



INSIGHT

THE RUSSIAN WAR AGAINST UKRAINE AND THE LAW OF THE EUROPEAN UNION

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SANCTIONS AND THE GEOPOLITICAL COMMISSION: THE WAR OVER UKRAINE AND THE TRANSFORMATION OF EU GOVERNANCE

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ABSTRACT: As a result of the invasion of Ukraine, the Commission has been increasing its weight throughout the EU sanctions process. This transformation is visible in the formation, implementation and communication of sanctions. Formulation has become less member state-driven, implementation has undergone some steps towards centralisation, and communication has becoming more aggressive. An enhanced role for the Commission may be advantageous for sanctions governance; however, the exceptionally fast pace at which it is unfolding is susceptible of undermining regular scrutiny by economic operators, public opinion, and, most acutely, parliamentary bodies.

KEYWORDS: Ukraine war – European Commission – CFSP – HR/VP – sanctions implementation – sanctions communication.

I. INTRODUCTION: THE WAR IN UKRAINE AND SANCTIONS

Most analyses on the war unleashed in Ukraine by Russia's invasion of February 2022 have focused on military strategy, the ensuing refugee crisis, the international food emergency provoked by the blockage in grain supply, and even Moscow's nuclear sabre-rattling.¹ However, the war is also having profound implications for the European Union (EU) that are receiving less attention, despite their potentially long-term permanence. The transformation that is underway in EU governance was not set in motion by the aggression on Ukraine; rather, the war accentuated and accelerated trends that were already nascent. The reaction to the crisis has reinforced their impulse and rationale sufficiently to diminish

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¹ C Portela, 'The EU and the Transformed Nuclear Context since the War in Ukraine' (May 2023) Istituto Affari Internazionali www.iai.it.



the level of scrutiny to which mass media, parliamentary bodies, and public opinion subject such policies, softening possible criticism and smoothing their process of adoption. In the wake of the invasion of Ukraine, the Commission has been able to increase its weight throughout the EU sanctions process, *i.e.* the adoption, implementation and communication of sanctions.

II. SANCTIONS FORMULATION

Sanctions formulation has become less member state-driven than it used to, with the bulk of innovation emanating directly from Commission proposals. This does not mean anything else than the Commission is doing its job, which consists in tabling proposals alongside the High Representative for Foreign Affairs and Security Policy/ Vice President of the Commission (HR/VP). The last word remains with the Council, which continues to be responsible for approving new restrictions via a unanimous vote.² Thus, formally, nothing has changed. However, two factors have enlarged Commission latitude relative to earlier practice. The UK masterminded many of the sanctions regimes that came about while it belonged to the organisation. It was the dominant sanctions power thanks to London's sizable expertise and technical support in sanctions matters coupled with a reflex to resort to sanctions absent in other foreign policy bureaucracies. One should remember that most member states had no foreign policy tradition of sanctions imposition whatsoever prior to joining the EU.³ The British withdrawal from the organisation left a leadership vacuum that allowed the Commission to step into its shoes - without stepping on anybody's toes. Instead of the decline in EU sanctions output that some had anticipated, the use of this instrument is growing.⁴ The Commission's increasing prominence was also facilitated by the Council's growing preference for economic and financial measures as key elements of its sanctions packages against Russia.⁵ As the institutional locus of expertise in these fields, the growing resort to financial and economic measures places the Commission in a privileged position to influence policy. The consolidating trend of Western sanctions orchestration at the G7 summit meetings helps: thanks to her seat at the table, Commission President Ursula von der Leyen was aware of the latest ideas on sanctions tools before the bulk of EU capitals - *i.e.* all but those of G7 members France, Germany and Italy - had even heard about them.

² L. Lonardo, *EU Common Foreign and Security Policy after Lisbon* (Springer 2023) chapter 4.

³ C Portela, 'How the EU learned to love sanctions' in M Leonard (ed), *Connectivity Wars* (European Council on Foreign Relations 2016) ecfre.eu.

⁴ K Meissner, 'How to sanction international wrongdoing? The design of EU restrictive measures', (2023) *Review of International Organisations* 61.

⁵ K Meissner and C Graziani, 'The transformation and design of EU restrictive measures against Russia', (2023) *Journal of European Integration* 377.

