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Generation

The Backbone of Economic Sanctions – Comparing US and EU Sanctions Frameworks

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The Backbone of Economic Sanctions – Comparing US and EU Sanctions Frameworks

Konstantin K. Oppolzer*

As a response to the Russian invasion of Ukraine, the United States and the European Union have put in place far-reaching and highly coordinated sanctions against Russia. While their sanctions are similar in content, the United States and the European Union differ in their sanctions history as well as in their respective sanctions frameworks, which govern how sanctions are adopted, implemented, and challenged. These frameworks constitute the backbone of the sanctions imposed and shape their effectiveness and impact. They therefore are critical for the United States' and the European Union's capacity to conduct geopolitics. This article explores the sanctions frameworks of the United States and the European Union from a comparative perspective and investigates their similarities and differences. It argues that the post 2022 sanctions against Russia are in many ways a turning point for the European Union's sanction practice, uncovering considerable insufficiencies, but also sparking critical reflection and much needed innovation. It furthermore underscores that a good look to the long-serving United States' sanctions framework will pay off for the European Union, when creating the foundation for future sanctions regimes.

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I. Introduction

The Russian invasion of Ukraine has sparked international outcry, with countries around the globe condemning Russia's actions and calling for an immediate withdrawal of forces.[1] The United States and the European Union, together with a number of allies, have been at the helm of an alliance that has confronted Russia not only by providing military support to Ukraine but also by putting in place far-reaching and unprecedented sanctions.[2] To enhance effectiveness, the United States, the European Union, and their allies have

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1 See, *e.g.*, *United Nations General Assembly*, Resolution ES-11/6 (which was adopted on February 23, 2023, with the support of 141 countries. It calls for "*comprehensive, just and lasting peace*" in Ukraine and urges Russia to "*immediately, completely and unconditionally withdraw*" its forces).

2 *US Treasury* (2022) Unprecedented Sanctions Press Release; *European Commission* (2022) Speech by Commissioner Gentiloni at Georgetown University. Currently Belarus and Serbia are the only European States that have not introduced sanctions against Russia (*Associated Press News*, Serbian president rejects calls for sanctions against Russia (January 4, 2023)). Sanctions of the European Union are implemented not just by the 27 Member States of the European Union (**Member States**), but also, with certain deviations, by non-EU countries such as Switzerland (see, *e.g.*, *Swiss Federal Council* (2023) Ukraine Press Release) and Norway (see, *e.g.*, *Norwegian Ministry of Foreign Affairs* (2023) Sanctions against Russia Press Release). See also *Gestri* (2016) Sanctions, 76 et seqq. (setting out categories of States that regularly align with the European Union on sanctions including candidate countries, potential candidates, and members of the European Economic Area).

closely aligned the content of their sanctions regimes, using similar means, such as asset freezes and export controls, against similar targets, such as certain proponents of the invasion and certain sectors of the Russian economy.[3]

The United States has for a long time been pioneering sanctions as a foreign policy tool.[4] It is well-known for its far-reaching and aggressive sanctions, which can be characterized as a means of "*economic warfare*".[5] Its economic importance, which is ostensibly reflected in the dominance of the US dollar (**USD**),[6] the notorious extraterritoriality of some of its sanctions,[7] its unique capacity to weaponize interdependence,[8] as well as – the focus of this article – its sanctions framework,[9] result in the fact that the United States can rightly be described as a "*sanctions superpower*".[10] Sanctions of the European Union, in contrast, have not yet attracted a similar reputation.

This article explores the sanctions frameworks of the United States and the European Union, which govern how sanctions are adopted, implemented, and challenged, and investigates their similarities and differences.[11] These frameworks constitute the backbone of the sanctions imposed and crucially shape their impact, reputation, and potential for deterrence. They therefore are critical for the United States' and the European Union's capacity to conduct geopolitics. The article argues that the post 2022 sanctions against Russia are in many ways a turning point for the European Union's sanction practice, uncovering considerable insufficiencies, but also sparking critical reflection and

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3 See, *e.g.*, *US Treasury* (2023) US and EU Bilateral Partnership Press Release; see also *Atlantic Council*, Russia Sanctions Database, <https://www.atlanticcouncil.org/blogs/econographics/russia-sanctions-database/>.

4 See, *e.g.*, *Nephew* (2020) US Sanctions, 93; *Buretta/Lew* (2021) US Sanctions, 98; see also Chapter II.1.a).

5 See, *e.g.*, *Barnes* (2016) Sanctions, 199.

6 For a description of the dominance of the USD in global trade and its implications for sanctions, see, *e.g.*, *Bertaut/Von Beschwitz/Curcuru* (2023) US Dollar; *Siripurapu/Berman* (2023) Dollar; *Norrlöf* (2023) Dollar dominance.

7 For a discussion of the extraterritoriality of US sanctions, see, *e.g.*, *Gordon/Smyth/Cornell* (2019) Sanctions Law, 114-115; *Ruys/Ryngaert* (2020) Secondary Sanctions, 3 et seqq.; *Goldman/Lindblom* (2021) Extraterritorial Sanctions, 130 et seqq.

8 See, *e.g.*, *Farrell/Newman* (2019) Weaponized Interdependence, 74 et seqq.

9 This article does not focus on the United States' economic hegemony and the extraterritoriality of US sanctions, however, recognizes them as two important and well-studied reasons for the particular importance of US sanctions for the global business community.

10 See *Farrell/Newman*, The U.S. Is the Only Sanctions Superpower, New York Times (March 16, 2022).

11 The article focuses solely on the framework of sanctions and not on the specific sanctions imposed. It furthermore does not discuss the highly debated subject of the overall effectiveness of sanctions in reaching their goals.

much needed innovation. It furthermore underscores that a good look to the long-serving United States' sanctions framework will pay off for the European Union, when creating the foundation for future sanctions regimes.

The article focuses on autonomous sanctions against Russia,[12] as the most recent, most innovative, and, certainly for the European Union, the most comprehensive sanctions regime imposed so far.[13] Furthermore, the sanctions against Russia are the first time in recent history that a global market participant of significant size, and, in particular for the European Union, a major trade partner has been sanctioned.[14] It moreover addresses *economic* sanctions, which, for the purpose of this article, can be understood as "*instruments of public policy*" that "*restrict[] foreign trade and finance or withhold[] economic benefits [...] from targeted States or other targeted non-State actors to accomplish broader security or foreign policy objectives*".[15]

The article conducts a comparative legal analysis of sanctions legislation in the United States and the European Union, taking into account academic literature and jurisprudence. It furthermore reflects background discussions with various stakeholders and experts in the European Union and the United States as well as semi-structured interviews with officials of sanction authorities on Member State and on EU level, which the author conducted from May to October 2023.

II. What is the history of today's sanctions frameworks?

Before engaging in the comparative legal analysis of the modern-day sanctions frameworks of the United States and the European Union, this chapter examines how they have come about. It highlights select events that are considered to be of particular relevance for the development of the modern-day sanction frameworks. For a better overview, they are divided up in certain periods. A review of the *history of sanctions frameworks* in the respective jurisdiction is

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12 Autonomous sanctions are sanctions that are imposed "*outside the framework of the United Nations*". They are also referred to as "*unilateral*" sanctions (*Asada* (2020) Definition of Sanctions, 10 et seqq.).

13 See, *e.g.*, *European Union*, EU Sanctions Map, ‹https://www.sanctionsmap.eu/#/main›.

14 *Congressional Research Service* (2023) Russia's Trade and Investment Role, p. 1 (describing Russia's "*significance in the global economy*" and noting that, in 2021, the European Union was Russia's most important trade partner for goods exports, whereas the United States share of Russian goods exports stood at 4%).

15 *Alexander* (2009) Economic Sanctions, 1 and 10. This article thus does not focus on other sanction measures such as diplomatic sanctions or visa bans. For the sake of readability, this article nevertheless uses the more comprehensive term "*sanctions*".

important as differences in their origins and in their evolution have far-reaching implications for today's sanctions regimes and up until today shape their character.

1. United States

The United States has a long and somewhat proud history with economic sanctions that goes hand in hand with the nation's fight for independence and its transition to a hegemonial global economic power.[16] It can be divided in four periods: (i) sanctions from the formation of the United States until the First World War, (ii) sanctions during the World Wars, (iii) sanctions during the Cold War and (iv) sanctions after the Cold War.[17]

a) Key developments until the end of the Second World War

The *first* period of United States' sanctions spans from 1806 to 1917. US sanctions can be traced back to 1806, when the federal government adopted the Non-Importation Act,[18] and to 1807, when it adopted the Embargo Act.[19] Both statutes targeted Great Britain and were a response to the attacks of the British navy on US merchant vessels during the Napoleonic Wars.[20] They were followed by the Non-Intercourse Act of 1809,[21] which targeted Great Britain and France.[22] These early sanctions regimes are mostly considered ineffective in achieving their goals of damaging the economies of their targets and to put in place a convincing disincentive against attacks on US vessels.[23] Later, during the Civil War of 1861 to 1865, the federal government used sanctions to prohibit trade with Confederate States, which – given changes in the global economy,

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16 See, *e.g.*, OFAC, About OFAC, ‹https://ofac.treasury.gov/about-ofac› (in its description of OFAC, the Treasury emphasizes its history with economic sanctions dating back "*prior to the War of 1812*").

17 Cf. with other authors defining similar or slightly different periods, *e.g.*, *Nephew* (2020) US Sanctions, 94 et seqq.; *Alexander* (2009) Economic Sanctions, 12 et seqq.

18 Pub. L. 9-29, 2 Stat. 379.

19 Pub. L. 10-5, 2 Stat. 451.

20 See *Nephew* (2020) US Sanctions, 94; see also *Alexander* (2009) Economic Sanctions, 12-13. For details on the Non-Importation Act, see *Heaton* (1941) Non-Importation, 178 et seqq. For details on the Embargo Act, see *Frankel* (1982) Embargo, 291 et seqq.

21 Pub. L. 10-24, 2 Stat. 528.

22 See Pub. L. 10-24, 2 Stat. 528 ("*[a]n Act to interdict the commercial trade between the United States and Great Britain and France, and their dependencies […]*"); see also *Olson/Mendoza* (2015) Economic History, 436; *Nephew* (2020) US Sanctions, 95.

23 See *Nephew* (2020) US Sanctions, 95.

in particular the greater importance of the United States and the political situation at the time – have been considered more effective.[24]

The *second* period spans from 1917 to 1945. In 1917, during the First World War, the United States adopted the Trading with the Enemy Act (**TWEA**).[25] TWEA prohibited trade with nations that are at war with the United States and authorized the President to regulate this prohibition, among other things by granting licenses,[26] *i.e.*, exemptions from the application of sanctions. The United States used TWEA as a basis for sanctions during the First and Second World War.[27] In 1933, the Emergency Banking Act[28] amended TWEA, expanding certain powers of the President to "*any other periods of national emergency declared by the President*",[29] thereby allowing for the use of sanctions also in times when the United States was not at war. In 1940, the Office of Foreign Funds Control was created, which was the predecessor of today's Office of Foreign Asset Control (**OFAC**),[30] the "*principal administrator of US economic sanctions programs*".[31] Sanctions during the second period have mostly been considered effective tools of economic warfare.[32]

b) Key developments since the end of the Second World War

The *third* period of United States' sanctions spans from 1945 to 1990. During this period, the United States mainly used sanctions to target communist countries. It, however, also used them as a foreign policy tool against its allies, in case of conflicting interests.[33] In 1950, in the context of the Korean War,

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24 See *Nephew* (2020) US Sanctions, 95; *Department of State, Office of the Historian*, The Blockade of Confederate Ports, 1861–1865, ‹https://history.state.gov/milestones/1861-1865/blockade› (pointing out that the blockade of Confederate ports "*successfully prevented Confederate access to weapons*").

25 Pub. L. 65-91, 40 Stat. 411.

26 See TWEA, Sec. 3 and 4.

27 See *Alexander* (2009) Economic Sanctions, 16 and 18-19.

28 Pub. L. 73-1, 48 Stat. 1 (Emergency Banking Act).

29 Emergency Banking Act, Sec. 2.

30 See OFAC, About OFAC, ‹https://ofac.treasury.gov/about-ofac›.

31 *Hirschhorn/Egan/Krauland* (2022) US Export Controls, 208. See also Chapter IV.1.a)aa)i).

32 See *Alexander* (2009) Economic Sanctions, 16 and 19; *Nephew* (2020) US Sanctions, 96; cf. *Mulder* (2022) Economic Weapon, 296.

33 See *Nephew* (2020) US Sanctions, 96-97; *Hufbauer et al.* (2007) Economic Sanctions, 10 (noting that, in 1956, the United States economically pressured France and the United Kingdom to withdraw troops from the Suez region); see also *Mulder* (2022) Economic Weapon, 293-294.

OFAC was formally created.[34] In 1974, the Trade Act of 1974 was adopted,[35] which included a provision referred to as "*Jackson–Vanik amendment*" that stipulated certain trade restrictions for "*nonmarket economy countr[ies]*" (**Jackson–Vanik**)[36] and applied to communist States, including the Soviet Union and the People's Republic of China.[37] In 1977, Congress adopted the International Economic Emergency Act (**IEEPA**),[38] which amended TWEA by reducing the President's sanctioning powers provided to him by TWEA again to times of war.[39] At the same time, the IEEPA itself, however, provided a new legal basis for the President to regulate commerce to "*deal with any unusual or extraordinary threat [...] outside the [United States], if the President declares a national emergency*".[40] Sanctions during the third period were facilitated by the US economic strength and bipolar nature of global politics.[41]

The *fourth* period started with the collapse of the Soviet Union. As US foreign policy goals changed, sanctions have been used to tackle matters such as international terrorism, human rights, and democratization. The United States has also relied more on international cooperation when adopting sanctions.[42] It was only in 2012, that the United States first adopted very selective sanctions against Russia with the Magnitsky Act:[43] it targets certain Russian officials and other persons involved in the abusive treatment and subsequent death of Sergei Magnitsky, a Russian tax lawyer that had investigated a corruption case involving a government official. It furthermore targets persons that, in general, are responsible for human right violations against whistleblowers on Russian corruption and human rights advocates in Russia.[44] In 2014, after Russia's oc-

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34 See OFAC, About OFAC, ‹https://ofac.treasury.gov/about-ofac›.

35 Pub. L. 93-618, 88 Stat. 1978-2 (Trade Act of 1974).

36 Trade Act of 1974, §402.

37 See *House of Representatives* (2010) US Trade Statutes, 314 et seqq.

38 Pub. L. 95-223, 91 Stat. 1625 (International Emergency Economic Powers Act).

39 See IEEPA, Sec. 101.

40 See IEEPA, Sec. 202 and 203.

41 See *Nephew* (2020) US Sanctions, 97.

42 See *Hufbauer et al.* (2007) Economic Sanctions, 125; *Nephew* (2020) US Sanctions, 97; see also *Mulder*, (2022) Economic Weapon, 294.

43 Pub. L. 112–208, 126 Stat. 1496 (Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012) (**Magnitsky Act**).

44 Magnitsky Act, Title IV. After the collapse of the Soviet Union, Jackson-Vanik continued to formally apply to Russia as one of the Soviet Union's successor states. It, however, was continuously waived by US Presidents and thus not exercised (see, *e.g.*, *New York Times*, A Costly Anachronism (February 27, 2012)). The Magnitsky Act formally ended this application (Magnitsky Act, Title I).

cupation of Crimea, the United States began to impose more comprehensive sanctions against Russia.[45]

2. European Union

The European Union's history of economic sanctions goes hand in hand with its own evolution as a supranational body. It is characterized by the European Union's increasing integration, starting from informal cooperation and alignment on foreign policy matters between Member States and finally creating an EU competence for sanctions.

a) Key developments until the Maastricht Treaty

Already in 1957, the foundation act of the European Community, the Treaty of Rome,[46] which established a common market between the Member States at the time, included foreign policy elements. It included provisions that aimed to ensure the Member States' ability to provide arms and a consultation between Member States in case one of them was to impose sanctions to ensure the functioning of the common market.[47]

In 1970, following the so called "*Davignon Report*",[48] the Member States formed the European Political Co-operation (**EPC**), an intergovernmental mechanism outside the European Community framework to coordinate foreign policy.[49] The EPC served as a forum for the discussion of sanctions, however, in the first decade of its existence, Member States did not manage to agree on any specific sanctions.[50] In 1973, the EPC was strengthened by the so called "*Copen-*

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45 US President, Exec. Order No. 13660 of March 6, 2014; see also *Nephew* (2020) US Sanctions, 111 et seqq.; *Myers/Baker*, Putin Recognizes Crimea Secession, Defying the West, New York Times (March 17, 2014).

