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Articles

Between armed conflict and state terrorism – specific individual restrictive measures adopted in Poland in the context of the war in Ukraine and the situation in Belarus. Legal perspective

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Abstract

The aggression of the Russian Federation against Ukraine in 2022 and the actions of Belarus, both at the internal level and in support of Russia, have caused numerous changes in the geopolitical dimension, with consequences reaching beyond the European continent. They also resulted in the adoption of specific legal measures, both at the European Union and national levels, to counteract support for this aggression. The aim of this study is to present national legal solutions regarding restrictive measures against persons and entities that were introduced by *the Act on special solutions for counteracting support for aggression against Ukraine and for the protection of national security*. The article sets out their relationship to the mechanisms contained in European Union regulations and identifies the need for legal changes to adopt permanent systemic solutions for the application of national restrictive measures.

Keywords

sanctions, restrictive measures, sanctions list, freezing of financial resources, war in Ukraine

Armed conflict and state terrorism

The armed attack by the Russian Federation (RF) on Ukraine on 24 February 2022, which was a development of the 2014 actions that resulted in the annexation of the Crimean peninsula by Russia, was from the outset a military conflict conducted by the regular Russian army, with the support of various types of units and forces, including the Wagner Group. However, the manner in which Russia conducted its military operations and its involvement in other conflicts around the world quickly led to it being seen not only as the aggressor state of the armed conflict, but also as a state sponsoring or supporting terrorism, with the Russian authorities even being referred to as a terrorist regime. In this context, an important piece of European legislation is *the European Parliament resolution of 23 November 2022 on recognising the Russian Federation as a state sponsor of terrorism* (hereafter: Resolution of 23 November 2022). Within it, the European Parliament took into account the legal bases indicating the military nature of the conflict, including *the European Parliament resolution of 6 October 2022 on Russia's escalation of its war of aggression against Ukraine, the European Parliament resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine* and *the European Parliament resolution of 25 November 2021 on the human rights violations by private military and security companies, particularly the Wagner Group*. The parliament also took into account the United Nations Charter, the Convention on the Prevention and Punishment of the Crime of Genocide signed on 9 December 1948[1], IV Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949, or the Rome Statute of the International Criminal Court. The European Parliament also referred to international and EU regulations on preventing or combating terrorism, including the UN Security Council Resolution 2341 on the protection of critical infrastructure against terrorist acts (of 13 February 2017), the Convention on the Suppression of Terrorism of 27 January 1977[2], and international conventions adopted thereafter, as well as EU legislation on combating terrorism, including *the Council Common Position 2001/931/CFSP*

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1 *The Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948 (ratified in accordance with the law of 18 July 1950)* – (editor's note).

2 *The European Convention on the Suppression of Terrorism, drawn up in Strasbourg on 27 January 1977.*

of 27 December 2001 on the application of specific measures to combat terrorism and *Council Regulation (EC) No. 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.*

The European Parliament, indicating the reasons for declaring Russia as a state sponsoring terrorism, in addition to the legal grounds mentioned, cited the factual premises justifying the adopted resolution of 23 November 2022. It indicated, inter alia, that:

> (...) since 2014, and in particular after 24 February 2022, when Russia relaunched the illegal, unprovoked and unjustified war of aggression against Ukraine, its forces have conducted indiscriminate attacks against residential areas and civilian infrastructure, have killed thousands of Ukrainian civilians and carried out acts of terror throughout the country targeting various elements of civilian infrastructure such as residential areas, schools, hospitals, railway stations, theatres, and water and electricity networks[3].

It was pointed out that Russia has for years supported and financed terrorist regimes and organisations, notably the Syrian regime of Bashar al-Assad, to which it has supplied weapons and in whose defence it has carried out deliberate attacks on Syrian civilians, cities and civilian infrastructure. Reference was made to attacks, including murders or attempted murders, on political opponents, including journalists, politicians, activists and foreign leaders. It was recalled that on 15 November 2022, a Dutch court convicted in absentia two Russians and a pro-Kremlin Ukrainian separatist for the murder of 298 people by shooting down a Malaysia airlines plane[4].

The circumstances cited in the resolution of 23 November 2022 do not exhaust the rationale invoked to justify it, but unambiguously broaden the perception of Russia's actions, which are analysed not only from a strictly military perspective, but also in the context of state terrorism. It is noteworthy that the resolution refers to a statement made by the then Polish Minister of Foreign Affairs, Zbigniew Rau, then serving as Chairperson-in-Office of the Organisation for Security and Co-operation in Europe (OSCE), on 14 March 2022, who (...) *qualified the attacks by the Government*

[3] The Resolution of 23 November 2022, letter A.

[4] Ibid., letter B, L, N.

of the Russian Federation against innocent civilians and civilian infrastructure in Ukraine as 'state terrorism'[5].

This resolution stated that, although the European Union (EU) maintains a list of sanctioned individuals, groups and entities involved in terrorist acts, its existing legislation, unlike that of, for example, the United States or Canada, does not provide for the designation of an entire state as a sponsor of terrorism. In this context, the European Parliament

> (...) calls for the EU and its Member States to develop an EU legal framework for the designation of states as sponsors of terrorism and states which use means of terrorism, which would trigger a number of significant restrictive measures against those countries and would have profound restrictive implications for EU relations with those countries; calls on the Council to subsequently consider adding the Russian Federation to such an EU list of state sponsors of terrorism; calls on the EU's partners to adopt similar measures[6].

The European Parliament called for Russia and Belarus to be put on the EU's high-risk third country list on anti-money laundering and countering the financing of terrorism[7].

The European Parliament further called on the EU and its Member States, as is obvious in circumstances of this kind, to take isolationist measures against Russia in the international arena, to (...) *include the Wagner Group and the 141st Special Motorized Regiment, also known as the Kadyrovites, as well as other Russian-funded armed groups, militias and proxies such as those active in the occupied territories of Ukraine, on the EU list of persons, groups and entities involved in terrorist acts (EU terrorist list)*[8]. He also called for the completion of another package of sanctions related to the freezing of financial resources, funds and economic resources of individuals and entities supporting the actions of Russia and Belarus. On sanctions, he called on both the European Commission (EC) and EU Member States to ensure the swift implementation and full enforcement of all individual and sectoral sanctions and to prevent their circumvention, as well as to investigate and prosecute perpetrators in such cases. There

[5] Ibid., letter T.

[6] Ibid., point 4.

[7] Ibid., point 9.

[8] Ibid., point 6.

was also a call that (...) *national penalties for breaching EU sanctions are effective, proportionate and dissuasive*[9].

The basis for the introduction of a sanction mechanism at EU level is Article 29 of *the Treaty on European Union* (TUE)[10], which allows the Council of the EU to impose restrictive measures (sanctions) against non-EU governments, non-state entities (e.g. companies) and individuals in order to bring about changes in their policies or actions. However, under Article 215(2) of *the Treaty on the Functioning of the European Union*[11], the Council may adopt the necessary measures to implement decisions adopted in accordance with Article 29 of *the Treaty on European Union* to ensure they are applied uniformly in all EU Member States[12].

