Russia invasion of Ukraine: Are EU sanctions going too far? A critical assessment

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Executive Summary

1. Economic restrictive measures (or so-called "sanctions") have become one of the European Union's (EU) favourite and most commonly used tools of its foreign policy. Sanctions are not relevant only because of their potential efficiency; they also send a clear foreign policy signal of disapproval, while being more moderate than a full embargo and less dangerous than a military deployment.

2. The authors acknowledge the importance and need of sanctions to respond to the invasion of Ukraine. However, in light of the speed in which they had to be adopted, the way they have been drafted and implemented is far from perfect. The article critically explores the legal and practical dimensions of EU sanctions with a focus on those sanctions adopted by the EU in view of the Russian invasion of Ukraine since 24 February 2022. Since these sanctions constitute the major measures against Russia the EU has used to respond to the war, the article calls for a critical assessment of their impact, quality and feasibility.

3. Their overall effectiveness to bring about change in the Russian government's military and political stance vis-à-vis Ukraine is sometimes questioned. Yet their legitimacy and acceptance, which are the preconditions for their success, will ultimately depend on how well they work in practice.

4. The EU gained the authority to adopt international restrictive measures with the enactment of the EU's common foreign and security policy. Currently, the EU has over forty regimes of restrictive measures in place. With respect to the invasion of Ukraine, the EU Member States have shown unprecedented unity in their sanctions policy toward Russia. In this regard, the EU has enacted ten comprehensive sanctions packages targeting a broad variety of sectoral restrictions, from newspaper broadcasting to the provision of certain business and consultancy services or oil and gas trading.

5. As sanctions apply not only to individuals and entities based in the EU, but also to EU citizens located outside the EU and non-EU legal persons conducting business in the EU (including just a part of their business activity), their effects go beyond the borders of the EU.

6. While the uniform and swift reaction of the EU on a political level must be welcomed, it is worrisome that many of these hastily adopted restrictive measures seem to having been drafted and enacted almost too quickly. They lack consistency, and the terms are often vague and therefore difficult to apply. Moreover, there are only few resources to draw guidance from.

7. Another area of criticism with respect to sanctions pertains to the lack of transparency on the criteria and standard of evidence to be met to be listed as a designated person on the EU Consolidated Sanctions List.

8. While sanctions are not criminal in nature, their impact is sometimes comparable to criminal sentences in practice. Yet, the standard of proof needed to be put on sanctions lists is much lower than in criminal law measures and lacks clear procedural safeguards, contrary to criminal proceedings.

9. Considering their overtly deterrent purpose, their enforcement, their indefinite length, and their heavy impact in practice, it is not unthinkable that the European Court of Human Rights would qualify asset freeze measures as criminal sanctions under the Court's autonomous interpretation of "criminal charges". Should sanctions have a (recognised) criminal nature, this would have tremendous consequences: Before a person could be put on a list, a criminal investigation and a public trial would need to be carried out, in the course of which evidence would need to be collected and discussed in open court to prove – according to adequate criminal standards – that the person is guilty of the allegations brought against him or her. Overall, recognising the criminal nature of restrictive measures would have the benefit of granting additional procedural safeguards governing the adoption, review and lifting of sanctions, which are currently inexistent.

10. Moreover, some of the sanctions threaten fundamental rule of law principles. As such, the prohibition to provide legal advisory services has been harshly criticised, as it restricts the concerned person's access to a lawyer and has a direct impact on the ability for EU lawyers to represent and assist Russian entities seeking advice on the applicability of EU sanctions. This is particularly worrisome as the above outlined inconsistencies and vagueness of some of the provisions make legal advice indispensable when navigating through the sanctions.

11. While restrictive measures somehow should pertain to a concerned persons' alleged involvement in the international crisis concerned or misconduct at stake, it is alarming that some of the provisions have as a sole criterion the (Russian) nationality of the concerned person. Using nationality as a stand-alone criterion to justify sectoral restrictions is a dangerous and slippery slope that directly endangers the very existence of the rule of law.

12. Another currently evolving issue is how to respond to violations of the restrictive measures. At present, this is up to the Member States. Member States largely differ in how to enforce compliance with these sanctions in practice.

13. Enforcement has always been the weak spot in ensuring compliance with the EU sanctions regime. Due to the vast differences within the EU, the EU sanctions regime is criticised for lack of consistency which leads to an uncoordinated, and, arguably, weak EU sanctions regime.

14. A current EU Commission's proposal attempts to harmonise this unsatisfying situation by obliging the member states to criminalise certain behaviour related to the violation of sanctions, thus creating a new EU crime.

15. The fact that the Council, for the first time in history, was ready to identify a new EU crime under Art. 83 of the TFEU, and that within a few months a new Directive proposal was on the table, coupled with the fact that the proposal foresees an extremely short transposition period (6 months), indicates the political pressure behind this criminalisation effort.

16. While the Directive proposal contains some apparent contradictions (e.g. intentional vs. negligent behaviour; reporting obligations vs. right not to incriminate oneself), it also strongly states that *this Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union (…).*

17. The introduction of the new proposed Directive which makes the violation of EU sanctions an EU crime raises the question as to whether violations of sanctions merit a criminal law reaction at all.

18. This becomes more problematic when noticing that the remedies against EU sanctions are rather limited. Whenever an individual or entity is added to the EU Consolidated Sanctions' List, it shall be informed of the reasons justifying for such inclusion, but this can also be done *through the publication of a notice,* so that it is not sure at all that the concerned person will even take notice

of the decision. Moreover, the concerned person is not informed about his or her rights and remedies against such decision.

19. EU sanctions are subject to a periodic review process. In practice however, the review of the statements of reasons included in the listing of designated persons often fall short of providing concrete and precise reasons for listing.

20. Whenever sanctions are upheld, designated persons may also seek a formal, judicial review before the General Court of the European Union. The legal arguments that may be raised before the General Court are limited. In practice, challenges brought against sanctions decisions mainly rely on arguments related to due process considerations.

21. This all stresses the need for sanctions to be consistent, transparent and in compliance with the rule of law. In light of the above, the EU sanctions regime should be critically reviewed and streamlined. Moreover, the legal uncertainty on how to correctly comply with the sanctions regime and the lack of guidance from national competent authorities put EU Operators in a particular difficult situation. Additional guidance in form of specific training and additional information on the practical application and enforcement by the Member States would help them to correctly navigate through the sanctions map. To this end, an implementation report, including a compilation of national decisions and case law, would contribute to better understand and comply with the sanctions.

Table of contents

Gelösch

Gelöscht

1. Introduction

1. Economic restrictive measures (or so-called "sanctions") have become one of the European Union's (EU) favourite and most commonly used tools of its foreign policy. They clearly contribute to defining and implementing a common EU foreign policy[1], where the EU is more and more able to speak as one united voice to weight on the scene of international relations, alongside powerful players like the United States of America.

2. As experts explain, sanctions are not relevant only because of their potential efficiency; they also send a clear foreign policy signal of disapproval, while being more moderate than a full embargo and less dangerous than a military deployment. Sanctions have been steadily implemented by the EU, with a significant increase following the annexation of Crimea and the war in Donbass in 2014.[2]

3. Today, EU sanctions regimes include either thematic restrictions – such as the latest EU Global Human Rights Sanctions Regime introduced in December 2020[3] – or geographic measures[4] (Russia, Belarus, Myanmar, Iran, etc.). Some are implementations of UN sanctions adopted under Chapter VII of the UN Charter[5], to maintain or restore international peace and security, others are EU autonomous sanctions.

4. The authors acknowledge the importance and need of sanctions to respond to the invasion of Ukraine. However, in light of the speed in which they had to be adopted, the way they have been drafted and implemented is far from perfect. This article critically explores the legal and practical dimensions of EU sanctions with a focus on those sanctions adopted by the EU in view of the Russian invasion of Ukraine since 24 February 2022. Since these sanctions constitute the major measures against Russia the EU has used to respond to the war, this article calls for a critical assessment of their impact, quality and feasibility. Their overall effectiveness to bring about change in the Russian government's military and political stance vis-à-vis Ukraine is sometimes questioned. Yet their legitimacy and acceptance, which are the preconditions for their success, will ultimately depend on how well they work in practice.

[1] R. Bloj, *Les sanctions, instrument privilégié de la politique étrangère européenne*, Fondation Robert Schuman, Question d'Europe n°598, 31 mai 2021.
[2] R. Bloj, *Les sanctions, instrument privilégié de la politique étrangère européenne*, Fondation Robert Schuman, Question d'Europe n°598, 31 mai 2021.
[3] Cf. Council Regulation (EU) 2020/1998 and Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses. In addition to the EU's Global Human Rights Sanctions Regime, the Union has also adopted thematic restrictions concerning chemical weapons, cyber-attacks, and terrorism (source EU Sanctions Map).
[4] As of the date of this article [1/18/2023], the EU has adopted restrictive measures in relation to the situation in the following 33 countries: Afghanistan, Belarus, Bosnia and Herzegovina, Burundi, Central African Republic, China, North Korea, Democratic Republic of the Congo, Guinea, Guinea-Bissau, Haiti, Iran, Iraq, Lebanon, Libya, Mali, Moldova, Montenegro, Myanmar, Nicaragua, Russia, Serbia, Somalia, South Sudan, Sudan, Syria, Tunisia, Turkey, Ukraine, United States of America, Venezuela, Yemen and Zimbabwe (source EU Sanctions Map).
[5] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html [accessed 19 March 2023].

2. Overview of sanctions introduction in the EU

2.1 Historical background of EU sanctions

5. Implementing restrictive economic measures as a response to military invasion is not a new idea. It already existed in the 17th century when England restricted the trade of its colonies through the so-called Navigation Acts.[6] Under this regime, it only allowed ships sailing under its own flag to transport certain goods. This aimed at diminishing the Dutch seafaring which could be achieved through economical means.[7] In the 19th century, Napoleon – as a reaction to the blockade instituted by the Royal Navy upon the British Order-in-Counsel of 16 May 1806[8] – issued the Berlin Decree, which enacted a blockade of all ports for the entry of British ships and goods.[9]

6. Becoming more of a strategic tool of warfare, during World War I, the British Grand Fleet blocked the North Sea so that goods could not enter Germany and German warships had no access to the world ocean. This weakened the belligerent power of Germany considerably.[10]

7. During the start of the Cold War, the Western Bloc at the initiative of the United States of America established a very comprehensive and broad sanction mechanism in 1949: The Coordinating Committee for Multilateral Export Controls ("**CoCom**")[11] aimed at controlling the export of technology to states of the East Bloc. Items that needed a permit for export were listed in an unpublished document.[12]

8. Sanctions against Russia emerged well before the 2014 invasion of Crimea. The first sanction within the framework of the European Economic Community ("**EEC**") was established in 1982

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[6] An Act for increase of Shipping, and Encouragement of the Navigation of this Nation of October 1651 http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp559-562; Charles II, An Act for the Encouraging and increasing of Shipping and Navigation of 1660 http://www.british-history.ac.uk/statutes-realm/vol5/pp246-250; Charles II, An Act for the Encouragement of Trade of 1663, http://www.british-history.ac.uk/statutes-realm/vol5/pp449-452; Charles II, An Act for the incouragement of the Greeneland and Eastland Trades, and for the better secureing the Plantation Trade of 1672 [sic!] http://www.british-history.ac.uk/statutes-realm/vol5/pp792-793; William III, An Act for preventing Frauds and regulating Abuses in the Plantation Trade [Chapter XXII. Rot. Parl. 7 & 8 Gul. III. pt.5.nu.8.] of 1695-6 http://www.british-history.ac.uk/statutes-realm/vol7/pp103-107 [all links accessed on 19 March 2023].

