Towards more effective sanctions against Russia – opportunities and limitations of sanctions legislation

Juha Rainne[1]

In February 2022, Russia launched a full-scale invasion of Ukraine. Among the European Union's responses to Russia's unlawful aggression was an unprecedented package of sanctions. The G7 and a number of like-minded countries imposed similar sanctions, which made them more effective. However, it is the EU's Russia sanctions policy that has played an especially important role, as Russia has been a major trading partner for the EU, particularly in the field of energy.

The EU's Russia sanctions can be seen as a great test case that will show just how effective sanctions can be against a major power such as Russia. To have an impact, it is critical that sanctions are imposed by an international coalition that is as wide as possible. The fact that sanctions usually take longer than we would like to start making a difference also has to be accepted. The EU and its partners need to be patient and prepared to stand united and firm behind their sanctions policy in the long term.

I have previously written about the economic and political implications of the sanctions imposed against Russia.[2] This article focuses on the development, effectiveness and limitations of sanctions from a legal perspective.

I will start by evaluating the current doctrine of targeted sanctions from the perspective of the rule of law and exploring the limits of the EU's increasingly casuistic sanctions policy. I will then analyse ways in which the EU can strive to increase the impact of its unilateral sanctions on a large country with vast resources.

---

[1] Director, Unit for International Law, Ministry for Foreign Affairs of Finland, Master of Laws (University of Helsinki), LL.M. (New York University School of Law). I would like to extend my thanks especially to Legal Officer *Marita Ojala* and LL.M. Candidate *Mickael Miettinen* for their comments and help with this article.

[2] Juha Rainne: 'Läntinen yhtenäisyys ja pakotteiden voima' ['Western unity and the power of sanctions'], Maanpuolustus – journal of the Society of the National Defence Course, 6 April 2022, https://www.maanpuolustus-lehti.fi/lantinen-yhtenaisyys-ja-pakotteiden-voima/ (visited on 3 November 2023). Juha Rainne: 'Russia sanctions bite and remind us of the value of transatlantic unity', New Atlanticist, Atlantic Council, 29 October 2020, https://www.atlanticcouncil.org/blogs/new-atlanticist/russia-sanctions-bite-and-remind-us-of-the-value-of-transatlantic-unity/ (visited on 3 November 2023).

The third part of my article focuses on the sanctions against listed individuals and entities by examining the interpretation of the relevant legislation in the light of recent case law. I conclude that the way in which the sanctions legislation is interpreted greatly affects the scale of their impact on Russia. To be effective, sanctions should target every element of, for example, the business empires of listed oligarchs.

Finally, I weigh up the objectives of sanctions in today's world that recognises the high risks of interdependence. I also touch on how likely the current sanctions are to lead to new operating models and structures that will become permanent fixtures even after the sanctions are lifted.

1 The doctrine of targeted sanctions and the rule of law

The problems related to the implementation of the trade embargo against Iraq in the 1990s and early 2000s played a big role in shaping the current sanctions policy. The UN Security Council imposed an extensive trade embargo under Article 41 of the UN Charter against Iraq after its attack on Kuwait in 1990.[3] The Iraq sanctions were widely criticised due to their unreasonable impact on the country's civilian population.[4] The UN's Oil-for-Food Programme[5], which was introduced to make life easier for the people, ultimately led to rampant corruption. This caused the UN, the EU and the United States to start favouring targeted sanctions.[6] The goal is to avoid unnecessarily widespread impacts on entire populations by instead targeting restrictive measures at specific individuals and entities as well as strategic sectors of the economy.

Since the current model advocates for targeting sanctions as precisely as possible, the relevant legislation is rather casuistic in nature. Sector-specific sanctions typically target at least finance, industry, energy, transport, technology and defence, and they are defined in terms of verbal descriptions and customs codes. Individual sanctions are targeted at specific natural and legal persons as well as assets owned, held or controlled by them. Implementing these kinds of rules requires considerable resources in both the public and the private sector. Businesses and especially banks and credit institutions bear much of the responsibility for enforcing the sanctions in practice.

The casuistic nature of sanctions legislation is also evidenced by the numerous ambiguous cases that the authorities are faced with. The principal competent authority for the implementation of sanctions in Finland is the Ministry for Foreign Affairs, which in 2022 alone had to answer more than 500 enquiries from businesses, individual citizens and other authorities

[3] Resolution No 661/1990 of 6 August 1990 of the United Nations Security Council, paragraph 3: '*Decides that all States shall prevent … [t]he import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution.*'

[4] According to the WHO's representative in Baghdad, the effects on the civilian population were widespread and devastating, which was evidenced, for example, by increased malnutrition among children and increased infant mortality. Ghulam Rabani Popal: Impact of sanctions on the population of Iraq, Eastern Mediterranean Health Journal 6(4), 2000, pp. 791–795, https://apps.who.int/iris/bitstream/handle/10665/118930/emhj_2000_6_4_791_795.pdf (visited on 3 November 2023).

[5] Resolution No 986/1995 of 14 April 1995 of the United Nations Security Council.