The European Union imposes restrictive measures either as its own measures (i.e. autonomous sanctions) or to implement United Nations Security Council resolutions when third countries, natural or legal persons, groups or non-state entities fail to respect international law or human rights or pursue policies or actions contrary to the rule of law or democratic principles. The European Economic Community first applied such autonomous sanctions to the Union of Soviet Socialist Republics in 1982. Subsequently, they were imposed on China, Burma (Myanmar), Belarus, Indonesia, Zimbabwe, Uzbekistan or the breakaway territory of Transnistria. As Piotr Kobza emphasises: *In all these cases, the European Union has acted as an 'exporter of European values', particularly in the fields of democracy, the rule of law and human rights*[13].

As envisaged, restrictive measures should not only be appropriate to the circumstances mandating their application, but also gradual, and their imposition requires political consensus at Member State level. However,

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9 Ibid., point 7.

10 *The Treaty on European Union* (consolidated version) – Title V – General provisions on the Union's external action and specific provisions on the common foreign and security policy – Chapter 2 – Specific provisions on the common foreign and security policy – Section 1 – Common provisions – Article 29 (former article 15 of TEU).

11 *The Treaty on the Functioning of the European Union* (consolidated version) – The Union's external actions – Title IV – Restrictive measures – Article 215 (former article 301 of Treaty Establishing the European Community).

12 *General framework for EU sanctions,* https://eur-lex.europa.eu/PL/legal-content/summary/general-framework-for-eu-sanctions.html [accessed: 26 X 2023].

13 P. Kobza, *Środki restrykcyjne jako instrument Wspólnej Polityki Zagranicznej i Bezpieczeństwa Unii Europejskiej* (Eng. Restrictive measures as an instrument of the European Union's Common Foreign and Security Policy), "Studia Europejskie" 2006, no. 3, p. 22.

this is sometimes made difficult by the particular interests of states[14]. The main types of sanctions at the EU's disposal include diplomatic sanctions (such as expulsion of diplomats, suspension of official visits, bilateral or multilateral cooperation with the EU, boycott of sporting or cultural events) and economic and financial sanctions (arms embargoes, restrictions on imports and exports of certain products). Such restrictive measures may include:

- freezing of funds and economic resources owned or controlled by sanctioned persons or organisations (e.g. cash, bank deposits, shares, stocks) which cannot be moved, sold or accessed, and real estate which cannot be sold or rented,
- visa bans or travel bans preventing persons from entering the EU,
- sectoral bans, e.g. a ban on importing or exporting certain goods or technologies[15].

In the context of the issues discussed in the article, the main legal acts at EU level in which restrictive measures are characterised are:

- *Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine* (hereafter: Regulation 765/2006),
- *Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine* (hereafter: Regulation 269/2014),
- *Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.*

It is worth noting that Regulation 765/2006 and Regulation 269/2014 contain EU lists, applicable in all Member States, of persons and entities against whom restrictive measures (known as sanctions) have been imposed by freezing the assets of these entities and persons in connection with Russia's actions against Ukraine and the situation in Belarus. In addition, these regulations became the basis for the adoption of autonomous national

[14] See in more detail: P. Pospieszna, *Sankcje Unii Europejskiej wobec Rosji: proces decyzyjny, trwałość i rola państw członkowskich* (Eng. European Union sanctions against Russia: decision-making process, sustainability and the role of Member States), "Rocznik Integracji Europejskiej" 2018, no. 12, pp. 311–321. https://doi.org/10.14746/rie.2018.12.21.

[15] Ibid.

solutions in Poland, which concern specific restrictive measures against persons and entities supporting the actions of the Russian and Belarusian authorities, as discussed in more detail later in this article.

It should be noted that at the time of the European Parliament's resolution on the recognition of the Russian Federation as a state sponsoring terrorism, the parliaments or individual parliamentary chambers of some EU countries, i.e. Lithuania, Latvia, Estonia, Poland and the Czech Republic, had already adopted national counterparts to the resolution, i.e. documents of a declaratory rather than normative nature, recognising Russia as a terrorist or terrorist-sponsoring state or the current Russian regime as terrorist. In Poland, this was *the Resolution of the Senate of the Republic of Poland of 26 October 2022 on the recognition of the authorities of the Russian Federation as a terrorist regime*. It indicated, inter alia, that:

> Russian invaders have been terrorising the populations of Ukrainian cities by shelling civilian targets: kindergartens, schools, theatres and residential estates. Bandits in Russian uniform have been torturing and murdering prisoners of war and civilians in the occupied territories. They abduct Ukrainian children to raise them as janissaries of the regime. They remove, resettle and send Ukrainian citizens to the most remote regions of Russia (...). We all know these acts of state terrorism well from the pages of history.

Therefore the Senate (...) *strongly condemns Russian aggression and calls on all countries which support peace, democracy and human rights to recognise the authorities of the Russian Federation as a terrorist regime*[16].

Less than two months later, the Sejm passed a similar resolution on the recognition of the Russian Federation as a state supporting terrorism[17]. Within it, the Sejm referred, as the European Parliament had done earlier in the resolution, inter alia to Russia's direct responsibility for the downing of the Malaysian airliner in July 2014 or the Russian Federation's perpetration of terrorist acts against civilian infrastructure, mass executions, abductions, sexual violence and torture, separation of children from their families to subject them to Russification, mass deportations of the population, forced conscription of Ukrainian citizens into the Russian armed forces

[16] The Resolution of the Senate of the Republic of Poland of 26 October 2022 on the recognition of the authorities of the Russian Federation as a terrorist regime.

[17] The Resolution of the Sejm of the Republic of Poland of 14 December 2022 on the recognition of the Russian Federation as a state supporting terrorism.

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and looting of property. The Sejm called on the Council of Ministers to continue and intensify its efforts to impose further sanctions packages on the Russian Federation and those supporting Vladimir Putin's regime, as well as further material and political support for Ukraine in its fight against the aggressor.

In Poland, the response to the actions of Russia and its supporter Belarus on a normative rather than declarative level was the adoption of *the Act of 13 April 2022 on specific solutions to counteracting support for aggression against Ukraine and to protect national security* (hereafter: Sanctions Act). It created, inter alia, a national mechanism to freeze the financial resources, funds and economic resources of persons and entities linked directly or indirectly to the regimes in Russia and Belarus and meeting certain criteria for such a link. These solutions were adopted earlier than the aforementioned resolution of the European Parliament and resolutions of the Polish Sejm and Senate, while they were closely correlated with Regulations 765/2006 and 269/2014, which were in force at the time and subsequently amended as part of successive EU sanctions packages. The subsequent application of the law was in line with the perception of the Russian Federation as a state that supports or finances terrorism, as indicated in the cited resolutions and decisions, by using as one of the restrictive measures the mechanism of freezing the assets of persons and entities. This was a typical instrument used to counter terrorist financing and money laundering, although it had already been used by the EU as a restrictive measure in relation to other countries. Sanctions against terrorism are (...) *administrative, and parallel (e.g. to the confiscation of assets in criminal proceedings) actions by mandatory institutions, intended to prevent perpetrators from using assets for criminal terrorist activities*[18].