46 Treaty establishing the European Economic Community, signed at Rome on March 25, 1957 (**Treaty of Rome**).

47 See Treaty of Rome, Art. 223 and 224; *Kreutz* (2005) Hard Measures, 8; *Giumelli* (2020) EU Sanctions, 117.

48 See *Foreign Ministers of the Member States* (1970) Davignon Report, 9 et seqq. (a committee of senior officials of the six foreign departments of the Member States prepared the report. The committee was chaired by the Belgian official *Etienne Davignon*. The report was adopted by the Member States' Foreign Ministers meeting in Luxembourg on October 27, 1970, following debate and approval by the European Community's legislative bodies).

49 See *Nuttall* (1992) European Political Co-operation, 1 and 5 (referring to the "*Luxembourg Report*", another term frequently used for the Davignon Report); see also *Gainar* (2020) European Political Co-operation, para. 1.

50 See *Kreutz* (2005) Hard Measures, 8-9; *Giumelli* (2020) EU Sanctions, 117.

hagen Report"[51] and, in 1981, by the so called "*London Report*".[52] Only after the London Report the EPC managed to agree on imposing sanctions. Joint sanction initiatives targeted, for example, the Soviet Union in 1981 and Argentina in 1982.[53]

In 1987, the Member States adopted the Single European Act,[54] which aimed at enabling the European integration to regain momentum. Among other things, it created new competences for the European Community and reformed its institutions.[55] Moreover, the Single European Act codified the EPC and thereby put it on treaty basis for the first time.[56] The European Commission (**Commission**) was strengthened by becoming responsible for sanctions adopted by the EPC.[57] The Single European Act, however, only aimed for a convergence of the Member States' individual foreign policy and ECP's decisions were still not binding for Member States.[58]

b) Key developments since the Maastricht Treaty

In 1993, the Maastricht Treaty,[59] which aimed at even deeper European integration, created the European Union.[60] Among other things it created the Common Foreign and Security Policy (**CFSP**) as its "*second pillar*".[61] CFSP decisions of the European Union, including such concerning sanctions, were now binding to the Member States.[62] With the Maastricht Treaty, the European Union assumed the primary competence for economic sanctions, thereby dramatically reducing the Member States' ability to impose sanctions.[63] Following

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51 *Foreign Ministers of the Member States* (1970) Copenhagen Report, 12 et seqq.

52 *Foreign Ministers of the Member States* (1981) London Report, 61 et seqq.

53 See *Kreutz* (2005) Hard Measures, 9; *Giumelli* (2020) EU Sanctions, 117.

54 Single European Act, 1987 O.J. L 169 (**Single European Act**).

55 See *European Union*, The Single European Act, April 4, 2004, <https://eur-lex.europa.eu/EN/legal-content/summary/the-single-european-act.html>.

56 See Single European Act, Art. 30 et seqq.; *European Community* (1988) European Political Cooperation, 5.

57 See *Davis* (2002) Regulation of Exports, 49 (furthermore the European Parliament became entitled to receive reports); see also *Kreutz* (2005) Hard Measures, 10.

58 See *Giumelli* (2020) EU Sanctions, 117-118.

59 Treaty on European Union, signed at Maastricht on February 7, 1992, 1992 O.J. C. 191 (**Maastricht Treaty**).

60 See Maastricht Treaty, Title I.

61 See Maastricht Treaty, Title V.

62 See, *e.g.*, Maastricht Treaty, Title V, Art. J.2 (2); J.3 (4); see also *Giumelli* (2020) EU Sanctions, 118.

63 See *De Vries/Hazelzet* (2005) New Actor, 98; *Golumbic/Ruff* (2013) EU Sanctions Exemption, 1018; *Savage* (2021) EU Sanctions Enforcement, 42; *Forwood et al.* (2021) Restrictive

the creation of the CFSP, most former ECP decisions were replaced by CFSP Common Positions.[64]

In 2009, the Lisbon Treaty[65] created the EU sanctions framework that is in place today. In particular, it established the European External Action Service (**EEAS**), which is headed by the High Representative of the Union for Foreign Affairs and Security Policy (**High Representative**).[66] It was based on this sanctions framework that the European Union first imposed sanctions against Russia, when Russia occupied Crimea in 2014.[67]

3. Results

The United States has a considerable head start to the European Union

Comparing the origins of sanctions in the United States and the European Union, one finds that the United States has a sanctions practice that dates back almost 220 years, while the European Union's sanctions practice is much younger: the first sanctions, which were still only *coordinated* by the EPC, were adopted only 40 years ago; the first sanctions actually *adopted* on EU level date back only 30 years. The United States thus has a considerable head start to the European Union.

Measures, 28 (pointing out that Member States can only impose sanctions if they are pursuing national objectives that are not covered by the CFSP objectives and noting that such national sanctions are "*relatively rare*"); the *European Commission* appears to take a more restrictive position on the Member States' ability to impose sanctions, noting with regard to national asset freezes that "*the unilateral adoption of [such] measures for reasons* ***related to*** *the achievement of the CFSP objectives as set out in Article 215 TFEU would have a clear impact on the functioning of the internal market and would undermine the purpose and effectiveness of the above-mentioned provision of the TFEU. Therefore, they would not be compatible with EU law*" (*European Commission* (2019) National Asset Freeze Opinion). Having said that, several EU States, including Poland and Czech Republic, have imposed their own domestic sanctions regimes against Russia in addition to the EU sanctions (see *Reuters*, Czechs put Russian Patriarch Kirill on sanctions list over Ukraine (April 26, 2023); *Reuters*, Poland sanctions Gazprom among 50 Russian firms and oligarchs (April 26, 2023)).

64 See *Kreutz* (2004) EU Arms Embargo, 46; see also *Kreutz* (2005) Hard Measures, 11.

65 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, December 13, 2007, 2007 O.J. C. 306 (**Lisbon Treaty**).

66 See, *e.g.*, Lisbon Treaty, Art. 1(16) and (30).

67 *Council of the European Union* (2014) Council Meeting Press Release; see also *Giumelli* (2020) EU Sanctions, 129 et seqq.; *Myers/Baker*, Putin Recognizes Crimea Secession, Defying the West, New York Times (March 17, 2014).

One may argue against such a head start that there had been a sanction practice within the individual Member States before the European Union gained competence in the field. However, the switch from a framework of sanctions on Member State level to EU level entailed, among other things, the involvement of new parties, new procedures, new lines of command and communication regarding the interpretation of the laws, and the need to find a compromise with other parties (with often very different interests) enjoying equal rights. It furthermore entailed a great number of new personnel that has never before worked together. Institutional knowledge had to be transferred to new forums and actors had to operate within a new framework. It is thus only natural that the switch was accompanied by a break with national traditions, practices, and, to some extent, experience.

The head start of the United States in sanctions practice is enhanced by two factors that can be discerned by looking at the history of sanctions: *first*, the United States has been by far more active in imposing sanctions over the last 70 years than individual Member States or the European Union as a whole;[68] *Second*, the legal framework of US sanctions has been remarkably consistent. For example, both the Embargo Act of 1807 and the Magnitsky Act of 2012 are adopted by Congress and executed by the President, who may delegate his competence to other authorities;[69] OFAC has been the key authority responsible for implementing sanctions regimes for over 70 years; the IEEPA has served as a legal basis for sanctions adoption for over 40 years.

The head start of the United States has far-reaching practical consequences: it has had more time to gain experience with imposing sanctions, among other things, by experimenting with them, by evaluating them, and by establishing best practices.[70] It furthermore has had more time to grow institutional knowl-

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68 See, *e.g.*, *Thouvenin* (2020) History, 84 et seqq; *Hufbauer et al.* (2007) Economic Sanctions, 17 and 20 et seqq. (noting that in 109 out of 174 cases of sanctions identified by the authors, the US, alone or in concert with others, has imposed sanctions); *Mulder* (2022) Economic Weapon, 293.

69 See, *e.g.*, Embargo Act, Sec. 2 and Magnitsky Act, Sec. 406.

70 Such evaluations have been performed not just by academia but also by government authorities. For example, the Central Intelligence Agency conducted comprehensive studies on various sanctions regimes, which were classified at the time and only later released to the public (see, *e.g.*, *Central Intelligence Agency* (1986) Economic Sanctions, 5 et seqq.; *Central Intelligence Agency* (1982) Economic Sanctions, 1 et seqq.) Economic Sanctions, 5 et seqq.). Other studies have, for example, been prepared for the legislative branch (see *US General Accounting Office* (1992) Economic Sanctions, 2 et seqq.).

edge on sanctions in the legislative, the executive, and the judicative branch of Government and to work on the organization and capabilities of their authorities responsible for the implementation of sanctions.[71]

The environments that created and promoted the respective sanctions frameworks strongly differ

Reviewing the history of sanctions in the United States and the European Union, one finds that the environments that created the respective sanctions frameworks strongly differ. The US sanctions framework originates in times of great uncertainty during which the United States were subject to the military aggression of foreign powers and under constant and existential threat: the Non-Importation Act of 1806 was adopted only 30 years after the nation had declared its independence and only six years before British troops invaded its capital and burned down the US Capitol. The European Union's competence to impose sanctions, in contrast, was created in 1993 with the Maastricht Treaty, arguably more due to the wish for further integration of the European Union than due to specific foreign security threats.[72]

Overall, external factors, such as military threats and war, have promoted the development of the sanctions framework in the United States. In the European Union, in contrast, internal factors, such as the consideration that the European Union is in need of a CFSP, better suited to exercise it,[73] and that war in Europe is prevented by stronger integration,[74] have done so. The EU sanctions framework has developed along with the integration of the European Union. Similar to the integration process of the European Union itself, it thus reflects

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71 As set out in Chapter IV.1.a)aa), the US sanctions are implemented through the cooperation of a large number of agency components belonging to several different departments.

72 The London Report, *e.g.*, argues that "*The development of European Political Co-operation over these years has shown that it answers a real need felt by the member states of the European Community for a closer unity in this field. […] The Foreign Ministers agree that further European integration […] will be beneficial to a more effective co-ordination in the field of foreign policy […]. The Foreign Ministers believe that in a period of increased world tension and uncertainty the need for a coherent and united approach to international affairs by the members of the European Community is greater than ever. They note that, in spite of what has been achieved, the Ten are still far from playing a role in the world appropriate to their combined influence. It is their conviction that the Ten should seek increasingly to shape events and not merely to react to them*" (see *Foreign Ministers of the Member States* (1981) London Report, 62).

73 See fn. 72.

74 See, *e.g.*, *Fondation Robert Schuman*, Declaration of 9 May 1950, ‹https://www.robert-schuman.eu/en/declaration-of-9-may-1950›; For a discussion of the idea of European integration as a solution to preventive war, see *Eilstrup-Sangiovanni/Verdier* (2005) European Integration, 104 et seqq.

the struggle between proponents of a deeper European integration and proponents of Member State autonomy, which had been ongoing for decades until the Maastricht Treaty finally created an EU competence for CFSP.[75]

The implications of the origins and history of the US and the EU sanctions frameworks and the resulting cultural differences on today's sanction practice should not be underestimated. They continue to have an effect on all stakeholders involved in sanctions, from authorities responsible for the implementation to affected persons to courts.[76]

Interestingly, the full-scale Russian invasion of Ukraine in 2022, which has sent shockwaves through Europe and has reminded Member States that peace in Europe is not to be taken for granted, has now provided an external factor strong enough to trigger a much-needed critical reflection on the sanctions framework currently available to the European Union. This reflection has uncovered substantial shortcomings.[77]

The United States was first to sanction Russia

With a view to Russia, one finds that the United States has imposed sanctions against Russia already in 2012 based on the Magnitsky Act and hence before the European Union. However, the sanctions introduced in 2012 have been only minor in scope. Both the United States and the European Union have thus started to comprehensively sanction Russia around the same time after the occupation of Ukraine in 2014 and have considerably expanded their sanctions regimes with the beginning of the full-scale invasion of 2022.

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75 See, *e.g.*, *De Gucht* (1997) Common Foreign and Security Policy, 50-54 and 59 et seqq. (describing Member States' reluctance to give up competences in the area of the CFSP before and after the Maastricht Treaty and the"*lack of political will*" regarding the EU's security cooperation), *Davis* (2002) Regulation of Exports, 51 (describing the "*unwillingness of member states to yield sovereignty in [the area of CFSP]*").

76 For the United States, this effect is visible, *e.g.*, in the strong position of the executive branch in the United States in the adoption process of sanctions (see Chapter III.1.); in the self-perception of US sanctions authorities as engaging in economic warfare (see, *e.g.*, *Barnes* (2016) Sanctions, 199-202); in their practice of imposing penalties (see Chapter IV.1.b)). For the European Union, it is visible, *e.g.*, in the central role of the Council as representation of the Member States in sanctions adoption (see Chapter III.2.a)), the implementation by the Member States (see Chapter IV.2.a)) and in the very different options for legal review that the United States and the European Union offer affected parties (see Chapter V.).

77 Such shortcomings include the lack of a flexible and reliable adoption procedure (see Chapter III.2.) and the heterogeneity of sanctions authorities (see Chapter IV.2.) and of penalties in the European Union (see Chapter IV.2.).

III. How are sanctions adopted?

A key element of the legal framework of sanctions is their *adoption*. This chapter outlines how sanctions are adopted in the United States and in the European Union. It sets out the main legal acts that constitute the legal basis for sanctions adoption and subsequent implementation, the key actors involved in the adoption process, and the adoption process itself. This is important as differences in the context of sanction adoption have wide-reaching implications for the ability and agility of the respective jurisdiction in imposing sanctions.

1. United States

In the United States, sanction adoption centers around Congress and the President. Congress constitutes the legislative branch of the US government and consists of the House of Representatives and the Senate. The President constitutes the executive branch. The competence of Congress and the President to introduce sanctions derives from the US Constitution. It, very briefly, stipulates Congress's right to "*regulate [c]ommerce with foreign nations*".[78] The President "*shall take [c]are of the [l]aws to be faithfully executed*".[79]

a) The role of Congress: sanction laws

Based on its constitutional power, Congress has passed a number of laws that authorize and sometimes mandate the President to introduce sanctions. These laws are either very specific to address a particular foreign policy issue, often stipulating concrete modalities of sanctions to be introduced by the President,[80] or very broad to provide the President with a flexible mechanism to safeguard national interest.[81] The two main statutes passed by the Congress that have been used as a basis for sanctions since the Second World War are TWEA and the IIEPA.[82] Both belong to the latter group, granting the President great flexibility in case of war or a national emergency.

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78 US Constitution, Art. I, Sec. 8; see also *Nephew* (2020) US Sanctions, 98; *Buretta/Lew* (2021) US Sanctions, 98.

79 US Constitution, Art. II, Sec. 3; see *Buretta/Lew* (2021) US Sanctions, 98.

80 See *Nephew* (2020) US Sanctions, 99. Examples for specific laws are the Magnitsky Act and the North Korean Sanctions and Policy Enhancement Act of 2016 (Pub. L. 114-122, 130 Stat. 93).

81 See *Nephew* (2020) US Sanctions, 99. Examples for broad laws are TWEA, the IEEPA and the United Nations Participations Act (Pub. L. 79-264, 59 Stat. 619).

82 See *Gordon/Smyth/Cornell* (2019) Sanctions Law, 111.

Key laws that serve as the basis for the sanctions against Russia are the IEEPA, the National Emergencies Act,[83] the Immigration and Nationality Act of 1952,[84] the Countering Americas Adversaries Through Sanctions Act,[85] the Ukraine Freedom Support Act of 2014[86] and the Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014.[87]

b) The role of the President: executive orders

Based on the laws passed by Congress, the President issues Executive Orders (**EOs**), which are a means for the President to manage the executive branch of Government.[88] Even though they are neither mentioned in the Constitution nor do any laws grant the President a general authority to issue them, they are considered to have the force of federal law.[89] The EOs specify the sanctions and identify the authorities that are responsible for adopting implementing regulations and for their execution. The President's room for maneuver thereby depends largely on the scope the respective law provides him with.[90] EOs regularly reference several legal bases for their issuance at the beginning of each EO.[91]

Assisting the President in specifying the sanctions through EOs are the President's advisors within the Executive Office of the President (**EOP**).[92] The EOP consists of a number of federal agencies immediately serving the President.[93] The EOP agency most relevant in the area of sanctions is the National Secu-

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83 Pub. L. 94-412, 90 Stat. 1255.