[6] The current term is 'targeted sanctions'. In the early 2000s, the term 'smart sanctions' was often used to sell the concept.

struggling to interpret the rules.[7] The Ministry for Foreign Affairs deals with, for example, applications for exemptions, for which there are well over one hundred different justifications in the EU's Russia sanctions regulations alone. The Ministry also dedicates a considerable amount of time to answering questions about the interpretation of sanctions legislation. The ban on the export of defence materiel is the responsibility of the Ministry of Defence, and the ban on the export of weapons for civilian use is enforced by the National Police Board. Other public authorities that contribute to the implementation and enforcement of sanctions include the National Enforcement Authority, the Financial Supervisory Authority, the Finnish Border Guard, Finnish Customs, the Finnish Transport and Communications Agency and various law enforcement agencies. One of the key obligations relating to individual restrictive measures is the freezing of listed persons' assets. According to the so-called Sanctions Act, the National Enforcement Authority carries out the freezing of assets upon the request of the Ministry for Foreign Affairs.[8]

The targeting of sanctions against individually listed persons and entities is an obvious example of the casuistic nature of sanctions legislation. The law explicitly states that the assets of a specific individual must be frozen and that they must not be given any assets or economic resources. Legal literature on the concept of the rule of law starts from the premise that the law must provide general rules that apply equally to everyone.[9] The wording of laws to be generally applicable rules is designed to stop those in power from abusing their position.[10] The requirement of generality is often seen to mean that the rules should also not be targeted at specific individuals or actions but should apply equally to all classes and categories.[11] While particularistic legislation that only applies to specific individuals is, *prima facie*, in direct conflict with the ideals of our legal system, the problems relating to this kind of regulation can be overcome by basing the listings on a solid legal framework.[12]

---

[7] Act on the Fulfilment of Certain Obligations of Finland as a Member of the United Nations and of the European Union (695/1967, 'Sanctions Act').

[8] Sanctions Act (695/1967), section 2b. It is also important to note that the EU's sanctions regulations are directly enforceable in Finland, which is why the asset-freezing obligation applies to all natural persons, legal persons and authorities regardless of the special provisions of the national Sanctions Act.

[9] *'When I say that the object of laws is always general, I mean that law considers subjects en masse and actions in the abstract, and never a particular person or action.'* Jean-Jacques Rosseau: The Social Contract (1762), JV Lehtonen (Finnish translation), Karisto Oy, Hämeenlinna, 1998, p. 82. This notion has also been explored by *Hayek* and *Tamanaha*; see Brian Z Tamanaha: On the Rule of Law – History, Politics, Theory, Cambridge University Press (2004), p. 66.

[10] According to *Aristotle*, this is all because the law is generic and predetermined, and not targeted at specific individuals or circumstances: *'The weightiest reason of all is that the decision of the lawgiver is not particular but prospective and general[.]'* Aristotle: The Rhetoric (ca 350 BC), W Rhys Roberts (translation), available online at https://kairos.technorhetoric.net/stasis/2017/honeycutt/aristotle/index.html (visited on 3 November 2023).

[11] See footnote 9 above.

[12] According to *Fuller*, *'the desideratum of generality is sometimes interpreted to mean that the law must act impersonally, that its rules must apply to general classes and should contain no proper names. […] But the principle protected by these provisions is a principle of fairness, which, in terms of the analysis presented here, belongs to the external morality of the law.'* Lon L. Fuller: The Morality of Law, Revised edition, New Haven and London, Yale University Press, 1969, p. 47. *'The formal conception of the rule of law which I am defending does not object to particular legal orders as long as they are stable, clear, etc. But of course, particular legal orders are mostly used*

The debate surrounding targeted sanctions was for many years in the early 2000s focused on the UN Security Council's sanctions on individual members of al-Qaeda, the Taliban and more recently ISIS. These attracted widespread critique over the years, as the Security Council's criteria for listing individuals were very broad and the listed individuals initially had no legal remedies to challenge their inclusion on the list. Essentially the only way for an individual to get the Security Council to rethink its decision was to invoke the principle of diplomatic protection and ask the government of their home country to put their case in front of the Security Council. The situation improved significantly thanks to the Court of Justice of the European Union's Kadi rulings[13] and the establishment by the Security Council of the Office of the Ombudsperson.[14] Individuals who find themselves blacklisted can now appeal to the Security Council's Ombudsperson to get their name removed from the list.[15] The Security Council generally listens to the Ombudsperson's recommendations to remove individuals from these lists and has, in practice, approved practically all of the Ombudsperson's recommendations to do so.[16] The ultimate decision-making power nevertheless still rests with the Security Council, and the mechanism therefore cannot be considered a powerful and independent legal remedy.[17]

In the context of the EU's Russia sanctions, the listing of individuals has been done in a way that carefully respects the rule of law: the criteria for listing[18] are laid down in law, and individuals who find themselves listed can challenge their inclusion on the list in the Court of Justice of the European Union in the light of these criteria. Russia sanctions can be targeted at individuals who support the Russian government and therefore Russia's illegal war of aggression in Ukraine or who otherwise provide assistance to the Russian government. These individuals are obviously not regular citizens but typically highly influential oligarchs, leading politicians and military commanders who represent the most powerful political, economic and military institutions. It is also important to think about the alternative: while a full embargo would be easy to formulate as a legal norm, it could lead to an unreasonable or unfavourable outcomes – which is another reason to opt for casuistic regulation.