It should be stressed that the very notion of sanctions is in this respect a major simplification that should be seen as a mental shortcut, even though both the act and the list of persons and entities it lists, the decisions it imposes or the restrictive measures it applies are usually referred to respectively as "sanctions act", "sanctions list", "sanctions decisions" or "sanctions measures". This is also used for the purposes of this article, and these terms

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[18] M.A. Kędzierski, *Szczególne środki ograniczające i sankcje jako forma przeciwdziałania wobec podmiotów terrorystycznych na tle polskiego ustawodawstwa (część 1)* (Eng. Specific restrictive measures and sanctions as a form of counteraction against terrorist entities against the background of Polish legislation (part 1)), "Prokuratura i Prawo" 2021, no. 10, pp. 22–23.

are also commonly used at EU level, for example within the framework of the previously cited resolution[19]. The purpose for which - on the basis of Polish or EU legislation adopted - the instruments of freezing funds, resources or economic resources are used is not punitive but preventive, so it is more appropriate here to use the term 'restrictive measure', which is usually used interchangeably. Its application prevents the transfer of assets that could finance aggression against Ukraine or violations of human rights and the fight against democratic opposition in Russia and Belarus, but it should not be seen as an instrument to punish such actors. While its effect may be, for example, to prevent economic activity, it is intended to have a temporary effect. The entity subject to the freezing of funds does not expose itself to financial liability in criminal or criminal-administrative terms as long as it does not break the imposed ban. In Polish terms, restrictive measures are a unilateral instrument of state foreign policy (...) *consisting in taking action to restrict or suspend normal relations with another state, in response to its unacceptable actions, both external and internal*[20].

Similar observations were made by the EC in its opinion of 19 June 2020 on Article 2 of Council Regulation 269/2014 (response to question 2.5), according to which:

> Restrictive measures are neither punitive nor confiscatory in nature, but preventive instruments. Article 4(1)(c) of the Regulation [269/2014 – author's note], which establishes a derogation from the financial restrictions set out in Article 2, allows national competent authorities to authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, after having determined that these are intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources[21].

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[19] On the relationship between the concepts of sanctions, restrictive measures and retaliatory measures at EU level, see in more detail: P. Kobza, *Środki restrykcyjne jako instrument...*, pp. 10–14. The topic of the origins of the concept of sanctions in the dimension of international law was addressed in the: M. Sułek, *Zachodnie sankcje wobec Rosji – sens i skuteczność* (Eng. Western sanctions against Russia - sense and effectiveness), "Rocznik Strategiczny" 2014/2015, vol. 20, pp. 398–400.

[20] Ibid.

[21] *Commission Opinion of 19 June 2020 on Article 2 of Council Regulation (EU) No 269/2014*, Brussels, 19 VI 2020, C (2020) 4117 final, p. 6. An analogous opinion in this regard is given in paragraph 28 of the document *Aktualizacja dobrych praktyk UE w zakresie skutecznego wprowadzania w życie środków ograniczających* (Eng. Update on EU good practice in

Research assumptions

The purpose of this article is to discuss individual restrictive measures introduced in Poland by the Sanctions Act and to show their relation to the mechanisms contained in the EU regulations, as well as to present the scale and manner in which these instruments are used in practice. The special nature of the Sanctions Act is worth noting, which is highlighted already in the very title of this piece of legislation. In this context, the research questions arise - what is the special nature of the Act, whether it should be seen from the perspective of the circumstances of the origin of this regulation or the subject or object scope of its standardisation, or perhaps both the substantive and procedural nature of the provisions contained therein.

The aforementioned perception of the conflict in Ukraine also in the context of state terrorism, and not only from a military perspective, harmonises with the application of similar preventive mechanisms, which are asset-freezing measures typical for countering terrorist financing and money laundering. On the Polish ground, this mechanism had already been introduced earlier, i.e. in *the Act of 1 March 2018 on counteracting money laundering and terrorist financing*, however, it has not been used in practice. The first decisions of the General Inspector of Financial Information (GIFI) on inclusion in the list of persons and entities subject to specific restrictive measures under the Act[22], were not issued until 26 September 2023, while the first decisions under the Sanctions Act - already on 25 April 2022.

Due to the comprehensiveness of the issue under discussion, the article omits the issue of the network of dependencies between entities and persons to whom restrictive measures were applied, which is worth a separate and detailed discussion. Neither was reference made to the issue of the structure of their direct or indirect links with the state apparatuses of Russia and Belarus or the persons and economic entities associated with them. It is worth noting that the scope of the law goes beyond the issue of individual restrictive measures applied to specific persons and economic entities affected by the solutions adopted in this law. Indeed, it also includes sectoral sanctions (relating to the ban on

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the effective implementation of restrictive measures), Brussels, 4 V 2018, document no. 8519/18, http://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/pl/pdf [accessed: 30 X 2023].

[22] On the basis of Article 104 § 1 the Act of 14 June 1960 – Code of Administrative Procedure – in relations to Article 120 of the Act on counteracting money laundering and terrorist financing.

the circulation of coal of Russian or Belarusian origin), provisions ensuring the application of the aforementioned EU regulations (i.e. provisions defining the competence of the authorities, procedural provisions and provisions sanctioning the violation of EU restrictive measures) and criminal provisions penalising the application, use or promotion of symbols or names supporting the aggression of the Russian Federation against Ukraine.

The issue of individual restrictive measures introduced in Poland in the context of Russia's aggression towards Ukraine and the situation in Belarus, as opposed to the issue of the application of sanctions at EU or UN level, had not been the subject of scientific publications[23] at the time of preparing this article, therefore, the sources in this case are generally available normative acts, EU guidelines, decisions of the minister in charge of internal affairs, as well as judgements of the Voivodeship Administrative Court (VAC) in Warsaw and decisions of the Supreme Administrative Court (SAC) issued in specific cases (as at the date of preparing this publication, the SAC had not yet issued judgements in the discussed scope).

The relationship between the individual restrictive measures adopted in Poland and the EU

The national solutions for the determination of individual restrictive measures adopted in the Sanctions Act are based on a list, maintained by the minister responsible for internal affairs, of persons and entities against whom, inter alia, the measures set out in Article 2(1)-(3) of Regulation 765/2006 and Articles 2 and 9 of Regulation 269/2014 are applied (hereinafter: sanctions list or list). The entry on the list, which is publicly available and published in the Bulletin of Public Information (BIP)[24], is preceded by

[23] The magazine "Prokuratura i Prawo" (2023, no. 6) published the article by Andrzej Lewny entitled *Kiedy wojenny zapał może zaszkodzić. Kilka uwag o przestępstwie z art. 16 ustawy z dnia 13 kwietnia 2022 r. o szczególnych rozwiązaniach w zakresie przeciwdziałania wspieraniu agresji na Ukrainę oraz służących ochronie bezpieczeństwa narodowego* (Eng. When war fervour can cause harm. Some comments on the offence of Article 16 of the Act of 13 April 2022 on Specific Solutions to Counteracting Support for Aggression against Ukraine and to Protect National Security), however, it does not address the issue of individual restrictive measures discussed in this article.

[24] *List of sanctioned persons and entities*, Ministry of the Interior and Administration, https://www.gov.pl/web/mswia/lista-osob-i-podmiotow-objetych-sankcjami [accessed: 30 X 2023].

an individualised decision of the minister responsible for internal affairs, which is appealable to the administrative court.

According to the cited Article 2(1)-(3) of Regulation 765/2006, freezing of financial resources shall consist of freezing all funds (i.e. preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the use of the funds, including portfolio management[25]) and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities and bodies listed on the sanctions list. Except that economic resources means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services. To freeze economic resources is to prevent their use to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them[26].

