

6 The Sanctions Principles-Based Regulation: A Blueprint for a New Approach for the EU Sanctions Policy (Part I)

by

IULIIA KHORT*

Despite the tremendous number of studies devoted to the effectiveness of economic sanctions, the unprecedented number of sanctions applied and the recent European Union (EU) reforms on sanctions, sanctions effectiveness should be still a matter of debate. More than a year after Russia's full-scale invasion of Ukraine, but G7-led sanctions have not materially hindered Russia's war effort. This study intends to address this problem by focusing on how to make the use and application of EU sanctions against Russia more effective. In doing so, I argue that the main impediments to EU sanctions effectiveness are systemic in nature and inherent to the EU sanctions policy framework. The piecemeal changes of the EU sanctions regulatory framework undertaken so far have not solved these systemic flaws that undermine the effectiveness of EU sanctions. A fundamental revision of the entire system of the EU sanctions policy framework is needed. This study proposes implementing a comprehensive principles-based framework for EU sanctions policy, where harmonisation and the risk-based approach are its foundations, to make sanctions more effective. The proposed sanctions principles-based framework is broader in its scope than is currently the case; it covers a broader set of principles. The proposed frame includes all the stages of the sanctions process, is addressed to a broader number of actors and its foundations are developed. I recommend that this sanctions principles-based framework should be mandatory for use. This is the first part of a two-part article. Part I of the article discusses the need for the revision of the regulatory approach to the EU sanctions policy to increase the effectiveness of sanctions. It includes the analysis of the EU sanctions as a foreign policy instrument and a comprehensive overview of the EU regulatory framework on sanctions as well as the analysis of imposition of the EU sanctions against Russia. Part I also discusses policy proposals for the effectiveness of the EU sanctions, such as harmonisation of the EU sanction policy and the application of a sanctions risk-based approach.

* Dr. Iuliia Khort is Postdoctoral Research Fellow at the University of Zurich.

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1. Introduction

Restrictive measures (sanctions)¹ are an important foreign policy instrument that aims to force a state that violates international norms to change its behaviour. During the last several decades, EU sanctions have significantly expanded in both the number,² severity³ and importance, with the EU becoming one of the most significant international organisations in addressing breaches of the norms of international law.⁴

However, the effectiveness of the EU sanctions, especially the targeted sanctions that have been the primary form in recent decades, has repeatedly been called into question.⁵ The problem of the effectiveness of sanctions is particu-

1 In the EU legal acts, the term ‘restrictive measures’ is used. In this article, the term ‘restrictive measures’ is used interchangeably with the term ‘sanctions’.

2 According to Giumelli et al., the number of the imposed EU sanctions increased in three times in the past 30 years. See *Francesco Giumelli/Fabian Hoffmann/Anna Książczaková*, “The When, What, Where and Why of European Union Sanctions”, *European Security* 30(1) (2020), 9; Cardwell and Moret pay attention that, as of 2018, the total number of the EU sanctions regimes was 35, rising to 44 in 2021. See Paul James Cardwell/ Erica Moret, “The EU, Sanctions and Regional Leadership”, *European Security* 32(1) (2023), 5.

3 *Yuliya Miadzvetskaya/Celia Challet*, “Are EU Restrictive Measures Really Targeted, Temporary and Preventive? The Case of Belarus”, *Europe and the World: A Law Review* 6(1) (2022), 19.

4 The United Nations Security Council (UNSC) failed to adopt a resolution imposing sanctions against Russia because Russia vetoed it. See *United Nations (UN)*, Meetings Coverage: Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, SC/14808, 25 February 2022, <https://press.un.org/en/2022/sc14808.doc.htm> (last accessed: 10 May 2023).

5 Many scholars consider targeted sanctions to be less effective than comprehensive sanctions. See *Daniel W. Drezner*, “Targeted Sanctions in a World of Global Finance”, *Inter-*

larly acute in view of Russia's war against Ukraine. While the EU imposed sanctions in 2014 in response to Russia's annexation of Crimea, there is an overall consensus that these sanctions were ineffective;⁶ Giumelli calls them 'ineffective at best, and harmful at worst, with European businesses also paying a price for the trade restrictions'.⁷ In the press, these sanctions are often called 'symbolic';⁸ indeed, according to a 2019 report by the International Monetary Fund (IMF), between 2014 and 2018, sanctions caused a decline in the economic growth of Russia of by 0.2% every year.⁹ Moreover, after the 2014 arms embargo, ten EU Member States continued to export weapons to Russia using a legal loophole, the exemption from the EU arms embargo that covered contracts concluded before 1 August 2014 or ancillary contracts necessary for the execution of such contracts.¹⁰ These sanctions did not simply halt the Russian aggression against Ukraine but their effect was so modest that Russia was able to escalate its aggression, launching a full-scale invasion of Ukraine on 24 February 2022.

Among experts, there are various assessments of the effectiveness of sanctions imposed after this Russia's full-scale invasion of Ukraine, but most of them agree that they had only a partial success – with some limited negative impact on the Russian economy. In this regard, the *Financial Times* reports that 'Rus-

national Interactions 41(4) (2015), 757–758; Peter A. G. van Bergeijk, "Sanctions against the Russian War on Ukraine Could Be Made to Work", CEPR 28 March 2022, <https://cepr.org/voxeu/columns/sanctions-against-russian-war-ukraine-could-be-made-work> (last accessed: 10 May 2023).

6 Lara Geiger, "2014 Sanctions Against Russia Failed, is the Second Time the Charm?", Columbia Political Review 7 April 2022, <http://www.cpreview.org/articles/2022/4/2014-sanctions-against-russia-failed-is-the-second-time-the-charm> (last accessed: 10 May 2023).

7 Francesco Giumelli, "Sanctioning Russia: the Right Questions", European Union Institute for Security Studies (EUISS) 10 (2015), https://www.files.ethz.ch/isn/188302/Alert_10_sanctions.pdf (last accessed: 10 May 2023).

8 van Bergeijk (fn. 5).

9 International Monetary Fund (IMF), "Russian Federation: Staff Report for the 2019 Article IV Consultation", IMF Country Report No. 19/260, August 2019, p. 5, <https://www.imf.org/~media/Files/Publications/CR/2019/1RUSEA2019001.aspx> (last accessed: 10 May 2023); See also Iikka Korhonen, "Economic Sanctions on Russia and Their Effects", CESifo Forum, Institut – Leibniz-Institut für Wirtschaftsforschung an der Universität München, 20(4) 2019, p. 20.

10 See Laure Brillaud/Ana Curic/Maria Maggiore/Leila Miñano/Nico Schmidt, "EU Member States Exported Weapons to Russia after the 2014 Embargo", Investigate Europe 17 March 2022, <https://www.investigate-europe.eu/en/2022/eu-states-exported-weapons-to-russia/> (last accessed: 10 May 2023).

sia's economy is staggering but still on its feet'.¹¹ Similarly, *Thomson Reuters* states that 'Russia seems so far to be weathering the sanctions'.¹² Demertzis et al. remark that sanctions did not impact Russian fiscal revenues sufficiently to reduce the length of this war.¹³ The financial expert for *The Independent* admits that the impact of sanctions on Russia is not as strong as was expected by the major sanctions country-senders.¹⁴ The Institute of International Finance, in its Fact Sheet of 24 May 2022, states that 'the economy is forecast to contract as much as 15% or more in 2022'.¹⁵ However, according to the IMF, the state of the Russian economy is better than it was predicted. For instance, the 2022 economic contraction in Russia is estimated at -2.2% (compared with a predicted -3.4%), and this was followed by positive growth of 3.6% in 2023, placing its growth rate ahead of that of Germany.¹⁶ Contrary to the IMF forecast, the predictions of the Organization for Economic Co-operation and Development (OECD) and World Bank are less optimistic regarding the state of the Russian economy. The World Bank fixed the economic contraction of Russia -4.4% fall in 2022 and it is forecasting drop in GDP -3.6% in

11 *Financial Times*, "Russia's economy is Staggering, but Still on Its Feet", *Financial Times* 19 August 2022, <https://www.ft.com/content/eebc166b-0ab3-4a69-b61c-62908ee984e5> (last accessed: 10 May 2023).

12 *Thomson Reuters*, White Paper: The Fog of Sanctions: Global Banks and Businesses Face Unprecedented Challenges in Applying Measures Against Russia, 2022, p. 3, <https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2022/07/Russia-Sanctions-White-Paper-2022.pdf> (last accessed: 10 May 2023).

13 *Maria Demertzis/Benjamin Hilgenstock/Ben McWilliams/Elina Ribakova/Simone Tagliapietra*, "How Have Sanctions Impacted Russia?", *Bruegel* 26 October 2022, <https://www.bruegel.org/policy-brief/how-have-sanctions-impacted-russia> (last accessed: 10 May 2023).

14 *William Mata*, "Are Sanctions Working? Why Russia's Economy Continues to Grow. Sanctions on Russia 'Might not Be Having the Impact the West Had Hoped'", *The Independent* 1 February 2023, <https://www.independent.co.uk/world/russia-sanction-economy-putin-uk-b2272770.html> (last accessed: 10 May 2023).

15 *The White House*, Fact Sheet: United States and Allies and Partners Impose Additional Costs on Russia, 24 March 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/fact-sheet-united-states-and-allies-and-partners-impose-additional-costs-on-russia/> (last accessed: 10 May 2023).

16 *IMF*, World Economic Outlook Update. Report: Inflation Peaking amid Low Growth, January 2023, p. 4, <https://www.imf.org/en/Publications/WEO/Issues/2023/01/31/world-economic-outlook-update-january-2023> (last accessed: 10 May 2023); *IMF*, Real GDP Growth Annual Percent Change, 2023, https://www.imf.org/external/datamapper/NGDP_RPCH@WEO/OEMDC/WEOWORLD/RUS (last accessed: 10 May 2023).

2023,¹⁷ and the OECD estimated a contraction of –3.9% fall in 2022 and it predicts –5.6% fall in 2023.¹⁸

IMF officials explain that positive economic outlook was possible because of an increase in energy prices and because the banking panic was averted when the sanctions were first imposed.¹⁹ Also, Russia redirected its crude oil exports to India and China²⁰ and has been successful in evading sanctions in both trading (trade by energy resources and other products)²¹ and financial sanctions using legislative loopholes (exporting and importing in/from countries that did not impose sanctions on Russia). As of 13 October 2022, 568 international companies continued to operate in Russia, 328 of which provide 40% of the Russian Gross domestic product (GDP), according to a study by Yale University.²² Even some EU-headquartered banks continued to operate in Russia (Raiffeisen and UniCredit); moreover, their revenue even significantly increased in 2022. For instance, Vogl, commenting for Inckstick, points out that

17 *World Bank*, Europe and Central Asia Economic Update Fall 2022: Social Protection for Recovery, 2022, p. 150, <https://openknowledge.worldbank.org/entities/publication/a60043e6-7bc3-5d56-bf41-c4b15bfd022d> (last accessed: 10 May 2023).

18 *OECD*, OECD Economic Outlook: Confronting the Crisis, November 2022, <https://www.oecd.org/economic-outlook/november-2022#gdp> (last accessed: 10 May 2023).

19 *AFP*, “Russia Doing Better than Expected Despite Sanctions: IMF”, France 24, 26 July 2022, <https://www.france24.com/en/live-news/20220726-russia-doing-better-than-expected-despite-sanctions-imf> (last accessed: 10 May 2023); *IMF* (fn. 16), p. 9.

20 *EURACTIV*, “Russia Says It Has Rerouted All Oil Exports, India the Biggest Buyer”, EURACTIV 28 March 2023, <https://www.euractiv.com/section/global-europe/news/russia-says-it-has-rerouted-all-oil-exports-india-the-biggest-buyer/> (last accessed: 10 May 2023).

21 *Integrity Risk International*, “Top Ten Most Common Russian Sanction Evasion Schemes”, <https://integrityriskintl.com/top-ten-most-common-russian-sanction-evasion-schemes/> (last accessed: 10 May 2023); *Frank Vogl*, Commentary: Why Are Sanctions Failing in Russia?, Inckstick 8 February 2023, <https://inkstickmedia.com/why-are-sanctions-failing-in-russia/> (last accessed: 10 May 2023); *Jared Malsin*, “Russia’s Ukraine War Effort Fueled by Turkish Exports”, *The Wall Street Journal* 3 February 2023; *Sam Fleming/Henry Foy/Felicia Schwartz/James Politi/Simeon Kerr*, “West Probes Potential Sanction Dodging as Exports to Russia’s Neighbours Surge”, *Financial Times* 1 March 2023; *CNBC*, “Top U.S. Treasury Official to warn UAE, Turkey Over Sanctions Evasion”, 28 January 2023, <https://www.cnbcm.com/2023/01/28/treasury-department-to-warn-uae-turkey-over-russia-sanctions-evasion.html> (last accessed: 10 May 2023).

