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Legal bases and instruments for sanctioning and asset recovery of transnational high-level corruption

September 19, 2023 – h. 9.30 CET – 15.30 CET

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Introduction to EU restrictive measures

Panel 1

19 September 2023

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University of Luxembourg



University of Luxembourg

Multilingual. Personalised. Connected.

Economic Sanctions: A Very Brief Introduction

Matthew Happold, Professor of Public International Law



- Economic/financial sanctions: not terms of art.
- Collective (United Nations Security Council) sanctions vs autonomous/unilateral sanctions.
- Unilateral coercive measures (UN General Assembly and Human rights Council-speak) vs restrictive measures (Article 215 TFEU).
- Comprehensive sanctions vs targeted/smart sanctions.

- **Arms embargoes**
- **Restrictions on admission** of listed persons (travel bans): targeted persons cannot enter the EU, or travel beyond their Member State of nationality if they are an EU citizen
- **Freezing of assets** belonging to listed persons or entities: all their assets in the EU are frozen and EU persons and entities cannot make any funds available to those listed
- **Economic sanctions** or restrictions concerning specific sectors of economic activity, including import or export bans on certain goods, investment bans, prohibitions on supplying certain services etc.

Powers of the United Nations Security Council to impose sanctions

Article 25: *The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*

Article 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations

Article 103: *In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*

Article 215 TFEU (Restrictive Measures)

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
3. ...

See also Article 75 TFEU (on actions to prevent and combat terrorism)

Article 21 TEU

1. *The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*
2. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. *It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.*

The judgment of the European Court of Justice in Kadi v Council and Commission

□ FACULTY OF LAW, ECONOMICS AND FINANCE



[T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include *the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.*

In this regard it must be emphasised that, in circumstances such as those of these cases, *the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.* (§§ 285-6)

With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens.

However, *any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.*
(§§ 287-8)

Critiques of the legality of autonomous (or unilateral) economic sanctions (or coercive measures)

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No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights. (Article 32, Charter of Economic Rights and Duties of States, GA res. 3281 (XXXIX) (12 December 1974))

Series of General Assembly (from 1983) and Human Rights Council (from 2007) resolutions on 'human rights and unilateral coercive measures', as well as the reports of the Special Rapporteur (mandate established in 2014) on the negative impact of unilateral coercive measures on the enjoyment of human rights

Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law (25 June 2016)

Justifying autonomous (or unilateral) sanctions under public international law

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- Some measures, such as embargos on the export of arms and materiel, are occasionally argued to be necessary to prevent the State or States imposing them from breaching their own legal obligations or being complicit in another State's illegal conduct.
- Sanctions can also be justified as retorsion rather than reprisals (countermeasures), as they breach no legal obligation owed to the target State.
- Should any such obligation exist, however, then unilateral or autonomous sanctions can only be lawful if they are countermeasures, meaning they are subjected to the stringent criteria codified in the International Law Commission's Articles on State Responsibility and its Draft Articles on the Responsibility of International Organisations.

Different approaches to the legality of autonomous (unilateral) sanctions under international law

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Views on the legality of autonomous sanctions can be seen as falling into three general categories:

1. Those that see economic sanctions as generally lawful for sovereignty-based reasons, stressing the continued relevance of the Lotus principle and States' entitlement to auto-interpret and auto-enforce their legal rights.
2. Those that see economic sanctions as generally unlawful for sovereignty-based reasons, arguing that in the light of the principles of self-determination and non-intervention they constitute illegal coercion.
3. Those privileging the existence of an international community and States' obligations *erga omnes*, breach of which can be countered by other States, including through the use of economic sanctions.

The legality of EU autonomous sanctions: some conclusions

The EU, when adopting economic sanctions usually purports to place itself in the 3rd category.

Its practice supports the view that States and international organisations can take countermeasures in response to breaches of obligations *erga omnes* even if they have not been not injured of the unlawful conduct.

Such a perspective, however, places a premium on sanctions' lawfulness as a matter of international law, and traditionally the EU has placed less emphasis on legally justifying its sanctions practice externally than it has internally.



**Who is responsible to
comply with EU sanctions?**



Who

Two main obligations:

Article 2

1. All funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I, shall be frozen.
2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I.

Council Regulation (EU) No 269/2014

Article 2

1. This Directive shall apply to the following obliged entities:

...

Anti-money laundering Directive



Who

Two main obligations:

Article 2

1. All funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I, shall be frozen.
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Council Regulation (EU) No 269/2014

Everyone?



Who

EU restrictive measures should only apply in situations where **links** exist with the EU.

Article 17

This Regulation shall apply:

- (a) within the territory of the Union, including its airspace;
- (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.

Council Regulation (EU) No 269/2014



Who

Role of economic operators and citizens



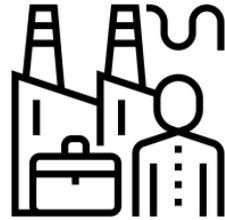
EU Best Practices

40. Anti-money laundering legislation imposes certain requirements on certain businesses and professions to verify the identity of customers and to refrain from anonymous transactions in certain circumstances. In some instances, the Regulations imposing financial restrictive measures may create additional obligations on economic operators to 'know their customers'. For that purpose, refer also to Section B Part VIII on ownership and control.
41. All persons and entities subject to the Union jurisdiction are obliged to inform the competent authorities of any information at their disposal which would facilitate the application of the financial restrictive measures. This includes details of any accounts frozen (account holder



Who

Role of economic operators and citizens



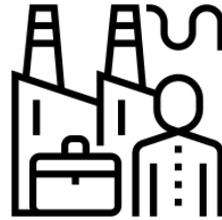
Duty to inform and cooperate with the competent authorities

- ...identify designated persons
- ...assess 'ownership and control'
- ...freeze (and make no funds available)
- ...detect and report circumvention



Who

What if they do not report?



Article 10

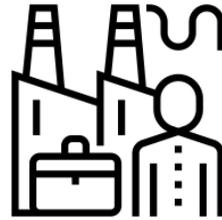
1. The freezing of funds and economic resources or the refusal to make funds or economic resources available, carried out in good faith on the basis that such action is in accordance with this Regulation, shall not give rise to liability of any kind on the part of the natural or legal person or entity or body implementing it, or its directors or employees, unless it is proved that the funds and economic resources were frozen or withheld as a result of negligence.
2. Actions by natural or legal persons, entities or bodies shall not give rise to any liability of any kind on their part if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in this Regulation.

No strict liability



Who

What if they do not report?



Case C-585/13 P

Europäisch-Iranische Handelsbank v Council

No strict liability... BUT...

- 73 The restrictive measures taken in respect of the appellant and the facts mentioned in the measures of 23 May 2011 fall within a context of growing suspicion and of increased and ever stricter controls of the financial transactions referred to in paragraphs 12 to 24 of the present judgment, a context of which the appellant could not have been unaware, given its status as a bank specialising in services and businesses relating to or in Iran.



**Who is responsible to
comply with EU sanctions?**

In war times...



Who

(Extended) Reporting duties

Art. 8

Council Regulation (EU) No 269/2014



Who

(Extended) Reporting duties

(a) supply immediately any information which would facilitate implementation of this Regulation, such as:

- information on funds and economic resources frozen in accordance with Article 2 or information held about funds and economic resources within Union territory belonging to, owned, held or controlled by natural or legal persons, entities or bodies listed in Annex I and which have not been treated as frozen by the natural and legal persons, entities and bodies obliged to do so, to the competent authority of the Member State where they are resident or located, within two weeks of acquiring this information;
- information held on funds and economic resources within Union territory belonging to, owned, held or controlled by natural or legal persons, entities or bodies listed in Annex I and which have been subject to any move, transfer, alteration, use of, access to, or dealing referred to in Article 1(e) or 1(f) in the two weeks preceding the listing of those natural or legal persons, entities or bodies in Annex I, to the competent authority of the Member State where they are resident or located, within two weeks of acquiring this information;

and,

(b) cooperate with the competent authority in any verification of such information.

Art. 8

Council Regulation (EU) No 269/2014



Who

(Extended) Reporting duties

2. Natural or legal persons, entities or bodies listed in Annex I, shall:
 - (a) report before 1 September 2022 or within 6 weeks from the date of listing in Annex I, whichever is latest, funds or economic resources within the jurisdiction of a Member State belonging to, owned, held or controlled by them, to the competent authority of the Member State where those funds or economic resources are located; and
 - (b) cooperate with the competent authority in any verification of such information.
3. Failure to comply with paragraph 2 shall be considered as participation, as referred to in paragraph 1, in activities the object or effect of which is to circumvent the measures referred to in Article 2.

Art. 9(2)

Council Regulation (EU) No 269/2014



Who

(Extended) Reporting duties

2. Natural or legal persons, entities or bodies listed in Annex I, shall:
 - (a) report before 1 September 2022 or within 6 weeks from the date of listing in Annex I, whichever is latest, funds or economic resources within the jurisdiction of a Member State belonging to, owned, held or controlled by them, to the competent authority of the Member State where those funds or economic resources are located; and
 - (b) cooperate with the competent authority in any verification of such information.
3. Failure to comply with paragraph 2 shall be considered as participation, as referred to in paragraph 1, in activities the object or effect of which is to circumvent the measures referred to in Article 2.

Everyone?

Art. 9(2)

Council Regulation (EU) No 269/2014



Who

Everyone!

EU sanctions whistleblower tool

<https://EUsanctions.integrityline.com>





Who



Welcome to the EU Sanctions Whistleblower Tool

EU sanctions support the objectives of the EU's common foreign and security policy, such as conflict resolution, the fight against terrorism, non-proliferation of weapons of mass destruction, and the promotion of democracy, rule of law and human rights. EU sanctions create legal obligations for all EU citizens, operators and any business conducted within the EU.

While EU sanctions are adopted by the Council of the EU, Member States are responsible for their enforcement, including through the application of penalties in case of violations. The European Commission monitors the implementation and enforcement of EU sanctions across Member States.

Proper implementation is essential for the effectiveness of EU sanctions. Sharing first-hand information can be a powerful tool to help uncover cases of sanctions violations, including evasion and circumvention. By voluntarily providing us with information about EU sanctions violations of which you might be aware, you can help us investigate such practices and ensure sanctions compliance in the EU.



Make a report
(send an anonymous message)



Reporting duties?



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THANK YOU

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Violations of EU restrictive measures and circumvention

Panel 2

19 September 2023

Francesca Finelli

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University of Luxembourg and University of Pisa



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1. What is circumvention?

