

LEGAL QUESTIONS SURROUNDING EUROPEAN  
UNION SANCTIONS OF RUSSIA AND  
ASSOCIATED INDIVIDUALS AND ENTITIES

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*Abstract:* Since 21 February 2022, the European Union and its Member States have adopted a mixture of sanctions against Russia, as well as providing military support to Ukraine. The European Union has adopted eleven wide-ranging but targeted sanctions packages in response to the crisis caused by the Russian invasion, covering the banking system, commodities, high-profile individuals and entities, diplomats, and more. This article considers the role of: (1) European Union law; and (2) World Trade Organization (henceforth WTO) law insofar as they relate to the various sanctions and other measures imposed by the European Union to date in these areas.

International trade law and European Union law provide broad exceptions to WTO and EU rules prohibiting restrictions on imports and exports for measures taken in times of war or emergencies in international relations. Thus this article examines the national security exceptions to the WTO's General Agreement on Tariffs and Trade (GATT) as well as Article 36 TFEU, which provides that restrictions on imports even from *other EU Member States* are permitted on grounds of public security. Under the TFEU, such measures must be “justified” and must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Under European Union law, the criteria for designating individuals and entities to be sanctioned have been expanded under these current sanctions packages. The required connection to the government has been loosened and now, for example, encompasses those simply benefitting from a relationship with the Russian Government. These modifications to the EU sanctions regime are examined below as are their implications for individuals and entities associated with governments.

At the WTO, the legality of ending Russia's receipt of most favoured nation (MFN) treatment is analysed before turning to the defences of these measures that would likely be proffered under GATT Article XXI as well as under other WTO Agreements. Limitations to these defences are outlined both in terms of their substance and coverage.

*Keywords:* enforcement – EU law – Russo-Ukrainian war – sanctions – WTO law

## THE BACKGROUND TO EUROPEAN UNION SANCTIONS AGAINST RUSSIA

Since 21 February 2022, the European Union and its Member States have adopted a mixture of sanctions against Russia as well as providing military support to Ukraine.<sup>1</sup> On 21 February 2022, Russia recognised the independence of two breakaway regions or quasi-states (the Donetsk and Luhansk People's Republics) that make up the Donbas region of Ukraine. On February 22, Russia deployed troops to this region and on 24 February, the attempted invasion of the rest of Ukraine began on multiple fronts. In response to this, the European Union adopted sanctions (or "restrictive measures" in EU parlance) against Russia. The European Union has sought to put pressure on Russia, as well as to aid Ukraine, and to secure European Union interests politically and economically.

The eleven European Union sanctions packages agreed so far have been far-reaching and have covered five main types of targeted sanctions including those on the banking system, on commodities, on sectors such as aviation and luxury goods, as well as sanctions on high-profile individuals and entities including Rosneft and Gazprom Neft. The fifth category includes diplomatic sanctions: 24 of the 27 European Union Member States have expelled Russian diplomats, with Hungary,<sup>2</sup> Cyprus and Malta<sup>3</sup> being the exceptions. Sanctions in these areas have progressively escalated over the course of the first year of the war.

## LEGAL QUESTIONS SURROUNDING EUROPEAN UNION SANCTIONS AGAINST RUSSIA

As a preliminary point, it is worth noting that international law and European Union law provide broad exceptions for measures taken in times of war or emergencies in international relations. Insofar as concerns the World Trade

1. By 2 February 2023, the European Union had authorised €3.6 billion in assistance measures under the European Peace Facility (EPF). The vast majority of this was used for military equipment. See "Ukraine: Council agrees on further military support under the European Peace Facility" (Council of the EU, Press Release, "Ukraine: Council agrees on further military support under the European Peace Facility" (2 February 2023), available at: <https://www.consilium.europa.eu/en/press/press-releases/2023/02/02/ukraine-council-agrees-on-further-military-support-under-the-european-peace-facility/> [Accessed 2 March 2023].
2. Hungarian government officials reportedly rejected United States requests to expel Russian diplomats. See CEPA, "Orbán Mixes it Up" (3 August 2022), available at: <https://cepa.org/article/orban-mixes-it-up/> [Accessed 2 March 2023].
3. Malta froze a Russian request to deploy more diplomatic staff and the Times of Malta was told that "with just a couple of Maltese diplomats assigned to Russia, the government fears ending up with no presence whatsoever in the country if Vladimir Putin's government were to respond to a diplomatic expulsion in kind." See "Malta will not be expelling any Russian diplomats: Ian Borg" *Times of Malta* (Birkirkara, 11 April 2022), available at: <https://timesofmalta.com/articles/view/malta-will-not-be-expelling-any-russian-diplomats-ian-borg.947695> [Accessed 2 March 2023].

Organization, the General Agreement on Tariffs and Trade provides for a broad national security exception to WTO rules for actions Members consider to be in their ‘essential security interests’. Under European Union law, Article 36 TFEU provides that restrictions on imports even from *other EU Member States* are permitted on grounds of public security. Such measures must be ‘justified’ and not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

This article considers the role of: (1) European Union law; and (2) WTO law as they relate to the various sanctions and other measures imposed by the European Union to date in these areas.

## 1. EUROPEAN UNION LAW

There are currently travel restrictions, asset freezes as well as other sanctions applying to almost 1,800 individuals and entities as a result of Russia’s military aggression against Ukraine.<sup>4</sup> European Union sanctions moved from targeting whole economies to targeting generally individuals in the aftermath of the UN embargo of Iraq in the 1990s. This followed the humanitarian crisis that ensued in Iraq as a result of this embargo and the high mortality rate among children.<sup>5</sup> While targeted sanctions are less likely to punish the population at large, they do give rise to concerns around breaches of due process and the fundamental rights of the blacklisted individuals.