Casuistic sanctions legislation also comes with certain challenges, namely ambiguous situations where it is unclear whether a ban applies to, for example, a specific asset transfer. The

by government agencies to introduce flexibility into the law […] As such they run counter to the basic idea of the rule of law.' Joseph Raz: 'The Rule of Law and its Virtue' in The authority of law: Essays on law and morality, Oxford, Clarendon Press, Oxford University Press, 1979.

13 Judgment of 3 September 2008 in *Yassin Abdullah Kadi v Council and Commission* (Kadi I) (C-402/05 P, EU:C:2008:461) and judgment of 18 July 2013 in *Commission and Others v Yassin Abdullah Kadi* (Kadi II) (C-584/10 P, EU:C:2013:518).

14 Regarding Finland's advocacy for the legal rights of individuals who find themselves blacklisted, see Juha Rainne: Elements of Nordic Practice 2005–2006: Finland, Nordic Journal of International Law 77(1–2), 2008, pp. 145–146.

15 Andrej Lang: Alternatives to Adjudication in International Law – A Case Study of the Ombudsperson to the ISIL and Al-Qaida Sanctions Regime of the UN Security Council, American Journal of International Law 117(1), 2023, pp. 48–91.

16 Ibid.

17 Ibid.

18 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, Article 3.

ambiguity can be caused by the wording of the regulation or by difficulties in establishing all the facts required to make a determination – or a combination of both.

According to *Frederick Schauer*, rules are always generalisations designed to communicate an underlying principle.[19] On the one hand, simply stating the underlying principle would not be clear enough to constitute a rule. On the other hand, since rules are generalisations, they can never perfectly communicate the spirit of the underlying principle. A specific ban (a prohibitive rule) can therefore also end up prohibiting activities that would be allowed from the perspective of the underlying principle. This would be an example of 'over-inclusiveness'.[20] Then again, the same ban can also allow activities that should have been prohibited in the light of the underlying principle. This would be an example of 'under-inclusiveness'.[21] In the context of written legal norms, the limitations of verbal expression also need to be taken into consideration.

Legislating on sanctions is not always an exact science either – despite the ideal of targeted sanctions. This is partly because the new sanctions against Russia have been penned under immense political and time pressure, without a chance to carry out careful impact assessments or broad consultations with stakeholders. The process has reminded building a plane while flying it: introducing a ban only to provide an exemption in the next sanctions package after realising that the ban leads to situations that, for example, harm European businesses but not the Russian counterparts. Each round of sanctions has also seen the introduction of new bans to fix issues of under-inclusiveness and better block Russia's access to sources of technology and financing. The first eleven sanctions packages have all included tweaking over-inclusiveness or under-inclusiveness to optimise the sanctions regime over the last 18 months. Ultimately, however, it falls to the authorities and businesses – and the courts – of each Member State to interpret the rules.

2 Effectiveness of non-universal sanctions and means of increasing effectiveness

The impact of sanctions has been studied extensively, and the debate on whether sanctions are 'effective'[22] is never-ending. There is an adage that sanctions never work – until they eventually do. The effects of sanctions regimes are often slow to materialise, while the general public expects quick results. This juxtaposition has become even more pronounced in our modern world of rapidly changing news cycle. If people over-optimistically think that unilateral sanctions imposed by the US and the EU could make the Russian government change its mind about the viability of the war in Ukraine – and to do so quickly – the sanctions are doomed to fail as ineffective. Setting such a goal would be naïve and should be avoided, and instead the sanctions regime should be seen as one of the most important tangible elements

[19] Frederick Schauer: Playing by the Rules – A Philosophical Examination of Rule-Based Decision-Making in Law and in Life, Clarendon Press, Oxford, 1991, pp. 17–37.

[20] Ibid, pp. 31–32.

[21] Ibid, pp. 32–34.

[22] In Finland, for example, the Bank of Finland's Institute for Economies in Transition (BOFIT) regularly publishes informative and internationally esteemed studies on the subject. See also the Finnish Institute of International Affairs – ETLA Economic Research: Development of EU's Sanctions Policy – Political and economic implications for Finland, 11 January 2019, https://www.fiia.fi/en/project/development-of-eus-sanctions-policy-political-and-economic-implications-for-finland.

of a comprehensive policy aimed at stopping Russia's war of aggression. A solid supply of materiel to the Ukrainian defence forces is another indispensable and critical element of this holistic policy.

When we talk about sanctions in Finland or in a Western context, we often forget that the sanctions that we have approved against Russia are not universal and that much of the world has chosen not to enforce them. The sanctions imposed by the EU are not binding on, for example, China or India, which as sovereign nations are entitled to decide on their own trade restrictions and the laws that govern businesses established on their territories. The fact that only some – albeit the most economically influential – of the countries in the world are supportive of the sanctions limits their theoretical maximum impact considerably.