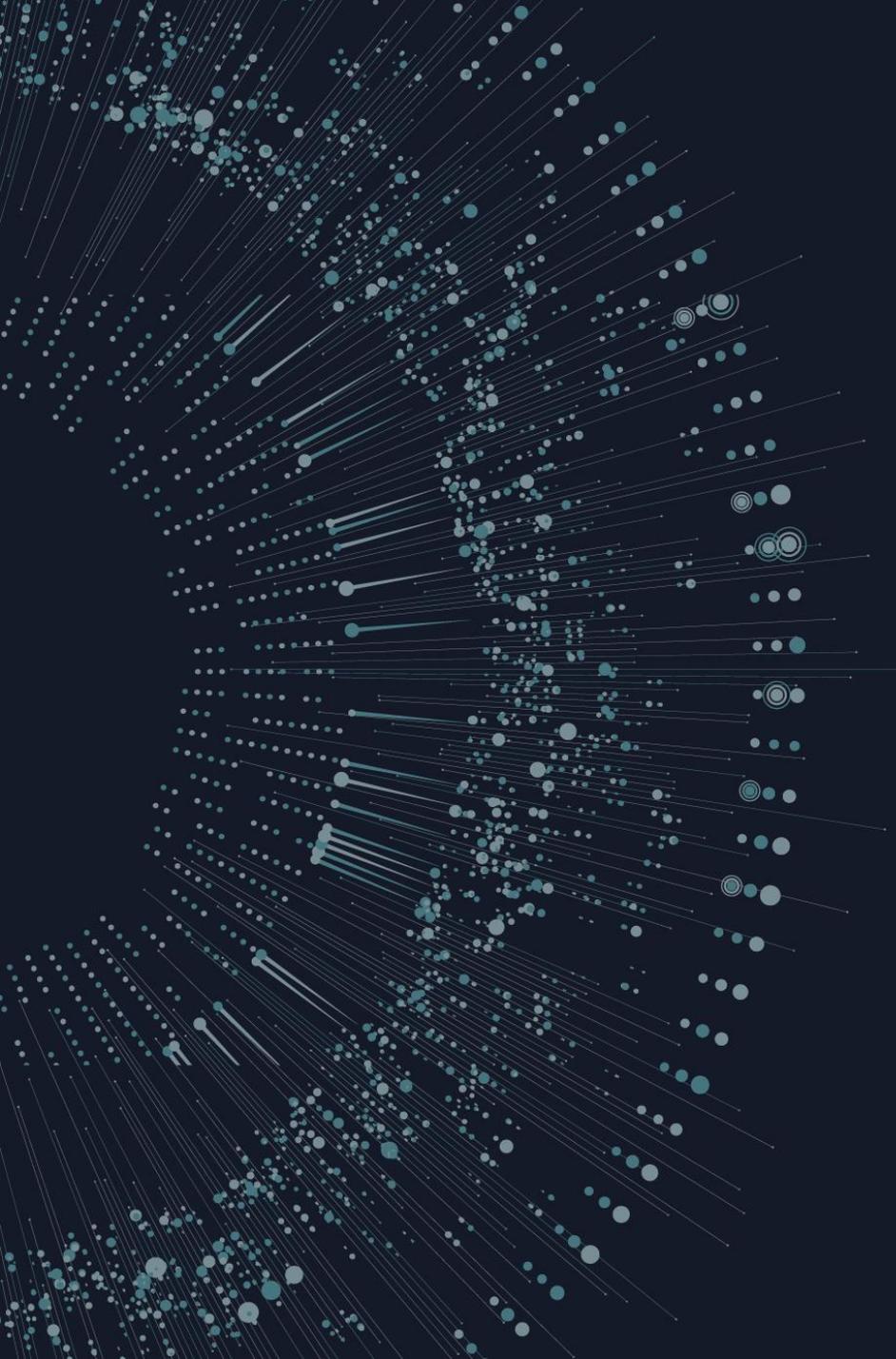
Definition – Standard wording – Interpretation

2. How the EU respond to it?

Designations – Implementation – Enforcement

3. Recent developments and proposed harmonization of criminal rules and penalties

New challenge? Before and after Russia's invasion of Ukraine



1. What is circumvention?



What is circumvention?

Circumvention and...**unilateral** (EU) sanctions

Circumvention and... **targeted** sanctions



What is circumvention?



Standard clause:

‘It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent prohibitions in this Regulation.’



What is circumvention?

Standard clause for UK sanctions:



Circumventing etc. prohibitions

- 19.—(1) A person must not intentionally participate in activities knowing that the object or effect of them is (whether directly or indirectly)—
- (a) to circumvent any of the prohibitions in regulations 11 to 18, or
 - (b) to enable or facilitate the contravention of any such prohibition.
- (2) A person who contravenes the prohibition in paragraph (1) commits an offence.

Standard clause(S) for US sanctions:



CODE OF FEDERAL
REGULATIONS

§ 589.213 Evasions; attempts; causing violations; conspiracies.

- (a) Any transaction on or after the effective date that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this part is prohibited.
- (b) Any conspiracy formed to violate the prohibitions set forth in this part is prohibited.

§ 589.215 Prohibited facilitation.

Except as otherwise authorized, U.S. persons, wherever located, are prohibited from approving, financing, facilitating, or guaranteeing a transaction by a foreign person where the transaction by that foreign person would be prohibited by § 589.206, § 589.207, or § 589.208 of this part if performed by a U.S. person or within the United States.



What is circumvention?

Examples and ‘red flags’:



What is circumvention?

Examples and ‘red flags’:



FinCEN

ALERT

FIN-2022-Alert001

March 7, 2022

FinCEN Advises Increased Vigilance for Potential Russian Sanctions Evasion Attempts

Select Red Flag Indicators¹⁶

- 1** Use of corporate vehicles (i.e. legal entities, such as shell companies, and legal arrangements) to obscure (i) ownership, (ii) source of funds, or (iii) countries involved, particularly sanctioned jurisdictions.
- 2** Use of shell companies to conduct international wire transfers, often involving financial institutions in jurisdictions distinct from company registration.
- 3** Use of third parties to shield the identity of sanctioned persons and/or PEPs seeking to hide the origin or ownership of funds, for example, to hide the purchase or sale of real estate.¹⁷



FinCEN

ALERT

FIN-2022-Alert002

March 16, 2022

FinCEN Alert on Real Estate, Luxury Goods, and Other High-Value Assets Involving Russian Elites, Oligarchs, and their Family Members

...



What is circumvention?

Examples and ‘red flags’:

December 2022



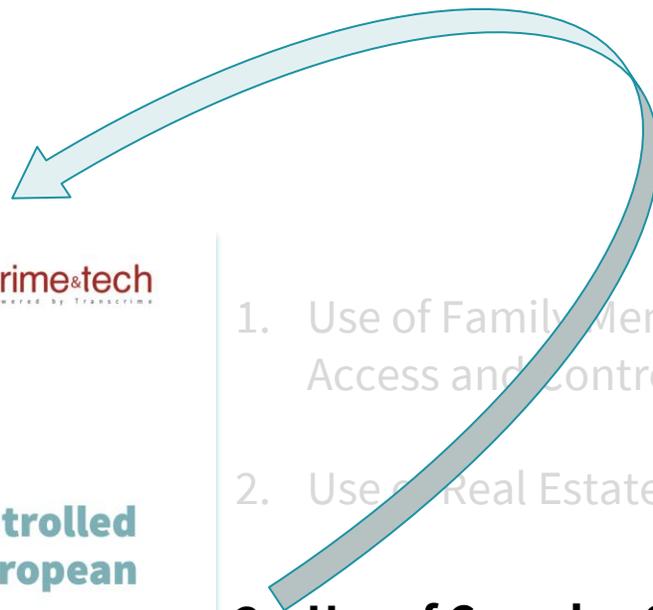
Global Advisory on Russian Sanctions Evasion Issued Jointly by the Multilateral REPO Task Force March 9, 2023

1. Use of Family Members and Close Associates to Ensure Continued Access and Control
2. Use of Real Estate to Hold Value, Benefit from Wealth
3. Use of Complex Ownership Structures to Avoid Identification
4. Use of Enablers to Avoid Involvement, Leverage Expertise
5. Use of Third-Party Jurisdictions, False Trade Information to Facilitate Sensitive Goods Shipment to Russia



What is circumvention?

Examples and 'red flags':



transcrime
Joint Research Centre on Transnational Crime



March 2022

Inside the matrioska: the firms controlled by sanctioned 'oligarchs' across European regions and sectors

This analysis is part of TOM – The Ownership Monitor, a joint-initiative by Transcrime and its spin-off Crime&tech

Authors: Giovanni Nicolazzo, Michele Riccardi and Antonio Bosisio

ISBN: 978-88-99719-36-4

crime&tech
Powered by Transcrime

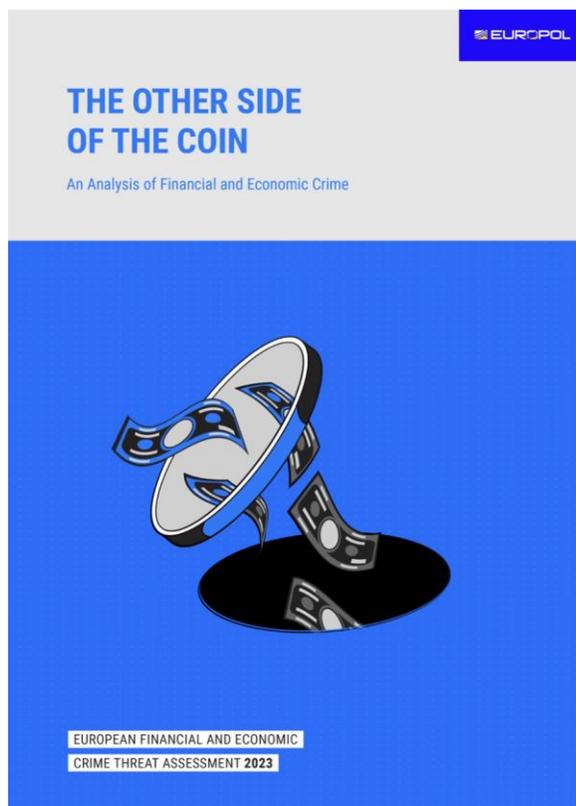
1. Use of Family Members and Close Associates to Ensure Continued Access and Control
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What is circumvention?