European Union sanctions against Russia are some of the most comprehensive sanctions that the European Union has enacted against another state and those linked to its government. While there are differences in scale, and the profiles of those involved, this does not necessarily represent a new approach for the European Union. European Union sanctions on Iran and Syria consist of sector-wide measures and individual designations. Currently 289 persons and 70 entities have been designated under the Syria sanctions regime, with three individuals having been removed from the list after the last review.<sup>6</sup>

### EUROPEAN UNION SANCTIONS AGAINST INDIVIDUALS

Following Russia’s deployment of troops to the Donbas region of Ukraine, the European Union adopted a far-reaching sanctions package that, inter alia,

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4. European Council, “EU sanctions against Russia explained” (last reviewed 1 March 2023), available at: <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/> [Accessed 14 September 2023].
  5. Peter Wallensteen, Carina Staibano and Mikael Eriksson, “The 2004 Roundtable on UN Sanctions against Iraq: Lessons Learned” (Uppsala University 2005) 17–18, available at: [https://www.pcr.uu.se/digitalAssets/653/c\\_653520-1\\_1-k\\_iraqreport\\_050210.pdf](https://www.pcr.uu.se/digitalAssets/653/c_653520-1_1-k_iraqreport_050210.pdf) [Accessed 14 September 2023].
  6. European Council, Press Release, “Syria: Council extends sanctions against the regime for another year” (31 May 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/05/31/syria-council-extends-sanctions-against-the-regime-for-another-year/> [Accessed 14 September 2023].

expanded the list of sanctioned individuals to include all 351 members of the Russian Duma and 27 others.<sup>7</sup>

The criteria for designating individuals and entities related to the Russian Government have been expanded to include those benefitting from a relationship with the government and those supporting it.<sup>8</sup> For example, the listing for Roman Abramovich reads that he has very good relations with the president and is a “major shareholder of the steel group Evraz, which is one of Russia’s largest taxpayers”. This is obviously very different to targeting cabinet members, as the connection to the government is considerably looser. Others listed include media personalities supportive of the Kremlin’s “propagated narratives”.<sup>9</sup> Nonetheless, there are serious doubts as to whether such listings could be overturned. Roman Abramovich has contested his listing and is seeking its annulment in an action brought on 25 May 2022. Abramovich sought the annulment of Council Decision (CFSP) 2022/429 in so far as it includes his name in the Annex to Council Decision 2014/145/CFSP of 17 March 2014.<sup>10</sup> Arguments listed include the claims: (1) that the Council Decision/Regulation infringes the principle of proportionality and the principle of equal treatment; (2) that it infringes fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union; and (3) that it infringes the obligation to state reasons.

Asset freezes and travel restrictions are two of the main sanctions taken by the European Union against individuals. Asset freezes cover all funds and economic resources owned or controlled by listed parties. It is also prohibited to make funds or economic resources available to listed individuals. Ownership entails the possession of more than 50% of the proprietary rights. What constitutes having control of an entity is a trickier concept, but examples given of this include, for example, (1) having the right to appoint or remove a majority of the members of the supervisory body; or (2) having the right to exercise a dominant influence over an entity.<sup>11</sup> If any of these criteria are satisfied, a rebuttable presumption of control is regarded as having been established.

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7. See earlier on this topic, Niall Moran, “Judicial scrutiny and EU Sanctions against individuals: Expanded listing criteria, limited safeguards and scrutiny” (20 December 2022) *Verfassungsblog*, available at: <https://verfassungsblog.de/judicial-scrutiny-and-eu-sanctions-against-individuals/> [Accessed 2 March 2023].
  8. See Council Implementing Regulation 1270/2014 of 28 November 2014 implementing Regulation 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L344/5, and see e.g., listings 879 and 887 for Roman Arkadyevich Abramovich and Artyom/Artem Grigoryevich Sheynin respectively, <https://data.consilium.europa.eu/doc/document/ST-7125-2022-INIT/en/pdf> [Accessed 2 March 2023].
  9. Council Implementing Regulation 1270/2014 [2014] OJ L344/5. See also listings 886, 887 and 888, <https://data.consilium.europa.eu/doc/document/ST-7125-2022-INIT/en/pdf> [Accessed 31 October 2023].
  10. *Abramovich v Council* (T-313/22) (OJ 2022/C 266/32).
  11. General Secretariat of the Council, Update of the EU Best Practices for the effective implementation of restrictive measures (22 June 2022) para.63, available at: <https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf> [Accessed 2 March 2023].

Travel restrictions usually come in the form of an outright ban on listed individuals entering or transiting through the European Union. As with asset freezes, these may be subject to certain limited exemptions including where an international intergovernmental organisation is hosted within the European Union.<sup>12</sup> Exemptions are set out in individual travel ban instruments and can include travel for the purposes of giving evidence at a trial,<sup>13</sup> which may be considered if an individual were to contest their listing.

European Union sanctions have generally been imposed on high-profile individuals many of whom are members of or closely connected to the Russian Government. Other countries have similar listing criteria with, for example, Australia targeting individuals or entities of “economic or strategic significance to Russia”.<sup>14</sup> European Union sanctions currently apply to individuals and entities related to the Russian Government including members of parliament, members of the National Security Council, people linked with the defence sector (generals, manufacturers etc.), propagandists, business people, and people linked with specific incidents in the war (e.g., atrocities in Bucha, the recruitment of mercenaries, and referendums in occupied Ukrainian regions). On 20 October, sanctions were extended to three Iranians and one Iranian entity linked to the provision of Unmanned Aerial Vehicles (UAVs) to Russia.