In accordance with Regulation 765/2006, no funds or economic resources may be made available, directly or indirectly, to listed natural or legal persons, entities or bodies. The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the restrictive measures shall also be prohibited[27].

A slightly different conceptual apparatus, which does not differentiate between the effects of the regulation, is used in Article 2 of Regulation 269/2014. According to it, all funds[28] (Regulation 765/2006 refers, as

[25] Article 1(2) of Regulation 765/2006.

[26] Article 1(4) of Regulation 765/2006.

[27] On the basis of Explanatory Memorandum to *the Government Draft Act on specific solutions in counteracting the promotion of aggression against Ukraine and serving to protect national security*, Print no. 2131, pp. 6–8, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2131 [accessed: 18 X 2023].

[28] According to Article 1(1) of Regulation 765/2006 funds means financial assets and benefits of every kind, including cash, cheques, claims on money, drafts, money orders and other payment instruments; deposits with financial institutions or other entities, balances on accounts, debts and debt obligations; publicly- and privately-traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts; interest, dividends or other income on or value accruing from or generated by assets; credit, right of set-off, guarantees, performance bonds or other financial commitments; letters of credit, bills of lading, bills of sale; documents evidencing an interest in funds or financial resources.

mentioned, to funds[29]) and economic resources belonging to, owned, held or controlled by indicated on the list any natural persons or natural or legal persons, entities or bodies associated with them indicated in the sanctions list shall be frozen. Similarly, no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them indicated on the list.

As the Sanctions Act refers explicitly to EU regulations, the relationship between the two legal orders requires comment. As stated in the explanatory memorandum: *The proposed law, based on selected legal instruments contained in Regulation 765/2006 and Regulation 269/2014, will introduce, under national law, a list of persons and entities, separate from the lists contained in these regulations, to whom the certain restrictive measures specified in these regulations apply*[30]. The Sanctions Act is therefore a self-standing piece of national legislation based on EU mechanisms for the application of individual restrictive measures. It also contains a standard to prevent duplication of the restrictive measures imposed, which is set out in Article 2(2). According to this provision, the scope of measures applied to listed persons and entities may not duplicate the scope of measures set out in Regulation 765/2006 or Regulation 269/2014.

The introduction of national solutions alongside EU law, resulting in a Polish sanctions list separate from the EU list, is in line with Article 4(2) of *the Treaty on European Union* of 7 February 1992, according to which*:*

> The Union respects the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It respects their essential state functions, including ensuring the territorial integrity of the state, maintaining law and

[29] Financial resources within the meaning of Article 1(g) of Regulation 269/2014 shall mean financial assets and benefits of every kind, including cash, cheques, claims on money, drafts, money orders and other payment instruments; deposits with financial institutions or other entities, balances on accounts, debts and debt obligations; publicly- and privately-traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts; interest, dividends or other income on or value accruing from or generated by assets; credit, right of set-off, guarantees, performance bonds or other financial commitments; letters of credit, bills of lading, bills of sale and documents showing evidence of an interest in funds or financial resources.

[30] Explanatory Memorandum to *the Government Draft Act on specific solutions...*, p. 4.

> order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

The legitimacy of considering the Act from a national security perspective is indicated by its very title – (...) *to protect national security*, although references to this concept are also found in individual provisions explicitly invoking the national security rationale (Articles 3(4) and 8 of the Sanctions Act).

It is also worth recalling here *Update of the EU Best Practices for the effective implementation of restrictive measures* adopted by the Council of the EU, in which point 25 explicitly states:

> In addition to legislation adopted by the Union, Member States should, if necessary, have in place additional legislative framework, laws or regulations to freeze funds and financial assets and economic resources of persons and entities subject to restrictive measures on national level, including persons or entities involved in terrorist acts, and to prohibit the making available of funds and economic resources to or for the benefit of such persons and entities, in particular by way of administrative freezing measures or through the use of judicial freezing orders having equivalent effects[31].

Although this document is not normative in nature, it provides a basis for interpreting the application of restrictive measures, including in relation to Regulations 765/2006 and 269/2014. Significantly in the context of these solutions and the search for analogies to the solutions adopted in the field of countering terrorist financing, it further emphasises that the solutions for restrictive measures should be in line with the standards of The Financial Action Task Force (FATF), in particular with the 6th recommendation on targeted financial sanctions related to terrorism and terrorist financing. The Act on counteracting money laundering and terrorist financing[32] and the Sanctions Act are precisely the implementation of these objectives on the Polish ground.

[31] *Update of the EU Best Practices...*

[32] See in more detail: M.A. Kędzierski, *Szczególne środki ograniczające i sankcje... (część 1)*; the same, *Szczególne środki ograniczające i sankcje jako forma przeciwdziałania wobec podmiotów terrorystycznych na tle polskiego ustawodawstwa (część 2)* (Eng. Specific restrictive measures and sanctions ... (Part 1)); idem, Specific restrictive measures and sanctions as a form of counteraction against terrorist entities against the background of Polish legislation (Part 2)), "Prokuratura i Prawo" 2021, no. 11, pp. 36–55.

The issue of the autonomy of the Sanctions Act in relation to the EU regulations, despite the use in national legislation of the mechanisms contained in these regulations, is also raised by the Minister of the Interior and Administration in the sanctions decisions he issues:

> From the outset, Poland strongly condemned Russia's aggression against Ukraine and human rights violations in Belarus, while pointing out the need for far-reaching and effective sanctions, with wide-ranging consequences for both the Russian Federation and Belarus cooperating with it. It is for these reasons that a legislative initiative has been taken, resulting in the Act of 13 April 2022 on specific solutions to counteracting support for aggression against Ukraine and to protect national security, which, it should be reiterated, while relying only on the sanction mechanisms set out in the aforementioned EU regulations, creates separate, national sanction solutions[33].

The Minister of the Interior and Administration also stated that: (...) *in particular, national security remains the exclusive responsibility of each Member State. Thus, European law does not exclude the possibility of measures taken by a Member State on grounds of national security, in particular by a state in such a specific and difficult geopolitical situation as the Republic of Poland, which is not experienced by states located far from a war zone*[34].

The Sanctions Act, however, not only creates a separate national system for imposing restrictive measures on persons and entities supporting the actions of the Russian Federation or Belarus, but also, within the framework of the provisions adopted therein, ensures the application of the aforementioned EU regulations. The explanatory memorandum of the Act indicates that: *The amendments to the sanctions regulations introduced after the aggression of the Russian Federation against Ukraine require legislative action related to the unambiguous regulation of the question of the authority taking decisions on the unfreezing of certain financial measures or economic resources*[35].

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[33] Decision of the Minister of the Interior and Administration of 29 August 2023 DPP-TPZ.0272.2.2023.AK(38), Decision of refusal – Timur Rashidov, p. 9, https://www.gov.pl/web/mswia/decyzje-ministra-swia-w-sprawie-wpisu-na-liste-sankcyjna [accessed: 22 X 2023].

[34] Ibid., p. 10.

[35] Explanatory Memorandum to *the Government Draft Act on specific solutions...*, p. 4.

Member States' obligations in this regard derive from treaty law. In accordance with Article 291(1) of *the Treaty on the Functioning of the European Union* Member States shall adopt all measures of national law necessary to implement legally binding Union acts. Similarly, the *Treaty on European Union*, in the second sentence of Article 4(3), indicates that the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union.