[7] W. Plumpe, *Wie zielsicher sind Sanktionen? Ein Blick in die Geschichte*, WirtschaftsWoche of 11 March 2022 https://www.wiwo.de/politik/europa/wiwo-history-wie-zielsicher-sind-sanktionen-ein-blick-in-die-geschichte/28154694-all.html [accessed 19 March 2023].

[8] British Note to the Neutral Powers of 16 May 1806 https://www.napoleon-series.org/research/government/diplomatic/c_continental.html; W. Plumpe, *Wie zielsicher sind Sanktionen? Ein Blick in die Geschichte*, WirtschaftsWoche of 11 March 2022 https://www.wiwo.de/politik/europa/wiwo-history-wie-zielsicher-sind-sanktionen-ein-blick-in-die-geschichte/28154694-all.html [both links accessed 19 March 2023].

[9] Berlin Decree of 21 November 1806 https://www.napoleon.org/en/history-of-the-two-empires/articles/the-berlin-decree-of-november-21-1806/ [accessed 19 March 2023].

[10] Eric Grove, *The War at Sea 1914-1918*, BBC History, last updated 17 February 2011 https://www.bbc.co.uk/history/worldwars/wwone/war_sea_gallery_01.shtml [accessed 19 March 2023].

[11] W. Plumpe, *Was die Sanktionen im ersten Kalten Krieg uns lehren können – ein Rückblick*, WirtschaftsWoche of 5 April 2022 https://www.wiwo.de/politik/europa/wiwo-history-was-die-sanktionen-im-ersten-kalten-krieg-uns-lehren-koennen-ein-rueckblick/28225886.html [accessed 19 March 2023]. For more details, *see*: B. Großfeld/A. Junker, *Das CoCom im internationalen Wirtschaftsrecht*, Mohr Siebeck, Tübingen 1991.

[12] B. Großfeld/A. Junker, *Das CoCom im internationalen Wirtschaftsrecht*, Mohr Siebeck, Tübingen 1991, p. 24.

against the Soviet Union and restricted the import of certain products originating in the USSR.[13] The political background was the polish declaration of a state of war on 13 December 1981 in order to eliminate Solidarność, i.e. the first independent and democratic trade union in the East Bloc.[14] The Council of the European Communities stated that it *was guided, among other things, by the desire to avoid negative consequences for employment in the Community*.[15]

9. With the 1982 sanctions, the EEC imposed significant sectoral restrictions limiting the import of certain products[16] originating in the USSR.[17]

10. In the following years, a number of restrictive measures, notably arms embargoes, financial restrictions and restrictions on admission (travel bans), were passed in the EEC and later in the EU against various countries. Due to treaty revisions and the jurisprudence of the Court of Justice of the European Union ("**CJEU**"), the legal framework of sanctions further evolved.[18] Currently, the EU has over forty regimes of restrictive measures in place.[19]

11. The EU gained the authority to adopt international restrictive measures with the enactment of the EU's common foreign and security policy ("**CFSP**").[20] The CFSP was first established in 1993 under the Maastricht Treaty (second pillar), and progressively reinforced by subsequent treaties, in particular the Treaty of Lisbon (2009), which notably granted the EU with legal personality. Today, the EU has implemented its own diplomatic service, the European External Action Service ("**EEAS**"), formally launched in 2011. The EEAS acts under the authority of the EU's High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission ("**HR/VP**"). The Political and Security Committee, which gathers ambassadors from the 27 EU Member States, also works under the responsibility of the HR/VP

[13] Council Regulation (EEC) No. 596/82 of 15 March 1982 amending the import arrangements for certain products originating in the USSR, *OJ L 72, 16.3.1982, p. 15–18*; P. Königs, *Sanktionspolitik der EU*, in: Große Hüttmann / Wehling, Das Europalexikon, 3rd Edition 2020, https://www.bpb.de/kurz-knapp/lexika/das-europalexikon/177246/sanktionspolitik-der-eu/ [accessed 19 March 2023].; Y. Miadzvetskaya/ C. Challet, *Are EU restrictive measures really targeted, temporary and preventive? The case of Belarus*, 6(1): 3. Europe and the World: A law review [2020], p. 3.

[14] Deutschlandfunk, *Als in Polen das Kriegsrecht verhängt wurde* https://www.deutschlandfunkkultur.de/kriegsrecht-polen-100.html [accessed 19 March 2023].; Written Question No 470/82 by Mr Radoux to the Commission, *OJ C 210, 12.8.1982, p. 21*; Written Question No 248/82 by Mr Pearce to the Commission, *OJ C 198, 2.8.1982, p. 15.*

[15] Written Question No 135/82 by Mr Ephremidis to the Council, *OJ C 188, 22.7.1982, p. 10.*

[16] The list of products included, *inter alia*, shrimps, polyamide fibre waste, universal motors of an output of more than 0-05 kW (Annex I) and synthetic organic dyestuff, fibre building board, reconstituted wood, Carpets, Agricultural tractors (Annex II).

[17] Article 1, Council Regulation (EEC) 596/82 of 15 March 1982.

[18] Y. Miadzvetskaya/ C. Challet, *Are EU restrictive measures really targeted, temporary and preventive? The case of Belarus*, 6(1): 3. Europe and the World: A law review [2020], p. 3, referring in particular, to the Kadi decision of the CJEU, which established a legal remedy against sanctions (joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat v Council [2008] ECLI:EU:C:2008:461; joined cases C-584/10 P, C-593/10 P and C-595/10 P Commission and Others v Kadi [2013] ECLI:EU:C:2013:518; Council Guidelines (n 3) para 9).

[19] Cf. European Commission, Proposal for a COUNCIL DECISION on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union (COM(2022) 247 of 25.5.2022), Introduction.

[20] R. Bloj, *Les sanctions, instrument privilégié de la politique étrangère européenne*, Fondation Robert Schuman, Question d'Europe n°598, 31 mai 2021.

and is tasked with monitoring the international situation, as well as defining and following-up on the EU's response to an international crisis.[21]

2.2 Sanctions' typology and objectives

12. Though commonly referred to as "sanctions", restrictive measures adopted by the EU are not punitive in nature. They are intended to foster a significant change in the policy or activity of the targeted person, entity or organisation by targeting non-EU recipients (be it countries, entities, organisations or individuals) deemed responsible for the harmful behaviour at stake.[22]

13. As such, they do not qualify as criminal sanctions and follow a distinct regime, halfway between political considerations and judicial sanctioning.

14. Restrictive measures adopted by the EU through their thematic or geographical regimes may take the following form:

- arms embargo;
- travel bans;
- asset freeze and prohibition to make economic resources available;
- other sectoral, targeted economic measures such as restrictions on imports or exports, sales, purchases, investments and provisions of services such as technical assistance.

15. Asset freezes and travel restrictions are two of the main sanctions taken by the EU against individuals. Asset freeze restrictions cover all funds and economic resources owned or controlled by designated persons and persons associated with them. This prohibition extends to making funds and economic resources available to designated persons (including, for example, through the provision of services for free). Ownership entails the possession (alone or in aggregate) of more than 50% of an entity's proprietary rights. Control of an entity is a trickier concept, which considers both legal and *de facto* control using a series of criteria assessed on a case-by-case basis, which is considered established as soon as one of them is met.[23]

2.3 A complex sanctioning process

16. Decisions on the adoption, renewal or lifting of sanctions regimes are taken by the Council of the European Union ("**EU Council**") on the basis of proposals from the HR/VP. The EU Council is constituted by government ministers from each EU country who regularly meet to develop the EU's CFSP. It is thus the main decision-making body in the EU.[24] The European Commission

[21] EUR-Lex, *Common foreign and security policy (CFSP)*, https://eur-lex.europa.eu/EN/legal-content/glossary/common-foreign-and-security-policy-cfsp.html [accessed 19 March 2023]..
[22] EU Commission, *Sanctions (restrictive measures)*, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en [accessed 19 March 2023]..
[23] EU Council, Restrictive Measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures, 27 June 2022 https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf [accessed 19 March 2023]..
[24] Cf. https://www.consilium.europa.eu/en/council-eu/ [accessed 19 March 2023]. Not to be confused with the Council of Europe, a group of 46 Member States, including Turkey and other countries who are not part of the

("**EU Commission**"), together with the HR/VP, give effect to these decisions into EU law through joint proposals for Council regulations that are also adopted by the Council.[25] These Council regulations are directly applicable in the Member States, without the need of additional transposal.[26]

17. Sanctions must be adopted, renewed or lifted by unanimity, on the basis of legislative proposals from the HR/VP. Generally speaking, unanimity is required on a number of matters which EU Member States consider to be particularly sensitive, including but not limited to CFSP related decisions (save under specific circumstances whereby a qualified majority is required). Interestingly, under unanimous voting, abstention does not prevent a decision from being taken.[27]

18. In other words, this means that EU Council's decisions introducing sanctions require unanimity from all EU Member States. With respect to restrictive measures aimed at interrupting or reducing economic and financial relations with third countries, the EU Council needs to implement a specific legislative act to give effect to the political decision taken, which requires a qualified majority under Article 215 of the Treaty on the Functioning of the European Union ("**TFEU**"). As experts put it bluntly, this is in practice a *fait accompli* after unanimity of the EU Council Decision, but this explains why this complex, two-step procedure require the adoption of two separate but connected legal acts for the implementation of economic sanctions regimes.[28]

19. With respect to the invasion of Ukraine, the EU Member States have shown unprecedented unity in their sanctions policy toward Russia.[29] Swiftness has also been welcomed by the international community in the Union's response to the Ukrainian crisis, setting a strong precedent on how the EU may now play a key role as an international diplomatic actor speaking as one united voice.