Examples and 'red flags':

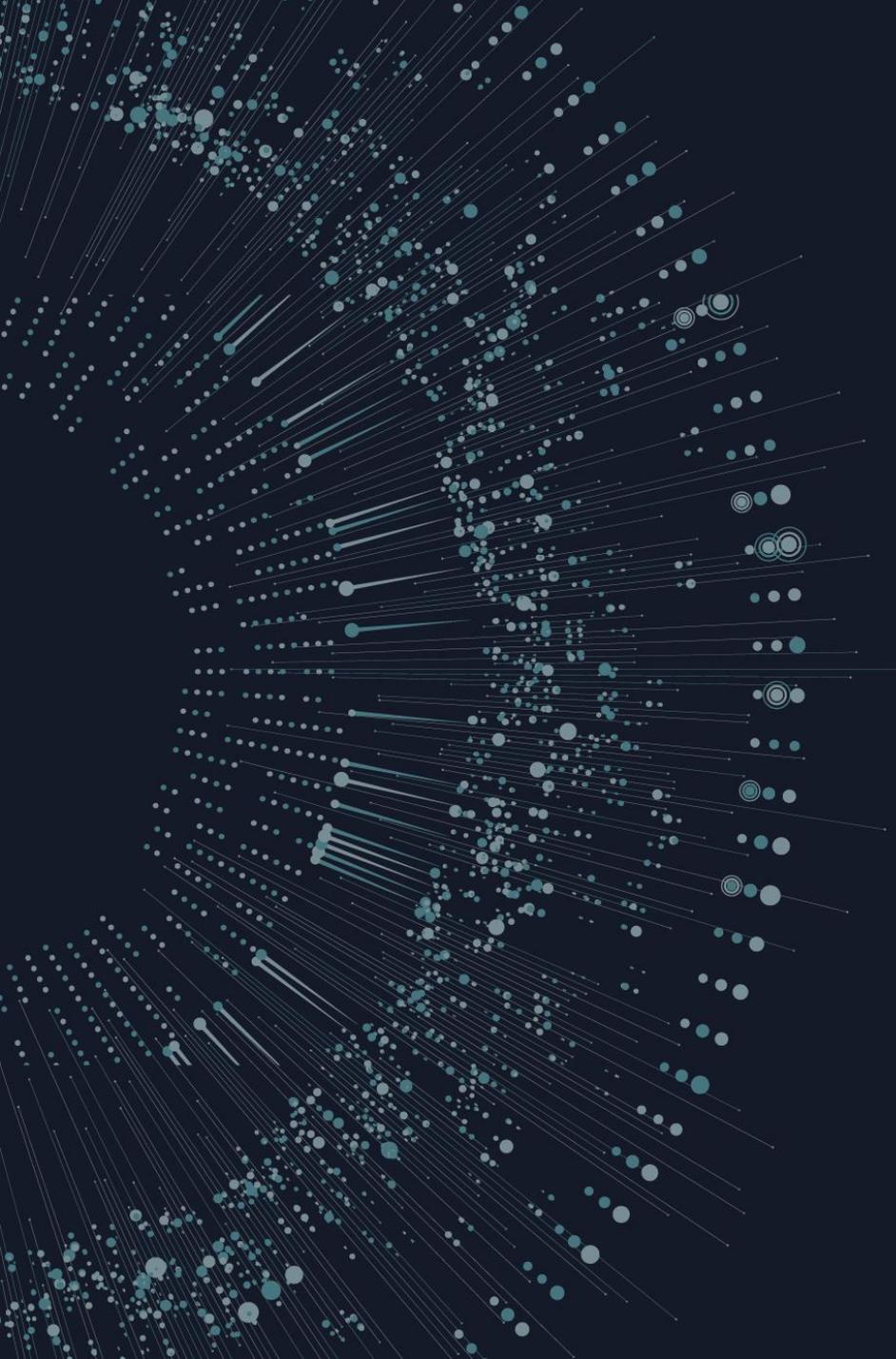
September 2023



2. Circumvention red flags related to business partners and customers

Various indicators⁹ should alert EU operators when they enter into a commercial relationship with a new trading partner. When conducting general due diligence, if operators find evidence of any of the indicators below, they should launch a deeper screening.

- Indirect transactions (such as those using intermediaries, shell companies etc.) that make no or little economic sense;
- New customer / transactions with companies located in countries known as "circumvention hubs" and involving items listed as high-priority battlefield items.
- Transit through countries or territories known as "circumvention hubs" based on the information available. Specific measures that can be taken depending on the role and responsibility of the operator, e.g.:
 - exporter who uses an external transport company: checks regarding the type of means of transport use, routings, use of sub-contractors, etc.
 - transport company which is responsible for the transport of the cargo: checks regarding the actual goods to be transported; match with documentation, etc.
- Complex corporate or trust structures linked to countries friendly to Russia or whose complexity is not justified by the business profile of the customer. Use of trust arrangements or complex corporate structures involving offshore companies;
- Business partner has been recently established or has merged with a sanctioned entity or an entity linked to sanctioned entities or persons;
- Business partner shares address with multiple different companies (e.g., it is likely a shelf company);
- Changes of ownership of a corporate holding to reduce ownership stakes below the 50 percent threshold;
- Change of ultimate beneficial owner shortly before or after sanctions are imposed;
- Movement of assets previously associated with a sanctioned person, by family members or otherwise on their behalf;
- Numerous transfers of shares from sanctioned entities to non-sanctioned entities involving corporations incorporated by the same individuals or entity (often with a registered office at the same physical address);
- Potential control of an entity by a designated person, despite apparent direct ownership under the 50 percent threshold (member of Board of Directors, beneficial owner, managing director, other entities or persons on the ownership structure linked with a designated person);
- CEO/manager is never available for discussions, i.e., all communications go via a regular employee or a representative who seems to have a general Power of Attorney (PoA).



2. How the EU respond to it?



How the EU respond to it?

Designations

Implementation

Enforcement



How the EU respond to it?

Designations

- Sanctions design
- Reference to circumvention in the sanctions regimes
- Designation grounds





How the EU respond to it?

Designations

→ Explicit reference to circumvention

....Annex [xx] shall include persons **assisting in the evasion of** sanctions or violating the provisions of this Regulation.
(DPKR)

.... that has **evaded** or violated, **or assisted** a listed person, entity or body to evade or violate, the provisions of...
(Iran, nuclear proliferation)

...have violated or have **assisted** in violating the provisions of..
(Libya)



How the EU respond to it?

The use of designations

Council Regulation (EU) No 269/2014

Art.3 ...

- (h) natural or legal persons, entities or bodies:
 - (i) facilitating infringements of the prohibition against circumvention of the provisions of this Regulation, or of Council Regulations (EU) No 692/2014 (¹), (EU) No 833/2014 (²) or (EU) 2022/263 (³) or of Council Decisions 2014/145/CFSP (⁴), 2014/386/CFSP (⁵), 2014/512/CFSP (⁶) or (CFSP) 2022/266 (⁷); or
 - (ii) otherwise significantly frustrating those provisions; or

23 June 2023



How the EU respond to it?

The use of designations

Council Regulation (EU) No 269/2014

SPS CJSC is a Russia-based entity that manufactures computers and other electronic equipment. SPS CJSC is actively involved in circumventing sanctions through its partnership with an EU-based entity, namely Woerd-Tech BV. Since the imposition of EU sanctions prohibiting the export of semiconductors to Russia, the Netherlands-based entity Woerd-Tech BV has been suspected of illegally smuggling semiconductors to the Russian Federation. The owner of Woerd-Tech BV has been arrested by the competent Dutch authority

23.6.2023



How the EU respond to it?

The use of designations

What is the standard of proof for circumvention?



How the EU respond to it?

The use of designations

What is the standard of proof for circumvention?



Case T-489/10



SHARIF
UNIVERSITY OF
TECHNOLOGY

Case T-181/13



Case T-262/12

Successful annulments:

- Insufficient statement of reasons.
- Excessively vague.
- No factual evidence.
- ‘...no clear indication of what exactly the allegations concerning the applicant are.’

- Difficult to prove circumvention, given the clandestine nature of nuclear proliferation activities.



How the EU respond to it?

The use of designations

What is the standard of proof for circumvention?



Re-listed under other grounds.





How the EU respond to it?

The use of designations

Council Regulation (EU) No 269/2014

Art. 3...

- (g) leading businesspersons operating in Russia and their immediate family members, or other natural persons, benefitting from them, or businesspersons, 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

5 June 2023



How the EU respond to it?

The use of designations

Council Regulation (EU) No 269/2014

Actions for annulment (DISMISSED):



6 September 2023

Galina Pumpyanskaya (Case T-272/22) and **Alexander Pumpyanskiy** (Case T-291/22)
Elena Timchenko (Case T-361/22)



How the EU respond to it?

Designations

Implementation

Enforcement



How the EU respond to it?

Designations

Implementation

Enforcement

Reporting duties
...and rights

Art. 8 Council Regulation (EU) No 269/2014

Art. 9 Council Regulation (EU) No 269/2014

EU sanctions
whistleblower tool



Multi-level dialogue



“Freeze and Seize” Task Force



How the EU respond to it?

Designations

Reporting duties

Enforcement



How the EU respond to it?

Designations

Reporting duties

Enforcement

I. Infringements

89. The Regulations imposing restrictive measures contain provisions regarding penalties to be taken in case of infringement. Standard wording for this issue:

Reg.

"1. *The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.*



How the EU respond to it?

Designations

Reporting duties

Enforcement

Categorisation of the violation of Union restrictive measures	Member States
The violation of restrictive measures is either criminal or administrative offence	BE, BG, CZ, DE, EE, IE, EL, IT, LT, AT, PL, RO, SI
The violation of restrictive measures is a criminal offence	DK, FR, HR, CY, LV, LU, HU, MT, NL, PT, FI, SE
The violation of restrictive measures is an administrative offence	ES, SK

Fragmentation

An abstract graphic on the left side of the slide, consisting of numerous thin, light blue lines radiating from the left edge towards the center. Interspersed among these lines are various sizes of blue dots and small circular patterns, some of which are concentric circles. The overall effect is a sense of dynamic movement and complexity, resembling a network or a data visualization.

3. Recent developments and proposed harmonization of criminal rules and penalties

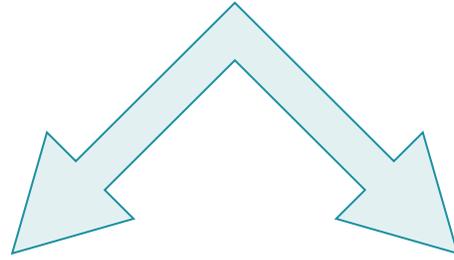
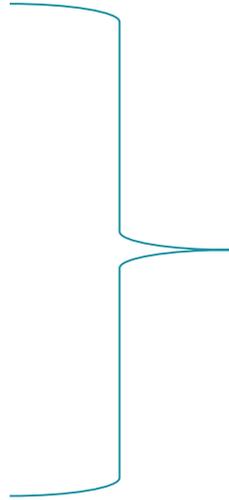


Recent developments

Designations

Implementation

Enforcement



**Context
specific
reforms**

**Structural
reforms**

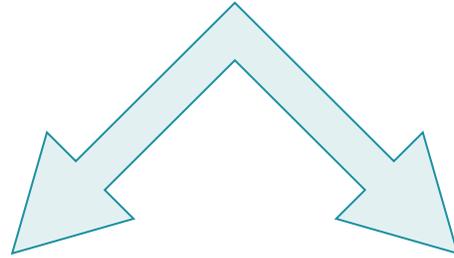
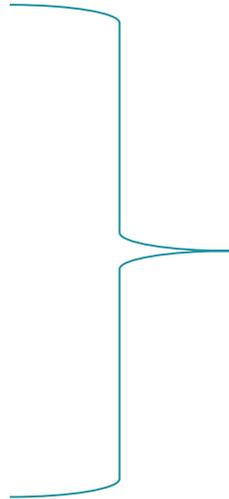
Recent developments



Designations

Implementation

Enforcement



**Context
specific
reforms**

**Structural
reforms**



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**Context specific and structural changes in EU restrictive
measures adopted in reaction to Russia's aggression on Ukraine**

DI SARA POLI* E FRANCESCA FINELLI**



Recent developments

Designations

Implementation

Enforcement



Context
specific
reforms

**Structural
reforms**



Recent developments



25 May 2022

1. Proposal for a **Council Decision** – extending the list of EU crimes to include the violation of Union restrictive measures COM/2022/247 final
2. Proposal for a **Directive** – harmonising criminal penalties for the violation of Union restrictive measures and annex COM/2022/249 final
3. Proposal for a **Directive** – asset recovery and confiscation COM/2022/245 final

Enforcement



Recent developments



25 May 2022



1. Proposal for a **Council Decision** – extending the list of EU crimes to include the violation of Union restrictive measures

