Neutral Citation Number: [2015] EWHC 248 (Admin)

Case No: CO/5379/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2015

Before :

LORD JUSTICE BEATSON AND MR JUSTICE GREEN

- -

Between :

The Queen on the application of OJSC Rosneft Oil Company	**Claimant**
- and -	
Her Majesty's Treasury	**1st Defendant**
- and -	
Secretary of State for Business, Innovation & Skills	**2nd Defendant**
- and -	
The Financial Conduct Authority	**3rd Defendant**

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- -

Pushpinder Saini QC, Patrick Dunn-Walsh and **Sarah Tulip** (instructed by **Joseph Hage Aaronson LLP**) for the **Claimant**
Tim Ward QC, Gerry Facenna and **Julianne Morrison** (instructed by **The Treasury Solicitor**) for the **1st and 2nd Defendants**
Sonia Tolaney QC and **Jamie McClelland** (instructed by **Kingsley Napley**) for the **3rd Defendant**

Hearing dates: 27th and 29th January 2015

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Approved Judgment

Mr Justice Green:

A. Introduction

1. This is the judgment of the Court. In it we set out the reasons which have led us to make a reference to the Court of Justice of the European Union ("CJEU") of the Questions which are set out in the Schedule to this Judgment. We have also taken the chance to set out certain provisional views and observations about the issues arising.

2. The Claimant, OJSC Rosneft Oil Company ("Rosneft" or "the Claimant"), is a company incorporated in Russia. It specialises in oil and gas. The majority of its shares (69.5%) are owned by OJSC Rosneftegaz, an organisation owned by the Russian State. A minority of its shares (19.75%) are owned by BP Russian Investments Ltd., a subsidiary of BP plc, the British oil company. The residual 10.75% of the issued share capital is publicly traded. The activities of the Claimant, and its group companies, include hydrocarbon exploration and production, upstream offshore projects, hydrocarbon refining and crude oil, gas and product marketing in Russia and abroad. It conducts its exploration and production activities in the key hydrocarbon provinces of Russia including West Siberia, Southern and Central Russia, Timan-Pechora, East Siberia, the Far East, and the Russian Continental Shelf. The Claimant conducts geological exploration both independently but also as part of joint ventures with Russian and foreign partners. Its exploration activities include operations in waters deeper than 150 metres and in shale formations.

3. The First and Second Defendants (Her Majesty's Treasury, and the Secretary of State for Business, Innovation and Skills respectively) are the authorities within the United Kingdom responsible for implementation of the EU legislation which imposes sanctions on the Russian Federation in response to that country's actions in Ukraine.

4. The Third Defendant, the Financial Conduct Authority ("FCA"), is not the competent authority within the United Kingdom responsible for ensuring compliance with the EU sanctions legislation. The FCA is, however, bound by the relevant EU legislation and has to consider its effect upon its own statutory duties and objectives. The FCA has explained to the Court that it is not its role to "police" the EU legislation. Should it, however, appear that there is a risk that prohibited securities would be issued and that this would risk adversely affecting the integrity of the markets regulated by the FCA or consumer protection, the FCA would be required to consider what, if any, action it should take to pre-empt or address that risk. Accordingly, it has an immediate concern in a number of the issues raised by the Claimant.

5. In this litigation launched on 20 November 2014, the Claimant challenges certain measures adopted by the United Kingdom authorities to give effect to aspects of Council Regulation (EU) 833/2014 as amended by Council Regulation (EU) 960/2014 and Council Regulation 1290/2014 ("the Regulation") and other measures of EU law giving rise to the sanctions measures. The challenge is also as to these measures of EU law. On 9 October 2014, it had brought an application for annulment against the relevant EU Regulations which is pending before the General Court. The proceedings were last before this Court on 27 November 2014 when (see [2014] EWHC 4002 (Admin)) an action for interim relief was rejected by Beatson LJ and Simon J: but an expedited hearing was ordered.

6. The contested measures form components of a series of progressively escalating sanctions measures the express objective of which is to respond to, and condemn, the conduct of the Russian Federation in relation to Ukraine.

7. On 6th March 2014 the Heads of State or Government of the Union's Member States ("the States") strongly condemned what it later described as the "*unprovoked violation of Ukrainian sovereignty and territorial integrity by the Russian Federation*". The States called upon the Russian Federation immediately to withdraw its armed forces to the areas of their permanent stationing, in accordance with relevant agreements. The States also decided to suspend bilateral talks with the Russian Federation on visa matters and on a new comprehensive agreement which would have replaced the existing Partnership and Cooperation Agreement ("the Partnership Agreement"). However, the States underlined that in their view a solution to the crisis should be found through negotiation between the Governments of Ukraine and the Russian Federation.

8. It was decided that in the circumstances travel restrictions and a freeze upon assets should be imposed upon persons responsible for actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine: See recitals (1)-(4) of Council Decision 2014/145/CFSP of 17th March 2014.

9. In order to implement that decision the Council of Ministers, on 17th March 2014, adopted Council Regulation 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. This imposed travel restrictions and froze the funds and other economic resources of certain persons listed in Annex I to the Regulation whom it was considered were responsible for threatening or undermining the territorial sovereignty and independence of Ukraine.

10. On 31st July 2014, in response to the belief that the Russian Federation had failed to respond to EU demands, and to a continued undermining of the territorial integrity, sovereignty and independence of Ukraine the Council imposed "*a package of further significant restrictive measures*". Council Decision 2104/512/CFSP of 31st July 2014 provided, in recitals (7)-(12):

> "(7) In addition, the Council recalled the previous commitments by the European Council and expressed readiness to introduce without delay a package of further significant restrictive measures if full and immediate cooperation from Russia on the abovementioned demands failed to materialise. The Council requested the Commission and the EEAS to finalise their preparatory work on possible targeted measures and to present by 24 July proposals for taking action, including on access to capital markets, defence, dual-use goods, and sensitive technologies, including in the energy sector.
>
> (8) In view of the gravity of the situation, the Council considers it appropriate to take restrictive measures in response to Russia's actions destabilising the situation in Ukraine.

> (9) In this context, it is appropriate to prohibit transactions in or the provision of financing or investment services or dealing in new bonds or equity or similar financial instruments with a maturity exceeding 90 days issued by State-owned Russian financial institutions, excluding Russia-based institutions with international status established by intergovernmental agreements with Russia as one of the shareholders. These prohibitions do not affect the granting of loans to or by those state-owned Russian financial institutions independently of their maturity.
>
> (10) In addition, Member States should prohibit the sale, supply, transfer or export to Russia of arms and related material of all types. The procurement from Russia of arms and related material of all types should also be prohibited.
>
> (11) Furthermore, the sale, supply, transfer or export of dual-use items for military use or to military end-users in Russia should be prohibited. This prohibition should not affect the exports of dual-use goods and technology, including for aeronautics and for the space industry, for non-military use and/or for non-military end-users.
>
> (12) The sale, supply, transfer or export of certain sensitive goods and technology should be prohibited when they are destined for deep water oil exploration and production, arctic oil exploration and production or shale oil projects".

11. The Council implemented this Decision by Council Regulation 833/2014. Article 3 provided, so far as is relevant, as follows:

> "Article 3
>
> 1. A prior authorisation shall be required for the sale, supply, transfer or export, directly or indirectly, of technologies as listed in Annex II, whether or not originating in the Union, to any natural or legal person, entity or body in Russia or in any other country, if such equipment or technology is for use in Russia.
>
> 2. …
>
> 3. Annex II shall include certain technologies suited to the oil industry for use in deep water oil exploration and production, Arctic oil exploration and production, or shale oil projects in Russia.
>
> 4. …
>
> 5. The competent authorities shall not grant any authorisations for any sale, supply, transfer or export of the technologies

> included in Annex II, if they have reasonable grounds to determine that the sale, supply, transfer or export of the technologies is for projects pertaining to deep water oil exploration and production, Arctic oil exploration and production, or shale oil projects in Russia".