22 *Yale School of Management, Chief Executive Leadership Institute*, “Yale CELI List of Companies Leaving and Staying in Russia – Simplified Version”, <https://www.yalerussianbusinessretreat.com/simplified-version> (last accessed: 10 May 2023); see also, *Yaroslav Pylypenko*, “International Businesses Leaving Russian Market: Is There Progress?”, *Fox Ukraine* 13 October 2022, <https://voxukraine.org/en/international-businesses-leaving-russian-market-is-there-progress/> (last accessed: 10 May 2023).

in late January 2023, UniCredit stated that ‘its Russian-related revenue in the fourth quarter of 2022 was €354 million (about \$380 million), up 88.2% from the previous year’.²³

The study by Sonnenfeld et al. from Yale University states that the IMF assessment of Russian GDP is mistakenly positive, stating that the impact of sanctions on Russia is much more severe than the IMF’s estimates.²⁴ The United States (US) Congressional Research Service states that economic conditions in Russia are starting to deteriorate at a faster rate; in November, the Russian central bank estimated a faster economic contraction in Q4 2022 (7.1%) relative to previous quarters in 2022 (around 4%).²⁵ Indeed, the harshest EU sanctions envisaging the oil embargo took into force recently: the crude oil embargo took effect on 5 December 2022 and that for petroleum products – on 5 February 2023. Some scholars also assert that the effectiveness of sanctions is quite high and they will work, albeit slowly.²⁶ The overall result, however, is that Russia is financially able to continue its aggression against Ukraine, and there is a need to make sanctions more effective in stopping the war.

Scholars have studied the effectiveness of international sanctions and sanctions policy for decades, but there is still no consensus on how to make them effective. This question constitutes the research problem of this article.

The key limitation of the existing research is the lack of attention to the fundamentals of sanctions policy. The considerations regarding principles governing the imposition of sanctions were analysed by Cohen more than 70 years ago

23 *Vogl* (fn. 21); see also, *Dominic O’Neill*, “Why Are Reiffeisen and UniCredit Still in Russia”, *Euromoney* 4 October 2022, <https://www.euromoney.com/article/2apjhvv09usrh8ynti4g/opinion/why-are-raiffeisen-and-unicredit-still-in-russia> accessed (last accessed: 10 May 2023).

24 *Jeffrey Sonnenfeld/Steven Tian/Franek Sokolowski/Michal Wyrebkowski/Mateusz Kasprowicz*, “Business Retreats and Sanctions Are Crippling the Russian Economy”, SSRN 19 July 2022, <https://ssrn.com/abstract=4167193> (last accessed: 10 May 2023), p. 9, 34; *Sebastian Shehadi*, “Yale Shoots Down ‘Naive and Lazy’ IMF Assessment of the Russian economy”, *Investment Monitor* 2 August 2022, <https://www.investmentmonitor.ai/special-focus/ukraine-crisis/yale-naive-lazy-imf-assessment-russian-economy/> (last accessed: 10 May 2023); *Jeffrey A. Sonnenfeld/Steven Tian*, “A Year after the Invasion, the Russian Economy Is Self-Immolating”, *Yale Insights* 21 February 2023, <https://insights.som.yale.edu/insights/year-after-the-invasion-the-russian-economy-is-self-immolating> (last accessed: 10 May 2023).

25 *Congressional Research Service*, “The Economic Impact of Russia Sanctions” (updated 13 December 2022), p. 1, <https://crsreports.congress.gov/product/pdf/IF/IF12092> (last accessed: 10 May 2023).

26 *Masahiko Takeda*, “Sanctions on Russia Will Work, But Slowly”, *Eastasiaforum* 10 January 2023, <https://www.eastasiaforum.org/2023/01/10/sanctions-on-russia-will-work-but-slowly/> (last accessed: 10 May 2023).

and relate only to the UN sanctions.²⁷ The Basic Principles have only occasionally attracted the attention of the scholars; however, they analysed its separate principles. For instance, a substantial line in the scholarly literature is devoted to the principle of effectiveness, in particular, to the analysis which type of sanctions is more effective – targeted or sectoral. Many scholars conclude that targeted sanctions are less effective than comprehensive sanctions.²⁸ The scholars also paid a significant attention to the proportionality of sanctions.²⁹ In this regard, *Hofer* points out the need to apply the principle of proportionality to a broader number of actors.³⁰ *Montaldo* analysed the principle of proportionality at the different stages of the sanctions process,³¹ and *Early* and *Schulzke* attended to the problem of proportionality in terms of the costs imposed and the potential benefits of the application of the sanctions.³² The House of Lords analysed the application of the principle of legality in the context of imposition of sanctions.³³ The principle of respect for human rights has been the subject of a range of legal studies; in particular, scholars investigated the due process in regard to sanctions³⁴ and some procedural rights of

27 *Benjamin V. Cohen*, “Principles Governing the Imposition of Sanctions under the United Nations Charter”, *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)* 45 (1951), 153–159.

28 *Drezner* (fn. 5) 757–758; *Dursun Peksen*, “Autocracies and Economic Sanctions: The Divergent Impact of Authoritarian Regime Type on Sanctions Success”, *Defence and Peace Economics* 30(3) (2019), 643; *United States Government Accountability Office (US GAO)*, Report to Congressional Requesters: Economic Sanctions. Agencies Assess Impacts on Targets, and Studies Suggest Several Factors Contribute to Sanctions’ Effectiveness, October 2019, p. 19, <https://www.gao.gov/assets/gao-20-145.pdf> (last accessed: 10 May 2023).

29 *Alexandra Hofer*, “The Proportionality of Unilateral “Targeted” Sanctions: Whose Interests Should Count?”, *Nordic Journal of International Law* 89(3–4) (2020), 399–421; *Stefano Montaldo*, EU Sanctioning Power and the Principle of Proportionality, in: *Stefano Montaldo/Francesco Costamagna/Alberto Miglio* (eds.), *EU Law Enforcement. The Evolution of Sanction Powers*, 2021, p. 115; *Bryan R. Early/Marcus Schulzke*, “Still Unjust, Just in Different Ways: How Targeted Sanctions Fall Short of Just War Theory’s Principles”, *International Studies Review* 21(1) (2019), 64.

30 *Hofer* (fn. 29), 399.

31 *Montaldo* (fn. 29), 115.

32 *Early/Schulzke* (fn. 29), 64.

33 *House of Lords, European Union Committee*, 11th Report of Session 2016–17. HL Paper 102: The Legality of EU Sanctions, <https://publications.parliament.uk/pa/ld201617/ldselect/ldecom/102/102.pdf> (last accessed: 10 May 2023).

34 *Monika Heupel*, EU Sanction Policy and the Protection of Due Process Rights: Judicial Lawmaking by the Court of Justice of the EU, in: *Monika Heupel and Michael Zürn* (eds.), *Protecting the Individual from International Authority: Human Rights in International Organizations*, 2017, p. 129–151.

the sanctioned persons.³⁵ The principle of international cooperation in the application of sanctions has also been a subject of scholarly research. Most of studies show that multilateral sanctions under the auspices of international institutions are more effective than those imposed by a single country or an ad hoc coalition of a few countries.³⁶ In the wake of the 24 February 2022 Russian aggression against Ukraine, interest significantly grew on to the principle of coordination with many scholars working to find ways to halt the aggression and make sanctions more effective.³⁷ However, these studies have a major blind spot because they do not capture how robustly the EU sanctions principles-based framework works. That is why, there is a need to pay more attention to the workings of the principles of the EU sanctions policy as a system. Also, scholars have mainly researched the principles of sanctions policy during the stage of imposition of sanctions. Application of the principles at other stages, such as implementation, supervision and enforcement, has received less attention. An analysis of the principles-based framework in a broader context is especially important in view of the recent processes to harmonise EU sanc-

35 *Peter Hilpold*, UN Sanctions Before the ECJ: the *Kadi* Case, in: August Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts*, 2010, p. 18–53.

36 *George A. Lopez*, “Effective Sanctions. Incentives and UN-US Dynamics”, *Harvard International Review* (Fall 2007), 51; *Thomas Biersteker/Peter A.G. van Bergeijk*, “How and When do Sanctions Work? The Evidence, in: Iana Dreyer, José Luengo-Cabrera (eds.), *On Target? EU Sanctions as Security Policy Tools* (EU Institute for Security Studies 2015), p. 25; *David Cortright/George A. Lopez*, “How to Mix Sanctions and Diplomacy to Avert Disaster in Ukraine”, *The Bulletin of the Atomic Scientists* 1 February 2022, <https://thebulletin.org/2022/02/how-to-mix-sanctions-and-diplomacy-to-avert-disaster-in-ukraine/> (last accessed: 10 May 2023); *Elena V. McLean/Taehee Whang*, “Friends or Foes? Major Trading Partners and the Success of Economic Sanctions”, *International Studies Quarterly* 54(2) (2010), 427–447; *Joschka Wanner/Julian Hinz/Sonali Chowdhry*, “Sanctions Coalitions: Stronger Together”, *CEPR*, 30 October 2022, <https://cepr.org/voxeu/columns/sanctions-coalitions-stronger-together> (last accessed: 10 May 2023).

37 *Demertzis/Hilgenstock/McWilliams/Ribakova/Tagliapietra* (fn. 13); *Viktor Szép*, “Unmatched Levels of Sanctions Coordination. The Strength of Transatlantic Cooperation in the Russia’s War on Ukraine”, *Verfassungsblog* 23 March 2022, <https://verfassungsblog.de/unmatched-levels-of-sanctions-coordination/> (last accessed: 10 May 2023); Report by the National Coordinator for Sanctions Compliance and Enforcement Stef Blok, 13 May 2022, p. 16, <https://www.government.nl/documents/reports/2022/06/02/report-by-the-national-coordinator-for-sanctions-compliance-and-enforcement> (last accessed: 10 May 2023); *Kim B. Olsen/Simon FASTERKJÆR Kjeldsen*, “Strict and Uniform: Improving EU Sanctions Enforcement”, *DGAP Policy Brief* 29 September 2022, <https://dgap.org/en/research/publications/strict-and-uniform-improving-eu-sanctions-enforcement> (last accessed: 10 May 2023).

tions policy.³⁸ Moreover, given the rapid development of sanctions policy, an up-to-date assessment of these principles is needed.

This study intends to address the mentioned limitations in the scholarly research and re-evaluate the regulatory approach to the EU sanctions policy to increase the effectiveness of sanctions. I argue that the problem of the effectiveness of sanctions policy cannot be solved by means of piecemeal changes. Rather, a conceptual revision of the entire sanctions policy framework is needed. The study takes a step towards a structured understanding of the system of principles underlying the EU sanctions policy. The contribution of this article is a development of the theoretical basis of the conceptually new, comprehensive, principles-based framework for the EU sanctions policy, where harmonisation and the risk-based approach are its foundations, to make it more effective, that could be also a basis for major revision of the EU's Basic Principles. It is proposed that the new principles-based framework should be broader in its scope than the current scheme – to cover a more extensive range of actors and all the stages of the sanction process and be based on a broader number of principles and – the foundations (pillars) of the principles-based framework should be developed. This study also provides a range of specific recommendations for a more effective application of the EU sanctions as a foreign policy instrument, including the development of a new sanctions institutional structure.

The article is divided into four sections. The article starts from the analysis of the EU's regulatory framework on sanctions. It explains the workings of the EU's overall policy toolbox concerning sanctions and sets out the recent regulatory developments in the EU sanctions regulatory framework. This section also investigates the application of the EU sanctions against Russia to understand how the EU sanctions regulatory framework works in a concrete case. This allows an understanding of the peculiarities and main pitfalls in the development of the EU sanctions regulatory framework. Finally, the concluding section, underlines the importance of moving forward in the sanctions debate and summarises the main argument of the study – the need for the introduction of a new sanctions principles-based framework, where harmonisation of the EU sanctions policy and the risk-based approach are its foundations.

38 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, 2 December 2022, COM (2022) 684 final.

2. *The European Regulatory Framework on Restrictive Measures (Sanctions)*

The effectiveness of the EU restrictive measures (sanctions) directly depends on the regulatory framework, which constitutes basis for them. This part provides an understanding of the EU sanctions as a foreign policy instrument and an up-to-date comprehensive overview of the EU regulatory framework on sanctions as well as the analysis of imposition of the EU sanctions against Russia.

2.1. *EU Sanctions as a Foreign Policy Instrument*

Currently, the EU's restrictive measures (sanctions) are an important foreign policy instrument. Initially, they were part of the Common Commercial Policy.³⁹ As scholars point out, EU sanctions policy during this period had 'a reactive character' and it was characterised by the implementation of the United Nations (UN) sanctions.⁴⁰

The principles of political cooperation envisaged by the legislature were first reflected in the Single European Act (1986), which was the first major revision of the Treaty of Rome (1957), and incorporated proposals for political cooperation reflected in the reports noted above. The Single European Act underlined the importance of consultations, frequency of meetings, the responsibility of the presidency, meetings of political directors within political committees, and meetings of working groups.⁴¹

These advancements in the development of European political cooperation formed the basis for the adoption of the Maastricht Treaty (1992),⁴² initiating the new stage in the EU sanctions policy development. The Treaty empowered the EU to adopt autonomous restrictive measures within the Common Foreign and Security Policy (CFSP) and introduced 'a two-tier procedure for the adoption of the EU sanctions'.⁴³ The provisions of the Maastricht Treaty also extended the scope of Article 228a on the movement of capital and payments.