28 November 2022

Council Decision (EU) 2022/2332

2. Proposal for a **Directive** – harmonising criminal penalties for the violation of Union restrictive measures and annex

2 December 2022

COM/2022/684 final

3. Proposal for a **Directive** – asset recovery and confiscation





Recent developments



COM/2022/684 final

Art. 3 Violation of Union restrictive measures

... **a criminal offence** when committed intentionally

- Concealing assets
- Providing false or misleading information
- Failing to inform the competent authorities
- Failing to cooperate with the competent authorities

Recent developments



COM/2022/684 final



Negotiations in progress





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**COUNTERING CIRCUMVENTION OF
RESTRICTIVE MEASURES: THE EU RESPONSE**



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Judicial review of EU restrictive measures

19 September 2023

Matthew Happold
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University of Luxembourg

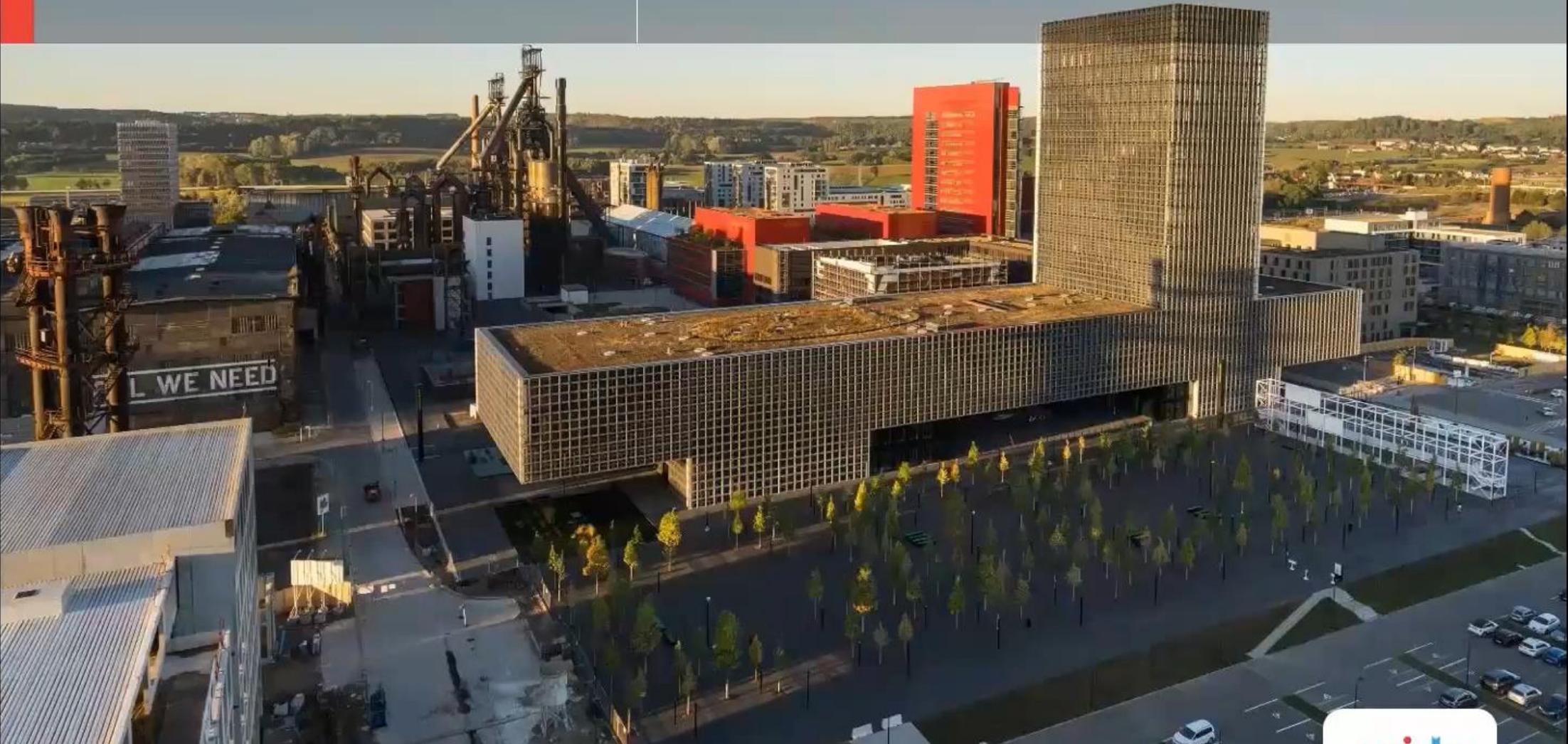


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Judicial review of EU restrictive measures

Matthew Happold, Professor of Public International Law



What are restrictive measures?

FACULTY OF LAW, ECONOMICS AND FINANCE



‘In spite of their colloquial name ‘sanctions’, EU restrictive measures are not punitive. They are intended to bring about a change in policy or activity by targeting entities and individuals in non-EU countries, responsible for such malignant behaviour.’ (European Commission, *Frequently Asked Questions: Restrictive Measures (Sanctions)*, 22 February 2022)

‘Any sanctions regime is likely to be backward looking, focusing on past actions not then unlawful. And the 2019 Regulations refer expressly to past conduct as providing the ground for designation. To be effective sanctions need to send messages to the designated person, and others in a similar position, that the conduct in question is unacceptable. The value of such messages persists even if the person in question ceases the conduct complained of and makes statements distancing himself from the Russian regime.’ (Garnham J in Shvidler v SSFCDA, [2023] EWHC 2121 (Admin), para. 122)

Article 21 TEU

- 1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*
- 2. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.*



The judgment of the European Court of Justice in Kadi v Council and Commission

□ FACULTY OF LAW, ECONOMICS AND FINANCE



[T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include *the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.*

In this regard it must be emphasised that, in circumstances such as those of these cases, *the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.* (§§ 285-6)



More from Kadi v Council and Commission

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With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens.

However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.
(§§ 287-8)



Article 263 TFEU

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.



Restrictive measures and substantive human rights

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Asset freezes are said not to be an absolute deprivation of property and to be proportionate. See Bank Melli v Council:

the applicant's freedom to carry on economic activity and its right to property are restricted to a considerable degree, on account of the adoption of the contested decision, for it may not, in particular, dispose of its funds situated within the territory of the Community or held by Community nationals, except by virtue of special authorisation ... However, given the primary importance of maintaining international peace and security, the disadvantages caused are not inordinate in relation to the ends sought, especially because, first, those restrictions concern only part of the applicant's assets and, secondly, Articles 9 and 10 of Regulation No 423/2007 provide for certain exceptions allowing the entities affected by fund-freezing measures to meet essential expenditure.





Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- (c) the obligation of the administration to give reasons for its decisions.



Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice

Restrictive measures and procedural human rights cont.

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‘The effectiveness of the judicial review guaranteed by Article 47 of the Charter [the right to an effective remedy and to a fair trial] also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person..., the Courts of the European Union are to ensure that that decision, which affects that person individually, is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated’.
(Kadi II, para. 119)

Issues concerning effectiveness of judicial review

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- Burden and standard of proof ('sufficiently solid factual basis' (EU) or 'reasonable grounds to suspect' (UK)).
- Wide criteria for designation (e.g., 'obtaining a benefit from, or supporting, the Government of Russia').
- Approach to proportionality review.
- Reliance on fictions (e.g. temporary nature of sanctions regimes).





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EU Restrictive measures and misappropriations of State funds

19 September 2023

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Outline

1. EU restrictive measures linked to misappropriations of State funds
2. Main takeaways from the CJEU case law
3. What conclusions to draw for the Council's sanctions practice and (other) potential corruption-related restrictive measures?



1. EU restrictive measures linked to misappropriations of State funds



Egypt (2011), Tunisia (2011), Ukraine (2014)

Aim:

- Supporting the rule of law and fundamental rights in Ukraine
- Supporting Egypt and Tunisia's democratic transition, economic and societal development





- Asset freezes + travel bans

- Listing criterion:

'persons having been identified as responsible for the misappropriation of [State] funds' and persons associated with them



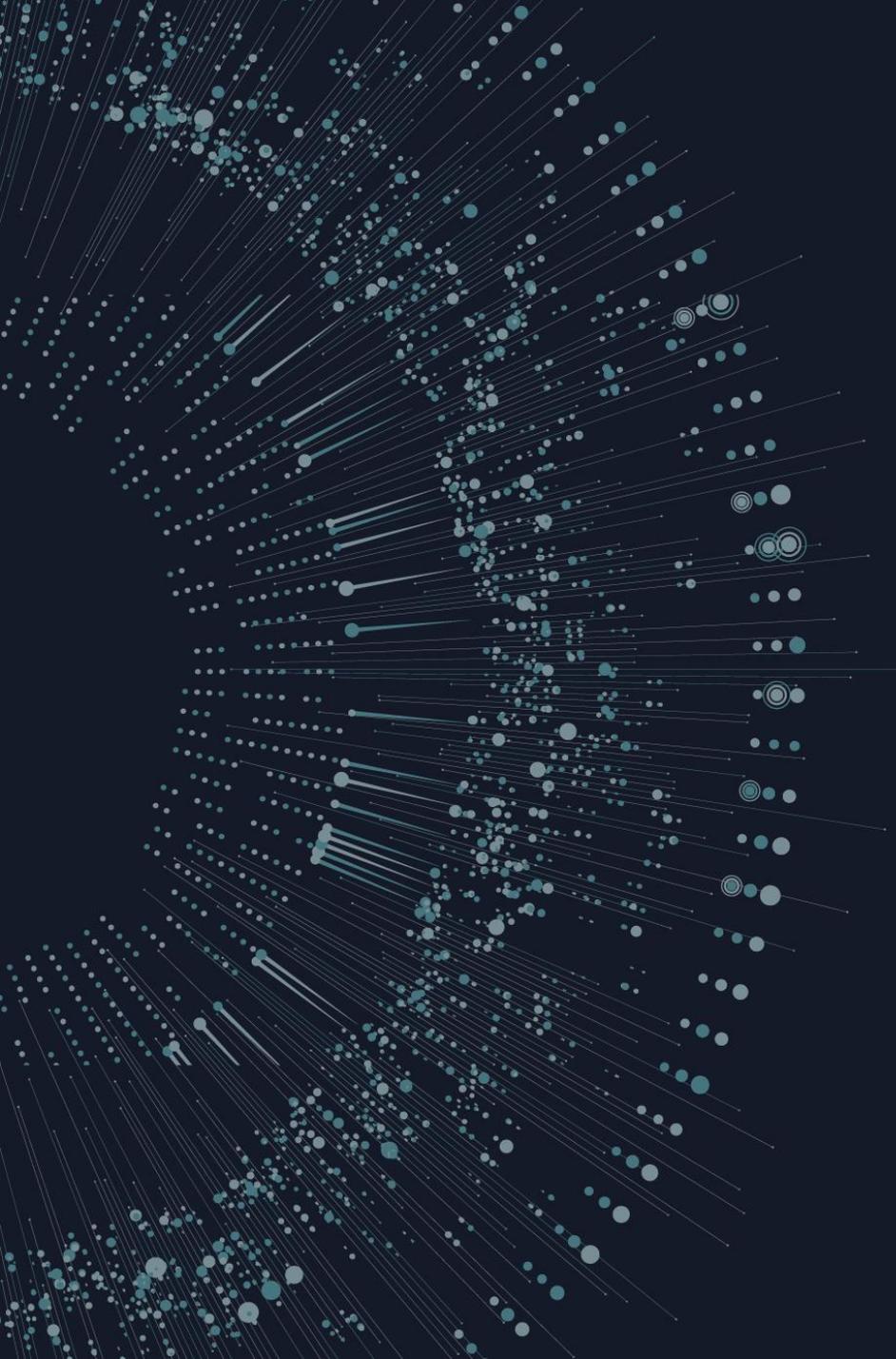
- Assisting the States' authorities in recovering misappropriated State funds



