
European Union sanctions and Russia

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ABSTRACT

The European Union has responded to Russia's war on Ukraine with an unprecedented set of economic sanctions. Sanctions introduced in early 2022 by the EU and the United States have already shaken the Russian economy, and there is still room to strengthen them further.

While the sanctions imposed on Russia in 2014 were narrowly and clearly defined, the new measures affect the operation of practically every business that trades with Russia. Consequently, sanctions laws the subject of significantly increased attention attention in both in Finnish legal debate and practice.

This article examines some of the key areas of public and private law from the perspective of the EU's latest sanctions regime and especially the legal basis of the sanctions, the criminalisation of sanctions violations, the most common issues of interpretation in the context of private law, as well as sanctions law provisions limiting liability in the event of civil disputes.

1 Introduction

The European Union is the third largest economy in the world. The gross domestic product of the Union amounts to approximately EUR 15 billionⁱ, and the EU accounts for around 15% of the world's trade in goodsⁱⁱ. Only the United States and China are larger in economic terms.

On the world stage, the EU is, above all, an economic power. Its political ideology and entire existence are founded on the principle of promoting free trade – both between the member states and internationally. However, the EU's economic power is also its most effective weapon when its fundamental values or key foreign and security policy interests come under threat.

The EU has used this weapon sparingly and always cautiously, almost sheepishly. The only economies truly impacted by the EU's sanctions at the start of 2022 were North Korea and Syria, and there are also only a handful of historical examples, the most recent being the extensive

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sanctions regime imposed on Iran, which has now been almost fully lifted. Apart from Syria, all of these sanctions systems were founded on a solid framework set up by the UN Security Council, which the EU has then complemented with its own additional measures.

In the light of this background, the sanctions imposed by the EU on Russia in February, March and April of 2022 are unique in the Union's history. At no previous time has the EU imposed such extensive sanctions on such a large economy and in the absence of an underlying UN Security Council sanctions regime. Russia's shameless invasion of Ukraine shattered illusions held by the EU, and made it reach for its most powerful weapon with force and determination that appears to have taken the Russian government completely by surprise.

2 European Union sanctions against Russia

At the time of writing this article in April of 2022, the sanctions that the EU has imposed on Russia consist of several separate legal regimes, each of which has its own specific objective.

Back in the winter of 2013, the then President of Ukraine, *Viktor Yanukovich*, suddenly decided not to sign a political association and free trade agreement with the EU that would have brought Ukraine closer to the West and announced instead his support for increasing economic integration with Russia. This created a widespread protest movement, which despite the government's violent resistance ultimately succeeded in removing Yanukovich from office. The EU supported Ukraine by, for example, imposing a number of sanctions on 5 March 2014, which included freezing the assets that the ousted kleptocrats had misappropriated from the Ukrainian state in order to return the funds to their rightful owner.ⁱⁱⁱ

Russia reacted to the collapse of the Yanukovich government by seizing parts of eastern and southern Ukraine both directly and through separatists whom it supported. The EU responded to this outrageous violation of international law and Ukraine's territorial integrity by introducing additional measures on 17 March 2014, including an asset freeze against persons who had participated in Russia's actions^{iv}, and by imposing a trade embargo on effectively all goods originating in the Russian-occupied areas of Crimea and Sevastopol on 23 June 2014^v.

The EU did not, however, resort to sanctions targeted directly at the Russian government and economy until separatists armed by Russia shot down a passenger plane flying over Ukraine in the summer of 2014, killing the almost 300 people on board. These sanctions, which were introduced on 31 July 2014, included prohibiting the provision of financing to certain state-owned Russian banks and businesses, prohibiting the export of defence materiel to Russia, and restricting the export of certain other goods that can be used for military purposes ('dual-use items'). A number of other narrower export restrictions were also introduced, which were designed to prevent the use of sophisticated European technologies for Russian deep water oil exploration and production, arctic oil exploration and production, or shale oil projects.^{vi}

Despite the progressive tightening of sanctions since 2014, the sanctions system that the EU and its partners had in place against Russia in early 2022 was relatively ineffective. Crimea remained under Russian control and the conflict in eastern Ukraine continued, but the member states of the EU had largely lost interest in the region and instead become preoccupied by issues of security policy that were emerging from the superpower battle between the United States and an increasingly powerful China. The finance-sector sanctions and targeted export restrictions were having a noticeable impact on the Russian economy^{vii}, but the price that Russia had had to pay for violating its neighbour's independence was really rather negligible in the grand scheme

of things. The price was, in any case, not high enough to make the Kremlin rethink its long-term geopolitical strategy.

