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The man in “entry 36”: legitimate expectations, legal certainty and economic sanctions.

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Introduction

This post concerns a question which ought to be of concern to all who practise in or study EU law: does the EU administrative law acquis provide the Union’s courts with the tools they need to supervise the exercise of Union power across a range of competences which were simply not in contemplation at the time the acquis was developed? There are two prompts for this post.

The first prompt is Joana Mendes’ recent [\(European Constitutional Law Review, 2022;18\(4\):706-736\)](#) and persuasive demonstration of how the current EU administrative law acquis grew up as a result of a “*sympiosis of judicial and scholarly developments*” in the pre-Maastricht era. The result was that, by the late 1980s there was a consensus that the subjugation of EU institutions to administrative law constraints (as then understood and theorised) had become “*an essential aspect of the EC’s legitimacy*”. Mendes argues (again persuasively) that this consensus and the principles which underlay it were the product of (amongst other things) the “*institutional and legal reality*” of what was then the European Community – i.e. “*a functional polity whose interventionist institutional and decision-making structures were created for the establishment and functioning of a common market*”. Mendes concludes by urging scholarly (and, perhaps, judicial) “*self-reflection*” as to whether this framework for analysis remains “*fit for purpose*” in an EU with competences far beyond what those pioneering scholars and jurists had conceived of.

The second prompt is the General Court's recent decision in [Case T-426/21 *Nizar Assaad v Council*](#) [ECLI:EU:T:2023:114](#). Here, the Court was asked to apply two core components of the administrative law *acquis* (the principles legitimate expectation and legal certainty) in a context which would have been inconceivable to the Court at the time the underlying legal principles were developed - targeted economic sanctions introduced to further a foreign policy objective of the Union as a whole. The *Assaad* decision provides an opportunity for reflection of the type urged by Mendes and, it is argued, indicates that the Court is capable standing back and interrogating the principles which underlay the early decisions establishing the EU administrative law framework, and how they ought to apply in the much changed context of the Union activity in the Lisbon era.

Background to the *Assaad* case

The Applicant in the *Nizar Assaad* case was Mr Nizar Assaad, a dual citizen of Canada and Syria. Mr Assaad was a prominent businessman who resided in Syria until the uprising in 2011 when he left and relocated to Beirut and Dubai. As will become apparent, Mr Assaad was never involved in politics and had no connection to the Syrian regime. Mr Assaad's business interests from 2000 onwards were largely outside Syria, and he had no business connections in Syria at all following the 2011 uprising. Rather, he had the ill-fortune to have a surname which bore (in English transliteration) a passing similarity to that of the Syrian president Bashar al-Assad.

The story begins in August 2011 when the Council added an individual identified as "Nizar Al-Assaad" as "entry 36" to the list of those subject to the EU's Syrian sanctions regime, which is set out in Annex II to [Regulation \(EU\) No 36/2012](#) concerning restrictive measures in view of the situation in Syria. The Applicant knew that entry 36 could not relate to him as he had not done any of the things suggested in the accompanying reasons, nor did he satisfy any of the listing criteria. However, since the Council had (it might be said, in dereliction of its duty to list individuals in compliance with the principle of legal certainty) given no identifying information, there was a real risk that third parties would conclude that he was the person listed at entry 36. Unsurprisingly, this was of the utmost concern to the Applicant, not least because he risked the severe reputational impact of third parties misapprehending that he was associated with President Assad's regime. Furthermore, there was a risk that third parties would (wrongly) conclude that he was subject to the strictures of the sanctions regime, including the far-reaching consequences of a complete EU wide freezing of all his assets and economic resources and of being prevented from entering or travelling through any EU Member State.

The Applicant's representatives tried repeatedly to contact the Council with a view to clarification, but to no avail. The Applicant then brought an application for annulment in respect of entry 36, on the basis that he was self-evidently not the person referred to. The

Council did not dispute this. Rather, the Council wrote to the Applicant confirming that "*the targeted person is President Al-Assad's cousin*" and that the Applicant was "*not the subject of the listing*", although he has a "*similar name*". Entry 36 was clarified, and the General Court concluded that the annulment application was inadmissible as the Applicant was not the addressee of the measure: [Assaad v Council](#) (T-550/11, not published, EU:T:2012:266).

There the story should have ended. Indeed, there was every indication that it would. For the subsequent decade, whenever there was any confusion as to who was identified in entry 36, the Council made clear that it was not the Applicant. Occasionally, this confusion was the result of administrative errors by the Council. While this was a matter of unneeded stress and inconvenience to the Applicant, the Council always responded by making clear that the Applicant was not the man referred to in entry 36.

Against that background (and at the risk of understatement), it was a matter of surprise to the Applicant when in February 2021 the Council wrote to him maintaining that, contrary to everything it had said to him, the Court, and the world at large over the previous decade, the Council had decided that he was in fact been the person who had been listed since 2011. Furthermore, the Council asserted that it was "maintaining" his listing, and that it would be amending the published statement of reasons to make this clear.

