

The EU's 2022 Sanctions against Russia

External Shocks Altering EU Restrictive Measure Practices?

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Abstract

Due to Russia's 2022 war in Ukraine, the EU decided to adopt a set of comprehensive measures against the tenth largest economy in the world. These sanctions include measures that were previously considered as sacrosanct elements of EU-Russia cooperation, including energy or finance. The main objective of this article is to show how the war in Ukraine and subsequent EU actions have brought about significant changes in EU sanctions policy. The aim is not to provide a comprehensive, 360-degree analysis of EU restrictive measures but to highlight some of the major developments in EU sanctions policy that have taken place largely due to Russia's war in Ukraine. These changes include the size and magnitude of sanctions, the increased likelihood of shifting from unanimity to qualified majority voting in foreign and security policy, the banning of media outlets through restrictive measures or a commitment to better enforce EU sanctions throughout the Union and perhaps even beyond. Up until now, most of these Union actions have been inconceivable but external shocks have seemingly changed policymakers' minds over the design of a more effective EU sanctions policy.

Keywords: restrictive measures, sanctions, CFSP, enforcement, media freedom.

1. Introduction

The EU has decades of experience with the design and implementation of restrictive measures (also known as sanctions). In the past, the EU imposed several restrictive measures against a number of Eastern European, African or Middle East countries. This growing experience is also demonstrated by the fact that since the entry into force of the Maastricht Treaty the number of sanctions regimes has increased from just a handful of sanctions to now almost 40 sanctions regimes, including some horizontal sanctions regimes.¹ In fact, most of the decisions taken within the framework of the EU's Common Foreign and Security Policy (CFSP) are related to

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1 Francesco Giumelli *et al.*, 'The When, What, Where and Why of European Union Sanctions', *Taylor & Francis Online*, Vol. 30, Issue 1, 2020.

sanctions. It is thus no exaggeration to argue that sanctions dominate CFSP discussions.²

The main objective of this article is to show how Russia's 2022 war in Ukraine has prompted several changes in EU sanctions practices. The aim is not to provide a comprehensive, 360-degree analysis of EU restrictive measures but to highlight some of the major developments in EU sanctions policy that have taken place due to Russia's war in Ukraine. (i) First of all, the article shows through a brief historical analysis that in the first two decades of the post-Cold War period the EU was reluctant to impose sanctions against Russia. That approach started to change due to the annexation of Crimea and the destabilization of Eastern Ukraine (2014) and then it was significantly altered owing to Russia's full-scale war against Ukraine (2022). (ii) Second, the article also shows that despite the fact that the EU still designs targeted sanctions, the Council imposed very comprehensive set of measures that affect even the sacrosanct elements of EU-Russia relations, including energy and finance. Before the 2022 war in Ukraine, these measures were almost inconceivable and in fact unacceptable for the Member States. (iii) Third, the article also shows that for the first time EU restrictive measures included a ban on broadcasting of certain media outlets which once again raised delicate questions over the balance between the protection of fundamental rights and the promotion of Union security. (iv) Fourth, the article also demonstrates how the war accelerated already existing debates on shifting from unanimity to qualified majority voting in CFSP issues. (v) Finally, the article also demonstrates how enforcement has become a central issue in EU sanctions policy and its importance preventing the circumvention of existing loopholes.

It should be borne in mind that each of these issues would deserve a separate analysis. For instance, the issue of banning media outlets through EU restrictive measures has attracted considerably scholarly attention.³ Instead of offering separate analyses of all these issues, the objective of this article is to present the 'big picture' in EU sanctions policy and the effects of the war on EU external action. In fact, the war in Ukraine has intensified ongoing discussions on the potential improvement of EU external action or it even created new demands for a more effective EU sanctions policy. EU policymakers, rightly so, have avoided a one-sided approach whereby only one dimension of EU sanctions policy needs to be improved. Instead, they have taken a more comprehensive approach where several aspects of EU sanctions policy were changed. This multidimensional approach is the focus of

- 2 Paul Cardwell, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions', *Cambridge Yearbook of European Legal Studies*, Vol. 17, Issue 1, 2015; Ramses A. Wessel *et al.*, 'The Future of EU Foreign, Security and Defence Policy: Assessing Legal Option for Improvement', *European Law Journal*, Vol. 26, Issue 5-6, 2020.
- 3 Luigi Lonardo, *EU Common Foreign and Security Policy After Lisbon*, Springer, Cham, 2022; Luigi Lonardo, 'Censorship after the war in Ukraine: how to square EU interests with EU values. Case T-125/22 RT France v Council', *forthcoming*; Sara Poli, 'Judicial Challenges to EU Restrictive Measures by Individual State Organs, Emanations of Non-EU Member States and Third Countries: the Limits to the Council's Discretion', in Giovanna Adinolfi *et al.* (eds.), *Sanctions by and Against International Organizations*, Edward Elgar, Cheltenham, *forthcoming*.

this article with the hope that it contributes to clarifying significant developments in EU sanctions policy.