“Propagandists” that have been listed include media personalities such as Russia 1 anchor Vladimir Solovyov and others deemed to be “spreading disinformation”. The propagandist label would also seem to include political philosopher/strategist Aleksandr Dugin and pro-war musicians. Singer Yulia Chicherina was filmed taking down the Ukrainian flag in occupied Enerhodar, while fellow singer Nikolay Rastorguev performed at a propaganda rally, donated money to the war, and is a member of Public Council of the Ministry of Defence of the Russian Federation (which is akin to an advisory board). The listing of prominent businesspeople has been a consistent feature of European Union sanctions and was previously used against the Syrian regime. Restrictive measures have targeted Syrian businesspeople operating on a level well below that of the Russian oligarchs targeted today, and the listing for some of these Syrian businesspeople made no reference to their links to the Syrian Government.<sup>15</sup>

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12. European Council, Press Release, “Factsheet, EU restrictive measures” (29 April 2014) 2, available at: [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/foraff/135804.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/135804.pdf) [Accessed 2 March 2023].

13. Home Office, “Travel Bans Version 9.0” (11 November 2022) 16, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1118529/Travel\\_bans\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118529/Travel_bans_guidance.pdf) [Accessed 2 March 2023].

14. See Autonomous Sanctions Amendment (Russia) Regulations 2022 (24 February 2022), available at: <https://www.legislation.gov.au/Details/F2022L00180> [Accessed 2 March 2023].

15. Thus, for example, one individual is described as a “leading businessperson operating in Syria, with interests and/or activities in the engineering, construction and oil and gas sectors. He holds interests in and/or has significant influence in a number of companies and entities in Syria...”. See Council Decision (CFSP) 2022/849 of 30 May 2022 amending Decision 2013/255/CFSP concerning restrictive measures against Syria [2022] OJ L148/52.

As such, it may be seen as no surprise that oligarchs such as Roman Abramovich have been listed. His listing reads that he has very good relations with the president and is a “major shareholder of the steel group Evraz, which is one of Russia’s largest taxpayers”. Abramovich’s United Kingdom listing gives five reasons for this having been done including: (1) his supporting the Russian Government through his involvement with Evraz plc.; (2) his association with Putin; and (3) his association with oligarch Alisher Usmanov.

At times, the rationale for sanctioning businesspeople may be less clear, particularly where the connection to the government is considerably looser than in relation to state officials for example. On this point, Michael Bishop told the House of Lords EU Justice Sub-Committee that the reason for targeting prominent businessmen is “not because they are necessarily doing bad things ... but because the policy idea is that the governments in those countries depend on those people’s support [in order to survive]”.<sup>16</sup> This ability under Article 215(2) TFEU to list “any person” has been criticised as eroding the difference between the private and the public as well as individual and collective forms of responsibility.<sup>17</sup>

The aim of listing individuals, including businesspeople with no explicit link to the government, is to apply coercive pressure on them. Elites such as businesspeople support the governments in targeted countries even if indirectly through the provision of taxes. One of the aims of these sanctions should be to make the individuals concerned question their actions, role, and policy preferences. One of the legal bases for EU restrictive measures against Russia is Decision 2014/145/CFSP.<sup>18</sup> Articles 1 and 2 of this Decision provide the legal basis for travel bans and asset freezes against listed individuals. Article 3.2. sets out that the Council shall communicate such decisions, including the grounds for the listing, “either directly, if the address is known, or through the publication of a notice, providing such person, entity or body with an opportunity to present observations”.

Article 3.3. further states that “where observations are submitted, or where substantial new evidence is presented, the Council shall review the decision referred to in paragraph 1 and inform the person, entity or body concerned accordingly.”

Listings should not be perceived by those targeted as being unduly unfair. These provisions ensure that those affected should be aware that they may challenge a listing and that it is subject to periodic review. Where a decision is directly communicated to an individual or entity, it should be made clear the actions that would have to be taken in order to be delisted. This may increase

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16. Select Committee on the European Union, EU Justice Sub-Committee, *11th Report of Session 2016–17: Corrected oral evidence: The Legality of EU Sanctions*, HL Paper 102 (11 October 2016), available at: <https://publications.parliament.uk/pa/ld201617/ldselect/ldecom/102/102.pdf> [Accessed 2 March 2023].

17. Eva Nanopoulos, *The Juridification of Individual Sanctions and the Politics of EU Law* (Oxford: Hart Publishing, 2021), Ch.6.I.

18. Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L78/16.

the likelihood of these individuals at least questioning their actions, role, and policy preferences.

### DIFFICULTIES OVERTURNING SANCTIONS

There does appear to be some prospect of successfully challenging listings that result from links to high-profile individuals following a recent decision of the EU General Court. The Court annulled the restrictive measures applied to Violetta Prigozhina, whose son, Yevgeniy Prigozhin, was responsible for deploying the Wagner Group in Ukraine. The General Court found that her links to undertakings owned by Prigozhin were insufficient to justify the measures against her and that a link based solely on a family tie was also insufficient.<sup>19</sup> This may be a significant decision for future European Union sanctions packages when the topic of broadening listing criteria is raised. Other individuals including Saodat Narzieva,<sup>20</sup> sister of Alisher Usmanov, and Olga Ayziman, ex-wife of oligarch Mikhail Friedman, have also been removed from the European Union sanctions list.

