

Op-Ed



Jan Dunin-Wasowicz

“The Long Arm of EU Sanctions”

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Russia’s full-scale invasion of Ukraine has forced the European Union (EU) into a new era of sanctions policy and implementation. With eight rounds of measures as of 24 October 2022, the EU has ratcheted up its response incrementally yet significantly. While since February 2022 much attention has understandably been devoted to the material scope of the sanctions, a deeper and less apparent movement has progressively expanded their geographic reach. Have EU sanctions entered an age of extra-territoriality? Is, as some have suggested, the EU at the dawn of imposing a form of ‘secondary sanctions’?

The Dynamic Foundations of EU Jurisdiction

Officials responsible for formulating EU sanctions law and policy have traditionally been loath to adopt extensive or assertive approaches to jurisdiction. Recent European Commission (Commission) guidance to EU operators clearly asserts that EU sanctions do not apply extra-territorially. However, that stated reluctance should not obscure the fact that EU sanctions law does not take a narrow view of the potential application of sanctions. Rather, they have never been deployed to their full potential. Although EU sanctions generally require either that some

conduct occur in the EU or that an EU entity or person be involved in it, EU law may in practice apply well beyond these criteria. EU sanctions jurisdiction has never been static.

Strictly speaking, EU sanctions apply: (i) within the territory of the EU, including its airspace; (ii) on board any aircraft or any vessel under the jurisdiction of a Member State, (iii) to any person inside or outside the territory of the EU who is a national of a Member State; (iv) to any legal person, entity or body, inside or outside the territory of the EU which is incorporated or constituted under the law of a Member State; and (v) to any legal person, entity or body in respect of any business done in whole or in part within the EU. If one defines extra-territoriality as a regulator’s effort to regulate conduct taking place in whole or in part outside its borders but somewhat connected to the regulating body, then some aspects of traditional EU sanctions jurisdiction have an extra-territorial reach.

Approaches to EU Nexus & Scope of Application in Practice

Regardless of the definition of extra-territoriality, the application of EU sanctions increasingly requires one to consider factors or actions that

occur beyond the EU's borders. EU sanctions often, if not systematically, cover both direct and indirect relationships. For instance, EU operators are prohibited from making funds or economic resources available, directly or indirectly, to sanctioned individuals and entities. In addition, the asset freeze and the prohibition on making funds or economic resources available to those listed extend to any entity that is owned or controlled by the sanctioned person, irrespective of their location.

Provisions against circumvention may also project EU law beyond the rules' initial subject. It is prohibited for EU operators to knowingly and intentionally participate in activities the object or effect of which is to circumvent EU sanctions. The Commission [has restated](#) the application of this important principle to parent-subsidiary relationships. It noted that although ' [...] Russian subsidiaries of EU parent companies are incorporated under Russian law, not under the law of a Member State, hence they are not bound by the measures [...], 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.' In other words, because the rule requires some degree of compliance by the non-EU entity with EU law, it therefore in practice extends the scope of EU law to entities that are not initially covered.

Several trade controls prohibit EU operators from trading with non-EU third parties that themselves trade with actors or products that are targeted by EU sanctions. Conversely, these rules are

intended to regulate the conduct of these third-country actors as they would not be able to trade with EU operators unless they comply with EU law. Emblematically, the proposed oil price cap mechanism would apply to the maritime transport to third countries of Russian crude oil and other petroleum products and related services. Concerning dual-use goods and technology and the goods and technologies listed in Annexes II, VII, X, XVI, XVIII, XX, and XXIII of [Regulation 833/2014](#), it is prohibited to sell, supply, transfer or export, directly or indirectly, goods or technology, whether or not originating in the EU, to any natural or legal person, entity or body in Russia or for use in Russia. Trade controls generally also cover the direct and indirect provision of technical assistance, brokering services, financing or financial assistance and other services related to the controlled goods and technologies.

Import restrictions on certain iron and steel products generally prohibit importing these products, directly or indirectly, if they originate in Russia or have been exported from Russia. It is further prohibited to purchase, import, or transfer, directly or indirectly, certain coal and other solid fossil fuels into the EU if they originate in Russia or are exported from Russia. Concerning the goods in Annexes XVII, XXI and XXII of [Regulation 833/2014](#), according to the Commission, the prohibition on purchase applies irrespective of the destination of the goods. Sanctions concerning gold, iron and steel explicitly reference third countries. For instance, it is prohibited to purchase, import, or transfer, directly or indirectly, gold, as listed in Annex XXVI, if it originates in Russia and has been exported from Russia into the EU or to any third

country. These restrictions extend to processing activities in third countries that incorporate the prohibited product.

Financial sanctions likewise prohibit EU operators from directly or indirectly purchasing, selling, providing investment services for or assistance in the issuance of, or otherwise dealing with certain transferable securities and money-market instruments. The prohibitions to make or be part of certain new loans or credits likewise apply directly and indirectly. It is prohibited to sell, supply, transfer or export banknotes denominated in any official currency of a Member State to any natural or legal person, entity, or body in Russia, including the government and the Central Bank of Russia, or for use in Russia. The transaction ban (Article 5aa of [Regulation 833/2014](#)) also applies indirectly to entities owned for more than 50% or to a legal person, entity or body acting on behalf or at the direction of an entity in scope of the prohibition. The scope of the prohibition on accepting certain deposits from Russian nationals or natural persons residing in Russia, legal persons, entities or bodies established in Russia extends to legal persons, entities or bodies established in third countries and majority-owned by Russian nationals or natural persons residing in Russia.