The scope of the implementation Regulation 269/2014 by the Sanctions Act must also be referred to the implementation of the disposition of its Article 15(1), according to which (…) *Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented.* In turn, the first sentence of Article 9(1) of Regulation 765/2006 indicates that: *Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented.* These provisions therefore concern the regulation of the competent authority that decides to unfreeze certain financial or economic resources and is responsible for imposing penalties for non-compliance with the restrictive measures imposed.

The scope of the implementation of the EU Sanctions Regulations by the Sanctions Act is therefore reduced to the changes introduced by Article 19 of that Act in *the National Revenue Administration Act of 16 November 2016*. In, inter alia, *Section V a*, which was added on this basis, the Head of the National Revenue Administration (NRA) was designated as the competent authority to decide on the application of derogations from individual restrictive measures imposed under the EU Sanctions Regulations (release of frozen funds or economic resources or making funds or economic resources available) and to impose fines for non-compliance with these measures.

The power granted to the NRA to authorise the release of certain frozen funds or economic resources or to make available certain funds or economic resources in respect of sanctioned persons and entities shall be exercised upon a determination that the funds and economic resources in question are, inter alia:

- necessary to satisfy the basic needs of natural or legal persons, sanctioned entities or bodies and their dependent family members, including payments for foodstuffs, rent or mortgage, medicines

and medical treatment, taxes, insurance premiums, and public utility charges,
- intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services,
- intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources.

In addition, Article 6 of the Sanctions Act indicates, inter alia, that a person or entity who, with respect to a listed person or entity, fails to comply with the obligation to freeze funds, funds or economic resources or the prohibition on making them available, or fails to comply with the prohibition on knowingly and intentionally participating in activities the purpose or effect of which is to circumvent the application of the measures set out in these regulations, shall be subject to a fine of up to PLN 20 million imposed by the head of the customs and tax office.

Individual restrictive measures adopted in Poland

According to Article 1 of the Sanctions Act, persons and entities included in the sanctions list shall be subject to:
- respectively the measures set out in Article 2(1)-(3) of Regulation 765/2006 (in view of the situation in Belarus and its involvement in Russia's aggression against Ukraine), i.e.:
  - all funds and economic resources belonging to, owned, held or controlled by natural or legal persons, entities and bodies listed on the sanctions list maintained by the minister responsible for internal affairs shall be frozen,
  - no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed on the sanctions list,
  - the participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the aforementioned measures shall be prohibited;
- respectively the measures set out in Article 2 and Article 9 of Regulation 269/2014 (in relation to Russia's actions), i.e.:

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- all funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them listed on the sanctions list shall be frozen,
- no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed on the sanctions list,
- it shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the aforementioned measures;

– exclusion from a public procurement procedure or competition conducted under *the Act of 11 September 2019 - public procurement law*;
– entry in the list of foreigners whose stay on the territory of the Republic of Poland is undesirable, referred to in Article 434 of *the Act of 12 December 2013 on foreigners.*

The first two types of individual restrictive measures are taken directly from EU regulations and both relate to asset freezing, while they differ in their purpose of application (linking to Belarus or Russia). The other two, on the other hand, are of a separate nature based on national legislation, i.e. the Act - public procurement law and the Act on foreigners.

In undertaking an assessment of the nature of individual restrictive measures adopted by the legislature to freeze assets, following the explanatory memorandum to the bill, it should be pointed out that:

> (...) the project concerns only the so-called freezing of property, i.e. the temporary inability to dispose of it. It does not imply the deduction of property, which, on the grounds of the Constitution of the Republic of Poland, may be carried out only within the framework of expropriation (for a public purpose and with just compensation - Article 21 of the Constitution) or forfeiture (adjudicated with a final court decision - Article 46 of the Constitution). This is an action that is already envisaged within the Polish legal order, whether by a directly effective EU regulation or by the Act on counteracting money laundering and terrorist and falls within the framework extended by the Constitution of the RP[36].

[36] Explanatory Memorandum to *the Government Draft Act on specific solutions...*, p. 7.

In this context, it is also worth noting the wording of the justification of the judgement of the VAC in Warsaw in the case of the deletion of one of the entities on the Polish sanctions list:

> The Act of 13 April 2022 on specific solutions to counteracting support for aggression against Ukraine and to protect national security is a special piece of legislation, as it regulates an extremely important issue, namely to counter support for aggression against Ukraine and to serve the protection of national security. These two main objectives have become a priority for the legislator, and the provisions of the Act should be read through their prism. Possible negative consequences for a particular listed entity cannot constitute grounds for repealing the decision, as this would be contrary to the ratio legis of the law in question and would not serve its main objectives. At the same time, it is obvious that the Act of 13 April 2022 has a repressive, sanctioning character and it is difficult to expect that the application of its provisions to a specific entity would not have negative consequences for that entity[37].

Furthermore, in the justification of one of the decisions dismissing the complaint against the failure to suspend the enforceability of the sanction decision, the SAC indicated that (...) *the Act concerns the so-called "freezing of assets", i.e. the temporary inability to dispose of these assets. This does not imply deprivation of the company's right to property, which, in the light of Article 21(2) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws no. 78, item 483, as amended), is only permissible if it is done for a public purpose and against just compensation or forfeiture ordered by a final court decision (Article 46 of the Constitution)*[38].

The freezing of financial resources, funds or economic resources is therefore a basic, but not the only instrument for influencing persons and entities on the Polish sanctions list. With regard to the sanction of exclusion from a procedure or a competition conducted on the basis of the public procurement law, which is not provided for in Regulations 765/2006 and 269/2014, control of the award of contracts is exercised in accordance with Article 596 of that law, and the persons or entities subject to exclusion,

[37] Judgement of the Voivodeship Administrative Court in Warsaw of 18 V 2023, ref. no. I SA/Wa 2524/22. An analogous statement was also made in other judgements of the VAC in Warsaw, e.g. the judgement of the VAC in Warsaw of 4 VII 2023, ref. no. I SA/Wa 2528/22.

[38] Decision of the Supreme Administrative Court of 9 V 2023, ref. no. III OZ 207/23.

who join public procurement procedures and competitions, are subject to a fine of up to PLN 20 million imposed by the President of the Public Procurement Office.

Exclusion from the procurement procedure or design contest applies to:

- the economic operator and the design contest participant included in the lists referred to in Regulations 765/2006 and 269/2014,
- the economic operator and the design contest participant whose beneficial owner,
- within the meaning of the Act on counteracting money laundering and terrorist financing is a person or entity listed in the lists set out in the regulations mentioned in Article 1 of the Act or included in the Polish sanctions list,
- the economic operator and the design contest participant whose parent company within the meaning of Article 3(1)(37) of the Accounting Act of 29 September 1994 is an entity listed in the lists set out in Regulations 765/2006 and 269/2014 or listed or being such a parent company as from 24 February 2022, provided that it has been listed on the basis of a decision on its inclusion in the Polish sanctions list deciding on the application of the measure in question[39].