2. A Shift from No Sanctions to Comprehensive Restrictive Measures

In the past years, we have seen dramatic changes in the EU's willingness to use sanctions against Russia. For many years after the collapse of the Soviet Union, the EU was quite reluctant to impose restrictive measures against Russia, including in relation to the two Chechen wars and the Georgian war. The 2014 but especially the 2022 sanctions regimes should partly be evaluated from this historical perspective. Indeed, we have moved from an EU that emphasized its special relationship with Russia, largely believing in open dialogue and sectoral cooperation, to partial sectoral sanctions in 2014 and now targeted but quite comprehensive set of measures that have seriously affected even the sacrosanct elements of cooperation, including energy and finance. Through the use of sanctions, the EU has substantially changed its Russian policies and for the time being there is no prospect that this 'reduced relationship' will significantly change.

To understand the magnitude of these changes, it is useful to briefly overview the role of sanctions in EU-Russia relations in cases when Member States at least considered the adoption of restrictive measures in crisis situations. Broadly speaking, until 2014 the EU was mostly unwilling to impose sanctions against Russia. It does not mean that the EU was silent in crisis situations or adopted no measures at all. In many cases, including in the Chechen wars or in the Georgian war, the EU always condemned Russian behavior. Moreover, it mostly used its trade competences to put some pressure on Russia. Meanwhile, however, for a long time the EU tried to strike a balance between its economic/political interests and the promotion of its own security agenda. That balancing act started to erode in 2014 and clearly ended in 2022 when the EU imposed a comprehensive set of measures against Russia.

In the first Chechen war, although the EU did not impose CFSP sanctions, it suspended the Partnership and Cooperation Agreement – a move which can be considered as a kind of restrictive measure, as it withheld some economic benefits from Russia for political reasons. During that time, only Germany supported the possible use of sanctions. In particular, German Economics Minister Gunter Rexrodt said “[i]f the Russian government does not respect the principles that we expect of them, then we will not and cannot rule out economic sanctions”.⁴ While other Member States also condemned Russia's actions in the first Chechen war, the imposition of sanctions was quickly ruled out on two grounds: on the one hand, it was not seen as a tool that can put an end to the conflict, on the other hand, EU diplomats wanted to give Russian President Yeltsin 'a chance'. The EU did not want to “get into a row with him over a self-proclaimed, troublesome republic in a region on the fringes of his country”.⁵

4 Taras Kuzio, 'International Reaction to the Chechen Crisis', *Central Asian Survey*, Vol. 15, Issue 1, 1996, pp. 99-100.

5 Id. p. 97.

The EU's decision not to impose sanctions did not mean that its disagreement over the first Chechen war did not trigger any common action. In fact, the EU decided to postpone the ratification of the Partnership and Cooperation Agreement that had been signed in June 1994. Later, in May 1995, the Commission considered that progress in Chechnya made it possible to sign an interim agreement with Russia in an effort to normalize relations between the two sides. After the hostilities ended between Russia and Chechnya in May 1997, the EU decided to move forward with the Partnership and Cooperation Agreement which was enacted in December 1997.

In the second Chechen war, the EU faced yet again the dilemma whether to impose sanctions against Russia. In principle, it was argued that sanctions could backfire, and the US was not willing to apply sanctions against Russia either. As a diplomatic response, Germany considered the suspension of Russian G8 membership, but that move was not supported by like-minded states. Instead, a decision was made in the December 1999 Helsinki European Council summit to suspend some provisions of the Partnership and Cooperation Agreement and to restrict the Technical Assistance to the Commonwealth of Independent States to selected areas, such as human rights, rule of law or civil society. While EU Member States put diplomatic pressure on Russia, former French President Jacques Chirac ruled out the possibility to impose EU-wide sanctions on the ground that they would worsen the life of ordinary Russian people. The December 1999 European Council noted that “[t]he [EU] does not want Russia to isolate herself from Europe” but it must live up to its obligations to uphold the strategic partnership with the EU. It took no more than a half a year for the EU to reconsider its policies. As Forsberg and Herd argue “the EU has sacrificed a coherent and systematic advancement of its normative agenda in favor of strengthening its relations with the Russian Federation”.⁶

In the Georgian war, while some Member States, including the UK, Sweden, Poland or the Baltic states, were in favor of adopting certain sanctions against Russia, France and Germany emphasized the role of diplomacy and especially open dialogue and good relations with Russia. For instance, former French President Nicolas Sarkozy emphasized there should be no dividing line between Europe and Russia. Sarkozy also warned against a new Cold War.⁷ Former German foreign minister Frank-Walter Steinmeier and Chancellor Angela Merkel argued against a blame game and making ‘final judgments’ in the conflict. The EU's main response was the postponement of the scheduled negotiations on a reinforced Partnership and Cooperation Agreement. The EU also decided to appoint an EU Special Representative to Georgia, but the European Council emphasized the

“independence between the [EU] and Russia, and the global problems they are facing [and therefore], there is no desirable alternative to a strong relationship,

6 Anna-Sophie Maass, *EU-Russia Relations, 1999-2015: From Courtship to Confrontation*, Routledge, Abingdon, 2016, pp. 28-57.

7 Nicolas Sarkozy, ‘The European Union and Russia in Global Governance’, *Hiver Politique Étrangère*, Vol. 73, Issue 4, 2008, p. 723.

based on cooperation, trust and dialogue, respect for the rule of law and the principles recognized by the United Nations Charter and by the OSCE.”⁸

Thus, also during the Georgian war, the EU tried to remain cautious, and its priority was seemingly to keep good overall relations with Russia.