There are various ways to increase the effectiveness of unilateral sanctions. The most important is partnership: when universally binding sanctions imposed by the UN Security Council are not available and countries introduce their own sanctions policies, it is important to find as much international support as possible from other like-minded countries. In an ideal scenario, these partnering countries would also synchronise the scope of their sanctions regimes. This would make the sanctions more effective, as a coordinated approach could, for example, simultaneously stop trade in a certain sector or with specific businesses around much of the world. A coordinated approach also simplifies implementation from the perspective of, for example, multinational corporations that have to simultaneously comply with sanctions regimes imposed by several different countries and international organisations. In the case of sanctions against Russia, close transatlantic cooperation and partnership with G7 countries are especially important.

In addition to the aforementioned political tools, the effectiveness of sanctions can be maximised by means of various legal instruments. The most proactive in this respect is the US, whose sanctions regimes are often said to have an extraterritorial effect. For example, European businesses that also wish to operate in the US often 'opt in' for US sanctions even in respect of transactions that have no links to the US. This is partly because the US threatens to also impose sanctions on foreign businesses that fail to observe its sanctions laws ('secondary sanctions').

The most notable Finnish example of the extraterritorial effect of US sanctions is Helsinki District Court's judgment No 20/1612[23], which involved Finnish banks refusing to execute asset transfers for the Russian oligarch *Boris Rotenberg* on the grounds that his name had been added to the sanctions list of the US Treasury Department's Office of Foreign Assets Control (OFAC). At that time, Boris Rotenberg was not yet sanctioned by the EU. Helsinki District Court accepted the banks' argument that, due to Rotenberg's inclusion on the OFAC sanctions list, executing transactions for him would constitute a considerable financial risk for the banks. The Court found that the banks taking a considerable financial risk of this kind would also be against the risk-taking rules laid down in the Finnish Act on Credit Institutions.[24] The

[23] Helsinki District Court, 13 January 2020, R 20/1612.

[24] See, in particular, the Finnish Act on Credit Institutions (610/2014), chapter 18, section 4. According to the judgment, the banks were also within their rights to refuse to execute the asset transfers on the grounds that the transactions were suspicious within the meaning of chapter 4, section 5 of the Finnish Act on Preventing Money Laundering and Terrorist Financing (444/2017). Moreover, the banks' refusal to execute the transactions did not constitute discrimination under the Finnish Non-Discrimination Act, as there was nothing to

banks therefore had a justified reason, under their account terms and conditions, to refuse to execute the asset transfers in question.[25] In other words, this interpretation gave the banks the right, in some circumstances, to base a refusal to execute a transaction on foreign legislation that has no applicability in Finland – on the grounds that the laws in question pose a risk to the banks. Helsinki District Court's recognising the impact of foreign laws in its ruling can be seen as an important position of principle, even though no more senior court ever heard the case since the parties settled and withdrew the case from the appellate court's docket.[26] Drawing overly far-reaching conclusions from Helsinki District Court's ruling should be avoided, however: the Court did not, for example, examine the relationship between foreign sanctions and basic banking services within the meaning of the Finnish Act on Credit Institutions, as Rotenberg was residing outside the EEA and was therefore not eligible for such services.[27] As a rule, banks have an obligation to provide basic banking services even if the customer is a listed individual. This much seems clear, at least in the light of the EU's sanctions laws: in the context of the EU, listed individuals can, for example, apply for an exemption to use their frozen bank account to make certain payments – such as to cover day-to-day living expenses and legal fees; the idea is not to stop them from using banking services, the use of which the sanctions regulation expressly allow.

The European Union traditionally takes a critical view of any extraterritorial sanctions of other countries, namely the US. Applying sanctions imposed by third countries to businesses established in the EU has been considered to be contrary to international law. The EU has also passed legislation that is expressly designed to stop the extraterritorial application of third-country sanctions in Europe.[28] The circumstances of Russia's war of aggression have nevertheless caused the EU to somewhat adjust its attitude towards how extensively EU sanctions rules should affect countries outside the EU's own territory. The key question is what to do about any circumvention of EU sanctions by, or through, third countries. We are still a long way away from the EU's adopting US-style legislation with similar extraterritorial reach.[29] The 11th package of EU sanctions against Russia, which entered into force in June 2023, is nevertheless significant in this respect, as it enables the EU to list businesses operating in third

suggest that Rotenberg's ending up on the US sanctions list was related to his personal attributes within the meaning of section 8 of the Non-Discrimination Act (1325/2014).

[25] See the Finnish courts' press release: 'Boris Rotenbergin kanne pankkeja vastaan hylättiin' ['Boris Rotenberg's suit against banks dismissed'], 13 January 2020, https://oikeus.fi/karajaoikeudet/helsinginkarajaoikeus/fi/index/tiedotteet/2020/tiedoteborisrotenberginkannepankkejavastaanhylattiin.html.

[26] Maria Rosvall: 'Boris Rotenberg perui valituksensa, pankkien ei tarvitse antaa palveluita' ['Boris Rotenberg withdraws appeal – banks have no obligation to provide services'], Helsingin Sanomat, 31 March 2023, https://www.hs.fi/talous/art-2000009490779.html (visited on 26 July 2023).