20. Of note, since the Russian invasion of Ukraine launched on 24 February 2022, the EU has in effect enacted ten comprehensive sanctions packages targeting a broad variety of sectoral restrictions, from newspaper broadcasting to the provision of certain business and consultancy services or oil and gas trading.

2.4 The de facto *extra-territorial reach of EU sanctions*

21. As indicated above, the material scope of EU restrictive measures can be extremely broad. On the other hand, their geographical is, theoretically, limited to the identification of an EU nexus.

EU – until 15 March 2022 even Russia was part of that one (for details, see https://www.coe.int/en/web/portal, [accessed 19 March 2023]); and not to be confused with the European Council, which is constituted by the heads of the Member States and determines the general political direction and priorities of the EU, cf. https://www.consilium.europa.eu/en/european-council/ [accessed 19 March 2023..

[25] EU Commission, *Sanctions (restrictive measures)*, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en [accessed 19 March 2023].

[26] Article 288(1) of the Treaty on the Functioning of the European Union (TFEU).

[27] The EU Council also has to vote unanimously in relation to EU membership, citizenship (i.e., the granting of new rights to EU citizens), harmonisation of national legislation on indirect taxation and in the field of social security and social protection, EU finance, certain provisions in the field of justice and home affairs (e.g., European Public Prosecution Office, etc.) https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/ [accessed 19 March 2023].

[28] Niall Moran, *Judicial scrutiny and EU Sanctions against individuals: Expanded listing criteria, limited safeguards and scrutiny*, Verfassungsblog.de, 20 December 2022. https://verfassungsblog.de/judicial-scrutiny-and-eu-sanctions-against-individuals/ [accessed 19 March 2023].

[29] S. Meister, *A Paradigm Shift: EU-Russia Relations After the War in Ukraine*, Carnegie Europe, 29 November 2022.

Indeed, restrictive measures apply only within EU jurisdiction and the obligations imposed by EU regulations are only binding on so-called "**EU Operators**".

22. Sanctions apply to the following EU Operators:[30]

- within the territory of the Union (including aboard any vessel or aircraft within jurisdiction of an EU Member State);
- to any EU national or resident, whether located inside or outside the territory of the Union;
- to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;
- any legal person, entity or body which conducts whole or part of its business in the EU.

Especially the last point extends the geographical scope of the sanctions far beyond the EU: the fact that such a person is incorporated outside of the EU does not change the fact that it is required to abide by EU sanctions at all times.

23. Council Decisions are directly binding on those to whom they are addressed (in general: EU Member States), while Council Regulations are binding in its entirety on any person or entity under EU jurisdiction. Enforcement of EU regulations and resulting sanctions fall within the responsibility of EU Member States' and their national competent authorities.

3. Legal and practical issues raised by an ever-evolving sanctions landscape

3.1 Inconsistencies between the various EU sanctions packages

24. While the uniform and swift reaction of the EU on a political level should be welcomed, it is worrisome that many of these hastily adopted restrictive measures seem to having been drafted and enacted almost too quickly. Some of them show a lack of an independent eye taking a step back to better harmonise these restrictive measures. Indeed, one may note that each sanctions package comes as a correction of the previous one yet often includes inconsistencies or misleading provisions that makes it extremely difficult for EU Operators to correctly navigate the constantly evolving sanctions landscape.

25. With regards to Russia's invasion of Ukraine, EU sanctions are gathered in two regularly amended regulations: EU Regulation 269/2014[31] pertaining to asset freeze measures and EU Regulation 833/2014[32], which gathers all sectoral business restrictions with Russia and Russian counterparts.

[30] Cf. Article 13, Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, as amended and Article 17, Council Regulation (EU) no. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, as amended.
[31] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, *OJ L 78, 17.3.2014, p. 6–15.*
[32] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *OJ L 229, 31.7.2014, p. 1–11.*

26. When analysing the various prohibitions in Regulation 833/2014, one immediately notices how the terms used in the Regulation are often vague and therefore difficult to apply: e.g., the definition of 'direct and indirect' provision of services under Article 5n raises questions as to how far services for non-Russian companies need to be traced in order to ensure that these services do not, eventually, also benefit a counterpart in Russia? Similarly, Article 5aa of Regulation 833/2014 sanctions EU Operators for 'engaging in transactions' with certain state-owned legal persons which are, in practice, uneasy to identify because it requires knowledge of the specific ownership structure and other company details not always available.[33]. Interestingly, one notes that various prohibitions apply to business interactions with the Government of Russia or legal persons, entities or bodies established in Russia, irrespective of whether they appear on a list or not.

27. Unfortunately, there are only few resources to draw guidance from. As most of these cases do not go to court, there is hardly any case law on EU restrictive measures. This is all the more so when the measures are fairly new, as is the case for the Russia-related restrictive measures introduced successively since February 2022. One of the main consequences is that practitioners can only turn to the EU Commission's Frequently Asked Questions ("FAQs") for guidance, thus raising the question of the binding effect and legal value of the EU Commission's interpretation.[34]

28. However, these FAQs do not always provide answers to every eventuality, and are obviously only developed and updated days, if not weeks or months after the concerned sanction package has already come into force, leaving it up to the EU Operators to see how they interpret newly passed sanction regulations. Little inspiration can be drawn from the underlying materials, e.g. Recitals or Council Decisions as they usually do not give much interpretative guidance. In consequence, there is always a timeframe of insecurity for the persons who need to conform to the new law. In addition, this creates the risk that EU Operators first interpret the new sanction in one way and, once the new FAQs in relation to the new sanction regime has been published, need to amend their practice again in light of the new interpretative guidelines.

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[33] Article 5aa(1) reads as follows: *It shall be prohibited to **directly or indirectly** engage in **any transaction** with a legal person, entity or body **established in Russia**, which is publically controlled or with over 50 % public ownership or in which Russia, its Government or Central Bank has the right to participate in profits or with which Russia, its Government or Central Bank has other substantial economic relationship, as listed in Annex XIX;*
*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 XIX**; or*
a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph.

[34] As soft law, the guidelines are of a not binding nature. Notwithstanding, they have a certain normative content and generate practical effects (cf. Directorate-General Internal Policies of the Union, Policy Department C.: Citizens' Rights and Constitutional Affairs Unite, *Better regulation and the improvement of EU regulatory environment, Institutional and legal implications of the use of "soft law" instruments*, (Background note), March 2007, PE 378.290, p. 3. Similarly, the Update of the EU Best Practices for the effective implementation of restrictive measures (EU Council of 27 June 2022, 10572/22), which aims at reviewing and adding best practices in this field, explicitly states: *The Best Practices are to be considered non exhaustive recommendations of a general nature for effective implementation of restrictive measures in accordance with applicable Union law and national legislation. They are not legally binding and should not be read as recommending any action which would be incompatible with applicable Union or national laws, including those concerning data protection* (ibid. p. 3). See also EU Council, How and when the EU adopts sanctions https://www.consilium.europa.eu/en/policies/sanctions/; EU Monitor, Guideline https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dou1h8az4..

29. Another area of criticism with respect to sanctions pertains to the lack of transparency on the criteria and standard of evidence to be met to be listed as a designated person on the EU Consolidated Sanctions List.

30. According to Article 2 of Council Regulation (EU) No. 269/2014[35], asset freeze measures and the prohibition to make funds or economic resources apply to *all funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I*.

31. Article 3 then specifies the criteria on which a natural or legal person shall be included onto Annex I. These criteria are extremely broad, vaguely defined, and pertain to persons *responsible for, supporting or implementing actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security in Ukraine, or which obstruct the work of international organizations in Ukraine, inter alia*.[36]

32. Support is characterised both materially or financially, and sanctions generally extend to persons *benefiting from the Government of the Russian Federation* or from *Russian decision-makers responsible for* (…) *the destabilization of Ukraine*. Along the same lines, Annex I also contains the names of *leading businesspersons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation*.

33. Yet, as far as the listing of designated persons is concerned, the legitimacy and thus quality of the regulation largely depends on the procedure that is being applied in order to determine who should be on the list and who not, as well as the legal remedies that exist against the listing. If, for instance, it turns out that persons were listed based on vague information – e.g. information provided by a source the reliability of which cannot be verified – this would put the quality of these listings into question as there is a high chance that persons might end up by mistake on the

[35] Council Regulation (EU) No. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, as amended.

[36] Article 3(1) defines the list of persons and entities that may be subject to sanctions as follows:
1. Annex I shall include:
(a) natural persons responsible for, supporting or implementing actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security in Ukraine, or which obstruct the work of international organisations in Ukraine;
(b) legal persons, entities or bodies ***supporting, materially or financially****, actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine;*
(c) legal persons, entities or bodies in Crimea or Sevastopol whose ownership has been transferred contrary to Ukrainian law, or legal persons, entities or bodies which have benefited from such a transfer;
(d) natural or legal persons, entities or bodies ***supporting, materially or financially, or benefiting*** *from Russian decision-makers responsible for the annexation of Crimea or the destabilisation of Ukraine;*
(e) natural or legal persons, entities or bodies conducting ***transactions*** *with the separatist groups in the Donbas region of Ukraine;*
(f) natural or legal persons, entities or bodies supporting, materially or financially, or benefitting from the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine; or
(g) leading businesspersons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine; or
(h) natural or legal persons, entities or bodies facilitating infringements of the prohibition against circumvention of the provisions of this Regulation, of Council Regulations (EU) No 692/2014 (1), (EU) No 833/2014 (2) or (EU) 2022/263 (3) or of Council Decisions 2014/145/CFSP (4), 2014/386/CFSP (5), 2014/512/CFSP (6) or (CFSP) 2022/266 (7).
and natural or legal persons, entities or bodies associated with them.

lists. Similarly, if legal remedies against the listings are scarce or poorly defined, this raises serious rule of law concerns.

34. To give an example slightly unrelated to sanctions: INTERPOL currently suffers severe reputational damage because it has been frequently abused by governments to hunt their political enemies. The fact that INTERPOL is being abused does not make red notices illegitimate, but the fact that there is no transparent and unified procedure in place to determine in which cases red notices and diffusions may be published significantly increases the risk of abuse. Similarly, if there are no transparent and reasonable standards applied when deciding who will be added to the list, the risk is high that the listing procedures may be abused by the wrong persons. Sanctions listings could face similar critiques.