Since 2014, however, Russia has been subject to major EU sanctions. That includes measures which were adopted in three phases after the annexation of Crimea and destabilization of Ukraine. Broadly speaking, in 2014 the following measures were adopted against Russia. The first set of measures included asset freezes and travel bans, cancellation of upcoming EU-Russia summit, exclusion of Russia from G8 and the suspension of the new Partnership and Cooperation Agreement. As a second phase, the EU added more individuals and entities to its sanctions list and it prohibited the import into the Union of goods originating in Crimea or Sevastopol. In the third phase, which came after the downing of Malaysia Airlines MH17, the EU prohibited the sale, supply or transfer of key equipment and technology for the creation, acquisition or development of infrastructure projects in transport, telecommunications and energy sectors in Crimea and Sevastopol; restricted key equipment and technology for the exploitation of oil, etc.⁹

Many observers believe that between 2014 and 2022 the EU has not really added new Russian entities or individuals to its sanctions lists. In fact, in addition to geographical sanctions regimes, in the last years the EU has also developed its so-called horizontal sanctions regimes, including a chemical weapons sanctions regime, a cyber-attack sanctions regime and a global human rights sanctions regime. One of the features of these sanctions regimes is that they do not specifically target a certain state (e.g. Russia) but instead they target individuals and entities irrespective of their geographical locations. The Council listed Russian individuals and entities under all these horizontal sanctions regimes.¹⁰

3. Major EU Sanctions against Russia in 2022

Despite the requirement of unanimity, since February 2022 the EU has been quite successful in adopting several measures against Russia. The EU has so far adopted ten packages of restrictive measures that include targeted but very comprehensive measures. These sanctions are almost unprecedented in the sense that the EU has introduced these measures against the tenth largest economy in the world and has targeted several Russian individuals, entities and sectors. These measures also

8 See at <https://data.consilium.europa.eu/doc/document/ST%2012594%202008%20INIT/EN/pdf>.

9 This is just a brief overview of the 2014 sanctions regime. For more information on the 2014 sanctions regime see Viktor Szép, ‘New Intergovernmentalism Meets EU Sanctions Policy: The European Council Orchestrates the Restrictive Measures Imposed against Russia’, *Journal of European Integration*, Vol. 42, Issue 6, 2020, p. 855.

10 Clara Portela, ‘Horizontal Sanctions Regimes: Targeted Sanctions Reconfigured?’, in Charlotte Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions*, Edward Elgar, Cheltenham, 2021; www.ceps.eu/the-spread-of-horizontal-sanctions/.

cover certain sacrosanct elements of EU-Russia cooperation, including energy and finance. Indeed, before 2022, targeting energy imports was a no-go for the Member States as they believed that the use of Russian energy resources was a pre-condition for the effective functioning of EU markets. The exclusion of Russian financial institutions from SWIFT was also rejected back in 2014 on the grounds that such a move would jeopardize mutual economic and commercial interests. All these areas are now under EU sanctions and it is hard to see at the moment how they could be reversed – even though all EU sanctions regimes need periodic review.

As a first group of measures, EU sanctions target entities and individuals for supporting, financing, implementing, or benefitting from policies and measures that undermine Ukraine's territorial integrity, sovereignty, and independence.¹¹ Individual restrictions include asset freezes and travel bans. Asset freezing prohibits access to funds directly and indirectly for sanctioned persons and entities, while travel bans prohibit the entrance or transit through the EU's territory of listed individuals via land, sea, or air. As a result, these individuals' funds cannot be utilized to support the Russian regime nor can the listed individuals find shelter in the EU.¹² The EU has so far sanctioned about 1500 individuals and more than 200 entities. This total sum includes earlier individual sanctions introduced after Russia's annexation of Crimea in 2014.¹³ Among the specific list of sanctioned individuals is Russia's President, Vladimir Putin; Russia's Minister of Foreign Affairs, Sergey Lavrov; members of Russia's parliament, the State Duma and Federation Council; local government and high-ranking military officials. More broadly, the list targets individuals responsible for engaging in activities that contribute to Russia's unjustified military aggression in Ukraine, such as those involved in conducting missile strikes against civilians. Entities such as banks and financial institutions, political parties, and paramilitary groups are also targeted by these restrictive measures.¹⁴

The EU has also introduced a wide range of import and export restrictions. Since February 2022, the European Commission estimated that the EU banned EUR 43.9 billion in exported goods to Russia and EUR 91.2 billion in imported goods.¹⁵ The list of sanctioned exports includes crucial technology used for oil refining, technological equipment and services employed in the energy industry, as

11 See at www.consilium.europa.eu/en/press/press-releases/2022/02/23/russian-recognition-of-the-non-government-controlled-areas-of-the-donetsk-and-luhansk-oblasts-of-ukraine-as-independent-entities-eu-adopts-package-of-sanctions/.

12 See at www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/.

13 See at www.consilium.europa.eu/en/press/press-releases/2022/02/23/russian-recognition-of-the-non-government-controlled-areas-of-the-donetsk-and-luhansk-oblasts-of-ukraine-as-independent-entities-eu-adopts-package-of-sanctions/.

14 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.