39 Kern Alexander, *Economic Sanctions: Law and Public Policy*, 2009, p. 129.

40 Radka Druláková/Jan Martin Rolenc/Zuzana Trávníčková/Štěpánka Zemanová, "Assessing the Effectiveness of the EU Sanction Policy", *Central European Journal of International and Security Studies* 4(1) (2010), 109.

41 Single European Act of 1986. For a detailed analysis of the European political cooperation, see Joakim Kreutz, "Hard Measures by a Soft Power? Sanctions Policy of the European Union", Bonn International Center for Conversion (BICC), Paper No. 45/2005, <https://www.files.ethz.ch/isn/15145/paper45.pdf> (last accessed: 10 May 2023), p. 7–10.

42 Treaty on European Union, signed at Maastricht on 7 February 1992.

43 Ian Anthony, "Sanctions Applied by the European Union and United Nations", in: SIPRI Yearbook 2002: Armaments, Disarmament and International Security, 2002,

The next important stage in the formation of the regulatory framework for imposing EU sanctions is associated with the adoption of the Lisbon Treaty in 2007, which defined the basic principles and mechanisms of the CFSP and clarified the procedure for the adoption of restrictive measures.⁴⁴ In particular, according to article 24(1) of the Treaty on European Union (TEU), the EU's competence in regards of CFSP covers all areas of foreign policy and all questions relating to the EU's security. The Treaty also anticipated the creation of the EEAS and the consolidation of the authorities of the High Representative for Foreign Affairs and Security Policy. Additionally, the Lisbon Treaty of 2007 clearly spelt out the economic and financial nature of restrictive measures. According to article 24 of the TEU, the EU's '[CFSP] shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise'. After that, the High Representative of the Union for Foreign Affairs and Security Policy together with the Commission draft a joint proposal to implement those measures. The Council then votes by a qualified majority on whether to adopt that joint proposal.⁴⁵ Article 215(2) Treaty on the Functioning of the European Union (TFEU) also clearly specifies against whom sanctions may apply – legal or natural persons, non-state actors and groups.⁴⁶ Interestingly, the EU treaties do not envisage the possibility of imposing sanctions against states.⁴⁷ On 9 June 2022, the European Parliament, by a large majority, approved a resolution proposing amendments to the EU treaties, in particular, to change article 29 of the TEU in order to give the EU a new mechanism to designate countries as sponsors of terrorism.⁴⁸ Thus, the principal EU treaties establish the foundations of the procedure of the adoption of sanctions within the CFSP.

p. 211; Aivaras *Batūra*, "Restrictive measures in EU Law", Master thesis, Mykolas Romeris University 2013, p. 8, <https://vb.mruni.eu/object/elaba:2119145/MAIN> (last accessed: 10 May 2023).

44 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

45 Art. 215(1) Treaty on the Functioning of the European Union.

46 *Melanie C. Papadopoulos*, "Do the Decision-Making Mechanisms in the EU Undermine Member States' National Interest?: A Case Study of the Sanctions Regime", *Emory International Law Review* 31(4) (2017), 570.

47 *European Parliament*, Press release: European Parliament Declares Russia to Be a State Sponsor of Terrorism, 23 November 2022, <https://www.europarl.europa.eu/news/en/press-room/20221118IPR55707/european-parliament-declares-russia-to-be-a-state-sponsor-of-terrorism> (last accessed: 10 May 2023).

48 *Anna Melenchuk/Andrea Castagna*, "The EU Must Give Itself the Means to Designate Russia as a Sponsor of Terrorism", *German Marshall Fund of the United States* 25 October 2022, <https://www.gmfus.org/news/eu-must-give-itself-means-designate-russia-sponsor-terrorism> (last accessed: 10 May 2023); *European Parliament*, Resolution from

The basic aspects of the implementation and enforcement of sanctions are set out in the Council's regulations separately in relation to each country against which sanctions apply. The Council's regulations define the scope of the sanctions' application, the main definitions for the implementation of sanctions, information sharing between competent authorities regarding sanctions, a ban on circumvention of sanctions, the issue of authorisation of the exemption from sanctions application and establishing liability for sanctions violation.

An analysis of the Council's regulations on Iran, Syria and Russia shows that there is no unanimous approach to the implementation and enforcement of the EU sanctions; the EU sanctions policy on the core issues is inconsistent and grounded justifications for this are not provided. For instance, the requirements for the coordination of sanctions imposed on Iran and Syria are weaker than the requirements concerning sanctions against Russia. In particular, there is an obligation to exchange information between competent authorities of the EU Member States regarding frozen funds Council's regulations on Iran and Syria but in these Council's Regulations there is no requirement to share information about economic resources as in Council's Regulation on Russia. Furthermore, there is no requirement in the Council's regulations on Iran and Syria to exchange information with enforcement authorities and administrators of official registers.⁴⁹ Additionally, until recently, the obligation to impose criminal sanctions for violations of restrictive measures has been required only against Russia but not against other sanctioned countries.⁵⁰ Similarly, the pos-

9 June 2022 on the Call for a Convention for the Revision of the Treaties (2022/2705 (RSP)).

- 49 Arts. 8(4), 12 Consolidated text: Council Regulation (EU) No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; art. 44 Council Regulation (EU) No. 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No. 961/2010; art. 29 Council Regulation (EU) No. 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No. 442/2011.
- 50 On November 22, 2022 Council added the violation of restrictive measures to the list of EU crimes, which applies to all sanctioned countries. Council Decision (EU) 2022/2332 of 28 November 2022 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. The regulations of the Council of the European Union on sanctions against Iran and Syria do not contain any requirements to introduce criminal sanctions for violation of restrictive measures. See art. 47 Council Regulation (EU) No. 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010; art. 33 Council Regulation (EU) No. 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No. 442/2011.

sibility of confiscation of the proceeds for sanctions violation is envisaged only in the relation to sanctions against Russia but not Iran or Syria.⁵¹

An important role in the development of the EU sanctions policy is played by the EU soft-law instruments on sanctions.

On 3 December 2003, the Council of the EU introduced the first *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common foreign and security policy* (hereafter, ‘the Guidelines’).⁵² This document contains standard wording and common definitions that may be used in the legal instruments when restrictive measures are implemented by the EU and its Member States.⁵³ The purpose of the Guidelines is to ensure uniform application of restrictive measures. This document also addresses a number of general and specific issues on the imposition, implementation and supervision of restrictive measures, including the application of principles for imposing restrictive measures (legality, proportionality, respect for human rights, effectiveness, and coordination). Particular attention is devoted to the objectives of imposing sanctions and the necessity of their clear statement for each restrictive measure.⁵⁴ This document contains recommendations on the most effective and successful mechanisms for the implementation of both the UN and EU autonomous sanctions. The Guidelines was reviewed and updated in 2005, 2009, and 2018 but the changes to it had fragmented nature.

Another significant policy development is the *Basic Principles on the Use of Restrictive Measures (Sanctions)* (hereafter, ‘Basic Principles’) adopted in 2004,⁵⁵ which laid the strategic foundations for the application of restrictive measures. The academic literature pays some attention to the interesting fact that the fundamental principles on the application of restrictive measures were

51 Art. 15(1) 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.

52 *Council of the European Union*, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (3 December 2003) 15579/03, <https://data.consilium.europa.eu/doc/document/ST-15579-2003-INIT/en/pdf> (last accessed: 10 May 2023).

53 Ch. I, para. 1 *Council of the European Union*, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (4 May 2018) 5664/18, <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf> (last accessed: 10 May 2023).

54 Ibid, Ch. II, para 5.

55 *Council of the European Union*, Basic Principles on the Use of Restrictive Measures (Sanctions)(7 June 2004), <https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/en/pdf> accessed 10 May 2023.

adopted after the Guidelines; however, it should be the other way around.⁵⁶ This document clearly states that restrictive measures are a key instrument of the EU foreign policy; the goals of the application of restrictive measures are also defined. The document also envisages the possibility of the application of two types of sanctions: the UNSC sanctions and autonomous European sanctions. As the Guidelines, the Basic Principles envisage a targeted sanctions approach. The Basic Principles envisage such principles as legality, effectiveness, proportionality, international cooperation and respect for human rights.

In 2005 there were also published *EU Best Practices for the effective implementation of restrictive measures* (hereafter, ‘Best Practices’) have been published.⁵⁷ The Best Practices are ‘non-exhaustive recommendations of a general nature’ for effective implementation of restrictive measures in accordance with the applicable Union law and national legislation’.⁵⁸ In particular, they contain recommendations on the designation and identification of persons and entities subject to targeted restrictive measures, delisting of sanctioned persons, recommendations for third parties, which are obliged to comply with sanctions, use of information by competent authorities, implementation of freezing of funds and the issues of cooperation and coordination of sanctions. The EU Best Practices were reviewed in 2007, 2008, 2015, 2016, 2018 and 2022, but the changes to them, as in case of the Guidelines, have a fragmented nature.⁵⁹

Since the adoption of these documents, there has been a significant growth in the use of sanctions, their diversity and complexity, and the role of the EU as the main sanctions player has increased. However, these changes are not properly reflected in the soft-law policy instruments considered.

These three sanctions policy documents laid down foundations for the EU sanctions policy. Despite significant advancements in the development of the EU sanctions policy in the above-mentioned policy documents, as Druláková et al. aptly noted, given that they are soft-law instruments, they do not create any real restrictions for EU sanctions policy.⁶⁰ Also, inconsistency between these docu-

56 Clara Portela, “Where and Why Does the EU Impose Sanctions?”, *Politique européenne* 17 (2005), 90.

57 Council of the European Union, *EU Best Practices for the effective implementation of restrictive measures* (29 November 2005).

58 Para. 3 Council of the European Union, *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> (last accessed: 10 May 2023).

59 Council of the European Union, *Update of the EU Best Practices for the effective implementation of restrictive measures* (27 June 2022, No. 10572/22), <https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf> (last accessed: 10 May 2023).

60 Druláková/Rolenc/Trávníčková/Zemanová (fn. 40), 117.

ments exists, the Guidelines and Best Practices have been constantly changed, these changes mainly reflect the developments in the Court of Justice of the European Union (CJEU) case law on sanctions policy. However, these piecemeal changes had fragmented nature. In contrast to the Guidelines and Best Practices, there have been no changes to the Basic Principles despite the urgent need in them. Currently, principles of sanctions policy are dispersed among different legal acts, also, there is no basic interpretation to all of them provided as well as there is a little clarity on how to understand the basic concepts. Additionally, there is an imbalance between the development of sanctions and the EU sanctions regulatory framework; for instance, new and more complex sanctions such as price cap are envisaged, however, the specifics of the adoption procedure of such sanctions are not set out. In fact, rather than being systemic, the applied approach is one of ‘patching holes’; as such, the development of the EU sanctions policy has rather a reactive rather than forward-looking character.

Thus, the EU restrictive measures have been significantly evolved from being used within the common commercial policy framework and implementing mainly the UN sanctions to getting used within the foreign policy framework and implementing both the UN sanctions and EU autonomous sanctions. The main focus of the EU sanctions regulatory framework is on sanctions decision-making and there is a little attention paid to the implementation and enforcement of sanctions. In view of the strong criticisms of the ineffectiveness of EU sanctions, there are a number of areas of concern: the lack of a uniform approach to the implementation and enforcement of sanctions, the absence of a forward-looking approach to sanctions policy, an imbalance between the development of sanctions and the sanctions regulatory framework, and a soft approach to the adoption, implementation and enforcement of sanctions.

2.2. *EU Sanctions against Russia*

The crucial moment in the development of EU sanctions policy was the application of the EU sanctions against Russia. It is important to investigate the EU sanctions imposed on Russia, as they are one of the most comprehensive in EU sanctions history⁶¹ and they are imposed on a country, whose economy is highly integrated into the world economy.⁶²

61 Before 2022, Iran was considered the country, at which the most comprehensive sanctions in EU history were imposed. See *Peter Seeberg*, “The EU and the International Sanctions against Iran: European and Iranian Foreign and Security Policy Interests, and a Changing Middle East”, Palgrave Communications 2 (2016), 3.