35. Of note: the EU Commission's FAQs specify that *strictly speaking, only the persons and entities who/which appear under the column 'Name' in Annex I* (…) *are directly subject to an asset freeze and a prohibition to make funds and economic resources available to them or for their benefit*.[37]

36. However, this rather straightforward explanation that only those persons listed under the column "Name" in Annex I should be concerned by any such asset freeze measures does not hold given that such measures explicitly extend to any *natural or legal persons, entities or bodies <u>associated</u> with them*[38], some of which *happen to be mentioned in the 'Identifying information' and/or 'Reasons' columns of Annex I.*[39] Only very recently has the CJEU clarified that a link based solely on a family relationship is not sufficient to justify the inclusion of a person on a list.[40]

37. In addition, no other requirement is asked of the EU Council than to *include the grounds for the listing of natural or legal persons, entities or bodies concerned*. In this respect, the level of details included in the statement of reasons justifying for the inclusion on the sanctions list varies significantly from one designated person to the other, raising significant concerns as to the rather low standard of proof that needs to be met to warrant sanctions. [41] Here is where we note a lack of transparency as to the grounds on which designated persons are included onto the sanctions list.

38. While these authors acknowledge that sanctions are not criminal in nature,[42] and do not result in confiscation or coercive measures such as imprisonment for those designated persons listed on the sanctions list, we are of the view that their impact is often comparable to criminal sentences in practice. From this follows that the executive is not the correct body to impose sanctions, as it leads to an actually existing lack of transparency and judicial review as to the standard of proof and the procedure in place to warrant sanctions.

39. Indeed, when considering the standards developed by the European Court of Human Rights (**ECtHR**) regarding the concept of a "criminal charge", within the meaning of Article 6 of the European Convention of Human Rights (**ECHR**), one may indeed wonder whether sanctions, in particular the so-called asset freeze measures under Regulation 269/2014, which foresee significant limitations of economic liberty and freedom of movement for certain listed individuals

[37] Cf. FAQs on Russian sanctions, EU Commission's response to question 2 under Section B.1 "Asset Freeze and Prohibition to Make Funds and Economic Resources Available", as updated on 21 December 2022.
[38] Article 2, Council Regulation (EU) No. 269/2014, as amended.
[39] Cf. FAQs on Russian sanctions, EU Commission's response to question 2 under Section B.1 "Asset Freeze and Prohibition to Make Funds and Economic Resources Available", as updated on 21 December 2022.
[40] CJEU, *Prigozhina v Council*, Judgment of 8 March 2023, T-212/22 (ECLI:EU:T:2023:104).
[41] Cf. *infra*, part 5.
[42] Note that a new Proposal for a Directive suggests to criminalise certain violations of sanctions, for details, see *infra* section 4.3.

and entities, could not be considered of a "criminal" nature by the ECtHR. "Criminal charge", in the context of the ECHR, has an "autonomous" meaning, independent of the categorisations employed by the national legal systems of the member States.[43] This is true for both the determination of the "criminal" nature of the charge and for the moment from which such a "charge" exists.[44] The definition of "criminal charges" within the meaning of Art. 6 is thus wider than that of domestic law. The legal qualification of an act as "criminal" under domestic law is only one of the criteria to be applied. The ECtHR, in its well-established case law, provided some parameters (the so-called "*Engel* criteria") to identify when the safeguards against unfair criminal measures foreseen by Article 6 (the so-called "criminal head of Article 6") are applicable. The Engel criteria are: (1) the legal qualification of the offence under domestic law (2) the very nature of the offence and (3) the degree of severity of the penalty incurred.[45]

40. The first criterion of legal qualification is of relative weight and serves only as a starting-point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the ECtHR will look beyond the national classification and examine the substantive reality of the procedure in question.[46] In this sense, the ECtHR has ruled in the case of *Palaoro v. Austria* that Austrian administrative offences are "criminal in nature" because of the terminology employed ("Verwaltungs*straf*taten" and "Verwaltungs*straf*verfahren" – "*Straf*" in German being translated as "penal").[47] In addition, the employment of explicit language is not even necessary; the mere "criminal connotation" can justify the classification of an offence as criminal.[48]

41. However, the main criterium to assess the applicability of the criminal head of Article 6 is the very nature of the offence. In evaluating this criterion, the following factors can be taken into consideration[49]:

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character;[50]
- whether the proceedings are instituted by a public body with statutory powers of enforcement;[51]
- whether the legal rule has a punitive or deterrent purpose;[52]
- whether the legal rule seeks to protect the general interests of society usually protected by criminal law;[53]

[43] ECtHR, *Blokhin v. Russia* [GC], 2016, § 179; *Adolf v. Austria*, 1982, § 30.
[44] ECtHR, Guide on Article 6 of the European Convention on Human Rights (updated 31 August 2022), p. 9.
[45] See ECtHR, *Engel and Others v. the Netherlands*, judgment of 8 June 1976, application no. 5100/71 [1976] ECtHR 3 §§ 80-85; see also *Oztürk v. Germany*, §§ 46-56; *Lutz v. Germany*, §§ 50-57; *Benham v. the United Kingdom*, §§ 54-56; *Ezeh and Connors v. the United Kingdom*, §§ 69-129; *Jussila v. Finland*, §§. 29-39; *Nicoleta Gheorghe v. Romania*, §§ 25-27; *Müller-Hartburg v. Austria*, §§ 37-49; *Kasparov and Others v. Russia*, §§ 37-45; *Ramos Nunes de Carvalho e Sá v. Portugal*, §§ 122-123; and *Navalnyy v. Russia*, §§ 77-80.
[46] ECtHR, *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], 2020, §§ 85 and 77-78); see also ECtHR, Guide on Art. 6 of the Convention, p. 11.
[47] See ECtHR, *Palaoro v. Austria*, § 35.
[48] See ECtHR, *Kasparov and Others v. Russia*, § 44.
[49] Cf. ECtHR, guide on Art. 6 of the Convention, p. 11.
[50] ECtHR, *Bendenoun v. France*, 1994, § 47.
[51] ECtHR, *Benham v. the United Kingdom*, 1996, § 56.
[52] ECtHR, *Öztürk v. Germany, 1984, § 53; Bendenoun v. France, 1994, § 47.*
[53] ECtHR, *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, 2018, § 42.

- whether the imposition of any penalty is dependent upon a finding of guilt;[54]

- how comparable procedures are classified in other Council of Europe Member States.[55]

Notably, the Court did classify a number of administrative offences as criminal, such as road-traffic offences punishable by fines or driving restrictions[56], minor offences of causing a nuisance or a breach of the peace,[57] offences against social-security legislation,[58] the administrative offence of promoting and distributing material promoting ethnic hatred, punishable by an administrative warning and the confiscation of the publication in question,[59] and the administrative offence related to the holding of a public assembly.[60] As far as tax law is concerned, Article 6 does not apply to ordinary tax proceedings, which do not normally have a "criminal connotation".[61] However, Article 6 has been held to apply to tax surcharges proceedings.[62] In contrast, political measures such as electoral sanctions[63] and the dissolution of political parties[64] were not deemed as criminal in nature.

42. The last criterion regards the degree of severity of the penalty incurred. This criterion is determined by reference to the maximum potential penalty under the relevant applicable law,[65] although the actual sanction imposed in practice by domestic courts is also considered.[66] In this context, the fact that the ECtHR has recently considered that a maximum punitive fine of 25 € is already a criminal sanction is noteworthy.[67]

43. The second and third criteria laid down in *Engel and Others v. the Netherlands*, 1976, are alternative and not necessarily cumulative; for Article 6 to be held to be applicable, it suffices that the offence in question should by its nature be regarded as "criminal" from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere.[68] The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character.[69] A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge. [70]

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[54] ECtHR, *Benham v. the United Kingdom*, 1996, § 56.
[55] ECtHR, *Öztürk v. Germany*, 1984, § 53.
[56] ECtHR, *Lutz v. Germany*, 1987, § 182; *Schmautzer v. Austria*, 1995; *Malige v. France*, 1998; *Marčan v. Croatia*, 2014, § 33; *Igor Pascari v. the Republic of Moldova*, 2016, §§ 20-23; by contrast, *Matijašić v. Croatia* (dec.), 2021.
[57] ECtHR, *Lauko v. Slovakia*, 1998; *Nicoleta Gheorghe v. Romania*, 2012, §§ 25-2.
[58] ECtHR, *Hüseyin Turan v. Turkey*, 2008, §§ 18-21, for a failure to declare employment, despite the modest nature of the fine imposed.
[59] ECtHR, *Balsytė-Lideikienė v. Lithuania*, 2008, § 61.
[60] ECtHR, *Kasparov and Others v. Russia*, 2013, § 39-45; *Mikhaylova v. Russia*, 2015, §§ 50-75.
[61] ECtHR, *Ferrazzini v. Italy* [GC], 2001, § 20.
[62] ECtHR, *Jussila v. Finland* [GC], 2006, § 38; *Steininger v. Austria*, 2012, §§ 34-37; *Chap Ltd v. Armenia*, 2017, § 36; *Melgarejo Martinez de Abellanosa v. Spain*, 2021, § 25.
[63] ECtHR, *Pierre-Bloch v. France*, 1997, §§ 53-60.
[64] ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey* (dec.), 2000.
[65] ECtHR, *Campbell and Fell v. the United Kingdom*, 1984, § 72; *Demicoli v. Malta*, 1991, § 34.
[66] See ECtHR, *Benham v. the United Kingdom*, § 56; *Ezeh and Connors v. the United Kingdom*, § 120; and *Müller-Hartburg v. Austria*, § 46;
[67] See ECtHR, *Kasparov and Others v. Russia*, § 44.
[68] ECtHR, *Lutz v. Germany*, 1987, § 55; *Öztürk v. Germany*, 1984, § 54.
[69] Ibid., § 53; ECtHR, *Nicoleta Gheorghe v. Romania*, 2012, § 26; see also ECtHR, Guide on Art. 6 of the Convention, p. 11.
[70] ECtHR, *Bendenoun v. France*, 1994, § 47; see also ECtHR, Guide on Art. 6 of the Convention, p. 11.

44. Theoretically, the case law of the ECtHR applies only to sanctions imposed by signing parties of the ECHR. Despite the planned accession of the EU to the ECHR under Art. 6(2) of the TEU, there has yet to be a decision regarding its applicability to the EU as an autonomous entity. Nonetheless, considering that its Member States will ultimately be the ones enforcing the sanctions, there are no substantial objections to the pertinence of the ECtHR case law to the EU actions.