84 Pub. L. 82-414, 66 Stat. 163.

85 Pub. L. 115-44, 131 Stat. 886.

86 Pub. L. 113-272, 28 Stat. 2952.

87 Pub. L. 113-95, 128 Stat. 1088; see OFAC, Ukraine-/Russia-related Sanctions, ‹https://ofac.treasury.gov/sanctions-programs-and-country-information/ukraine-russia-related-sanctions›.

88 *Federal Register*, Executive Orders, ‹https://www.federalregister.gov/presidential-documents/executive-orders›.

89 See *Nephew* (2020) US Sanctions, 100; see also *Congressional Research Service* (2021) Executive Orders, 2 and 4 (with references).

90 See *Nephew* (2020) US Sanctions, 100-101. For a description of the formalities of the issuing procedure, see *Congressional Research Service* (2021) Executive Orders, 2 et seqq.

91 See *Gordon/Smyth/Cornell* (2019) Sanctions Law, 111.

92 See *Nephew* (2020) US Sanctions, 101.

93 See *Relyea* (2008) Executive Office of the President, 2. For an overview of the 17 federal agencies currently being part of the EOP, see *The White House*, Executive Office of the President, ‹https://www.whitehouse.gov/administration/executive-office-of-the-president/›.

rity Council (**NSC**).[94] Its purpose is to consolidate domestic, foreign, and military policies regarding national and international security and to promote corresponding collaboration among various government departments, agencies, and the military.[95] The NSC consists, *inter alia*, of the President and the Secretaries of State, Defense, Energy and the Treasury. The Director of National Intelligence is a statutory adviser to the NSC.[96] Sanctions experts within the departments assist in the design and drafting of the EOs; the NSC facilitates interagency discussions.[97]

President Obama,[98] *President Trump*[99] and *President Biden*[100] issued a number of EOs targeting Russia.[101] These EOs declare and expand a national emergency, specify sanctions and delegate the President's powers to the Secretary of the Treasury, of State, of Homeland Security and of Commerce.[102] They furthermore authorize them to further delegate these powers to other officers and agencies of the Government.[103]

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94 See *Nephew* (2020) US Sanctions, 101.

95 See *Congressional Research Service* (2022) National Security Council, 1; see also 50 U.S. Code §3021.

96 See 50 U.S. Code §3021; *Congressional Research Service* (2022) National Security Council, 1.

97 See *O'Toole/Sultoon* (2019) Sanctions Program, 1-4.

98 *President Obama* issued the following EOs with a view to the sanctions against Russia: US President, Exec. Orders No. 13660 of March 6, 2014; No. 13661 of March 16, 2014; No. 13662 of March 24, 2014; No. 13685 of December 19, 2014.

99 *President Trump* issued the following EOs with a view to the sanctions against Russia: US President, Exec. Orders No. 13849 of September 20, 2018; No. 13883 of August 1, 2019.

100 *President Biden* has issued the following EOs with a view to the sanctions against Russia: US President, Exec. Orders No. 14024 of April 15, 2021; No. 14039 of August 20, 2021; No. 14065 of February 21, 2022; No. 14066 of March 8, 2022; No. 14068 of March 11, 2022; No. 14071 of April 6, 2022.

101 For a list of EOs adopted, see OFAC, Ukraine-/Russia-related Sanctions, ‹https://ofac.treasury.gov/sanctions-programs-and-country-information/ukraine-russia-related-sanctions›.

102 See, *e.g.*, US President, Exec. Order No. 13660 of March 6, 2014, Sec. 1(a); US President, Exec. Order No. 13849 of September 20, 2018, Sec. 1(a) & 4(a)(v); US President, Exec. Order No. 14068 of March 11, 2022, Sec. 1(a).

103 See, *e.g.*, US President, Exec. Order No. 13660 of March 6, 2014, Sec. 8; US President, Exec. Order No. 13849 of September 20, 2018, Sec. 10.

c) The role of sanction authorities: implementing acts and designations

The EOs usually delegate the President's powers to other authorities of the US Government, including the Secretaries of the Treasury, of State, of Commerce and of Homeland Security. They have considerable power when implementing the EOs, for example, by adopting implementing regulations and compiling the list of specific sanction targets.[104] The implementing regulations of the authorities are included in the US Code of Federal Regulations.[105] The lists of specific sanction targets are published in the Federal Register[106] and on the respective authorities' websites.[107]

2. European Union

In the European Union, the Council of the European Union (**Council**) is the central institution for the adoption of sanctions.[108] Its competence derives from the Treaty on European Union (**TEU**), which stipulates that in matters of the CFSP, "*the Council shall […] define the approach of the Union to a particular matter of a geographical or thematic nature*".[109] Sanctions, referred to as "*restrictive measures*" in the European Union, are a key tool of the CFSP.[110] They have their legal basis in the Treaty on the Functioning of the EU (**TFEU**).[111]

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104 Note that the President sometimes explicitly lists SDNs in the EOs (see, *e.g.*, US President, Exec. Order No. 13224 of September 23, 2001, in which *President Bush* sanctioned persons in connection with the 9/11 terrorist attacks).

105 See, *e.g.*, implementing regulations concerning OFAC (see 31 C.F.R. Subtitle B, Chapter V; *Gordon/Smyth/Cornell* (2019) Sanctions Law, 111), concerning the Financial Crime Enforcement Network (**FinCEN**) (31 C.F.R. Subtitle B, Chapter X) and concerning the Bureau of Industry and Security of the Department of Commerce (15 C.F.R. Subtitle B, Chapter VII, Subchapter C).

106 See, *e.g.*, *Department of the Treasury*, *Office of Foreign Assets Control*, Notice of OFAC Sanctions Actions, 84 Fed. Reg. 68,013 (December 12, 2019); *Department of State*, Notice of Department of State Sanctions Actions, 87 Fed. Reg. 74,467 (December 5, 2022); *Department of Commerce*, *Bureau of Industry and Security*, PJSC Aeroflot, 1 Arbat St., 119019, Moscow, Russia; Order Temporarily Denying Export Privileges, 87 Fed. Reg. 21,611 (April 12, 2022).

107 See, *e.g.*, OFAC, Specially Designated Nationals And Blocked Persons List, ‹https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists›; *Bureau of Industry and Security*, Entity List, ‹https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list›.

108 See, *e.g.*, *Council of the European Union* (2018) Sanctions Guidelines, 5 para. 2.

109 Treaty on European Union, 2012 O.J. C. 326/13, Art. 29.

110 *Council of the European Union* (2018) Sanctions Guidelines, 46.

111 Treaty on the Functioning of the European Union, 2012 O.J. C. 326/47, Art. 263.

a) The role of the Council of the European Union: decisions and regulations

To introduce sanctions, the Council has to adopt a decision. The vote on the decision in the Council has to be unanimous,[112] which means that 27 Member States have to come to an agreement. Member States may also abstain from a vote, in which case they are not bound by the decision but accept that it binds the European Union.[113]

Depending on whether the sanctions included in the decision fall within the competence of the European Union or of the Member States, either the Council implements them itself or the Member States implement them on their own by adopting national legislation. Sanctions that fall within the competence of the European Union are all measures that (i) affect EU commercial policy, for example, trade restrictions; or (ii) that affect the movement of capital and the functioning of the economic relations with a third country, for example, asset freezes and other financial sanctions.[114] Sanctions that fall within the competence of Member States include travel restrictions and arms embargoes.[115]

To introduce sanctions that fall into the competence of the European Union, the Council has to adopt a regulation. The Council needs to adopt the regulation with a qualified majority,[116] which means that both 55% of the Member States have to vote in favor of the proposal simultaneously representing 65% of the total EU population.[117]

It is important to note that the chronological order between the decision and an EU regulation that the EU treaties appear to intend[118] is only theoretical.

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112 See TEU, Art. 31(1). See also, *e.g.*, *Forwood et al.* (2021) Restrictive Measures, 28 (identifying Art. 31 TEU as the legal basis); cf. with *Gordon/Smyth/Cornell* (2019) Sanctions Law (identifying Art. 24 TEU as the legal basis).

113 See TEU, Art. 31(1).

114 *Gordon/Smyth/Cornell* (2019) Sanctions Law, 38-39; see also *Council of the European Union* (2018) Sanctions Guidelines, 6; *Forwood et al.* (2021) Restrictive Measures, 29.

115 *Gordon/Smyth/Cornell* (2019) Sanctions Law, 38; *Council of the European Union* (2018) Sanctions Guidelines, 6; *Forwood et al.* (2021) Restrictive Measures, 29.

116 TFEU, Art. 215. The European Parliament is only *informed* of the adoption of measures by the Council (TFEU, Art. 215(2)).

117 See TEU, Art. 16.

118 See TFEU, Art. 215.

In practice, both the decision and the regulation are "*usually adopted together and enter into force on the day of the adoption*".[119]

The Council has adopted four key decisions and regulations concerning Russia[120] that can be differentiated as economic sanctions,[121] individual sanctions,[122] and restrictions on trade and investments in certain occupied parts of Ukraine occupied by Russia.[123]

b) The role of other parties involved

A number of parties are involved in the adoption of a decision and a regulation. A Member State or the High Representative (with or without the support of the Commission) make a proposal for the decision.[124] If sanctions fall within the competence of the European Union, and hence are adopted through a regulation, the High Representative and the Commission provide a joint proposal for an EU regulation that is based on the decision to the Council.[125]

Other parties involved include the Political and Security Committee and the geographic working group of the Council.[126] The competent geographic working group within the Council concerning Russia sanctions is the Working Party on Eastern Europe and Central Asia (**COEST**).[127] Sanctions experts from the EEAS and experts from the Commission as well as the Council Legal Service provide assistance. The legal and technical issues are discussed in the For-

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119 See *Council of the EU and the European Council*, Infographic – The EU sanctions process explained, ‹https://www.consilium.europa.eu/en/infographics/the-eu-sanctions-process-explained/›; see also *Gordon/Smyth/Cornell* (2019) Sanctions Law, 40.

120 *European Commission*, Sanctions adopted following Russia's military aggression against Ukraine, ‹https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en#timeline-measures-adopted-in-2022-2023›.

121 Council Decision (CFSP) 2014/512; Council Regulation (EU) No 833/2014.

122 Council Decision (CFSP) 2014/145; Council Regulation (EU) No 269/2014.

123 Council Decision (CFSP) 2014/386 and Council Regulation (EU) No 692/2014 (both concerning Crimea and Sevastopol); Council Decision (CFSP) 2022/266 and Council Regulation (EU) 2022/263 (both concerning the Donetsk, Kherson, Luhansk and Zaporizhzhia oblasts of Ukraine).

124 See TEU, Art. 30; *Gestri* (2016) Sanctions, 81.

125 TFEU, Art. 215. The European Parliament is only *informed* of the adoption of measures by the Council (TFEU, Art. 215(2)).

126 See *Council of the European Union* (2018) Sanctions Guidelines, 47; *Gordon/Smyth/Cornell* (2019) Sanctions Law, 39-41; *Forwood et al.* (2021) Restrictive Measures, 28-29.

127 *Council of the EU and the European Council*, Working Party on Eastern Europe and Central Asia (COEST), ‹https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-eastern-europe-central-asia/›.

eign Relations Counsellors Working Group (**RELEX**). The Committee of Permanent Representatives II (**COREPER II**) approves a draft decision or draft regulation and prepares the formal decisions of the Council.[128] Furthermore, the Member States usually contribute significantly to design of the sanctions ultimately adopted by the European Union. For example, they suggest designations of sanction targets and prepare the respective information and evidence on them.[129]

3. Results

The US sanctions adoption process is clearer cut and the number of actors involved more limited

In the United States, the sanction adoption reflects that (i) it is one nation with more or less similar interests concerning sanctions.[130] It furthermore reflects (ii) the astonishing simplicity of the US Constitution – a nation built on seven articles and 27 amendments: the Congress, the President, and authorities that draw their competence from a delegation by the President. In the European Union, in contrast, the adoption of sanctions reflects the particularities of a supranational organization, notably (i) the need to take into account the specific interests of Member States, and (ii) the struggle between proponents of deeper European integration and proponents of Member State autonomy. The fact that sanctions are part of the CFSP and touch upon a core area of Member State sovereignty exacerbates the particularities.[131] They ultimately inevitably lead to a more complex adoption framework that seeks to alleviate these conflicts, for example by stipulating different quorums in the adoption process. Furthermore, the adoption process of sanctions involves a greater number of actors: the Council with its various preparatory bodies, the Commission, the EEAS, the High Representative, and the Member States' sanction authorities. It can thus be found that in the United States, the adoption process of sanctions is clear cut and the number of actors involved limited, whereas, in the European Union, it is more complex and involves more actors.

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128 See *Council of the European Union* (2018) Sanctions Guidelines, 47; *Gordon/Smyth/Cornell* (2019) Sanctions Law, 39-41; *Forwood et al.* (2021) Restrictive Measures, 28-29.

129 See *Giumelli* (2020) EU Sanctions, 124. The EEAS, however, has a key coordinating and reviewing role of the designations proposed by the Member States (see Chapter IV.2.a)bb)ii)).

130 This is reflected in the fact that sanctions legislation traditionally is a field that enjoys bipartisan congressional support (see, *e.g.*, *Tama* (2020) Sanctions Legislation, 398-399).

131 See fn. 75.

The US framework for sanction adoption grants the executive branch of government a bigger role

The US framework for sanction adoption furthermore grants the executive branch of government a bigger role, whereas the European Union emphasizes the role of the legislative branch. This is apparent in many different ways: *first*, the President usually introduces sanctions based on existing legislation that provides him with considerable flexibility in case of a national emergency, such as TWEA and subsequently the IEEPA. In such cases, Congress thus only plays a limited role, if any.[132] In the European Union, there is no such legislation authorizing EU authorities, such as the Commission or the High Representative, to impose sanctions on their own in case of an emergency. The Member States have so far chosen to remain in control in the field of sanctions by keeping it within the competence of the Council.

Second, in the United States, the legislative branch usually provides the executive only with a mission to introduce sanctions and a certain (more or less detailed) framework for it. Acting within that framework, it is the executive branch's responsibility to design sanctions and to identify targets. In the European Union, in contrast, the legislative branch determines the complete sanctions regime, stipulating not just *that* sanctions are to be applied, but also *what* sanctions and against *who* exactly they are applied. Even though there are certain ways to streamline the process to amend the designated targets of the sanction regulations, one has to keep in mind that concerning each and every designated target there needs to be an unanimous decision of the 27 Member States.

Third, in the United States, even within the executive branch, lower level authorities play a more important role than in the European Union: they usually have more competences and are more autonomous, as the President freely makes use of his power to delegate his responsibilities to them. They hence not just do the legwork in the overall design of sanctions, but also adopt the implementing regulations and compile the lists of specific sanction targets. For example, once the legislation is in place, the President may delegate his authorities to the Treasury. OFAC, as a Treasury component then designates

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132 Congress nevertheless may among other things "*engage in oversight on sanctions implementation, or [as a tool of last resort] revoke or amend the legislation that grants authority to the executive branch*" (see, *e.g.*, *Congressional Research Service* (2022) Sanctions, 1). Note that emergency legislation has been commonly used by Presidents to impose sanctions. Before the IEEPA was enacted, the United States has been in a state of emergency for over 40 years. This practice hasn't changed since. As of early 2022, Presidents have declared 67 national emergencies based on IEEPA (*Congressional Research Service* (2022) IEEPA, i).

sanction targets (and subsequently also decides about a potential delisting of an affected person). In the European Union, in contrast, sanction authorities of Member States play an important role in compiling information and evidence on potential sanction targets. The actual sanctioning decision, however, is taken by the Council as a legislative body.