12. On 8th September 2014 these sanctions were further extended following the adoption by the Council of Decision 2014/659/CFSP. The recitals to this measure record that on 30th August 2014 the Council condemned the increasing inflows of soldiers and weapons from the territory of the Russian Federation into Eastern Ukraine and the aggression of Russian armed forces on Ukrainian soil. At this point in time the Council commenced preparatory work to enable further sanctions to be adopted if and in so far as the "*situation on the ground*" so demanded. In view however of the worsening gravity of the situation the Council subsequently decided to adopt further restrictive measures. Accordingly, Regulation 833/2014 was amended. Recital (5) of the Decision provides:

> "[I]t is appropriate to extend the prohibition in relation to certain financial instruments. Additional restrictions on access to the capital market should be imposed in relation to … certain Russian entities whose main business is the sale or transportation of oil".

13. The amending Regulation, Regulation 960/2014, extended existing prohibitions on EU nationals: (i) engaged in various activities connected with Russian oil exploration projects; (ii) entering commercial transactions with specified Russian military companies; and (iii), facilitating, or providing financial services or assistance in relation to capital raising initiatives by a number of Russian entities.

14. Further details relating to these prohibitions were introduced by Council Regulation 1290/2014 on 4th December 2014.

15. Article 3 of Regulation 833/2014 was amended. The full amended terms of Article 3 were, now, in the following terms:

> "1. A prior authorisation shall be required for the sale, supply, transfer or export, directly or indirectly, of items as listed in Annex II, whether or not originating in the Union, to any natural or legal person, entity or body in Russia, including its Exclusive Economic Zone and Continental Shelf or in any other State, if such items are for use in Russia, including its Exclusive Economic Zone and Continental Shelf.
>
> 2. For all sales, supplies, transfers or exports for which an authorisation is required under this Article, such authorisation shall be granted by the competent authorities of the Member State where the exporter is established and shall be in accordance with the detailed rules laid down in Article 11 of Regulation (EC) No 428/2009. The authorisation shall be valid throughout the Union.

> 3. Annex II shall include certain items suited to the following categories of exploration and production projects in Russia, including its Exclusive Economic Zone and Continental Shelf:
>
> (a) oil exploration and production in waters deeper than 150 metres;
>
> (b) oil exploration and production in the offshore area north of the Arctic Circle; or
>
> (c) projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing; it does not apply to exploration and production through shale formations to locate or extract oil from non-shale reservoirs.
>
> 4. Exporters shall supply the competent authorities with all relevant information required for their application for an export authorisation.
>
> 5. The competent authorities shall not grant any authorisation for any sale, supply, transfer or export of the items included in Annex II, if they have reasonable grounds to determine that the sale, supply, transfer or export of the items are destined for any of the categories of exploration and production projects referred to in paragraph 3.
>
> The competent authorities may, however, grant an authorisation where the sale, supply, transfer or export concerns the execution of an obligation arising from a contract concluded before 1 August 2014, or ancillary contracts necessary for the execution of such a contract.
>
> The competent authorities may also grant an authorisation where the sale, supply, transfer or export of the items is necessary for the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health and safety or the environment. In duly justified cases of emergency, the sale, supply, transfer or export may proceed without prior authorisation, provided that the exporter notifies the competent authority within five working days after the sale, supply, transfer or export has taken place, providing detail about the relevant justification for the sale, supply, transfer or export without prior authorisation".

16. Regulation 1290/2014 also replaced Article 3a of Regulation 833/2014. The new, amended, terms were now:

> "1. It shall be prohibited to provide, directly or indirectly, associated services necessary for the following categories of

exploration and production projects in Russia, including its Exclusive Economic Zone and Continental Shelf:

(a) oil exploration and production in waters deeper than 150 metres;

(b) oil exploration and production in the offshore area north of the Arctic Circle; or

(c) projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing; it does not apply to exploration and production through shale formations to locate or extract oil from non-shale reservoirs.

For the purpose of this paragraph, associated services shall mean:

(i) drilling;

(ii) well testing;

(iii) logging and completion services;

(iv) supply of specialised floating vessels.

2. The prohibitions in paragraph 1 shall be without prejudice to the execution of an obligation arising from a contract or a framework agreement concluded before 12 September 2014 or ancillary contracts necessary for the execution of such a contract.

3. The prohibitions in paragraph 1 shall not apply where the services in question are necessary for the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health and safety or the environment.

The service provider shall notify the competent authority within five working days of any activity undertaken pursuant to this paragraph, providing detail about the relevant justification for the sale, supply, transfer or export".

17. Regulation 1290/2014 also amended Article 4(3) of Regulation 833/2014. The new text now reads, as follows:

"3. The provision of the following shall be subject to an authorisation from the competent authority concerned:

(a) technical assistance or brokering services related to items listed in Annex II and to the provision, manufacture, maintenance and use

> of those items, directly or indirectly, to any natural or legal person, entity or body in Russia, including its Exclusive Economic Zone and Continental Shelf or, if such assistance concerns items for use in Russia, including its Exclusive Economic Zone and Continental Shelf, to any person, entity or body in any other State;
>
> (b) financing or financial assistance related to items referred to in Annex II, including in particular grants, loans and export credit insurance, for any sale, supply, transfer or export of those items, or for any provision of related technical assistance, directly or indirectly, to any natural or legal person, entity or body in Russia, including its Exclusive Economic Zone and Continental Shelf or, if such assistance concerns items for use in Russia, including its Exclusive Economic Zone and Continental Shelf, to any person, entity or body in any other State.
>
> In duly justified cases of emergency referred to in Article 3(5), the provision of services referred to in this paragraph may proceed without prior authorisation, on condition that the provider notifies the competent authority within five working days after the provision of services".

18. Annex II to Regulation 833/2014 listed a number of technologies related to the extraction and transportation of oil such as pipes, tubes and drilling platforms.

19. Pursuant to Article 8 of Regulation 833/2014 Member States were required to lay down the rules on "*penalties applicable to infringements*" of the Regulation and to take all measures necessary to ensure their implementation. It provided that the penalties for violation should be "*effective, proportionate and dissuasive*".

20. In the United Kingdom four specific measures have been adopted which have been made the subject of the application for judicial review. These include a statutory instrument made by HM Treasury (the First Defendant) which creates criminal offences in the United Kingdom for violation of the provisions of the Regulation relating to financial services. The implementing measures also include a statutory instrument made by the Secretary of State for Business, Innovation and Skills (the Second Defendant) which creates criminal offences in the United Kingdom for violation of (*inter alia*) the provisions of the Regulation relating to oil and related restrictions.

21. In addition the challenge before the domestic court is also to the published guidance issued by the Second Defendant concerning the interpretation of the expression "financial assistance".

22. Finally, the challenge is also made to the statements made by the FCA (the Third Defendant), in relation to the application of Article 5(2) of Regulation 833/2014 concerning newly issued transferable securities in the form of Global Depository Receipts ("GDRs") which are issued in respect of Rosneft shares and which are listed on the Official List and traded on the London Stock Exchange. Article 5 of Regulation 833/2014 as amended by Council Regulation 960/2014 directly applies to Rosneft by virtue of Annex VI thereto which specifies the company amongst the list of persons, entities and bodies referred to in Article 5(2)(b). Article 5(1)-(3) is in the following terms:

> "Article 5
>
> 1. It shall be prohibited to directly or indirectly purchase, sell, provide investment services for or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments with a maturity exceeding 90 days, issued after 1 August 2014 to 12 September 2014, or with a maturity exceeding 30 days, issued after 12 September 2014 by:
>
> (a) a major credit institution, or other major institution having an explicit mandate to promote competitiveness of the Russian economy, its diversification and encouragement of investment, established in Russia with over 50 % public ownership or control as of 1 August 2014, as listed in Annex III; or
>
> (b) a legal person, entity or body established outside the Union whose proprietary rights are directly or indirectly owned for more than 50 % by an entity listed in Annex III; or
>
> (c) a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (b) of this paragraph or listed in Annex III.
>
> 2. It shall be prohibited to directly or indirectly purchase, sell, provide investment services for or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments with a maturity exceeding 30 days, issued after 12 September 2014 by:
>
> (a) a legal person, entity or body established in Russia predominantly engaged and with major activities in the conception, production, sales or export of military equipment or services, as listed in Annex V, except legal persons, entities or bodies active in the space

> or the nuclear energy sectors;
>
> (b) a legal person, entity or body established in Russia, which are publicly controlled or with over 50 % public ownership and having estimated total assets of over 1 trillion Russian Roubles and whose estimated revenues originate for at least 50 % from the sale or transportation of crude oil or petroleum products, as listed in Annex VI;
>
> (c) a legal person, entity or body established outside the Union whose proprietary rights are directly or indirectly owned for more than 50 % by an entity listed in point (a) or (b) of this paragraph; or
>
> (d) a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a), (b) or (c) of this paragraph.
>
> 3. It shall be prohibited to directly or indirectly make or be part of any arrangement to make new loans or credit with a maturity exceeding 30 days to any legal person, entity or body referred to in paragraph 1 or 2, after 12 September 2014 except for loans or credit that have a specific and documented objective to provide financing for non-prohibited imports or exports of goods and non-financial services between the Union and Russia or for loans that have a specific and documented objective to provide emergency funding to meet solvency and liquidity criteria for legal persons established in the Union, whose proprietary rights are owned for more than 50 % by any entity referred to in Annex III".