45. Applying the above-mentioned *Engel* criteria to the EU asset freezing measures under Regulation 269/2014 leads to the conclusion that they could be qualified as criminal in nature, though not formally qualified as such. When looking on the persons listed in Annex 1 to Regulation 269/2014, though technically limited to the group of persons (extended on an at least monthly basis[71]) that figure on the list, the targets of the sanctioning norms are in no way restricted to a clearly defined group in the sense of ECtHR case law. People and entities show on the lists because they, according to the list, hold or have held a certain position in the Russian government or have "supported" the Russian invasion of Ukraine, or simply because they are "associated" with a listed person. The generic criterion is that they are considered to "support or implement actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine". The proceedings are instituted by the Council, i.e. a public body, and the sanctions are enforced by the competent authorities of the Member States. Whether the sanctions may pursue a punitive purpose may be subject to debate. They certainly follow a deterrent purpose: The inclusion of an individual in an internationally available list of "banished" people, even when there is no direct reference to crime-related terminology, already implies a "criminal connotation" with high stigmatising potential. Indeed, the stigmatisation and ostracization are the very purpose of these sanctions. On the other hand, they do not seek to protect the general interests of society usually protected by criminal law, and their imposition does not depend on finding guilt. And they are not deemed criminal in nature by any other Member States. However, the third *Engel* criterion, the severity of the sanctions incurred, is, undoubtedly, significant. It is not limited to the confiscation of luxury goods, but extends to the freezing of all bank accounts and possibility to have access to any funds or economic resources, whether directly or indirectly, with no perspective as to when they will be released again. This consequence alone has the *de facto* effect of an extremely heavy criminal fine, given that there is no temporal limitation of the measure (despite the periodic review of sanctions).

46. Although the ECtHR has shown significant reluctance to classify political measures as criminal offences, considering the overtly deterrent purpose and the procedures of enforcement, their indefinite length, and their heavy impact, it is not unthinkable that the ECtHR and one day qualify EU restrictive measures as criminal sanctions under its autonomous interpretation of "criminal charges".[72]

47. Should sanctions indeed have a criminal nature, within the meaning of Art. 6 of the ECHR, this would have tremendous consequences. Not only would the listing equate with the execution of a criminal judgment, but before a person could be put on a list, a criminal investigation and a public trial would need to be carried out, in the course of which evidence would need to be collected

[71] The frequency to add new persons to the list has recently increased: New persons were added lastly on 16.12.2022, before that on 12.12.2022, on 14.11.2022, on 20.10.2022, on 6.10.2022, on 1.9.2022, on 21.07.2022, 03.06.2022, 08.04.2022…

[72] See also ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland* – Judgment of 26.11.2013, application no. 5809/08, where the Court found that Switzerland had violated Art. 6(1) of the ECHR (access to justice) by implementing a UNSC sanction in relation to Iraq.

that would prove that the person is guilty of the allegations brought against him or her. The rights of Art. 6, ECHR, notably, the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Art. 6(1), ECHR), would need to be observed.

48. However, sanctions are not meant as criminal judgments, as this would require not only a stronger standard of proof, but also a minimum of clarity and certainty in the description of the penalised behaviour. In the case of Ukraine-related sanctions, the persons are listed for having *supported or implemented actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine*. Such a vague description would never satisfy the principles of accessibility and foreseeability of the criminal law, as required by *the nulla poena sine lege* principle enshrined in Art. 7 of the ECHR.

49. Finally, considering that the purpose of the sanctions is to protect the territorial integrity, sovereignty and independence of Ukraine, and that this is thus the legally protected interest of the sanctions, it is questionable whether sanctioning certain individuals is an adequate means to reach that goal. Under the rule of law, accusing someone of committing a criminal activity implies a certain level of agency of the accused over the interest protected by the prohibiting norm. Otherwise, there would be a clear risk of instrumentalising individuals in a manifest violation of human dignity and the culpability principle. It is questionable whether or to which extent individuals affected by the EU sanctions can influence the geopolitical events at stake or if the purpose of those measures (i.e., the cessation of a war of aggression led by Russia) is beyond their command. The concerns here are even more severe when considering the case of persons affected by sanctions through the deeply problematic "association clause" of Article 2(2) of Regulation 269/2014.[73]

3.2 Prohibition of legal services as a threat to the rule of law?

50. Following the 8th sanctions package in October 2022, Article 5n of Regulation 833/2014 was amended, introducing a prohibition to provide, amongst others, legal advisory services. This prohibition has been harshly criticised by legal professionals, as it has a direct impact on the ability for EU lawyers to represent and assist Russian entities seeking advice on the applicability of EU sanctions. This is particularly worrisome as the above outlined inconsistencies and vagueness of some of the provisions make legal advice indispensable when navigating through the sanctions. Furthermore, it raises many questions, one of them being its interpretation and the issues EU lawyers may face as a result, in particular with respect to the distinction between advisory work (prohibited) and contentious matters (allowed), a distinction that can hardly be made, as any litigation will generally be preceded, and, in many cases can be avoided, by sound legal advice.

51. Generally speaking, it is unfortunate that the members of a profession of court officers, whose role is essential to the preservation of the rule of law and justice being properly rendered and whose mantra relies on trust, independence, integrity, probity and dignity seem to be viewed as a medium to help designated persons circumvent applicable sanctions. This unfortunately substantiates the general distrust aimed against lawyers, who are too often associated in the public mindset with the deeds of the people they are tasked with advising or defending.

52. This tendency can also be witnessed in other areas of laws, whereby lawyers are actively seen as potential enablers of criminal offences (for example, tax advisors who *facilitate … aggressive*

[73] Cf. *supra*, para. 30 and 36.

tax planning - i.e. in many cases do no more than informing their clients about the boundaries of the law)[74] or when considering anti money laundering legislation throughout Europe which requires transactional lawyers to report suspicions of wrongdoings committed by their clients and thus significantly impacts lawyers' independence.[75]

3.3 A slippery slope: when sanctions exclusively rely on nationality

53. In principle, restrictive measures somehow pertain to a concerned persons' alleged involvement in the international crisis concerned or misconduct at stake. This is particularly true for asset freeze measures or prohibition to make funds and economic resources available. Put simply, one needs to be involved in (although sometimes somewhat remotely) the destabilisation of the concerned country to be subject to sanctions.

54. The same does not hold true for sectoral restrictions, some of which are dangerously based on the sole criteria of nationality.

55. In particular, this is the case for sectoral restrictions applicable to the provision of trust-related services by EU Operators. This restriction was introduced under the 5th sanctions package adopted on 8 April 2022, with a view to include *a prohibition on providing trust services to wealthy Russians, making it more difficult for them to store and manage their wealth in the EU*.[76]

56. Under Article 5m, EU Operators are prohibited to *register, provide a registered office, business or administrative address as well as management services to a trust or similar legal arrangement having as a trustor or beneficiary (a) Russian nationals or natural persons residing in Russia, (b) legal persons, entities or bodies established in Russia* (…).

57. The EU Commission's FAQs state that the prohibition only applies where the settlor or the beneficiary is a Russian person, as defined under paragraphs (a) to (e). However, such services could be provided if such Russian persons are removed from the trust. Such a prohibition does not apply to bi-nationals or EU residents (whether temporary or permanent residence). Finally, the EU Commission recalls that specific authorisation may be sought with the relevant national competent authority ("**NCA**") for those trusts that include a Russian person as settlor or beneficiary, provided that *the trustee does not accept from or distribute assets to a trustor or beneficiary who qualifies as a Russian person*.[77]

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[74] See, e.g., the Proposal of 6 July 2022 for a Council Directive to tackle the role of enablers that facilitate tax evasion and aggressive tax planning' in the European Union (Securing the Activity Framework of Enablers - SAFE), Document Ares(2022)4939801.

[75] See, e.g., the criticism of the German Bar Association on the newest money laundering package of the commission, press release 29/21, online available here: https://anwaltverein.de/de/newsroom/pm-29-21-dav-kritik-am-geldw%C3%A4schepaket-der-eu-kommission [accessed 19 March 2023].

[76] EU Commission press release, *Questions and answers on the fifth package of restrictive measures against Russia*, 8 April 2022, accessible at the following link: https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_2333 [accessed 19 March 2023].

[77] Cf. FAQs on Russian sanctions, EU Commission's response to question 4 under Section G.9 "Trust Services", as updated on 21 December 2022.

58. Interestingly, despite being presented in the media as targeting "wealthy" Russians,[78] no financial considerations or thresholds have been introduced, hence the measures apply to all trusts or similar legal arrangements, irrespective of the value of the assets under management.

59. Furthermore, the prohibition applies to any trust (or similar arrangement) whose trustor or beneficiary is – or is owned or controlled by – a Russian national or entity, regardless of whether such a Russian person is listed on the EU sanctions' list as a designated person. In this respect, the EU approach significantly differs from that adopted by the United Kingdom, where trust related prohibitions are dependent upon the presence of a UK designated person in the trust structure, and does not solely rely on the nationality of such person.

60. Using nationality as a stand-alone criterion to justify sectoral restrictions is a dangerous and slippery slope that directly endangers the very existence of the rule of law. Yet, one immediately notices that several prohibitions focus solely on nationality (or the seat of incorporation) and do not refer to a potential designation as additional criteria to warrant restrictions. This applies, for instance, to the restriction against Russian individuals with no dual (EU) nationality or residence permit preventing EU financial institutions to accept deposits of more than EUR 100,000.[79]

61. Given Europe's still recent darkest hours, combined with the continued emergence of populist, nationalist parties throughout the various Member States, economic sanctions should not be enacted at the detriment of the EU's fundamental and core values embodied in the rule of law, equality and justice.

4. Enforcement of EU Sanctions

4.1 Enforcing sanctions through Member States

62. As the Council phrased it in 2018: *The effectiveness of EU restrictive measures – and also the EU's credibility – hinges to a large degree on restrictive measures being implemented and enforced promptly and without exceptions in all Member States*.[80]

63. While EU regulations provide clear prohibitions (e.g. arms embargo) or restrictions (e.g. licence requirement for certain exports), they generally do not outline the consequences of violating these prohibitions. It is therefore up to the Member States to decide how they respond to violations of the restrictive measures. Some provide for criminal or regulatory offences, others do not foresee any consequences. A current EU Commission's proposal attempts to harmonise this unsatisfying situation by obliging the Member States to criminalise certain behaviour related to the violation of sanctions, thus creating a new EU crime.

64. Although sanctions adopted through EU regulations are directly applicable, in practice they require action from the Member States, [81] for:

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[78] EU Commission press release, *Questions and answers on the fifth package of restrictive measures against Russia*, 8 April 2022, accessible at the following link: https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_2333 [accessed 19 March 2023].

[79] Article 5b, Council Regulation (EU) No. 833/2014, of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, as amended.

[80] EU Council, 'Sanctions Guidelines – update', Doc. 5664/18 of 4 May 2018, at https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf [accessed 19 March 2023].