62 As of 2021, Russia was the 11th largest economy in terms of GDP, or the 6th largest in purchasing power parity (PPP), as well as a major producer and exporter of oil and

Currently, Russia is ‘the most-sanctioned country in the world’⁶³ with 13 596 sanctions in place as of 17 January 2023 according to Statista,⁶⁴ and their number continues to increase. Noteworthy is the speed of imposing sanctions on Russia: in the period from 23 February 2022 until 23 June 2023 eleven sanctions packages were imposed;⁶⁵ the number of sanctions against Russia exceeded the number of sanctions against Iran for over the last 40 years.⁶⁶

At the same time, the question arises as to how effective are the sanctions introduced against Russia are. Is it possible to talk about the success or failure of the sanctions in terms of the achievement of the sanctions’ goals?

Russia has been under international scrutiny since 2014 due to its violation of Ukraine’s sovereignty and territorial integrity by the Russian armed forces and the illegal annexation of Crimea and Sevastopol. The Council of the EU first addressed the issue by officially condemning the country’s actions and the holding of an illegal referendum in Crimea;⁶⁷ this was followed by the imposi-

natural gas, representing a formidable target. See, *Statista*, “Economy of Russia – Statistics & Facts”, <https://www.statista.com/topics/7835/economy-of-russia/#topicOverview> (last accessed: 10 May 2023); *World Bank*, “Gross Domestic Product 2021, PPP”, https://databankfiles.worldbank.org/public/ddpext_download/GDP_PPP.pdf (last accessed: 10 May 2023).

63 Florian Zandt, “The World’s Most-Sanctioned Countries”, Statista 9 March 2022, <https://www.statista.com/chart/27015/number-of-currently-active-sanctions-by-target-country/> (last accessed: 10 May 2023).

64 *Statista*, “Number of Sanctions Placed Worldwide 2023, by Target Country” (17 January 2023), <https://www.statista.com/statistics/1294726/number-of-global-sanctions-by-target-country/> (last accessed: 10 May 2023).

65 The Council of the European Union has imposed successive sanctions packages on the following dates. First, 23 February 2022; second, 25 February 2022; third, 2 March 2022; fourth, 15 March 2022; fifth, 8 April 2022; sixth, 3 June 2022; seventh, 21 July 2022; eighth, 6 October 2022; ninth, 16 December 2022; tenth, 25 February 2023, and eleventh, 23 June 2023. See in Council of the European Union, “Timeline – EU restrictive measures against Russia over Ukraine”, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/> (last accessed: 10 May 2023).

66 Nick Wadhams, “Russia is Now the World’s Most Sanctioned Country”, Bloomberg 7 March 2022, <https://www.bloomberg.com/news/articles/2022-03-07/russia-surges-past-iran-to-become-world-s-most-sanctioned-nation#xj4y7vzkg> (last accessed: 10 May 2023).

67 *Council of the European Union*, Foreign Affairs Council, Meeting: EU Condemns Russia’s Actions in Ukraine, Calls for Dialogue and Remains Ready for Further Measures, 3 March 2014, <https://www.consilium.europa.eu/en/meetings/fac/2014/03/03/> (last accessed: 10 May 2023); *Council of the European Union*, Foreign Affairs Council meeting: Council Conclusions on Ukraine, 17 March 2014, <https://www.consilium.europa.eu/media/28727/141601.pdf> (last accessed: 10 May 2023).

tion of EU sanctions.⁶⁸ In the case of Iran, sanctions against an internationally coordinated response to its nuclear proliferation programme and consisted of both the UNSC sanctions and bilateral actions led by the US and the EU and other countries. By contrast, sanctions against Russia are mainly led by the US and the EU and their strategic partners (the UK, Canada, Australia, and Japan);⁶⁹ the UNSC could not overcome the veto of Russia and impose sanctions against it⁷⁰ and only condemned the breach of the Ukrainian sovereignty and annexation of Crimea in a non-binding resolution.⁷¹

Initially, in 2014 the European Union imposed sanctions focused on Russian individuals and entities, responsible for the illegal annexation of Crimea and Sevastopol, including individuals and entities controlled by those actors.⁷² During the period from 2014 until 2021, the listing criteria for inclusion in the sanctions list were expanded to include not only persons and entities, responsible for the illegal annexation of Crimea and Sevastopol but also for the breach of the territorial integrity in the Donbas region of Ukraine; those who facilitated by their actions to the undermining of the territorial integrity of Ukraine (materially or financially supported it; conducted transactions with the separatist groups in the Donbass region of Ukraine; transferred their ownership in Crimea or Sevastopol contrary to Ukrainian law, or who have benefited from such a transfer; undermined the work of international organisations

68 Para. 1 *Council of the European Union*, Foreign Affairs Council meeting, 17 March 2014 (fn. 67).

69 *European Parliament*, Briefing: EU sanctions on Russia: Overview, Impact, Challenges, 10 March 2023, p.1, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739366/EPRS_BRI\(2023\)739366_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739366/EPRS_BRI(2023)739366_EN.pdf) (last accessed: 10 May 2023).

70 *UN*, UN news: UN Security Council action on Crimea referendum blocked, 15 March 2014, p. 3, <https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked> (last accessed: 10 May 2023). Similarly, the UN could not overcome the veto right of Russia when it tried to adopt resolution after Russia started the war in Ukraine. *UN*, Meetings Coverage: Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, SC/14808, 25 February 2022, [HTTPS://PRESS.UN.ORG/EN/2022/SC14808.DOC.HTM](https://press.un.org/en/2022/SC14808.DOC.HTM) (last accessed: 10 May 2023).

71 UN General Assembly Resolution 68/262 from 27th March 2014. See also, *UN*, Meetings Coverage: General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, GA/12407, 2 March 2022, [HTTPS://PRESS.UN.ORG/EN/2022/GA12407.DOC.HTM](https://press.un.org/en/2022/GA12407.DOC.HTM) (last accessed: 10 May 2023).

72 Art. 3(1) 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.

in Ukraine).⁷³ As a result of these measures, the number of the sanctioned persons, whose assets should be frozen, increased six times: from 33 sanctioned individuals as of 21 March 2014 to 203 sanctioned individuals and 51 entities as of 13 December 2021. The list of categories of sanctioned persons has significantly evolved. In 2014, sanctions were imposed on political representatives, government officials and military commanders of Russia and Crimea, which supported the annexation of Crimea. Later they came to cover a greater number of government and military officials who supported not only the annexation of Crimea, but also the creation of Lugansk and Donetsk republics, paramilitary organisations, separatist groups, propagandists, oligarchs, and entities that exercise their activities on the territory of the illegally annexed Crimea and Sevastopol and Russia and others.⁷⁴

This period is characterised by the application of the mainly classic targeted sanctions (visa bans and asset freezes and a prohibition on providing funds to individuals and legal entities) and some sectoral sanctions – arms embargo and restricting export of the dual-use goods and technologies for military use, other trade (related to oil exploration and production) and investment restrictions imposed on major credit institutions or financial development institutions established in Russia with over 50% public ownership or control.⁷⁵

Despite the expansion in sanctioned persons and legal entities, and listing criteria, at this stage, the sanctions against Russia did not impact significantly the industries, which bring significant input to the Russia's budget and GDP; in 2019, sanctions caused an annual decline in the economic growth of Russia of

73 Council Regulation (EU) 476/2014 of 12 May 2014 amending Regulation (EU) No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, which amends art. 3(1) of the Council Regulation (EU) No. 269/2014; Council Regulation (EU) 811/2014 of 25 July 2014 amending Regulation (EU) 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, which amends art. 3(1) of the Council Regulation (EU) No. 269/2014; Council Regulation (EU) 959/2014 of 8 September 2014 amending Regulation (EU) 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, which amends art. 3(1) of the Council Regulation (EU) No. 269/2014.

74 Annex 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.

75 Arts 1(1), 2(1), 4 Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

around -0.1% per year.⁷⁶ As previously noted, scholars call this period of sanctions against Russia – the period of the ‘symbolic’ sanctions.⁷⁷

Council’s regulations on the implementation of sanctions on Russia did not contribute much to the effective implementation and enforcement of sanctions during this period of their imposition. On the one hand, the violation, including circumvention of sanctions was forbidden. However, while the EU sanctions regulations established liability for violation of sanctions, there was no requirement to criminal liability for violation of sanctions.⁷⁸ As a result, only twelve states have established criminal sanctions, and these sanctions varied significantly,⁷⁹ which, in turn, facilitated regulatory arbitrage and negatively impacted the effectiveness of sanctions compliance. The scope of requirements to coordination of sanctions was quite narrow, relating mainly to information sharing, for example, on accounts and frozen assets, authorisations granted etc.⁸⁰

The year 2022 marked a significant shift in EU Russia sanctions policy. In the legal literature, this sanctions period is referred to as a ‘sanctions tsunami’.⁸¹ As Russia started the full-scale invasion of Ukraine, the EU unprecedentedly increased the number, diversity and severity of sanctions against Russia; up to date the EU has imposed eleventh packages of sanctions on Russia. The EU continued the expansion of the listing criteria for the sanctioned persons and legal entities to cover those responsible for the full-scale Russia’s invasion of Ukraine and their close relatives, those who facilitated such invasion, those who provided significant revenue to the Russian budget, and those who facilitated sanctions evasion.⁸² The list of categories of sanctioned persons signifi-

76 IMF (fn. 9), 5.

77 van Bergeijk (fn. 5).

78 Arts. 9, 15(1) 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.

79 *Network for Investigation of Genocide, Crimes against Humanity and War Crimes (Genocide Network)*, “Prosecution of Sanctions (Restrictive Measures) Violations in National Jurisdictions: a Comparative Analysis”, December 2021, https://www.eurojust.europa.eu/sites/default/files/assets/genocidenetwork_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf (last accessed: 10 May 2023), p. 22

80 Art. 12 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.

81 Elena Chachko/J. Benton Heath, “A Watershed Moment for Sanctions?: Russia, Ukraine, and the Economic Battlefield”, Temple University Legal Studies Research Paper No. 2022-07, <https://ssrn.com/abstract=4090894> (last accessed: 10 May 2023), p. 1.

82 Art. 2(1) 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.

cantly evolved, covering a wider number of top political representatives and government officials (including from Belarus), oligarchs, and military personnel, including from Belarus, Iran and Syria for the facilitation of the Russia's invasion of Ukraine.⁸³ As of 28 February 2022, the assets of 696 individuals and 56 entities should be frozen; as such, in the first days after the start of the full-scale Russia's invasion of Ukraine, the number of only asset freezes increased three times. As of 15 March 2023, the number of sanctions targets, whose assets should be frozen, had expanded to cover 1499 individuals and 209 entities.⁸⁴ Thus, compared to 2021, by the end of October 2022, the number of sanctioned individuals, whose assets should be frozen, increased almost 7,4 times and the number of sanctioned entities increased four times. Notably, the variety and severity of sanctions also increased after the full-scale Russia's invasion of Ukraine. Before 2022, the measures imposed were mainly classic targeted sanctions (visa bans, freezing of assets and prohibition to provide funds), alongside arms embargo, and some trade and investment measures. By contrast, after 2022, already imposed sanctions were strengthened and the new sectoral sanctions were introduced: (a) in the military sector, greater restrictions of the export of the dual-use military products have been imposed; (b) in the financial sector, sanctions were imposed on the Russian central bank, transactions in Euro and other monetary restrictions, and a range of Russian banks were excluded from SWIFT. Prohibitions were introduced on providing credit rating services, opening crypto-wallets to Russian nationals and entities and accepting any deposits from Russian nationals or natural persons residing in Belarus, or legal persons, entities or bodies established in Russia in the amount exceeding EUR 100 000; (c) investment restrictions were imposed on the Russian Direct Investment Fund, and the Russian energy sector; (d) export and import trade restrictions were imposed on natural resources (iron, steel, coal and other solid fossil fuels, crude oil, petroleum products, gold etc.) and luxury goods; (e) restrictions were instituted on propagandist media abroad; (f) transport restrictions were imposed, including a ban on all Russian vessels from accessing EU ports and on Russian and Belarusian road transport operators from entering the EU. In addition, a new and more complex type of sanctions – price cap mechanism for the Russian oil was introduced.⁸⁵ Thus, this period of imposition of sanctions against Russia is characterised by the application of the classic targeted sanctions but with a significant increase in the role of sectoral sanctions (e.g., the partial embargo on crude oil and petroleum products), which are in their nature closer to comprehensive measures than to tar-

83 Ibid, Annex.

84 Ibid, Annex.

85 Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

geted sanctions. In fact, sectoral sanctions target the military and other sectors facilitating the Russian military aggression and bringing a significant inflow to the budget and, thereby, financing the war. EU sanctions continue to strengthen, and their escalation is ongoing. In particular, on 23 November 2022, the European Parliament adopted a resolution recognising Russia as a terrorist state and calling for the establishment of an ad hoc international tribunal to investigate and prosecute Russian crimes of aggression against Ukraine and ensure strict enforcement of all sanctions, to actively prevent, and further addressing any circumvention of the sanctions.⁸⁶ In this period, there was increasing sanctions decision-making and enhancing requirements for the implementation and enforcement of sanctions. In particular, coordination of sanctions has been strengthened, including mechanisms for revealing the assets of the sanctioned persons have been improved, the obligation to exchange information between competent authorities of the EU Member States, including enforcement authorities and administrators of official registers have been envisaged, a ‘Freeze and Seize Task Force’⁸⁷ and the international Russian Elites, Proxies, and Oligarchs ‘REPO’ Task Force⁸⁸ have been set up as well as transatlantic cooperation on sanctions between the EU and US,⁸⁹ compliance guidelines for the third parties who are required to implement sanctions have been developed in some countries, and criminal liability for sanctions violation has been established at the EU level.⁹⁰

In this period, the sanctions imposed were not ‘symbolic’; they impacted the Russian GDP and the negative impact on the Russian economy continues. However, the negative implications were not so devastating for the Russian economy as from ‘tsunami’, with which this period of sanctions is compared.