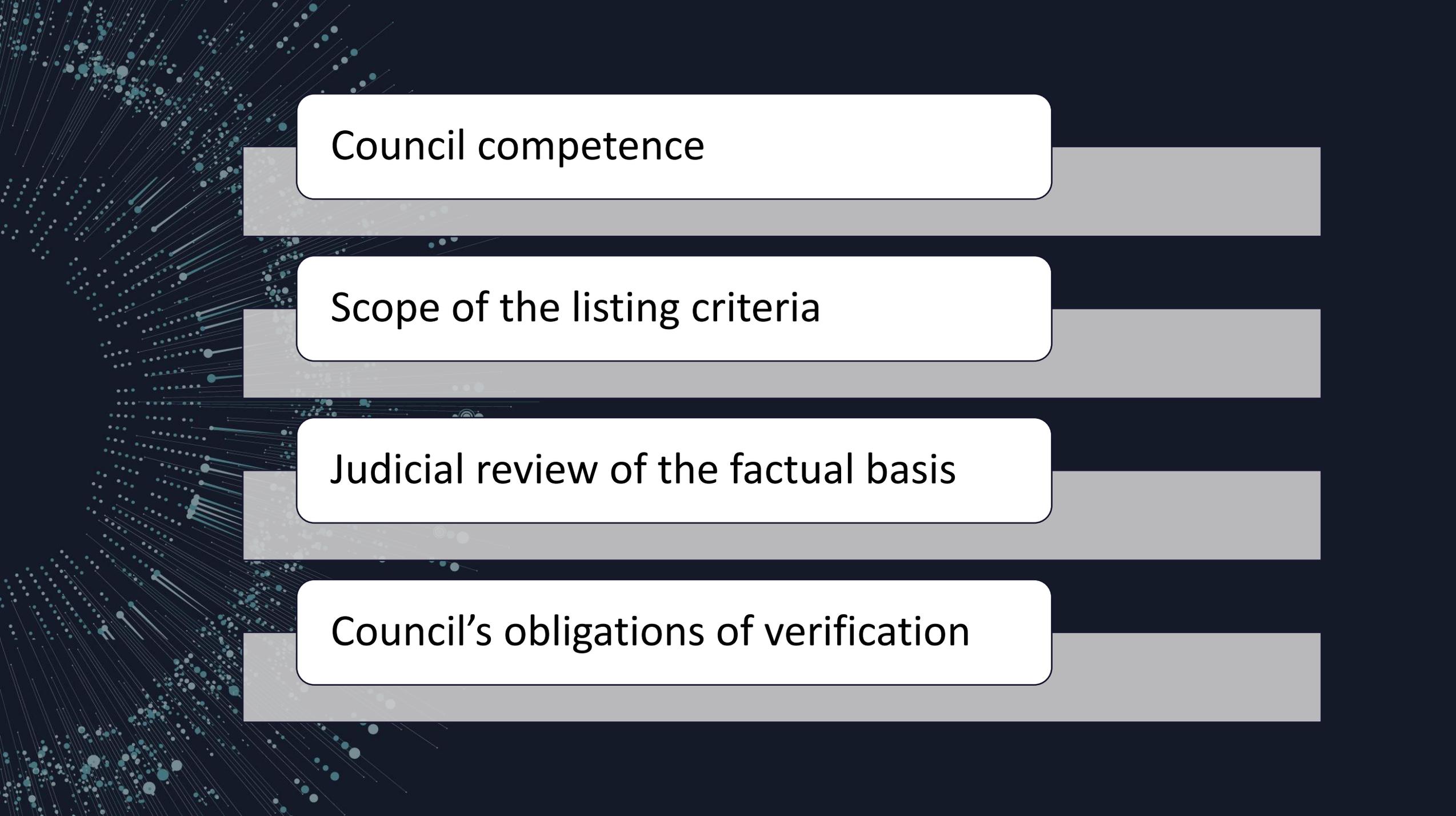
Specificities of the restrictive measures:

- No definition of key concepts
- Use of third States' information and evidence to justify the listings
- Issue of third States' compliance with due process and right of the defence



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2. CJEU case law



Council competence

Scope of the listing criteria

Judicial review of the factual basis

Council's obligations of verification

Council competence

- Compliance with Article 29 TEU
- Possibility to target individuals regardless of any status or link with the State's current government
- Political and rule of law situation in the States concerned does not affect the possibility to adopt/maintain the restrictive measures
- No evidence that the situation in the third States affected the capacity of their judicial system to protect the rule of law and fundamental rights in general, and within the proceedings against the applicants in particular.

Scope of the listing criteria

‘Identified as’ responsible for misappropriations of State funds

- No requirement for a person to be convicted in court
- 5 categories of targets: convicted persons, convicted accomplices, prosecuted persons, prosecuted accomplices, other persons subject to connected criminal proceedings

‘Misappropriation of State funds’

- Autonomous concept of EU law (but can vary in scope)
- Illegal use of funds or assets belonging to, or under the control of, a public figure for a purpose contrary to that for which those funds or assets were intended, particularly for private purposes

Investigation/judicial proceedings

Judicial review of the factual basis

- Annulments of (Ukrainian) listings based on a lack of a sufficiently solid factual basis
- Sole letter from a judicial body (e.g. Prosecutor General of Ukraine) is not a sufficiently solid factual basis if:
 - General and generic statement linking an applicant to an investigation
 - No detail as to the establishment of the acts under investigation and the applicants' involvement in those acts
 - Council could not prove that the listing criterion was fulfilled

Council's obligations of verification

- Council's use of third States' information and evidence that investigations and/or judicial proceedings are ongoing.
- **Initial CJEU case law (2016-2018):**
 - Council has wide margin of appreciation when acting upon the request of the third State's judiciary
 - Council only has to prove that
 - 1) applicant is subject to criminal proceedings in connection with misappropriation of State funds
 - 2) applicant's actions can be characterised as being identified as responsible for the misappropriation of State funds
 - CJEU not competent to question the Council's political choice to support the new governments (especially with respect to Ukraine)

Council's obligations of verification

- **Initial CJEU case law (2016-2018):**
 - Growing awareness of issues linked to the Council's sanctions practice
 - lack of progress of the proceedings/unexplained closures by the Ukrainian authorities, 'intrinsic inconsistencies' in the evidence used by the Council
 - applicant's arguments were such as to cast doubt on the adequacy of the evidence used by the Council, thereby requiring additional verifications
 - Council should have sought clarification from the Ukrainian authorities as to the possible reasons for the lack of progress in the proceedings

Council's obligations of verification

- **Impact of *Azarov v. Council* (C-530/17 P, 2018) :**
 - Council must verify that the rights of the defence and the right to effective judicial protection were respected at the time of the adoption of the third State's decision
 - Double obligation:
 - 1) ensure that the third States' authorities have complied with the rights of the defence and the right to effective judicial protection at the time of adoption of their decision.
 - 2) Council must refer, in its decision imposing the sanctions, to the reasons for which it considers that the third State's decision has been adopted in compliance with those rights
 - Ukraine's Council of Europe membership cannot render the verifications superfluous

Council's obligations of verification

- **Post-Azarov judgments (2018-):**
 - Council must ensure that the criminal proceedings on which it relies to maintain the restrictive measures do not conflict with the *ne bis in idem* principle
 - where a person has been listed for several years on account of the same preliminary investigation conducted in Ukraine, Council must 'explore in greater detail the question of a possible infringement of the fundamental rights of that person by the Ukrainian authorities'
 - verifications must be carried out irrespective of any evidence from the applicants
 - Council's obligation of verification is a matter of public policy

Council's obligations of verification

'B. Rights of defence and right to effective judicial protection

The rights of defence and the right to effective judicial protection under the Code of Criminal Procedure of Ukraine

Article 42 of the Code of Criminal Procedure of Ukraine ("Code of Criminal Procedure") provides that every person who is suspected or accused in criminal proceedings enjoys rights of defence and the right to effective judicial protection. These include: the right to be informed of the criminal offence of which he has been suspected or accused; the right to be informed, expressly and promptly, of his rights under the Code of Criminal Procedure; the right to have, when first requested, access to a defence lawyer; the right to present petitions for procedural actions; and the right to challenge decisions, actions and omissions by the investigator, the public prosecutor and the investigating judge. Article 306 of the Code of Criminal Procedure provides that complaints against decisions, acts or omissions of the investigator or public prosecutor must be considered by an investigating judge of a local Court in the presence of the complainant or his defence lawyer or legal representative. In addition, Article 309 of the Code of Criminal Procedure specifies the decisions of investigating judges that may be challenged on appeal, and that other decisions may be subject to judicial review in the course of preparatory proceedings in Court. Moreover, a number of procedural investigating actions are only possible subject to a ruling by the investigating judge or a Court (e.g. seizure of property under Article 164, and measures of detention under Article 176 of the Code of Criminal Procedure).