By February 2022, Europeans had been watching a Russian military build-up along Ukraine's borders for several months. When Russia, disregarding the fundamental principles of international law, recognised the 'independence' of the Ukrainian breakaway regions of Donetsk and Luhansk, the EU responded by imposing the first of its new sanctions on 23 February, which included restricting trade in these areas similarly to what had been done with Crimea^{viii} and introducing measures targeted at those members of the Russian State Duma who had voted for the recognition of independence^{ix}, military leaders^x and Russian government bonds^{xi}.

The Kremlin had already made its decision, however. As the world watched on in horror, Russia launched a large-scale invasion of Ukraine on 24 February 2022. In an instant, the fragile peace in Europe was shattered for good and Ukrainians had to take up arms to fight for their lives and the independence of their country.

The EU and its member states came out in staunch support of Ukraine. Sanctions, in addition to the provision of financial and material assistance, have been the most important form of this support. By mid-April of 2022, the European Union had prohibited the export of, for example, defence materiel, dual-use items, oil exploration, production and processing technology, aviation, space and maritime technology, production machinery and components critical to several different industries, a wide range of wood, rubber, paper and metal products and numerous chemicals, many types of ordinary computers, smartphones and other electronics as well as everyday software, all kinds of luxury goods, and euro-denominated banknotes to Russia. The import of Russian steel, iron, coal and certain other goods such as wood and car tyres, which are important to Finland, had also been prohibited. The tough sanctions imposed in the banking sector include, among others, asset freezes on several large banks and banning them from using the SWIFT messaging service. The EU has prohibited Russian road transport operators from transporting goods on European roads, closed its ports to Russia's entire merchant fleet, and banned Russian airline carriers from overflying EU airspace. Several large state-owned businesses and oligarchs have also been banned from trading with the EU, and their assets here have been frozen. A number of sanctions have been imposed on the assets of Russian operators in the EU, setting caps on bank balances and limiting the right to trade in European securities.^{xii} Belarus has paid for the support it has given to Russia by being hit with similar sanctions.^{xiii}

Russia has not stopped its invasion. News reports from Ukraine tell of a large-scale campaign of war crimes committed by Russian armed forces. There is no doubt that the EU will respond with even tougher sanctions. The next target is likely to be Russia's energy exports.

3 Public law perspectives

The European Union's jurisdiction in respect of sanctions is based on Title V, Chapter 2 of the Treaty on European Union (TEU), which concerns the Common Foreign and Security Policy (CFSP). According to these provisions, the Union's action on the international scene seeks not only to ensure its own security but also to maintain international peace and security in the wider world and to promote, for example, international law and the rule of law. It is on these fundamental principles that the Council Decisions imposing sanctions on Russia and also members of the ousted Yanukovich government are based.

The Council implements its Decisions on sanctions by means of Regulations issued under Article 215 of the Treaty on the Functioning of the European Union (TFEU). These regula-

tions have binding legal force throughout every member state, and they are also automatically binding on Finnish legal persons and citizens. In terms of the EU's sanctions against Russia, the most significant Regulations are Council Regulation (EU) No 833/2014 (sanctions targeting trade and the financial sector), Council Regulation (EU) No 269/2014 (list of persons, entities and bodies subject to asset freezes), Council Regulation (EU) No 692/2014 (sanctions targeting Crimea) and Council Regulation (EU) 2022/263 (sanctions targeting the regions of Donetsk and Luhansk). The freezing of assets of former members of the Yanukovich government is provided for in Council Regulation (EU) No 208/2014.

Each of the aforementioned Regulations obligates member states to lay down the rules on penalties applicable to infringements and specifies that the penalties must be 'effective, proportionate and dissuasive'.^{xiv} In Finland, infringements of Regulations issued under Article 215 TFEU are criminalised as 'regulation offences' under chapter 46, section 1 of the Criminal Code (39/1889) and carry a penalty of a fine or up to two years of imprisonment. Section 3 of that same chapter criminalizes 'petty regulation offence' and section 2 'aggravated regulation offence', which carries a maximum penalty of four years of imprisonment. Section 13 of the chapter specifies that provisions on corporate criminal liability apply to regulation offences and aggravated regulation offences. Under section 15 of the chapter, however, a minor neglect of a reporting obligation or of an obligation to provide information or other minor violation of a procedural provision is not deemed an offence.