[81] See also Barnes QC/Feldberg/Turner/'Bradshaw/Mortlock/Thoms/Alpert, GIR, The Guide to Sanctions, 3rd edition (June 2022), p. 61.

- granting exemptions;
- receiving information from, and cooperating with, economic operators (including financial and credit institutions);
- reporting upon their implementation to the EU Commission;
- for UN sanctions, liaising with the Security Council sanctions committees, if required, in respect of specific exemption and delisting requests, and
- determining so-called "**secondary sanctions**", i.e. penalties for the violation of sanctions imposed by the EU Council regulations.[82] Council regulations generally therefore include a standard clause, imposing a duty on the Member States to lay down the rules on penalties which must be *effective, proportionate and dissuasive*.[83]

65. Based on the numerous legal and practical issues in complying with the sanctions, EU Operators increasingly approach the NCAs to seek guidance. The NCAs are currently overloaded with requests for authorisation or derogations.[84] However, little is publicly known on how they deal with requests in practice. No implementation reports on their enforcement practice are publicly available with regards to the Ukraine related sanctions.[85]

4.2 Status quo*: a diverse enforcement practice in Europe*

66. How secondary sanctions are implemented at the national level is thus currently up to every Member State. While all Member States are bound by EU sanctions, Member States largely differ in how to enforce compliance with these sanctions in practice. Penalties adopted by the Member States range from measures of an administrative or civil nature to criminal law penalties.[86] In 12 Member States, the violation of Union restrictive measures is a criminal offence.[87] In 13 Member States, it can amount to either a criminal or administrative offence, depending on the

[82] Ibid, p. 12 f (with reference to: Gestri Marco, *Sanctions Imposed by the European Union: Legal and Institutional Aspects*, in: Coercive Diplomacy, *Sanctions and International Law*, Brill Nijhoff, 2016, p. 87).
[83] Cf., e.g. Article 8(1) of Regulation 833/2014: *Member States shall lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall also provide for appropriate measures of confiscation of the proceeds of such infringements*. Similarly, Article 15(1) of Regulation 269/2014 states: *Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.*
[84] Cf., e.g., the warning on the website of the German NCA (BAFA): *Against the background of the now very high number of general enquiries from associations and companies to BAFA, we ask for your understanding that we have to concentrate our capacities on processing imminent, very specific export projects in order to create more legal clarity and security for as many enquirers as possible in the most effective way.* https://www.bafa.de/DE/Aussenwirtschaft/Ausfuhrkontrolle/Embargos/Russland/russland_node.html (accessed 19 March 2023).
[85] Unlike as in other areas of law where the legislative act itself requires such reports, cf., e.g., Art. 12 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1–10)
[86] Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 13, https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf [accessed 19 March 2023].
[87] CY, DK, FI, FR, HR, HU, LV, LU, MT, NL, PT, SE, cf. Genocide Network (note 86), p. 22 (note 71).

gravity of the wrongdoing at stake,[88] and in two Member States, it can only lead to administrative penalties.[89]

67. In those states in which sanctions violations constitute criminal offences, the penalties vary between maximum monetary fines between 1,200 € (Estonia) and 5,000,000 € (Malta) and maximum prison sentences between 6 months (Greece) to 12 years (Italy, Malta).[90] The majority of states (10) foresee a maximum prison period of 5 years.[91]

68. Besides these substantial legal differences, enforcement practice also depends on the authorities designated by the Member States as competent to enforce the sanctions, their personal and financial resources, the ministry they are subordinated to etc., as well as procedural aspects which may vary from country to country.

69. The problem with secondary sanctions is that most domestic laws imposing penalties make dynamic references to EU law, e.g.: *Whoever violates an economic sanction adopted by the Council of the European Union in the field of Common Foreign and Security Policy shall be punished by…*. That means that while the conduct to be criminalised is defined in EU law, it is the domestic legislator who determines the legal consequence of this conduct. This raises two problems:

    (1) By this technique, the description of the criminal conduct has been delegated from the domestic, parliamentary legislator to the European legislator of the Regulation, so that the domestic legislator foresees legal – criminal – consequences for conduct that is not yet known to the national legislator. The dynamic reference to any current or future EU regulation implies conducts he may not be thinking of when determining the punishment.
    (2) This technique creates a serious lack of legal certainty and clarity of the law as the specific conduct that is criminalised is not visible in the domestic law itself, but only when looking into the referred provisions, which may, again, refer to other provisions and so on and so forth ('chain references').[92]

70. All these factors (e.g. political will, domestic legal constraints, inclination to protect economic interests of domestic operators)[93] contribute to a very divergent enforcement practice amongst Member States.

71. Enforcement has always been the weak spot in ensuring compliance with the EU sanctions regime. The disparities in the penalties incurred in the 27 Member States have, until now, created the possibility for "legal shopping" – the search for the least restrictive EU jurisdictions. Indeed, it has been possible for Member States to have different definitions of what constitutes a violation of restrictive measures and differing penalties that should be applied in the event of such a violation. This means there could be varying degrees of enforcement of sanctions from state to

[88] AT, BE, BG, CZ, DE, EE, EL, IE, IT, LT, PL, RO, SI. Observer States: USA, cf. cf. Genocide Network (note 86), p. 22 (note 73).
[89] ES, SK (Genocide Network (note 52), p. 22 (note 72).
[90] Genocide Network (note 52), p. 23.
[91] Ibid.
[92] While we are not aware of any case law related to sanctions, the references to European law in another area of law was subject to a constitutional complaint on this ground, and led to the respective norm being null and void, cf. German Federal Constitutional Court, decision of 21 September 2016 – 2 BvL 1/15, BVerfGE 143, 38-64, http://www.bverfg.de/e/ls20160921_2bvl000115.html [accessed 19 March 2023].
[93] Cf. GIR The Guide to Sanctions (see note 81), p. 66.

state and a risk of these measures being sidestepped, giving those sanctioned the chance to keep accessing their assets and "dare" violating sanctions in a jurisdiction with little to no enforcement practice.

72. For instance, cross-border law enforcement and judicial cooperation may be hampered if the offence, in view of its punishment in one Member State, is considered serious enough to authorise the use of Mutual Legal Assistance instruments such as the European Investigation Order, while in another Member State, the use would be deemed as disproportionate.[94]

73. Moreover, there are examples of non-enforcement such as a complaint by the European Centre for Constitutional and Human Rights (**ECCHR**) and 14 other human rights organisations to the EU Commission. In this complaint, it was alleged that the Government of the Italian Republic infringed Union law by allowing Ali Mamlouk, Head of Syria's National Security Bureau since July 2012 and Former Head of the General Intelligence Directorate between 2005 and 2012, to enter Italian territory and meet with then Interior Minister Marco Minniti and Head of Intelligence Alberto Manenti in early 2018.[95] Mamlouk is allegedly responsible for numerous human rights violations committed in Syria and has been subject to travel restrictions under Council Decision 2013/255/CFSP of 31 May 2013.[96] The obvious violation of these travel restrictions appears to have been without consequences. Another example for non-enforcement was a Danish company, that, through a Russian branch office, was involved in supplying jet-fuel to the Russian air force in Syria, allegedly transiting the goods through other EU Member States. National authorities were criticised for failing to prevent future shipments. Eventually, however, the case ended in convictions.[97]

74. Due to the vast differences within the EU, the EU sanctions regime is criticised for lack of consistency which leads to an uncoordinated, and, arguably, weak EU sanctions regime. This criticism is increased by the lack of a centralised single authority responsible with issuing licences and derogations to EU Operators. Given that each Member State is responsible for designating its own NCA, it is in turn the NCA's responsibility to assess each case and determine whether specific authorisations should be granted. Unfortunately, one NCA's decision is not binding upon the other Member States, which may in practice give rise to additional uncertainties for EU Operators active in various EU countries. This may notably be the case in transportation, whereby goods under licensing transit through various EU countries but it is, in practice, very cumbersome and quasi impossible for one EU Operator to request a license authorisation from each EU country in transit.

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[94] See also: Van Ballegooij, *Ending Impunity for the Violation of Sanctions through Criminal Law*, eucrim 2/2022, pp. 146-161, https://doi.org/10.30709/eucrim-2022-009 [accessed 19 March 2023].

[95] Cf. ECCHR, *Joint Letter dated 28.06.2018: 14 Syrian and international human rights organisations support ECCHR's complaint against Italy*, submitted to the EU Commission on 28 June 2018 (for details, see https://www.ecchr.eu/en/press-release/joint-letter-14-syrian-and-international-human-rights-organisations-support-ecchrs-complaint-against-italy/, accessed on 19 March 2023). Also cited by GIR The Guide to Sanctions (note 81), p. 66 as well as by Olsen/Kjeldsen, *Strict and Uniform: Improving EU Sanctions Enforcement*, 29 September 2022, DGAP/German Council on Foreign Relations, Case Study 1, online available at https://dgap.org/en/research/publications/strict-and-uniform-improving-eu-sanctions-enforcement (accessed 19 March 2023).

[96] Cf. Annex I of Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures in view of the situation in Syria (OJ L 147 1.6.2013, p. 14).

[97] Olsen/Kjeldsen, *Strict and Uniform: Improving EU Sanctions Enforcement*, Sept. 29, 2022, DGAP/German Council on Foreign Relations, Case Study 1, online available at https://dgap.org/en/research/publications/strict-and-uniform-improving-eu-sanctions-enforcement (accessed 19 March 2023).

75. Uncertainty is further increased by the fact that there is hardly any case law (as most of these cases are dealt with domestically by the competent authorities and never go to court) and very few Member States release information regarding sanctions investigations and enforcement activity.[98]

4.3 Towards harmonising secondary sanctions? A new directive proposal

76. On 25 May 2022, the Commission proposed to add the violation of Union restrictive measures to the areas of crime laid down in Art. 83(1) of the TFEU.[99] This step laid the foundation for the later proposal to harmonise criminal law definitions of violations of sanctions.[100]

77. On 28 November 2022, the Council followed this proposal and adopted the corresponding decision,[101] whereby the violation of the Union's restrictive measures is now defined as an area of crime to be subject to harmonisation under Article 83(1) TFEU.

78. This is the first time the Council made use of its power under Art. 83(1), sub-paragraph 3, TFEU, thereby identifying a new area of crime to be added to the EU crimes. EU crimes have so far included terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime (cf. Art. 83(1) sub-paragraph 2).

79. Based on this Council Decision, on 2 December 2022, the EU Commission presented a draft Directive for the harmonisation of criminal sanctions for the violation of EU sanctions.[102] The Union's ability to "speak with one voice" in this area of EU sanctions became particularly urgent against the current backdrop of Russia's military aggression against Ukraine.[103] The EU Commission's legislative proposal establishes minimum standards for the investigation and prosecution of sanctions violations, as well as requirements for judicial cooperation.