In the context of individual restrictive measure in the form of an entry on the list of foreigners whose residence on the territory of the Republic of Poland is undesirable, it is worth noting that the entry is made ex officio by the Head of the Office for Foreigners in the case this measure is indicated in a decision issued by the Minister of the Interior and Administration. The practice of issuing such decisions indicates that in the vast majority this instrument is not used independently, but together with other individual restrictive measures, i.e. freezing of assets or prohibition of participation in proceedings and competitions conducted on the basis of the public procurement law. The Head of the Office transfers the data of a foreigner, for the period of their retention in the list, to the Schengen Information System for the purpose of refusing entry and stay not only in Poland, but also throughout the EU.

39 Article 7(1) of the Sanctions Act.

Conditions for inclusion in the Polish sanctions list

The most important issue related to the analysis of the Polish solutions for individual restrictive measures is the determination of the conditions for entry on the sanctions list. According to the statutory solutions, the minister in charge of internal affairs shall decide on the entry with regard to persons and entities with financial means, funds and economic resources within the meaning of Regulation 765/2006 or Regulation 269/2014, directly or indirectly supporting:

1) the aggression of the Russian Federation against Ukraine beginning on 24 February 2022 or
2) serious violations of human rights or repression of civil society and democratic opposition, or whose activities constitute another serious threat to democracy or the rule of law in the Russian Federation or Belarus

– or directly linked to such persons or entities, in particular by personal, organisational, economic or financial links, or who are likely to use such funds, financial or economic resources at their disposal for that purpose[40].

When analysing these prerequisites for inclusion on the Polish sanctions list, it is worth noting the case law of the administrative courts. The Voivodeship Administrative Court in Warsaw, in one of its judgements dismissing a complaint against a decision on inclusion in the sanctions list, referred to them thus:

> It follows from the provision cited above that the legislature intended that not only those directly or indirectly supporting the aggression, but also any other person or entity, insofar as they are directly linked to the supporting entities, would be subject to listing. Such links may be, inter alia, of a personal or economic nature, but the use of the phrase “in particular” in the provision under consideration means that links of various kinds may be the basis for inclusion in the list, provided that they can be attributed to the attribute of directness.

With regard to the issue of the forms of support for the states specified in the provision, the VAC in Warsaw, in its judgement, pointed out that (…) *a direct or indirect form of support may mean generating by any means profits for the budget of the Russian Federation, which may then be used for*

[40] Article 3(2), point 1 of the Sanctions Act.

the warfare conducted by the Russian Federation against Ukraine, as well as used to directly or indirectly support serious violations of human rights and repression of society (...)[41].

It is worth noting another fragment of the provision defining the prerequisites for inclusion in the Polish sanctions list: (...) *or in respect of which there is a probability of using such financial means, funds or economic resources at their disposal for this purpose*. It is therefore not necessary to establish the existence of an accomplished act, but the mere probability of the use of financial means, funds or economic resources for a specific purpose. This probability in turn is made credible by the existence of various types of links. This was also pointed out by the VAC in Warsaw in its judgement dismissing a complaint against the decision of the Minister of Interior and Administration: *It should be noted that the provision referred to indicates the 'existence of a likelihood' that financial resources, funds or economic resources will be used. There is therefore* (...) *no legal significance to the applicant's argument* [indicating] *that the authority has failed to "prove" the transfer of certain funds* (...)[42]. The mere probability of support turns out to be sufficient. The inclusion by the legislator of a premise of a non-executed nature is, however, necessary from the perspective of the object of the regulation and conditions its effectiveness. A transfer that has been made in this case cannot be undone, so if the premise is to cut states off from, inter alia, sources of income, it must be a pre-emptive action and independent of whether the person or entity in question has already done so previously, i.e. before they were placed on the sanctions list.

Specific nature of Polish sanctions proceedings

Pursuant to Article 3(1) of the Sanctions Act, decisions on listing and de-listing are issued by the minister responsible for internal affairs. He issues them ex officio or upon a reasoned application:

- the Head of the Central Anticorruption Bureau,
- the Head of the Internal Security Agency,
- the Head of the Foreign Intelligence Agency,
- the Head of Military Counterintelligence Service,

[41] Judgement of the VAC in Warsaw of 17 V 2023, ref. no. I SA/Wa 2522/22.

[42] Judgement of the VAC in Warsaw of 18 V 2023, ref. no. I SA/Wa 2524/22.

- the Head of Military Intelligence Service,
- the General Inspector of Financial Information,
- the Commander-in-Chief of the Police,
- the Polish Financial Supervision Authority,
- the President of the National Bank of Poland,
- the Commander-in-Chief of the Border Guard,
- the Head of the National Prosecutor's Office,
- the Head of the National Revenue Administration,
- the Chairman of the Committee of the Council of Ministers responsible for matters of security and state defence.

Thus, the power to request an inclusion in the list has been granted to special services able to obtain information on existing connections both on the basis of operational and exploratory activities, as well as analytical and information activities or, as in the case of the Central Anticorruption Bureau, within the framework of control activities, and from partner services from other countries. The analysis of the 507 decisions[43] on entry on the sanctions list to date clearly shows that it is these services (successively the Internal Security Agency - 458[44], the Central Anticorruption Bureau - 36 and the Military Counterintelligence Service - 8) which addressed to the minister in charge of internal affairs the largest number of applications on the basis of which sanction decisions were issued.

In addition, this power is granted to two services subordinate to the minister responsible for internal affairs, i.e. the Police - as a service obtaining information on financial or economic flows in connection with suspected criminal offences - and the Border Guard - not only as a migration service, but also carrying out tasks concerning certain forms of crime, including economic crime. However, this power has only been used by the Police in three cases. The Voivodeship Administrative Court in Warsaw, in one of the justifications of the judgement, stated that these entities are (…) *specialised state bodies that have specific knowledge in the field of public order or state security in its various aspects. The Minister of Internal Affairs and Administration therefore rules on the basis of a request from a special state body*[45].

[43] The figures quoted in the text represent the situation as of 1 January 2024.

[44] Concerning the same three entities, requests were made by both the Internal Security Agency and the Central Anticorruption Bureau.

[45] Judgement of the VAC of 4 VII 2023, ref. no. I SA/Wa 2528/22. Analogous statements were contained in the justifications of the judgements of the VAC in Warsaw: of 18 V 2023, ref. no. I SA/Wa 2524/22 and – of 4 VII 2023, ref. no. I SA/Wa 2528/22.

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This competence has also been granted to other types of entities with knowledge of fund transfers, i.e. the General Inspector of Financial Information, the Polish Financial Supervision Authority, President of the National Bank of Poland or the Head of the National Revenue Administration and, as a result of the prosecutor's competence to conduct or supervise pre-trial proceedings in criminal matters, to the Head of National Prosecutor's Office, as well as to the Chairman of the Committee of the Council of Ministers competent in matters of security and defence of the state, due to the coordination function of this committee. However, up to the time of the formation of this article, no decisions on inclusion in the sanctions list had been issued on the basis of applications from these entities. In the cases so far, on the other hand, the Minister of the Interior and Administration has exercised his power on five occasions and made an entry on the sanctions list ex officio.

It is worth noting that the authorised authority's application for listing, in accordance with the Act, must include an indication of the person or entity in respect of whom a decision is to be issued and, in the case of a listing decision, also a proposal for the application of certain restrictive measures. It does not have to consist of a simple choice among the four restrictive measures described above and set out in Article 1 of the Act. Indeed, sanctions in the form of a freeze may apply to the entirety of the financial means, funds or economic resources connected to the person or entity concerned or only to specific components thereof.

