

EU Procedures re. Autonomous Sanctions and the Blocking Regulation

Including the latest ECJ judgement

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Autonomous Sanctions: Legal Basis at EU Level

Exclusive competence of the EU as opposed to Member States

- Free capital movements and payment applied to non-Member States (Art. 64 para.1 TFEU)
- Trade policy (Art. 3 para.1 Lit e) TFEU)

Sanctions on non-Member States require a specific legal basis in the EU Treaties

- Fighting terrorism: ban on financing terrorism Art. 75 TFEU = lex specialis (non-state persons or entities)
- Regularly Part of Common Foreign and Security Policy under Title V TEU, in particular Art. 29 TEU: Council Decision
 - Right of veto declaring vital reasons of national policy (TEU Art. 31 para.2) by Council Members

EU Autonomous Sanctions: Established Procedures re. Decisions and Implementation

- Step 1: Common Foreign and Security Policy (CFSP) Council Decision (Art. 29 TEU)
 - Legally binding for Member States (Art. 288 s.3 TFEU), without general force of law
- Step 2: Council Regulation based on Art.215 TFEU („Restrictive Measures“)
 - Direct force of law in all Member States (Art.288 s.2 TFEU)
 - Art. 215 para.1: interruption or reduction, in part or completely, of economic and financial relations with one or more third countries
 - Art. 215 para.2: restrictive measures against natural or legal persons and groups or non-State entities.

Flexibility for further developments- scaling up and down

- Basic Council Decision + basic Council Regulation to be amended as the case may be using the 2-step procedure

EU Blocking Regulation on Third Country Sanctions

Aim: Blocking of sanctions imposed by Third Countries with extraterritorial effect on EU persons

Legal basis: Regulation (EC) 2271/96

- Direct force of law in all Member States (Art.288 s.2 TFEU)
- Specification of sanctions subject to the Regulation: Annex, to be updated by Commission Delegated Regulations – latest: (EU) 2018 / 1100 (USA/Iran)
- Art. 5 para.1: EU persons as defined by Art. 11 shall not comply with Third Country sanctions as determined by the Regulation.
- Consequences of breach: liability for any damages incurred by EU persons caused by such breach (Art. 6).

EU Blocking Regulation and Judicial Review - Basics

EU sanctions and related implementation measures are subject to judicial review – exclusive competence of the European courts re. EU law.

The Interpretation of Art. 5 para.1 of the Blocking Regulation and evidence of violation is exposed to challenges.

- Possible conflicts with Art. 16 and Art. 52(1) of the Charter of Fundamental Rights of the EU – principle of entrepreneurial freedom
- The Regulation does not create a direct civil law claim to enter into contracts or refrain from termination thereof.
- In practice, hard to demonstrate evidence whether related action/activity is due to commercial business considerations or to a specific stipulation of a Third Country sanction regime.

EU Blocking Regulation and Judicial Review – ECJ Findings in Bank Melli Iran vs. Deutsche Telekom GmbH

(judgement of 21st Dec. 2021, C-124/20)

Background: German national court case on the termination of contracts re. supply of telecommunication services, underlying EU law issues brought forward to the ECJ.

Guidelines:

- The EU Charter of Fundamental Rights does not preclude annulment of actions under the Regulation, such as termination of contracts, provided such annulment does not entail disproportionate effects for the person in breach of Article.5 para.1.
- It is for the person charged with breach of Art. 5 para.1 to establish to the requisite legal standard that his/her conduct was not intended to comply with a Third Country sanction subject to the Regulation.
- The judgement does not cover the question whether Article.5 para.1 would entail an obligation to enter into a contract affected by a Third Country sanction regime. It can be expected that this would be the case at least in respect of parties benefiting from a „monopoly in fact“, again subject to the principle of proportionality.