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Sanctioning the sins of the father – has the ECJ got it right in Tay Za?

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Following up on the article in February 2012's edition of Money Laundering Bulletin [1], **Andrew Katzen** and **Nicholas Querée** of Hickman & Rose analyse the judgment of the European Court of Justice in *Pye Phyo Tay Za v Council of the European Union*. Has it struck the proper balance between ensuring financial sanctions are effective whilst providing sufficient rights to challenge for those wrongfully affected?

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Context

The Grand Chamber of the European Court of Justice (ECJ) gave judgment in the case of *Pye Phyo Tay Za v Council of the European Union C-576/10P* on 13 March 2012, finding for Mr Tay Za in ordering the unfreezing of his assets. They were frozen for nearly ten years under EU financial sanctions against Burma. This was on the basis that he benefitted from the Myanmar regime due to his father's connections with the military leaders. Mr Tay Za senior is, according to the US Treasury, "an arms dealer and financial henchman of Burma's repressive junta" - allegations that he completely denies. Tay Za senior is considered to be one of the country's richest businesspeople, the owner of the Htoo Group, which the *Financial Times* cites as having interests in timber, tourism (including a chain of 17 luxury hotels and a private airline), construction and gemstones. According to *Forbes*, in

2011, the Htoo Group was quoted as having annual revenues of US\$500 million. Both Mr Tay Za junior and his father were the subject of restrictive measures from 2003. The son was aged 16 at the time and, for a number of years was living with his mother in Singapore, apparently estranged from his father.

Since 28 October 1996, due to concerns about serious human rights violations and lack of democracy, a number of sanctions, some of them financial, have been imposed by the EU against individual members of the Burmese Government and those associated with them. The European Council's powers to do so emanate from Articles 60 and 301 EC. As time went by, further measures were incrementally introduced by to put pressure on those in power to change. These included Commission Regulation (EC) no. 2297/2003, which affected both father and son in this case as persons "associated" with the Government of Burma/Myanmar.

The Regulation contested in this case, in force from 10 March 2008, listed both Messrs Tay Za as "persons who benefit from government economic policies and other persons associated with the regime" (Commission Regulation (EC) No 385/2008 Annex VI). In the notice published by the European Council setting out the restrictions implemented, it stated that "[t]he persons and entities concerned may submit at any time a request to the Council, together with any supporting documentation, that the decision to include and maintain them on the lists referred to... should be reconsidered..."

On 15 May 2008, Mr Tay Za Junior wrote to the Council asking for his removal from the list and requesting the facts justifying his inclusion. The following day he lodged an application with the Registry of the General Court seeking annulment of the contested regulation insofar as it affected him.

The case in the General Court

Pye Phyo Tay Za put forward a number of submissions to the General Court including the absence of a lawful basis for the contested regulation, infringement of the duty to state reasons, of the right to a

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fair hearing, of the right to effective judicial protection and of the right to property, breach of the principle of proportionality and of the principles of law deriving from the criminal law nature of the imposition of the asset freeze and breach of the principle of legal certainty.

It was contended that Pye Phyo could not be considered to be “associated with” the regime as required by articles 60 and 301 EC and interpreting ECJ case law (*Kadi and Al Barakaat International Foundation v Council and Commission* C-402/05P and C-415/05P).

In dismissing this argument, the General Court held that an inference could be drawn that family members of those associated with the regime did themselves benefit from its economic policies: “As regards family members of such leading business figures, it may be presumed that they benefit from the functions exercised by those businessmen, so that there is nothing to prevent the conclusion that such family members also benefit from the economic policies of the government.” (Judgment of the General Court on 19 May 2011, case T-181/08)

This presumption could be rebutted but the applicant had failed to do so. He had not established that he had “disassociated” from his father.

The General Court proceeded to dismiss Pye Phyo’s remaining arguments, those that centred on the absence of procedural safeguards and proportionality.