Nonetheless the Court's review of sanctions under Article 275 has generally been limited to procedural questions and the difficulty of overturning listings should not be underestimated. While the General Court annulled Violetta Prigozhina's listing in *Prigozhina v European Council*, the mother of the now deceased Wagner group founder could also be re-listed on other grounds, particularly if new information comes to light.

European Union sanctions against individuals contain "war-like" elements. They target "enemies" who need not have breached any legal norm, as well as secondary targets (those associated with high-ranking officials etc.)<sup>21</sup> There are certain safeguards in place, however, including that the listing criteria be valid and the right of those listed to due process. Individuals may also contest their listing on the basis of having been mistakenly identified or there being insufficient evidence for the claims made in their listing. In *Safa Nicu v European Council*,<sup>22</sup> the Court of Justice upheld a claim for compensation where the Council had listed a company (based on a proposal by a Member State), in the context of restrictive measures against Iran, but could not substantiate its finding as to the company's involvement in nuclear proliferation.

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19. *Prigozhina v Council of the European Union* (T-212/22) EU:T:2023:104. See, Court of Justice of the European Union, Press Release No. 43/23, Judgment of the General Court in Case T-212/22 *Prigozhina v Council* (8 March 2023), available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/cp230043en.pdf> [Accessed 8 March 2023].

20. Simon Goodley, "Sister of oligarch Alisher Usmanov removed from EU sanctions list" *The Guardian* (London, 16 September 2022), available at: <https://www.theguardian.com/world/2022/sep/16/alisher-usmanov-removed-eu-sanctions-list-saodat-narzieva> [Accessed 2 March 2023].

21. Nanopoulos, *The Juridification of Individual Sanctions and the Politics of EU Law* (2021), Ch.4.B.

22. *Safa Nicu Sepahan Co v Council of the European Union* (C-45/15 P) EU:C:2017:402.

As these measures relate to the European Union's security interests, their legal basis is the EU Common Foreign and Security Policy (CFSP) rather than the Common Commercial Policy (Article 207 TFEU). As such the main aim of such measures is to strengthen international security rather than any economic objective. The key provision in this area is Article 29 TEU concerning restrictive measures. This provision affords wide discretion to the Council to take political decisions in the area of foreign and security policy. Decisions introducing sanctions on this basis require unanimity. Thus each Member State has a veto.

Given that the basis for these measures is the Common Foreign and Security Policy, as is the norm in international law when dealing with national security, there is limited judicial review of decisions and furthermore wide discretion is afforded to the Council to take political decisions here. The Court has only struck down individual sanctions on due process grounds. It does not see itself as the arbiter of whether a person should be listed, viewing this as a policy decision of the Council.

Where the Council takes restrictive measures on trade and investment with Russia, a European Union legislative act is required to give effect to the political decision taken. These acts are adopted by qualified majority under Article 215 TFEU, requiring 55% of the Member States (in other words, fifteen of the twenty-seven EU Members) representing 65% of the total European Union population. In practice, this is a *fait accompli* once the unanimous Council Decision has been adopted. Nonetheless, this two-step procedure entails the obligatory adoption of two separate but connected legal acts for the enactment of economic sanctions regimes.

The Court of Justice of the European Union has reduced scope to review decisions taken on the basis of Article 29 TEU. Article 275 TFEU provides that "the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions."

Article 275(2) introduces two exceptions to allow the Court to intervene. These include exceptions: (1) to ensure compliance with the separation of competences among the European Union's institutions; and (2) to review the legality of measures taken against natural or legal persons. However, the Court's review of sanctions under Article 275 has been limited to procedural questions. Where the courts have struck down individual sanctions, they have only done so on due process grounds. The courts have not considered substantive questions such as whether the designation of an individual is necessary in terms of the ends pursued or whether the criteria for designation have been drawn up in an appropriate manner.

Consequently, there have been questions regarding the low level of judicial scrutiny of European Union sanctions, the broad powers of the Council, and the lack of formal oversight from the European Parliament or Commission even in this sensitive area of foreign policy. This was particularly the case when the Council relisted individuals in 57% of the cases<sup>23</sup> under the Iran and

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23. Elena Chachko, "Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence" (2019) 44(1) *Yale J. of Int'l L.* 1, 28.



Syria sanctions regimes when the Court struck down their original listing on procedural grounds. The Council maintained certain individuals on sanctions lists in an additional 5% of cases. This can occur where the Council can show that the applicant is continuing to perform the functions for which he or she was initially listed.<sup>24</sup>

Listings were overly vague in the past. This was remedied in the aftermath of the *Kadi* ruling.<sup>25</sup> *Kadi* concerned a shareholder of a Bosnian bank in which “planning sessions for an attack on a United States facility in Saudi Arabia “may have” taken place”.<sup>26</sup> Such allegations would of course be difficult to challenge given their vagueness. Post *Kadi*, the Council has used broad listings and these have proved difficult to challenge. This usage of broader listing criteria may well explain why the Council has been winning more cases in recent years.<sup>27</sup> It is more difficult to demonstrate that an individual is working on the Iranian nuclear programme than it is to demonstrate that he or she provides support to the Government of Iran.<sup>28</sup> Therefore, a greater level of oversight may also be called for where the Council broadens or introduces “new listing criteria”<sup>29</sup> for individual designations.