The Council's Regulations on sanctions also stipulate that, in addition to providing for penalties in their national laws, member states also 'take all measures necessary to ensure that [the sanctions] are implemented'.^{xv} This refers, above all, to the setting up of national systems for the enforcement of compliance with the sanctions, investigation of infringements and sentencing of those who do not comply. It is, in this light, somewhat curious how little case law there is in Finland concerning sanctions: not a single regulation offence relating to EU sanctions was prosecuted in Finland between 2009 and 2018.^{xvi} This is perhaps partly due to the generally law-abiding nature of Finns, but likely also because of pre-trial investigation authorities' lack of understanding of, and familiarity with, the rules concerning sanctions. It can nevertheless be assumed that the current situation will see more resources being channelled to the investigation of sanctions violations, which, combined with the exponential growth of sanctions against Russia, will soon lead to numerous pre-trial investigations and ultimately more convictions.

Finland also has national laws setting out the division of responsibilities and information sharing relating to sanctions, official procedures concerning asset freezes, and reporting obligations of operators subject to the Finnish Act on Detecting and Preventing Money Laundering and Terrorist Financing (444/2014, 'Money Laundering Act') in the context of frozen assets. One of the most important national laws is the Act on the Fulfilment of Certain Obligations of Finland as a Member of the United Nations and of the European Union (659/1967, 'Sanctions Act'). Moreover, the Parliament of Finland was, at the time of writing, in the process of reviewing a government proposal (HE 236/2021 vp) amending the Money Laundering Act so as to make the operators subject to reporting obligations responsible for adopting procedures needed to ensure compliance with sanctions and to give the relevant authorities powers to enforce these obligations.

4 Private law perspectives

The expansion of the sanctions against Russia has also significantly increased the potential of private law issues associated with them. The new regime is likely to lead to an unprecedented number of various kinds of sanctions-related civil cases in courts and arbitration tribunals in the coming months and years.

Disputes are most likely to arise from claims for damages in situations where a Finnish business has stopped delivering its contractual obligations on the grounds of the sanctions imposed. The easiest to deal with will be cases that involve the stoppage of deliveries due to the EU-wide ban on exports. Delivering banned goods to Russia would be simply illegal. The best defence for Finnish businesses that find themselves in such a situation would be to invoke the *force majeure* clause in their contract, as it should be possible to argue, in line with well-established interpretations of *force majeure*, that these kinds of binding EU sanctions constitute, from the perspective of a contract signed before the sanctions were imposed, unforeseeable and insurmountable obstacles that are beyond the party's control.

A party's having its assets frozen and being denied access to funds due to its being added to the EU's list of persons, entities and bodies subject to asset freezes provided in Annex I to Council Regulation (EU) No 269/2014 pursuant to Article 2 of the Regulation would also constitute a *force majeure* event. The provision unequivocally prohibits Finnish exporters from supplying goods to any operator included in the list, and equally explicitly orders Finnish banks to block such operators' access to their bank accounts.

More complex disputes can arise in situations where Finnish businesses have to make their own judgements based on more ambiguous rules. One example could be where a Finnish company's business partner is not on the list itself but has a majority shareholder or someone else with a controlling interest – such as a Russian oligarch – who is. Regulation (EU) No 269/2014 does not specifically prohibit trading with such an entity, but it does prohibit the making of funds or economic resources available to anyone on the list, whether directly or *indirectly*. The European Commission's guidance on the interpretation of the provision starts from the premise that a transaction with such an entity generally leads to an outcome that violates Article 2 of the Regulation and that European operators should therefore *presume* that the transaction is prohibited.^{xvii} The Commission goes on to say, however, that this presumption can be rebutted if it can be 'reasonably determined, on a case-by-case basis using a risk-based approach, taking into account all of the relevant circumstances, that the funds or economic resources concerned [in the transaction] will not be used by or be for the benefit of [the shareholder or director designated in the list]':

In practice, Finnish businesses have recently taken a clearly more cautious view of entities whose shareholders or directors are designated in the EU sanctions list, and this is largely due to the sanctions against Russia. Many appear to have decided to presume, as per the Commission's guidance, that dealing with these kinds of entities is prohibited and stop deliveries and payments to them without bothering with the kind of complicated and uncertain 'risk-based approach, taking into account all of the relevant circumstances' that could deem an individual transaction to be technically within the rules. It is difficult to find fault with this approach, but the ambiguity of the rules still increases the risk to Finnish businesses when it comes to settling disputes.