15 See at www.consilium.europa.eu/en/press/press-releases/2022/02/23/russian-recognition-of-the-non-government-controlled-areas-of-the-donetsk-and-luhansk-oblasts-of-ukraine-as-independent-entities-eu-adopts-package-of-sanctions/.

well as machinery utilized in the aviation industry.¹⁶ As to the list of prohibited imports from the Russian Federation to the EU, most notably, since December 2022, seaborne crude oil has been sanctioned and, from February 2023, refined petroleum products have also been banned.¹⁷ As the great majority of Russian oil delivered to the EU is transported by sea, EU restrictions prohibit 90% of Russian oil imports to Europe, thereby significantly lowering Russia's trade profits.¹⁸ Moreover, in collaboration with the Price Cap Coalition, the EU set oil price caps to limit Russia's revenue from its oil sector.¹⁹ Furthermore, as Russia's economy relies heavily on services imported from the EU, the Union has prohibited the provision of certain business-related services to the government and legal persons established in Russia, including their subsidiaries in the EU. Such prohibitions, among others, encompass accounting and auditing services as well as architecture and engineering services to facilitate pressure on Russia's industrial capacity.²⁰

The EU has also introduced sanctions on transport, particularly in the road transport field, the aviation sector, and the maritime transport field. Road transport operators are prohibited from entering the EU, including for goods in transit, in order to limit Russia's industry capacity to obtain crucial goods and also to disrupt road trade. Additionally, Russian carriers are prohibited from flying over EU airspace or landing at its airports. Since 75% of Russia's current commercial aviation fleet has been produced in the EU, the US, or Canada, the prohibition of exporting technological equipment will ultimately result in the grounding of the Russian civil aviation fleet.²¹ Moreover, EU ports are closed to Russia's merchant fleet, which consists of more than 2,800 vessels, and to vessels circumventing these sanctions by changing their flag or state registration.²²

Major sanctions include financial restrictions as well. In particular, the EU excluded 10 Russian banks from SWIFT: these banks may not make or receive international payments using SWIFT, which connects 11,000 entities worldwide through its information exchange framework. As a result, banks can neither obtain foreign currency nor transfer assets abroad, weakening substantially their capacity to operate globally.²³ Moreover, the EU has prohibited all transactions with the

16 Council Decision (CFSP) No. 2022/327 of 25 February 2022 amending Decision 204/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

17 Council Regulation (EU) No. 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

18 See at www.consilium.europa.eu/en/press/press-releases/2022/02/23/russian-recognition-of-the-non-government-controlled-areas-of-the-donetsk-and-luhansk-oblasts-of-ukraine-as-independent-entities-eu-adopts-package-of-sanctions/.

19 See at www.consilium.europa.eu/en/press/press-releases/2023/02/04/eu-agrees-on-level-of-price-caps-for-russian-petroleum-products/.

20 Council Regulation (EU) No. 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

21 See at www.consilium.europa.eu/en/press/press-releases/2022/02/23/russian-recognition-of-the-non-government-controlled-areas-of-the-donetsk-and-luhansk-oblasts-of-ukraine-as-independent-entities-eu-adopts-package-of-sanctions/.

22 See at www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/.

23 Council Regulation (EU) No. 2022/345 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

Russian National Central Bank. Due to this asset freeze, the central bank may not access its reserves stored in the Union's central banks or private institutions, which have been estimated to be €579 billion in February 2022. Ultimately, this means Russia cannot circumvent the effects of other sanctions by providing funds from its foreign assets to its banks.²⁴

All these measures show the increased willingness of EU Member States to let go nearly all the old taboos of EU-Russia relations. Perhaps most surprisingly, the EU took also the decision, through the use of restrictive measures, to seriously limit energy imports from Russia. This is far from ideal, partly because during the negotiations on oil sanctions certain exceptions had to be given to some Member States. Those concessions have contributed to a more fragmented EU sanctions regime towards Russia. But at the same time the same exceptions have made it possible to adopt a 'common' sanctions policy against Russia while making sure that the reservations of some Member States are also taken into consideration. Through the use of sanctions, the EU has fundamentally changed its relations with Russia. Although the maintenance of sanctions is subject to periodic review, it is hard to see how sanctions could be lifted in the near future.

4. Banning Russian Media Outlets: T-125/22 RT France versus Council

Another restriction in relation to Russia was the EU's decision to suspend the broadcasting activities and licenses of certain Russian media outlets, including Russia Today (RT).²⁵ Given that media freedom is one of the essential components of modern democratic societies, the EU's action to ban RT has obviously raised delicate questions over the balance between the protection of fundamental rights and the EU institutions' broad margin of discretion in the field of the CFSP.²⁶

As a result of an action for annulment by RT France,²⁷ the EU General Court examined the balance between the protection of fundamental rights and the Council's broad margin of discretion in CFSP matters. The exceptional interest in this case was demonstrated among others by the fact that the proceedings moved ahead at an almost record speed under the expedited procedure: the application was filed on 8 March 2022, the hearing took place on 10 June 2022 and the

24 See at www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/.

25 See Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; see also Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

26 For a more extended discussion on the case law, see Viktor Szép & Ramses Wessel, 'Balancing Restrictive Measures and Media Freedom: RT France v Council', *Common Market Law Review*, 2023, forthcoming. See also Luigi Lonardo, *EU Common Foreign and Security Policy After Lisbon*, Springer, Cham, 2022; Luigi Lonardo, 'Censorship after the war in Ukraine: how to square EU interests with EU values. Case T-125/22 RT France v Council', forthcoming; Sara Poli, 'Judicial Challenges to EU Restrictive Measures by Individual State Organs, Emanations of Non-EU Member States and Third Countries: the Limits to the Council's Discretion', in Giovanna Adinolfi et al. (eds.), *Sanctions by and Against International Organizations*, Edward Elgar, Cheltenham, forthcoming.