III. SANCTIONS IMPLEMENTATION

The most fundamental transformations are unfolding in the implementation of sanctions. For the roughly four decades it has been in existence, the EU operated a decentralised system of sanctions implementation.⁶ While the enactment of sanctions legislation was centralised in Brussels, it was left to individual member states to pass its own legislation establishing penalties for violations, and to take care of enforcement. This arrangement was justified by the principle of subsidiarity, and was long considered satisfactory despite vast discrepancies among member states in terms of implementation.⁷ This changed in late 2022, when the violation of sanctions became one of the Eurocrimes contemplated under art. 83(1) TFEU, which allows the Commission to propose a common definition of the crime, and to establish minimal penalties.⁸ Moreover, the existing system has been overhauled without discussion at the EP Committee on Civil Liberties, Justice and Home Affairs, made possible by the European Parliament's application of the urgency procedure.⁹ Equally, the act was adopted without the conduct of the normally compulsory impact assessment.¹⁰ The Economic and Social Council was not among those bodies consulted prior to the tabling of the decision on criminalisation, which it resented in an opinion.¹¹ Fostering the uniformity of sanctions implementation and enforcement throughout the EU is part of a declared agenda announced prior to the invasion of Ukraine.¹² However, the crisis has accelerated the implementation of such agenda. The transfer of this competence to the Commission has been accompanied by a number of initiatives at EU-level that reveal an unprecedented emphasis on implementation, not least the establishment of a dedicated whistleblowing tool allowing individuals to alert the Commission of possible violations without having to approach national authorities first,¹³ or the creation of a "freeze and seize" task force to explore options for the use of

⁶ C Portela, 'Implementation and enforcement', in N Helwig, J Jokela and C Portela (eds), *Sharpening EU Sanctions Policy* (Finnish Institute of International Affairs 2020).

⁷ R Drulakova and P Prikryl, 'The implementation of sanctions imposed by the European Union' (2016) *Central European Journal of International and Security Studies* 134.

⁸ Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union; European Commission, Proposal for a directive of the European Parliament and the of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures, COM(2022) 684 final, 2 December 2022.

⁹ S Poli and F Finelli, 'Context specific and structural changes in the EU restrictive measures adopted in reaction to Russia's aggression on Ukraine' (2023) *Rivista Eurojus* 19.

¹⁰ *Ibid.*

¹¹ European Economic and Social Committee, Opinion on the Criminalisation of violations of sanctions, SOC/739-EESC-2022, 22 March 2023

¹² Communication COM(2021) 32 final from the Commission of 19 January 2021, 'The European economic and financial system: fostering openness, strength and resilience'.

¹³ European Commission, *EU sanctions whistleblower tool* finance.ec.europa.eu

frozen Russian state assets in the reconstruction of Ukraine.¹⁴ Some of the new initiatives point towards an increased protagonism of the Commission. This is notable in the creation of a Special Envoy for the Implementation of EU Sanctions, a special adviser to the European Commission rather than an EU Special Representative appointed by the HR/VP, whose first incumbent is senior Commission official David O'Sullivan.¹⁵

IV. SANCTIONS COMMUNICATION

A further area that is undergoing remarkable transformation is that of communication. Paradoxically, this might have been noticed less than changes in the preceding areas. Due to sanctions' traditionally inter-pillar nature as economic and financial tools deployed for political purposes, one would expect the HRVP to be entrusted with their public communication. He emerges as the ideal figure because his post brings together the Commission's competences in economic and financial governance with the political role in foreign affairs of the Council. Having a single figure represent both institutions was the very rationale for the creation of the post in the Lisbon Treaty, which involved the HR/VP closely in sanctions decision-making. Yet, in the communication of new EU sanctions packages, it was the Commission President von der Leyen that assumed the leading role. Only after her initial announcement of the adoption of every new sanctions round, the President typically gave the floor to the HR/VP Josep Borrell, who outlined the specifics of each package. This arrangement almost reverses the traditional roles of Council and Commission in sanctions formulation, with the Council at the driving seat in setting up the sanctions regime, and the Commission following up with the technicalities and the oversight of implementation. Moreover, this order emphasises Borrell's quality as Vice-President of the Commission, subordinate to its President, to the detriment of the other segment in his job title, which represents the Council. More broadly, it evidences that competition between the EU's top positions – President of the Commission, HR/VP, and even the President of the European Council – for centrality in foreign policy has not been fully eliminated by the Lisbon reform. Furthermore, the protagonism of Commission President von der Leyen has been accentuated by an unusually aggressive discourse in the presentation of new sanctions rounds. Using unprecedented language, von der Leyen has been speaking of EU sanctions packages designed to “cripple Putin's ability to finance his war machine”,¹⁶ “further isolate Russia and drain the resources it uses to finance this barbaric war”, “hit a central sector of Russia's system” and “deprive it of billions of export