[27] The Court found that since Rotenberg was not a resident of the EEA, the rules about the provision of basic banking services laid down in chapter 15, section 6, subsection 1 of the Finnish Act on Credit Institutions (610/2014) did not apply.

[28] See Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom ('Blocking Statute').

[29] All EU sanctions regulations come with the same scope of application, which limits the applicability of the rules, subject to certain conditions, to the territory of the EU, to citizens of EU Member States and legal persons established in EU Member States. See, for example, Regulation (EU) No 269/2014, Article 17 and Regulation (EU) No 833/2014, Article 13.

countries that contribute to circumventing EU sanctions.[30] This listing mechanism is limited to specific goods and certain parties to whom such goods cannot be exported. Action can be taken against third countries that have systematically failed to stop the transit of goods to Russia through their territories. The mechanism is designed to be applied as a last resort if the desired outcome cannot be achieved through diplomatic negotiations with these countries.

The anti-circumvention listing mechanism can also enable – depending on how the regulation is interpreted in practice – the targeting of sanctions at third-country parties that are facilitating violations of the anti-circumvention rules of EU sanctions laws. This criterion can also give grounds to listing individuals who promote infringement of the ban on evading sanctions set out in Council decisions and regulations, or who otherwise systematically act in a manner contrary to the purpose of sanctions.[31] Alternatively, if interpreted narrowly, it is possible that this listing mechanism will only be used to list businesses established in the EU that contribute to facilitating sanctions circumvention in respect of their operations in third countries.

Adding the aforementioned listing criteria to the Council's sanctions regulations reflects the EU's cautious change in attitude as it begins to extend its powers to businesses established outside its territory that contribute to facilitating sanctions circumvention. If the EU wants its Russia sanctions policy, which is critical to its security interests, to succeed, it will have to take another serious look at its approach towards ways to curb the circumvention of sanctions with the help of third-country operators.

One tangible example of an innovative legal mechanism perceived to have an extraterritorial impact is the price cap set for Russian crude oil and oil products in the Council's sanctions regulations.[32] The US led talks on the issue among the G7 countries in 2022, and a price cap was introduced for crude oil in December 2022 and for oil products in February 2023. The price cap for Russian crude oil that was adopted by the G7 group in February 2023 was set at USD 60 per barrel, and the prices of oil products were capped at USD 100 and USD 45 per barrel.[33] Sanctions laws are essentially creating a global cartel that seeks to limit Russia's oil revenues by lowering the price of Russian oil on the global market.[34]

This is a new kind of sanctions mechanism the viability of which has been doubted due to, for example, uncertainty over whether a coalition of like-minded countries would have enough influence to also get reluctant countries and businesses operating in those countries involved. This approach is necessary, however, to effectively control crude oil and oil products, which represent the biggest source of income for the Russian government. An import ban that only covers the territories of the EU and the US inevitably increases exports to other parts of the world. The price cap mechanism controls this by also lowering the price that third

[30] Council Regulation (EU) No 269/2014, Article 3(1)(h).

[31] Ministry for Foreign Affairs of Finland, press release: 11th package of EU sanctions against Russia focuses on preventing sanctions circumvention, 23 June 2023, https://um.fi/current-affairs/-/asset_publisher/gc654PySnjTX/content/eu-n-11.-pakotepaketti-keskittyy-venajalle-asetettujen-pakotteiden-kiertamisen-estamiseen.

[32] Council Regulation (EU) No 833/2013, Article 3.

[33] In respect of the EU, the price cap is laid down in Annex XXVIII of Council Regulation 833/2014.

[34] US Department of the Treasury, press release: Preliminary Guidance on Implementation of a Maritime Services Policy and Related Price Exception for Seaborne Russian Oil, Office of Foreign Assets Control, 9 September 2022, https://ofac.treasury.gov/recent-actions/20220909_33.

parties pay for Russian oil and oil products. As a leverage to induce support by third countries and their businesses, the G7 has imposed a ban on the provision, directly or indirectly, of technical assistance, brokering services, financing or financial support to oil shipments that exceed the price cap.[35] All operators in G7 countries that provide assistance to oil shipments – such as brokers, insurers and credit institutions – have an obligation to contribute to the implementation of the ban. Third countries also have their own natural incentive for taking advantage of the price cap mechanism: cheaper oil and oil products.

In any case, it is clear that EU sanctions only have limited influence on, for example, transactions taking place within Russia. The effects of EU sanctions are mostly felt within the Union itself (e.g., asset freezes) and in foreign trade (e.g., import and export restrictions). The provisions on the scope of application of the sanctions limit their effects to the territory of the EU, citizens of EU Member States and legal persons established in the EU or pursuant to the laws of a specific Member State as well as businesses that operate even partially within the EU.[36] Regardless of this, people are frequently surprised to learn that the sanctions can lead to, for example, an EU-based business having its assets frozen because the authorities consider the business to be owned or controlled by a listed entity. The lawmakers have specifically sought to control, for example, assets and businesses that listed oligarchs have in Europe, even when this inevitably inconveniences the relevant EU based companies and their employees. This is, however, part of the nature of sanctions. The Court of Justice of the European Union found in the so-called Rosneft case (2017) that 'restrictive measures, by definition, have consequences which affect rights to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions'.[37]