The US approach is more agile and less affected by a pressure to generalize

The above mentioned differences have the effect that the US approach is more agile than the one of the European Union. Based on existing legislation, the President and the authorities that draw their competence from his delegation can impose and relieve sanctions on short notice. In the European Union, the adoption of sanctions usually takes much longer. The post 2022 Russia sanctions, however, are an exception to that as they were put in place very quickly.[133] They have shown that also in the European Union, sanctions can be adopted very fast, if there is an external factor of enough importance that leads to sufficient political will across the EU Member States. The differences in sanctions adoption furthermore have the effect that US sanctions are less affected by a pressure to generalize and use ambiguous terminology. The President usually decides on how to phrase rules in the EOs. The required unanimity of a decision and the qualified majority of an EU regulation, in contrast, often require compromises on the wording of the legal texts.[134]

IV. How are sanctions implemented?

Sanction authorities have a number of responsibilities that can collectively be referred to as "*implementation*": notably, they develop sanctions, identify sanction targets and investigate, enforce and prosecute sanction violations. Moreover, they inform stakeholders on sanctions, provide advice to market participants, provide licenses and review compliance of private sector businesses and financial institutions with the sanctions regimes.[135] To ensure that subjects within their jurisdiction comply with sanctions regimes, sanctioning States

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133 In interview, the sanctions adoption process concerning Russia was described as "*unprecedented*", noting that "*before, there were so many administrative burdens*" but in this case "*everyone wanted them and pushed for it*" (Interview EU #2, EU Official, July 18, 2023).

134 In interview, it was noted that regularly EU regulations "*are deliberately phrased in more ambiguous way*" to allow for a consensus required for the adoption (Interview EU #1, EU Official, June 7, 2023). This again makes the interpretation of the legal acts more important and adds to the challenge of ensuring a uniform application of the law by national sanctions authorities (see Chapter IV.2.a)bb)i)).

135 See US *Government Accountability Office* (2020) Economic Sanctions, 9.

stipulate penalties for their violation. These penalties can be of administrative or civil nature[136] and of criminal nature. They may also consist of publicly identifying the perpetrator, a practice referred to as "*naming and shaming*".[137]

This chapter (i) outlines the implementation of sanctions in the United States and the European Union. It sets out the main authorities tasked with the implementation and enforcement of sanctions, their responsibilities and, as far as could be determined, their personnel resources. It then (ii) provides an overview of the penalties authorities may impose, their legal bases, and, as far as could be determined, the practice of authorities in imposing penalties.

1. United States

a) Authorities and responsibilities

In the US, many authorities are involved in the implementation of sanctions. Four departments are of particular importance as they comprise the most important sanction authorities: *First*, the Department of the Treasury (**Treasury**). It comprises OFAC. *Second*, the Department of Commerce. It comprises the Bureau of Industry and Security (**BIS**). *Third*, the Department of State. It comprises the Office of Economic Sanctions Policy and Implementation (**SPI**); and *fourth*, the Department of Justice (**DOJ**). It comprises the National Security Division (**NSD**). Other departments include the Department of Defense, Department of Energy, Department of Homeland Security. Furthermore financial regulatory agencies play an important role in sanctions implementation.[138]

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136 The term "*civil penalty*" refers to a "*non-criminal remedy for a party's violations of laws or regulations*". It usually comprises fines or other financial payments (see *Cornell Law School*, *Legal Information Institute*, civil penalties (civil fines), ‹https://www.law.cornell.edu/wex/civil_penalties_(civil_fines)›). In Europe, such penalties are regularly categorized and referred to as "*administrative*" penalties (see, *e.g.*, *EUROJUST* (2021) Prosecution of Sanctions, 13 and Annex, "*United States*"). This article follows this approach and uses both terms for monetary fines imposed by authorities.

137 See, *e.g.*, *Giumelli* (2020) EU Sanctions, 126.

138 For a comprehensive list of authorities as of 2019, see *US Government Accountability Office* (2020) Economic Sanctions, 37 et seqq.

aa) Department of the Treasury

i) Office of Foreign Asset Control

The Treasury comprises several authorities that have a role in the implementation of sanctions, most notably OFAC. It is the main authority responsible for administering sanctions, investigating violations and issuing civil penalties in the United States;[139] it furthermore publishes guidances on its sanctions regimes, issues general and specific licenses and provides advice to market participants.[140] OFAC is the most prominent US authority in the field of sanctions – arguably because of the penalties it is notorious for applying.[141] It operates under the oversight of the Office of Terrorism and Financial Intelligence (**TFI**) of the Treasury.[142] It is the biggest authority in the United States solely focused on sanctions with a headcount, in 2019, of over 200 employees.[143]

To efficiently carry out its mission, OFAC makes use of the existing regulatory architecture, essentially outsourcing important tasks. It does not work on its own but is cooperating with "*other Treasury components and other federal agencies, particularly the State and Commerce Departments and Justice Department, law enforcement agencies, the intelligence community, domestic and international financial institutions, the business community and foreign governments*".[144] Among other things, OFAC signs memoranda of understanding with other federal authorities, such as the Internal Revenue Service (**IRS**) and with bank regulators on state level on the sharing of information. According to these memoranda of understanding, such authorities notify OFAC in case they discover "*apparent […] sanctions violations*" or compliance issues in the course

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139 See *Gordon/Smyth/Cornell* (2019) Sanctions Law, 109 (describing OFAC as the "*main US civil sanctions-enforcer*"); *Mortlock et al.* (2021) US Sanctions Enforcement, 114 and 117.

140 See OFAC, Notices and Guidances, ‹https://ofac.treasury.gov/›.

141 See Chapter IV.1.b)bb).

142 See *Department of the Treasury*, Terrorism and Financial Intelligence Office, ‹https://home.treasury.gov/about/offices/terrorism-and-financial-intelligence›.

143 See *US Government Accountability Office* (2020) Economic Sanctions, 17 (noting that OFAC had 204 full-time equivalents (**FTEs**) in 2019 and had been trying to hire further 55 FTEs, mainly for its Office of Global Targeting, which conducts investigations of sanctions targets). Given this aim to hire and the increased importance of sanctions as of 2022, it can be assumed that the number of employees has increased since.

144 See *Subcommittee on Oversight and Investigations* (2004) Statement of Director of OFAC, *Statement of Richard Newcomb*.

of their examinations.[145] The IRS furthermore conducts reviews for compliance with economic sanction programs for OFAC.[146]

ii) Other components

The Treasury also comprises other components relevant for sanctions implementation. Of particular importance are FinCEN and the IRS. FinCEN aims to combat the illicit use of the financial system and money laundering, through the collection and analysis of financial data as well as through cooperation with authorities in other countries and international organizations.[147] FinCEN hence assists OFAC by collecting and analyzing financial data and providing it to OFAC.[148] Similarly to OFAC, FinCEN operates under the oversight of the TFI.[149] In 2019, it had a headcount of 26 employees with sanctions implementation duties, of which, however, only a fraction was working solely on sanctions.[150]

The IRS Criminal Investigations Division (**CI**), "*is a key player [...] in sanction-related enforcement efforts*".[151] CI's main task is the investigation of potential criminal violations of the Internal Revenue Code. With regard to sanctions, CI cooperates with OFAC and FinCEN to identify sanction targets. It furthermore assists in complex sanctions investigations, in particular through its Global Illicit Financial Team, which has "*large-scale sanctions case experience involving financial institutions*".[152]

Other units supporting sanctions implementation at the Treasury include the Office of the General Counsel, which provides legal advice to OFAC and reviews proposed penalties and settlements for legal sufficiency. In 2019, it had a headcount of 14 employees.[153] TFI's Office of Terrorist Financing and Financial Crimes, among other things, advises TFI on whether financial transactions

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145 See, *e.g.*, *OFAC/NY State Banking Department* (2006) Memorandum of Understanding, 2; *OFAC/Internal Revenue Service* (2009) Memorandum of Understanding.

146 See *OFAC/Internal Revenue Service*, Delegation of Authority to Conduct Compliance Reviews, May 3, 2007, ‹https://ofac.treasury.gov/media/31196/download?inline›.

147 See *FinCEN*, What we do, ‹https://www.fincen.gov/what-we-do›.

148 See *US Government Accountability Office* (2020) Economic Sanctions, 39.

149 See *FinCEN*, What we do, ‹https://www.fincen.gov/what-we-do›.

150 See *US Government Accountability Office* (2020) Economic Sanctions, 17 (these 26 employees corresponded with only 2 FTEs, indicating that sanctions implementation is only one of several tasks of the 26 employees).

151 See *IRS Criminal Investigations Division* (2023) Annual Report 2022, 3.

152 See *IRS Criminal Investigations Division* (2023) Annual Report 2022, 1, 3, 4 and 10.

153 See *US Government Accountability Office* (2020) Economic Sanctions, 38 and 72.

violate sanctions regimes. In 2019, it had a headcount of 36 employees, which, however, are not solely working on sanctions implementation.[154]

bb) Department of Commerce

The Department of Commerce has an important role in the implementation of sanctions due to its competence for export controls. Its BIS is the key authority in charge of export control regimes.[155] The BIS designs, monitors and enforces export control policies with regards to the majority of products exported from the US.[156] Similarly to OFAC, the BIS administers lists of specific sanction targets,[157] by which it restricts their access to US goods. It furthermore investigates potential violations of export regimes having a law enforcement mission and arrest powers.[158]

Within BIS, the Foreign Policy Division of the Office of Nonproliferation and Treaty Compliance, is an important unit responsible for the implementation of sanctions through export controls. Its tasks include "*developing, analyzing, evaluating, and coordinating export controls related to sanctions policy*". In 2019, it had a headcount of eight employees.[159] It is assisted by other units, such as the certain offices involved in export enforcement, which are responsible for criminal and administrative investigations against sanction violators.[160]

cc) Department of State

The Department of State is also active in the context of economic sanctions. Its Division for Counter Threat Finance and Sanctions comprises the SPI,[161] a specialized sanctions unit with the mandate to implement foreign policy-related

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154 See *US Government Accountability Office* (2020) Economic Sanctions, 41 and 72 (these 36 employees corresponded with only 10.7 FTEs).

155 See *Hirschhorn/Egan/Krauland* (2022) US Export Controls, 208.

156 See *Nephew* (2020) US Sanctions, 102-103. Specialized goods, *e.g.*, defense equipment, gas, and nuclear equipment are licensed by other authorities, such as the *Department of State* or the *Department of Energy*. For a good overview, see *Bureau of Industry and Security*, United States Government Departments and Agencies with Export Control Responsibilities, ‹https://www.bis.doc.gov/index.php/about-bis/resource-links›; *Nephew* (2020) US Sanctions, 103.

157 See *Bureau of Industry and Security*, The Denied Persons List, ‹https://www.bis.doc.gov/index.php/the-denied-persons-list›.

158 See *Nephew* (2020) US Sanctions, 103.

159 See *US Government Accountability Office* (2020) Economic Sanctions, 10 and 72.

160 See *US Government Accountability Office* (2020) Economic Sanctions, 54 and 56.

161 See *Department of State*, Economic Sanction Programs, ‹https://www.state.gov/economic-sanctions-programs/›.

sanctions. SPI works diplomatic channels to improve international support for economic sanctions, advises the Treasury and the Department of Commerce on foreign-policy aspects of sanctions and assists Congress in drafting legislation.[162] It furthermore has a role in sanctions enforcement supporting the agencies that are responsible for the civil enforcement, *i.e.*, OFAC and the BIS, and for the criminal enforcement, *i.e.*, the DOJ.[163] In 2019, SPI had a headcount of 14 employees.[164]

There are a number of other units working on sanctions scattered over various components of the Department of State:[165] the Office of the Legal Advisor is, among other things, responsible for extradition issues in the context of sanctions prosecutions. In 2019, it had a headcount of 21 employees working on sanctions.[166] The Bureau of International Security and Nonproliferation, which, in 2019, had a headcount of 34 employees working on sanctions, and the Bureau of Counterterrorism and Countering Violent Extremism, which, in 2019, had a headcount of 9 employees working on sanctions, have a number of responsibilities concerning specific nonproliferation sanctions and terrorism.[167] The Bureau of Intelligence and Research, which, in 2019, had a headcount of 20 employees, investigates issues concerning sanctions enforcement and gathers and provides information on sanction targets to other authorities.[168] To improve the coordination within the Department of State, in 2022, the Office of Sanctions Coordination was created, which oversees the Department of State's sanctions work and improves cooperation with allies.[169]

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162 See *Department of State*, Economic Sanction Programs, <https://www.state.gov/economic-sanctions-programs/>.

163 See *US Government Accountability Office* (2020) Economic Sanctions, 42-51.

164 See *US Government Accountability Office* (2020) Economic Sanctions, 72.

165 See *Fried/Fishman* (2021) Office of Sanctions Coordination, para. 3.

166 See *US Government Accountability Office* (2020) Economic Sanctions, 51 and 72 (these 36 employees corresponded to 10.5 FTEs).

167 See *US Government Accountability Office* (2020) Economic Sanctions, 47 and 72 (in 2019, the *Bureau of International Security and Nonproliferation* had 11.7 FTEs and the *Bureau of Counterterrorism and Countering Violent Extremism* had 6.4 FTEs).

168 See *US Government Accountability Office* (2020) Economic Sanctions, 45 and 72 (these 36 employees corresponded to only 5.8 FTEs.)

169 See *US Department of State* (2022) Office of Sanctions Coordination Press Statement, para. 2.

dd) Department of Justice

The DOJ has several roles in sanction implementation, including in the design, targeting, outreach and compliance with sanctions. Most notably, it is responsible for the criminal investigation and enforcement of sanctions laws.[170]

The NSD is the main agency unit of the DOJ working on sanctions implementation. Its declared mission is "*to ensure greater coordination and unity of purpose between prosecutors and law enforcement agencies, on the one hand, and intelligence attorneys and the Intelligence Community*".[171] Among other things, the NSD participates in sanctions design through interagency meetings, including on EOs, and provides legal guidance on designation proposals. It furthermore reaches out to local law enforcement and foreign partners to support their sanctions enforcement. Moreover, it cooperates with law enforcement on the investigation and prosecution of sanction violators.[172] In 2019, it had a headcount of 30 employees.[173] Due to the post 2022 increased sanctions effort, this number has increased considerably.[174]

Despite the NSD's focus on sanction implementation, the DOJ typically makes use of its US Attorney's Offices, which are located all over the country, when prosecuting sanctions violations.[175]

b) Penalties

In the US, penalties for sanctions regime violations can be substantial. Civil penalties and criminal penalties often amount to millions of dollars, sometimes even billions of dollars.[176] Courts regularly sentence sanction violators to

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170 See US *Government Accountability Office* (2020) Economic Sanctions, 62-66.

171 See *Department of Justice*, About the National Security Division, ‹https://www.justice.gov/nsd/about-national-security-division-nsd›.

172 See US *Government Accountability Office* (2020) Economic Sanctions, 65.

173 See US *Government Accountability Office* (2020) Economic Sanctions, 73 (these 30 employees corresponded to 11 FTEs).

174 In March 2023, it was reported that the DOJ added 25 new prosecutors to the NSD (see *Tokar/Talley*, Justice Department Hiring Dozens of New Prosecutors to Enforce Russian Sanctions, Wall Street Journal (March 2, 2023)).

175 See US *Government Accountability Office* (2020) Economic Sanctions, 65.

176 For example, *BNP Paripas*, entered into a settlement with OFAC amounting to USD 964 million (see OFAC (2014) Settlement Agreement BNP Paribas, 8). The settlement was part of a USD 8.9 billion settlement with federal and state authorities (OFAC (2014) BNP Paribas Press Release, para. 1). This Chapter pays particular attention to OFAC's practice of imposing civil penalties as it is the central and most prominent sanctions authority responsible for the civil enforcement of violations (see Chapter IV.1.a)aa)i)).

prison and order the forfeiture of illicit proceeds.[177] Authorities furthermore "*nam[e] and sham[e]*" perpetrators.[178]

aa) Legal basis of penalties

The various sanction laws provide the legal basis for penalties in case of violations. For example, the IIEPA stipulates *civil* penalties of up to USD 250,000 or "*an amount that is twice the amount of the transaction that is the basis of the violation*". It furthermore stipulates *criminal* penalties of "*not more than $ 1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both*".[179] TWEA stipulates *civil* penalties of up to USD 50,000 and forfeiture of objects subject to a violation. It furthermore stipulates *criminal* penalties of "*not more than $1,000,000, or if a natural person, be imprisoned for not more than 20 years, or both*".[180] The monetary penalties stipulated by the statutes are subject to inflation adjustments, which have considerably increased the penalties since their adoption. Civil penalties for IIEPA violations thus currently amount to up to "*$ 356,579 or twice the amount of the underlying transaction*". TWEA violations amount to up to USD 105,083. They are adjusted annually.[181]

Violations of export control regulations can also lead to civil and criminal penalties. The Export Control Reform Act of 2018 (**ECRA**)[182] stipulates *civil* penalties of "*not more than $300,000 or an amount that is twice the value of the transaction that is the basis of the violation*", revocation of licenses or prohibitions to trade certain items. It furthermore includes *criminal* penalties amounting to up to USD 1,000,000 and "*in the case of the individual, [imprisonment of] not more than 20 years, or both*".[183]

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177 The NSD regularly publishes reports on successful arrests, forfeitures and prosecutions, see *Department of Justice*, Export Control and Sanctions News, ‹https://www.justice.gov/nsd/export-control-news›. For a discussion of civil penalties see the below paragraphs on the enforcement action of OFAC.

