Key Court Positions and Conclusions in Cases Contesting Sanctions and Unblocking Assets

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Over the past decade, the introduction of restrictive measures against the Russian Federation and its residents has become a common practice. The main "legislators" of our time in this area at the moment are the United States of America (USA), Great Britain and the European Union (EU).

Around two thousand people have become the targets of anti-Russian sanctions within the EU alone, and the amount of frozen private assets has reached 24 billion euros.[1]Accordingly, the noticeable increase in attempts to challenge the introduced restrictive measures is natural, and in each jurisdiction this process has its own characteristics.

The most active challenge of personal sanctions in court is observed in the EU, but there are also lawsuits against lifting of sanctions can be found in both the US and the UK. How successful these attempts are and whether there is hope will be discussed further.

An analysis of the relevant judicial practice and the extremely low percentage of cases of successful challenges to sanctions demonstrates that the practice is still in the stage of active development, and the arguments of applicants need to be improved.

This article proposes to do the following:

- a brief overview of the US sanctions regimes, UK, EU and
- analysis of important aspects that should be take into account when assessing the chances of challenging sanctions in court.

1 EU sanctions against individuals, companies and organisations [Electronic resource] // European Commission, available at: https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine/sanctionsagainst-individuals-companies-and-organisations_ru.

REVIEW OF THE US AND UK SANCTIONS REGIMES AND RELEVANT JUDICIAL PRACTICES

In both the US and the UK, overall management of sanctions policy and control over their implementation is carried out by structural divisions of the Treasury Department: in the US, the Office of Foreign Assets Control (OFAC), and in the UK, the Office of Financial Sanctions Implementation (OFSI).

Currently, there are two US sanctions programs in effect against Russian individuals: Ukraine-/Russia-related Sanctions and Russian Harmful Foreign Activities Sanctions, within the framework of which the US President's Executive Orders are issued, regulating sanctions restrictions and the criteria for their introduction. In the UK, the key act in the field of anti-Russian sanctions is the supplemented The Russia (Sanctions) (EU Exit) Regulations 2019 (2019 Regulations)[2], issued under the Sanctions and Anti-Money Laundering Act 2018 (SAMLA)[3]. The directorates, among other things, also maintain lists of sanctioned persons: the well-known American Specially Designated Nationals And Blocked Persons List (SDN List) and the British UK Sanctions List.

In the context of US sanctions, it is important to understand that the status of a sanctioned person only appears after his name is directly included in the sanctions list. Simply meeting the criteria from the US President's decrees is not enough to designate a person as sanctioned. But there is an exception, the so-called 50 Percent Rule, which is applied in the US, the UK and the EU: the assets of a legal entity that is 50% or more owned by a sanctioned person are automatically blocked, regardless of whether such a legal entity is included in the sanctions list.

There are many criteria for classifying a person as a sanctioned person.[4]. At the same time, the subjective criteria in the 2019 Regulations (UK) are, in essence, analogous to the EU sanctions criteria, but in a certain part they are much more detailed.**In the US and UK, cases Judicial challenges to sanctions, compared to the EU, are extremely rare, and successful cases are few and far between. This is also due to the need to first appeal sanctions in a rather lengthy administrative procedure by contacting OFAC or OFSI.**

So, Mrs.**Titova**and Mr.**Golikov**succeeded in lifting sanctions restrictions as a result of separately filed lawsuits in June 2023 in the United States[5]. Both applicants are former members of the supervisory board of Otkritie Bank, which was sanctioned on February 24, 2022, which is why they were included in the sanctions list. However, at the time of their inclusion in the SDN List, the applicants had already resigned, and this was the reason for the Court to recognize OFAC's actions as unlawful due to the lack of current grounds for imposing sanctions.

In the UK, relevant case law is even rarer. 27 February 2024

2 The Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019, No. 855), available at: https://www.legislation.gov.uk/uksi/2019/855/contents.

3 Sanctions and Anti-Money Laundering Act 2018 (p. 13), available at: https://www.legislation.gov.uk/ukpga/2018/13/contents.

4 In the US, see 31 CFR 589.201 and 31 CFR 587.201; in the UK, see reg. 62019 Regulations.

5 See Elena Titova v Blinken et al (case 1:23-cv-01751-RC) and Golikov v Blinken et al (case 1:23-cv-01752-BAH).

The Court of Appeal of England and Wales has given an appeal judgment in a case challenging sanctions against Mr.**Shvidler**[6].

This case is the first judicial challenge to UK sanctions and was decided at first instance by the High Court in London on 18 August 2023.[7]Despite In spite of all attempts by the Applicants to point out the irrationality and illegality of the sanctions imposed, the Court rejected the appeal, after which Mr Shvidler's lawyers described the decision as making it "virtually impossible" to challenge the UK sanctions in court.[8].