Pursuant to Article 3(4) of the Sanctions Act, the proposal for the application of sanction measures shall be determined taking into account, in particular, the nature and scope of the activities carried out by the person or entity, the capital structure of that entity and national security considerations. Particularly the last of these considerations forces the applicant authority to assess the consequences of a possible inclusion in the sanctions list, although the final decision on this matter rests with the minister responsible for internal affairs. Significantly, under Article 3(7) of the Act, when issuing a decision on inclusion in the list, he or she may determine the extent of the financial means, funds or economic resources within the meaning of Regulation 269/2014 or Regulation 765/2006 covered by the measures referred to in Article 1(1) or (2) of the Act, i.e. concerning the freezing of assets. The minister responsible for internal affairs ultimately decides not only on the inclusion in the list, i.e. determines that the person or entity in question meets the prerequisites for inclusion in

the sanctions list (or removal from it), but also on the scope of the sanction measures applied. Reference was made to this issue in the justification of the judgement of the VAC in Warsaw in the sanction case, in which the court stated that: (…) *the choice of these measures is up to the public administration body, and as long as they fall within the catalogue provided for by law, there are no grounds for declaring the decision defective*[46].

Further in the article, the author presents three examples of different applications of the scope of determining sanctions regarding asset freezing - from the freezing of all financial resources and economic resources, to the freezing of only financial resources accumulated on bank accounts, to the specific exclusion of the scope of the freezing and its connection to the activities performed in order to implement the orders issued by the Prime Minister under Article 7a of *the Act of 26 April 2007 on crisis management*.

The first example:

a) freezing of all financial and economic resources,
b) the prohibition on making available to or for the benefit of the listed entity, directly or indirectly, any funds or economic resources,
c) the prohibition to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in points (a) and (b),
d) exclusion from a public procurement procedure or competition[47].

The second example:

a) freezing of funds held in bank accounts,
b) the prohibition to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in point (a),
c) exclusion from participation in a procurement procedure or competition[48].

The third example:

[46] Judgement of the VAC in Warsaw of 18 V 2023, ref. no. I SA/Wa 2524/22.

[47] Sanctions list: SKA Assets Management Limited, https://www.gov.pl/web/mswia/lista-osob-i-podmiotow-objetych-sankcjami [accessed: 27 X 2023].

[48] Sanctions list: Cryogas M&T Poland Spółka Akcyjna, https://www.gov.pl/web/mswia/lista-osob-i-podmiotow-objetych-sankcjami [accessed: 27 X 2023].

> a) the freezing of all funds and economic resources,
> b) a prohibition on making available, directly or indirectly, any funds or economic resources to, or for the benefit of, the listed entity,
> c) the prohibition to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in points (a) and (b),
> d) exclusion from public procurement or competition.
> With regard to the measures referred to in points (a) and (b), the scope relating to activities carried out in order to implement orders issued by the Prime Minister pursuant to Article 7a of the Act on crisis management shall be excluded[49].

However, the special nature of sanction proceedings is not limited to the fact that, as a rule, they are initiated in practice by the requesting authority, which is not a party to the proceedings. It differs from typical administrative proceedings fully based on the Act of 14 June 1960 – The Code of Administrative Procedure (CAP). Indeed, pursuant to Article 4(1) of the Sanctions Act, only some of the provisions of the CAP, e.g. Article 107 § 1, apply to proceedings in matters of listing and de-listing to the extent not regulated by the Act. For example, pursuant to Article 107 § 1 point 6 of the CAP, the decision shall contain, in particular, the factual and legal grounds, which must be read in conjunction with Article 3(6) of the Sanctions Act. According to it, a decision on inclusion in the list shall contain the date of issue, the designation of the person or entity to which the sanctioning measures apply, together with a decision as to which of these measures apply to them, a statement of reasons, the designation of the issuing authority, the legal basis of the decision, the signature of the issuing person and an instruction on the right to file a complaint with the administrative court. It should be emphasised, however, that the provision of Article 4, section 1 of the Sanctions Act does not refer to Article 107 § 3 of the CAP, in accordance with which the factual justification of a decision should include, in particular, specification of facts recognised by the authority as proven, evidence on which it relied and reasons for which other evidence was denied credibility and evidentiary value, while the legal justification should include an explanation of the legal basis of the decision, with citation of legal provisions. At the same time, in

49 Sanctions list: Novatek Green Energy Sp. z o.o., https://www.gov.pl/web/mswia/lista-osob-i-podmiotow-objetych-sankcjami [accessed: 27 X 2023].

accordance with Article 3(9) of the Act, the minister in charge of internal affairs may limit the scope of justification for the sake of state security or public order. Such a situation occurs especially in cases in which classified materials are used.

The specific nature of this procedure, as described above, was referred to by the VAC in Warsaw in the justification of its judgement dismissing an action to remove an entity from the sanctions list:

> (...) the listing procedure is not a typical administrative proceeding, as, according to Article 4 of the Act of 13 April 2022, only certain, specifically listed, provisions of the Code of Administrative Procedure apply to such proceedings to the extent not regulated by the Act. (...) As a result, in proceedings under the provisions of the Act of 13 April 2022, the authority is not obliged to assess whether a circumstance has been proven, based on the totality of the evidence, and the reasons for the decision do not have to include an indication of the facts that the authority has found to be proven, the evidence on which it has relied and the reasons why it has denied the credibility and evidential value of other evidence. The above statement also corresponds with the wording of Article 3(9) of the Act of 13 April 2022, which provides that the Minister may limit the scope of the reasons for a decision on listing for reasons of state security or public order[50].

In the further part of the cited justification for the judgement, the court emphasised that (...) *the difficulties in collecting full evidence on entities located in Belarus or Russia will often result in the fact that, when issuing a decision on inclusion in the list, the authority will have at its disposal only limited evidence on the basis of which it will assess the fulfilment of the conditions listed in Article 3(2) of the Act of 13 April 2022*[51].

The special nature of these proceedings is also evidenced by the manner of notifying the parties of the authority's decision and binding the party to it, as set out in Article 4(2) and (3) of the Sanctions Act. Notification of the decisions to the parties is made by making them

[50] Judgement of the VAC in Warsaw of 2 II 2023, ref. no. I SA/Wa 2527/22. An analogous view was also expressed by the VAC in Warsaw in other cases – judgement of 18 V 2023, ref. no. I SA/Wa 2524/22; judgement of 4 VII 2023, ref. no. I SA/Wa 2528/22; judgement of 17 V 2023, ref. no. I SA/Wa 2522/22; judgement of 18 VI 2023, ref. no. I SA/Wa 2541/22.

[51] Judgement of the VAC in Warsaw 2 II 2023, ref. no. I SA/Wa 2527/22.

available in the Bulletin of Public Information (BIP) on the website of the minister responsible for internal affairs. The binding of the authority with the decision issued by it, the commencement of the time limit for lodging a complaint against the decision and the occurrence of immediate enforceability of the decision shall take place on the day following the day on which the decision was made available in the BIP.

