

The Future of EU Sanctions against Russia: Objectives, Frozen Assets, and Humanitarian Impact

Anton Moiseienko



euclid

European Law Forum: Prevention • Investigation • Prosecution

Article

ABSTRACT

EU sanctions against Russia are unprecedented in their breadth, as well as in the seriousness of the wrongdoing they seek to address. As a result, the EU finds itself in uncharted waters as it develops its sanctions policy vis-à-vis Russia. This paper offers an overview of three strategic issues that are likely to impact the further evolution of EU policy in this area, namely: the objectives that EU sanctions against Russia can pursue; the fate of hundreds of billions of dollars' worth of Russian assets reportedly frozen across EU Member States; and the possible humanitarian impact of sanctions on Russian population. While questions associated with each of these issues admit of no easy answers, thinking through them will be essential to shaping a coherent, credible and effective sanctions policy in response to Russia's aggression in Ukraine.

AUTHOR

Anton Moiseienko

Lecturer

Australian National University, Canberra

CITATION SUGGESTION

A. Moiseienko, "The Future of EU Sanctions against Russia: Objectives, Frozen Assets, and Humanitarian Impact", 2022, Vol. 17(2), euclid, pp130–136. DOI: <https://doi.org/10.30709/euclid-2022-008>

Published in

2022, Vol. 17(2) euclid pp 130 – 136

ISSN: 1862-6947

<https://euclid.eu>



EU sanctions against Russia are unusual in many ways. Most conspicuously, the circumstances of their adoption are unusual, as they concern the first overt, large-scale military interstate aggression in Europe since World War II as well as widespread and incontrovertible reports of war crimes.¹ The diversity of the resulting sanctions, which range from individual sanctions against over a thousand people to the freezing of the Russian Central Bank's assets, is likewise unprecedented.²

As this situation unfolds, it is worth considering the possible endgame of the EU's sanctions against Russia. Since predicting the future is a fool's errand, this contribution aims to analyse several of the legal and policy issues that sanctions against Russia engender in light of the EU's previous sanctions programmes and the current circumstances. In particular, this includes the objectives that these sanctions pursue, the fate of the frozen assets, which potentially amount to hundreds of billions of dollars, and the humanitarian impact of such sanctions.

I. Objectives of Sanctions

What the EU's sanctions against Russia seek to achieve is, almost self-evidently, a crucial question. It should have a bearing on the design of sanctions and the conditions for their relaxation, in addition to contributing to the evaluation of whether or not they are, in fact, fulfilling their purposes. This, at least, is the theory. Accordingly, the EU's sanctions guidelines state as follows:³

The objective of each measure should be clearly stated and consistent with the Union's overall strategy in the area concerned. Both the overall strategy and the specific objective should be recalled in the introductory paragraphs of the Council legal instrument through which the measure is imposed. The restrictive measures do not have an economic motivation.

One can surmise that the exclusion of economic motivations means sanctions should not be used as an instrument of, for instance, economic competition in order to undermine a third country's industrial capacity. Other than that, it is obvious that economic considerations are central to the assessment of both which measures are likely to have an impact on the targeted state and what consequences they entail for the EU itself.

In relation to Russia, the EU's sanctions date back to Decision 2014/512/CFSP of 31 July 2014, which was adopted in the aftermath of the Russian annexation of Crimea and its proxy invasion of Eastern Ukraine. The Decision does not expressly list the objectives it pursues, but they are implicit in its recounting of the previous appeals the EU had made to Russia, including the following:⁴

- To immediately withdraw its armed forces to the areas of their permanent stationing;
- To actively use its influence over the illegally armed groups [in Eastern Ukraine] in order to achieve full, immediate, safe, and secure access to the site of the downing of Malaysian Airlines Flight MH17;
- To stop the increasing flow of weapons, equipment, and militants across the border.