80. The identification of sanctions violations as an EU crime demonstrates a clear willingness by the Member States to ensure a similar degree of sanctions enforcement throughout the EU and prevent and deter attempts to use loopholes to circumvent or violate EU measures. The proposed Directive aims to ensure the effective application of the Union's restrictive measures by harmonising the criminalisation of violations of restrictive. The inconsistent criminalisation is to

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[98] GIR The Guide to Sanctions (see note 81), p. 66.
[99] European Commission, Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union (COM(2022) 247 of 25.5.2022).
[100] It was necessary because before, there was no legal basis for a harmonisation for this type of offence. Article 215 TFEU provides a legal basis for the Council to adopt the 'necessary measures' in the case of an adoption of Union restrictive measures. However, the legal basis for the adoption of restrictive measures does not allow for the approximation of criminal law definitions and the types and levels of criminal penalties (cf. previous note).
[101] EU Council, Council Decision on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union, 30 June 2022, 10287/1/22 Rev 1 (O.J. L 308 of 29.11.2022, p. 18).
[102] Proposal of 2 December 2022 for a Directive on the definition of criminal offences and sanctions in the event of violation of Union restrictive measures, COM/2022/684 final, online available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0684 [accessed 19 March 2023].
[103] Cf. p. 2 of the Proposal.

be standardised through defining certain behaviour to be criminalised, minimum criminal penalties, and the enforcement of prosecution is to be improved.

81. The fact that the Council, for the first time in history, was ready to identify a new EU crime under Art. 83 of the TFEU, and that within a few months a new Directive proposal was on the table, coupled with the fact that the proposal foresees an extremely short transposition period (6 months), indicates the political pressure behind this criminalisation effort.

82. To further strengthen the impact of this attempt to harmonise criminalisation of sanction violations, on 29 November 2022, the French and German ministers of Justice, Eric Dupond-Moretti and Marco Buschmann, came forward with a joint call to grant the European Public Prosecutor's Office (EPPO) competence to prosecute these violations.[104]

83. The proposal foresees that violations of Union restrictive measures shall be criminalised by the Member States. Pursuant to the first paragraph of Article 3, this shall only be the case if

(1) they are committed intentionally, and
(2) fall under one of the categories further defined in paragraph 2 of Article 3.

Paragraph 2 then lists a number of conducts that are often also subject to restrictive measures, such as making funds or economic resources available to a designated person, entity or body, failing to freeze without undue delay funds or economic resources etc. In direct contradiction to paragraph 1 is then paragraph 3 of the same Article, as it specifies that any of the conducts referred to in paragraph 2 (except the last one: circumventing activities) *shall also be criminalised when committed not intentionally, but with 'serious negligence'*. The extension to serious negligence extends criminal liability considerably, by shifting the burden of proof from the authorities to the concerned persons (who then need to show that they had adequate compliance procedures in place to avoid a sanction violation). The German Bar Association and the German Federal Bar both criticised the proposal for criminalising negligent behaviour.[105]

84. The criminalisation of circumvention offences includes situations such as failing to report funds or economic resources, and failing to cooperate with the competent authorities in verification of information regarding the reporting of funds, thereby imposing an obligation on the relevant stakeholders to actively report information which may be used against them. This triggers concerns insofar as such reporting duty goes against the core principle of protection against self-incrimination. However, as Article 3(4) clarifies: *nothing in paragraph 2 shall be understood as imposing obligations on natural persons contrary to the right not to incriminate oneself*. The question remains how this can be done in practice.

85. Considering that the reporting and cooperation obligations are not obligations created originally by the proposed Directive, but stem from the previously adopted EU sanctions, the clarification in the proposed Directive with regards to the protection of professional secrecy and of the right not to incriminate oneself actually must be welcomed. It is indeed an important statement of the

[104] Le Monde, *Violations of EU sanctions must be prosecuted by the European Public Prosecutor's Office*, 29 November 2022, https://www.lemonde.fr/en/opinion/article/2022/11/29/violations-of-eu-sanctions-must-be-prosecuted-by-the-european-public-prosecutor-s-office_6006013_23.html (accessed 19 March 2023).
[105] See *Stellungnahme* 03/23 of the German Bar Association (DAV), online available at https://anwaltverein.de/de/newsroom/sn-3-23-eu-richtlinie-zu-sanktionsverstoessen?file=files/anwaltverein.de/downloads/newsroom/stellungnahmen/2023/dav-sn-03-23-sanktions-rl.pdf, and of the German Federal Bar (BRAK), online available at Microsoft Word - stellungnahme-der-brak-2023-04.docx (both accessed 19 March 2023).

Directive proposal that legal advice shall be protected by legal privilege and professional secrecy, as previous restrictive measures were less clear in that matter and caused some concern amongst legal professionals.[106]

86. While the Directive proposal contains some apparent contradictions (e.g. intentional vs. negligent behaviour; reporting obligations vs. right not to incriminate oneself), it also strongly states that *this Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the rights to liberty and security, the protection of personal data, the freedom to conduct a business, the right to property, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence including the right not to incriminate oneself and to remain silent, the principles of legality, including the principle of non-retroactivity of criminal penalties and proportionality of criminal offences and penalties, as well as the principle of ne bis in idem. This Directive seeks to ensure full respect for those rights and principles and should be implemented accordingly* (Recital 24). What will remain of this proposal, however, is yet to be seen. The proposal is currently discussed in the Council and will then go to the European Parliament.

4.4 Need for criminalisation of sanction violations?

87. The introduction of the new proposed directive proposing to make the violation of EU sanctions an EU crime raises the question as to whether violations of sanctions merit a criminal law reaction at all.

88. The purpose of criminal law as *ultima ratio* is to react to anti-social behaviour that reaches a dimension that threatens peaceful co-existence of the people. Traditionally, it deliberately did not target petty violations of, e.g., civil or administrative law, but aimed at punishing those who endanger or violate protected legal interests. With regards to EU sanctions, one may consider that the sanctions at stake are primarily a political tool to foster the EU's common foreign security policy, thus not in need for a criminal answer in case of breach. Yet, one notices a general evolution of greater criminalisation of behaviours traditional very remote from general criminal law: this is particularly the case for environmental law, corporate law or tax law where the border between administrative wrongdoing and criminal offence is becoming blurrier.

5. Uncertainties when challenging of EU sanctions

5.1 Periodic review vs. judicial process

89. After being added to the EU Consolidated Sanctions List[107], designated persons may challenge sanctions against them via two channels: (i) the regular review process of the EU Council, or (ii) the judicial review process brought before the CJEU.

5.1.1 Submitting observations seeking delisting with the EU Council

[106] E.g. Article 8 of Regulation 2022/1273 amending Regulation 269/2014 changed the wording from "without prejudice" to "notwithstanding".
[107] Full list, regularly updated, available at: https://webgate.ec.europa.eu/fsd/fsf#!/files.

90. As put forward in the EU's best practices for the effective implementation of restrictive measures, the effectiveness and credibility of EU sanctions largely depends on their prompt and harmonious implementation and enforcement throughout the Union. To monitor and follow-up these restrictive measures, a specific Council body dedicated at the implementation and application of the restrictive measures was set up in 2004:[108] a special "sanctions formation" was established within the Foreign Relations Counsellors Working Party ("RELEX/Sanctions") which since then meets on a regular basis.[109]

91. Whenever an individual or entity is added to the EU Consolidated Sanctions' List, it shall be informed of the reasons justifying for such inclusion. More specifically: *The Council shall communicate its decision, including the grounds for listing, to the* [concerned] *natural or legal person, entity or body* (…), *either directly* (…) *or through the publication of a notice, providing such natural or legal persons (…) with an opportunity to present observations*.[110] In other words: it is not sure at all that the concerned person will even be directly informed about the Council's decision, as such notification may in practice take the form of a notice published in the Official Journal of the European Union, merely referring to the sanctions' decision and requiring active monitoring to be informed of its publication. In practice, many designated persons only learn of their sanctioning when their accounts are frozen or when a contemplated transaction is blocked, for instance.

92. Moreover, it is important to note that – unlike in domestic administrative law – the concerned person is not informed about his or her rights and remedies against such decision.

93. EU sanctions are subject to a periodic review process, which shall occur at least every 12 months with respect to designated persons listed under Annex I to EU Regulation No. 269/2014,[111] pursuant to Article 14(4) of said regulation. Such periodic review process shall occur more promptly if observations are submitted or where substantial new evidence is presented.[112]

94. Theoretically, the EU Best Practices recommend that *proposals for autonomous listings should include individual and specific reasons for each listing*, the purpose of which being *to state, as concretely as possible, why the* [EU Council] *considers, in the exercise of its discretion, that the person, group or entity concerned falls under the designation criteria defined by the relevant legal act, taking into considerations the objectives of the measures as expressed in its introductory paragraphs*.[113]

95. In practice however, the review of the statements of reasons included in the antepenultimate column of Annex I to Council Regulation (EU) No. 269/2014 listing designated persons often

[108] EU Council, Guidelines on implementation and evaluation of restrictive measures of 8 December 2003, Doc. 15579/03.
[109] EU Council, Restrictive Measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures, 27 June 2022 https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf [accessed 19 March 2023]; see also Council of the European Union, Monitoring and evaluation of restrictive measures (sanctions) in the framework of CFSP - Establishment of a 'Sanctions' formation of the Foreign Relations Counsellors Working party (RELEX/Sanctions), 22 January 2004, Doc. 5603/04.
[110] Article 14.2, EU Regulation No. 269/2014.
[111] Council Regulation (EU) No. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, as regularly amended.
[112] Article 14.3, EU Regulation No. 269/2014.
[113] EU Council, Restrictive Measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures, 27 June 2022 https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf [accessed 19 March 2023].

fall short of providing concrete and precise reasons for listing. Lawyers and sanctions experts regularly note that such statements of reasons often rely on past conduct and alleged but unclear ties to the government, without substantiating clearly how such past behaviour may still impact the current situation of the concerned country.

96. As can be seen in the CJEU case law,[114] a first step for designated persons is to request the underpinning evidence justifying for their inclusion to the sanctions list, which is often not spontaneously communicated to the concerned person when notified of sanctions. Once obtained, the concerned person is better positioned to provide its observations to the reasons for listing.

97. This process, which is in many aspects similar to the administrative informal appeal,[115] primarily relies on factual and political considerations being provided by the concerned person seeking withdrawal from the sanctions list. The EU Council is granted total discretion in reviewing the evidence brought forward and deciding on whether to amend or revoke the sanctions decision. No specific timeframe is set for such a review. In practice however, it often coincides with the annual periodic review conducted by the EU Council concerning the global regulation itself.