178 See, *e.g.*, *Giumelli* (2020) EU Sanctions, 126.

179 See 50 U.S. Code §1705.

180 See 50 U.S. Code §4315.

181 31 C.F.R. Subtitle B, Appendix A to Part 501, V.B.2.a.v.

182 Pub. L. 115-232, 132 Stat. 2208.

183 See 50 U.S. Code §4819.

bb) Penalties enforced by the Office of Foreign Asset Control

OFAC issues detailed guidelines on how to calculate civil penalties.[184] Particularly relevant is whether the case is "*egregious*", *i.e.*, "*a particularly serious violation of the law calling for a strong enforcement response*"[185] and whether it comes to OFAC's attention through voluntary self-disclosure.[186] It then takes into account a number of other factors, including, awareness of the violating conduct, cooperation with OFAC, and the existence and quality of a sanction compliance program.[187] OFAC's investigations may end with (i) a no-action determination, (ii) a cautionary letter, (iii) the finding of a violation, (iv) a civil monetary penalty or (v) a settlement.[188] OFAC may also refer the case to the DOJ, which does not impair its ability to pursue civil penalties.[189] Except for no-action determinations and cautionary letters, OFAC furthermore publishes the name of the sanction violator, details of the matter and the penalty and settlement amounts.[190] OFAC's enforcement is based on strict liability, which means that a sanctions violation can be fined regardless of whether the perpetrator intended it or was aware of it.[191]

The below table gives an overview of OFAC's enforcement activity over the last 10 years. It includes the number of cases, information on how enforcement was concluded and the total penalties and settlement amounts. It furthermore identifies the number of USD 100m plus cases and their share of the total penalty and settlement amounts.[192]

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184 See Economic Sanctions Enforcement Guidelines, 31 C.F.R. Subtitle B, Appendix A to Part 501.

185 31 C.F.R. Subtitle B, Appendix A to Part 501, V.B.1.

186 31 C.F.R. Subtitle B, Appendix A to Part 501, V.B.2.a.

187 31 C.F.R. Subtitle B, Appendix A to Part 501, III.

188 31 C.F.R. Subtitle B, Appendix A to Part 501, II.

189 See *Congressional Research Service* (2022) Enforcement, 2.

190 OFAC, Enforcement Information, ‹https://ofac.treasury.gov/civil-penalties-and-enforcement-information/2022-enforcement-information›.

191 See, *e.g.*, *Jeydel* (2019) Foreign Subsidiary Trading, para. 1.

192 OFAC, Enforcement Information, ‹https://ofac.treasury.gov/civil-penalties-and-enforcement-information/2022-enforcement-information› (the table reflects information as of end of November 2023); cf. with *Rathbone/Jeydel/Lentz* (2013) Sanctions Everywhere, 1105 et seqq. (who applied a similar analysis in 2013).

Year	Number of Enforcement Proceedings	Penalties	Findings of Violation	Settlements	Total Penalties/Settlements (USD)	Penalties/ Settlements > USD 100m (per centage of total)
2023	13	0	0	13	1,526,047,164	2 (97%)
2022	16	0	2	14	42,664,007	0
2021	20	0	1	19	20,896,739	0
2020	16	0	0	16	23,565,657	0
2019	26	1	0	25	1,289,027,059	2 (98%)
2018	7	0	0	7	71,510,561	0
2017	16	1	0	15	119,527,845	1 (84%)
2016	9	0	0	9	21,609,315	0
2015	15	1	0	14	599,705,997	2 (98%)
2014	22	0	0	22	1,205,225,807	2 (93%)
2013	27	2	0	25	137,075,560	0
Total:	184	5	3	176	4,087,998,805	8

Altogether OFAC's enforcement practice over the last 10 years appears to be very heterogeneous, with sanction violators ranging from small and obscure companies to international publicly listed corporations. The absolute majority of OFAC enforcement cases that are not resolved by no-action and cautionary letters are concluded by settlement. Penalties and findings of violations are very rare, with five penalties and three findings of violations against 176 settlements. Penalty and settlement amounts furthermore range from low thousands to hundreds of millions USD, with overall amounts in some years of over a billion USD and some years only slightly over 20 million USD. The overall yearly amounts are, however, mostly driven by the very few, much noticed over 100 million USD enforcement actions.

cc) *Penalties enforced by the Bureau of Industry and Security*

BIS issues guidelines on how to calculate civil penalties as part of its Export Administration Regulations.[193] They are very similar to OFAC's guidelines, differentiating whether a case is "*egregious*" and whether it comes to the BIS's attention through voluntary self-disclosure. Also with regard to the conclusion of an investigation they provide similar options.[194] Some violations of export controls trigger strict liability, which means that an export control violation can be fined regardless of whether the perpetrator intended it or was aware of it.[195] BIS publishes information on closed cases in its annual reports.[196] Since 2022, BIS furthermore publishes its charging letters, to "*enhance transparency efforts, including with respect to actions related to Russia and Belarus export controls*".[197] Both indicate that the BIS is active in pursuing export control violations. For example, in 2021, the BIS completed 57 administrative enforcement actions, imposing a total of USD 9,8 million in civil penalties[198]

dd) *Penalties enforced by the Offices of the United States Attorneys*

OFAC and BIS work closely with the DOJ and law enforcement authorities on the criminal enforcement of sanctions violations. They liaise, share information and enter into settlement agreements together with them as the case may be. They furthermore provide witness testimony in criminal prosecutions.[199] The DOJ publishes information on its prosecutions on its website,[200] which,

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193 Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, 15 C.F.R. Subtitle B, Chapter VII, Subchapter C, Supplement 1 to Part 766.

194 15 C.F.R. Subtitle B, Chapter VII, Subchapter C, Supplement 1 to Part 766, II & IV. See also *Bureau of Industry and Security*, Penalties, ‹https://www.bis.doc.gov/index.php/enforcement/oee/penalties› (noting that the "*guidelines also more closely align the administrative enforcement policies and procedures of BIS with those of the Department of the Treasury's Office of Foreign Assets Control*").

195 See, *e.g.*, *US District Court for the District of Columbia*, Federal Express Corporation v. US Department of Commerce et al., July 8, 2022, 2; *Morgan et al.* (2022) EAR Russia Industry Sector Sanctions, para. 1 (noting that to certain Russia related transactions strict liability is applicable).

196 See, *e.g.*, *Bureau of Industry and Security* (2022) Annual Report 2021, 54 et seqq.

197 See *Department of Commerce, Bureau of Industry and Security*, Export Administration Regulations: Revisions to Russia and Belarus Sanctions and Related Provisions; Other Revisions, Corrections, and Clarifications, 87 Fed. Reg. 34,134 (June 6, 2022).

198 See, *e.g.*, *Bureau of Industry and Security* (2022) Annual Report 2021, 45.

199 See *US Government Accountability Office* (2020) Economic Sanctions, 37-41 and 52-56.

200 See *Department of Justice*, Export Control and Sanctions News, ‹https://www.justice.gov/nsd/export-control-news?page=0›.

however, is non-exhaustive. BIS also reports on the activity of the DOJ, as far as export controls are concerned, in its annual report.[201] Both indicate that the DOJ is active in the prosecution of sanctions and export control violations. For example, in 2021, the DOJ successfully prosecuted 50 individuals and legal persons for export control violations, resulting, among other things, in a total prison time of 1,118 months.[202]

2. European Union

a) Authorities and responsibilities

aa) Authorities of Member States

In the European Union, Member States are responsible for the implementation of sanctions. It is their national authorities that supervise companies located within their territory, investigate violations of the sanctions provisions and, if necessary, execute penalties.[203] They furthermore decide about licenses for their domestic market participants.[204] They thus handle the day to day operations that arise in connection with EU sanctions.

Due to the fact that there are 27 Member States, there is a large number of authorities responsible for sanctions implementation in the European Union. Member States typically have specialized components working on sanctions within at least four departments: they have components responsible for diplomatic communication with the European Union and partnering countries (the department of foreign affairs), for financial sanctions such as asset freezes (the department of finance or the central bank), for import and export controls (the department responsible for trade or customs authorities), for the civil and criminal enforcement (the department of justice, the department of interior, the public prosecution, or other security authorities).[205] The number of sanctions authorities has further increased due to the fact that post 2022 Russia sanctions have become very comprehensive, ranging from asset freezes to export controls to other specific measures such as restrictions for Russian ships to enter EU harbors. Many Member States are thus in the process of expanding and reshaping the structure of their sanction authorities.

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201 See, *e.g.*, *Bureau of Industry and Security* (2022) Annual Report 2021, 54 et seqq.

202 See, *e.g.*, *Bureau of Industry and Security* (2022) Annual Report 2021, 44.

203 See *Giumelli* (2020) EU Sanctions, 125.

204 See *Gestri* (2016) Sanctions, 92.

205 Interview EU #3, EU Official, September 13, 2023. Cf. *European Commission* (2023) National Competent Authorities, 1-37; *Giumelli* (2020) EU Sanctions, 41.

The Commission aims to keep track of the organization of national sanction authorities.[206] The Commission counts 177 authorities over the 27 Member States that have a role in sanctions implementation.[207] Overall, the authorities included in the Commission's list appear to be organized rather heterogeneously: some Member States identify more than 27 competent authorities (Latvia), while other Member States identify only one (for example, Croatia, Cyprus, and Malta). Some identify whole departments (for example, Austria) while others identify specialized units (for example, Spain and France). Some furthermore centralize the implementation (for example, Italy), while others distribute it geographically (for example, Belgium). Furthermore, some Member States have established designated "*sanction coordinators*" (Italy, France, Luxembourg, Poland), while others have not.[208]

It appears that Member States did not apply the same methodology in identifying their sanction authorities for the Commission's list, which is why, in the author's opinion, it should not be viewed as a comprehensive picture of EU authorities involved in sanctions implementation.[209] Nevertheless, there are some cautious findings on the current state of the organization of Member States' authorities that can be drawn from it:[210] *first*, the current authority landscape as depicted by the Commission, suggests that there are no established EU wide best practices, let alone, a harmonization yet. Member States' authorities are heterogeneously organized, reflecting historical particularities

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206 See *European Commission* (2023) National Competent Authorities, 1-37.

207 See *European Commission* (2023) National Competent Authorities, 1-37 (the considerations in this article reflect the content of the Commission's list as of September 2023).

208 See *European Commission* (2023) National Competent Authorities, 1-37; see also *Giumelli et al.* (2022) United in Diversity, 41-42.

209 For example, some Member States include their department of justice or their public prosecution while others do not, even though they prosecute sanction violations. According to an interview with the EU's *International Special Envoy for the Implementation of EU Sanctions* (**Special Envoy**), every Member State now has created a sanction coordinator position (*EU Watch*, "Russia sanctions will remain in place for a long time": EU Sanctions Envoy David O'Sullivan (March 6, 2023). The list only mentions this position for few countries. The list furthermore appears to be outdated (for example, there are several inconsistencies for Germany, cf. with *Deutscher Bundestag* (2023) Antwort Bundesregierung, 2). Another example of considerable discrepancies between the list and the authorities actually implementing sanctions is Finland. The Commission's list mentions one authority. Finland's Ministry of Foreign Affairs, however, mentions 10 authorities with implementation duties (see *Ministry of Foreign Affairs of Finland*, National competent authorities in sanctions regulations, ‹https://um.fi/documents/35732/0/National authorities.pdf/40625ba4-1186-de62-6fcf-2fded00ef75f?t=1698127043330›).

210 For a more detailed analysis of the Commission's list of national competent authorities, see *Giumelli et al.* (2022) United in Diversity, 41.

and general characteristics of the Member States, such as differences between unitary States and federal States.[211] *Second*, there is no clear and standardized designation of certain authorities for certain sanction related issues. The description of what the responsibilities the authorities mentioned on the Commission's list are, is inconsistent and in some instances cryptic. For some Member States, there is no description at all. The existing sanction coordinators are not comprehensively reflected.[212] *Third*, the organization of Member States' authorities is not static but undergoes frequent changes. The author shares the experience of *Giumelli et al.* who found during their study that "*not all contacts [on the Commission's list] were working and/or accurate*",[213] which indicates that changing responsibilities or means of communication are not reflected soon enough to ensure an up-to date list. *Fourth*, not enough is done yet, to assist the business community and other stakeholders in navigating the complex environment of sanctions. If not even the Commission's list of competent sanctions authorities can be used as a reliable tool for navigating the sanctions landscape in the European Union, what can. The business community but also other stakeholders, such as national regulators themselves, often seek to contact a competent sanctions authority in other Member States. It would thus be helpful to have a reliable and up to date list of points of contact in the various Member States for specific sanctions-related issues.[214]

The implementation by national authorities has been criticized in the past, in particular based on the assumption that it is unlikely that sanctions regimes are equally applied over so many Member States.[215] As *Gestri* notes the implementation of EU sanctions may be affected by "*the unequal availability of financial resources [...], from different levels of efficiency and professionalism [...] but also from diverging political attitudes in respect of the targeted entities or from a tendency to favour the economic interests of domestic operators*".[216]

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211 Belgium, for example, lists four authorities responsible for export controls due to its federal character (see *European Commission* (2023) National Competent Authorities, 3).

212 See fn. 209.

213 See *Giumelli et al.* (2022) United in Diversity, 41.

214 Lists that designate points of contacts and regulate means of communication between the authorities of the respective Member States are used in many matters that require international cooperation. For example, Regulation (EU) 2020/1783 sets out rules that allow courts of the Member States the taking of evidence in civil or commercial matters in other Member States. The European e-Justice Portal assists private parties in navigating international legal matters, such as identifying the competent courts (*European Union*, e-Justice Portal, ‹https://www.e-justice.europa.eu›).

215 See *Golumbic/Ruff* (2013) EU Sanctions Exemption, 1044 et seqq.; *Gestri* (2016) Sanctions, 92 et seqq.

216 See *Gestri* (2016) Sanctions, 93.

While, in the author's opinion, there is certainly truth to this criticism, one has to note that certain discrepancies are a natural reality of the application of EU law by national authorities. While with a view to sanctions this may become particularly obvious, it holds true also to all other areas of EU law that are applied by the Member States. More transparency and a regular reporting on the sanctions authorities' capabilities, personnel, resources, and decision practice, that would allow for a comparison of the Member States would potentially already alleviate these discrepancies to some extent. Moreover, it appears that the more pressing problem is the uneven interpretation of EU sanctions legislation by the national authorities due to a lack of unifying guidance by the Commission.[217] More comprehensive and in-depth guidance by the Commission would address that and would also facilitate the application of the legislation by national authorities that are equipped with fewer resources.

In general, it can be stated that the capabilities, resources, and headcount of national sanctions authorities in the European Union remain rather opaque. Neither Member States nor the Commission systematically disclose the respective information. One may catch a glimpse of these issues when they are discussed in public fora, such as parliamentary debates.[218] Only few comprehensive academic studies focus on the important topic of sanctions implementation by Member State authorities.[219]

bb) Authorities of the European Union

As Member States' authorities are tasked with the implementation of sanctions, there is a considerable effort by the European Union and Member States to achieve a somewhat harmonized implementation practice. Member States' authorities are to report to each other and to the Commission and the EEAS on their monitoring and enforcement activities.[220] Key authorities that are working towards the harmonized implementation of sanctions on EU level are the Commission, the EEAS and RELEX/Sanctions.

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217 See Chapter IV.2.a)bb).