23. The implementing legislation in the United Kingdom, in substance, makes it a criminal offence (subject to a limited defence), to breach Article 5(1)-(3) of the Regulation.

B. The questions referred to the Court of Justice of the European Union

24. In the Schedule to this judgment the Court has set out the questions which it has referred to the CJEU. In the text below we set out the reasons which have led us to the conclusion that a reference is appropriate.

25. We start by expressing our conclusion that answers to the questions are necessary to enable this Court, ultimately, to decide the Claimant's application for judicial review. The present application for judicial review includes a challenge to the legality of the relevant EU Regulations. This Court does not have the power to declare those Regulations invalid. We have the power to conclude that there are no grounds for concluding that the measures are invalid; however, if we have doubts we have the

jurisdiction to refer the question of validity to the CJEU: See, for example, Case 314/85 *R Firma Foto Frost v Hauptzollamt Lubeck-Ost* [1987] ECR 4199. We have also had regard to the guidance provided by the CJEU in Case C-344/98 *Master Foods Limited v HB Ice Cream Limited* [2000] ECR I-11369 at paragraphs [54]-[55].

26. We have referred to the application for annulment brought by the Claimant against the relevant Regulation now pending before the General Court. At the hearing before us, we received argument as to whether it is appropriate for us to make a reference to the CJEU notwithstanding that pending application for annulment. This is a matter that we have taken into consideration: see [28] ff, and [36].

27. For the four main reasons that we set out below we have come to the conclusion that a reference of questions relating to all of the issues which are before the High Court is, in the somewhat unusual circumstances of this case, appropriate. Our reasons are as follows.

28. First, the Court recognises that in circumstances where an application for annulment is ongoing before the General Court there may be good reason for the national court to await the outcome of those proceedings in order to determine whether the judgment of the General Court determines the issues before the national court. However, this is not an absolute rule and there are also circumstances where it remains appropriate to make a reference to the CJEU which will proceed at the same time as the annulment proceedings before the General Court.

29. Before us, arguments were advanced comparing and contrasting (a) the amount of time which normally elapses from the commencement of an application to the General Court for annulment to judgment, and thereafter to the outcome of any appeal to the CJEU, with, (b) the amount of time normally elapsing for the CJEU to resolve a reference from a national court. In the present case, for reasons that we set out below, we do not consider that questions relating to timing bear upon the issue as to whether we should make a reference. We are conscious that in applications for the annulment of Regulations relating to the imposition of sanctions the General Court has, in recent years, acted with some considerable speed. Statistics placed before the High Court show that the General Court can resolve such applications within 12-18 months and in sanctions cases has generally done so in the last two/three years. It was also pointed out to us that in only a relatively modest percentage of cases where, in principle, an appeal may lie to the CJEU, does an actual appeal take place. Equally, data was put before us to demonstrate that the CJEU is resolving references in approximately 16-18 months.

30. The reason that we consider that a reference is necessary of all issues is that although, as we explain below, we have views as to the merits of a number of the Claimant's arguments, we cannot be confident that the same conclusions would be arrived at by all courts across the EU and we are conscious that already there are differences of view on some key issues between the competent authorities of the different Member States.

31. In a case such as the present, we consider it to be of real importance for there to be consistency and uniformity of application of the provisions of the sanctions regime. HM Treasury and the Secretary of State have, quite properly, brought to our attention that there is a difference of view as to the meaning properly to be attributed to certain

provisions of the Regulation amongst the competent authorities of the different Member States. We set out below paragraphs [6] – [9] of the Witness Statement of Mr Christopher Chew who is Head of Policy within the Export Control Organisation of the Second Defendant. His role involves responsibility for the regulatory framework for the export control of arms and other items of strategic importance. He also provides support to ministers and assists in the development of Government policy. He gave the following evidence to this Court as to the meaning of the expression "*financing or financial assistance*" and also as to the fact that there are differences of views amongst competent authorities in the Member States:

> "6. There has been discussion of the meaning of "financing or financial assistance" in relevant EU working groups. It is clear from this that some other Member States have interpreted the phrase more narrowly than the UK, so that in their view financing/financial assistance does not include payment processing services. This appears to be because they consider that "financing or financial assistance" implies an active and intentional act by the bank, whereas when processing a payment the bank does not itself act to provide finance but instead plays a more passive, facilitating, role.
>
> 7. The terms "financing or financial assistance", have not, to the best of my knowledge, ever been defined either at UN or EU-level. For example, the EU "Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU common foreign and security policy" (Council document ST 11205/12, 15 June 2012,…say, at paragraph 66, in respect of financing/financial assistance related to arms embargoes only that "a ban on financing of or providing financial assistance for arms exports could strengthen the arms embargo".
>
> 8. However, on 16 December 2014 the European Commission published "Commission Guidance Notes on the implementation of certain provisions of Regulation (EU) No 833/2014", (Commission document C(2014) 9950 final,… At paragraph 1 on page 2 is the following question and answer:
>
> > "Q. Do the provision of payment services and issuance of letters of guarantee/credit constitute financial assistance in the sense of Articles 2 and 4, and are therefore prohibited for the goods and technology subject to a ban?
> >
> > A. Yes. In accordance with Article 4, payment services and issuance of letters of guarantees/credit constitute financial assistance and are prohibited when linked to the underlying commercial transaction subject to a ban under Article 2".
>
> 9. It is not clear why there is only a reference to financial assistance under Article 4 linked to a commercial transaction

> subject to a ban under Article 2, since financial assistance is a term that also appears in Article 2a and in Articles 4(1)(b) (linked to the prohibition on the sale, supply etc, of goods and technology listed in the Common Military List) and 4(3)(b) (linked to a commercial transaction subject to restriction under Article 3) of Regulation 833/2014. I note that the second paragraph of the introduction to the Guidance on page 1 states that: "*This guidance note is conceived in a form of answers to certain questions that have been brought to the Commission's attention. Should further questions arise, the Commission may revise or extend the questions and answers provided*". It may be the case that the question was put to the Commission only in the context of the restrictions under Article 2".

32. Mr Chew proceeds to state in his evidence that the expression "*financing or financial assistance*" must be defined at an EU level because this would enable the Export Control Organisation to ensure that sanctions are correctly applied and implemented within the United Kingdom and will ensure consistency of approach across the EU and provide a level playing field for UK businesses.

33. In the view of this Court, this illustration underscores the importance of a common interpretation being applied to key terms found in the relevant sanctions legislation. It is in our view a characteristic of these measures that terms are broadly defined and there may therefore be scope for multiple interpretations. Whilst the specific example given above focused upon the expression "*financing or financial assistance*", in our view the ambiguities do not rest there but extend to a number of other important expressions found elsewhere within the legislation.

34. We have accordingly formed the view that a ruling of the CJEU is of considerable importance in providing the domestic authorities with a definitive interpretation of the Regulation. This is important not only to ensure consistency between the competent authorities of the Member States but to ensure, as Mr Chew points out, a level playing field for all businesses operating within the EU.