While there are concerns with measures taken under the Common Foreign and Security Policy and with the difficulty of challenging them, it is worth noting that there have also been concerns when the basis for legislative acts has been the European Union’s Common Commercial Policy. One example here is the export restrictions of dual-use goods—such as mass surveillance technology that can be used for civil and military purposes. In its case-law, the Court of Justice has tended to uphold economic rights, such as the right to export based on the Common Commercial Policy.<sup>30</sup>

24. *Ferdinand Ilunga Luyoyo v Council of the European Union* (T-108/21) EU:T:2022:253 at [36].

25. *Kadi v Council of the European Union* (C-402/05 P) and (C-415/05 P) EU:C:2008:461, confirmed in *European Commission v Yassin Abdullah Kadi*(C-584/10 P) and (C-593/10 P) EU:C:2013:518.

26. *European Commission v Yassin Abdullah Kadi* (C-584/10 P) and (C-593/10 P) EU:C:2013:518 at [43].

27. Clara Portela, “*Targeted Sanctions against Individuals on Grounds of Grave Human Rights Violations – Impact, Trends and Prospects at EU Level*” (2018) Study requested by the DROI Committee of the European Parliament, 11–16.

28. See Select Committee on the European Union, EU Justice Sub-Committee, *11th Report of Session 2016–17: Corrected oral evidence: The Legality of EU Sanctions*, HL Paper 102 (11 October 2016), para.23.

29. See European Council, Extraordinary Foreign Affairs Council, “Main Results” (25 February 2022), available at: <https://www.consilium.europa.eu/en/meetings/fac/2022/02/25> [Accessed 2 March 2023].

30. It has in certain cases found that the right to export under the Common Commercial Policy trumped export restrictions based on security concerns grounded in national law, as it did in *Werner v Germany* (Case C-70/94). This case concerned the refusal of an export licence to Libya by the German authorities under the current Article 207 TFEU. Fritz Werner Industrie-Ausrüstungen sought this licence for an order of a vacuum-induction oven and other items but this was refused as transactions in foreign trade could be curtailed to “guarantee the security” of Germany as per para.7 of the Außenwirtschaftsgesetz (Law on Foreign Trade). The Court of Justice held that measures whose effect is to “prevent or restrict the export of certain products cannot be

Pursuing these delicate areas under the Common Commercial Policy can also raise issues of consistency with the European Union's security and human rights objectives. One example of this was the sale of mass surveillance technology to six Arab states based on Danish export licences in 2017 against the wishes of British export authorities. One of the benefits associated with restrictive measures taken under the Common Foreign and Security Policy is that they tend to be more coherent and it has been found that Member States rarely undermine these measures.<sup>31</sup>

#### EUROPEAN UNION AND MEMBER STATE RESPONSES OPERATING IN PARALLEL

European Union sanctions against Russia have been far-reaching but operate in parallel to foreign policy measures taken by individual Member States against Russia. As such, it is unsurprising to see individual Member States taking measures that go beyond what has been agreed in Brussels. The strongest measures would be expected to have been taken in Eastern European countries such as Poland and the Baltics. Lithuania is an example of a Member State that has taken such additional measures. Lithuania reportedly withdrew its ambassador to Russia on 1 June 2022, without naming a replacement, having expelled the Russian ambassador on 4 April 2022.<sup>32</sup> This followed China withdrawing its ambassador to Lithuania having expelled the Lithuanian ambassador in August 2021. Tensions between the countries increased in the aftermath of Lithuania's decision to allow Taiwan to open a representative office in Vilnius.

On 17 June, Lithuania also imposed a transit ban for goods subject to European Union sanctions traveling through its territory to the Russian exclave Kaliningrad. The ban applied to steel and other ferrous metals *inter alia*.<sup>33</sup>

This decision came after the European Union stated that the transit prohibition only applied to road transport (rather than rail) and that Lithuania should permit Russia to carry materials like concrete, wood, and alcohol into the exclave.<sup>34</sup> EU High Representative Josep Borrell clarified that Lithuanian

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treated as falling outside the scope of the common commercial policy" on the basis that it has foreign policy and security objectives (para.10).

31. Clara Portela, "Member States Resistance to EU Foreign Policy Sanctions" (2015) 20 *European Foreign Affairs Review* (Special Issue) 39, 60.
32. See Gwladys Fouche and Nerijus Adomaitis, "Lithuania to Withdraw its Ambassador to Russia from June 1" (23 May 2022) *Reuters.com*, <https://www.reuters.com/world/europe/lithuania-withdraw-its-ambassador-russia-june-1-2022-05-23/> [Accessed 2 March 2023].
33. BNS, "Lithuania hands note clarifying Kaliningrad transit to Russia" (20 June 2022) *LRT.it*, available at: <https://www.lrt.lt/en/news-in-english/19/1723762/lithuania-hands-note-clarifying-kaliningrad-transit-to-russia> [Accessed 2 March 2023].
34. Anwesha Majumdar, "Lithuania Removes Ban on Rail Transport of Goods into Russia's Kaliningrad: Report" (New Delhi, India, 23 July 2022) *Republicworld.com*, <https://www.republicworld.com/world-news/russia-ukraine-crisis/lithuania-removes-ban-on-rail-transport-of-goods-into-russias-kaliningrad-report-articleshow.html> [Accessed 15 September 2023].

actions did not amount to a blockade of Kaliningrad and that the European Union had no intention of banning lawful goods in transit to Kaliningrad.<sup>35</sup> Lithuania accepted the Commission clarification and lifted its ban on the rail transport of sanctioned goods on 22 July 2022.<sup>36</sup>

While divergent responses to the Ukraine crisis are to be expected and the European Union and other Member States have been broadly supportive of actions taken to date, there is a question of when going beyond what has been agreed in Brussels would lead to tension with the European Union and among Member States.