The Global Reach of Targeted Sanctions

A second trend has developed in parallel to these changes. Thematic ‘horizontal’ EU sanctions programmes (such as regarding terrorism, the proliferation of chemical weapons, or cyber-attacks) foresee the imposition of sanctions without regard to geography. Perhaps most illustrative of the EU’s readiness to impose

sanctions on actors irrespective of their location or degree of connection to the EU to advance vital policy goals is the [Global Human Rights Sanctions Regime](#) (GHRSR). Since December 2020, the GHRSR has allowed the EU to impose sanctions on individuals and entities responsible for a very broad range of serious human rights violations. A proposal is advancing to add to the GHRSR regime the possibility to impose individual sanctions related to corruption.

Calls on third parties to align with EU sanctions against Russia have been unequivocal. For instance, in its 24-25 March 2022 conclusions, the European Council asked ‘[...] all countries to align with those sanctions. Any attempt to circumvent sanctions or to aid Russia by other means must be stopped.’ In its 20-21 October 2022 conclusions, it further emphasised ‘the importance of ensuring effective implementation, preventing circumvention and its facilitation, and calls on all countries to align with EU sanctions. Efforts in this regard should be stepped up.’ The legal basis for imposing individual sanctions under the Russia sanctions programme is even more telling. Article 3(1) of [Regulation 269/2014](#) gives the Council of the European Union (the Council) considerable leeway to impose sanctions. It may impose sanctions on, among other grounds:

- legal persons, entities or bodies supporting, materially or financially, actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine;
- natural or legal persons, entities or bodies supporting, materially or financially, or benefitting from the Government of the

Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine;

- leading businesspersons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine; or
- natural or legal persons, entities or bodies associated with them.

Thus, for instance, a buyer of a commodity in an economic sector providing a substantial source of revenue to Russia could be sanctioned by the EU, irrespective of the buyer's location or connection to the EU. As another example, on [21 July 2022](#), the EU sanctioned a Syrian private security company for its recruitment, on behalf of the Wagner Group (sanctioned by the EU under the GHRSR in [December 2021](#)), of mercenaries sent to Ukraine. On [20 October 2022](#), the EU sanctioned several Iranian individuals and one entity under [Regulation 269/2014](#) for their role in the development and delivery of Unmanned Aerial Vehicles to Russia for use in Ukraine.

In addition to its continued efforts to increase third-country alignment with EU sanctions (which extend the scope of their application), the EU is preventing third parties from engaging in or facilitating certain trades. Having added a new criterion to [Regulation 269/2014](#) in October 2022 for that reason, the EU may impose sanctions on any natural or legal persons, entities or bodies (or associated persons, entities or bodies) for “facilitating infringements of the prohibition

against circumvention [...]’ of several regulations, including of Regulation 833/2014.

At first glance, the target of the sanctions would have to have some EU nexus to facilitate circumvention (if for instance a third party buys sanctioned goods in the EU, takes them to a third country and then exports them to Russia or if an EU national is involved). At the same time, the target may have no connection to the EU but be involved in an activity the object or effect of which runs afoul of EU sanctions. This subjective assessment coupled with an intent to deter or punish third-party actors from supporting the target country or target entities of EU sanctions is somewhat reminiscent of secondary sanctions policy.

Time will tell whether and how these provisions will be used. Future designations on these bases would still require a unanimous agreement in the Council. Even if one were tempted to consider them as introducing ‘secondary’ sanctions by analogy to US law, the comparison seems limited. These measures are adopted in response to breaches of peremptory norms of international law and seek to bring Russia back into compliance with international law. In some respects they are unilateral actions with extra-territorial effect adopted within a multilateral coalition.

Conclusion: Towards A Non-Binary View

The long arm of EU sanctions should not be underestimated. It is driven by a more expansive approach to principles of jurisdiction and a clear will to exercise influence on the global stage. These trends herald what appears already to be a new age of EU assertiveness in the

sanctions space. The principle is that EU sanctions require an EU nexus, though sometimes and perhaps increasingly a tenuous one. The exception is that the EU can impose certain sanctions on third parties for their actions vis-à-vis Russia or serious human rights abuses, among other thematic sanctions programmes, even in the absence of any connection to the EU.

There is value for both policy makers and practitioners to be clear-eyed about this evolution. Rather than discussing whether the EU has both ‘primary’ and ‘secondary sanctions’, it may be worth discussing whether categorically stating that EU sanctions ‘do not apply extra-territorially’ is still a fair reflection of their intended and actual reach. As with many topics of EU law, private operators are at the forefront of these changes. It is paramount that appropriate guidance on expectations be given to them, and it would be even better if they were able to feed the policy cycle with their experience in these tumultuous times.

Jan Dunin-Wasowicz is Counsel in an international law firm in Paris where he focuses his practice on EU sanctions and trade controls, transnational investigations, and compliance. He is admitted to the Paris, New York & District of Columbia bars. Jan Dunin-Wasowicz is an adjunct lecturer at Sciences Po Law School where he has taught economic sanctions and anti-corruption law.



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