218 See, *e.g.*, *Deutscher Bundestag* (2023) Antwort Bundesregierung, 7 (in which the German Government replies to a parliamentary request for information noting that the newly established "*Zentralstelle Sanktionsdurchsetzung*", which is a component of the department of finance, has increased its headcount to 61 of 91 planned employees).

219 See *Giumelli et al.* (2022) United in Diversity, 36 and 42; *EUROJUST* (2021) Prosecution of Sanctions, 1 et seqq.

220 See *Council of the European Union* (2018) Sanctions Guidelines, 13 and 50; *Council of the European Union* (2018) Sanctions Best Practices, 33; *Savage* (2021) EU Sanctions Enforcement, 44 et seqq.; see also *Gestri* (2016) Sanctions, 92.

i) European Commission

As guardian of the EU Treaties, the Commission has the competence and responsibility to ensure the proper application of EU law, including the implementation of sanctions.[221] It receives and evaluates the reports of the Member States and, importantly, assists them in the interpretation of the EU regulations. This is a critical and demanding task taking into account that 27 Member States' sanctions authorities look to the Commission for support concerning often timely and complex questions on the interpretation of the sanctions legislation. Among other things, the Commission has in connection with the Russia sanctions begun to adopt guidances and opinions to facilitate the uniform application of sanctions legislation concerning key questions.[222] Nevertheless, due to the unprecedented quantity of interpretation requests, it appears that there still remains room for improvement.[223]

In the Commission's Directorate-General for Financial Stability, Financial Services and Capital Markets Union (**DG FISMA**), there is a specialized sanctions team within the subgroup Financial Stability, Sanctions and Enforcement.[224] Currently the Commission's sanctions team has a headcount of around 30, having tripled in size since 2020.[225] With a view to the respective task and in particular when drafting sectoral sanctions, the Commission makes use of its experts from its broader infrastructure. For example, when tailoring sanction packages that impact transport, it involves experts from the Directorate-General for Mobility and Transport.[226]

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221 TEU, Art. 17 ; see also *Savage* (2021) EU Sanctions Enforcement, 45.

222 See, *e.g.*, *European Commission* (2023) Food Security Guidance Note; *European Commission* (2020) Interpretation Opinion.

223 This has been noted by several regulators in interview (*e.g.*, Interview Member State #4, Swedish Sanction Authority Official, September 21, 2023 (noting that the efforts of sanction authorities to address interpretation issues can sometimes be described as a "*game of whispers*")).

224 See *European Commission* (2023) DG FISMA Organigramme.

225 Interview EU #1, EU Official, June 7, 2023; cf. *Duvernoy et al.* (2023) Global Russia Sanctions Enforcement, para. 14 (noting that the Commission "*recently doubled*" the team's headcount to "*about 20*").

226 Interview EU #1, EU Official, June 7, 2023.

ii) European External Action Service

The EEAS has an important role in the coordination of EU sanctions policy.[227] In particular, the EEAS advises and coordinates individual designations. While it is regularly the Member States that take the initiative on individual designations, for example, of a specific industry of the target country, and come up with a draft list, the EEAS reviews these drafts together with the Council Legal Service, advises, coordinates and prepares their adoption by the Council. The Member States thereby usually handle the "*legwork*", investigating and compiling information on the individuals.[228] The European Union emphasizes the need to constantly review its sanctions list to ensure there "*remain grounds for keeping a person or entity on the list*".[229] The EEAS is in the driving seat of this review, coordinating and reviewing regular checks handled by the Member States.[230] The EEAS has a specialized sanctions team (POL-1) that is located beneath the Deputy Secretary General for Political Affairs.[231] It works hand in hand with the Commission and the Member States.[232] It currently has a headcount of around 15 employees.[233]

iii) RELEX/Sanctions

Within the Council, RELEX/Sanctions is responsible for the gathering and managing of knowledge on sanctions implementation as well as for the communication of such. Its mandate includes "*[e]xchanging information on and experiences on the implementation of specific restrictive measures regimes*", "*[c]ontributing to developing best practices among Member States*", "*[c]ollecting all information available on alleged circumvention*" and "*[e]xchanging information and experience, including with third states and international organisations*".[234]

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227 See *Giumelli* (2020) EU Sanctions, 123.

228 Interview EU #1, EU Official, June 7, 2023; see also *Giumelli* (2020) EU Sanctions, 124 (noting that the Member States gather evidence to support listing requests).

229 See *Council of the European Union* (2018) Sanctions Best Practices, 10.

230 Interview EU #2, EU Official, July 18, 2023.

231 See *European External Action Service* (2013) Organigramme; cf. *Giumelli* (2020) EU Sanctions, 123.

232 Interview EU #1, EU Official, June 7, 2023.

233 Interview EU #2, EU Official, July 18, 2023.

234 See *Council of the European Union* (2004) RELEX/Sanctions, 1 and 3.

b) Penalties

As mentioned above, the Member States decide on the penalties that are imposed in case of sanctions violations. EU law currently only requires their penalties to be "*effective*, *proportionate and dissuasive*", a phrase "*systematically*" included in sanctions regulations.[235] It, however, does not provide guidance on how Member States are to fulfill these criteria.

aa) Penalty landscape of the European Union

In effect, the penalties in the Member State differ considerably: *first*, Member States regulate the penalties in different forms. Some adopt *ad hoc* legislation with regard to a specific sanctions regime, often taking the form of secondary legislation adopted by the Government. Others use provisions that prohibit violations of EU regulations in general as a basis for penalties.[236] *Second*, penalties are of diverse legal nature. In most Member States, sanction violations qualify as criminal offenses. Many Member States, however, differentiate according to the gravity of the offence, whether the penalty is of *administrative*[237] or *criminal* nature. Only few Member States qualify them solely as administrative offenses (Spain, Slovakia). *Third*, penalties differ greatly in their gravity. According to a 2021 study by EUROJUST, maximum prison terms range from six months (Greece) to 12 years (Italy and Malta), with the majority of Member States stipulating maximum prison terms of four to five years. The same applies to financial penalties, concerning which a number of Member States differentiate between individuals and legal persons. For example, maximum fines for individuals range from EUR 1,200 (Estonia) to EUR 5 million (Malta). For legal persons the discrepancy is even greater with maximum fines ranging from EUR 133,000 to EUR 37.5 million.[238]

There is no standardized publication process for enforcement decisions of EU authorities and courts. It depends on domestic procedural law, whether judgments and authority decisions are released. Member States furthermore do not publicly disclose statistics on their enforcement. There is hence only fragmented information on specific cases available, which is mostly based on news

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235 See *European Commission* (2022) Criminal Penalties Communication, 2.

236 See *Gestri* (2016) Sanctions, 88-89.

237 See fn. 136.

238 See EUROJUST (2021) Prosecution of Sanctions, 22-24; *European Commission* (2022) Criminal Penalties Communication, 2-3.

reporting.[239] Furthermore, it appears that there are considerable differences between national procedural laws regarding forceful tools such as an option for settlement and strict liability.

bb) Directive on the Criminalization of Sanction Violations

In 2022, the European Union and the Member States decided there is a need to act and to address these significant discrepancies. First, the Council, in 2022, adopted a decision including sanctions violations into the "*areas of crime*" that the European Union may stipulate minimum rules on through an EU directive,[240] thereby expanding the EU's competences in the field of criminal law.

The Commission then issued a proposal for the directive harmonizing penalties for sanction violations in late 2023. The Commission's draft directive includes maximum criminal penalties of up to "*at least five years of imprisonment*" for individuals and of at least "5 *percent of the total worldwide turnover of the legal person in the business year preceding the fining decision*" for legal persons.[241] Since then, the Council issued its general position, generally supporting the Commission's draft directive[242] and the European Parliament issued its draft legislative resolution, generally exacerbating the Commission's draft directive with increased penalties and publication requirements.[243]

While the directive harmonizing penalties for sanction violations is still in trialogues, *i.e.*, the legislative negotiations between the Commission, the Council, and the European Parliament, legislators certainly aim to adopt it before the EU elections of June 2024.

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239 For a discussion of recent enforcement cases in the EU, see, *e.g.*, *Savage* (2021) EU Sanctions Enforcement, 52 et seqq.

240 See TFEU, Art. 83(1); Council Decision 2022/2332.

241 See *European Commission* (2022) Criminal Penalties Directive Proposal, Art. 5 & 7. Aggravating circumstances should lead to higher penalties (see *European Commission* (2022) Criminal Penalties Directive Proposal, Art. 8).

242 See *Council of the European Union* (2023) General Approach Criminal Penalties Directive Proposal, *e.g.*, Art. 5 & 7 (with no changes to the maximum penalties proposed by the Commission).

243 See *European Parliament* (2023) Report Criminal Penalties Directive Proposal, *e.g.*, Art. 5 & 7 (proposing a considerable increase of the maximum penalties proposed by the Commission).

3. Results

a) Authorities and responsibilities

Capabilities and resources are typically concentrated in four major organizations

Comparing the organization of sanction authorities in the United States and the EU, one finds that on both sides of the Atlantic, capabilities and resources are typically concentrated in four major organizations. In the United States, these organizations are (i) the *Department of State*, (ii) the *Treasury*, (iii) the *Department of Commerce*, and (iv) the *DOJ*. In the EU, these organizations are usually the Member States' (i) department of foreign affairs, (ii) department of finance or central bank, (iii) department responsible for trade or customs authorities, and (iv) the department of justice, the public prosecution or other security authorities. This similarity is a result of the fact that sanctions are (i) a tool of foreign policy that usually takes the form of (ii) economic restrictions and (iii) export controls and (iv) is enforced by States. In the European Union, due to the decentralized implementation of sanctions by the Member States, this landscape is complemented by the Commission, the EEAS, and RELEX/Sanctions, which have important functions safeguarding that national sanctions authorities apply the sanctions evenly.

Many specialized components typically handle the concrete implementation tasks

In both the United States and in most of the Member States, many specialized components, mainly of the four major organizations mentioned above, but also of other major organizations, handle the concrete implementation tasks. This is because States normally distribute sanctions implementation tasks among their existing authorities and usually do not choose to create an independent national sanctions authority that centralizes all sanctions implementation activities. It, however, entails that a large number of authorities and specialized components are working in one way or another on the implementation of sanctions. One may think of the above mentioned example of Latvia, which, according to the Commission's list of competent authorities, employs 27 authorities for sanctions implementation.

To involve a "*myriad*" of authorities within a State is criticized by some authors as "*problematic*".[244] Indeed, on first sight, the involvement of many different components appears counterintuitive and disadvantageous to the alternative of a centralized sanctions authority that is responsible for all implementation tasks. This especially holds true for the European Union, where each of the 27 Member States has several authorities with responsibilities in the field. In the author's opinion, however, there are a number of reasons that favor a decentralized implementation, *if the conditions are right*. *First*, existing authorities and components have unrivalled expertise in their field. Expertise can thus be drawn from where it already exists and does not need to be created and maintained in a centralized authority. *Second*, existing authorities and components usually have established formal and informal communication channels that can be used and expanded in the field of sanctions. *Third*, given the temporary nature of sanctions, entrusting existing authorities with sanctions implementation has the advantage that resources can be concentrated on short notice if needed and used for non-sanction related tasks if none are applied. This view appears to be shared by regulators. In interview, both national and EU regulators emphasized the benefits of locating sanction implementation competences within the historically grown authority structure and largely argued against a completely centralized structure.[245]

As mentioned above, however, decentralized implementation requires that the conditions are right. Besides the obvious need for sufficient resources this includes certain conditions of how components interact with each other and with external stakeholders, such as domestic market participants or, in the case of the European Union, EU institutions and other EU sanctions authorities. Among other things, there needs to be a clear hierarchy and chain of command, clear responsibilities and procedures, and a sufficient exchange of information and cooperation. A certain centralization, for example in the form of a specific EU-level coordinating body or in significantly expanded teams at the Commission and the EEAS, could help to ensure these conditions. While since the beginning of the sanctions against Russia there has been considerable progress on reaching these conditions, it seems safe to say that there is still a lot of room for improvement.

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244 See, *e.g.*, *Gestri* (2016) Sanctions, 95 (referring to Italy employing several different authorities with sanctions implementation).

245 Interview EU #3, EU Official, September 13, 2023; Interview Member State #1, Polish Sanction Authority Official, September 6, 2023; Interview Member State #2, Italian Sanction Authority Official, August 31, 2023; Interview Member State #3, Austrian Sanction Authority Official, September 20, 2023; Interview Member State #4, Swedish Sanction Authority Official, September 21, 2023.

In the United States, there is both centralized and decentralized implementation

The comparison with the arguably well working, long established and refined United States' sanctions framework lends arguments for and against (de-)centralizing sanctions implementation.

On the one hand, as mentioned above, the United States makes use of a large number of specialized components in sanctions implementation. The US Government Accountability Office identified 52 specialized authorities and components that have a role in sanctions implementation in a 2020 analysis of the US sanction authority landscape for the US House of Representatives. They belong to the four above mentioned departments as well as to the Department of Defense, Department of Energy, Department of Homeland Security, or are financial regulatory agencies.[246] They to a large extent have other responsibilities and cover sanctions only to the extent they overlap with them.[247]

On the other hand, in the United States, there clearly is one authority that is at the center of sanction implementation: OFAC. It by far exceeds the manpower of all other sanction authorities and exclusively works on sanction implementation.[248] This "*personification*" of sanctions implementation, together with its strict enforcement practice, the option to enter into settlements, the application of strict liability, the publication of its enforcement results,[249] as well as its ability to designate sanction targets and strike them off its lists,[250] in the author's opinion, are key factors for its notoriousness and prominence around the globe. In the European Union, in contrast, given the decentralized implementation of sanctions, the lack of transparency concerning the decision-making practice of national regulators, and the competence of the Council to decide upon the listing and delisting of sanction targets, no such authority currently exists.

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246 See US *Government Accountability Office* (2020) Economic Sanctions, 37-69.

247 This can be deducted from the low number of full-time equivalents and the relation between the estimated number of personnel with sanctions implementation duties and the full-time equivalents. See US *Government Accountability Office* (2020) Economic Sanctions, 72-74.

248 See US *Government Accountability Office* (2020) Economic Sanctions, 72.

249 See Chapter IV.1.b)bb).

250 See Chapters III.1.c) and V.1.a).

Considerations regarding personnel

A comparison of the personnel of sanction authorities in the United States and the European Union is only possible selectively and under major *caveats*.[251] Nevertheless, from the sparce data available some cautious findings can be made: *First*, taking into account the reputation and influence on the business community of OFAC, the actual number of employees of 217 in 2019[252] is rather small. The newly established German *Zentralstelle für Sanktionsdurchsetzung* (**Zentralstelle**) currently has a headcount of 61 employees and aims for a headcount of 91 employees.[253] One has to bear in mind that, in the EU, 26 other Member States also have authorities working on similar tasks as the *Zentralstelle*. It is thus even more striking that an authority as small as OFAC has managed to attain such a global reputation. *Second*, the total number of employees of EU authorities appears to be surprisingly low compared both to the US sanction authorities and to Member State authorities. Considering their many responsibilities, and, most importantly, the fact that they are one of the few factors ensuring the harmonized application of EU sanctions, the Commission with around 30 employees[254] and the EEAS with around 15 employees[255] appear understaffed for these important tasks. One has to keep in mind that they are facing interpretation requests of sanctions authorities in 27 Member States. *Third*, in the US, and in the EU, there has been an increase in personnel over the last years[256] that, given the sanctions against Russia, will likely continue.

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251 *First*, both for the United State and for the European Union there is only limited data available. Available data from the United States dates back to 2019 (see *US Government Accountability Office* (2020) Economic Sanctions, 72-74) and thus notably does not reflect the comprehensive sanctions imposed after the full-scale invasion of Ukraine in 2022. *Second*, numbers would need to be assessed based on full-time equivalents or a similar basis that allows a comparison. *Third*, given the large number of specialized authorities and organizational units involved in sanctions implementation, for a comprehensive picture, many different agencies would need to estimate their activity.

252 See *US Government Accountability Office* (2020) Economic Sanctions, 72.

253 See *Deutscher Bundestag* (2023) Antwort Bundesregierung, 2 and 7.

254 See Chapter IV.2.a)bb)i); cf. *Duvernoy et al.* (2023) Global Russia Sanctions Enforcement, para. 14 (noting that the Commission "*recently doubled*" the team's headcount to "*about* 20").