¹⁴ European Commission, Press release of 17 March 2022, ‘Enforcing sanctions against listed Russian and Belarussian oligarchs: Commission's “Freeze and Seize” Task Force steps up work with international partners’ ec.europa.eu.

¹⁵ European Commission, *Special advisers to the European Commission*, commission.europa.eu.

¹⁶ European Commission, ‘Statement by President von der Leyen on further measures to react to Russia's invasion of Ukraine’, 26 February 2022, ec.europa.eu.

revenues".¹⁷ A former minister of defence, von der Leyen heralded in her inauguration the geopolitical vocation of her Commission, and sanctions have manifestly been the tool enabling her to give full substance to this plan.¹⁸

V. CONCLUSION

None of the novelties outlined above is bad news for EU sanctions. On the contrary, most of it is good news: increased attention to a more scrupulous implementation of sanctions was long overdue,¹⁹ and the growing centrality of the Commission in the field certainly helps taking it more seriously. Moreover, there is nothing unusual about the push towards centralisation motivated by a crisis, especially when the crisis is security-driven.²⁰ The unifying effect across EU member states has enhanced willingness to support common European action, with the sanctions policy field as a prime example.²¹ This push towards centralisation, however predictable, may be going too fast for those who have to adjust to the changes, notably those small and medium enterprises that implement sanctions – and risk facing penalties if they commit mistakes – and the public bureaucracies that need to keep abreast. Perhaps more acutely overwhelmed by the complexity and depth of the transformation of EU sanctions governance are the bodies in charge of democratic scrutiny. Technically, innovations in sanctions implementation remain subject to the same level of democratic control that prevailed at the EP before the war. However, practices like the urgency procedure that obviates debate at committee level, and the omission of the impact assessment, are detrimental to democratic scrutiny. This is particularly so against the background of ongoing contingencies, which make the stringency of sanctions implementation a key element of the seriousness of the EU response, transforming it into a political imperative of incontestable quality. This circumstance becomes problematic, however, when it combines with a parliamentary body experienced in calling for sanctions imposition, tightening or lifting, but scarcely equipped to deal with the technical complexities of sanctions implementation.²² Down the line, we may realise

¹⁷ European Commission, 'Statement by President von der Leyen on the fourth package of restrictive measures against Russia', 11 March 2022, ec.europa.eu.

¹⁸ C Portela and J Kluge, 'Slow-acting tools. Evaluating EU sanctions against Russia after the invasion of Ukraine', Brief 11, EUISS: Paris, www.iss.europa.eu.

¹⁹ SF Kjeldsen and KB Olsen, 'Strict and Uniform: Improving EU Sanctions Enforcement' (29 September 2022) German Council on Foreign Relations [dgap.org](https://www.dgap.org).

²⁰ P Genschel, L Leek and J Weyns, 'War and integration. The Russian attack on Ukraine and the institutional development of the EU' (2023) *Journal of European Integration* 343.

²¹ C Håkansson, 'The Ukraine war and the emergence of the European commission as a geopolitical actor' (2024) *Journal of European Integration*, first-view version available at www.tandfonline.com

²² C Portela and KB Olsen, 'Implementation and monitoring of the EU sanctions regimes, including recommendations to reinforce the EU's capacities to implement and monitor sanctions' (Policy Department for External Relations Directorate General for External Policies of the Union 2023) www.europarl.europa.eu.

that devoting more reflection time and greater institutional capacities to democratic scrutiny would have produced better policies for sanctions implementation.