that, in view of the delay between legal challenges being submitted and the judgment of the EU courts, there can be a period in which further listings are made without the benefit of the determination of an issue by the EU courts. In these circumstances a number of cases may turn on the same issue(s) of which the Council may only become aware after the judgment has been delivered. A number of listings may therefore need to be amended or renewed once the issue(s) have been determined. This was notably the case following the Kadi II judgment.

As regards the comment that re-listings are made "on criteria or allegations or evidence that could have been relied on at the time of the original listing", this statement is made with the benefit of hindsight. The criteria used by the Council have developed in response to the jurisprudence and the observations of the EU courts. Moreover, designation decisions were made on the basis of the best assessment at the time they were taken and before the EU courts had ruled on the issue.

In many cases the court has annulled a listing not on the grounds that the allegation cannot form the basis of a listing per se, but because of specific defects, for example in the Statement of Reasons, the listing criteria or the substantiation. In these circumstances, if the Council can remedy the defect to comply with the judgment of the court and the listing remains necessary, it is reasonable for it to do so. This will include an assessment of the proportionality of any re-listing.

Consequently, the Commission would not describe re-listing by the Council as "an artificial legal device to prolong restrictive measures that have a weak foundation".

The Commission hopes that these further observations are of assistance to the House of Lords.

Yours sincerely,

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First Vice-President

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High Representative/Vice-President