86 European Parliament resolution of 23 November 2022 on recognising the Russian Federation as a state sponsor of terrorism (2022/2896(RSP)).

87 *European Commission*, Press Release: Freeze and Seize Task Force: Almost €30 Billion of Assets of Russian and Belarussian Oligarchs and Entities Frozen by the EU So Far, 8 April 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2373 (last accessed: 10 May 2023).

88 *European Commission*, “Ministerial Joint Statement on the Russian Elites, Proxies, and Oligarchs Task Force by the European Commission, the United States, Australia, Canada, France, Germany, Italy, Japan and the United Kingdom”, 17 March 2022, https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1850 (last accessed: 10 May 2023).

89 *European Commission*, “Statement by President von der Leyen with US President Biden”, 25 March 2022, https://ec.europa.eu/commission/presscorner/detail/es/STATEMENT_22_2043 (last accessed: 10 May 2023).

90 Council Decision (EU) 2022/2332 of 28 November 2022 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.

Their significant negative impact on the Russian economy can be explained by the strengthening and broadening of sectoral sanctions. The effectiveness of these sanctions is much greater compared to the sanctions imposed before the full-scale Russia's invasion of Ukraine, their impact on the Russian economy is significant but not sufficient as they did not reach their main goal – stopping the war against Ukraine.

The analysis of the effectiveness of the EU sanctions policy against Russia shows significant progress in imposing, implementing and enforcing sanctions but a range of shortcomings are inherent to the sanction process, negatively impacting the effectiveness of sanctions against Russia.

First, the application of sanctions looks chaotic, and there seems to be no strategic approach to their application, and no clear criteria on whom and when the EU imposes sanctions. For instance, after the annexation of Crimea until the full-scale Russia's invasion of Ukraine there have been exemptions from the arms embargo – sanctions did not cover contracts concluded before 1 August 2014, and there was no strict ban on the trade by products of the dual use; as a result, a number of the companies, which produced products for military purposes were not covered.⁹¹ Interestingly, according to experts, some Russian military companies producing missiles are not covered even after the full-scale invasion of Russia in Ukraine.⁹² Another example of EU sanctions policy being inconsistent is that, on the one hand, the EU targets with its sanctions industries that contribute substantially to Russia's revenues, but, on the other hand, some industries, which bring significant income to Russia, are not covered.⁹³

Second, there is no sufficient attention to the risks, which are inherent to the sanctions process, for instance, to the risk of sanctions evasion. This risk is not incorporated properly in the sanctions policy-making process. For instance, as

91 Art. 4(4) Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; Анастасія Химичук, "Тридцять один спосіб. Як Кремль обходив санкції", Економічна правда 1 липня 2022, <https://www.epravda.com.ua/publications/2022/07/1/688735/> (last accessed: 10 May 2023).

92 Олексій Павлиш, "18 підприємств російського ВПК досі не під санкціями – аналітики", Економічна правда 26 вересня 2022, <https://www.epravda.com.ua/news/2022/09/26/691847/> (last accessed: 10 May 2023).

93 *The Brussels Times*, "EU Will not Ban Russian Diamonds in New Sanction Package" *The Brussels Times* (30 September 2022). Diamonds industry is the Russia's third largest export after oil and gas. See, in Jean-Pierre Stroobants/Maria Udrescu, "Russian Diamonds Continue to Evade European Sanctions to Belgium's Delight", *Le Monde* 1 March 2023 https://www.lemonde.fr/en/europe/article/2023/03/01/russian-diamonds-continue-to-european-sanctions-to-belgium-s-delight_6017738_143.html (last accessed: 10 May 2023).

a result of the absence of the definition of Russian oil or petroleum products or other norms (which would prevent circumvention of the oil embargo), in the initial version of the decision of the Council of the European Union 2022/884 of 3 June 2022, the practices of blending Russian oil with oil from the third country in order to change the country of origination of oil (so-called ‘renaming of the oil’ strategy) could exist.⁹⁴ Interestingly, blending crude oil is a well-known way to circumvent oil embargo sanctions and was used earlier by other sanctioned countries. It would be reasonable to take into consideration this form of sanctions evasion when designing the implementing regulation for the embargo on Russian crude oil and petroleum products. The problem of the circumvention of sanctions by means of the mixing oil was partially resolved by issuing a ‘Notice to operators Imports of Russian crude oil or petroleum products into the Union 2022/C 296/05’ of 3 August 2022, which forbids the import of Russian crude oil into the EU in a mixed form.⁹⁵ However, it is not fully clear whether this ban applies to the petroleum products produced from Russian oil in third countries; in fact, the ways of circumventing the petroleum products embargo are not fully removed.

Third, the existing mechanisms do not provide effective implementation and enforcement of sanctions against Russia. First of all, until recently there was no obligation for the EU Member States to impose criminal liability for sanctions violations. As a result, some EU Member States had very low criminal sanctions or did not impose any criminal liability for breach of sanctions. It was only on 28 November 2022 that the Council of the EU in its decision identified the violation of sanctions as a crime at the EU level. However, even after this legislative change, the implementation of sanctions may be quite diverse across the EU Member States as there are no minimum requirements for criminal sanctions. Also, there are no legislative constraints against Russia’s trade diversion and evasion of the EU sanctions through third countries that did not join the EU sanctions regime.

94 See Ron Bousso/Rowena Edwards, “Shell Tightens Restrictions on Russian Oil Buying”, Reuters 27 April 2022, <https://www.reuters.com/business/energy/shell-no-longer-accepts-refined-oil-blended-with-russian-products-2022-04-27/> (last accessed: 10 May 2023). If the presence of the sanctioned oil is less than 50%, it might be considered that it originated from the other country than sanctioned one and in such way the sanctions might be circumvented. See *Vladyslav Vlasniuk*, “10 Tricks Russia Uses to Evade Sanctions”, *Ekonomichna pravda* 6 June 2022 <https://euromaidanpress.com/2022/06/06/sanctions-circumvention-how-russian-nationals-corporations-bypass-global-sanctions/> (last accessed: 10 May 2023).

95 European Commission, Notice to Operators Imports of Russian Crude Oil or Petroleum Products into the Union 2022/C 296/05, PUB/2022/990.

Thus, despite the significant improvement of the sanctions decisions and implementing regulations on Russia, sanctions against Russia have not still attained their main goal. The shortcomings of the sanctions policy against Russia are a result of the shortcomings inherent to the overall EU sanctions policy, when it seems there is no strategic approach to the application of the sanctions, and the regulatory framework, which shapes it, is ineffective; the changes to the sanctions policy and regulatory framework have a fragmented character, and the overall approach to the sanctions policy is reactive (corrective actions) rather than a precautionary forward-looking (which includes ex-ante planning). As a result, there is a need for the development of a new systemic approach to the EU sanctions policy.

2.3. Recent Regulatory Initiatives on Sanctions in the EU

During the last several years, the need to enhance the effectiveness of the implementation and enforcement of the EU sanctions has been actively discussed.

The Communication ‘The European economic and financial system: fostering openness, strength and resilience’ of 19 January 2021 proposed a range of steps for this purpose: the creation of the Sanctions Information Exchange Repository, the establishment of a single contact point for enforcement and implementation issues with cross-border dimensions, and ensuring that EU funds and economic resources provided to third countries, international organisations and international financial institutions, which are not used in violation of EU sanctions.⁹⁶

With the increasing aggression of Russia against Ukraine this issue arose with the new force as sanctions against Russia were highly criticised for their ineffectiveness. On 25 May 2022, the European Commission also issued several legislative proposals directed at establishing a harmonised approach to criminal penalties for violation of the EU sanctions⁹⁷ as well as envisaging the possibility of confiscation of the assets for sanctions violation.⁹⁸

96 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee of the Regions, The European economic and financial system: fostering openness, strength and resilience, COM/2021/32 final, section 5.

97 Communication from the Commission to the European Parliament and the Council, Towards a Directive on Criminal Penalties for the Violation of Union Restrictive Measures, COM/2022/249 final.

98 Proposal for a Directive of the European Parliament and of the Council on the Asset Recovery and Confiscation, COM (2022) 245 final.

The European Commission first proposed to add the violation of EU sanctions to the list of EU crimes and harmonise criminal sanctions for violations of the sanctions across the EU on 25 May 2022 in its Communication from the Commission to the European Parliament and the Council ‘Towards a Directive on Criminal Penalties for the Violation of Union Restrictive Measures’.⁹⁹ The motivation of the European Commission for the adoption of this regulatory proposal was, first, the need to criminalise breaches of the restrictive measures across all EU Member States because, as of 2021 only twelve Member States criminalised them;¹⁰⁰ second, the need to provide unanimity in definitions and a system of punishment among the EU Member States. For instance, in fourteen Member States, the maximum length of imprisonment is between two and five years; in eight Member States, maximum sentences between eight and twelve years are possible. There is also a big difference in the amount of the maximum fine that can be imposed for the violation of sanctions in the different Member States.¹⁰¹ On 22 November 2022, the Council added the violation of restrictive measures to the list of EU crimes,¹⁰² but the definition, criminal sanctions and other issues are not harmonised yet. On 2 December 2022, the European Commission issues a Proposal of a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures.¹⁰³ This Commission’s Proposal contains a range of important regulatory changes. In particular, it proposes not only envisage criminal liability for the above-mentioned breaches of restrictive measures committed both by natural and legal persons but also to approximate penalties applicable to legal persons, give precise definitions of various criminal offences related to violations of Union restrictive measures, envisage the list of aggravating circumstances, which should be taken into account when penalties are applied for an offence, harmonise some aspects of coordination and investigation of sanctions violations, and to broaden significantly a provision on jurisdiction rules.¹⁰⁴ This Commission’s proposal is a significant step forward towards making sanctions more effective

99 Communication from the Commission to the European Parliament and the Council, Towards a Directive on Criminal Penalties for the Violation of Union Restrictive Measures, COM/2022/249 final.

100 Ibid, 2; *Genocide Network* (fn. 79), p. 22.

101 Communication from the Commission to the European Parliament and the Council, Towards a Directive on Criminal Penalties for the Violation of Union Restrictive Measures, COM/2022/249 final, p. 2–3; *Genocide Network* (fn. 79), p. 22.

102 Council Decision (EU) 2022/2332 of 28 November 2022 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.

103 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.

104 Ibid.

and resolve the issue of regulatory arbitrage, which exists now. In the legal literature, it is fairly remarked that the adoption of such a regulatory proposal would bring the EU closer to the US sanctions regime.¹⁰⁵ Nevertheless, the proposed approach is modest; it proposes limited harmonisation of the implementation and enforcement of EU sanctions.

In addition, the European Commission developed a Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation (2022) to reinforce its rules on the urgent freezing, recovery and confiscation of assets. The motivation for developing this Directive was the wish to strengthen the capabilities of competent authorities to identify, freeze and manage assets, reinforce and extend confiscation capabilities to cover all relevant criminal activities carried out by organised crime groups and improve co-operation between all authorities involved in asset recovery.¹⁰⁶ Margaritis Schinas, vice president of the European Commission, also said that the existing rules for freezing and confiscating assets ‘are fragmented and not implemented in a uniform way’, what makes sanctions evasion easier.¹⁰⁷ The proposed Directive on asset recovery and confiscation envisages ensuring asset tracing investigations with a view to facilitating cross-border cooperation, the obligation of the Member States to establish at least one asset recovery office, which would have direct access to and use the Secure Information Exchange Network Application (SIENA) system for exchanging information, the obligation of Member States to adopt a national strategy for asset recovery, the possibility of confiscation of the assets for a wider set of crimes, including criminal violations of EU restrictive measures, application of the non-conviction-based confiscation, including confiscation of unexplained wealth when wealth derives from criminal activities, even if it cannot be linked to a specific crime or the accused cannot justify the legal origin of property that does not match their official income.¹⁰⁸ On 3 June 2022, the Council of the EU obliged Mem-

105 *Erik de Biel/Robert Hardy*, “European Commission Proposes Criminalizing Economic Sanctions Violations and Bolsters Asset Recovery Measures”, LAW.COM / OnPractice 1 June 2022 <https://onpractice.law.com/4050812/european-commission-proposes-criminalizing-economic-sanctions-violations-bolsters-asset-recovery-measures?slreturn=2022-07-01T08:09:25+00:00> (last accessed: 10 May 2023).