5.1.2 Filing action for annulment with the General Court of the European Union

98. Whenever sanctions are upheld, designated persons may also seek a formal, judicial review before the General Court of the European Union ("**General Court**").[116] Such process is done through the filing of an action for annulment, whereby the applicant seeks the annulment of a measure adopted by an EU institution pursuant to Article 263 TFEU.

99. Under this article, the CJEU has jurisdiction to *review the legality of legal acts* (and) *acts of the Council* (…) *intended to produce legal effects vis-à-vis third parties*. Proceedings may be instituted by any natural or legal person *against an act addressed to that person or which is of direct and individual concern to them*.

100. Procedural considerations applicable to such an action for annulment depend on whether the appeal is filed by so-called "privileged applicants" (including EU Member States, the EU Parliament, the EU Council and the EU Commission) or non-privileged applicants (i.e., natural and legal persons). The main distinction is that privileged applicants benefit from a more favourable procedural regime, as opposed to non-privileged applicants who need to demonstrate that they have standing to challenge the concerned decisions. Appeals shall be filed within two months[117] of the publication of the concerned measure, to which an additional ten-day distance delay is added.[118]

101. A limited set of five legal arguments may be raised before the CJEU when challenging the legality of an act, namely:

- lack of competence of the EU institution that adopted the contested act;
- infringement of an essential procedural requirement;

[114] Fulmen v. Council, T-439/10 and T-440/10, 21 March 2012; Ghaoud v. Council, T-700/19, 15 September 2021.
[115] Known under French administrative law as *recours gracieux*.
[116] Article 256 TFEU.
[117] Article 263 TFEU.
[118] Article 60 Rules of Procedures before the General Court.

- infringement of the Treaties;
- infringement of any rule of law relating to the application of the Treaties; and
- misuse of powers.[119]

102. In practice, challenges brought against sanctions decisions mainly rely on arguments related to due process considerations,[120] asserting that concerned sanctions infringe essential procedural requirements, applicable EU treaties or any law relating to the application of such treaties, insofar as the concerned decisions:

- infringe the applicant's right of defence and right to a fair hearing;
- infringe the applicant's right to effective judicial protection and the administration's obligation to state reasons;
- constitute a manifest error of assessment of the facts concerned or of the applicant's involvement in the concerned allegations (which, in practice, shifts the burden to prove this error to the Applicant);
- infringe the principle of proportionality and equal treatment; and/or
- infringe other fundamental rights of the applicant.[121]

103. After the written and oral stages of the proceedings, the General Court issues its decision regarding the legality of the concerned act. If annulment is granted, the contested act is rendered null and void, and deemed never to have existed. As such, the annulment carries a retroactive effect. As appropriate, the party that obtained annulment of the contested act may seek for damages under separate proceedings. It is important to highlight that only the decision under challenge and subsequently annulled is deemed never to have existed. As such, if the concerned person was listed in other decisions that have not been challenged and/or annulled, then such a person remains listed, which significantly limits the impact of sanctions' annulment.[122]

104. Importantly, the court is called upon to verify the legality of the contested Act in question only. It may not substitute its own reasoning for that of the author of the contested act. This is because the action for annulment is a form of judicial review, in which the court controls the conformity of the contested legislative, regulatory or individual act with the applicable legal framework, but is not called upon to issue a new, improved decision or to evaluate its content from a political or economic perspective.

105. The competence of the Court is therefore framed narrowly and limited to the strict review on assessing the legality of the contested act.

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[119] Article 263(2) TFEU.

[120] Studies have found that EU Courts struck down challenged sanctions on due process grounds in 73% of the cases. Cf. Yale Journal of International Law, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 2019 https://www.belfercenter.org/publication/foreign-affairs-court-lessons-cjeu-targeted-sanctions-jurisprudence [accessed 19 March 2023].

[121] See for instance, the appeal lodged by *Roman Abramovich v. Council*, T-313/22, 25 May 2022; see also *Fulmen v. Council*, T-439/10 and T-440/10, 21 March 2012; see also *Ovsyannikov v. Council*, T-714/20, 26 October 2022.

[122] Cf. *infra*, section 5.2.

5.2 Limited Impact of Sanctions Annulment

106. As explained above,[123] restrictive measures relate to the EU's security interest, and are taken based on the EU's CFSP. Their main objective is therefore geared towards international security as opposed to economic considerations.[124] The EU Council is thus afforded wide discretion to take political decisions in the area of the EU's foreign and security policy. Along the same line, there is limited judicial review for the control of such sanctions decisions (see *supra* para. 101).[125]

107. The other side of such discretionary power granted to the EU Council is that designated persons are not clearly informed of the steps that need to be taken to be struck from the sanctions list, an argument that is often used by defence counsel to substantiate sanctions' disproportionality.

108. As of December 2022, one company and 61 individuals from Russia and Belarus had reportedly challenged sanctions decisions against them before the CJEU.[126] Most cases are brought by Russian oligarchs targeted by the EU's asset freeze measures and travel bans, sometimes successfully managing to strike down sanctions.[127]

109. However, specialists note that even when the EU loses in court, the oligarchs' path to restitution is often obstructed by the meandering of the EU judicial system.[128] Significantly, even when decided, the annulment affects the contested act only, but does not prohibit the concerned EU institution to enact a new one that would be "cured" of the previous "flaws" that called for its annulment by the court. Studies have noted that approximately 2/3 of invalidated sanctions ultimately survived judicial annulment, after the EU Council re-imposed most invalidated sanctions.[129]

6. Summary and Conclusion

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[123] Cf. *supra*, para. 11.

[124] Having said this, designated persons are now required to actively disclose all their assets within the EU's jurisdiction to the NCA. Non-compliance with this reporting obligation is treated as breach of applicable sanctions, with the consequences that follow under each EU Member State's national legislation, including criminal ones. As explained, this is about to evolve significantly with the proposed introduction of breach of sanctions as an EU crime.

[125] Niall Moran, *Judicial scrutiny and EU Sanctions against individuals: Expanded listing criteria, limited safeguards and scrutiny*, Verfassungsblog.de, 20 December 2022 https://verfassungsblog.de/judicial-scrutiny-and-eu-sanctions-against-individuals/ [accessed 19 March 2023].

[126] Regulation Asia, *EU Facing Legal Challenge Over Anti-Russia Sanctions*, 26 December 2022 https://www.regulationasia.com/eu-facing-legal-challenge-over-anti-russia-sanctions/ [accessed 19 March 2023].

[127] See for instance Ovsyannikov v. Council, T-714/20, 26 October 2022, whereby the former governor of Sevastopol obtained the annulment of his designation.

[128] Politico, *The oligarch sanctions runaround: Freeze, lose in court, and still keep the money*, 15 November 2022 https://www.politico.eu/article/russian-oligarch-european-union-sanctions-lose-in-court-still-keep-money/ [accessed 19 March 2023].

[129] Cf. Yale Journal of International Law, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 2019 https://www.belfercenter.org/publication/foreign-affairs-court-lessons-cjeu-targeted-sanctions-jurisprudence [accessed 19 March 2023].

110. Sanctions have always been used as economic tools to politically influence foreign countries: they were initially applied as measures of national foreign policy in the form of trade restrictions, in the context of colonial political conflicts. During the cold war, they were used to control the export of technology to states of the East Bloc and, in relation to the former Soviet Union, as early as 1982 through the European Economic Communities. After the foundation of the EU in 1993, sanctions such as arms embargos, trade restrictions, travel bans and financial asset freezes have been continuously adopted again as a tool of the EU's foreign policy. This also applies to the restrictive measures adopted in relation to Russia's actions destabilising the situation in Ukraine.

111. The legal process of adopting sanctions is complex. Sanctions can only be adopted, renewed or lifted with a Council Decision by unanimity. To give legislative effect to the political decision taken, a regulation has to be adopted by qualified majority under Article 215 TFEU. With respect to the invasion of Ukraine, the EU Member States have shown unprecedented unity in their sanctions policy towards Russia. As of the date of writing this article, ten sanctions packages have been adopted.

112. As sanctions apply not only to individuals and entities based in the EU, but also to EU citizens located outside the EU and legal persons conducting business in the EU, their effects go beyond the borders of the EU.

113. This all stresses the need for sanctions to be consistent, transparent and in compliance with the rule of law. However, while the speedy reaction of the EU to the war in Ukraine generally must be welcomed, the sanctions were passed in great haste and could need a more thorough review; the sometimes vague and not previously defined terms in the legislative acts, inconsistencies between differing instruments, lack of transparency when it comes to designating individuals and private entities, make it very difficult for EU Operators to comply with them.

114. The recent inclusion of legal advisory services in the list of services prohibited under certain circumstances has been particularly worrisome as it increases not only uncertainty of what is allowed or not allowed, but also restricts access to legal advice, which is necessary to make sure to comply with the law.

115. Insofar as restrictive measures are solely based on the criteria of nationality, this jeopardises the principles of non-discrimination and equality before the law and therefore goes against the EU's own core values that the sanctions regime aims to protect.

116. Although sanctions are, in principle, purely administrative measures, their impact on the persons concerned is increasingly comparable with that of criminal sanctions. The recent endeavour by the EU to harmonise criminal law definitions of them further reinforces this tendency. The executive is not the correct body to impose sanctions with criminal effects. This criminalisation raises two questions:
    (1) whether such interventions on (non-existential but still fundamental) rights such as the right to property or to free movement, which aim to be so intense as to change the course of geopolitical decisions, can still be proportionate when applied with such a low level of safeguards (including the lack of transparency and limited judicial review) for the individual
    (2) whether a person should be so severely affected by state actors, especially in their fundamental economic rights, for a purpose (i.e. the cessation of aggression) that, as a rule, remains beyond their command. The condition of the affected person here resembles that of a hostage or an object of blackmail. A minimum level of guilt and/or

agency over the intended purpose is to be expected here, on pain of falling into a clear instrumentalisation of individuals. This concern applies especially to the case of persons affected by sanctions through the overly lax "association clause" of Article 2(2) of Regulation 269/2014.

117. In light of the above, it becomes virulent that the EU sanctions regime should be critically reviewed and streamlined. Moreover, the legal uncertainty on how to correctly comply with the sanctions regime and the lack of guidance from NCAs given the numerous requests they receive put EU Operators in a particular difficult situation. Additional guidance in form of specific training and additional information on the practical application and enforcement by the Member States would help them to correctly navigate through the sanctions map. To this end, an implementation report, including a compilation of national decisions and case law, would contribute to better understand and comply with the sanctions.