These appeals are consistent with the stipulation in the EU's sanctions guidelines that sanctions are generally imposed to "bring about a change in policy or activity by the target country, part of country, government, entities or individuals."⁵ The notion that sanctions are intended to elicit a change in behaviour is widely accepted in the political science literature on sanctions and, to a lesser degree, in legal studies on the subject.⁶ The appeal of this idea lies, in part, in the simple benchmark it offers for assessing the effectiveness of sanctions, namely whether or not they succeed in making the targeted state or person mend their

ways. It also provides plausible deniability as to whether or not less elevated considerations, such as the desire to inflict a degree of punishment on the target, play a part in decision-making.

That said, there is a richer tapestry of possible objectives of sanctions. The US government has identified three main objectives, which include behaviour change, constraining the target's malicious activities, and signalling disapproval thereof.⁷ Even if the first of these objectives is unattainable, the other two can make the game worth the candle. On a more general level, sanctions objectives can also be classified as primary (achieving the desired change in the target's behaviour), secondary (affecting the sanctioning state's own domestic politics or bolstering its international reputation), and tertiary (maintaining the integrity of international rules and institutions).⁸ The latter classification gives expression to the symbolic aspect of sanctions, which can either be a distraction from or a complement to more tangible action.⁹ To reflect the diversity of the possible expectations from sanctions, one commentator draws a distinction between the "purposes" of sanctions, i.e. the envisaged effects on the target, and broader "objectives."¹⁰ There is, in short, a great variety of reasons why sanctions may be imposed, in addition to the ways of thinking about what they are supposed to achieve.

Eight years since Russia's original invasion of Ukraine in 2014, all of the aforementioned objectives – such as pressuring Russia to change its behaviour, constraining its action, and signalling its disapprobation – are relevant to sanctions, although in what combination, and in what proportion, is in the eye of the beholder. As long as Russia's hostilities against Ukraine continue, there is little doubt that the most basic of these objectives, namely that of eliciting a change in Russia's behaviour, remains paramount. One must give some thought, however, to what exactly that means. There is a difference between achieving a permanent, let alone temporary, ceasefire, on the one hand, and securing a comprehensive peace settlement between Ukraine and Russia, on the other. The latter would need to encompass issues of reparations for the damage caused; credible investigation of apparent war crimes, crimes against humanity, and acts of genocide; territorial entitlements; and treatment of the Ukrainian and Crimean Tatar minorities within Russia, to name a few of the most salient issues.

A key political decision that the EU faces is whether its sanctions should be leveraged to achieve the latter, longer-term objective as well as the former, more immediate outcome. One obvious ramification that the decision will have is the future of frozen Russian assets. According to press reports cited by the EU itself, over half of Russian Central Bank assets, put at US\$630 billion before the invasion, have been attached across the world.¹¹ A significant proportion of these assets is supposedly to be found in EU Member States, in particular France and Germany.¹² A hypothetical decision to scale back or reverse EU sanctions upon the attainment of a ceasefire could, depending on its exact form, result in the restoration of these assets to Russia, while Ukraine would have no realistic prospect of recovering the hundreds of billions of dollars in damage it suffered.

This state of affairs would likely be politically untenable, largely because of its iniquitous effects but also because of the signal it would send about the EU's willingness to relinquish its most powerful coercive tool with the job less than half done. If one accepts this view, which is ultimately a matter of political and moral judgment, then complex considerations arise. The reason for this is because EU sanctions rarely involve the freezing of billions in value, let alone in sovereign assets arguably protected by immunities under international law, and its previous attempts to link (temporary) sanctions to (permanent) confiscation have proven less than successful. These issues are discussed in greater detail in the following section of this article, but another general comment is worth making first.