Another case in point are Russian subsidiaries of EU businesses and the applicability of the sanctions in that context – if, for example, a Finnish company decides to exit from the Russian

market but has to keep its Russian subsidiary running for the duration of the exit process. According to the provisions on the scope of application of the Regulations imposing the sanctions, the rules apply to businesses established under the law of any EU member state and to nationals of EU member states.^{xviii} Foreign legal persons, on the other hand, only need to apply the sanctions in respect of any business they conduct within the territory of the EU. This often leads to a situation where a Finnish parent company and its Finnish directors face a penalty if they do not comply with EU sanctions but whose Russian subsidiary is not legally bound by the same rules.

This incongruity has rarely led to insurmountable problems before. Large international corporations and socially and politically aware SMEs have long applied a policy whereby the internal policy of the company require all its subsidiaries, regardless of where they are based, to comply with any EU Regulations concerning sanctions. This kind of an internal policy therefore ensures compliance without any need to examine the scope-of-application provisions, and internal disciplinary action can be taken if the policy is not complied with, regardless of whether or not the non-compliance is actually against the law.

The growing tension between Russia and the West and the rapid expansion of sanctions have nevertheless led to Russian subsidiaries voicing at times vehement objections to having such an obligation to comply with EU sanctions in their local operations. These protests may also have been provoked by threats and pressure from the local authorities. It is only recently that many businesses have found themselves looking for a way to justify to their subsidiaries the need to comply with EU rules – and some may have even sought some legal determinations to conclude that their subsidiaries business may not, in fact, be impacted by EU's sanctions.

The law provides no clear answers on the applicability of EU sanctions on these kinds of scenarios. On the one hand, it is clear that a Russian company operating exclusively in Russia cannot be bound by the EU's sanctions. This is legally the case even if the majority of the company's shares are held by a Finnish company.

On the other hand, it is equally clear that a Finnish company must comply with sanctions in all aspects of its business. For instance, the rules prohibit Finnish companies not only from supplying goods to anyone on the EU sanctions list directly but also 'indirectly'^{xix}, through a subsidiary, for example. Even more relevant in this context is the so-called 'anti-circumvention clause': the Council Regulations concerning sanctions complement the main prohibitions by stipulating that it is also prohibited to 'participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the prohibitions.'^{xx}

According to the European Commission's guidance, this means, among other things, that it is prohibited for EU parent companies to use their Russian subsidiaries to circumvent the obligations that apply to the EU parent, for instance by delegating to them decisions which run counter the sanctions, or by approving such decisions by the Russian subsidiary.^{xxi} The Commission goes on to explain that even where a transaction that contravenes the EU sanctions is executed by the Russian subsidiary itself, the EU parent company or any EU national working for the company could be held responsible if they 'participated in activities' the object or effect of which was to circumvent the main prohibition. This ambiguous rule is probably best applied by presuming that neither a Finnish parent company nor any Finnish worker can be in any way actively involved in executing, approving or facilitating a transaction that would be prohibited to a Finnish company.

The ambiguity of this provision does, however, create problems not just in terms of determining whether or not a violation of the sanctions has taken place but also in respect of relationships governed by private law. Disputes and claims for damages are likely to ensue if a decision

taken by a Finnish company to require its Russian subsidiary to also comply with EU sanctions causes the subsidiary to not be able to deliver its contractual obligations.

Finnish companies therefore need to carefully consider not only this but also many other, even more complex scenarios – and they have to do it under extremely challenging and rapidly evolving circumstances as well as pressure from Russian authorities, which is making it increasingly difficult to find safe, ethically sustainable and legally sound solutions.

The EU Regulations on sanctions do, however, include provisions that are designed to make the life of European companies easier in the face of civil disputes.