106 Proposal for a Directive of the European Parliament and of the Council on the Asset Recovery and Confiscation”, (25 May 2022), COM (2022) 245 final, 2.

107 *Agnes Szucs*, “EU Unveils New Rules on Confiscating Assets of Oligarchs Breaking Sanctions”, Anadolu Agency 25 May 2022, <https://www.aa.com.tr/en/europe/eu-unveils-new-rules-on-confiscating-assets-of-oligarchs-breaking-sanctions/2597306> (last accessed: 10 May 2023).

108 Proposal for a Directive of the European Parliament and of the Council on the Asset Recovery and Confiscation”, (25 May 2022) COM (2022) 245 final, arts. 4, 5(1), 9(5), 12, 13, 14, 15, 16, 24(1).

ber States to introduce appropriate measures to ensure possibility of confiscation of the proceeds for violation of sanctions against Russia.¹⁰⁹ The proposed Directive on asset recovery and confiscation will go further and ensure stricter punishment for violation of sanctions imposed by the EU against all sanctioned countries and will introduce a unified approach to freezing and confiscating assets.

Thus, during the last two years, there have been significant steps taken to make EU sanctions a more effective foreign policy instrument. The proposed approach to the EU sanctions policy is much broader than is currently the case, as it tries not to solve certain problems in relation to the sanctions regime of the specific country but to cover a spectrum of issues related to sanctions implementation and enforcement and the possibility of introduction of a unified approach, which could be applicable to all sanctions regimes. Also, there has been a significant strengthening of the EU sanctions policy, following the example of the US, to make sanctions hard law tools. Nevertheless, the proposed approach of the limited harmonisation of the EU sanctions policy will not fully solve the problem of making sanctions more effective foreign policy instrument and there is a need for consideration of a broader approach to the reform of EU sanctions policy.

3. Policy Proposals for Strengthening the Effectiveness of the EU Sanctions

3.1. Harmonisation of the EU Sanctions Policy

While the procedure of the adoption of the EU sanctions belongs to the competence of the Council of the EU and the EU law regulates it, the implementation and supervision, including enforcement of EU law on restrictive measures, are left to the EU Member States. It is worth noting that the implementation, supervision, including enforcement of sanctions, diverge among the EU Member States.¹¹⁰ The existing enforcement system of sanctions where the Member States apply divergent procedures, and impose divergent sanctions for

109 Art. 6c(2) Council Regulation (EU) 2022/880 of 3 June 2022 amending Regulation (EU) No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, ST/8836/2022/INIT.

110 *Genocide Network* (fn. 79), p. 22–24; Communication from the Commission to the European Parliament and the Council, Towards a Directive on Criminal Penalties for the Violation of Union Restrictive Measures, p. 2; *Francesco Giumelli/Willem Geelhoed/Max de Vries/Aurora Molesini*, “United in Diversity? A Study on the Implementation of Sanctions in the European Union”, *Politics and Governance* 10(1) (2022), 43; Olsen/Fasterkjær Kjeldsen (fn. 37), p. 3.

violation of sanctions and remedies administered by various actors showed its ineffectiveness.¹¹¹ According to the Genocide Network (2021), ‘the number of enforcement actions within the EU during the past few years remains minimal’.¹¹² In response, the European Council adopted criminal liability for sanctions violation and European Commission developed two proposals regarding the harmonisation of definition of criminal offences and penalties for the violation of Union restrictive measures and confiscation of assets for sanctions violation. In my view, the proposed Commission’s proposals are narrow.

To make the EU sanctions policy more effective, the harmonisation of the EU sanctions policy should be broad-based and cover all the stages of the sanctions’ policy cycle (design, implementation, and supervision, including enforcement).

A broad-based harmonisation of sanction policy is needed. First, this will improve the effectiveness and speed up the process of sanctions implementation. For instance, severe criminal sanctions for violation of sanctions will not be enforced if the enforcement authority does not have uniform and adequate powers to enforce of sanctions. Second, it will tackle the problem of the regulatory arbitrage, which may exist in case of the divergent requirements to sanctions implementation and enforcement across countries. Third, it will reduce transaction costs of the implementation and enforcement of sanctions. Transaction costs will be high if sanctions are not implemented properly due to some procedural differences among the EU Member States. Reducing these transaction costs is particularly important as they impact not only sanctioned countries but also the country-sender of sanctions.

A three-tier harmonisation of the EU sanctions policy is needed that should cover the following: first, procedures (investigatory powers, monitoring of sanctions implementation), mechanisms (EU sanctions database) and the rights of the parties involved in the sanction process, including access to information, second, penalties (not only criminal, as it currently proposed but also administrative), and, third, institutional structure for the implementation and enforcement of sanctions.

111 The lack of harmonisation despite the need in it can be explained by ‘the lack of clarity regarding the penal competence and the Member States’ protective approach to the sovereignty of national criminal law’. See in *Markus Kärner*, “Interplay between European Union Criminal Law and Administrative Sanctions: Constituent Elements of Transposing Punitive Administrative Sanctions into National Law”, *New Journal of European Criminal Law*, 13(1) (2022).

112 *Genocide Network* (fn. 79), p. 13.

Harmonisation of sanctions' procedures, mechanisms and rights

The Commission's proposal on the definition of criminal offences and penalties for the violation of Union restrictive measures envisages harmonisation of some procedural rules, which relate to coordination and cooperation of sanctions within Member States, including exchange and share of information, consultations on investigations and development of the investigative tools, exchange of best practices, whistle-blowing mechanisms, and cross-border cooperation between Member States and with the EU institutions (Europol, Eurojust, the European Public Prosecutor's Office, and European Commission). The deficiency of the Commission's proposal is that it takes exceedingly narrow approach to harmonisation of the EU regulatory framework for sanctions. In this regard, in the scholarly literature, it is aptly noted that there is a lack of attention to the stage of prosecution.¹¹³ I believe that EU harmonisation should also have a broader scope in regard of supervision of sanctions implementation and enforcement. Another shortcoming of the Commission's approach is lack of clarity regarding how harmonisation on the listed issues will occur. In this regard, the more specific recommendations of the Dutch National Coordinator deserve attention, particularly, to issue at the EU level clear parameters for the investigation of sanctions, to develop a uniform EU approach on the ownership structures and interpretation of the grounds for granting exemptions, to create a central reporting point for freezing shareholdings and shareholder rights in legal persons held by sanctioned persons, to improve the process of publishing of sanctions at the EU level, and to develop a stronger legal basis at the EU level for the sharing of data etc.¹¹⁴

Harmonisation of the sanctions' penalties

Scholars also aptly note that it is important to consider whether 'Member States may implement administrative sanctions enforcement regimes parallel to the EU-mandated criminal regime'.¹¹⁵ Harmonisation of not only criminal sanctions but also administrative sanctions for violation of sanctions is highly needed. Currently, there is a lack of criminal investigations and prosecutions;

113 Jeff Nielsen, "Considering the EU Commission's Proposal on its Directive for Criminal Penalties for Violations of Restrictive Measures in the Context of a Comparative Analysis with United States Sanctions Enforcement", SSRN, 22 November 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4283807 (last accessed: 10 May 2023), p. 9; Regarding interplay between EU criminal law and administrative sanctions see Kärner (fn. 111).

114 Report by the National Coordinator for Sanctions Compliance and Enforcement Stef Blok (fn. 37), p. 6, 12.

115 Nielsen (fn. 113), p. 12.

in practice, very few individuals or legal persons responsible for the violation of the EU sanctions are effectively held accountable. The administrative sanctions applicable for violation of sanctions do not apply in some EU Member States and in those they do, they differ substantially.¹¹⁶ As in the case of the enforcement powers and rights, this may lead to regulatory arbitrage and high transaction costs. It is also worth noting that sanctions infringements cannot lead to a criminal offence in all cases. The intervention of criminal law must, as in any other area, be exceptional and sanction only the most serious infringements. Even administrative sanctions must only be imposed in cases of negligence or intentional infringements, and when certain thresholds of evaded duties, lower than those reserved for criminal acts, are met. Under the proposed regime of harmonisation of administrative sanctions, every EU Member State would be obliged to furnish its national authorities with common administrative sanction powers and to establish common criteria for determining the type and level of administrative sanctions that should apply.

Harmonisation of the sanctions' institutional structure

Legal scholars have already considered the need for reform of the institutional structure of the bodies responsible for the EU sanction process to boost the effectiveness of the existing system of the implementation and enforcement of the sanctions.

At the EU level, the legal reform of the sanctions institutional structure has been initiated. In particular, it is proposed that the Anti-Money Laundering Authority (AMLA) should be empowered to monitor and support the implementation of asset freezes under the sanctions' regimes across the EU, and to develop draft regulatory technical standards, draft implementing technical standards, guidelines and recommendations, in the specific cases.¹¹⁷ In fact, it is proposed that the AMLA be empowered with competences similar to those of OFAC¹¹⁸ in relation to AML/CFT cases;¹¹⁹ but in relation to the sanctions it is proposed that AMLA be given narrower competence.

116 *Genocide Network* (fn. 79), 4, 22, 27–72.

117 Arts. 5(1)(f), 6(4)(a)(b)(c) Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No. 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM/2021/421final.

118 Olsen/Fasterkjær Kjeldsen (fn. 37), p. 6.

119 It is proposed to empower the AMLA with such tasks as coordination and cooperation in the AML/CFT cases, issuance of the draft technical standards, guidelines and recommendations and the imposition of supervisory measures and administrative sanctions in a range of cases; see arts. 5(1)(g), 6(2)(3)(4), 21, 22 Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money

The legal literature also contains proposals of several models for the reform of the sanctions institutional structure. These proposals can be divided into several groups.

The first set of proposals concern the creation of a centralised agency on the sanctions' enforcement at the EU level. In the legal literature in this regard, several proposals have been suggested. First, establishment of an agency similar to the US OFAC in the EU is proposed; this proposal was made by the French minister of the Economy, Finance and Recovery Bruno Le Maire (2018).¹²⁰ The second, is the possibility of the establishment of a European Sanctions Enforcement Authority (de Vries, 2021). Nevertheless, the scholar does not clearly specify how the model of the proposed authority should be built noting only that while the enforcement of the EU laws is within the competence of the EU Member States, in a number of other policy areas than EU sanctions show that certain direct enforcement competencies can better be exercised at the EU level (the European Banking Authority and the Data Protection Authority).¹²¹

The second set of proposals concerns the creation of an authority similar to the OFAC at the level of the EU Member States and centralized authority for the secondary sanctions' enforcement. Geranmayeh and Lafont Rapnouil (2019) propose the creation of a version of OFAC at the level of the EU Member States along the lines of the pan-European enforcement authority to combat money laundering and to create a pan-European organisation to help European companies respond to secondary sanctions imposed by third countries.¹²² In this regard, it is pointed out that the UK set up an Office of Financial

Laundrying and Countering the Financing of Terrorism and amending Regulations (EU) No. 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM/2021/421 final. Similarly, the main tasks of the OFAC are administration and enforcement of sanctions; see *US Department of the Treasury, the OFAC*, "Basic Information on the OFAC and Sanctions", <https://ofac.treasury.gov/faqs/topic/1501sanctions> (last accessed: 10 May 2023).

120 *France 24*, "France Urges Europe to Push Back Against "Unacceptable" US Sanctions on Iran", *France 24*, 11 May 2018, <https://www.france24.com/en/20180511-iran-france-usa-europe-business-push-back-against-unacceptable-sanctions-nuclear-trump> (last accessed: 10 May 2023).

121 *Anthonijs de Vries*, Enhancing Compliance with EU's Foreign Policy Sanctions Through Better and/or New Interfaces, in: Sascha Lohmann/Judith Vorrath (eds.), *International Sanctions: Improving Implementation through Better Interface Management*, SWP Research Division International Security and the Americas Division, WP No. 01 (August 2021), p. 65, 71, 72, https://www.swpberlin.org/publications/products/arbeitspapiere/WP_International_Sanctions.pdf (last accessed: 10 May 2023).

122 *Ellie Geranmayeh/Manuel Lafont Rapnouil*, "Meeting the Challenge of Secondary Sanctions", European Council on Foreign Relations, Policy Brief 25 June 2019,

Sanctions Implementation (OFSI) – a centralised agency dealing with the implementation and enforcement of sanctions.¹²³

It appears that the first academic proposals on the reform of the sanctions institutional structure appeals to one-tier reform (at the EU level); the second appeals to two-tier reform (at the EU level and at the level of the EU Member States).

In my view, the preferable approach is the creation of a two-tier sanctions institutional structure in the EU. This would include the creation of a centralised authority on sanctions enforcement similar to the EU AMLA, but without enforcement powers, and creation of the coordination authority (the national coordinator / Commission) at the level of each EU Member State, similar to that in the Netherlands and Lithuania,¹²⁴ that could coordinate a wide number of institutions involved in the implementation and enforcement of sanctions.¹²⁵ The coordination authority should be established on the permanent basis as it is recommended in the report of the National Coordinator for Sanctions Compliance and Enforcement.¹²⁶

The need for the implementation of such an institutional structure can be explained by the following reasons.