255 See Chapter IV.2.a)bb)ii).

256 See *US Government Accountability Office* (2020) Economic Sanctions, 17, 20 and 22; see Chapter IV.2.a)bb)i).

b) Penalties

In the European Union, sanctions penalties have been neglected

The United States has for a long time enforced their sanctions regimes by vigorously prosecuting violations and imposing civil and criminal penalties against natural and legal persons. In the European Union, in contrast, sanctions enforcement appears not to have received proper attention since the European Union became competent to adopt sanctions: over the last 30 years, perpetrators have been able to choose a jurisdiction that did not or not adequately penalize sanction violations. Moreover, it is to be noted that bringing perpetrators to justice requires successful prosecution which again requires that authorities discover illicit acts in the first place. Considering that, in many Member States, the competent security authorities also face considerable challenges from other areas of crime, such as organized crime or drug related crime, it can be assumed that often low-sentence and difficult to prove sanction violations have not been a top priority of their prosecutors and security authorities.[257] The experiences with the post 2022 Russia sanctions, however, have resulted in critical reflection and in the arguably unanimous understanding that penalties for sanction violations need to be somewhat aligned in the European Union.

In the United States, sanctions authorities publish the results of their enforcement action

US authorities publish the results of their enforcement action. They thereby provide the public both with information on their enforcement practice and with a repeated warning that sanctions regimes are to be complied with. In the author's opinion, this transparency is one of the key reasons why comparatively small authorities like OFAC, the BIS and the DOJ's National Security Division manage to create the impact and reputation that they have.[258] In the EU, Member State authorities have not reported on their enforcement action in a comparable way. The Parliament has recently called for more transparency

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257 The assumption that "*very few individuals or legal persons responsible for the violation of Union restrictive measures are effectively held accountable*" is also stressed by the Commission in its explanatory memorandum to the proposal for a directive harmonizing penalties for sanction violations. The Commission thereby cites a publication of EUROJUST that does, however, not provide any further details, explanations, or sources for the assumption (*European Commission* (2022) Criminal Penalties Directive Proposal, Explanatory Memorandum, 3; *EUROJUST* (2021) Prosecution of Sanctions, 4).

258 See also the considerations regarding other factors contributing to the reputation of OFAC that essentially also apply to the BIS and the criminal enforcement authorities, Chapter IV.3.a).

on Member States' enforcement action in its draft legislative resolution on the directive harmonizing penalties for sanction violations. It proposes both the "*national or Union-wide publication of the judicial decision*" as an additional penalty[259] and reporting obligations for Member States on criminal proceedings, frozen assets and seized assets.[260] In the author's opinion, both proposals are a step in the right direction. To educate the public and to deter perpetrators, to incentivize authorities to act upon sanctions violations, to contribute to the common application of EU law, and to allow for the comparison of decisions Member State authorities take, more transparency is urgently needed.

Penalties in the United States are harsher than in the EU

Maximum penalties in the United States are generally harsher than in the European Union. This particularly applies to the current heterogenous landscape of penalties in the European Union, but will likely also apply to the harmonized landscape, notably as the directive harmonizing penalties will only establish a common minimum. For example, the IIEPA, one of the most used bases for sanctions in the US, stipulates criminal penalties of up to 20 years for natural persons,[261] whereas, according to EUROJUST, the maximum prison sentences in the European Union vary between six months and 12 years. The directive harmonizing penalties for sanction violations will raise this bar by stipulating maximum prison sentences of five years or more.[262] Member States thus will remain free to stipulate much higher prison sentences for sanction violations.

Furthermore, one of the key strengths of the US sanctions framework is the ability of OFAC and the BIS to impose significant civil penalties, which apply in addition to a potential criminal prosecution of perpetrators. Where appropriate, they may also form a suitable alternative to criminal prosecutions. The strong position of the US enforcement authorities when challenged before courts,[263] the ability to enter into settlements and the strict liability that allows penalties without intent or even awareness of the perpetrator of a violation,[264] appears unmatched by European sanctions authorities at this point in time. It is to be seen whether this can be replicated by EU authorities based on the means available to them.

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259 See *European Parliament* (2023) Report Criminal Penalties Directive Proposal, Art. 5 and 7.

260 See *European Parliament* (2023) Report Criminal Penalties Directive Proposal, Art. 18a.

261 See Chapter IV.1.b)aa).

262 See Chapter IV.2.b).

263 Note that the deference of courts concerning sanction authorities' judgments set out in Chapter V.1. also applies with regard to legal remedies against penalties imposed.

264 See Chapter IV.1.b).

V. How can sanctions be challenged?

This chapter addresses how designated persons can challenge sanctions in the United States and in the European Union. It outlines the *legal remedies* available and sets out the options affected persons have to challenge sanctions. It furthermore addresses what authorities are competent to decide about the challenges, who has standing, and what rights affected persons can assert.

1. United States

Persons and entities that have been designated sanction targets and are thus included in a sanction list of OFAC can challenge the designation through two legal remedies: (i) administrative reconsideration (also referred to as a "*petition for removal*")[265] according to the Federal Regulations[266] and (ii) subsequent judicial review according to the Administrative Procedure Act (**APA**).[267]

What rights they can assert, depends on whether they can invoke rights based on the US Constitution in addition to the rights provided only by the statute. The former is only available to citizens, residents and companies incorporated in the United States as well as affected persons that can demonstrate substantial connections to the United States, usually by acquiring or holding property in the United States.[268]

a) Petition for removal

According to the Federal Regulations, an affected person may contact OFAC in writing (i) arguing or submitting evidence that there was an insufficient basis for the designation, or (ii) proposing steps that could remove the basis for the designation. The latter includes measures "*such as corporate reorganization, resignation of persons from positions in a blocked entity, or similar steps, which the person believes would negate the basis for designation*".[269] The affected person may furthermore request a meeting with OFAC, which, however, is not re-

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265 See OFAC, Filing a Petition for Removal from an OFAC List, ‹https://ofac.treasury.gov/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list›.

266 See 31 CFR §501.807; *Gordon/Smyth/Cornell* (2019) Sanctions Law, 231. This article does not cover the procedure set out for the unblocking funds believed to have been blocked due to mistaken identity (see 31 CFR §501.806).

267 Pub. L. 70-404, 60 Stat. 237; see *Gordon/Smyth/Cornell* (2019) Sanctions Law, 231.

268 See *Barnes* (2016) Sanctions, 202-203; *Gordon/Smyth/Cornell* (2019) Sanctions Law, 232.

269 See 31 CFR §501.807.

quired to grant the request. OFAC reviews the submission and may request further information from the person affected. After its review of the request for reconsideration, OFAC provides a written decision.[270]

Interactions with OFAC can be of very different character. OFAC and the affected persons usually enter a "*relatively lengthy dialogue*"[271] with OFAC being more or less responsive in interactions. Depending on the case, OFAC and other authorities may be perceived by affected persons as interested and open to interact, or as uninterested and hard to get a hold of. It is to be emphasized that given OFAC's wide discretion, affected parties have only limited means to shape the interaction.

Furthermore, similar to listing decisions, delisting decisions are usually made through an inter-agency process, which means that, frequently, affected persons interact not only with OFAC but with a range of other enforcement authorities. It can thus very well be the case, that affected persons are dealing not just with OFAC but with other authorities, including, the DOJ, the IRS, or the BIS.[272] It is important to note that requests for administrative reconsideration can be submitted repeatedly. Backed up with new evidence and arguments, OFAC may thus reach a different conclusion.[273]

Interactions with OFAC can be particularly tricky for affected persons when the actual reason for the designation is unknown to them or difficult to ascertain. OFAC and other sanction enforcement authorities use classified and unclassified information and evidence to designate targets. In addition to the regularly completely or in parts classified "*evidentiary package*", they compile an unclassified *Statement of the Case*, which comprises only a short description of the alleged facts without underlying evidence and is used to announce the designation.[274] Affected persons can often only scrutinize the Statement of the Case to assess how to respond to the allegations. Given the high-level and sometimes selective information included in the Statement of the Case, affected persons may not be able to respond to all considerations that formed the basis of the authorities' decision to designate them.

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270 See 31 CFR §501.807.

271 Cf. with *Barnes* (2016) Sanctions, 204.

272 Cf. with, *e.g.*, *Barnes* (2016) Sanctions, 204 and 206.

273 See OFAC, Filing a Petition for Removal from an OFAC List, ‹https://ofac.treasury.gov/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list›.

274 See, OFAC (2004) Richard Newcomb Press Release, Heading IV, Subheading 3; *Barnes* (2016) Sanctions, 205.

It is often criticized that, besides briefly setting out the procedure, the Federal Regulations provide no further substantive information on "*factors [...] taken into account or [...] standards [...] applied*" by OFAC during the procedure. OFAC thus has discretion in its decisions on substance that is "*unfettered to the greatest extent possible*". Furthermore, the reduced wording of the Federal Regulations does not provide comprehensive rights to affected persons. Neither a right to be informed of the reasons for the listing decision nor a right to review material that formed the basis of the listing decision can be deduced of the statute alone. Affected persons moreover have no right to the oral hearing before OFAC.[275] Such rights can only be asserted by invoking the US Constitution. It provides affected persons with a right to be informed of the reasons for a designation, to be informed of non-classified information that formed the basis of the listing decision and to present evidence and arguments to refute allegations against them.[276]

b) Judicial review

If the administrative reconsideration is refused by OFAC, affected persons may challenge the decision with a claim for judicial review.[277] As there are no special provisions setting out the judicial review of OFAC's decisions, affected persons may challenge their designations only based on the right to review provided by APA, a default provision generally applicable to decisions of US agencies.[278]

APA states that a "*person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof*".[279] As neither the various sanctions laws, nor the Federal Regulations, nor APA provide potential causes of action to affected parties, they can only challenge the due process of OFAC's actions and not the merits of its decision.[280] Courts focus on the question whether the authority rationally decided based on the information and evidence it compiled.[281]

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275 See *Barnes* (2016) Sanctions, 204.

276 See *Barnes* (2016) Sanctions, 207-208.

277 See *Barnes* (2016) Sanctions, 209.

278 In case of certain terrorist designations, special provisions for the judicial review apply. The *Antiterrorism and Effective Death Penalty Act* (Pub. L. 104-132, 110 Stat. 1214) provides special rules for the review of designations (see 8 U.S. Code §1189). These rules, however, do not allow for a more comprehensive review than APA (*Barnes* (2016) Sanctions, 209-210).

279 See 5 U.S. Code §702.

280 See *Slocum* (2013) Terrorist Designation Process, 396, fn. 78; *Meagher* (2020) Crosshairs, 1024.

281 See *Barnes* (2016) Sanctions, 210 (with references to jurisprudence).

There is furthermore comprehensive jurisprudence emphasizing the restraint of courts in reviewing OFAC decisions. Courts, for example, apply a low standard regarding information and evidence that forms the basis of sanction designations, accepting all sorts of information including hearsay evidence and unsubstantiated information from questionable sources.[282] Even cases in which courts indeed find that there was a harmful due process violation, they regularly do not quash the agency's decision but may remand the decision back to agency.[283] This "*highly deferential approach*" to authorities that deal with matters of foreign policy and national security leads to very few sanctioned persons and entities having successfully brought judicial review claims in court.[284]

2. European Union

Persons and entities affected by EU sanctions designations can challenge sanction measures through (i) a direct delisting request to the Council, (ii) judicial review in the courts of the Member States and (iii) judicial review by the EU courts.[285] In the European Union, it has been a declared priority of lawmakers to pay special attention to the legal principles of the European Union. The Council thus has emphasized that sanctions must "*always be in accordance with international law [and] must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy*".[286] Affected persons can invoke rights of EU law irrespective of their personal link to the European Union.[287]

a) Petition for removal

The Council emphasizes that a "*transparent and effective [delisting] procedure is essential to the credibility and legitimacy*" of sanctions.[288] Both the EU Sanction Guidelines and the EU Best Practices set it out: delisting requests are to be addressed to the General Secretariat of the Council, which acts as the "*mailbox for [delisting] requests*". The EEAS and the Council Legal Service then

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282 See *Barnes* (2016) Sanctions, 210-214 (with references to jurisprudence); see also *Gordon/Smyth/Cornell* (2019) Sanctions Law, 236-237 (with references to jurisprudence).

283 See *Gordon/Smyth/Cornell* (2019) Sanctions Law, 239.

284 Cf. *Gordon/Smyth/Cornell* (2019) Sanctions Law, 231; see also *Barnes* (2016) Sanctions, 202 (emphasizing the "*significant deference*" of US case law on sanctions).

285 See, *e.g.*, *Gordon/Smyth/Cornell* (2019) Sanctions Law, 151.

286 See *Council of the European Union* (2018) Sanctions Guidelines, 7.

287 See *Barnes* (2016) Sanctions, 203 (with references to jurisprudence).

288 See *Council of the European Union* (2018) Sanctions Best Practices, 9.

prepare a preliminary analysis of the delisting request. The General Secretariat then forwards the request together with the preliminary analysis to the to the competent regional working party for consideration, for the Russia sanctions that is COEST. RELEX then discusses the legal and technical issues of the delisting request and prepares the EU response.[289] Decisions to delist are to be implemented "*as swiftly as possible*".[290] According to the Council, a delisting is appropriate "*wherever the criteria for listing are no longer met*". Most notably this is the case when there is "*a relevant subsequent change in facts [or the] emergence of further evidence*".[291]

b) Judicial review in the courts of the Member States

As Member State authorities enforce EU sanctions regimes, specific sanction measures, such as an asset freeze performed by a domestic bank, may be challenged before domestic authorities or domestic courts according to domestic procedural law.[292] Domestic courts may in this context request a preliminary ruling from the Court of Justice, if they consider that a decision on a question is necessary to enable it to give judgment. If such questions are raised in domestic courts of last instance, they are obliged to request a preliminary ruling.[293]

c) Judicial review in the courts of the European Union

Any affected person can challenge acts of the European Union by action for annulment before EU courts, if they (i) address that person, (ii) are of direct and individual concern to the person, or (iii) are regulatory acts of direct concern.[294] The first variant only applies in situations in which the affected person is "*literally and stricto sensu the addressee of the contested act*". That can be the case, *inter alia*, if it is named as addressee of "*a formally adopted decision, a letter, email or oral communication emanating from the services of an institution*".[295] The second variant applies in situations in which acts are not directly addressed to the affected persons. The affected person has to show

289 See *Council of the European Union* (2018) Sanctions Guidelines, 51.

290 See *Council of the European Union* (2018) Sanctions Best Practices, 10.

291 See *Council of the European Union* (2018) Sanctions Best Practices, 9.

292 See *Gordon/Smyth/Cornell* (2019) Sanctions Law, 152.

293 See TFEU, Art. 267; *Gordon/Smyth/Cornell* (2019) Sanctions Law, 152.

294 See TFEU, Art. 263. On the action for annulment in general, see *Adam et al.* (2020) Annulment Proceedings, 51 et seqq.

295 See *Luszcz* (2020) Action for Annulment, 156; see also *Lenaerts/Maselis/Gutman* (2014) EU Procedural Law, 316 et seqq.

that the act is of "*direct concern*" to it. This cumulatively requires, *first*, that it directly affects the legal situation of the affected person and, *second*, that the act leaves no discretion to the addressees implementing it. It furthermore has to show that the act is of "*individual concern*", which requires that it is affected "*by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee*".[296] The third variant applies to non-legislative acts of general application, notably delegated acts of the Commission and implementing acts of the Commission or the Council.[297] As the EU sanctions regimes are directed at the general public in the European Union and, in case of financial sanctions, designate sanctioned natural or legal persons by name, standing regularly derives from the second variant.[298]

EU acts can be challenged based on lack of competence, an infringement of an essential procedural requirement, an infringement of EU law, or the misuse of powers.[299] In practice, the grounds of the enumeration somewhat overlap. For example, an infringement of the right to defense, which essentially includes access to the case file and the right to a fair hearing, violates both essential procedural requirements and EU law, in particular the Charter of Fundamental Rights.[300] The most common ground for the successful challenges so far has been that sanctions are based on incorrect factual claims, for example, if an affected person has indeed not done what it is accused of.[301]

The judicial review in the courts of the European Union is characterized by two instances administering justice. Challenges are heard in first instance by the General Court. If the General Court decides against the affected person, it may appeal the decision to the Court of Justice. The appeal, however, is limited to points of law.[302] In case of a successful action for annulment, the courts declare that the contested act is "*fully or partly void, ex tunc, from the moment of its adoption*".[303]

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296 See *Luszcz* (2020) Action for Annulment, 156, 157 and 166; see also *Lenaerts/Maselis/Gutman* (2014) EU Procedural Law, 318 and 323-324.