3 Individual sanctions and business empires of Russian oligarchs

The scale of asset freezes resulting from individual sanctions depends largely on the interpretation of the sanctions regulations and specifically the provision whereby all 'funds and economic resources belonging to, owned, held or controlled by' listed individuals and entities must be frozen.[38] If the asset freezes only led to the freezing of the listed Russian oligarchs' personal bank balances and assets that are held directly in their name in the EU, the effect of these individual sanctions would be very limited indeed. This interpretation could hardly be argued to be persuasive enough to have any impact on Russia's war of aggression. The effectiveness of individual sanctions results from a broader interpretation of the asset-freeze obligation which requires that the measures are applied to the entire business empires of listed oligarchs. Some of these empires are so vast that the listing of one individual can have

[35] Council Regulation (EU) No 833/2013, Article 3(1).

[36] For details, see, for example, Council Regulation (EU) No 269/2014 of 17 March 2014, Article 17.

[37] Judgment of 28 February 2017 in *PJSC Rosneft oil Company v Her Majesty's Treasury and Others* (Rosneft) (C-72/15).

[38] Council Regulation (EU) No 269/2014, Article 2(1). A similar provision is also included in other EU sanctions regimes.

widespread international implications, as was demonstrated by the effects on the global aluminium market that followed from the blacklisting of the oligarch *Oleg Deripaska* in the US.

If the rules were to be interpreted more narrowly and taken to only cover businesses in which a blacklisted individual is a formal majority shareholder, it would be too easy for that individual to avoid the reach of sanctions by, for example, reorganisation of their business using shell companies. The key legal issue therefore comes down to determining the circumstances in which a business should be deemed to be 'owned, held or controlled by' a listed individual or entity and what proof is needed to demonstrate this.

Finnish courts have already had a few cases exploring this issue. Helsinki Court of Appeal ruled on a case involving the enforcement of an asset freeze imposed on a company called Agricultural Minerals DMCC on 17 May 2023 (U 22/1040). The District Court had overruled the National Enforcement Authority's decision to freeze the company's assets (by way of a confiscation order), but the Ministry for Foreign Affairs had appealed. The Court of Appeal overturned the District Court's ruling and reinstated the asset freeze. The issue came down to the strength of evidence showing that the assets were owned or controlled by a listed individual. The Court of Appeal took the view that the evidence presented by the authorities, which was largely based on reports in the media, was strong enough to prove that a listed individual held a majority share in the Russian fertiliser company. It was therefore reasonable to demand from the company reliable evidence that any profits from the sale of fertilisers would not end up in the hands or within reach of a listed person. The company was unable to produce such evidence, and the Court of Appeal consequently concluded that the funds were destined to a listed individual. Beyond this case, which is yet to reach a final binding decision, a significant body of case law is excepted to develop in the coming years.[39]

As a rule, the burden of proof in these kinds of cases lies with the authorities. However, it is often extremely difficult in practice to obtain information about the businesses involved due to their complicated ownership arrangements and the use of shell corporations. Sometimes these kinds of arrangements have been made specifically to evade the effects of sanctions. Courts therefore have to decide what kind of proof can reasonably be expected from the authorities on the one hand and from the companies subject to asset freezes on the other. If the evidential threshold is set too low, sanctions could end up being targeted at entities that are not in fact owned or controlled by listed individuals. Setting the standard of proof required of the authorities too high, on the other hand, could enable listed individuals to evade the effects of sanctions by rearranging the ownership structure of their businesses. The courts in individual EU Member States have to set the evidential threshold and determine how to divide the burden of proof in the light of their own national laws as well as the Council's regulations. Finnish district courts currently have a number of cases on their dockets that involve decisions to freeze the assets of listed individuals and entities. These cases will set a standard for how much proof the authorities need to be able to present to justify asset freezing. It is this standard of proof that will to a great extent determine the scale of asset freezes under the Individual Sanctions Regulation.

Businesses and special credit institutions that have an obligation to comply with the EU's sanctions regulations also have to interpret the rules on ownership and control in their daily

[39] Ruling No 746 of Helsinki Court of Appeal of 17 May 2023 in case U 22/1040; Helsinki Court of Appeal's press release of 17 May 2023.

operations. This involves investigating the backgrounds of their partners and the payers and recipients of asset transfers as well as the ownership structures of businesses. Both obtaining this evidence and interpreting it in the light of the relevant legal rules can be challenging, especially since neither national nor EU courts have yet established harmonised interpretations of the rules. Erring on the side of caution and not taking risks seems prudent in this situation but could lead to over-cautiousness and banks' refusing to execute asset transfers just in case and because doing so is easier. This phenomenon is sometimes referred to as 'over-compliance' or 'de-risking'. However, the sanctions regulations are not intended to completely stop trade or asset transfers at the smallest suspicious sign. This could also be problematic from the rule of law standpoint and lead to unreasonable consequences for individuals of a certain nationality, for example. Credit institutions in particular have had to invest heavily in their compliance procedures to ensure the correct implementation of the sanctions that have been introduced since February 2022.