First, it is essential to address the current shortcomings in sanctions supervision and enforcement across the EU: sanctions enforcement within the EU currently takes place at the level of Member States. Its quality and effectiveness are uneven, due to significant variations in resources and practices across Member States. As recent studies of the EU sanctions show, the enforcement of sanctions is not consistent.¹²⁷ Also, given the increasing number of sanctions, the frequency of their use and their complexity, it is preferable not to strengthen powers of the European Commission but to centralise enforcement powers and to transfer these powers to a separate authority at the EU level.

https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/ (last accessed: 10 May 2023).

123 Clara Portela, Implementation and Enforcement, in: Niklas Helwig/Juha Jokela/ Clara Portela (eds.), *Sharpening EU Sanctions. Challenges and Responses in a Geopolitical Era*, FIIA Report No. 63/2020, p. 114, https://www.fii.fi/wp-content/uploads/2020/05/report63_web.pdf (last accessed: 10 May 2023).

124 Art. 10 Republic of Lithuania Law on International Sanctions from 22 April 2004 No. IX-2160, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/66ca3582036d11edbf9c72e552dd5bd?jfwid=-hx57wlgdf> (last accessed: 10 May 2023).

125 Report by the National Coordinator for Sanctions Compliance and Enforcement Stef Blok (fn. 37), p. 3.

126 Ibid, at p. 5.

127 Olsen/Fasterkjær Kjeldsen (fn. 37), p. 8.

Second, it is not possible to agree with the proposed model of a centralising agency similar to the US OFAC in the EU (as proposed by the French Minister of the Economy, Finance and Recovery Bruno Le Maire (2018)).¹²⁸ Scholars have fairly pointed out why this model should not be accepted. First, the OFAC model does not fully fit the EU. OFAC is a federal agency that, apart from its federal legislative, investigative and adjudication competencies, has enforcement powers across the USA; the EU was built in another way that resembles the German Bundesstaat, where ensuring compliance with the federal laws is mainly entrusted to the Bundesländer.¹²⁹ Second, the establishment of an agency similar to OFAC at the EU level is difficult to accomplish in the short to medium term as the enforcement competences, which are inherent to OFAC, currently belong to the EU Member States and transferring such competences may take time; the establishment of a European OFAC can only be a ‘part of a long-term vision’.¹³⁰

Third, the approach that underlies model proposed by the European Commission in 2021 is too narrow; it will not provide consistency in the sanctions enforcement across the EU. Under this proposal, the AMLA is empowered to monitor and support asset freezing under EU sanctions across the EU, including the issuance of draft technical standards and guidelines and recommendations in this relation.¹³¹ There is also no sense to create a pan-European organisation to help European companies respond to secondary sanctions imposed

128 *France 24*, “France Urges Europe to Push Back Against “Unacceptable” US Sanctions on Iran”, *France 24*, 11 May 2018, <https://www.france24.com/en/20180511-iran-france-usa-europe-business-push-back-against-unacceptable-sanctions-nuclear-trump> (last accessed: 10 May 2023).

129 *Anthonius de Vries*, Enhancing Compliance with EU’s Foreign Policy Sanctions Through Better and/or New Interfaces, in: Sascha Lohmann/ Judith Vorrath (eds.), *International Sanctions: Improving Implementation through Better Interface Management*, SWP Research Division International Security and the Americas Division, WP No. 01/2021, p. 65, 71, 72, https://www.swpberlin.org/publications/products/arbeitspapiere/WP_International_Sanctions.pdf (last accessed: 10 May 2023).

130 *Clara Portela*, Implementation and Enforcement, in: Niklas Helwig/Juha Jokela/Clara Portela (eds.), *Sharpening EU Sanctions. Challenges and Responses in a Geopolitical Era*, FIIA Report No. 63/2020, p. 114, https://www.fii.fi/wp-content/uploads/2020/05/report63_web.pdf accessed 10 May 2023; Geranmayeh and Lafont Rapnouil also refer to the principle of subsidiarity, which makes the Member States rather than the EU responsible for the enforcement of sanctions. See *Geranmayeh/Lafont Rapnouil* (fn. 122).

131 Arts. 5(1)(f), 6(4)(a)(b)(c) Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No. 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM/2021/421 final.

by third countries¹³² as this authority is empowered with too narrow competence.

Fourth, in order to boost the efficient functioning of the sanctions' implementation, there is a need for the establishment of a centralised authority for the enforcement of sanctions with broader competencies, which would also include competencies regarding the secondary sanctions.

Given the cross-border nature of the assets and economic resources, the new EU sanctions authority is expected to make a strong and useful contribution to the detection of the assets of the sanctioned individuals and entities. Among other tasks, it could contribute to the harmonisation and coordination of sanctions-related investigations, and the direct supervision of implementation of sanctions by high-risk and cross-border sanctioned individuals and entities. To bring sanctions implementation, supervision, including enforcement, to an efficient and uniform level across the Union, it is necessary to provide the EU Sanctions Authority with the following powers: monitoring, analysis and exchange of information concerning sanctions risks affecting the internal market; and coordination and oversight of the Member States' enforcement authorities. Other functions could be administering the database for sanctions enforcement cases and developing unified draft technical standards, guidelines and recommendations for implementation and enforcement of sanctions.

The AMLA could serve a prototype for the EU sanctions authority and could be empowered with similar functions, except for the enforcement. There is no need to transfer the enforcement function to the EU centralised sanctions authority,¹³³ doing so would require approval by all EU Member States, which could take years and require changes to a great number of laws. For this reason, the function of the sanctions' enforcement should be exercised by the EU Member States; however, the development of unified standards on sanctions implementation and supervision, including enforcement among the EU Member States, is needed.

Currently, the enforcement of the EU sanctions is dispersed across multiple authorities in each Member State. There is a great need for coordination and cooperation among all these authorities. In the Netherlands and Lithuania, such coordination institutional structures (national coordinator/commission)

132 *Geranmayeh/Lafont Rapnouil* (fn. 122).

133 Olsen and Fasterkjær Kjeldsen also suggest the enforcement of the sanctions may be left at the level of the EU Member States. They say that there is no need 'to reinvent the wheel; it can copy those elements and/or best practices that are transferable to the field of sanctions...The inspiration could be taken from such areas as data protection, competition law, and recent proposals for a common digital single market'. See Olsen/Fasterkjær Kjeldsen (fn. 37), p. 9.

have been recently implemented and shown their effectiveness. Also, the creation of the OFSI or the Federal Authority for Fighting Financial *Crime* will not solve the problem of coordination as this organisation is responsible for the enforcement of only financial sanctions.

Thus, there is a high need for broader harmonisation at the EU level of the sanctions' procedures, mechanisms and rights, penalties for sanctions violation (both criminal and administrative), the sanctions institutional structure at the EU level and the establishment of a coordination committee at the level of each EU Member State to improve the effectiveness of the EU sanctions policy.

3.2. *The Risk-Based Approach to Sanctions*

Addressing sanctions risks has perhaps never been more important than it is now. The sanctions risks, competent authorities and third parties, who are required to comply with the sanctions, face, have become more complex, fueled by the enhanced scope and diversity of imposed sanctions. Risks in sanctions policy, if ignored or not properly handled,¹³⁴ negatively affect the effectiveness of the sanctions policy, the business of persons who are required to comply with the sanctions and also have negative impact on the EU economy as well as a global economy.

Nevertheless, the application of the risk-based approach (RBA) in the current EU regulatory framework on sanctions is limited. It is envisaged application of the RBA in a limited number of cases by the EU authorities when facilitating to sanctions implementation (when making exemptions from the freezing funds and economic resources, in investigations¹³⁵) and by individuals and legal entities in sanctions compliance. The latter is relatively more developed. In particular, for individuals and legal entities required to comply with the sanctions imposed on Iran and Russia, the risk assessment constituencies are developed and should include identification of the risks, assessment of the risks, and responding to risks as well as the factors of the risk assessment and the different risk assessment for assessment of the potential contractual relationship

134 OFAC first emphasised on the negative implications of ignoring or not properly handling sanctions risks for financial institutions. See *The US Department of the Treasury*, "A Framework for OFAC Compliance Commitments", (2019), <https://ofac.treasury.gov/media/16331/download?inline> (last accessed: 10 May 2023).

135 Paras. 66, 82, 89 *Council of the European Union*, EU Best Practices for the effective implementation of restrictive measures (27 June 2022); Para. 55d *Council of the European Union*, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (4 May 2018).

with the counterparties.¹³⁶ Also, the core elements of risk-based compliance program for dual-use trade controls are set out.¹³⁷ Additionally, specific risk assessment criteria have been developed for the exports of military technology and equipment.¹³⁸ Lastly, non-binding risk management principles for sending humanitarian funds by non-governmental organisations (NGOs) into Syria and similar high-risk jurisdictions have been developed; it is expected that they will implement risk-mitigation standards across all humanitarian programming, and response modalities, in line with international standards, the differentiated approach for their implementation will apply, the risk appetite for the NGOs is an important constituency of the risk management and the key risks and challenges in moving funds are defined.¹³⁹ Also, the typology of the evasion of sanctions imposed on Russia has recently been developed.¹⁴⁰

Despite some advancements in the implementation of the RBA in EU sanctions policy, the comprehensive approach to its implementation is absent. It is unevenly applied across different sanctions regimes; the existing regulation does not fully reflect the specifics of the risk-based sanctions compliance in different sectors. The need to tackle the risk of sanctions circumvention is clear, and a typology of the Russian sanctions evasion was recently developed but its scope is relatively narrow compared to the US and UK. The main emphasis is

- 136 Sec. 7–12 *European Commission*, “Q&A Due Diligence on Restrictive Measures for EU Business Dealing with Iran”, https://finance.ec.europa.eu/system/files/2020-01/faqs-restrictive-measures-iran_en.pdf (last accessed: 10 May 2023). It is envisaged that the same provisions, as developed for Iran, apply to compliance with sanctions against Russia. See Ch. A(2), sec. 2 *European Commission*, “Consolidated FAQs on the implementation of Council Regulation No. 833/2014 and Council Regulation”, No. 269/2014 (last update 10 May 2023), https://finance.ec.europa.eu/system/files/2023-05/faqs-sanctions-russia-consolidated_en.pdf (last accessed: 10 May 2023). Regarding Syria, the risk assessment of only export of arms and related products is envisaged. Ch. III, sec. 12 *European Commission*, Commission Notice: Commission Frequently Asked Questions on EU restrictive Measures in Syria, 1 September 2017 https://finance.ec.europa.eu/system/files/2020-01/170901-faqs-restrictive-measures-syria_en.pdf (last accessed: 10 May 2023).
- 137 Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No. 428/2009.
- 138 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.
- 139 *Justine Walker*, “Risk Management Principles Guide for Sending Humanitarian Funds into Syria and Similar High-Risk Jurisdictions”, ACAMS May 2020, <https://www.acams.org/en/media/document/10691> (last accessed: 10 May 2023), p. 2, 3, 9, 13, 19.
- 140 *The REPO Task Force*, “Global Advisory on Russian Sanctions Evasion”, 9 March 2023, https://finance.ec.europa.eu/system/files/2023-03/230309-repo-global-advisory_en.pdf (last accessed: 10 May 2023).

on risk-based sanctions compliance; however, greater attention is also needed for implementation of the risk-based supervision.

In the recent legal literature (after the Russia's full-scale invasion of Ukraine), there has been increased attention to the application of the RBA in sanctions policy. The International Working Group on Russian Sanctions emphasises the need for the application of the RBA in the context of Russian sanctions, particularly in respect of sanctions compliance (e.g. when there is a risk of dealing with Russia) and risk-based supervision, which includes enhanced supervision for higher-risk jurisdictions, companies and individuals believed to be involved in sanctions evasion and identifying for this purpose a list of higher-risk jurisdictions and a list of companies and individuals believed to be involved in sanctions evasion.¹⁴¹ Keatinge also recommends the creation of a list of jurisdictions with a high risk of sanctions evasion and additionally specifies that this list could be similar to already existing lists of jurisdictions with a high risk of tax evasion and money laundering, which requires financial institutions to take enhanced measures against such jurisdictions.¹⁴²

The existing research regarding implementation of the RBA into sanctions policy has some limitations. First, theoretical foundations of the application of the RBA applicably to sanctions policy are absent (e.g., its definition, important constituencies, and peculiarities of the application at the different stages of the sanctions process). Second, in existing studies, the application of the RBA to sanctions policy is relatively narrow in scope, although some recommendations to risk-based sanctions compliance and risk-based supervision have been developed.