297 See *Luszcz* (2020) Action for Annulment, 178-179; see also *Lenaerts/Maselis/Gutman* (2014) EU Procedural Law, 334.

298 See, *e.g.*, Judgment of the General Court of September 13, 2018 (T-515/15), paras 61 et seqq.

299 See TFEU, Art. 263.

300 See *Luszcz* (2020) Action for Annulment, 213.

301 See *Gordon/Smyth/Cornell* (2019) Sanctions Law, 156; see also *House of Lords* (2017) Legality, 9 et seqq.

302 See TFEU, Art. 256; see also *Gordon/Smyth/Cornell* (2019) Sanctions Law, 154.

303 See *Luszcz* (2020) Action for Annulment, 109.

In the European Union, the principled approach, providing affected persons with comprehensive rights, has led to the fact that the European Union is "*definitely a legal order where judicial challenges have been more numerous and more groundbreaking*".[304] Occasionally this has led to cases that attracted a lot of attention, given their polarizing results.[305] Then again, in other cases, the European courts have applied an approach that is considered by many as too stringent as it appears to depart from the principle that the Council must demonstrate the actual and specific involvement of the affected party in the target State's conduct.[306] There furthermore appears to be a controversial practice of the Council in sanctions design of making listing criteria easier to satisfy and by that attempting to avoid disputes.[307]

3. Results

In the European Union, there is a threefold chance of receiving a beneficial decision within reasonable time

Designated persons are, depending on their location, profession, and personal wealth, often completely blocked from participating in the business life and severely impacted in their personal life. If a designated person is unjustly sanctioned, it is thus of utmost importance to become unlisted as fast as possible. In the United States, persons that are subject to sanctions administered by OFAC do not have a choice in how to challenge sanctions. US law does not provide for alternatives to the two-step procedure before OFAC and the courts.[308] It can take a long time to receive a final agency decision of OFAC,

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304 See *Pantaleo* (2016) Sanctions Cases in European Courts, 172.

305 See, *e.g.*, Judgment of the General Court of March 8, 2023, Prigozhina v Council (T-212/22).

306 For a discussion of the European courts' jurisprudence on that matter, see *Pantaleo* (2016) Sanctions Cases in European Courts, 191-194 (describing this as an "*undesirable change*" that may lead to a situation in which essentially "*any activity of economic relevance*" may allow the Council to designate someone).

307 See, *e.g.*, *House of Lords* (2017) Legality, 9-11 (quoting an expert who noted that "*[i]t seems to me that one reason why the Council is now winning more cases than before is that it has made the criteria easier to satisfy*").

308 See Chapter V.1. Note that there may be means outside the legal framework by which sanctioned persons can attempt to reach a delisting, including public relations work, lobbying and media outreach. Given the option of repeated petitions for removal, affected persons may also continue to interact with OFAC, which may delist a sanctioned person when it considers sanctions not to be necessary anymore. For example, in a much-noticed case saga, the listed person, Mr. Kadi, succeeded before EU courts and other fora but was not successful in challenging sanctions in the United States (see, in particular, *US District Court for the District of Columbia*, Yassin Abdullah Kadi v. Timothy Geithner et al., March 19, 2012). OFAC, however, delisted Mr. Kadi two years after the judgment (*Department of the Treasury*,

which then again needs to be challenged before US courts. In the European Union, in contrast, affected persons can regularly choose between three options for challenging sanctions that can also be combined and pursued at the same time.[309] Overall, there is thus a threefold chance of receiving a beneficial decision within reasonable time.

The EU system safeguards against a potential inactivity or unwillingness of the authorities

The fact that, in the European Union, courts as independent authorities that do not have a role in the listing decision can be called upon immediately after sanctions are introduced, also safeguards against a potential inactivity or unwillingness of the authorities that are responsible for the listing decision to reconsider that decision. Especially in the highly political field of foreign policy and, even more so, national security, authorities can be inclined to insist on their decisions. This is exacerbated taking into account the use of designating information of varying quality, which frequently requires a judgment call, the large number of tasks that implementation authorities attend to with a limited number of resources, and political pressure for results. In the United States, it is furthermore exacerbated by the "*wartime inception of OFAC and its unbroken institutional development thereafter in the context of international conflict and situations characterized internally as national emergencies*"[310] and the bigger role of OFAC in the designating process: while in the European Union, the designation process requires support of several different authorities, and thus leads to a shared responsibility, in the United States, OFAC is regularly in the driving seat of designations. OFAC thus acts as the prosecutor and the judge in the designating process and as a judge of second instance in a subsequent petition for removal.[311]

Affected persons have a stronger position under EU law

It depends on the rights that an affected person can assert, whether it can *demand* the quashing of a wrongful sanction decision or whether it is limited to only *ask for* reconsideration. In the United States, the rights available to the affected person vary based on the question whether it can assert only the scarce rights of the statute or, in addition to them, the still limited rights provided by the US Constitution. According to the former, affected person only have a

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Office of Foreign Assets Control, Unblocking of a Specially Designated Global Terrorist Pursuant to Executive Order 13224, 79 Fed. Reg. 72,48 (December 5, 2014)).

309 See Chapter V.2.

310 See *Barnes* (2016) Sanctions, 199.

311 *Ortblad* notes that this procedure is "*essentially asking OFAC to judge its own sanctions*" (*Ortblad* (2008) Criminal Prosecution, 1465).

weak position. For example, they do not have a right to be informed of the reasons for the listing decision. However, even when the affected person can invoke the US Constitution, there is "*[no] meaningful due process*".[312] In the European Union, in contrast, affected persons can, without a need for a link to the European Union, invoke all rights provided by EU law, including the Charter of Fundamental Rights. Overall, it can be stated that the rights that affected persons can assert are clearly more comprehensive in the European Union and that they have a stronger position under EU law.

Hand in hand with the question, which rights an affected person can assert goes the question, whether courts can review the merits of a decision to sanction someone. In the US, courts do not review the merits but are limited to reviewing a violation of due process. There is furthermore a considerable deference to agencies' decisions. In the European Union, in contrast, there is a review of the merits and no comparable deference to the decisions of the Council.

The rigorous approach of the United States concerning legal remedies may be considered effective from a national security perspective as enemies of the state are restricted in their defense.[313] It furthermore clearly avoids polarizing cases, in which affected persons manage to get off the sanction lists against the public opinion. It, however, carries a significant risk of persisting errors, collateral damage, and complacency in the designation work, if only a limited review of an authority's practice is permitted. The principles the European Union claims for its sanction practice are not compatible with a comparable restriction of legal remedies.

Having said that, also in the European Union, there are developments that may lead to a curtailing of the right of defense.[314] In the author's opinion, any limitation of an effective defense, be it through the courts' jurisprudence or the design of the sanctions legislation, requires attention and a careful review, given the impact sanctions have on an affected person. Furthermore, there are existing ways to reconcile national security considerations with effective legal remedies. For example, the Rules of Procedure of the General Court provide the option of a closed material procedure, which allows the use of classified intelligence information against an affected person.[315]

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312 See *Ortblad* (2008) Criminal Prosecution, 1439.

313 Especially, when taking the view that the next escalation step to sanctions is military action (see, *e.g.*, *O'Toole/Sultoon* (2019) Sanctions Program, 1 (describing sanctions as "*one of the few middle grounds between war and words*").

314 See Chapter V.2.c).

315 See *General Court of the European Union* (2015) Rules of Procedure, Art. 105).

In the author's opinion, the comparatively strong position of affected parties in the European Union is, overall, a strength of the European system, because it avoids persisting errors, collateral damage and complacency in the designation work and thereby enhances the credibility of the specific sanctions imposed. That it occasionally leads to polarizing cases can also be seen as a signal that the principled approach generally works.

VI. Conclusion and Outlook

This article explored the sanctions frameworks of the United States and the European Union. They constitute the backbone of the sanctions imposed, shaping their effectiveness and impact. Conducting a legal comparison, this article identified some of their key similarities and differences. The following paragraphs reiterate select findings, argue that the EU sanctions framework is currently at a turning point, and underscore that a good look to the long-serving United States' sanctions framework will pay off for the European Union, when creating the foundation for future sanctions.

The chapters above showed that the US sanctions framework is in many ways a well-oiled machine that has been running without greater changes for a long time. The legal bases for sanctions, the parties involved, and the adoption and implementation practice have been consistent for many decades and, in some respects, even centuries. The EU sanctions framework, in contrast, has, seemingly unnoticed, since its comparatively recent inception, suffered from considerable insufficiencies. Only the newly emerged geopolitical threat of the 2022 full-scale Russian invasion of Ukraine and the unprecedented test for the sanctions framework that followed it led to their discovery. The parties involved certainly deserve credit for how they have improvised and, as the Special Envoy put it, have worked "*with the system and structures that they ha[d]*".[316]

The bad news for the European Union is that many of the insufficiencies continue to be in place or have been patched up only provisionally. For example, due to the strong political will, the European Union managed to adopt sanctions against Russia very quickly, however, procedural requirements for the adoption of sanctions remain burdensome. It is by no account certain that

316 See *EU Watch*, "Russia sanctions will remain in place for a long time": EU Sanctions Envoy David O'Sullivan (March 6, 2023) ("*let's talk about how we do it better in the future, but in the coming weeks, let's focus on what we can already do with the system and structures that we have*").

this can be replicated in a different and less unifying foreign policy scenario;[317] sanctions authorities in the Member States have managed to cope with unprecedented demands, however, there is still not enough done to assist the business community and other stakeholders in navigating the complex environment of national sanctions authorities' responsibilities; the Commission has begun to use new tools to facilitate the uniform interpretation of EU sanctions legislation, however, there is still considerable room for improvement; a certain alignment on criminal penalties for sanctions violations is on its way, however, it is not yet implemented.

The good news for the European Union is that the realization that there are geopolitical threats that require a strong unified response and the discovery of the insufficiencies of the current capabilities to impose sanctions seem to mark a turning point. This critical reflection has been vividly portrayed in interview by a EU regulator who noted that, the post 2022 Russia sanctions were a "*wake up call*" that the European Union was not equipped enough to deal with sanctions implementation of this massive scale; they forced the regulators to "*rais[e] the carpet and [find] that there was a lot of dust beneath it*".[318]

Indeed, a great number of initiatives have been taken in the European Union since, to address the insufficiencies identified. In doing so, a good look at the United States' sanctions framework will pay off for the European Union as there are many things that can be learned from this well-tried and in many ways highly effective system. Concerning *adoption* one finds that the United States' strong focus on the executive branch allows it to be more agile. Indeed, the experience with sanctions against Russia has been grist to the mill for calls for more flexibility in the European Union's adoption procedure, which criticize above all the requirement for a unanimous vote in the Council.[319] Only recently, the European Parliament published a comprehensive report on the topic. Among the options discussed are "*reverse decision-making*", which

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317 For example, in 2020, Cyprus threatened to object EU sanctions in response to Belarus cracking down on citizens to advance its own initiative for sanctions against Turkey (see *European Parliamentary Research Service* (2023) Qualified Majority Voting, 13).

318 Interview EU #1, EU Official, June 7, 2023. Similarly, the Special Envoy noted in an interview that "*[i]n [his] personal view, it is clear that we are not organised optimally yet to oversee the implementation of the sanctions, at least not on this scale. That is self-evident.*" (*EU Watch*, "Russia sanctions will remain in place for a long time": EU Sanctions Envoy David O'Sullivan (March 6, 2023)).

319 For an overview of such efforts, see, *e.g.*, *Wessel/Szep* (2023) Qualified Majority Voting, 65 et seqq.

means that a decision is deemed adopted unless a certain percentage of Member States in the Council oppose it, and the delegation of selected decisions to the High Representative.[320]

Concerning *implementation* one finds that the United States have specifically designated and well equipped authorities with a clear responsibility for sanctions implementation. OFAC, BIS and the NSD respectively the US attorney's offices, determinedly and transparently enforce civil and criminal penalties. In doing so, they have tools such as settlements, strict liability and the publishing of the perpetrators' identities at their service. In the European Union, in contrast, the post 2022 Russia sanctions have in many Member States awoken dormant or, given their unprecedented scope, created formerly non-existing responsibilities. From one day to the other, authorities that usually handle different tasks had to understand their new responsibilities, existing sanctions authorities had to dramatically increase their personnel, and within the Member States and the European Union, new fora for coordination and information exchange had to be created. Considerable differences between the penalties applied in the Member States remain. Several initiatives aim to address these issues. For example, there are plans for a database facilitating the reporting and exchange of information between Member States and the Commission on sanctions implementation, and the creation of a single point for sanctions enforcement.[321] Furthermore, there have been repeated calls from various parties for a sanctions enforcement body on EU level.[322] Finally, the directive for a harmonization of penalties is in the making.

Concerning *legal remedies*, one finds that, in the United States, parties affected by sanctions have only limited rights and overall not a strong position before OFAC and before courts. This rigorous approach may have certain benefits. It, however, contradicts the principles the European Union claims for its sanction practice. The comparatively strong position of affected parties in the European Union is, as argued above, overall, a strength of the European system. A look at case law and sanctions design indicates, however, that also with re-

320 See *European Parliamentary Research Service* (2023) Qualified Majority Voting, iii et seqq. and 38-39.

321 See, *e.g.*, *European Parliament* (2023) EU-Russia Sanctions List, 9.

322 See, *e.g.*, *Fleming/Bounds*, Brussels pushes for tougher sanctions enforcement via EU-wide body, Financial Times (July 3, 2022). An EU-level authority with similar responsibilities to OFAC, however, will likely not be created in the close future (see, *e.g.*, *EU Watch*, "Russia sanctions will remain in place for a long time": EU Sanctions Envoy David O'Sullivan (March 6, 2023)).

gard to legal remedies, the European Union sanctions framework keeps evolving and that careful considerations need to be made to preserve the comprehensive rights of affected parties while imposing effective sanctions.

Imposing sanctions against Russia has put the European Union's sanctions framework, the backbone of the sanctions imposed, to the challenging test of practical large-scale application. Major insufficiencies have been detected and many lessons have been learned. In her State of the Union Address of 2023, *Commission President von der Leyen* proclaimed the "*birth of a geopolitical Union – supporting Ukraine, standing up to Russia's aggression, responding to an assertive China and investing in partnerships*".[323] For a foreign policy that measures up to such a "*geopolitical Union*", however, there is no way around creating and constantly improving the capability to impose effective sanctions. This capability depends on a well-functioning and reliable framework governing the adoption, implementation, and legal remedies against sanctions. The United States can in many ways be regarded as a role model and as a reference point for this endeavor.[324] While many recent initiatives aim to address the lessons learned, the ambitious goal of a "*geopolitical Union*" requires deeper and in many ways still undetermined changes to the sanctions framework of the European Union. One thing, however, is clear: there will not be a "*geopolitical union*" without a sanctions framework that constitutes a robust backbone for the sanctions imposed.

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323 *European Commission* (2023) Speech by President von der Leyen.

324 This was recently reaffirmed by the Special Envoy, noting that "*[w]e always look at what the Americans are doing because they do have a vast experience of this and they've been using restrictive measures for a long time*" (*EU Watch*, "Russia sanctions will remain in place for a long time": EU Sanctions Envoy David O'Sullivan (March 6, 2023)).

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Next Generation

As a response to the Russian invasion of Ukraine, the United States and the European Union have put in place far-reaching and highly coordinated sanctions against Russia. While their sanctions are similar in content, the United States and the European Union differ in their sanctions history as well as in their respective sanctions frameworks, which govern how sanctions are adopted, implemented, and challenged. These frameworks constitute the backbone of the sanctions imposed and shape their effectiveness and impact. They therefore are critical for the United States' and the European Union's capacity to conduct geopolitics. This article explores the sanctions frameworks of the United States and the European Union from a comparative perspective and investigates their similarities and differences. It argues that the post 2022 sanctions against Russia are in many ways a turning point for the European Union's sanction practice, uncovering considerable insufficiencies, but also sparking critical reflection and much needed innovation. It furthermore underscores that a good look to the long-serving United States' sanctions framework will pay off for the European Union, when creating the foundation for future sanctions regimes.

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