## ENFORCEMENT IN THE EVENT OF BREACHES

European Union sanctions are given legal effect via Council Regulations. These have direct effect in all European Union Member States although the Member States are required to provide for penalties under national law for breach of European Union sanctions. In Ireland, secondary legislation is introduced in order to provide for these penalties on a case-by-case basis.

A recent Irish statutory instrument implementing restrictive measures relates to Libya and contains wording that is typical of these instruments.<sup>37</sup> It provides that a person who is guilty of an offence under the EU Regulations shall be liable “(a) on summary conviction, to a class A fine or to imprisonment for a term not exceeding 12 months or both, or (b) on conviction on indictment, to a fine not exceeding €500,000 or to imprisonment for a term not exceeding 3 years or both.”

Such offences are known as “either way” or “hybrid” offences in Ireland meaning that they can be dealt with summarily in the District Court (for minor offences) or they may be tried on indictment in the higher courts on the choice of the Director of Public Prosecutions and with the agreement of the District Court judge.

A breach of European Union sanctions legislation would likely be dealt with by the higher courts in Ireland. Nonetheless, there may be concerns that where a breach is found by these courts the maximum fine that could be imposed on the basis of this legislation is €500,000, which may not be a sufficient deterrent for certain operators (although the prospect of a criminal conviction may be more of a deterrent). It is noted that s.6 of the Penalties of

35. See European Council, Press Release, “Remarks by High Representative Josep Borrell upon Arrival” (23 June 2022), available at: [https://www.eeas.europa.eu/eeas/european-council-remarks-high-representative-josep-borrell-upon-arrival-3\\_en](https://www.eeas.europa.eu/eeas/european-council-remarks-high-representative-josep-borrell-upon-arrival-3_en) [Accessed 2 March 2023]. See also, Henry Foy and Sam Fleming “EU aims to De-Escalate Tensions over Russian Trade to Kaliningrad” *Financial Times* (London, 23 June 2022), available at: <https://www.ft.com/content/dcbb1dbd-5e43-4822-a58f-4d301b6f5b0b> [Accessed 2 March 2023].

36. See “Lithuania lifts ban on rail transport of goods into Kaliningrad” (23 July 2022) *Euractiv.com*, <https://www.euractiv.com/section/global-europe/news/lithuania-lifts-ban-on-rail-transport-of-goods-into-kaliningrad/> [Accessed 2 March 2023].

37. S.I. No. 410 of 2022 European Union (Restrictive Measures concerning Libya) (No.2) Regulations 2022.

the Financial Transfers Act 1992 provides higher sentences and the possibility of fines up to £10,000,000.<sup>38</sup>

In other EU Member States, fines seem to have more teeth and may be “at least half of the value of the transaction and up to the double of the same value” (Italy). France also provides for “a fine equal to the amount to which the offence relates at a minimum, and up to a maximum of twice the amount”.<sup>39</sup>

Differences such as these in the sanctions regimes of Member States are one of the reasons behind the December 2022 proposed EU Directive on harmonising criminal offences and penalties across the European Union for the violation of EU sanctions.<sup>40</sup> Inter-institutional negotiations between the European Parliament and the Council opened following the finalisation of the Council position and a vote in favour of this (36:2) at the EP Civil Liberties Committee in June and July 2023 respectively.<sup>41</sup> The purpose of the proposed Directive is to ensure the effective application of European Union sanctions and it would ensure common basic standards for penalties (see Articles 6–10 of the proposal) where offences are committed. Offences would include the violation of sanctions as well as the intention to circumvent sanctions.

## 2. WORLD TRADE ORGANIZATION LAW

In terms of the international trade law landscape, the context for the questions surrounding European Union measures is rather bleak. There was much more scope for optimism in the early 2000s and while there were issues with faltering multilateral negotiations during this time, successes were still evident in terms of a functioning WTO dispute settlement system and the conclusion of trade agreements at the regional level.

Russia’s invasion of Ukraine in 2022 was a fourth major blow to globalisation in recent times, Brexit and the election of Donald Trump having been the first such blow in 2016, followed by the US–China trade war in 2018 and the taking of COVID-19 measures in 2020—and this is without mentioning the 2019 demise of the WTO’s Appellate Body, which was a major blow to the institutional structure of the WTO.

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38. See Eurojust, *Prosecution of Sanctions (Restrictive Measures) Violations in National Jurisdictions: A Comparative Analysis (2021)* (2021), available at: [https://www.eurojust.europa.eu/sites/default/files/assets/genocide\\_network\\_report\\_on\\_prosecution\\_of\\_sanctions\\_restrictive\\_measures\\_violations\\_23\\_11\\_2021.pdf](https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf) [Accessed 2 March 2023].

39. Eurojust, *Prosecution of Sanctions (Restrictive Measures) Violations in National Jurisdictions: A Comparative Analysis (2021)* (2021).

40. Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures COM/2022/684 final.

41. See European Council, Press Release, “EU Sanctions: Council Finalises Position on Law That Aligns Penalties for Violations” (9 June 2023), available at: <https://www.consilium.europa.eu/en/press/press-releases/2023/06/09/eu-sanctions-council-finalises-position-on-law-that-aligns-penalties-for-violations/>; see also European Parliament, Press Release, “EU Sanctions: New Law to Crack Down On Violations” (6 July 2023), available at: <https://www.europarl.europa.eu/news/en/press-room/20230703IPR01909/eu-sanctions-new-law-to-crack-down-on-violations> [Accessed 15 September 2023].