27 Please note that there is an appeal case before the ECJ (C-620/22 P, *RT France v Council*).

judgment was issued on 27 July 2022. The applicant relied on four pleas of law, alleging the violation of, respectively, (i) the rights of defense, (ii) the freedom of expression and information, (iii) the freedom to conduct a business, and (iv) the principle of non-discrimination. Additionally, RT France expressed doubt regarding the Council's competence to adopt the contested acts.²⁸

This article will primarily give an overview of the General Court's judgment concerning its points on the freedom of expression and information and the Council's competence to adopt such measures. The General Court first addressed the Council's competence in relation to the suspension of the broadcasting activities of certain media outlets through restrictive measures. The General Court held that the Council has considerable freedom in defining the objective of the restrictive measures. The contested act is based on Article 29 TEU, the scope of which should be interpreted broadly. Under that article, the Council can go beyond simple (foreign and security policy) declarations and can adopt measures affecting the legal status of individuals.²⁹ This broad interpretation is confirmed by the goals and objectives of the EU's external action in Articles 3(5) and 21 TEU as well as the specific CFSP provisions under Articles 23 and 24 TEU. Thus, as a response to the serious threat to peace at the EU's borders and the breach of international law, the Council could not be held liable for considering that appropriate measures also included temporarily prohibiting broadcasting by certain media outlets funded by Russia.

As propaganda and disinformation campaigns undermine the pillars of democratic societies and are an integral tool of modern warfare, these restrictive measures align with the EU's objectives in Articles 3(1) and (5) TEU.³⁰ Within this context, the General Court underlined that the competence of national regulatory authorities, such as Arcom in France, to adopt sanctions against television broadcasters does not exclude the Council's competence to introduce restrictive measures.³¹ Moreover, the uniform implementation of the broadcast ban against the RT Group throughout the EU could be accomplished more effectively at the EU level as opposed to the national level.³² As a result, by adopting the contested decision, the Council exercised the competences granted to the EU by the EU Treaties on the basis of CFSP provisions.³³

Turning to the question of freedom of expression and information, the General Court underlined that this freedom is one of the most important foundations of democratic societies. However, the General Court also recognized that the freedom of expression is not unlimited. In line with the case law of the ECtHR, it identified four conditions under which the limitation of freedom of expression and information is acceptable. These include: (i) the limitation on the freedom of expression must be laid down by law (the existence of legal basis); (ii) the restriction must respect the essential content of freedom of expression; (iii) the restriction

28 Judgment of 27 July 2022, *Case T-125/22, RT France v Council*, ECLI:EU:T:2022:483, para. 45.

29 *Id.* para. 51.

30 *Id.* para. 56.

31 *Id.* para. 57.

32 *Id.* para. 63.

33 *Id.* para. 57.

must meet an objective of general interest recognized by the Union as such; *(iv)* the restriction must be proportionate.³⁴

The General Court proceeded to examine each of the four conditions. *(i)* First, the General Court held that the condition of the legality of the restrictions on freedom of expression was satisfied.³⁵ In view of the significant role played by audio-visual media in modern society, the General Court found that it was foreseeable that Articles 29 TEU and 215 TFEU could serve as legal bases to adopt restrictive measures infringing or limiting the freedom of expression.³⁶ *(ii)* Next, the General Court examined whether the restriction respects the essential content of freedom of expression and found that the nature and extent of the temporary prohibition comply with the essential content of the freedom of expression and do not call that freedom into question. Due to the temporary and reversible nature of the prohibition, the General Court found the restrictions complied with the essence of freedom.³⁷ Furthermore, the General Court noted that the contested acts only prohibited RT France from broadcasting within the EU, but did not prevent its engagement in other activities, such as research and interview, or from continuing to broadcast outside the EU, including in French-speaking states.³⁸ *(iii)* In the third place, the General Court assessed the condition relating to the pursuit of an objective of general interest. By adopting the restrictive measures in question, the Council pursued a twofold objective.³⁹ First, the measures aimed to protect the EU's public order and security which was threatened by the systematic propaganda campaign carried out by Russia through its media outlets. The adoption of restrictive measures against media organizations spreading such propaganda activities was in line with CFSP objectives and in particular with Article 21(2)(a) TEU that provides for the protection of EU's values, fundamental interests, security, independence and integrity.⁴⁰ Secondly, the restrictive measures had the objective of exerting pressure on the Russian authorities to end its military aggression in Ukraine.⁴¹ In this sense, restrictive measures are in line with Article 21(2)(c) TEU that provides for the preservation of peace, the prevention of conflicts and the strengthening of international security in accordance with the purposes and principles of the UN Charter.⁴² Therefore, the third condition was also satisfied.⁴³ *(iv)* Lastly, in assessing the proportionality of the restrictive measures, the General Court examined the evidence produced by the Council.⁴⁴ The General Court found the body of evidence to be sufficiently concrete, precise, and consistent in demonstrating that RT France was under the permanent control,

