The EU sanctions against Russia and their imposition on family members of designated persons ??? second-best solutions on the way to first-best goals

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The Russian aggression against Ukraine, which started in 2014 with the annexation of Crimea and became a full-out war with the attack on the rest of the Ukrainian territory as of 24 February 2022, has unleashed a series of reactions by many members of the international community. Alongside active help for Ukraine, a second set of measures has proved to be essential in the attempts by the EU to react to this egregious attack against the international and European peace order. This is the sanctions policy, an instrument on which the EU has built a rich experience, but which is also in continuous evolution.

Within the context of the EU sanctions adopted against Russia, one particularly interesting aspect that has emerged from the jurisprudence concerns the question of whether individual sanctions should consider the existence of family ties. More specifically, the question arose whether the EU sanctions can be extended also to family members of listed businessmen or designated political rulers.

Scrutiny of sanctions affecting family members by the CJEU

The Council has already listed many family members of Russian politicians and of Russian businesspersons. Numerous of these designated Russian family members have challenged their listings before the EU Courts. Similar issues have been addressed in the past by the EU Courts in relation to sanctions against Syria. Thus, in order to obtain a somewhat comprehensive picture, also the previous case-law concerning the designation of family members of Syrian political leaders or Syrian businesspersons will be examined briefly. It will be shown that in the field of the EU sanctions policy, no general, abstract, "one-size-fits-all" rule applies with regard to the imposition of sanctions on family members of otherwise sanctioned persons.

The concept of "association" of a person to a sanctioned family member has not yet been defined and its exact meaning is contingent on the concrete context and the circumstances of the case. It is all the more important to analyse the different decisions taken by the EU Courts as it is only by examining the cases singularly that the meaning of the term "association" can be given concrete substance. The Syrian cases in this regard present different features, but some parallels with the Russian cases can still be drawn.

EU restrictive measures against Syria

As regards the EU sanctions adopted against Syria, reference can be made to the landmark ruling in *Al Assad*. In this case, it was sufficient that the applicant was the sister of the president of Syria, Mr Bashar Al Assad, to consider her to be associated with the Syrian regime. The General Court (GC) adopted a similar approach also in the *Foz* case. In this judgement, the GC came to the conclusion that it is reasonable to think that a family member of a leading businessman poses a real risk of circumvention of the restrictive measures if he has business and family ties with the listed individual. Thus, in these two cases the GC relied on a rebuttable presumption that certain political leaders (see the *Al Assad* case) and leading businessmen (see the *Foz* case) are using their family members to circumvent restrictive measures.

EU restrictive measures against Russia

The EU Courts have taken a different position when ruling on the acceptability of presumptions in the context of the sanctions regime adopted against Russia. A very important decision in this regard is the judgement in *Prigozhina*. In this case, the GC made reference to the well-known *Tay Za* judgment according to which there is no presumption that family members of leading businessmen are associated with a targeted regime. A sufficient link can only be assessed "in reliance upon precise, concrete evidence" that confirms that the family members of businessmen benefit from the economic policies of the targeted regime. Also in the case *Prigozhina*, the GC refused to apply such a rebuttable presumption of association. The GC underscored that family ties alone cannot justify the inclusion of the applicant's name on the contested lists. For the extension of the sanctions to family members of listed individuals, a link that goes beyond simple family ties must exist at the time of the adoption of the sanctions.

In the case *Pumpyanskaya*, the GC has confirmed that no general, abstract, "one-size-fits-all" rule can apply in these situations, but an assessment on a case-by-case basis has to be made. The applicant claimed that she should not be considered as being "associated" with her husband who is a Russian businessman as she had not been involved in her husband's business activities. She argued that a family relationship and her role as a chairwoman of a charitable organisation linked to her husband's activities should not be sufficient for listing her as an individual associated with a leading businessperson. She claimed that the concept of "association" presupposes "the existence of a relationship by means of a mutual economic and political activity". The reasoning by the GC in this regard deserves close attention. The GC stated that the concept of "association" is not as such defined and does not require the existence of an economic relationship. Whether such an "association" can be considered as existing has to be determined individually for each case. The exact meaning of the term "association" is, according to the GC, "contingent on the context and circumstances at issue". However, a listing based exclusively on a family relationship is unlawful. The GC stated that common interests going beyond a family relationship are required.

This has been reiterated by the GC also very recently in the case *Mazepin*. Mr Nikita Mazepin, a former Formula One driver, had been designated due to his association with his father who is a leading businessperson in Russia. However, the GC annulled the acts that had placed him on the sanctions list and repeated once again that the "association" concept implies the existence of a link going beyond a family relationship. There must be common interests linking a family member to its designated relative.

Looking ahead at future cases, it can be argued that it is unlikely that the Court of Justice of the European Union will accept a general presumption according to which family members of leading Russian businessmen would automatically benefit from their relatives' relationship with the government. Such a presumption could be problematic from the viewpoint of human rights law and the rule of law. However, in view of the extreme situation in Ukraine, sanctions that are "biting" are needed and therefore a case-by-case approach - allowing for the consideration of factual circumstances which a general, abstract rule would probably miss - is probably the most appropriate one. As a consequence, a balancing of the different contending values and interests has to be undertaken. Of course, "purists" of law opining for an "orthodox" solution, abstract rules, might be disappointed with such a balancing on the basis of pragmatic considerations but a compromise is needed. It can be stated that, in general, an extension of sanctions to family members is always problematic as the whole philosophy of sanctions, as developed on the basis of Roman law, is rooted in individual responsibility. On the other hand, in extreme situations, such as those which have come into being in the Russo-Ukrainian conflict, there is strong evidence that responsibility has to extend beyond the specific individual sphere of actors which are commonly known by name as perpetrators of criminal acts that should be sanctioned by these EU measures. The involvement of family members in illegal activities in connection with Russian governmental decisions is often a matter of fact and the EU has to take into consideration this circumstance if it wants to apply sanctions in an effective manner.

Conclusions

In sum, it can be stated that the EU sanctions regimes adopted against different countries have to be analysed separately as they present different features. With reference to the Syrian regime, it can be argued that the decision to apply a general presumption that members of certain families benefit from the targeted regime was justified by the fact that their connection to the regime could be taken as granted. The approach taken by the EU Courts in the Syrian cases is based, at least implicitly, on the assumption that the dominant groups in Syria are essentially formed by families close to the Assad regime.

As regards the Russian cases, the EU Courts took a different position. No general presumption of association between family members of designated persons and the Russian regime was accepted. However, some involvement in the business activities of their sanctioned family members - even on a voluntary basis in related charities - was deemed to suffice for a listing.

It can be claimed that the approaches chosen by the EU Courts, while appearing somewhat haphazard and inconsistent at first glance, sum up to a broader concept intended to balance a variety of interests - the need to tackle the extreme challenges deriving from the Russian aggression, the intent to defend the European values system and the requirement to uphold individual rights protection also in such a precarious situation - in the best possible way. The result may not completely satisfy legal purists but in an imperfect world the EU Courts are struggling to obtain at least a second-best solution better than none. And by the continuous fine-tuning of its jurisprudence, the EU Courts also evidence that a first-best solution, while being out of reach for the moment, still remains their ultimate goal.

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