While it is uncontroversial that resorting to sanctions should be done in a deliberate and thoughtful manner, genuine clarity about their objectives, in the sense of visualising the desired endgame, may not be within reach at the time of their imposition. Consider the case, not too far removed from the present situation, of EU

sanctions against Belarus. They were first imposed on human rights grounds in 2012, due to ongoing repression¹³ but were then largely lifted in 2016 because of the perceived constructive role that Belarus was playing in negotiations between Ukraine and Russia.¹⁴ The signification of relaxation of the sanctions had little to do with the problem they originally set out to address but was instead a reward for advancing EU and allied interests in foreign affairs. These sanctions have since been reinstated and broadened in response to Belarus's rigged elections, massive repression, and, ultimately, support for the Russian invasion of Ukraine.¹⁵ What this example amply demonstrates is the potential for using sanctions in a flexible manner, so as to calibrate the amount of pressure the EU is exerting on a third country, depending on the latter's conduct and attendant circumstances.

The lesson this holds for current sanctions against Russia is that the experts who call for greater certainty on what the EU wishes to achieve and under what conditions sanctions can be scaled down may be overstating their case. It is exceedingly difficult, if at all possible, to predict how the war between Russia and Ukraine will continue to unfold. Subject to one exception outlined below, it may therefore not be wise to nail one's colours to the mast too early and commit to any particular *outcome*, as opposed to using sanctions as a pressure point against Russia in support of the evolving EU and Ukrainian objectives in this war.

II. The Fate of Frozen Assets

All that said, one matter that is exceedingly likely to arise in any political constellation as long as the Ukrainian state survives is that of compensation for the damage caused to Ukraine, its citizens and companies, and foreign persons or businesses affected by Russia's war. The international law term is reparation and, in line with customary international law, the applicable principle is stated as follows in the Articles on Responsibility of States for Internationally Wrongful Acts:¹⁶

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

The Ukrainian government has asserted its willingness to seek full reparation and estimated the damages at over half a trillion dollars as of late March 2022.¹⁷ At present, a complete estimate remains elusive due to the ongoing destruction, with a recent report suggesting that Ukraine's economy will shrink by over 45% in 2022.¹⁸ Meanwhile, effective avenues for securing compensation are few and far between. The interstate dispute initiated by Ukraine in the International Court of Justice has yielded an order on provisional measures that enjoined Russia from continuing its military operation, but it was – predictably – ignored.¹⁹ Likewise, in the past, Russia has been known to ignore monetary awards issued by international arbitral tribunals, including the \$50 billion *Yukos* award.²⁰

It would be incongruous *not* to draw a connection between this conundrum and the fact that significant Russian assets are frozen across EU Member States as a result of sanctions. On its face, using this pool of property to satisfy Ukrainian claims would be incompatible with the temporary nature of sanctions, which involve the provisional *freezing* of assets, not their permanent *confiscation*. This, however, is not really the issue. While sanctions per se are temporary, they can also be a prelude to a more definitive disposal of the property in question, such as confiscation.

That was precisely the idea behind the EU's misappropriation sanctions, which froze the assets allegedly misappropriated by former public officials from Egypt, Tunisia, and Ukraine with a view to their ultimate confiscation, based on court judgments in their countries of origin.²¹ The problem that bedevilled misappropriation

priation sanctions is that the countries concerned proved incapable of furnishing those final judgments or even substantiating the continued need to keep those targeted on a sanctions list. As a result, misappropriation sanctions ended not with a bang of confiscations but with a whimper of sanctions designations being struck down one by one by the Court of Justice of the EU.²²

As with misappropriation sanctions, there is apparently some appetite in the present circumstances to explore opportunities for the confiscation of frozen Russian assets. In March 2022, the European Commission set up a “Freeze and Seize” Task Force, led by the Commissioner for Justice *Didier Reynders*, whose objective was described as follows:²³

The ‘Freeze and Seize’ Task Force is composed of the Commission, national contact points from each Member State, Eurojust and Europol as well as other EU agencies and bodies as necessary. It will coordinate actions by EU Member States, Eurojust, Europol and other agencies to seize and, where national law allows provides for it, confiscate assets of Russian and Belarussian oligarchs.