34 Id. para. 145.

35 Id. para. 152.

36 Id. para. 151.

37 Id. para. 154.

38 Id. para. 156.

39 Id. para. 160.

40 Id. para. 161.

41 Id. para. 164.

42 Id. para. 163.

43 Id. para. 167.

44 Id. para. 169.

either directly or indirectly, of the Russian Federation.⁴⁵ The General Court also held that RT France actively supported, before the imposition of EU restrictive measures, Russia's de-stabilizing and aggressive policies against Ukraine and, on the other hand, the applicant disseminated, among others, information justifying military aggression against Ukraine which posed significant and direct threat to the public order and security of the EU.⁴⁶

In light of all of the foregoing (and in light of the other parts of the judgment), the action was dismissed in its entirety.⁴⁷ Certainly, this case was yet another episode in the case law where EU Courts had to strike a balance between the protection of fundamental rights and the promotion of Union security interests. That is also precedent that the notion of 'economic and financial' measures under Article 215 TFEU can be stretched also to ban media broadcasts. This means that the scope of that article has been further extended to cover such measures if certain strict conditions are met.

5. The Need to Improve Decision-Making Procedures: from Unanimity to Qualified Majority Voting?

Apart from developing case law in the field of EU restrictive measures, sanctions against Russia have also accelerated discussions on changing CFSP decision-making procedures. In fact, the EU's 2022 sanctions against Russia are further catalyzers in relation to the discussion to shift from unanimity to qualified majority voting in CFSP matters. The challenge is that EU sanctions cannot be disentangled from the EU's CFSP framework. In fact, the clear link with the CFSP framework largely determines the decision-making procedure on sanctions. EU restrictive measures – even if they often exhibit economic features – pursue wider foreign and security policy objectives, including the promotion of peace and stability or the protection of human rights and democracy. The CFSP is “subject to special rules and procedures” which includes the requirement of unanimity.⁴⁸ Indeed, the adoption of EU sanctions regimes requires unanimity in the Council. At the same time, given that the use of EU sanctions creates nexuses with other EU competences, including trade policy, a CFSP decision on sanctions is often insufficient for the EU to adopt measures with economic or financial repercussions.⁴⁹

In light of the division of competences in the EU and given that sanctions 'cut across' various areas of EU external action, the EU adopts its restrictive measures through the so-called two-step procedure. First, it needs to adopt a CFSP Council decision on the basis of Article 29 TEU. That decision must be adopted by unanimity in the Council. With that EU act, the EU can adopt travel bans and arms embargoes. If, however, that CFSP decision provides for the interruption or reduction of

45 Id. para. 174.

46 Id. para. 188.

47 Id. para. 242.

48 Article 24(1) TEU.

49 Viktor Szép & Ramses Wessel, *The Current Legal Basis and Governance Structure of the EU's External Action*, ENGAGE, 2022.

economic and financial relations, as a second step, it must also adopt a Council regulation on the basis of Article 215 TFEU. That Regulation is adopted by qualified majority voting in the Council.⁵⁰ In practice, both the Council decision and regulation are adopted by unanimity at the same time. In some cases, existing sanctions regimes are amended by qualified majority voting.⁵¹ However, the fact remains that EU sanctions regimes are established by unanimity.

In the last couple of years, therefore, some EU institutions and Member States took the view that this requirement is becoming obsolete and argued that qualified majority voting should be used instead. There are two main drivers behind the increasing number of calls to shift from unanimity to qualified majority voting in CFSP and sanctions matters. The internal reason is that citizens urged the EU institutions within the framework of the Conference on the Future of Europe to use qualified majority voting in all areas of EU policymaking, including foreign and security policy. That initiative was particularly taken up by the European Parliament which even initiated a Treaty change to fulfill that objective. The external driver is clearly linked to new geopolitical challenges, including Russia's war in Ukraine where certain sanctions were actually vetoed by some Member States, preventing the Union from taking actions.⁵²

No wonder that between July and December 2022 the Czech Council Presidency organized several meetings of EU affairs ministers to discuss the possibility to shift from unanimity to qualified majority voting in CFSP matters. While some Member States remain reluctant to accept such a move, including Hungary or Poland, it was reported that no Member State ruled out completely a compromise on the issue.⁵³ Such compromise may include a progress in enlargement policy – that is favored among others by Hungary – in exchange for a partial extension of qualified majority voting in CFSP matters. In other words, a 'package deal' may help Member States incur mutual advantages in different fields of EU policymaking.

In fact, EU Treaties already offer the possibility to shift from unanimity to qualified majority voting – without the need to amend primary EU law. In particular, the special CFSP *passerelle* clause under Article 31(3) TEU provides that the European Council may unanimously expand QMV possibilities. One could argue that this is simply not possible because the requirement of unanimity has been one of the hallmarks of EU foreign and security policy. However, given that internal and external pressures are mounting, it cannot be ruled out that EU Member States will find a compromise on this issue. In May 2023, for example, a joint statement was issued by nine EU foreign ministers on the launch of the 'Group of Friends on Qualified Majority Voting' in the EU CFSP.⁵⁴ Almost at the same time, German

50 Viktor Szép, 'Foreign Policy Without Unilateral Alternatives? EU Member State Interests and the Imposition of Economic Sanctions', in Marton Varju (ed.), *Between Compliance and Particularism*, Springer International Publishing, Cham, 2019, pp. 321-338.