35. A second reason why we consider that these matters are best addressed by the CJEU is that even if this Court considered that it could form a clear conclusion on the matters arising, it would do so without the benefit of submissions provided to it by the institutions of the EU and by other Member States. The High Court has been provided with detailed submissions from the competent and other authorities from within the United Kingdom and from Rosneft but does not have the benefit of different perspectives which may be held by other authorities in other Member States and/or the European Commission or Council. It seems to us that this is a material advantage that the CJEU has over the High Court and is a further consideration which has led us to consider that a reference of all outstanding issues is desirable.

36. Thirdly, in relation to the fact that the General Court will, in due course, rule upon the application for annulment we are aware that the Respondent to those proceedings has raised admissibility as an issue and that the *locus* of Rosneft to bring that application has been challenged. In these circumstances, we cannot, confidently, form the view that the General Court will necessarily rule upon the merits of the application for annulment. We are conscious of the fact that it is the usual practice of the General

Court to rule on admissibility at the same time as it rules upon the merits of the case (i.e. not deal with admissibility by way of preliminary issue). Accordingly, there is the risk that if the High Court were to stay its own procedure and await the outcome of the ruling of the General Court it might discover, after a considerable delay, that the General Court was declining to address the merits. Associated with this is the fact that the application for annulment invites the General Court to annul the relevant Regulation and the annulment procedure does not provide for the General Court to give rulings on interpretation. It is, of course, possible that in the course of giving judgment the General Court might set out its views on the meaning and interpretation of certain phrases and expressions used in the Regulation, but this will not be its principal task and accordingly even if the General Court concludes that admissibility has been established the judgment of that Court might not, ultimately, provide the answers to all of the issues that the High Court needs answers to in order to determine the application for judicial review that is before it. For these reasons, we conclude that it is not desirable for the High Court to await the outcome of the judgment of the General Court before considering whether to make a reference to the CJEU.

37. Fourthly, we are aware that by making a reference to the CJEU we are not prejudicing such case management decisions as the CJEU and/or General Court might take to ensure the smooth and efficient conduct of the litigation. The rules of procedure provide for both courts to stay their proceedings pending determination by the other. The fact that this is a possibility indicates to us that we should not delay in making a reference to the CJEU. It is for the CJEU in the exercise of its own case management powers to decide how it now addresses the reference in the light of the ongoing proceedings before the General Court.

38. For all of these reasons, we have decided to make a reference, at this stage, to the CJEU of the questions which are set out in the Schedule to this judgment.

39. We turn now to express, albeit briefly, our provisional views on some of the issues which arise upon these references.

C. The questions relating to the validity of the EU Regulation and the UK implementing measures: Questions 1 and 2(a), (b)

40. Questions 2(a) and 2(b) request the CJEU to rule upon the validity of the relevant Regulation. We have come to the view that the points raised are, at least, arguable. A summary of the Claimant's grounds are set out in the Schedule to the Order for reference (below) at paragraphs [13] – [25]. Rosneft explained to the High Court that the grounds it would advance to the CJEU were, in large measure, the same as those being advanced to the General Court. The Court does not propose to go into detail in relation to the specific arguments raised. Most of the grounds raised are relatively orthodox and are of a type that will be very familiar to the CJEU.

41. The exception is the argument that the sanctions regime is inconsistent with the Partnership Agreement (see Schedule paragraph 14). With regard to that it was submitted to the High Court by the Secretary of State that, in its view, there was in fact no inconsistency by virtue of Article 99(1)(d) of the Partnership Agreement. This provision provides:

> "Article 99

> Nothing in this Agreement shall prevent a Party from taking any measures:
>
> 1. which it considers necessary for the protection of its essential security interests:
>
> …
>
> (d) in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security…".

42. It was submitted that sanctions measures constitute a permitted derogation from the Partnership Agreement pursuant to this provision. It seems to us that *prima facie* there is some force in this submission. However, the issue remains one of importance which requires a definitive ruling of the CJEU.

43. Question 1 has been raised because it is arguable that the jurisdiction of the CJEU does not extend to determining the legality of the Council decisions adopted pursuant to the Common Foreign and Security Policy of the European Union ("CFSP"). It seems to the High Court that the First and Second Defendants have raised a serious issue as to the scope of the immunity from judicial challenge of such measures. We therefore consider it is appropriate to raise as a preliminary or threshold question the scope of the powers of the CJEU to review such decisions. This Court is conscious of the sensitive nature of the issue and would advance only the following observations. First, the principle of access to a court to review the legality of measures of the executive is a fundamental right enshrined *inter alia* in Article 6 of the European Convention on Human Rights ("ECHR"). There can be little doubt but that decisions adopted within the confines of the CFSP can exert severe consequences for natural and legal persons, as this case exemplifies; and as such that it might be thought that any immunity for the executive from challenge to such measures should be narrowly construed.

44. Secondly, Article 19(1) TEU states:

> "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
>
> Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

45. The Claimant, Rosneft, submitted to the High Court that it is the duty of the High Court, as a domestic court, to provide remedies sufficient to ensure "effective legal protection in fields covered by Union law". It was submitted that the decisions adopted in the present case were, manifestly, measures adopted from within the "fields covered by Union law", and that the High Court would not be ensuring "effective legal protection" if it were not within its powers to make a reference to the

CJEU of issues concerning the scope and effect and legality of the impugned decisions. Equally, it was submitted that it was the obligation of the CJEU to ensure that the law was "observed" and that it would not be able to achieve this end if it lacked jurisdiction over the decisions in question. These considerations appear to the High Court to be relevant to the questions which have been raised as to the jurisdiction of the Court of Justice. Finally, we have noted in this regard that in "*EU Procedural Law*", by Lenaerts, Maseils and Gutman (Oxford) at page 458 paragraph 10.04 the authors, having set out the *prima facie* immunity from challenge which arises from the provisions in issue, comment that: "*… it cannot be wholly excluded that the exceptions set down in the Treaties may afford possibilities for the Court to deliver preliminary rulings on the validity of Union acts adopted on the basis of the provisions relating to the CFSP*".

D. The questions relating to the principle of legal certainty: Questions 2(b) and 3(c)

46. Questions 2(b) and 3(c) arise from the Claimant's allegation that certain expressions in the sanctions legislation (and in particular "*waters deeper than 150 metres*", and "*shale*" as deployed in the expression "*projects that have the potential to produce oil from shale formations"*) are so unclear and uncertain that they violate general principles of law and in particular the principle of legal certainty.

47. The High Court considers that the issues raised by the Claimant are arguable. Terms used in the legislation are undeniably broad brush in their scope and effect and it is also undeniably true that there are no definitions provided of these important terms. However, the High Court has doubts whether, ultimately, the ambiguities inherent in these phrases are sufficient to give rise to legal uncertainty. Guidance as to the test to be applied may be found from the jurisprudence of the European Court of Human Rights under Article 7 of the ECHR which that Court has held incorporates within it the principle that an offence involving criminal sanctions, must be clearly defined in the law. By way of illustration it is possible to identify from the judgment in *Cantoni v France* Application No 17862/91 (11th November 1996) the criteria to be applied to determine whether measures of the type in issue in this case offend the principle of legal certainty. The Court set out that the principle that an offence must be clearly defined in law:

> "…is satisfied where the individual can know from the wording of the relevant provision…and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable".
>
> (Paragraph [29]).

48. In paragraph [31] the Court stated:

> "31. As the Court has already had occasion to note, it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably

> couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depends on practice…".

49. The Court then proceeded to observe (in the context of a case which concerned, *inter alia*, the definition of "medicinal product") that when the legislative technique of categorisation is used: *"…there will often be grey areas at the fringes of the definition. This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7… provided that it proves to be sufficiently clear in the large majority of cases*".

50. The Court went on to state that the role of adjudication performed by courts serves to "*dissipate such interpretational doubts as remain, taking into account the changes in everyday practice*".