If the announcement is taken at face value, it appears that the Task Force’s work is limited to private assets, as being distinct from frozen funds that belong to the Russian Central Bank. One of the legal grounds for confiscation that will likely be explored is the possibility that the assets at hand constitute the proceeds of crime, such as corruption, or were intended for use in the commission of crime. The use of the proceeds of crime, or money laundering, is a criminal offence in all EU Member States as per the EU’s successive Money Laundering Directives and the non-binding but influential standards of the Financial Action Task Force (FATF). Some of these states also have procedures in place that enable confiscation in the absence of a criminal conviction. Nonetheless, assembling the evidence that would trigger the application of any such measures is bound to prove challenging, not least since no cooperation from Russia will be forthcoming.

The legal position of Russian state-owned assets is rather different. Their confiscation is precluded by the enforcement immunity that the emanations of the Russian state enjoy under customary international law.²⁴ There is, of course, bitter irony in proclaiming that the assets of a state that has made its contempt for international law well known should be safe from confiscation on the basis of neither sound policy nor principle but solely on the basis of steadfast commitment to a rule of international law. Given the circumstances, the issue arises as to whether any exception to sovereign immunity rules applies, for example because the claims stem from a violation of a *jus cogens* norm,²⁵ or whether circumstances precluding wrongfulness – such as countermeasures – could neutralise the potential breach of international law by a state that will move to confiscate the assets.²⁶ These matters deserve detailed analysis and are thus beyond the scope of this article, but there is little doubt that they will continue to preoccupy the minds of government lawyers and policymakers in the months to come.

One of the key challenges for the EU is that, while the outcome of its sanctions programmes has reverberations for the EU’s credibility, the potential confiscation of frozen assets can only take place under Member States’ domestic legislation. So far, two likely avenues for such action appear to exist. One is the confiscation of private assets, such as those belonging to so-called oligarchs, based on proceeds of crime laws. The other is the enactment of bespoke legislation enabling the confiscation of frozen assets, potentially including those belonging to the Russian state.

So far, however, it is non-EU states, specifically the USA and Canada, that have been exploring respective legislative initiatives, namely the Asset Seizure for Ukraine Reconstruction Act and the Frozen Assets Repurposing Act, respectively.²⁷ While the proposed Canadian Frozen Assets Repurposing Act has been subsumed, in substance, within the Budget Implementation Act 2022 tabled by the country’s government,²⁸ the analogous bill in the USA has stalled in Congress, reportedly due to the American Civil Liberties Union’s opposition to extrajudicial confiscation of property.²⁹ In the meantime, the Polish government has suggested

that it will explore amending the country's constitution to allow for precisely that prospect.³⁰ This gives us a taste of the legal and policy maze that EU members and, by extension, the EU itself will need to navigate in order to settle on the manner of the ultimate disposal of frozen Russian assets.

Unless and until these issues are resolved, it is difficult to see how any relaxation of respective financial sanctions can be anything but premature and counterproductive. Or, to put it another way, it becomes apparent that the objective of sanctions must be linked not only to the cessation of hostilities but also to the provision by Russia of full reparations for the damage it caused. Therefore, while there is some overall benefit to maintaining flexibility in relation to the purposes that sanctions serve, as discussed above, this is one area where articulating the EU's commitment to a particular outcome, namely full reparation, would be desirable.

III. Humanitarian Impact

Among other things, the extent of financial and trade sanctions on Russia brings into focus a concern that has been attenuated in most sanctions programmes over the past several decades, namely their potential impact on the population of the sanctioned state. Most recent accounts of sanctions build a narrative arc from comprehensive sanctions, such as a trade blockade, to targeted or smart sanctions, which hurt individuals and not nations.³¹ The sentiment underpinning this shift is eloquently summed up in W. Michael Reisman's assessment of the United States' trade embargo against Haiti, when "[t]he wealthy elite and the military command were waxing rich off the contraband industry the economic sanctions had spawned", while the rest of the population was "without exaggeration starving to death."³² EU and allied sanctions against Russia do not fit this trajectory from comprehensive to targeted sanctions, and that conjures up the same spectre of unintended humanitarian consequences that beset some of the sanctions programmes of the past. It is therefore appropriate, and arguably desirable, for the policy discourse on sanctions against Russia to address this aspect.