Since the EU has a much more extensive practice of challenging sanctions in court, it is worth looking at it in more detail.

REVIEW OF SANCTIONS EU REGIME AND CASE PRACTICE ON CHALLENGING RESTRICTIONS

Description of EU sanctions restrictions

EU sanctions, officially referred to as "restrictive measures"[9]), are adopted by the EU Council by virtue of the direct indication of the existence of such competence in Title IV of Part V of the Treaty on the functioning of the EU (TFEU)[10]and Chapter 2 of Title V of the Treaty on European Union (TEU)[11].

The amended Regulation (EU) No 269/2014 of 17 March 2014 (Regulation (EU) No 269), as amended, provides for the freezing of all funds and other economic resources (property) belonging to the persons specified in the same document and a prohibition on the direct or indirect provision of funds and property to such persons (and persons associated with them) and for their benefit (Article 2)[12]. The criteria for inclusion of persons in the sanctions list are set out further in Article 3 and include, for example, "leading businesspersons" operating in certain sectors of the Russian economy, persons benefiting from or materially supporting Russian persons responsible for making decisions condemned by the EU (decisionmakers) regarding Crimea or Ukraine.

The practice of the Court of Justice of the EU in cases challenging sanctions

The growth of restrictions is also accompanied by an increase in appeals to EU bodies with requests to lift the imposed sanctions. Some of the most significant in this regard are the following cases of the European General Court (EGC): Usmanov v Council (case **Usmanova**)[13], Shuvalov v Council (case**Shuvalova**)[14],

6 [2024] EWCA Civ 172.

7 [2023] EWHC 2121 (Admin).

8 Court of Appeal dismisses Russian sanctions delisting challenge in UK // Global Investigations Review, available at: https://globalinvestigationsreview.com/just-sanctions/article/court-of-appeal-dismisses-russian-sanctions-delisting-challenge-in -uk.

9 Art. 215 TFEU.

10 Title IV, Part Five TFEU.

11 Chapter 2, Title V TEU.

12 Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine // OJ L 07817.3.2014, p. 6.

13 Judgment of 7 February 2024, Usmanov v Council, T-237/22, not published, EU: T:2024:56.

14 Judgment of 7 February 2024, Shuvalov v Council, T-289/22, not published, EU: T:2024:57.

Rotenberg v Council (case**Rotenberg**)[15]and successful challenges to sanctions in the Shulgin v Council case **Shulgina**)[16]AndA. Pumpyanskiy v Council (case**A. Pumpiansky**»)[17]. The most substantial in its motivation is the Usmanov case. The competent authority for claims for the annulment of sanctions acts introduced by the EU (in terms of exclusion from the list of certain persons) is the EGC as a court of first instance and the European Court of Justice (ECJ) as an appellate instance. [18].

Following established judicial practice, it is possible to identify a number of requests (pleas in law) filed in the context of challenging the imposed sanctions, which will allow us to examine the relevant positions of the courts and determine the chances of challenging them. Applicants often point out the following:

- violationright to be heard (infringement of the rights of defense; of the right to be heard);
- breach by the Council of the EU of its duty to underlying indication of the reasons for inclusion in the sanctions list (infringement of the obligation to state reasons);
- unreliability reasons inclusions to the sanctions list (errors of assessment; (unlawful reasons).

It is important to take into account that for a victorious outcome it is sufficient for the Court to satisfy at least one of the requests.

Violation of the right to be heard

In the Usmanov case, for example, a violation of the right to be heard was indicated due to the failure of the EU Council to send prior individual notification to the known address to the Applicant about the decision being taken to include him in the sanctions list, and therefore the Applicant was unable to put forward his objections that would have made it possible to avoid such a decision.[19].

In rejecting the Applicants' arguments, the EGC stated that such a right may be limited by virtue of Article 52(1) of the EU Charter of Fundamental Rights[20], in particular, because of the element of "surprise"[21]when imposing sanctions that prevent an emergency withdrawal of assets on the eve of their imposition. Therefore, the absence of prior notification is not permissible, but even necessary. But if a person is included in the list again, then failure to send prior notification will indeed be a violation, since this deprives the sanctioned person of the opportunity to submit in advance his objections to the elimination of the reasons for his inclusion in the sanctions list.

In this case, the EU Council may resort to notification by publication in the Official Journal of the EU of the inclusion of a person in the sanctions list only if it is not possible to notify that person personally (in particular, if the personal address is unknown, has not been provided to the EU Council or the attempts at communication have been unsuccessful).[22].