51. In paragraph [35] the Court recorded that in relation to the foreseeability of a particular criminal measure this depended to a considerable degree upon the content of the text in issue, the field that it was designed to cover and the number and status of those to whom it was addressed. The Court stated:

> "A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail…This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails. With the benefit of appropriate legal advice, Mr Cantoni, who was, moreover, the manager of a supermarket, should have appreciated at the material time that, in the view of the line of case-law stemming from the Court of Cassation and from some of the lower courts, he ran a real risk of prosecution for unlawful sale of medicinal products".

52. It will be for the CJEU to consider whether the challenged terms and expressions violate the principle of legal certainty.

53. However, the provisional view of the High Court is that the terms in issue are not sufficiently ambiguous to give rise to successful legal challenge. This view is based upon the following considerations. First, it appears to be common ground between the parties that there are no universally accepted technical or geological definitions of the terms in question. Hence, it may well be said to have been perfectly reasonable for the Council to avoid seeking to create definitions of its own and instead to adopt broad-brush definitions upon the basis that to attempt a definitive and exhaustive formulation might have risked being over prescriptive and might have either left out relevant activities or included activities that warranted exclusion. Moreover, given the urgency with which the legislation was drafted it might have been quite impossible for the Council to undertake the necessary research to be in a position to formulate precise definitions. We therefore have formed the provisional view that the drafting

approach adopted by the Council was in the circumstances a proper one. Secondly, there is some evidence before the High Court that at least in the vast majority of cases experts in the field would understand the limits of these definitions and that the problems identified by the Claimant may hence be more hypothetical than real, or at least operate at the margins of the definitions. Thirdly, it was submitted by the First and Second Defendants that in peripheral cases where there was real doubt it was always open to the company affected to seek guidance from the prosecutorial authorities and thereby obviate any risk of prosecution for otherwise innocent violations of the provisions in question. Finally, it is open to the CJEU, if it considers it appropriate, to provide a higher degree of definition to these terms than is evident from the text of the measures themselves. Various permutations were put before the High Court by the First and Second Defendants which appeared, at least *prima facie*, to be sensible. The Commission and/or Council or the Member States may also seek to advance alternative definitions to the Court. It seems to the High Court that if any Court is to assist in providing interpretative guidance, as the Court of Human Rights suggests is always a possibility, then, particularly in this context, it is the CJEU which is best placed to perform that task.

54. These are the reasons which have led us to conclude that it is appropriate to make the reference of Questions 2(b) and 3(c) to the CJEU in these circumstances.

E. The questions relating to the meaning of "financial assistance": Question 3(a)

55. Question 3(a) raises a relatively narrow issue which is whether the expression "financial assistance" includes processing of payments. The High Court considers that the issue is one of importance and, as has already been observed, is the subject of different interpretations on the part of different competent authorities within the Member States. Given its importance and the risk of diversity of interpretation it seems important that this matter is resolved by the CJEU. This Court cannot properly conclude that the arguments advanced by Rosneft are not arguable or serious. It is unnecessary for this Court to rehearse the arguments of the various parties because a summary is provided in the Schedule. It suffices to say that a determination by the CJEU as to the correct meaning of the expression is necessary to enable the High Court to determine this aspect of the application for judicial review before it.

F. The questions relating to the effect of the provisions concerning global depository receipts: Question 3(b)

56. Question 3(b) concerns the interpretation of Article 5(2) of the Regulation which imposes prohibitions in relation to transferable securities and money-making instruments with: a maturity exceeding 30 days. "*Transferable securities*" is defined, in Article 1, as including, *inter alia*, "*depository receipts in respect of shares*". The dispute between Rosneft and the FCA (the Third Defendant) concerns depository receipts issued in relation to the shares of Rosneft. Such depository receipts are transferable securities issued by JP Morgan ("JPM") which has been, and at the time of the reference continues to be, appointed by Rosneft as its sponsored depository pursuant to an ongoing service agreement between those parties. The FCA takes the view that Article 5(2) expressly prohibits JPM from issuing new depository receipts in respect of the shares of Rosneft. Statements published by the FCA record its expectation that, for so long as the sanctions remain in force, depositories should not

issue new depository receipts in respect of the shares of target entities, such as Rosneft.

57. For its part Rosneft alleges that the FCA has misinterpreted the law which, it submits, only prohibits the issuing of global depository receipts in respect of shares issued after 12th September 2014. If Rosneft is correct then JPM can freely perform its service agreement with Rosneft by issuing depository receipts in respect of all shares issued by Rosneft on or prior to 12th September 2014.

58. Both Rosneft and the FCA made detailed submissions to this Court as to the correctness of their respective positions. The provisional view of the High Court is that the FCA is correct in its analysis of Article 5(2) and that its construction is supported by the language of the Regulation, and by a consideration of the underlying purpose and objectives of the sanctions measures.

59. However, the High Court has decided that, nonetheless, it should refer the question to the CJEU for a definitive ruling. It does this upon the basis that if the High Court was to decide now in favour of the FCA, there would (most likely) be an appeal to the Court of Appeal in the United Kingdom and there is at least the possibility that a reference might be made by that Court to the CJEU at some point in the future. It seems to the High Court that whilst that remains a possibility there are gains to be made in terms of case management and efficiency for all issues in dispute between Rosneft and the UK Government and authorities to be referred in one go to the CJEU. Furthermore, even if the Court of Appeal came to the same conclusion as the High Court, and favoured the interpretation placed upon Articles 1 and 5 of the Regulation by the FCA, this would not preclude a court in another Member State, taking a different view in an analogous case. The High Court has therefore concluded that the most efficient way to obtain a definitive answer to the dispute between Rosneft and the FCA is to refer the question to the CJEU.

G. Conclusion

60. For all the reasons set out above we refer the questions set out in the Schedule to this judgment to the CJEU for determination.

SCHEDULE TO JUDGMENT: THE ORDER FOR REFERENCE

IN THE HIGH COURT OF JUSTICE **Claim No. 5379/2014**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

LORD JUSTICE BEATSON & MR JUSTICE GREEN

B E T W E E N :

THE QUEEN

on the application of

OJSC ROSNEFT OIL COMPANY

Claimant

- and -

(1) HER MAJESTY'S TREASURY
(2) THE SECRETARY OF STATE FOR BUSINESS, INNOVATION, AND SKILLS
(3) THE FINANCIAL CONDUCT AUTHORITY

Defendants

ORDER FOR REFERENCE PURSUANT TO ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

UPON the Claimant's claim for judicial review dated 20 November 2014

AND UPON hearing Leading and Junior Counsel for the Claimant, the First and Second Defendant, and the Third Defendant on 27 January 2015 and 29 January 2015.

AND UPON the Court in the judgment (the Judgment), to which this Order forms a part, deciding that in order to enable it to give final judgment in this case it is necessary to resolve questions concerning the interpretation of European Union law and the validity of certain EU acts and that it is appropriate to request the Court of Justice of the European Union to give a preliminary ruling thereon.

IT IS ORDERED THAT:

1. Permission to apply for judicial review on all the grounds in the Claim Form, including those added by amendment applications made on 26 January 2015 and 29 January 2015 (each being in respect of **the Decision**, as defined below), is granted.

2. Pursuant to CPR 68.2 the questions set out in the Schedule hereto, concerning the jurisdiction of the Court of Justice and the interpretation and validity of:

   i. Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as amended by Council Decision 2014/659/CFSP and Council Decision 2014/872/CFSP (collectively, "**the Decision**"); and

   ii. Council Regulation (EU) No.833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as amended by Regulation (EU) No.960/2014 and Regulation (EU) No.1290/2014 (collectively, "**the EU Regulation**")

   be referred to the Court of Justice for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union **("TFEU")**.

3. The proceedings be stayed until the Court of Justice has given a preliminary ruling on the questions referred or until further order.