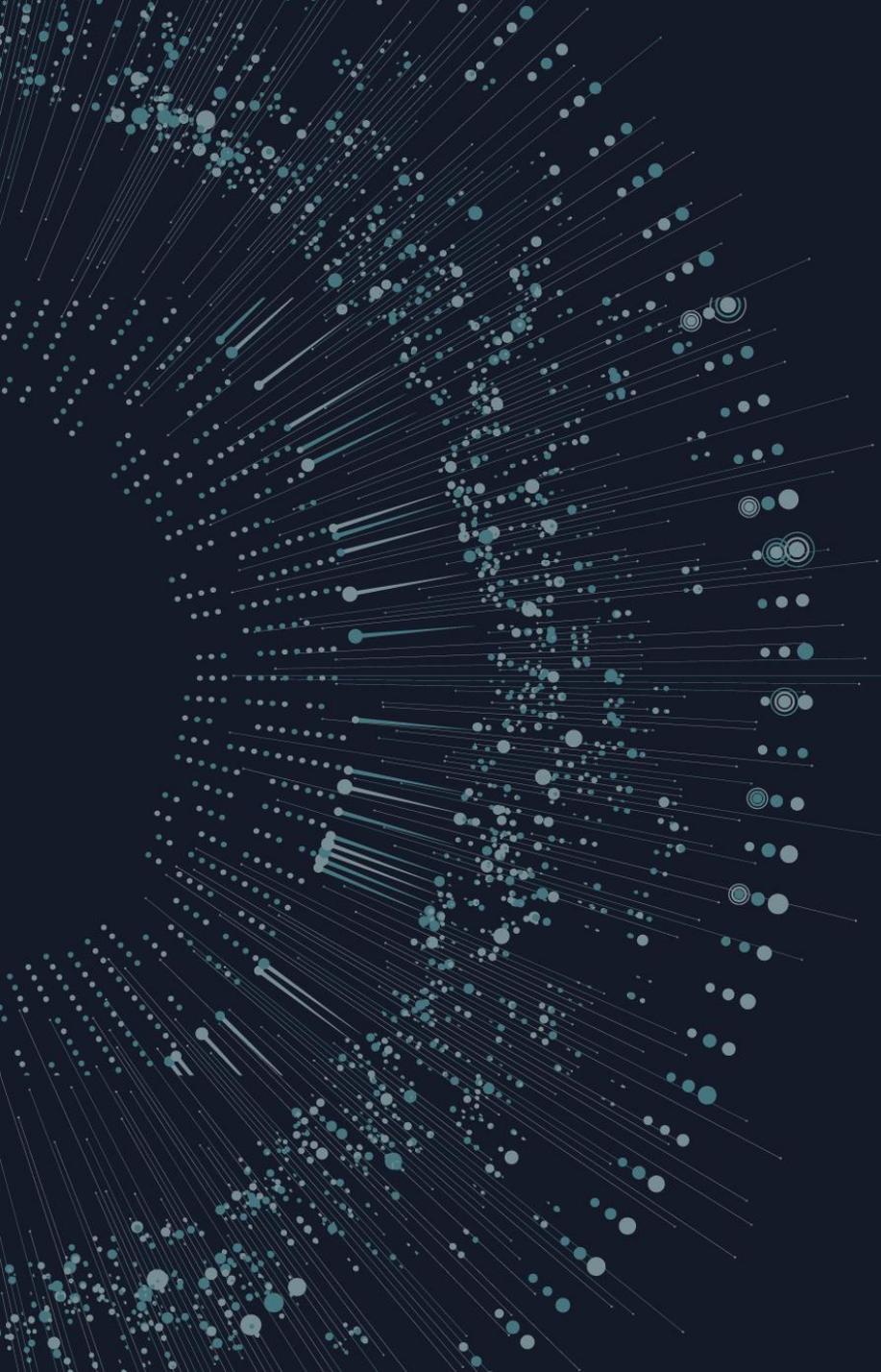
Application of the rights of defence and the right to effective judicial protection of each of the listed persons

1. Viktor Fedorovych Yanukovych

The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Yanukovych were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by a number of Court decisions relating to the seizure of property and by a Court decision of 1 November 2018 granting permission for the arrest and summoning and bringing of the suspected to the Court, as well as by a decision of the investigating judge of 8 October 2018 refusing the prosecutor's application for a special pre-trial investigation *in absentia*.

• Post-Azarov judgments (2018-):

- Council must carry out verifications as regards the principal proceedings (especially if still at a preliminary stage after several years)
- Each of the decisions relied on by the Council must leave no doubt as to their compliance with due process
- Council must ascertain whether the decision relied on was consistent with the articles of the Code of Criminal Procedure mentioned in Section B



3. What lessons for the Council's sanctions practice and (other) potential corruption-related restrictive measures?

Misappropriations of State funds – Burden of proof

Listing criteria

Ongoing investigations/
prosecutions

Persons
‘identified as
responsible for
MSF’

National context

Obligations of verification

Compliance of principal procedure
with defined standards

Compliance of each decision with
national (criminal procedural) law

Compliance of national proceedings
with *ne bis in idem*

If lack of
progress:
additional
verifications

Other potential corruption-related restrictive measures

- Stand-alone corruption sanctions regime:
 - What definition of corruption?
 - Use of information/evidence originating from third States
- Inclusion of corruption in the EU's Global Human Rights Sanctions regime
 - What threshold of gravity (cf. Art. 2 GHRSR)?



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From Freeze to Seize and Magnitsky Sanctions

Recent Developments in EU Sanctions Practice

19 September 2023

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Corruption and Targeted Sanctions

*Law and Policy of
Anti-corruption
Entry Bans*

Anton Moiseienko



Queen Mary Studies in International Law

BRILL | NIJHOFF

Frozen Russian Assets and the Reconstruction of Ukraine

Legal Options



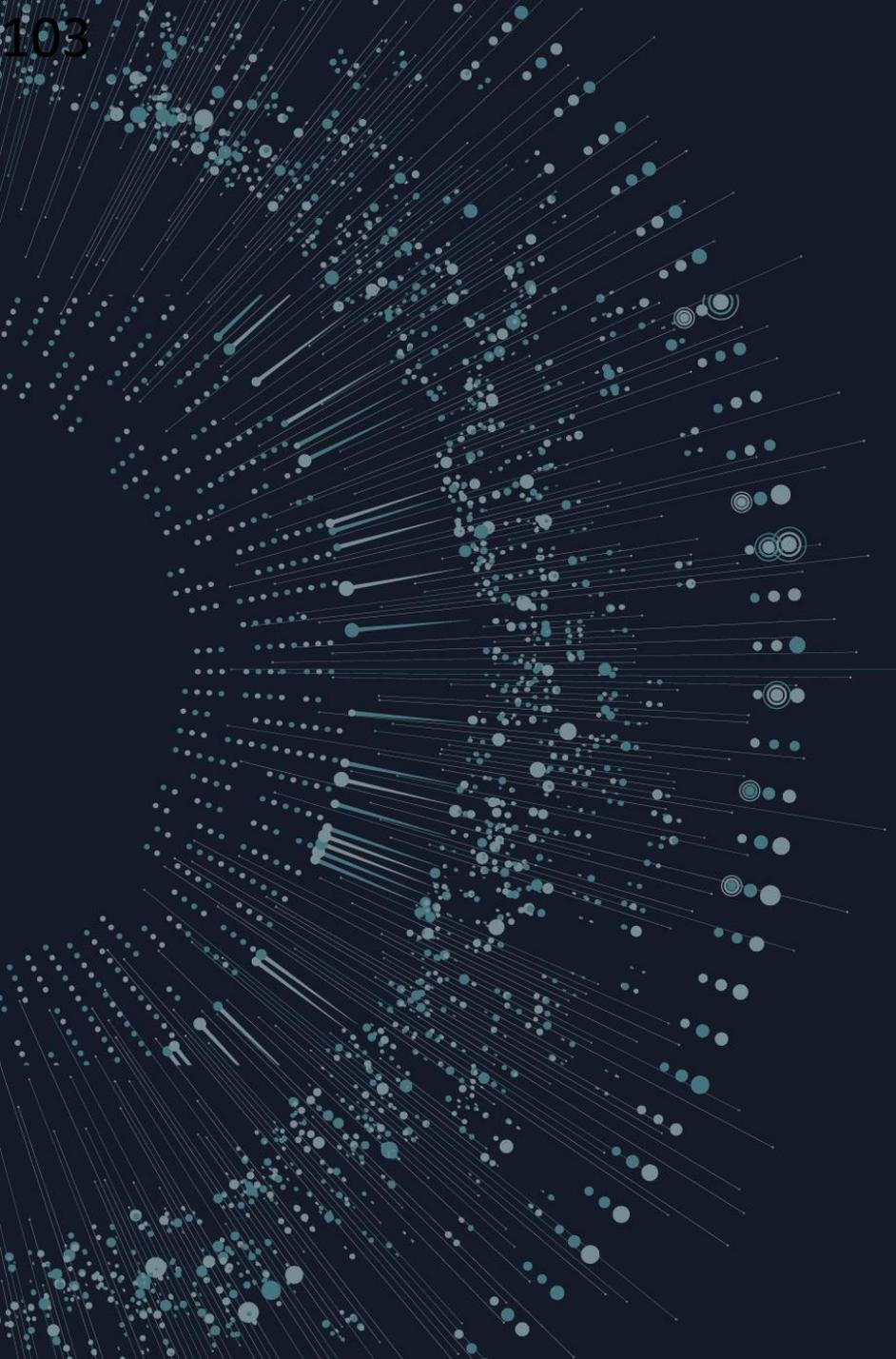
RESEARCH PAPER

July 2022





From Freeze to Seize

- 
- 01 Russia's Frozen Assets:
Where and How Much?
 - 02 Current Initiatives:
Confiscating Private Wealth
 - 03 Ongoing Debates:
Is Sovereign Wealth Off-Limits?

SOME TYPES OF SANCTIONS

Individual	Sectoral	State
Asset freezes	Capital market restrictions	Trade restrictions
Travel bans	Other business restrictions	Sovereign debt restrictions
No fly lists		Asset freezes
		Air traffic restrictions

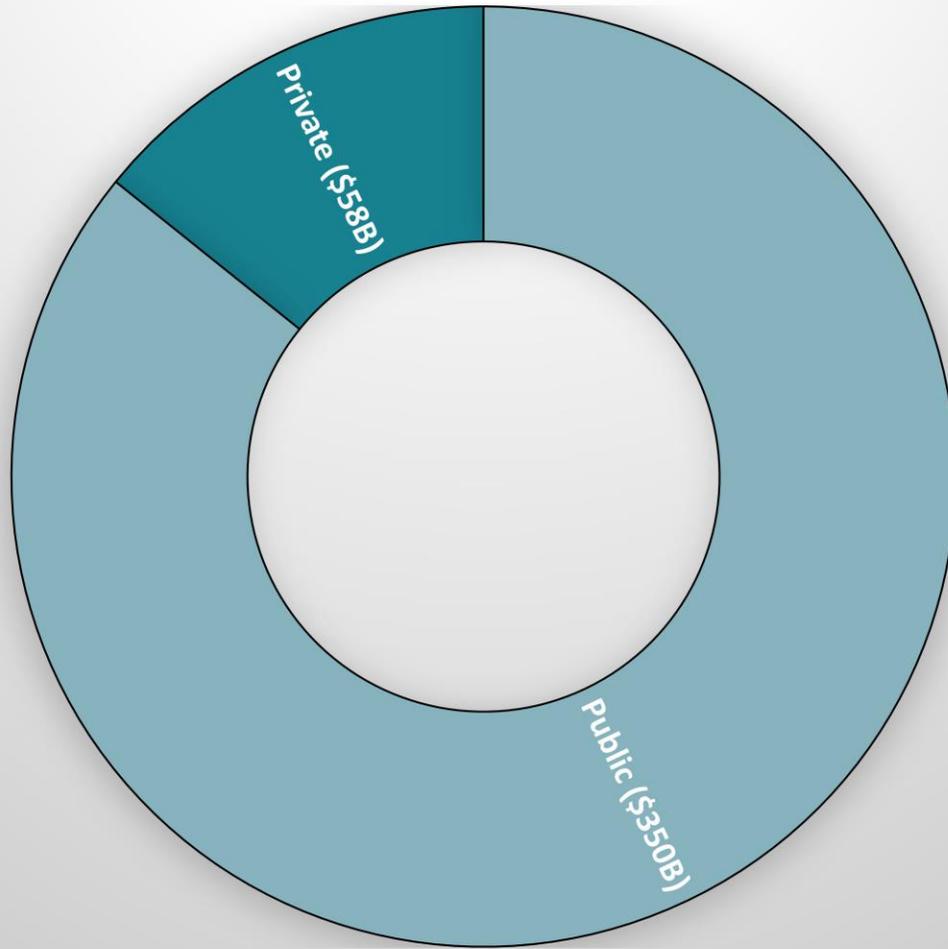
TARGETED

COMPREHENSIVE

MAJOR MILESTONES

Year	Event	Types of Sanctions	Sanctioning States
2014	Annexation of Crimea	Individual sanctions	EU, US, Albania, Australia, Iceland, Japan, Montenegro, Ukraine
2014	War in the Donbas	Further individual sanctions; asset freezes against several banks and energy companies; embargo on arms & dual use goods export; ban on investments in Crimea	+ Canada, Norway, Switzerland,
2018	Skripal poisoning	Financing prohibitions (primary market)	
2022	Full-scale war in Ukraine	Further <u>individual sanctions</u> , including Putin and FM Lavrov; <u>asset freezes against major banks</u> (Sberbank and VTB); <u>financing prohibitions</u> (including primary and secondary markets); <u>partial SWIFT disconnection</u> ; <u>air traffic restrictions</u> ; <u>central bank asset freezing</u>	+ Singapore, South Korea, Taiwan