15 Judgment of 30 November 2016, Rotenberg v Council, T-720/14, EU: T:2016:689.

16 Judgment of 6 September 2023, Shulgin v Council, T-364/22, not published, EU: T:2023:503.

17 Judgment of 29 November 2023, A. Pumpyanskiy v Council, T-734/22, not published, EU: T:2023:761.

18 Usmanov v Council, paragraph 37.

19 Usmanov v Council, paragraph 59.

20 Charter of Fundamental Rights of the European Union // OJ C 326, 26.10.2012, p. 391–407.

21 Usmanov v Council, paragraph 75; see also Rotenberg v Council, paragraph 150.

22 Usmanov v Council, paragraphs 69, 70.

Violation by the EU Council of the obligation to properly indicate the reasons for inclusion in the sanctions list

The obligation to properly state reasons (motivations) stems from Article 296 TFEU[23], its violation is examined by the Court independently even without the applicant's request.[24].

Compliance with the criterion is assessed subjectively: if the Court establishes that the essence of the stated reasons is clear to the sanctioned person, then such a description will be considered sufficient.[25]**.**In addition, the reasons must have a clear connection with the subjective criteria for imposing sanctions. For example, disagreeing with the arguments of the Applicants in the Usmanov case, who pointed out the vagueness and imprecision of the reasons[26], EGC noted that the reasons stated clearly indicate material (and not only) support for Mr. Putin and Mr. Medvedev as Russian decision-makers[27]with a detailed description of the types of this support[28], which directly corresponds to the criteria for inclusion in the sanctions list set out in EU Regulation 269/2014, and this connection, as well as the facts themselves, are known to the Applicant[29].

Accordingly, if there is a visible connection between the stated reasons and the criteria for imposing sanctions (usually the use of the same formulations: decision-makers, financial support, etc.) and the reasons are clearly related to a specific sanctioned person, then challenging sanctions based on this criterion has virtually no chance of success.

Inaccuracy (unreasonableness) of reasons for inclusion in the sanctions list

The most popular claim, within which there are successful challenges to sanctions, is the argument about the unreliability of the facts underlying the reasons for including a person in the sanctions list. In the context of this request, everything strictly depends on the facts of a particular case; there are no clear criteria here. The court can ad hoc substantiate, for example, the validity of the presence of financial or political support for Russian decision-makers even in the absence of an obvious connection, relying on various media (Financial Times[30]; Komsomolskaya Pravda[31]; Kommersant[32]; TASS, MarketScreener, Reuters, The Moscow Times[33]; The Moscow Post, Novaya Gazeta, Svoboda, Rogtec Magazine, Forbes[34]).

The Pumpyansky case and the Shulgin case, which were successful in this context, are similar to other cases of lifting sanctions in other jurisdictions and are based on the same logic: the reasons for the initial introduction of sanctions have already disappeared, and therefore their extension

23 Ibid., paragraphs 97–98.

24 Judgment of 2 April 1998, Commission v Sytraval and Brink's France, C-367/95 P, ECLI: EU: C:1998:154, paragraph 67.

25 Shuvalov v Council, paragraph 29; See also Usmanov v Council, paragraphs 103, 105.

26 Usmanov v Council, paragraph 104.

27 See Article 3(1)(d) of Regulation (EU) 269/2014.

28 Usmanov v Council, paragraph 104.

29 Usmanov v Council, paragraph 102.

30 Usmanov v Council, paragraph 141.

31 Rotenberg v Council, paragraph 84.

32 Rotenberg v Council, paragraph 78; Usmanov v Council, paragraph 145 et al.

33 Shulgin v Council, paragraph 56.

34 Judgment of 6 September 2023, Galina Pumpyanskaya v Council, T-272/22, not published, EU: T:2023:491, paragraph 38.

is unlawful. In the Shulgin case, the EGC stated: the EU Council cannot presume the applicant's status as an influential businessman in the relevant sectors of the economy simply because the applicant was previously the CEO of the Ozon Group, since his position cannot be "frozen", since this would deprive the procedure for periodic review of sanctions of any meaning[35]. By similar logic, due to the loss of the status of leading businessman, the extension of sanctions was recognized as unlawful in relation to A. Pumpyansky.

Equally important, EGC defined the concept of a leading businessperson:what is meant is any significant businessman who tops the list of the richest businessmen in Russia or who, although not topping such a list, can be called such, in particular, due to the size of his capital or his functions in one or more large enterprises[36].

Thus, the presented analysis shows that challenging sanctions in court is a complex process and rarely successful even with large resources. Those successful cases that exist are united by the fact that the reasons for introducing restrictions have simply disappeared, but nothing more.

It is pointless to discuss any deep legal logic here, since in many ways sanctions are simply an instrument of the executive power.**However, judicial practice in this This area is only just emerging, as can be seen in the example of the UK, and it is possible that in the future the courts and executive bodies will take a more thoughtful approach to the reasons and supporting evidence that form the basis for imposing or lifting restrictive measures.**

35 Shulgin v Council, paragraph 118.

36 Ibid., paragraphs 74–76.