As such, the backdrop to these legal questions at the WTO is really one of: (1) institutional dysfunction; and (2) momentum away from a rules-based order towards a power-based order in international trading relations (even if much of the rules-based order remains). As the international trading system creaks, this raises several questions for European Union law and policy.

A central issue in recent times for the international trading system has been acute disruption to global supply chains across the world. This was compounded by the Russian invasion of Ukraine as well as COVID-19 restrictions in China and the economic effects of this have already set in. There is currently a rethinking of globalisation underway and of how supply chains are structured, with the basic trend being one of reshoring for both jobs and manufacturing.<sup>42</sup> Because of these crises, previous assumptions around the reliability of shipping and availability of raw materials have been called into question. Supply chains are being restructured with an increased emphasis on local production. There is also far less talk today of ambitious next generation trade agreements and of expanding the WTO rulebook. While the European Union focuses on building its trade defence toolbox, the United States is chipping away at the rulebook with the signing into law of large subsidy programmes<sup>43</sup> and the announcement that it will maintain its s.232 measures (which have been found to be incompatible with the GATT) under the US Section the 1962 US Trade Expansion Act.<sup>44</sup>

On 11 March 2022, the European Union announced a series of measures against Russia, including ending its MFN treatment at the WTO. This was announced with partners including the United States,<sup>45</sup> the United Kingdom, Japan and Canada, a group making up more than half the global economy. The European Union has justified this suspension under the “security exemptions of the WTO Agreement”,<sup>46</sup> which is a first for the European Union in the WTO era.

42. See European Parliament Studies, INTA Committee, *Global value chains: Potential synergies between external trade policy and internal economic initiatives to address the strategic dependencies of the EU* (March 2023), available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702582/EXPO\\_STU\(2023\)702582\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702582/EXPO_STU(2023)702582_EN.pdf) and DG for External Policies, *Post Covid-19 value chains: options for reshoring production back to Europe in a globalised economy* (March 2021), available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653626/EXPO\\_STU\(2021\)653626\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653626/EXPO_STU(2021)653626_EN.pdf) [Accessed 15 September 2023].

43. The White House, “By the Numbers: The Inflation Reduction Act” (15 August 2022), available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/15/by-the-numbers-the-inflation-reduction-act/> [Accessed 2 March 2023].

44. See US Government, “Statement from USTR Spokesperson Adam Hodge” (9 December 2022), available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge> [Accessed 2 March 2023].

45. White House, “Fact Sheet: United States, European Union, and G7 to Announce Further Economic Costs on Russia” (11 March 2022), available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/> [Accessed 2 March 2023].

46. European Commission, “Statement by Executive Vice-President Dombrovskis on EU Decision to Stop Treating Russia as a Most-Favoured-Nation at the WTO” (15 March 2022), available at: [https://ec.europa.eu/commission/commissioners/2019-2024/dombrovskis/announcements/statement-executive-vice-president-dombrovskis-eu-decision-0\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/dombrovskis/announcements/statement-executive-vice-president-dombrovskis-eu-decision-0_en) [Accessed 2 March 2023].

It is worth recalling that WTO rules provide broad exceptions for measures taken in times of war or emergencies in international relations. GATT Article XXI contains a broad national security exception for “any action which [a Member] considers necessary for the protection of its essential security interests”.

Ironically, it has been Russia that has most vigorously pursued flexibilities under this exception at the WTO. In the WTO Panel Report, *Russia—Traffic in Transit* (2019), Russia is stated to have asserted that restrictions it had placed on the transit of goods were not inconsistent with the WTO Agreements as they related to an emergency in international relations, a situation covered under GATT Article XXI.<sup>47</sup> The WTO Panel found that such measures were not entirely self-judging<sup>48</sup> and had to be evaluated objectively by a panel, contrary to the position taken by Russia (and by the United States as a third party).

While Article XXI is not entirely self-judging, it does provide each Member with broad discretion to adopt measures “which it considers” necessary for the protection of its essential security interests in times of war or during an emergency in international relations. If EU measures, such as those taken in its sanctions packages against Russia, were to be challenged at the WTO, the European Union and its partners would be unlikely to have difficulties demonstrating that these measures were taken during an emergency in international relations. (For evidence of this point, see for example, the UN General Assembly Resolution condemning Russia’s aggression in Ukraine.<sup>49</sup>)

On 2 March, Ukraine invoked security exceptions under the WTO Agreements to justify disapplying these Agreements in its relations with Russia.<sup>50</sup> It listed exceptions under Article XXI of the General Agreement on Tariffs and Trade (GATT), Article XIV *bis* of the General Agreement on Trade in Services (GATS) and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). Russia responded that the provisions in question related to a “limited number of the WTO Agreements” and as such could not justify disapplying all of the WTO Agreements in relations with Russia.<sup>51</sup>

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47. WTO Panel Report, *Russia – Traffic in Transit* (panel report adopted 26 April 2019), available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds512\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm) [Accessed 2 March 2023].

48. The basis for the claim that the GATT’s security exceptions are self-judging is the language used in the chapeau of Article XXI(b) stating that a party may take any action “which it considers necessary” for the protection of its essential security interests. See also GATT Article XXI(a), which contains similar language.

49. United Nations, “General Assembly Resolution Demands End to Russian Offensive in Ukraine” (2 March 2022), available at: <https://news.un.org/en/story/2022/03/1113152> [Accessed 2 March 2023].

50. Letter from Permanent Representative Yevheniia Filipenko to HE Mr Didier Chambovey, Chairman, WTO General Council (2 March 2022), available at: <https://worldtradelaw.typepad.com/files/ukraine-wto-1.pdf> [Accessed 2 March 2023].

