



# Challenging targeted sanctions

Guy Martin of Carter-Ruck offers practical advice to businesses and individuals who are targeted by sanctions and discusses the importance of successfully dealing with the wider reputational issues associated with fighting against sanctions.

**O**n 15 June 1215, King John of England reached an agreement with a group of rebellious barons and signed a document that has since become known as the Magna Carta. This year marks the 800th anniversary of the signing of that famous parchment; an agreement which inspired the Constitution of the USA and which is credited by some as the foundation of the rule of law and due process.

On the anniversary of the Magna Carta it is fitting then to discuss the nature of targeted sanctions which can pervert the due process and the rule of law that is so aspired to by the very states that use them. There are more sanctions regimes now than at any other point in history, and in recent years the Gulf States have become ever more proactive in publically designating organisations as terrorist organisations. Individuals and businesses throughout the Middle East should be aware of the challenges they present.

The EU, UN, the US and other States increasingly

rely on targeted sanctions to achieve foreign policy aims. Increasing geo-political instability means this trend will continue, posing significant risks for individuals and businesses engaged in international trade and finance, as well as charities operating globally. Sanctions not only target rogue governments or terrorists but also individuals, businesses or charities who are suspected of 'supporting' or 'associating with' them.

## THE KADI LITIGATION

While targeted sanctions have been in use by States and supra national bodies such as the EU since the 1990s, it was in the aftermath of September 11, 2001 that the side effects of these measures came to public attention. Only last year, Saudi businessman Sheikh Yassin Abdullah Kadi was removed from US sanctions which had been imposed thirteen years before - in October 2001 - by OFAC (the Office of Foreign Assets Control, part of United States Treasury Department).

This was followed by a 13 year legal battle brought by Kadi to have his name removed from numerous lists worldwide. Kadi was placed on simultaneous and identical sanctions lists by both the US and the UK. Following that, he was placed on UN and EU lists, freezing his assets, making it a criminal offence for anyone to provide him with economic assistance, and preventing him from travelling.

The allegations made against Kadi were nebulous and vague and his situation could accurately be described as Kafkaesque: there was no legal means by which he could bring a legal challenge against his UN listing and he was not allowed to see any of the evidence against him. Due process, it seemed, had been forgotten. Carter-Ruck, on behalf of Kadi, challenged all of the sanctions against him through various court actions and legal petitions.

#### **Kadi I**

The Kadi litigation in the EU Courts has led to some of the most important developments in the relationship between international law and EU law. In 2008, in a ground-breaking judgment known as Kadi I, the European Court of Justice (ECJ) – the highest EU Court - annulled the EU's sanctions against Kadi. The ECJ held that all EU measures must be compatible with fundamental human rights, and in particular, in the case of targeted sanctions, the right to a defence and the duty to give reasons for the listing. In Kadi's case, the EU had complied with neither.

*Kadi I* was of particular significance because it was the first time the EU Courts accepted that UN Security Council Resolutions could be susceptible to judicial review, despite the primacy of a resolution passed under Chapter VII of the Charter of the United Nations (which sets out the UN Security Council's extremely broad powers to restore and maintain peace in the international community). For the first time, the ECJ held that EU targeted sanctions measures must comply with fundamental human rights, including the rule of law, even if they implement a UN Security Council Resolution.

#### **Kadi II**

Notwithstanding the judgment in *Kadi I*, Kadi was re-listed by the EU under a second regulation. This time around however, the European Commission provided Kadi with a short Narrative Summary of reasons which the UN issued for his listing.

Kadi challenged this second listing and his case was again brought before the ECJ, in the case now known as *Kadi II*. The ECJ decided in 2013 that Kadi's designation should again be annulled, as it was held that the UN Narrative Summary was entirely unsubstantiated.

In tandem, *Kadi I* and *Kadi II* have influenced the way in which restrictive measures in the European Union sanctions regime are implemented, and have

ensured that certain safeguards, such as the right to a defence, are made available to listed individuals, and that the giving of sufficient reasons are provided by the EU Council in 'individual, specific and concrete' terms.

Kadi has succeeded in removing all sanctions against him, culminating in the removal of his US listing in 2014. His case paved the way for other successful challenges and the improvement of judicial safeguards for persons subject to sanctions. Just by way of example, thanks to the case of Kadi, the UN has now created an Ombudsperson process through which individuals listed can challenge their listing formally.

#### **THE CASE AGAINST SANCTIONS**

These changes on both the EU and international level are certainly a step in the right direction, but targeted sanctions continue to be used as a political tool by States around the world and are still heavily weighted against the sanctioned person

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or entity. Targeted sanctions can cause indefinite harm for the individuals and businesses affected which, as in the case of Kadi, can last for many years.

Despite the judgments in *Kadi I* and *II*, the procedural rights of persons continue to be challenged in the European Courts. Earlier this year,

27 out of the EU's 28 Member States approved new procedural rules for European Courts in relation to these cases. These new rules, which it is understood are due to take effect in the near future, will include a procedure for closed material proceedings and allow for cases to be heard *in camera*.

Both of these new provisions are a real threat to a number of fundamental human rights, in particular the right to a fair trial. With worrying developments such as these, it is evident that a return to the core principles of the rule of law and due process, set out 800 years ago in the Magna Carta and enshrined in fundamental constitutional documents all over the world, is more necessary than ever. 🇺🇸



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