

## The hybrid nature of the European regulation: the case of sanctions against Russia

Following the annexation of Crimea in 2014 by the Russian Federation, the European Union along with other NATO Member States have progressively introduced numerous restrictive measures through the implementation of European regulations.

According to Article 288 of the Treaty on the Functioning of the European Union (TFEU), a European regulation is a binding legislative act of general application and is directly and immediately applicable in its entirety within EU countries. By general application is meant a characteristic of abstractness, namely that the regulation is not addressed to expressly specified or easily identifiable addressees, but to abstract categories of persons<sup>1</sup>. The mandatory nature of the regulation in its entirety prohibits its partial application by states. The most significant feature of the figure of the regulation is its direct applicability in each of the Member States. By immediately integrating into state legal systems without requiring further national transposition measures, the regulation thus directly confers obligations and rights on European citizens, the protection of which is the task of national courts.

Regulations fit into the autonomous European legal system and are explicitly legitimized by the TFEU, which results from the will of all Member States and stands at the apex of EU law.

Sanctions against the Russian Federation are a current example of the function of Europe-wide harmonization of regulations. They affect Russia in a number of areas and include financial, economic and trade restrictions, particularly regarding so-called dual-use goods, i.e., technologies and software that can be used for both civilian and military purposes, as well as regarding certain goods and technologies for the oil industry, plus restrictions on economic relations with Crimea and Sevastopol.

The regulations issued by the EU following the 2014 Russian-Ukrainian crisis allowed uniform sanctions against Russia in targeted and strategic areas for 8 years, achieving a greater real and symbolic impact than if each Member State had imposed its own sanctions.

The 2022 European sanctions packages in response to the invasion of Ukraine and Russia's recognition of the Donetsk and Luhansk regions expand the measures described above through new (EU) regulations, many of which amend key 2014 regulations (833/2014, 269/2014). These new sanctions include restrictive measures against individuals and entities, as well as restrictions on media and diplomatic measures, economic sanctions in the financial, metals, luxury goods, energy, transportation, and defense sectors, and restrictions on economic relations with non-government-controlled areas of Donetsk and Luhansk.

On March 07, 2022, the chairwoman of the European Commission, Ursula von der Leyen, said that the global community, consisting of more than 40 countries including the United States, Canada, and the United Kingdom, is jointly imposing sanctions against President Putin and that these measures aim to further isolate Russia<sup>2</sup>. Therefore, the regulations are not only

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<sup>1</sup> G. STROZZI, *Diritto dell'Unione Europea*, Giappichelli, Torino, 2005, p. 193.

<sup>2</sup> Deutschlandfunk, *EU-Kommissionspräsidentin von der Leyen: „Die Sanktionen beißen ganz hart“*, 7 marzo 2022.

a means for the Union to act as a single entity, but also allow it to impose severe sanctions coordinated on a global scale together with its G7 partners.

Restrictive measures implemented in 2022 in the field of export will now be analyzed. They stem from Regulations (EU) No. 328/2022 of February 25, 2022, 394/2022 of March 9, and 428/2022 of March 15, which amend Regulation (EU) No. 833/2014, as well as Regulation (EU) No. 263/2022 of February 23.

Regulation (EU) No. 328/2022 specifically prohibits the export of dual-use goods, which according to Article 1(1)(a) of the Regulation include "items listed in Annex I to Regulation (EU) 2021/821 of the European Parliament and of the Council". The other regulations under consideration cover, for example, steel products, luxury goods (Regulation (EU) No. 428/2022), maritime navigation goods (Regulation (EU) No. 394/2022), as well as the transport, telecommunications and energy sectors (Regulation (EU) No. 263/2022).

Article 8(1) of Regulation (EU) No. 833/2014, amended by three of the aforementioned regulations, as well as Article 13(1) of Regulation (EU) No. 263/2022 explicitly delegate to Member States the imposition of penalties for infringements. This is a common practice.

#### Italian implementation of the 2022 (EU) regulations sanctioning Russia

Despite their direct applicability, the European sanctions regulations against Russia are a recent example of European regulations requiring national implementation measures.

As the 2022 European restrictive measures are very recent, no implementing regulations have yet been officially enacted in Italy. However, Italy had already enacted legislation in 2017 in order to implement European regulations regarding dual-use goods, EU restrictive measures and trade embargoes. This is the Legislative Decree 221/2017. Since today's sanctions cover, among other things, dual-use goods (through Regulation (EU) No. 328/2022) and trade embargoes (through Regulations (EU) No. 328/2022, 428/2022, 263/2022, 394/2022), this decree is considered by many to be a landmark legislation regarding the implementation of the 2022 sanctions regulations against Russia.