As a preliminary observation, it is useful to note that the distinction between comprehensive and targeted sanctions is not a binary one, and the measures directed at Russia fall somewhere on the continuum between the two extremes. On the one hand, they encompass asset freezes and travel bans against a number of individuals responsible for Russia's policies, including President Putin and Foreign Minister Lavrov, among others. On the other hand, initiatives such as the freezing of Central Bank assets are obviously directed at the state as a whole, rather than at specific people. Therefore, they go in the direction of comprehensiveness, although, as mentioned previously, they have not at present reached the maximum level of pressure possible. The assets of the state are, in theory at least, the assets of its people. Likewise, sanctions aimed at degrading Russia's economy, for instance by inducing the depreciation of its currency, are out of necessity going to hurt Russian citizens, provided these measures enjoy a modicum of success.

At first sight, this gives rise to exactly the sort of dilemma identified by Reisman. For better analysis, however, it is helpful to distinguish between sanctions that aim to pressure a certain government into changing its internal policy stance, on the one hand, and those that seek to address the threat it poses internationally, on the other. Here, again, we are talking about a continuum rather than a clear delineation – the difference is between unilateral sanctions against a certain country's regime due to internal repression and those against a state carrying out a military aggression or bent on developing nuclear weapons. Unilateral sanctions by the USA against Haiti in the 1980s and 1990s or the ongoing sanctions imposed by a number of Western states against Myanmar's military regime are instances of the former category; measures against Russia, North Korea, and Iran are firmly in the latter.

Insofar as countries posing a serious outward-facing threat are concerned, one must go beyond a balancing exercise that weighs up the likelihood of altering the ruling regime's calculus against the amount of pain inflicted on its civilian population. Disrupting the state's activities becomes a significant consideration. That is, in effect, shorthand for saying that its military, economic, and social resilience must be depleted so as to deprive it of the tools needed to carry on with its destructive foreign policy course. And, while in the case of North Korea or Iran there is a relatively narrow category of activities that sanctions are aiming to impede, namely those related to nuclear proliferation, Russia's malign actions involve waging a full-scale war by the country's regular army, supported by its budget – so that, out of necessity, Russia's entire economy is the inevitable target for sanctions.

The fact that some sanctions inevitably have an adverse humanitarian impact is not a new phenomenon. For instance, in relation to North Korea, this has been highlighted time and again in the reports by the UN Independent Panel of Experts, with little in the way of tangible recommendations, save for encouraging continued engagement with relevant non-governmental organisations.³³ In practice, therefore, the necessity of dealing with the risk North Korea presents has left very little room to mitigate the unintended consequences that sanctions sadly wreak on the country's population.

Russia is, broadly speaking, in the same situation, except that the need for sanctions is all the more acute, since there is not merely the risk of a country developing weapons of mass destruction in the future but rather the reality of a nuclear-armed power carrying out a war of aggression, accompanied by widespread and credible allegations of war crimes.³⁴ Against this background, it is incredibly difficult to say whether there is at all a point beyond which further escalation of sanctions becomes unconscionable, except that it is abundantly clear that such a point, should it exist, remains far off for now. It may be all too easily forgotten that, in these circumstances, the humanitarian imperative cuts both ways, as one must be concerned not only with preventing the unnecessary immiseration of the Russian people but also, first and foremost, with forestalling further violence in Ukraine and, subsequently, with helping restore the livelihoods ruined by an aggressive war.