51. Letter from Permanent Representative D. Lyakishev to HE Mr Didier Chambovey, Chairman, WTO General Council (7 March 2022), available at: <https://worldtradelaw.typepad.com/files/russia-wto.pdf> [Accessed 2 March 2023].

Most WTO substantive law is contained in the fifteen Agreements found in Annex 1 of the WTO Agreement. The situation is relatively clear in relation to the three most well-known of these Agreements—the GATT, GATS and TRIPS Agreements—security exceptions to which were invoked by Ukraine as mentioned above), and each of which contain security exceptions similar to Article XXI of the GATT *mutatis mutandis*.

The situation is less clear in relation to some of the other agreements. Article 3 of the Agreement on Trade-Related Investment Measures (TRIMs) incorporates GATT exceptions into the provisions of this Agreement. Article 2.2 of the Agreement on Technical Barriers to Trade (the TBT Agreement) explicitly lists national security requirements as a legitimate objective for technical regulations. The Preamble to the TBT Agreement also recognises “that no country should be prevented from taking measures necessary for the protection of its essential security interest”.

However, not all of the Agreements in Annex 1 contain such references. As such there are questions around extending the withdrawal of MFN treatment to the areas covered by these Agreements.

#### SANCTIONS CIRCUMVENTION, RULES OF ORIGIN, AND RULES ON DESTINATION

The circumvention of sanctions is an issue that has arisen in relation to European Union sanctions packages. The European Union has taken a range of measures to prevent circumvention including extending sanctions to certain third countries and the adoption of a proposal to criminalise the evasion of sanctions in a uniform manner across the European Union.<sup>52</sup> The European Union has seen a surge in imports of sanctioned goods from the remainder of the Eurasian Economic Union (EAEU) since import bans against Russia have taken effect. Russian imports now appear to be labelled as coming from Central Asian countries that share a customs union with Russia. Consequently, there should be increased scrutiny of goods coming from Eurasian Economic Union countries that fall under the European Union sanctions regime, given the difficulty of determining the origin of these goods. Likewise where goods are subject to export bans targeting Russia, buyers in Kazakhstan or Kyrgyzstan should be subject to increased scrutiny where there is a risk they will move these goods on to Russia.

In relation to the former category—the increased scrutiny of goods coming from EAEU countries that fall under the EU sanctions regime—this may necessitate tweaking Rules of Origin (RoO), which set out the criteria for determining the source of a product under international trade rules. In relation to the latter situation—the risk of goods being moved on to Russia where there is an export ban targeting that country—there is a need for Rules on

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52. Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures COM/2022/684 final.

Destination (RoD) to minimise the risk of goods and related services subject to export bans reaching the targeted country. Rules on Destination would come under exceptions to the WTO Agreements, notably Article XXI(b)(ii) of the GATT on the traffic of “goods and materials ... for the purpose of supplying a military establishment”.

Designing RoD would involve complex questions such as how these rules should apply to sales within the European Union, to third countries, and to countries in bordering the targeted country (in this instance, Eurasian Economic Union countries). There is also an argument for applying enhanced due diligence rules to manufacturers of goods subject to export bans.

While these areas of international trade law are new (in the case of RoD) or perceived as being technical (in the case of RoO), an update to European Union legislation in this area may be required to minimise goods that come under the European Union sanctions regime entering the EU or goods and related services that are subject to export bans reaching the targeted country.

## CONCLUSION

In consequence of all the foregoing, in terms of European Union law, questions arise regarding the level of judicial scrutiny of European Union sanctions, the broad powers of the Council, and the lack of formal oversight from the European Parliament and the Commission even in this sensitive area of foreign policy. This was seen for example (as has been seen in the text above) when the Council relisted individuals in a majority of cases<sup>53</sup> under the Iran and Syria sanctions regimes after the Court had struck down their original listing on procedural grounds.

Even if the problem of excessively vague listings was remedied in the aftermath of the Kadi ruling,<sup>54</sup> there remains a risk today of overly broad listings and of the Council winning more cases simply as a result of using broader listing criteria.<sup>55</sup> A greater level of oversight may thus be called for where the Council broadens or introduces new listing criteria for individual designations.<sup>56</sup> As regards WTO law, the invasion of Ukraine has led to a series of measures being taken against Russia that have impacted its rights under the WTO Agreements. This may lead to further interpretations of the once-dormant national security provision of the GATT (Article XXI). There is also an increased impetus for the European Union to enact legislation that will prevent the circumvention of its sanctions.

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53. Chachko, “Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence” (2019) 44(1) *Yale J. of Int’l L.* 1.

54. *Kadi v Council of the European Union* (C-402/05 P) and (C-415/05 P) EU:C:2008:461.

55. Portela, *Targeted Sanctions against Individuals on Grounds of Grave Human Rights Violations – Impact, Trends and Prospects at EU Level* (2018) Study requested by the DROI Committee of the European Parliament, 11–16.

56. See European Council, Extraordinary Foreign Affairs Council, “Main Results” (25 February 2022).



The medium-to-long-term implications of sanctions against Russia will be further entrenchment of a fragmented international order and at least some reshoring of supply chains. Efforts in these areas must be coordinated with likeminded allies even if cooperation has been and will be imperfect. While the European Union can be expected to remain steadfast in its support of Ukraine, further sanctions packages are likely to be more incremental with increased focus on enforcement of existing sanctions and closing gaps in them, particularly in relation to gas and oil.

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