The most important of these is the so-called ‘no-claims clause’, which is worded slightly differently in each of the relevant Council Regulations. The Regulation concerning export and import bans, for example, provides that courts must ignore any claims made by Russian operators that relate to any ‘contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation.’^{xxii} If a Finnish company invokes the no-claims clause in a European court of law, the onus of proving that satisfying the claim is not prohibited – i.e. that, for example, the performance of obligations under the contract in question was not even indirectly affected by the sanctions – is on the Russian operator seeking the enforcement of that claim.^{xxiii}

The Regulation also protects Finnish operators who, in good faith, try to comply with the requirements relating to asset freezing and not making funds available. The ‘no-liability clause’ included in the Council Regulation relating to asset freezes ensures that Finnish operators who are later found to have had no just cause to freeze assets or renege on contractual obligations face no liability of any kind, if they did not know that their actions would infringe the measures set out in the Regulation, unless they have acted negligently.^{xxiv} It is therefore normally safer, if there is any uncertainty, for Finnish companies to stop all dealings with an entity that could be subject to sanctions due to its being controlled by someone on the sanctions list, for example, than to risk violating the sanctions, as they can, in the event that their actions are later challenged, invoke the no-claims clause or the no-liability clause in respect of any claims for damages.

5 Conclusion

The European Union has responded to Russia’s war with an unprecedented set of sanctions. Although the sanctions imposed by the EU, the United States and others have been in force for less than two months at the time of writing, it is already clear that they will cause extensive and long-lasting damage to the Russian economy. The planned sanctions on the import of oil and gas nevertheless promise to multiply the economic impact of these sanctions.

It remains to be seen whether even a full ban on the import of energy can make Russia rethink its destructive geopolitical strategy, which appears to be more driven by the Russian government’s misguided ideological doctrines than the country’s economic interests. Either way, expanding the sanctions is justified both ethically and strategically: crippling Russian industry and economy will, at least in the medium and long term, also damage its military performance – which fierce Ukrainian resistance has already proven to be less impressive than expected.

Endnotes

ⁱ International Monetary Fund, World Economic Outlook Database, <https://www.imf.org> (visited on 15 April 2022).

ⁱⁱ In 2017. *Eurostat*, International Comparison Program, Summary of Results 2017, <https://ec.europa.eu/eurostat/documents/2995521/10868691/2-19052020-BP-EN.pdf/bb14f7f9-fc26-8aa1-60d4-7c2b509dda8e> (downloaded on 15 April 2022).

ⁱⁱⁱ Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine.

^{iv} 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.

^v Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol.

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

^{vii} Korhonen, *Sanctions and counter-sanctions – What are their economic effects in Russia and elsewhere?* BOFIT Policy Brief 2019 No 2, Bank of Finland, BOFIT Institute for Economies in Transition, Helsinki.

^{viii} Council Decision (CFSP) 2022/266 of 23 February 2022 concerning restrictive measures in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas.

^{ix} Council Decision (CFSP) 2022/267 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

^x Council Decision (CFSP) 2022/265 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

^{xi} Council Decision (CFSP) 2022/264 of 23 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

^{xii} The new sanctions regime is based on numerous Council Decisions amending Council Decision 2014/512/CFSP and Council Decision 2014/145/CFSP.

^{xiii} The new sanctions are based on Council Decisions amending Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus.

^{xiv} See, e.g., Council Regulation (EU) No 833/2014, Article 8.

^{xv} *Ibid.*

^{xvi} Pursiainen, *Kansainväliset pakotteet ja vientivalvonta* [International Sanctions and Export Controls] (Alma Talent, 2021), p. 112.

^{xvii} Commission Opinion of 8 June 2021 on Article 2(2) of Council Regulation (EU) No 269/2014.

^{xviii} See, e.g., Council Regulation (EU) No 833/2014, Article 13: 'This Regulation shall apply: (a) within the territory of the Union; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.'

^{xix} Council Regulation (EU) No 269/2014, Article 2(2): 'No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I.'

^{xx} See, e.g., Council Regulation (EU) No 833/2014, Article 12.

^{xxi} *Commission Frequently Asked Questions on Sanctions adopted following Russia's military aggression against Ukraine* (https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russias-military-aggression-against-ukraine_en, downloaded on 15 April 2022).

- xxii Council Regulation (EU) No 833/2014, Article 11(1).
- xxiii Council Regulation (EU) No 833/2014, Article 11(2).
- xxiv Council Regulation (EU) No 269/2014, Article 10.