Public vs Private Assets



Public (\$350B) Private (\$58B)

EU Commissioner Says Almost \$17 Billion In Russian Assets Frozen



EU Justice Commissioner Didier Reynders (file photo)

...around 17 billion euros (\$16.9 billion) ...ders said in

POLICY ISSUES DATA SERVICES **NEWS**

In the year since Finance, Justice, Home Affairs, and Trade Ministers and European Commissioners launched the REPO Task Force, REPO members have:

- Blocked or frozen more than \$58 billion worth of sanctioned Russians' assets in financial accounts and economic resources.
- Ensured that Russian Central Bank and Russian National Wealth Fund assets in our jurisdictions remain immobilized, and cannot be used to support Russia's war effort.
- Seized or frozen luxury real estate and other luxury assets owned, held, or controlled by sanctioned Russians, valued in the many billions of dollars.
- Seized, frozen, or detained yachts and other vessels owned, held, or controlled by sanctioned Russians, and conducted asset tracing activities to identify, loca

Private Wealth

Jersey court seizes \$7bn of Roman Abramovich's assets

© 13 April 2022



GETTY IMAGES

Roman Abramovich has been forced to sell Chelsea FC and move his superyachts out of EU waters

Oligarch's lawyers say UK caused severe hardship by freezing assets

Eugene Shvidler wants expedited court hearing to hear his claim that impounding his jets was wrong



Eugene Shvidler (right) with Roman Abramovich at a Chelsea football match.

Photograph: Nick Potts/PA

Russian-born billionaire who is a close associate of the former owner of Chelsea FC, **Roman Abramovich**, has launched a legal challenge against UK government sanctions imposed on him in response to Vladimir Putin's invasion of Ukraine.



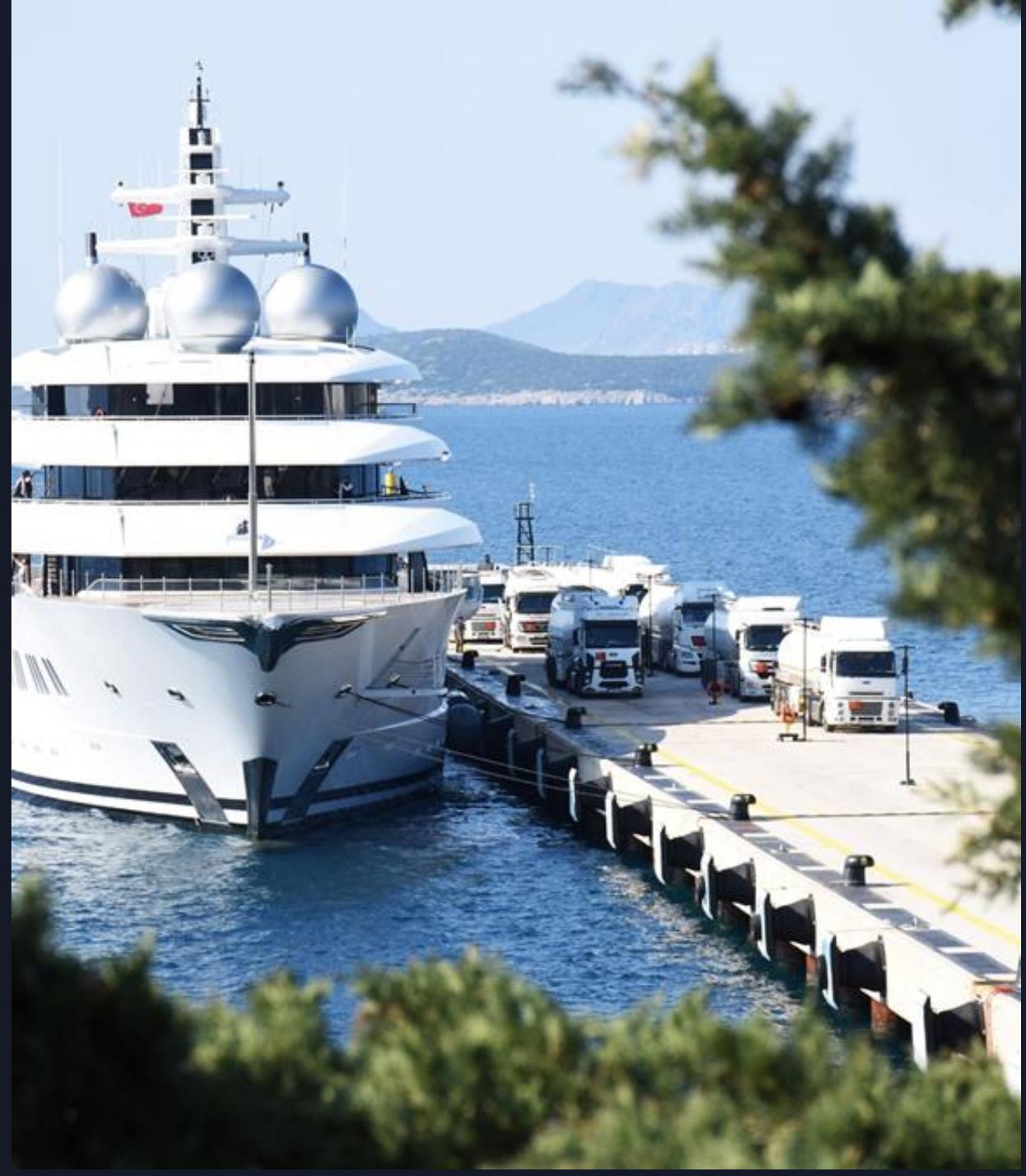
Current Initiatives: Confiscating Private Wealth

Task Forces

- **Russian Elites, Proxies, and Oligarchs (REPO) Task Force (international)**
 - Freeze and Seize Task Force (EU)
 - ‘To confiscate, one must establish a link between assets and criminal activities’ (Didier Reynders)
 - KleptoCapture Task Force (US)
 - ‘[u]sing civil and criminal asset forfeiture authorities to seize assets belonging to sanctioned individuals or assets identified as the proceeds of unlawful conduct’

US Practice

- Existing options:
- Transferring confiscated funds to Ukraine
- Confiscating the 'proceeds' of sanctions evasion
- Proposed reforms (April 2022):
 - Allowing for the confiscation of property with 'a connection to' specified unlawful activity
 - Making it an offence knowingly or intentionally to possess proceeds obtained from corrupt dealings with the Russian government
 - Expediting forfeiture



Proposed EU Reforms

- Enabling confiscation of the 'proceeds' of sanctions evasion
- New freezing powers for Asset Recovery Offices
- New rules on management of frozen assets



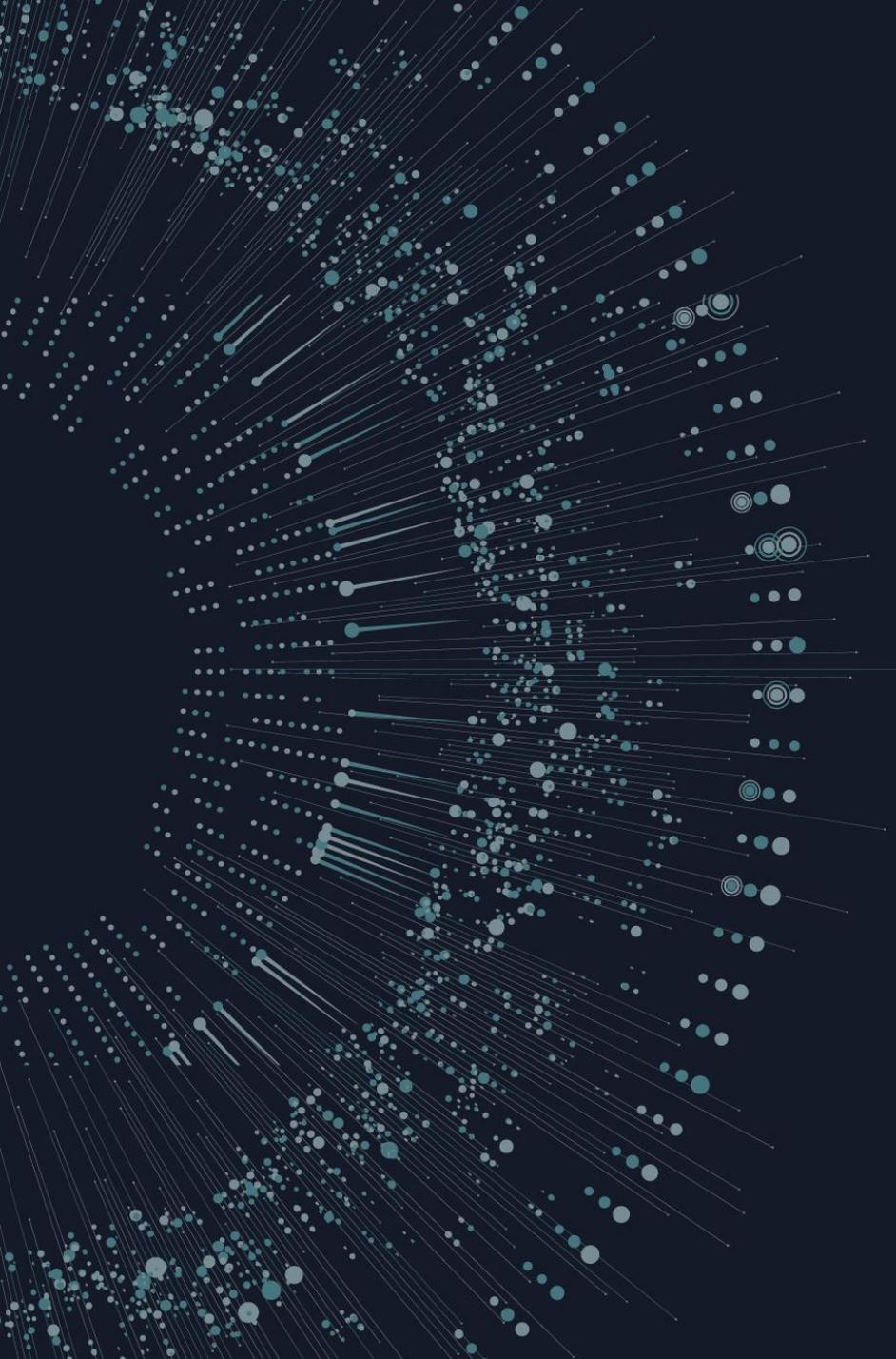
Canadian Legislation



- Amended the Special Economic Measures Act 1992 and the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) 2017
- A court can order the forfeiture of property belonging to a sanctioned person
- The first (ongoing) case involves Roman Abramovich