4. Costs reserved.

5. Liberty to apply.

REQUEST FROM THE HIGH COURT (ENGLAND & WALES) FOR PRELIMINARY RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO ARTICLE 267 TFEU

Questions referred to the Court of Justice

The questions referred concern Council Decision 2014/512/CFSP, as amended by Council Decision 2014/659/CFSP and Council Decision 2014/872/CFSP (collectively, "**the Decision**") and Regulation (EU) No.833/2014, as amended by Regulation (EU) No.960/2014 and Regulation (EU) No.1290/2014 (collectively, "**the EU Regulation**"). They are the following:

1) Having regard in particular to Article 19(1) TEU, Article 24 TEU, Article 40 TEU, Article 47 EUCFR and Article 275, second paragraph, TFEU does the Court of Justice have jurisdiction to give a preliminary ruling under Article 267 TFEU on the validity of Article 1(2)(b)-(d), Article 1(3), Article 4, Article 4(a), Article 7 and Annexe III of the Decision?

2)(a) Are one or more of the following provisions **("the Relevant Measures")** of the EU Regulation and, to the extent that the Court has jurisdiction, the Decision invalid :

i. Article 4 and Article 4a of the Decision;

ii. Articles 3, 3a, 4(3)-4(4) and Annex II of the EU Regulation;

(together, **"the Oil Sector Provisions"**);

iii. Articles 1(2)(b)-(d) and 1(3) and Annex III of the Decision;

iv. Articles 5(2)(b)-(d), 5(3) and Annex VI of the EU Regulation;

(together, **"the Securities and Lending Provisions")**;

v. Article 7 of the Decision; and

vi. Article 11 of the EU Regulation.

2)(b) In so far as the Relevant Measures are valid, is it contrary to the principles of legal certainty and *nulla poena sine lege certa* for a Member State to impose criminal penalties, pursuant to Article 8 of the EU Regulation, before the scope of the relevant offence has been sufficiently clarified by the Court of Justice?

3) In so far as the relevant prohibitions or restrictions referred to in Question 2(a) are valid:

(a) Does the term "*financial assistance*" in Article 4(3) of the EU Regulation include the processing of a payment by a bank or other financial institution?

(b) Does Article 5 of the EU Regulation prohibit the issuing of, or other dealings with, Global Depositary Receipts ("**GDRs**") issued on or after 12 September 2014 under a deposit agreement with one of the entities listed in Annex VI, in

respect of shares in one of those entities which were issued before 12 September 2014?

(c) If the Court considers that there is a lack of clarity which can appropriately be resolved by the Court providing further guidance, what is the correct interpretation of the terms *"shale"* and *"waters deeper than 150 metres"* in Article 4 of the Decision and Article 3 and 3a of the EU Regulation? In particular, if the CJEU considers it necessary and appropriate, can it provide a geological interpretation of the term "*shale*" to be used in implementing the Regulation, and clarify whether the measurement of *"waters deeper than 150 metres"* is to be taken from the point of drilling or elsewhere?

The Factual Background

1. On 31 July 2014, the EU Council adopted Decision 2014/512/CFSP and Regulation (EU) No.833/2014 in response to Russia's actions destabilising the situation in Ukraine. Decision 2014/512/CFSP and Regulation (EU) No.833/2014 imposed a range of sanctions on various Russian industries. Recital (2) of Regulation No. 833/2014 stated: *"It is … considered appropriate to apply additional restrictive measures with a view to increasing the costs of Russia's actions to undermine Ukraine's territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis…"*

2. Council Decision 2014/512/CFSP was subsequently amended by Council Decision 2014/659/CFSP on 8 September 2014, and Regulation (EU) No.833/2014 was amended on the same date by Regulation (EU) No.960/2014, which came into force on 12 September 2014. Recital (4) of Decision 2014/659/CFSP stated, "*In view of the gravity of the situation, the Council considers it appropriate to take further restrictive measures in response to Russia's actions destabilising the situation in Ukraine."* On 4 December 2014, the EU Council adopted Decision 2014/872/CFSP (**"the Second Amending Decision")** and Regulation (EU) No.1290/2014 (**"the Second Amending Regulation")**. Recital (3) of the Second Amending Decision stated that, "*The Council considers it necessary to clarify certain provisions.*"

3. The relevant prohibitions in the EU Regulation and Decision are:

   3.1. The prohibition on the sale, supply, transfer or export of products listed in Annex II of the EU Regulation without an authorisation (Article 4(1) of the Decision; Article 3 of the EU Regulation);

   3.2. The prohibition on the provision of various specified services for "*oil exploration and production in waters deeper than 150 metres*", "*oil exploration and production in the offshore area north of the Arctic Circle*", and "*projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing…*" (Article 4a of the Decision; Article 3a of the EU Regulation);

   3.3. The prohibition on the provision of "*technical assistance or other services*" and *"financing or financial assistance",* without authorisation, in relation to Annex II technologies provided to a Russian person or entity or for use in Russia (Article 4(2) of the Decision; Article 4 of the EU Regulation);

3.4. The prohibition on directly or indirectly purchasing, selling, providing investment services for, or assistance in the issuance of, or otherwise dealing with "*transferable securities*" or "*money market instruments*" with a maturity exceeding 30 days issued after 12 September 2014 by an entity listed in Annex VI of the EU Regulation (Article 1(2) and Annexe III of the Decision, Article 5(2) and Annex VI of the EU Regulation);

3.5. The prohibition on directly or indirectly making or being part of any arrangement to make new loans or credit with a maturity exceeding 30 days to any person listed in Annex VI after 12 September 2014, subject to an exception for loans with a specific and documented objective to provide financing for non-prohibited imports or exports of goods and non-financial services between the Union and Russia, and for loans that have a specific and documented objective to provide emergency funding to meet solvency and liquidity criteria for legal persons established in the Union (Article 1(2) of the Decision, Article 5(3) of the EU Regulation); and

3.6. The prohibition of claims in connection with any contract or transaction, the performance of which has been affected, directly or indirectly, in whole or in part, by measures imposed under the EU Regulation (Article 7 of the Decision, Article 11 of the EU Regulation).

4. Article 8 of the EU Regulation requires Member States to lay down effective, proportionate and dissuasive penalties applicable to infringements of the EU Regulation.

5. GDRs are certificates representing ownership of a certain number of a company's shares. Because those certificates are transferable, they constitute free-standing securities which can be listed and traded within the EU capital market independently from the underlying shares, which may be separately listed in a foreign market. GDRs are often issued by depositaries pursuant to deposit agreements formed between those depositaries and the issuers of the underlying shares.

Procedural Background

6. Rosneft lodged an application for the annulment of, *inter alia*, the Regulation Oil Sector Provisions, the Regulation Securities and Lending Provisions and the Decision Securities and Lending Provisions ("**the Annulment Application**"), pursuant to Article 263 and 275 TFEU at the General Court of the European Union on 9 October 2014, in conjunction with a request for an expedited hearing. The request for an expedited hearing was refused by a decision communicated to Rosneft on 13 November 2014.

7. On 20 November 2014, Rosneft issued proceedings, in the High Court of England and Wales, for judicial review against the Defendants ("**the Domestic Proceedings**"). These proceedings, as amended, raised the following issues:

7.1. The legality, as a matter of English domestic law, of the Second Defendant's decision to introduce domestic delegated legislation that criminalized a breach of Article 3a of the EU Regulation, on the basis that such a decision contravened the principle that any criminal offence must be defined with a high level of clarity.

7.2. The legality of delegated legislation introduced by the First and Second Defendants, on the basis that the Decision and the EU Regulation which the legislation purported to implement were themselves invalid.

7.3. The guidance issued by the Second Defendant, regarding the meaning of "*financial assistance*" as used in the EU Regulation, and statements made by the Third Defendant, in which it expressed its expectation that new GDRs would not be issued in light of the EU Regulation's prohibition on the issue of "*transferable securities*".

7.4. The meaning of the terms *shale"* and *"waters deeper than 150 metres"* in Article 4 of the Decision and Article 3 and 3a of the EU Regulation.

8. In a judgment dated 27 November 2014, the High Court refused Rosneft's application for interim relief to prevent the coming into force of national legislation criminalising the breach of Article 3a of the EU Regulation.

9. For the reasons set out in the Judgment the High Court has decided that there is sufficient doubt as to the validity of the EU Regulation and Decision, that applying the principles in C-314/85 *Foto-Frost v Hauptzollamt Lubeck-Ost* [1987] ECR 4199), the Court should refer the above questions to the Court of Justice concerning the validity of the Decision and Regulation. The Court has also decided to refer the issues of interpretation concerning those measures.