The humanitarian aspect is among the most intractable dilemmas in the law and policy of sanctions, and it is regrettable that no credible multilateral initiative exists to study it. In 2014, the UN Human Rights Council set up the office of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, which might have become a commendable initiative. The Council's respective resolution, however, exhibited little readiness to engage in a free and unbiased inquiry that the issue deserves, stipulating *ab initio* that the Council "[c]ondemns the continued unilateral application and enforcement by certain powers of such measures as tools of political or economic pressure against any country."³⁵ More importantly, the Special Rapporteur's terms of reference concentrate on documenting and cataloguing the negative impact of sanctions, and thereby give short shrift to the real issue, which is how it should be weighed against the (legitimate) objectives and (positive) effects of sanctions.³⁶ As might be expected, the documents since published by the Special Rapporteurs have been creative, to the point of being imaginative, in their assessment of the facts and legal analysis.

Following his official visit to Russia, the first Special Rapporteur, the late Ambassador *Idriss Jazairy* of Algeria, was anxious to recommend as a "priority" that members of the Russian parliament should be exempt from Western sanctions, as "parliamentary immunity is recognized worldwide and this must be for good reason."³⁷ (Of course, while members of parliament may enjoy domestic immunity, no immunities from another state's exercise of jurisdiction accrue to them under international law, to say nothing of the complexities of applying sovereign immunities to sanctions in the first place!).³⁸ Ambassador Jazairy's successor as Special Rapporteur, Professor *Alena Douhan* of Belarus State University, has likewise utilised her mandate to promote an idiosyncratic understanding of international law, such as by arguing that "[sanction-

ing] State officials ex officio contradicts the prohibition of punishment for activity that does not constitute a criminal offence.”³⁹

As a result, despite the Human Rights Council’s engagement with the issue, there is still no serious multilateral process for considering the legal, political, and ethical quandaries related to the humanitarian impact of sanctions.⁴⁰ There is, instead, a corpus of eccentric reports bearing the UN’s imprimatur, along with “letters of allegation” that the current Special Rapporteur has been sending to the USA in relation to its sanctions programmes,⁴¹ which are bound to be used before long to impugn Russia-related sanctions on ostensibly humanitarian grounds. Instead of accepting these at face value, it is vital for policymakers to reason from first principles, namely to keep in mind not only the humanitarian impact of sanctions but also the ongoing humanitarian crisis in Ukraine that they are intended to stop and, insofar as possible, rectify the consequences of.

IV. Conclusion

This contribution has attempted to sketch out some of the key legal and policy issues that are likely to determine the development of the EU’s sanctions regime against Russia. The focus here has been neither on further measures that may or may not be put in place, nor on the likelihood of EU sanctions resulting in any substantial changes to Russia’s stance, but rather on the three matters likely to remain salient, regardless of the precise shape of sanctions: what their objectives are; what happens to frozen Russian assets; and how one should think about the humanitarian implications of sanctions.

In brief, the argument of this paper is that it is perfectly legitimate not to have a well-defined answer to the first question. As long as sanctions remain a useful way of exerting pressure on Russia in a highly volatile and fluid situation, it would be foolhardy to limit the room for manoeuvre by adhering to any particular dogma as to what sanctions should intend to achieve. That said, and of particular relevance to the second question, EU sanctions should be found wanting in ambition if they were not leveraged to help Ukraine secure full reparations from Russia for the damage it caused. If accepted, this simple premise means that some of the main sanctions, such as the freezing of the Russian Central Bank’s assets, are here for the long run. Finally, it is inevitable, and indeed appropriate, that considerations of a humanitarian nature become part of the discussion if and when sanctions begin taking a toll on Russian living standards. These arguments should be taken seriously, but the only way to do so is by placing them in the context of the much more profound humanitarian crisis that Russia’s military aggression is continuing to exacerbate.

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The project is co-financed by the [Union Anti-Fraud Programme \(UAFB\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



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