51 Ramses Wessel *et al.*, 'The Future of EU Foreign, Security and Defence Policy: Assessing Legal Options for Improvement', *European Law Journal*, Vol. 26, Issue 5-6, 2021, p. 371.

52 Ramses Wessel & Viktor Szép, *The Implementation of Article 31 of the Treaty on European Union and the Use of Qualified Majority Voting*, Think Tank European Parliament, Brussels, 2022.

53 *Id.*

54 *See* at www.auswaertiges-amt.de/en/newsroom/news/-/2595304.

Chancellor Olaf Scholz called for qualified majority voting in CFSP matters⁵⁵ which is the last major call in a longer series of requests towards the (European) Council to use more efficient decision-making procedures.⁵⁶ These pushes come on the top of many other calls in the past to use qualified majority voting in CFSP matters. It remains to be seen whether Member States will be able to find a compromise solution on this issue.

6. Enforcement of EU Sanctions

6.1. Criminalizing Sanctions Violations?

The 2022 sanctions against Russia have also demonstrated that enforcement is increasingly important to close potential loopholes in the EU's single market. In fact, due to the Member States' varying criminal law provisions, loopholes can be exploited for among others gaining unfair economic advantages.⁵⁷ In this context, in 2022 the European Commission proposed a set of measures to strengthen the functioning of EU sanctions.⁵⁸ By aiming to attain Union-level coordination, the Commission's proposals mark a milestone in the harmonization of EU sanctions enforcement.⁵⁹

First, the proposals of the Commission included measures to harmonize the criminal laws of the Member States in relation to the violation or circumvention of restrictive measures. In fact, Article 83(1) TFEU does not include restrictive measures in the various categories of serious and cross-border crime for which it would enable harmonization of offence definitions and sanctions. And since the legal bases of Articles 29 TEU and Article 215 TFEU do not provide for EU-level approximation of restrictive measures violations, Member States are currently required to adopt appropriate national measures in response to infringements of EU restrictive measures.⁶⁰ As a matter of fact, in some Member States the violation of restrictive measures is an administrative and criminal offense, whereas, in others, it is solely a criminal offense or only leads to administrative fines. Consequently, negative consequences of sanctions violations differ significantly in terms of maximum length of imprisonment and fines across EU Member States.⁶¹

In the absence of uniform law enforcement, such discrepancies lead to divergent levels of EU sanctions enforcement in the Member States and thus pose

55 See at www.europarl.europa.eu/news/en/press-room/20230505IPR85002/olaf-scholz-we-need-a-geopolitical-larger-reformed-eu-open-to-the-future.

56 Wessel & Szép 2022, pp. 65-67.

57 Francesco Giumelli *et al.*, 'United in Diversity? A Study on the Implementation of Sanctions in the European Union', *Politics and Governance*, Vol. 10, Issue 1, 2022, p. 36.

58 Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offenses and penalties for the violation of union restrictive measures, COM/2022/684 final.

59 See at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3264.

60 Although Article 29 TEU and Article 215 TFEU constitute legal bases for the Council to introduce the necessary measures for adopting Union restrictive measures, the approximation of criminal definitions and sanctions cannot take place through the non-legislative legal basis of the aforementioned articles; See Szép and Wessel 2022, p. 23.

61 See at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3264.

an increased risk of 'forum shopping,' whereby actors operate in States with the lowest possible penalty.⁶² Therefore, the Commission proposed to add the violation of restrictive measures to the list of offences in Article 83(1) TFEU. That was the first step to introduce a legal basis for future criminal law harmonization. That proposal was accepted by Council Decision 2022/2332 and the violation of Union restrictive measures has become an area of crime within the meaning of Article 83(1), second subparagraph, TFEU

After the Council agreed to identify the violation of EU sanctions as an area of crime that meets the criteria laid down in Article 83(1) TFEU, the Commission also submitted a proposal for a Directive on the definition of criminal offences and penalties for the violation of EU sanctions. In that, the Commission identified four objectives: (i) approximate definitions of criminal offences related to the violation of Union restrictive measures; (ii) ensure effective, dissuasive and proportionate penalty types and levels for criminal offences related to the violation of EU restrictive measures; (iii) foster cross-border investigation and prosecution; and (iv) improve the operational effectiveness of national enforcement chains to foster investigations, prosecutions and sanctioning.⁶³

Violation of EU restrictive measures, among other things, include making funds or economic resources available to a natural or legal person subject to restrictive measures or circumventing an EU restrictive measure.⁶⁴ Member States would need to qualify these violations of EU restrictive measures as a criminal offense in their national domestic legislation. Under the Swedish Presidency (January-June 2023), the competent working party of the Council has already completed the first examination of the proposal. It showed that Member States strongly support the Commission's proposal and largely agree with the substance of the envisaged provisions. The Swedish Presidency has already proposed a few tentative redrafts which are under consideration in the Council.⁶⁵