Submissions relating to Question 1

10. Question 1 asks whether the Court of Justice has jurisdiction to rule on the validity of the Decision on a preliminary reference pursuant to Article 267 TFEU.

Claimant's submissions (in summary form)

11. Having regard to Article 19(1) TEU, Article 47 EUCFR, Article 275, second paragraph, TFEU and Article 40 TEU, Rosneft contends that the Court of Justice has jurisdiction to give a preliminary ruling under Article 267 TFEU on the validity of both the Oil Sector Provisions and the Securities and Lending Provisions of the Decision. The Court has jurisdiction under Article 275, second subparagraph, TFEU to verify whether the Decision affects the application of the procedures and powers of the institutions under the TFEU contrary to Article 40 TEU. Furthermore, in the absence of such jurisdiction, Rosneft would be denied an effective remedy against national criminal and other measures giving effect to the Decision. Even if the Court of Justice were to find that the Regulation is invalid, Member States would be bound under Article 29 TEU to give effect to the Decision unless it were also held to be invalid.

Defendants' submissions (in summary form)

12. The Court of Justice has no jurisdiction to rule on the validity of the Decision on a preliminary reference pursuant to Article 267 TFEU, having regard to the terms of Article 24 TEU and Article 275 TFEU; any such claim must be brought by direct action and must satisfy the requirements of Article 263(4) TFEU. These proceedings are not monitoring compliance with Article 40 TEU: they are in substance a direct attack on the validity of the Decision and may only be brought pursuant to Article 263(4) TFEU.

Submissions relating to Question 2a) and b)

13. In summary Questions 2(a) and (b) asks whether the Relevant Measures in the EU Regulation and, to the extent that the Court has jurisdiction, the Decision are invalid and then, if they are valid, whether certain of the prohibitions are formulated with sufficient clarity lawfully to form the basis of criminal penalties.

Claimant's submissions (in summary form)

The Relevant Measures breach the Partnership and Co-operation Agreement with Russia ("the Partnership Agreement")

14. The Partnership Agreement has been held by the CJEU to have direct effect and can be relied upon by individual litigants to contest the validity of acts of the EU institutions. The Securities and Lending Provisions are contrary to Article 52 of the Partnership Agreement, which provides for the free movement of payments and capital movements between the Russian Federation and the EU. The Oil Sector Provisions also contravene the Partnership Agreement in numerous respects. Specifically, the Oil Sector Provisions contravene:

    14.1. Articles 10 of the Partnership Agreement, by which the EU agreed to accord to the Russian Federation most-favoured nation status, as described in Article I, paragraph 1 of the General Agreement on Tariffs and Trade;

    14.2. Article 12 of the Partnership Agreement, which requires that each party to the Partnership Agreement provide for freedom of transit through its territory of goods originating in the customs territory or destined for the customs territory of the other party; and

    14.3. Article 15 of the Partnership Agreement, which provides that goods originating in the Russian Federation and the Community shall be imported into the other party free of quantitative restrictions.

15. Moreover, none of the Relevant Measures could be said to fall within or be proportionate to the narrow exceptions set out in Article 19 and Article 99(1) of the Partnership Agreement, concerning *"public security"* and *"essential security interests"* respectively. They do not in any way relate to goods or services having any military connection whatsoever.

The Relevant Measures contravene the duty to give reasons, infringe the right to a fair hearing and infringe the right to effective judicial protection

16. The Relevant Measures fail to provide reasons sufficient to permit review of legality, as is required by Article 296 TFEU. No explanation has been given as to how the sanctions imposed will further the aim of the EU Regulation, the selection criteria used to choose the industries targeted, or what the desired consequences are for actors in the industries targeted. Moreover, despite repeated requests on behalf of Rosneft, the Council has refused to provide access to any information or documents which shed light on the reasoning adopted by the Council. These failings amount to an infringement of the (closely linked) principles of the obligation to state reasons, the right to a fair hearing and the right to effective judicial protection. The importance of the duty to state reasons, and the close links between this duty and the right to a fair hearing and principle of effective

judicial protection, were explained by the General Court in Case T-228/02 *People's Mojahedin Organisation of Iran v Council* [2006] ECR II-04665, ¶80 and ¶89.

17. The provision of adequate reasons is particularly important in relation to the Relevant Measures, which target particular persons or categories of trader and were adopted by the Council under the special procedure laid down by Article 215 TFEU, in derogation from the general principles of free trade and investment laid down by the TFEU and legislation adopted thereunder. Moreover, the Council was not giving effect to any international commitments but acted autonomously and selected the targeted sectors without explanation.

The Oil Sector Provisions are contrary to the principle of equal treatment and constitute a misuse of powers

18. The Council's failure to advance any reasons for the Relevant Measures also leads to a breach of the principle of equal treatment, which prohibits comparable situations from being treated differently unless such treatment is objectively justified (see, for instance, Case T-390/08 *Bank Melli Iran v Council* [2009] ECR II-03967, ¶56 et seq). In the present case, there is no evidence that the businesses affected are in any different position to any other business that is economically important to the Russian Federation. In particular, the targeted businesses have no particular connection to the events in Ukraine.

19. The absence of any proper explanation for the Relevant Measures also leaves the Council vulnerable to the criticism that (at least part of) the purpose of the Relevant Measures was to serve an ulterior aim, such as enabling the EU to obtain a competitive advantage in relation to the sectors concerned. The Relevant Measures are therefore also invalid on the further ground that they entail a misuse of powers.

The Relevant Measures are disproportionate, encroach upon the Union's legislative competences and breach Rosneft's fundamental rights

20. The Council had no competence to adopt, or could not lawfully adopt, the Oil Sector Provisions, because they are not (or have not shown to be) proportionate to the stated general aim of the Decision and the EU Regulation. According to the CJEU's settled case-law, an EU act which prohibits economic activity must be proportionate to the aim of the measure (see, e.g. *R v Minister of Agriculture, Fisheries and Food ex parte Fedesa* (C-331/88) [1990] ECR I-4023, ¶13). Moreover, as a consequence of their lack of proportionality, the Relevant Measures encroach upon the Union's legislative competences under the common commercial policy and constitute an impermissible interference with Rosneft's freedom to conduct a business and right to property.

21. In particular, Rosneft submits that:

    21.1. The Relevant Measures do not disclose a rational connection between the aims of the Decision and the means for giving effect thereto. The CJEU has consistently required that a person targeted by sanctions should have a sufficient connection with the third country regime and/or the aims pursued by the measure taken. Businesses in a sector with no stated or other particular connection to events in Ukraine cannot properly be targeted simply because the sector is economically important to Russia.

21.2. The Relevant Measures go beyond what is necessary to achieve their stated general aim. Where there is a choice between several appropriate measures, recourse must be had to the least onerous: Case T-8/11 *Bank Kargoshaei and Others v Council and Commission* (16 September 2013) ECLI:EU:T:2013:470, ¶171. The Council has failed to demonstrate that the Relevant Measures are the least onerous means of pursuing the objective in question, nor that alternative, less restrictive means have been considered and rejected or are exhausted.

21.3. The Relevant Measures lack overall proportionality, impairing the *"substance"* or *"essential content"* of Rosneft's right to conduct a business and right to property (see e.g. Case C-548/09 *Bank Melli Iran v Council* [2011] ECR I-11381 ECLI:EU:C:2011:735). In considering whether measures are proportionate, the Court will take account of why a particular industry has been targeted: see Case C-348/12 *Council of the European Union v Manufacturing Support & Procurement Kala Naft Co.,Tehran*, ¶12. The Relevant Measures target the Russian oil industry for no better reason than to cause economic harm to the Russian Federation.

21.4. Article 11 of the EU Regulation, which sanctions the actual or de facto destruction of Rosneft's existing property rights (or far reaching consequences therein), also constitutes a disproportionate interference with Rosneft's right to property.