One example of an over-cautious interpretation of the rules is the recent rise in cases where housing companies have been refused credit on the grounds that an individual unit in the building has been owned by the Russian Federation. The Ministry for Foreign affairs of Finland issued its opinion on the interpretation of the EU's sanctions regulations in these kinds of cases on 17 February 2023.[40] Council Regulation (EU) No 269/2014 ('Individual Sanctions Regulation') does not apply in such cases, as the Russian Federation is not mentioned on the lists of individuals and entities to which the sanctions regime applies, which are annexed to the Individual Sanctions Regulation. The same goes for the Russian embassy and consulates in Finland. Less straightforward is the interpretation of Council Regulation (EU) No 833/2014 ('Sectoral Sanctions Regulation'), under which certain measures are also targeted at the Russian Federation. Under Article 5a, paragraph 2 of the Sectoral Sanctions Regulation, it is prohibited to directly or indirectly make or be part of any arrangement to make any new loans or credit to any legal person, entity or body referred to in paragraph 1. Paragraph 1 specifies that the Article applies, for example, to the Russian Federation and its government. According to the opinion of the Ministry for Foreign Affairs of Finland, 'the ownership of housing companies needs to be examined on a case-by-case basis in order to determine whether making a loan to the company could be construed as being prohibited under Article 5a, paragraph 2 of Council Regulation (EU) No 833/2014'. This examination could be based on, for example, the Commission's best practices for the determination of ownership and control.[41] The Ministry for Foreign Affairs' interpretation of the rules is as follows:

> *'In the case of buildings consisting of multiple residential units where the Russian Federation owns some of the units but is not the majority shareholder in the housing company, the Ministry for Foreign Affairs' view is that the aforementioned provision of Article 5a, paragraph 2 does not prevent the making of a loan to the Finnish housing company. This is because, in such cases, the loan is not*

[40] Ministry for Foreign Affairs of Finland: 'Pakotteet eivät sovellu taloyhtiöön, jonka yhtenä osakkaana on Venäjän federaatio' ['Sanctions do not apply to housing companies that have the Russian Federation as one of their shareholders'], 17 February 2023, https://um.fi/ajankohtaista/-/asset_publisher/gc654PySnjTX/content/pakotteet-eivat-sovellu-taloyhtioon-jonka-yhtena-osakkaana-on-venajan-federaatio (visited on 27 July 2023).

[41] Council of the European Union – Foreign Relations Counsellors Working Party: EU Best Practices for the effective implementation of restrictive measures, 4 May 2018, paragraphs 62–65, https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/fi/pdf.

made to a legal person, entity or body referred to in paragraph 1 within the meaning of the Article in question. The situation could be different if such a legal person, entity or body were to be the majority shareholder in the company or otherwise have control over the company, however.'

In theory, the wording of Article 5a of the Sectoral Sanctions Regulation makes it possible to interpret the lending ban very broadly and so that it prohibits the making of a loan to a housing company in which the Russian Federation is just one of many shareholders and only controls one or a few units in a large building. This kind of interpretation would severely inconvenience completely innocent parties, namely regular local people coincidentally owning a unit in the same building. It is necessary to interpret the sanctions regulations in the light of their object and purpose, the intention of the legislator and the Commission's interpretive guidance. This case is a good example of how sanctions lead to surprising and unforeseen consequences when applied to a variety of real-life situations.

4 Paradigm shift in interdependence and acceptance of a new world order

Increasing use of unilateral sanctions has become a trend in international relations in recent years. At the same time, universal sanctions imposed by the UN Security Council have become less significant in relative terms, although the UN also still has a number of important sanctions regimes in place, including those targeting ISIS and al-Qaeda. Sanctions imposed by the UN played a key role in pressurising Iran to agree to the nuclear deal framework in 2016, which was when the majority of the UN Security Council's Iran sanctions were lifted. The United States and the European Union, together with the G7, have been particularly active in introducing new, unilateral sanctions. The number of individuals and entities on US sanctions lists has grown from less than 1,000 to well over 10,000 since 2000.[42] In principle, it is recognised that sanctions should only be used carefully and as a last resort, new blatant violations of international law have made their use imperative yet and again.[43] In these situations, sanctions have offered an efficient and tangible means to react in a way that complies with international law.

The sanctions introduced in response to Russia's full-blown attack on Ukraine in February 2022 have raised the relevance of the EU's sanctions policy to a completely new level. The EU has used sanctions to pressurise Russia since 2014, but the new regimes adopted in and after the spring of 2022 mark a fundamental shift in the scale and objectives of EU sanctions. This goes hand in hand with a wider political paradigm shift away from approaches that emphasise the benefits of interdependence. The sanctions introduced in 2014 were aimed at getting the Russian government to rethink its policies and to honour the Minsk agreements or at least hold back from further assaults on Ukraine's sovereignty. There was room for making the sanctions much more severe, and this was made clear to Russia, which was hoped to bring about leverage and convince the Russian government to reconsider its position. This

[42] See The Department of the Treasury: The Treasury 2021 Sanctions Review, October 2021, https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf (visited on 27 July 2023).