The application for annulment

The Applicant immediately brought an application for annulment, the primary ground being that the Council had made a manifest error of assessment. The Applicant established that he was not a person to whom the Syrian sanctions regime could apply: he was not associated with the Syrian regime, did not have any ties (professional or personal) to either President Assad's family or the Makhoul family and did not have business interests in Syria at all (still less in a prominent capacity). The Court [agreed](#), and annulled the listing on the basis that it could not be supported in fact (even given the very large margin that the Court accords to the Council in such matters).

The Court did not, however, let matters rest there. The Court went on to find that the Council's conduct had been breach of the applicant's legitimate expectations and of the related principle of legal certainty. It is the Court's approach to these issues which presents an opportunity for reflection of the kind urged by Mendes.

Assessment of the Court's approach

As Mendes notes the principles of legitimate expectation came to form part of the corpus of EU administrative law as a result of the "transplanting" into EU law of principles deriving from the domestic administrative law of member states. Following that transplant, the

underlying EU legal principles of legitimate expectation were settled in a line of pre-Maastricht decisions which establish that, where a Union institution considers that it has adopted an "*incorrect position*", it will be permitted to resile from that position within a reasonable period, but only where that would not frustrate the legitimate expectations of the individual concerned (or those of third parties) who had been led to rely on the lawfulness of their conduct. Where a Union institution "*finds that a measure which it has just adopted is tainted by illegality*" it will have a right to withdraw that only "*within a reasonable period*". Even then "*that right may be restricted by the need to fulfil the legitimate expectations of a beneficiary of the measure, who has been led to rely on the lawfulness thereof*": [Case C-365/89 Cargill v Produktschap voor Margarine, Vetten en Oliën](#) paragraph 18, citing [Case 14/81 Alpha Steel v Commission](#).

All very well in circumstances where the contested act concerned steel quotas ([Alpha Steel](#)) or agricultural subsidies to a legal person ([Cargill](#)). But how does the principle apply where the Union contends that it was previously mistaken as to a matter as serious as whether the Applicant was a supporter or beneficiary of the Syrian regime who is to be treated as, in effect, *persona non grata*? Does one apply the same approach? Does one give the Council a greater freedom to correct what it contends are errors? Does one weigh the interests of the affected individual differently?

Returning to the *Nizar Assaad* case, the Council (for its part) denied that there was any retrospectivity at all. The Council's argument was that because economic sanctions operated only prospectively, there could be no question of retrospectivity. In their telling, it was only if the contested measure could be said to have retrospective economic consequences that the principle would bite. One can see the logic of the Council's position, having regard to the circumstances of the (pre-Maastricht) cases which established this principle.

The Court's reasons, however, evince a sensitivity to the quite different context of the case before them, and in particular what one might call the human context of the contested measure. This is evident in the terms in which the Court rejected the Council's restrictive approach, concluding that while it was "*true that, in principle, the funds of a person or entity may be frozen only for the future*", this was not a principled answer to the Applicant's claim. Accordingly the Court went on (at para 198) to hold that "*confining the effects of the 2021 measures solely to the freezing of the applicant's funds and economic resources, or to restrictions on admission to the territory of the Member States, wrongly disregards the effects which the adoption of those measures has had on the applicant's overall legal situation and, in particular, on his reputation and integrity*". This was undoubtedly correct – as the Court went on to explain at para 200: "*in establishing, by means of the 2021 measures, that the applicant's name has been included on the lists at issue since the 2011 measures, the Council asserts that, since that date, the applicant has had links with the*

Syrian regime and has carried out the various acts which justified his name being entered on the lists at issue and retained since then. Such an assertion is sufficient to alter retroactively the applicant's legal situation, quite beyond the freezing of his funds alone."

The same sensitivity is evident in the Court's treatment of the Council's alternative submission, which was that any retrospectivity or frustration of the Applicant's legitimate expectations could be justified by reference to the Council's objectives. Again, the objectives relied upon ("consolidating and supporting human rights and international humanitarian law") were of a nature far removed from the economic context in which the Court's general principles were settled. The Court accepted that correction of errors in sanctioning measures could contribute to this aim, and that this was in the general interest (para 219). Nevertheless, the Court concluded that the Council "*failed to have due regard for the applicant's legitimate expectations by adopting restrictive measures with retroactive effect against him*" (para 241). Here, again, the Court demonstrated an acute awareness of the human situation before it, reasoning (at para 246) that the Council's error correction prerogative was "*subject to limits, namely observance of the principle of the protection of legitimate expectations*", cautioning that "*the compliance with which is all the more important*" in the sanctions context "*since the consequences for the legal situation of the persons and entities concerned by the restrictive measures are not insignificant*". The Court's assessment, like the author's above, might, perhaps be accused of understatement.

Conclusion

Standing back, the Court's approach in the instant case is – it is suggested – an instance of the kind of self-reflection urged by Mendes. Faced with a situation far removed from that considered in the leading authorities, the Court stood back and interrogated what principles underlay those decisions, and how they ought to apply in the much changed context of the Union activity in issue in the particular case before it. To return to one of Mendes' themes, such introspection (judicial and scholarly) is not only welcome, but also essential to the continued legitimacy of the EU legal order.