Pye Phyo appealed to the ECJ. The Council, supported by the European Commission and the UK, opposed the appeal.

The Appeal to the ECJ

Pye Phyo had four grounds of appeal. The first was that there no proper legal basis to freeze his assets. He again argued that there was insufficient connection between him and the government to properly form a presumption that he benefitted from its policies – this was solely based on him being a member of a family in which his father was deemed to be a beneficiary. It was this argument that the ECJ exclusively considered. The Court only ruled on this point and not on any other issues raised.

The Court ruled that (following its decision in *Kadi*) restrictive measures of this type must be directed only, in relation to natural persons, against the leaders of the country concerned and the persons associated with them. This was to ensure “a sufficient link between the persons concerned and the third country targeted by the restrictive measures adopted by the European Union, precluding too broad an interpretation of Articles 60 EC and 301 EC” (see paragraph 64 of the Court’s judgment).

The Court of Justice held that the General Court had gone too far by extending the category of natural persons who may be subject to targeted restrictive measures to family members of leading business figures: “The application of such measures to natural persons on the sole ground of their family connection with persons associated with the leaders of the third country concerned, irrespective of the personal conduct of such natural persons, is at variance with the Court’s case law” (paragraph 66).

The Court also found, at paragraph 69, that it was “not easy to establish a link, even an indirect link, between the absence of progress towards democratisation and the continuing violation of human rights in Myanmar... the reasons which led to the adoption of the regulation, and the conduct of the family members of those in charge of businesses”.

Finally, at paragraph 70, the Court determined that “a measure to freeze funds and economic resources belonging to the appellant could have been adopted... only in reliance upon precise, concrete evidence which would have enabled it to be established that the appellant benefits from the economic policies of the leaders of the Republic of the Union of Myanmar.”

Having found that the contested provisions had no legal basis, the Court decided not to deal the other grounds of appeal at all. This was despite the lengthy and detailed opinion of the Advocate General Mengozzi discussed in the previous article. It will be recalled that the Advocate General upheld some of the other issues raised by the appellant, considering that there was merit in the need for certain procedural rights for those subject to targeted economic sanctions: prior notification, a statement of reasons for inclusion citing some evidence, and a right of reply. None of these matters was addressed by the Court at all.

Conclusion

Following the judgment, Pye Phyo Tay Za’s solicitor, Guy Martin of Carter-Ruck, said: “Phyo Tay Za is delighted with the ECJ’s ruling in his favour. He felt that it was a very unattractive if not inhuman proposition to put pressure on his father by imposing sanctions solely through him being related to him as his son.”

However, as the political scene in Burma appears to shift so the EU has been quick to recognise this by suspending the majority of its package of economic sanctions. This was announced on 23 April 2012, only a few weeks after judgment was given in the Tay Za case, possibly rendering it obsolete to the appellant and his family. Yet, whatever the significance of this case to them and even to those seeking democracy in Burma, it could be argued that this was an opportunity missed by the ECJ. Economic sanctions may be useful weapons in making a stand against “rogue states” and, for their

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effective implementation, it is recognised that those affected may attempt to evade them by putting assets out of reach. As the EU tries to tackle human rights abuses, terrorism and nuclear proliferation by imposing financial sanctions, it could be argued that if the policy is to maintain credibility there have to be rights of due process afforded to properly challenge them. Here was a chance for the Grand Chamber to set out some much needed guidance for the Council, the Commission, member states, third party countries, companies and individuals affected by sanctions. Authority on these principles ought to be established to help direct the conveyor belt of future cases challenging economic sanctions going through the European Court system. As it is we are left with a judgment given in almost the narrowest possible margin, making further litigation almost inevitable. It seems that the sins of the fathers may continue to be visited on their children for some time yet.

Notes

1. <http://www.moneylaunderingbulletin.com/sanctions/nice-as-pye--eu-sanctions-and-the-right-of-reply-50357.htm>

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