The EU Regulation fails to give proper effect to the Decision

22. The EU Regulation does not give proper effect to the provisions of the Decision in material respects. In particular, Article 3(5) of the EU Regulation is inconsistent with Article 4(4) of the Decision. Whereas Article 4(4) confers no discretion on Member States to decide whether to grant an authorisation with respect to a contract concluded before 1 August 2014, Article 3(5) purports to authorise Member States to decide at their discretion whether to permit the supply in question pursuant to the contract.

The Oil Sector Provisions (together with Article 8 of the EU Regulation) contravene the principle of legal certainty and legality of criminal offences

23. In its Annulment Application, Rosneft challenged the meaning of the terms "*deep water*", "*arctic*", and "*shale oil project*". By the Second Amending Regulation, those terms were, to some extent, expanded in their definitions. However, a large degree of uncertainty remains in two areas. First, the test of *"waters deeper than 150 metres"* is unclear in the context of sophisticated oil exploration and production. Secondly, uncertainty remains as to the definition of *"shale"* as there is no consensus, in the geological or any other industry, as to what *"shale"* even is. That uncertainty has not been remedied by the Second Amending Decision and/or the Second Amending Regulation. Moreover, there is as yet no case-law that can assist Rosneft's lawyers, the domestic court, or the CJEU in determining their proper meaning. This is particularly objectionable where effect is given to Article 8 of the EU Regulation by way of criminal sanctions. In these circumstances, the terms *"deep water"* and *"shale"* offend against both the EU principle of legal certainty and legality of criminal offences.

24. Moreover, the CJEU has held that the principle of legality of criminal offences may preclude the retroactive application of a new interpretation of a rule establishing a criminal offence. This is particularly true if the interpretation was not reasonably foreseeable at the time: see *Dansk Rorindustri and Others v Commission* (Joined Cases

C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P [2005] ECR I-05425, ¶¶217-219 and *AC-Treuhand AG v Commission* (T-99/04) [2008] ECR II-0151, ¶142. Rosneft therefore submits in the alternative that if Article 8 of the EU Regulation is held to be valid, it would nonetheless be contrary to the principle of legal certainty and *nulla poena sine lega certa* for a Member State to impose criminal penalties pursuant to that provision, before the scope of the relevant offence has been clarified by the CJEU.

Defendants' submissions (in summary form)

25. The First and Second Defendants submit, in summary, as follows:

25.1. To the extent that the Partnership and Co-operation Agreement with Russia is relevant, the Relevant Measures do not breach that Agreement having regard, in particular, to Article 99 of the Agreement which provides that the Agreement does not prevent a party from taking measures which it considers necessary for the protection of its essential security interests, in specified circumstances. Moreover, neither the General Agreement on Trade Tariffs or other World Trade Organization treaties are capable of conferring rights that individuals may invoke before the courts to challenge an EU measure: see case C21/72 *International Fruit* ECLI:EU:C:1972:115 at §27; Article XXI of GATT 1947 also contains an applicable security exception in any event;

25.2. The Relevant Measures state the reasons on which they are based, in conformity with Article 296 TFEU. They accordingly do not infringe the Claimant's procedural rights. Nor are they contrary to the principle of equal treatment: any difference in treatment is objectively justified by the aim of the Relevant Measures, namely to "*increase the costs of Russia's actions to undermine Ukraine's territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis*": recital 2 to the EU Regulation. There is also no basis for the suggestion that the aim of the measures was to enable the EU to obtain a competitive advantage;

25.3. The Relevant Measures are proportionate to, and rationally connected to, the stated aims of the Decision and the Regulation and do not involve any violation of Rosneft's fundamental rights;

25.4. The Regulation gives proper effect to the Decision, having regard to the discretion given to the Council to adopt *"necessary measures"* under Article 215 TFEU;

25.5. The Oil Sector Provisions are sufficiently clear as to satisfy the requirements of foreseeability and legal certainty, having regard in particular to the principles reflected in the case law of the European Court of Human Rights ; see, in particular, *Cantoni v France* (Application no. 17862/91, judgment of 11 November 1996) at §35, referred to by the Court of Justice, in case C-189/02 P *Dansk Rørindustri v Commission* ECLI:EU:C:2005:408 at §219. That case law makes clear that only reasonable, rather than absolute, certainty is required. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail, and may be

required to take special care in assessing the risks that a particular activity entails; and

25.6. As to question 2b) EU law does not require that the Member States await clarificatory rulings from the Court of Justice before implementing criminal penalties pursuant to Article 8 of the EU Regulation.

Question 3– Points of Interpretation

26. In the event that the Court of Justice holds any of the relevant prohibitions in the Relevant Measures to be valid, the Court is also asked to address the questions of interpretation set out in Questions 3a), 3b) and 3c).

Claimant's Submissions (in summary)

27. Regarding Question 3a), Rosneft disagrees with the Second Defendant's contention that the term encompasses the processing of payments. Rosneft submits that the term financing and financial assistance should be read together and understood to mean the provision of funding and associated services.

28. Regarding Question 3b), Rosneft submits that this prohibition does not affect the issue of GDRs after 12 September 2014 in respect of shares that were issued before 12 September 2014. The purpose of the restriction is to prohibit targeted entities' ability to access capital markets. Prohibiting the issue of GDRs in respect of pre-existing shares would not do this; rather, it would penalize third-party shareholders, who would be deprived of the opportunity to offer their shares for sale in the form of a GDR.

29. Regarding Question 3c), Rosneft submits, as noted above, that the terms *"shale"* and *"waters deeper than 150 metres"* are so uncertain as to contravene the principles of legal certainty and legality of criminal offences. Alternatively, at the very least, the meaning of these terms is unclear and the Court of Justice should provide guidance on the interpretation of these terms. It is submitted for this purpose that the meaning of *"shale"* is kerogen-containing deposits, predominantly of clay composition (those with the portion of any clay minerals in excess of 35%) that do not contain fluid oil. As regards *"waters deeper than 150 metres"*, the United Kingdom considers that it is the depth of the drilling platform that is determinative, irrespective of the depth of the water over the location of the oil, and irrespective of whether extended reach drilling technology is used. However, the Court of Justice should itself, if possible, give its own EU law autonomous interpretation to these terms.

Defendants' submissions (in summary)

30. The First and Second Defendant submit, in summary, that:

30.1. the term "*financial assistance*" in Article 4(3) of the EU Regulation includes the processing of a payment by a bank or other financial institution. Such an interpretation is in accordance with the Commission's Guidance Note on the implementation of certain provisions of Regulation (EU) No 833/2014. There is no basis to read that term narrowly as Rosneft contends;

30.2. the terms of Article 4 of the Decision and Article 3 and 3a of the EU Regulation, and in particular the meaning of the terms *"waters deeper than 150 metres"* and "*projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing*" is sufficiently clear to satisfy the requirements of legal certainty. To the extent that there may be cases of genuine uncertainty, it is for the national authorities to apply the terms of the legislation to the specific facts of each case. It is neither necessary nor appropriate for the Court to provide a precise geological definition of the term *"shale"* in the context of these proceedings. There is no basis to define *"shale"* as narrowly as the Claimant contends. In any event, the relevant concept is "*shale formation*" as opposed to *"shale"*.

31. Regarding Question 3b) the Third Defendant submits that on its plain terms Article 5(2)(b)-(d) of the EU Regulation prohibits the issuing of, or other dealings with, GDRs which are issued after 12 September 2014 under a deposit agreement with a sanctioned entity, whether or not they are in respect of shares issued before or after that date. The EU Commission has already expressed its unequivocal view that this is indeed the correct construction of Article 5 (Commission Notice, C(2014) 9950 final, Q&A No. 22). The EU Regulation expressly includes GDRs within the definition of the "*transferable securities*" that are made subject to restrictive measures. Article 5 furthers the EU Regulation's policy objective of putting pressure on the Russian Government, a policy which is clearly stated in Recital (2) of the EU Regulation and Recital (6) of Regulation (EU) No.960/2014. Article 5(2)(b)-(d) obstructs Rosneft's access to the EU capital market, which is contrary to Rosneft's interests (and therefore those of its majority shareholder, the Russian state), and (amongst other things) prevents the Russian state from converting its shares into GDRs in the EU capital market.