[43] Juha Rainne: 'Läntinen yhtenäisyys ja pakotteiden voima' ['Western unity and the power of sanctions'], Maanpuolustus – journal of the Society of the National Defence Course, 6 April 2022, https://www.maanpuolustus-lehti.fi/lantinen-yhtenaisyys-ja-pakotteiden-voima/ (visited on 27 July 2023).

approach made sense in a world where the mainstream view was to believe in the benefits of interdependence.[44]

Since the spring of 2022, sanctions have been imposed as widely as possible across all the sectors where their impacts are likely to be more acutely felt in Russia than in the EU – and in respect of which EU Member States have been able to reach the necessary consensus. More and more the objective has become to urgently reduce Russia's ability to finance its war of aggression and supply its troops. This is surely a more straightforward and therefore a more realistic objective than gradually and conditionally seeking to influence the policies of the Russian government.

The Russian economy has not collapsed, but the sanctions are clearly causing some damage and making the country's economic outlook increasingly bleak. The Federal State Statistics Service has reported that Russia's GDP fell by 2% in 2022.[45] Compared to the country's pre-war projections of approximately 3% growth, the drop is considerably greater. Russia's GDP fell rapidly between January and March 2023 and was down 2% from one year ago.[46] Government revenues have dropped considerably, and the country now has a budget deficit: tax revenues from oil and gas in particular have been halved in the space of one year, with the price of Urals oil being just three-quarters of what it was (situation in June 2023).[47] The more profound effects of sanctions take longer to materialise and will not be felt until, for example, the restrictions on technology exports begin to slow down regular industrial development. Russia is naturally taking steps to adapt to the restrictions and has started, for example, to look for ways to circumvent the sanctions, increase domestic production and identify new trading partners. The price of oil and the concerted effort of the G7 to make more efficient use of the price cap mechanism play especially important roles.

Infrastructure and laws can both be used as means to shape society, influence public order and exercise power.[48] In a way, the EU's sanctions laws are like infrastructure that has been built on the EU–Russia border. The way in which infrastructure shapes society tends to be relatively permanent in nature, since building it is costly and has wider societal implications, which become part of the norm and the structure of society (in the case of, for example, a new underground line or a motorway). Laws, on the other hand, can usually be changed relatively

[44] The liberals among scholars of international relations emphasise the benefits of cooperation on both parties in an interdependent world. *Keohane* and *Nye* (1977) coined a concept called 'complex interdependencies' to stress how using, for example, military force against other countries is less effective and therefore less likely in an interdependent world. Their paper was a direct response to the realist theory of, for example, *Hans Morgenthau*, which was prevalent at the time and focused on the probability of war in international relations. The liberal school believe that the reciprocal nature of vulnerabilities that come from interdependence is likely to lead to a world where strategies that are based on forcing the desired outcome are less effective. Robert Keohane and Joseph Nye Jr: Power and Interdependence, Second edition, Pearson, 1997, pp. 27–29.

[45] BOFIT Weekly Review 2023/21: Russian first-quarter GDP contracted by 2% on year, 25 May 2023, https://www.bofit.fi/en/monitoring/weekly/2023/vw202321_1/ (visited on 26 July 2023).

[46] BOFIT Weekly Review 2023/21.

[47] There has been significant weakening in Russia's government finances; see BOFIT Weekly Review 2023/25: Budget revenues declined while spending still increased even after a pull-back, 21 June 2023, https://www.bofit.fi/en/monitoring/weekly/2023/vw202325_1/ (visited on 26 July 2023).

[48] Professor *Benedict Kingsbury* from New York University has named this the 'InfraReg' project ('infrastructure as regulation'). Benedict Kingsbury: Infrastructure and InfraReg – on Rousing the International Law 'Wizards of Is', 8(2) Cambridge International Law Journal, 2019.

quickly, but the state of affairs that exists while a particular legal norm is in force also affects how people behave, and it takes more than a law change to change behaviours. From the perspective of Finland, the sanctions against Russia are like a physical wall or a man-made strech of sea that has more or less cut off all trade with Russia – regardless of the fact that the sanctions are meant to be targeted. However, the impact of targeted sanctions is always wider than what their exact wording would require (also known as the 'chilling effect').

How permanent is this change in the relationship between Russia and the EU? If the sanctions against Russia are not lifted soon but become a long-term fixture, which seems extremely likely, a new world order of sorts will inevitably form that can no longer be undone simply by reversing the law. Even though it is often faster to undo legislation than to take down physical infrastructure, legal norms also lead to new patterns of behaviour and structures which become entrenched and thus have long-term implications: for example, new trade partnerships blossom and the structures that once enabled old trade relations are abandoned, which also has long-term implications beyond the law.

At the moment, our focus must be on ensuring the effective implementation of the sanctions both by the private and the public sector. It is especially important to prevent the continuation of Russian trade through third countries in a way that would establish a new order linking Russia and the West with the help of middlemen. The economic temptation to do so is undoubtedly considerable, which is why steering society in another direction calls for political determination, continuous development of sanctions legislation and its effective implementation.