Rule of Law Dilemma

- Can one confiscate property that is not proceeds of crime?
- If not, can one keep assets frozen indefinitely?
- See *Kadi II*, EU General Court, Case T-85/09 (30 September 2010), ¶150

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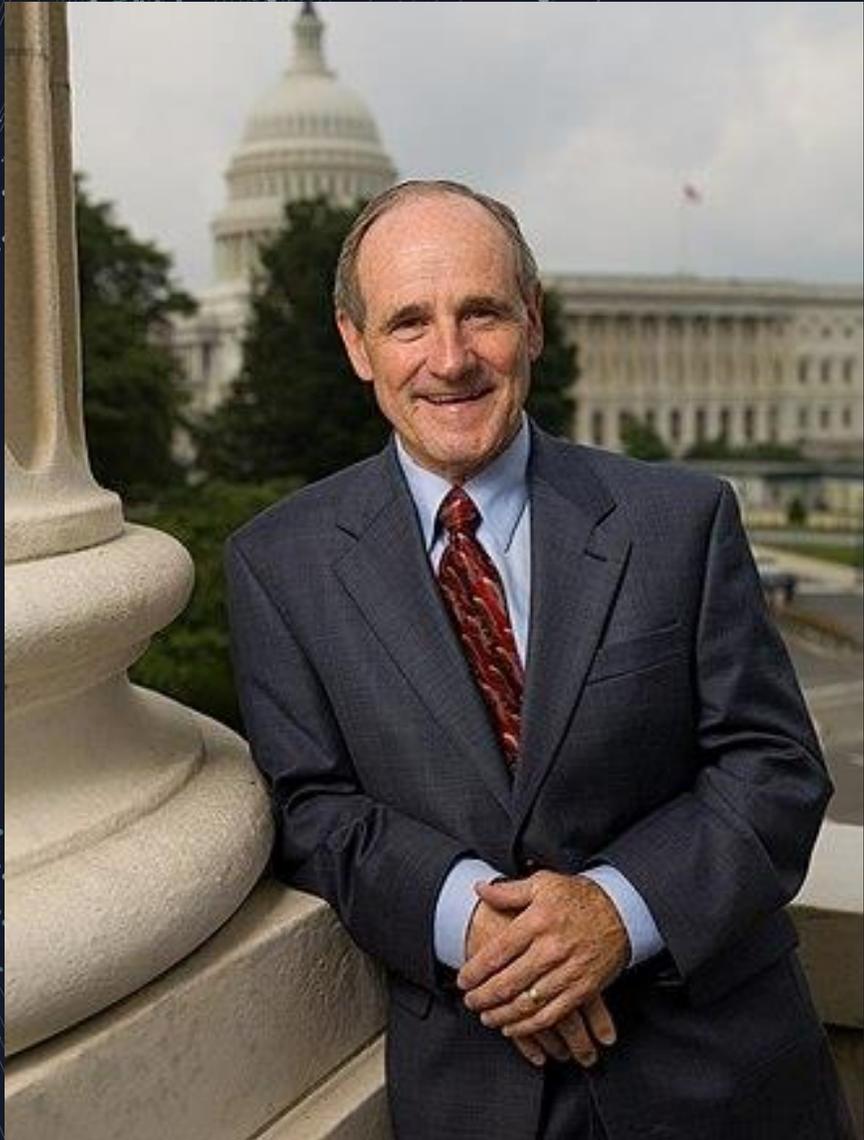
Ongoing Debates: Sovereign Property



Domestic Basis for Confiscation

Sovereign Immunities

Investment Treaties



US Draft Legislation

- Rebuilding Economic Prosperity and Opportunity (REPO) for Ukrainians Act introduced by a bipartisan group of Congress members in July 2023
- Provides for outright confiscation of Russian sovereign property and use for compensating and supporting Ukraine

EU Options Paper

- *'The Commission is proposing to create a new structure to manage frozen and immobilised public Russian assets, invest them and use the proceeds for Ukraine'*
- Based on the European Commission's study prepared around November 2022
- Were sovereign immunities addressed?





UK Draft Legislation

- Seizure of Russian State Assets and Support for Ukraine Bill proposed by Chris Bryant MP
- Would oblige the Home/Foreign Secretary to 'lay before Parliament a Bill for the seizure of Russian state assets for the purpose of offering support to Ukraine and Ukrainian people'
- Gov't blocked 2nd reading

Sovereign Immunities

- Protects state property from 'execution'
- Unclear if applies to executive (non-judicial) action

Investment treaties

- Protect against expropriation without compensation
- Allow for certain measures in the public interest e.g. forfeiture of proceeds of crime

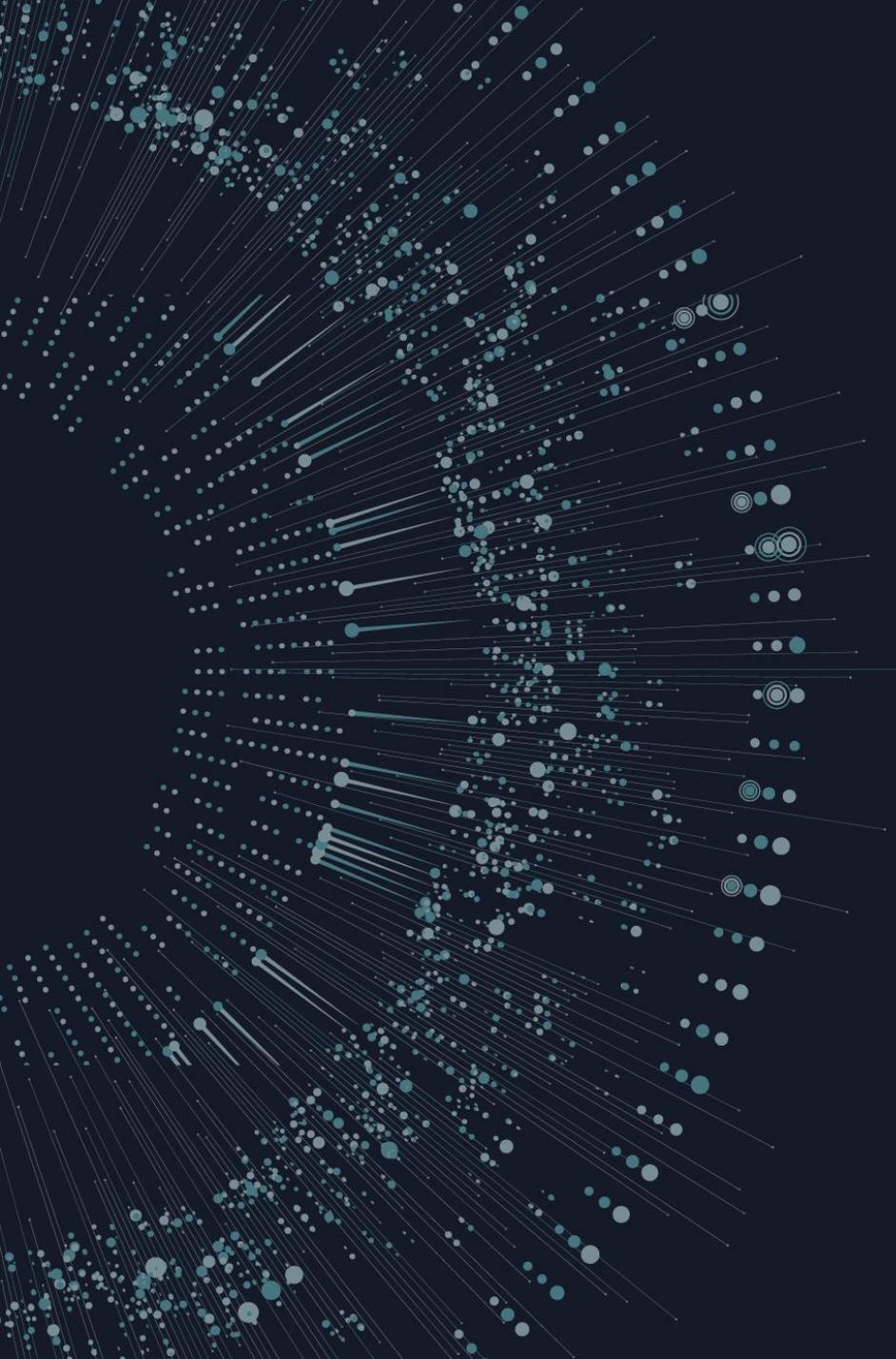
Countermeasures

Countermeasures

- Taken in response to a breach of international law
- Must be proportionate
- Cannot be punitive
- ...Must also be temporary and 'as far as possible' reversible – this is where disagreement lies!

CONCLUSIONS

- Private property: a true rule of law dilemma, but greater willingness to experiment (e.g. Canadian experience)
- State assets: politically and economically challenging, therefore greater caution. Ultimately policy and politics, not law!

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‘Magnitsky’ Sanctions

US Magnitsky Act 2012

- The original 'Magnitsky' law



- Adopted in response to the apparent killing of tax accountant Sergei Magnitsky in a Moscow jail in 2009
- The Act's co-sponsor, Senator Ben Cardin, said it enabled US Gov't to 'see beyond the veil of sovereignty that kleptocrats often hide behind'
- By that time, US Gov't had two legal authorities for travel bans but not asset freezes against corrupt foreign officials:
 - Presidential Proclamation 7750 (non-public sanctions)
 - Section 7031(c) sanctions (dormant until 2018)

'Magnitsky' legislation worldwide

US	Canada	UK	EU
<p>Global Magnitsky Act 2016 / EO 13818</p> <ul style="list-style-type: none"> • Human rights abuse & corruption • Asset freezes & travel bans 	<p>Sergei Magnitsky Law 2017</p> <ul style="list-style-type: none"> • Human rights abuse & corruption • Asset freezes & travel bans 	<p>Sanctions and Anti-Money Laundering Act 2018</p> <ul style="list-style-type: none"> • Human rights abuse & corruption • Asset freezes & travel bans 	<p>Misappropriation sanctions</p> <ul style="list-style-type: none"> • Corruption • Asset freezes <p>Human rights sanctions</p> <ul style="list-style-type: none"> • Only human rights abuse • Asset freezes and travel bans
<p>Magnitsky Act 2012</p> <ul style="list-style-type: none"> • Human rights abuse related to Russia • Asset freezes & travel bans 			
<p>Section 7031(c) (2008-)</p> <ul style="list-style-type: none"> • Corruption & human rights abuse • Travel bans • Also covers family members 			
<p>Proclamation 7750 (2004)</p> <ul style="list-style-type: none"> • Corruption • Travel bans only 			

What's the Impact?

A Journey of 20:

An Empirical Study of the Impact of
Magnitsky Sanctions on the Earliest
Corruption Designees

June 2023

Anton Moiseienko
Megan Musni
Eva Van Der Merwe

Direct Impact

Asset Freezes

Travel Bans

Private-Sector Action

Banks Ceasing Business

Other Companies Ceasing Business

Media Scrutiny

Home Developments

Criminal Investigation / Prosecution

Job Loss

Loss of Political Influence

Behaviour Change

By the Target

By Broader Regime/Network



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