Generally, agreeing with the mentioned scholarly proposals concerning the RBA to sanctions policy, it is important to emphasise the need for a comprehensive approach towards the implementation of the RBA in sanctions policy and its broadening and enhancing. The scholarly literature suggests that implementing a RBA has a range of advantages over the regulation, which is not specifically designed to manage risks. Risk-based regulation is, by its nature, a precautionary forward-looking tool, which involves the anticipation and assessment of risks and the use of preventive action to reduce or mitigate the

141 *The International Working Group on Russian Sanctions*, "Measures to Increase the Effectiveness of Sanctions", Working Group Paper No. 9/22 November 2022, https://www.president.gov.ua/storage/j-files-storage/01/16/53/71b23f093432c3bc87591218a53e1b7b_1669288210.pdf (last accessed: 10 May 2023), p. 13, 15, 19,

142 *Tom Keatinge*, "Failure to Expand the Allied Sanctions Coalition Must Be Addressed", *Politico* 17 January 2023, <https://www.politico.eu/article/failure-expand-sanction-coalition-addressed-eu-russia-ukraine-war/> (last accessed: 10 May 2023).

risks¹⁴³ that the regulatory/supervisory/compliance framework is designed to address. Also, a RBA to sanctions policy would ensure greater consistency in sanctions decision-making, supervision and compliance because it would be dictated by the relative level of risk. Such approach would allow greater flexibility for competent authorities and parties required to comply with sanctions to adapt to changing conditions. It would ensure greater effectiveness in sanctions' decision-making, supervision, compliance by focusing on areas where the risk is greatest and reducing it where the risks are relatively low and the outcomes that the sanction policy is intended to achieve. It would also ensure better efficiency of the sanctions policy by allowing more efficient use of resources when applying sanctions and controlling their implementation.¹⁴⁴ The RBA to sanctions policy would allow strengthening incentives for all persons involved in the sanctioned process for prudent and proper behavior. Taking into consideration the advantages of the RBA, it should be a basis for the EU sanctions policy irrespective of the country to which the sanctions regime applies, and its application should be mandatory.

The successful application of the RBA is not possible without a clear understanding of its definition and main constituencies.

The clear definition of the RBA for the EU sanction policy is absent, only its elements are defined in the relation to compliance with the sanctions imposed on Iran and Russia. The RBA for sanctions policy and its main constituencies could be defined on the analogy with such an approach in the related areas, for example, in anti-money laundering and countering the financing of terrorism (AML/CFT).

The RBA for sanctions policy should cover identification, prevention, risk assessment, monitoring, mitigation of the sanctions risks and tailoring the sanctions decision-making / supervision / business activity by competent authorities / parties required to comply with the sanctions policy, commensurate to these risks to prevent them or, if they do materialise, monitor and mitigate them effectively.

One of the central tenets of the RBA to sanctions policy for competent authorities and parties required to comply with sanctions policy, as in case of the AML/CFT, there should be *an ongoing assessment of the sanctions risks*.

143 For a detailed difference between risk-based regulation and regulation, which are not designed to manage risks, see *Maddocks*, "Clarifying the Difference Between Regulation Designed to Manage Risks and a Risk-Based Approach to Regulation", 18 October 2016, <https://www.maddocks.com.au/insights/15256> (last accessed: 10 May 2023).

144 For a discussion of the advantages of RBA over regulation, see *Maddocks* (fn. 143).

Differentiation should be the basis of the sanctions RBA to ensure greater effectiveness of the sanctions. In particular, the risks should be analysed by competent authorities in view of types of imposed sanctions, types of sanctioned persons, types of parties, which are obliged to implement sanctions (their risk profile, industry, in which they operate, etc.), sanctions country-senders and the stage of the sanctions policy cycle etc. Implementing the RBA in sanctions compliance should be sufficiently tailored to the nature, severity and likelihood of occurrence of the specific risks and adverse impacts they identify.¹⁴⁵

RBA in sanctions policy does not necessarily seeks to eliminate all risks inherent to the sanction process but it supposes identification, assessment, monitoring and responding to *all material risks*, including the evolving and newly emerging risks that are inherent to the sanctions process. That is why, the materiality of sanctions risks should be defined.

RBA in sanctions policy supposes that the competent authorities and parties required to comply with the sanctions will take into consideration such *risk criteria* as the severity and likelihood of the sanctions' risks occurrence and potential adverse impacts.

Where it is not possible to address all risks, *standards for balancing different risks* in the sanctions policy cycle should be developed. In particular, criteria for ensuring appropriate prioritisation of risks (which could include severity and probability), including risk factors to ensure a credible process of prioritisation against outcome-oriented targets and ensuring that new and evolving risks feed into prioritisation processes should be established. The sanctions competent authorities and parties required to implement sanctions should focus on higher importance risks while ensuring that lower risks effectively and efficiently addressed.¹⁴⁶

Zero-tolerance approach to the violation of sanctions should be an important constituency of sanctions policy. It means that competent authorities and par-

145 The basis for the developed key considerations for the use of the RBA in sanctions compliance is the OECD report. See *OECD*, "Translating a Risk-Based Due Diligence Approach into Law: Background Note on Regulatory Developments Concerning Due Diligence for Responsible Business Conduct" (2022).

146 Currently, prioritisation of the risk is recommended in compliance with the sanctions against Iran and Russia but I believe that prioritisation of the risks should be used not only by parties who are required to comply with the sanctions but also for competent authorities responsible for sanctions decision-making and sanctions supervision. OECD has proposed to consider the severity and likelihood of the risks and adverse impacts in its risk-based due diligence approach as well as balancing different risks in RBA. I propose to implement such an approach to sanctions policy. See *OECD* (fn. 145) p. 8, 9, 11.

ties required to comply with the sanctions should adopt all reasonable steps to prevent, comply or mitigate material sanctions risks, particularly to prevent the sanctions evasion and other forms of the sanctions non-compliance. If the violation of sanction policy happens, all persons committed it should be subject to liability.

Compared to the existing scholarly proposals, I believe that the RBA to sanctions policy should have a broader scope of application (be mandatorily implemented at all the stages of the sanctions policy cycle, which should include the sanction design, compliance, and supervision, including enforcement).

Risk-based sanctions design: Sanctions decision-makers should implement RBA into the entire process of the imposing, modifying and removing sanctions. The sanctions decision-makers should coordinate their sanctions decision-making with other competent authorities where it is allowed under the law and relevant, including its foreign allies, by sharing information and prioritising risks.¹⁴⁷ When designing sanctions to manage risks, the regulatory impact assessment process can be used to identify, analyse, and categorise relevant risks and avoid them.

Risk-based sanctions compliance: Third parties, who are not sanctioned persons but who are required to comply with sanctions regulation, should implement a RBA for sanctions compliance purposes across their entire organisational structure, and in their policies and procedures. To enhance the effectiveness of the use of RBA in sanctions compliance, it is rational that competent authorities would issue risk-matrixes or sector-wide guidances to third parties on how they expect them to meet their legal and regulatory sanctions obligations in a risk-sensitive way, taking into consideration specifics of the sectors and types of sanctions. Also, better risk alerts for sanctions compliance needs as in the US should be developed. Additionally, de-risking strategy should be adopted to overcome the de-risking problem. Special Rapporteur on unilateral coercive measures,¹⁴⁸ as well as US Treasury Department officials,¹⁴⁹ pay attention to this problem. It has been pointed out that banks and other financial

147 I propose to use OECD recommendations for implementing a risk-based due diligence approach for law to the sanction policy. See *OECD* (fn. 145).

148 *UN, Special Rapporteur on Unilateral Coercive Measures*, “Guidance Note on Overcompliance with Unilateral Sanctions and its Harmful Effects on Human Rights”, <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/resources-unilateral-coercive-measures/guidance-note-overcompliance-unilateral-sanctions-and-its-harmful-effects-human-rights> (last accessed: 10 May 2023).

149 *Daniel Flatley*, “Treasury Officials Warn Banks Over Sanctions Compliance Overkill”, *Bloomberg* 6 January 2023, <https://www.bloomberg.com/news/articles/2023-01-06/treasury-officials-warn-banks-against-sanctions-overcompliance#xj4y7vzkg> (last accessed: 10 May 2023).

institutions are becoming overcautious and often overcomply with sanctions. This can take different forms, from blocking all financial transactions with a sanctioned country, entity or individual, even when some transactions are authorised by humanitarian exemptions or fall outside of the scope of sanctions to requiring cumbersome documentation and charging higher rates etc.¹⁵⁰ The Special Rapporteur on the negative impact of such practices on respect for human rights and recommends financial institutions to exclude overcompliance to minimise the risks and consequences of violating human rights through their sanctions compliance activities, including any overcompliance and states to adopt measures not to admit such violations.¹⁵¹ Given that sanctions compliance requirements are imposed not only on financial institutions but on a great variety of organisations (e.g., legal professionals etc.), de-risking and overcompliance problem should be addressed by a broader number of third parties required to comply with sanctions regulation. To tackle this problem in the area of AML/CFT, a great number of policy instruments are developed.¹⁵² Similar policy instruments could be developed specifically for sanctions.

Risk-based sanctions supervision and enforcement: The application of the RBA at the stage of supervision of sanctions means that the range, degree, frequency or intensity of controls conducted by competent authorities should be in accordance with the risks posed. Thus, more intrusive enforcement tools and severe enforcement responses could be employed to address situations where the risks associated with sanctions non-compliance are highest.¹⁵³ In this regard, a recommendation of the International Working Group on Russian Sanctions to focus on the supervision of higher-risk jurisdictions, companies and individuals¹⁵⁴ deserves particular attention. Keatinge also recommends the creation of a list of jurisdictions with a high risk of sanctions evasion, specifying that this list could be similar to the already existing lists of jurisdictions with a high risk of tax evasion and money laundering, and that financial institutions should take enhanced measures against such jurisdictions.¹⁵⁵ I believe

150 UN, *Special Rapporteur on Unilateral Coercive Measures* (fn. 148).

151 Ibid.

152 US Department of the Treasury, “AMLA, The Department of the Treasury’s De-risking Strategy”, https://home.treasury.gov/system/files/136/Treasury_AMLA_23_508.pdf (last accessed: 10 May 2023); EBA, Final Report: Guidelines on Policies and Controls for the Effective Management of Money Laundering and Terrorist Financing (ML/TF) Risks When Providing Access to Financial Services, EBA/GL/2023/04, 31 March 2023, https://www.eba.europa.eu/sites/default/files/document_library/Publications/Guidelines/2023/1054144/Guidelines%20on%20MLTF%20risk%20management%20and%20access%20to%20financial%20services.pdf (last accessed: 10 May 2023).

153 Maddocks (fn. 143).

154 *The International Working Group on Russian Sanctions* (fn. 141), p. 13, 15, 19.

155 Keatinge (fn. 142).

that the identification of the high-risk jurisdictions could be accomplished using the methodology for identifying high-risk third countries under AML/CFT Directive already developed by the European Commission.¹⁵⁶ Additionally, competent authorities should focus on sectors that pose a higher risk for sanctions evasion. The effectiveness of the RBA depends on establishing clear rules on how risk-based supervision will be exercised. For this reason, it is important to develop the risk-based supervision guidelines that could establish the general requirements to the sanctions risk-based supervision and be developed on the analogy with such guidelines, developed by the Financial Action Task Force (FATF)¹⁵⁷ and also additional guidelines for the specific sectors where sanctions risk-based supervision should apply (e.g., for the banking industry on the analogy with the guidelines, developed by the European Banking Authority for AML/CFT).¹⁵⁸ These guidelines could take the form of high-level requirements based on the desired outcomes, risk-based rules, and information about how competent authorities should supervise sanctions implementation and enforce sanctions or interpret relevant legislation.

Thus, the RBA should be a central concept of the sanctions policy to ensure its effectiveness; it should be mandatory for application at all stages of the sanctions policy cycle, taking into consideration the risks inherent to all parties involved in the sanctions process and mandatory applicable for both the authorities, responsible for sanction imposition, implementation and supervision, and parties obliged to comply with sanctions. Furthermore, conducting ongoing risk-based analysis, differentiation, materiality, and zero tolerance approach to sanctions violations should be its basis. Also, risk criteria and standards for balancing different risks in the context of sanctions should be developed.

156 Commission Staff Working Document: Methodology for Identifying High-Risk Third Countries under Directive (EU) 2015/849, SWD(2020) 99 final.

157 FATF, Guidance on Risk Based Supervision, 4 March 2021, <https://www.fatfgafi.org/en/publications/Fatfrecommendations/Guidance-rba-supervision.html> (last accessed: 10 May 2023).

158 *European Banking Authority*, Final Report: Guidelines on the Characteristics of a Risk-Based Approach to Anti-Money Laundering and Terrorist Financing Supervision, and the Steps to Be Taken When Conducting Supervision on a Risk-Sensitive Basis under Article 48(10) of Directive (EU) 2015/849 (amending the Joint Guidelines ESAs 2016 72). The Risk-Based Supervision Guidelines. EBA/GL/2021/16.