Article 18 of Legislative Decree 221/2017 regulates sanctions related to dual-use goods and unlisted dual-use goods. Article 18, paragraph 1 of Legislative Decree 221/2017 punishes with a fine of 25,000 to 250,000 euros and a term of imprisonment of two to six years anyone who exports products and technologies in the absence of prescribed authorizations as well as uses authorizations based on false documentation. On the other hand, a punishment of one to four years' imprisonment or a fine of 15,000 euros to 150,000 euros is imposed for simple exportation in deviation from the obligations stipulated in the individual authorizations obtained by the UAMA (Unità per le autorizzazioni dei materiali di armamento) (Article 18, paragraph 2, Legislative Decree 221/2017). Therefore, Art. 18 of the Legislative Decree 221/2017 could be the Italian transposing measure that allows sanctioning violations of dual-use goods export restrictions of Regulation (EU) No. 328/2022 of Feb. 25, 2022.

Article 20, paragraphs 1 and 2, of Legislative Decree 221/2017 presuppose export of products listed as a result of EU restrictive measures.

Article 20, paragraph 1, punishes the violation of an export ban with a prison sentence of two to six years. Since it does not presuppose any possibility of authorization, it can only implement (EU) regulations that do not provide any authorization as an exception to export bans, namely the export freeze concerning goods and technology suited for use in aviation or the space industry regulated by Art. 1(6), of the Regulation (EU) No. 328/2022, which inserts *Article 3c* to Regulation (EU) No. 833/2014, and the export freeze on luxury goods established in Article 1(8) of Regulation (EU) No. 428/2022, which inserts *Article 3h* to Regulation (EU) No. 833/2014.

Article 20, paragraph 2, for its part, punishes with imprisonment from two to six years or a fine from €25,000 to €250,000 the export carried out without the prescribed authorization, or with an authorization obtained by providing false statements or documentation. It can therefore implement the following Regulations (EU): No. 328/2022 except for the ban on export of goods and technologies suitable for use in aviation or space industry; 428/2022 except for the ban on export of luxury goods; 394/2022 and 263/2022.

Article 20, paragraph 3, punishes with imprisonment from one to four years or a fine from 15,000 euros to 150,000 euros anyone who carries out the operations referred to in paragraph 2 in breach of obligations prescribed by the relevant permit.

## Conclusion

As the Union plans further sanctions packages against Russia, both the restrictions themselves and the implementing measures of the regulations are part of a process that needs constant updating.

Although Italy has not yet officially notified any implementing legislation, Legislative Decree 221/2017 seems to be the appropriate provision to transpose the regulations of 2022 into the Italian legal system, as argued in particular by the Customs and Monopolies Agency (Agenzia delle Dogane e dei Monopoli). Article 18 of Legislative Decree 221/2017 is suitable for sanctioning infringements of Regulation (EU) No. 328/2022 on dual-use goods, while Article 20 appears to be the appropriate sanctioning provision in case of infringement of Regulations (EU) 328/2022 (except for dual-use goods, see above), 394/2022, 428/2022, 263/2022.

Since the Legislative Decree 221/2017 is a pre-existing provision, its official promulgation as a transposition provision for the EU Regulations of 2022 would avoid the adoption of a new implementing legislation, which is unfortunately often necessary in practice in Italy.

The analysis of the Italian transposition of these European sanctioning regulations also highlights the gap between their direct theoretical applicability in Member States and the need in practice for a laborious process for their implementation.

The regulations often delegate the various Member States about the regulation of the consequences of their infringement, and this can lead to different sanctions from one state to another. This means that the general applicability of the Union regulation is in fact accompanied by a dissimilarity in the action exercised by the various EU states regarding the consequences of their infringement.

Indeed, the regulation constitutes a hybrid legal figure that, while being a symbol of harmonization at the European level and a direct connection between EU law and national

law, highlights in practice the difficulties of individual Member States in adapting to European law.

### Acknowledgment

This article is extracted from my Bachelor degree thesis for the Universität zu Köln. To write this paper, I spent a 6-week internship at the Studio Legale Armella & Associati in Genoa. I would like to warmly thank Attorney Stefano Comisi and Attorney Sara Armella for their help and advice, which enabled me to successfully complete my work thesis.

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