6.2. Enforcement of EU Sanctions Outside EU Territories?

As a result of new EU sanctions against Russia, another potential development might be that as part of its 11th package of sanctions the EU creates its own 'extraterritorial' measures that is partly connected to the broader EU agenda to better enforce its own sanctions. Indeed, states sometimes impose extraterritorial measures to somehow 'synchronize' different sanctions jurisdictions, to close potential loopholes and to avoid circumvention. Traditionally, the US is one of the main actors that has used extraterritorial sanctions. The US has used its economic power and the strong role of US dollar in the global economy to put pressure on non-US actors to align their sanctions policies. In short, the use of US extraterritorial

62 See at https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7373.

63 Council of the European Union, 'Explanatory Memorandum: 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', *Council of the European Union*, 2022, p. 4; Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offenses and penalties for the violation of union restrictive measures, COM/2022/684 final, Recital (23), and Article 13.

64 Id. Article 3.

65 See at https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7373.

sanctions means the extension of domestic laws to non-US persons and entities. In practice, this means that even non-US persons and entities can be held liable for breaching US sanctions. A famous example included a French banking giant that was hit with an almost \$9 billion fine for violating extraterritorial US laws that prohibited private banks anywhere in the world from using US dollars to transact with certain countries under US sanctions.⁶⁶

Traditionally, the EU's position has been that its sanctions regimes do not apply extraterritorially. But in fact, some aspects of even traditional EU sanctions have an extra-territorial reach. That includes examples where EU operators are prohibited from making funds or economic resources available to sanctioned individuals and entities. It may also be prohibited for EU operators to participate in activities the object or effect of which is to circumvent EU sanctions. This new trend already shows a new age of EU assertiveness in EU sanctions policy.⁶⁷

In the spring of 2023, several non-official Commission proposals have been floated in relation to a new legal mechanism to impose certain economic penalties on third countries if they do not comply with EU sanctions. Indeed, according to some of these proposals the main objective would be to prevent third countries from helping Russia acquiring banned goods. This shows the growing frustration in Brussels that EU sanctions are simply circumvented by unscrupulous states and businesses. The EU could target among others Central Asian countries, including Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.⁶⁸

The adoption of such measures will be subject to the requirement of unanimity. Media has already reported that within the context of Russia's war in Ukraine not all Member States agree with targeting China. In particular, Germany voiced its concern about the 'extraterritorial' nature of EU sanctions and said that the EU needs to strike a balance between enforcing sanctions and upsetting international diplomatic and trade ties.

If accepted, this would be a quite important change in the EU's position in relation to the extraterritorial reach of its sanctions. In fact, in the past decades the EU has tried to fight against US extraterritorial sanctions and even adopted its so-called Blocking Statute to mitigate the impact of such measures.⁶⁹ The Blocking Statute nullifies the effect of any foreign decisions, including court rulings, in the EU. Moreover, EU operators are legally entitled to seek compensation for their losses. The Blocking Statute is currently being updated to be able to better respond to recent events.

The new EU 'extraterritorial' sanctions are prepared at the time of writing this article. We shall wait a bit to see how the EU designs these measures and to what extent they will have extraterritorial effects.

66 See at www.washingtonpost.com/news/monkey-cage/wp/2014/06/30/an-8-9-billion-fine-shows-that-foreign-banks-evade-u-s-laws-at-their-peril/.

67 Jan Dunin-Wasowicz, *The Long Arm of EU Sanctions*, EU Law Live, 2022.

68 See at www.politico.eu/article/russia-sanctions-circumvention-eu-mulls-sanctioning-third-countries/.

69 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.

7. Conclusions

Russia's 2022 war in Ukraine has caused, or at least accelerated, policy ideas to create and design a better functioning EU sanctions policy. Some of these issues have already been on the EU's agenda for quite some years. For instance, for years now the European Commission and the European Parliament have been calling for a shift from unanimity to qualified majority voting in CFSP matters. Since the war started in Ukraine, the debate on a more extensive use of qualified majority voting has clearly gained new momentum: more and more Member States are open to considering such a change. If accepted, it will change decades-long rules in EU foreign and security policy where unanimity has been the default voting rule.

Other questions are more recent: the enforcement of EU sanctions is a logical consequence of a Union that strives for more strategic autonomy. Strengthening the level playing field in the single market can only be guaranteed by a proper implementation of EU sanctions by all Member States. It is equally important to close loopholes so that those targeted cannot find the weak links. Part of its desire to strengthen enforcement mechanism, the EU is now willing to adopt sanctions with some extraterritorial effects. There is a sign of growing frustration amongst EU institutions that sanctions are simply circumvented, and Russia still acquires some materials that it is not supposed to in the context of coordinated sanctions. The adoption of such measures is still ongoing, but the mere willingness to design them already shows a move away from the status quo.

The war in Ukraine is a fundamental security challenge for the Union. But it is also a chance for the Union to further develop its fragmented external action. The war in Ukraine has once again made EU policymakers realize that the domain of EU restrictive measures should be developed in its many dimensions. It is not sufficient to focus on the procedural aspects of EU sanctions nor is it satisfactory to solely examine the uneven national implementation of EU restrictive measures. EU policymakers, rightly so, have focused on the many aspects of EU sanctions policy to create a more effective and functional external action. That is the only way to render EU restrictive measures more effective and functional.