The construction of the aforementioned provision with regard to delivery is based on Article 49 § 1 of the CAP, according to which, if a specific provision so provides, notification of the parties of decisions and other actions of a public administration body may be made in the form of a public notice, in another form of public announcement customarily accepted in a given locality or by making the letter available in the BIP on the website of the competent public administration body. However, in contrast to the solution in the CAP, the norm according to which the day on which the letter was made available in the BIP is not included, and the notification is deemed to have been made after the lapse of 14 days from the day of making it available.

Article 61 § 4 of the CAP, according to which the initiation of proceedings ex officio or at the request of one of the parties must be notified to all persons who are parties to the case, also does not apply in sanction proceedings. In these proceedings, a party only becomes aware of its initiation in relation to him/her at the moment of issuing the decision on entry on the sanctions list and this by posting the decision in the BIP. On the one hand, the reason for adopting such a solution is the risk that earlier acquisition of information about the initiation of the proceedings, i.e. before the decision is issued, could result in the concealment or diversion of the financial means, funds or economic resources to be frozen. On the other hand, the nature of the listed entities, often based, for example, in Russia, Belarus or Cyprus, could prevent service of the decision or the acknowledgement of service, which a party dissatisfied with the effect of the decision could deny. It should also be borne in mind that the decision, although of an individual nature, also has an impact on other persons and entities, e.g. banks obliged to freeze funds in the account of a listed person, and therefore its publication is made in the BIP, analogous to the publication of the sanctions list itself[52].

[52] In accordance with Article 2(1) of the Sanctions Act, the list of persons and entities against whom the measures referred to in Article 1 of the Act are applied is published in the BIP on the website of the minister responsible for internal affairs.

However, the simplified procedure at the level of the decision-making authority, as well as the single-instance nature of this procedure, does not exclude the possibility of a defence on the part of the listed person or entity. Pursuant to Article 3(10) of the Sanctions Act, sanction decisions cannot be appealed by filing a request for reconsideration. Instead, they are subject to appeal to the Voivodeship Administrative Court[53]. The complaint shall be lodged through the Minister of the Interior and Administration, within 30 days of the decision being made available in the BIP on the subject page of the minister responsible for internal affairs. The Voivodeship Administrative Court in Warsaw, in the justification of one of its judgements, emphasised, on the one hand, the special nature of these proceedings, and on the other hand, indicated that:

> However, this does not mean that such a person or entity is completely deprived of legal protection. Indeed, a complaint may be lodged against an issued decision with the administrative court (Article 3(6) of the Act), and in the course of the proceedings before the court, the complainant may present his/her own arguments, allegations and conclusions. (...) In view also of the geopolitical situation caused mainly by the aggression of the Russian Federation against Ukraine, certain restrictions must be imposed on the freedom to conduct economic activity in a situation where there is a likelihood that the funds obtained from it could serve its support and threaten the social interest, security of the state[54].

Temporary compulsory administration

The adoption in the Sanctions Act of a solution for the application of individual measures arising from the EU regulations allowed, as mentioned earlier, for the NRA to carry out the release of certain measures, e.g. to enable legal protection of the company covered by them. However, the original solution was considered insufficient in the broader

[53] In accordance with Article 16 § 2 of the Code of Administrative Procedure and Article 3 § 2 item 1, Article 53 § 1 and Article 54 § 1 of the Act of 30 August 2002 - Law on proceedings before administrative courts.

[54] Judgement of 4 VII 2023, ref. no. I SA/Wa 2528/22; judgement of 18 V 2023, ref. no. I SA/Wa 2524/22.

perspective, primarily due to the fact that some of the frozen companies operating in Poland had employees and were simultaneously responsible for the production of goods or technology. Therefore, on 18 August 2022, an amendment to the Sanctions Act introducing new safeguard instruments came into force[55]. It was considered expedient to introduce a solution allowing the continuation of the entities against which freezes were applied under the provisions of the Sanctions Act. Consideration was given, on the one hand, to the need to extend individual restrictive measures to entities that may be used to dispose of financial resources, funds or economic resources to support the aggression of the Russian Federation against Ukraine, and, on the other hand, to the social and public interest, including the interest of the side of the employees of enterprises run by sanctioned economic entities[56].

The adopted amendment supplemented the previous regulations contained in the Sanctions Act with the institution of temporary compulsory administration and the provision of support to employees providing work for sanctioned entities. Although a detailed discussion of the instruments introduced is beyond the scope of this article, it is worth noting that the minister responsible for economic affairs may, by way of a decision, establish a compulsory administration with respect to a listed entity. The purpose of the instituted temporary administration is to dispose of financial means, funds or economic resources when it turns out to be necessary to ensure the continued operation of economic entity conducting business on the territory of the Republic of Poland and this serves:

- maintaining workplaces in this enterprise, or
- maintaining within the scope of activity of this enterprise the provision of public utility services or the performance of other tasks of public character, or
- protection of the national economic interest[57].

The tasks performed by the administrator are aimed at the continued smooth operation of the business entity's enterprise until the financial resources, funds or economic resources under administration are disposed

[55] Act of 5 August 2022 amending the Act on Specific Solutions to Counteracting Support for Aggression against Ukraine and to Protect National Security and the Act on the National Revenue Administration.

[56] Explanatory memorandum to *the Government Draft Act on specific solutions…*, p. 1–2.

[57] Article 6a(1) of the Sanctions Act.

of - i.e. taken over by capital not linked to persons and entities supporting Russian aggression. The funds from the sale are frozen in the accounts of the existing sanctioned owners.

An alternative solution adopted in the act is the use of a compulsory administration to take over ownership of financial resources, funds or economic resources belonging to a listed person or entity for the benefit of the State Treasury, if this is necessary to protect an important public interest, to protect the national economic interest or to ensure the national security.

Summary

To summarise the considerations, it is worth quoting once again the justification for one of the judgements of the Voivodeship Administrative Court in Warsaw dismissing complaints against decisions concerning entry on the sanctions list:

> (...) the aggression of the Russian Federation against Ukraine, which began on 24 February 2022, caused numerous changes in the world, including in Poland, related to national security, but also resulted in legal steps being taken to counteract support for this aggression. The Act of 13 April 2022 is an expression of this. (...) Indeed, since the end of World War II, there has not been an outright aggression of one state against another on the European arena. Therefore, the action of the legislator in terms of restriction, simplification of administrative proceedings in the cases of entry on the list of persons and entities supporting the aggression of the Russian Federation against Ukraine launched on 24 February 2022 is not unjustified[58].

It may be argued that the specific nature of the sanctions law, justified by the circumstances and the purpose of its creation, remains undisputed, while taking into account, however, the fundamental guarantee elements for the person or entity included in the list. On the one hand, the initiator of the proceedings is usually not himself a party to the proceedings and the subject of the proceedings is not informed of the initiation

[58] Judgement of the VAC in Warsaw of 4 VII 2023, ref. no. I SA/Wa 2528/22; judgement of 18 V 2023, ref. no. I SA/Wa 2524/22.

of the proceedings, but only of the possible negative effect on him. In addition, decisions in sanction cases have limited justification and, as a result, do not require the presentation of the entirety of the evidence on which they are based, they are served through a publicly accessible BIP and the proceedings are single-instance. On the other hand, an entity or person included in the list has the right to lodge a complaint with the administrative courts, and making an entry cannot be treated as a sanction, i.e. a punishment sensu stricto, as it is in fact a temporary restrictive measure aimed at preventing direct or indirect support for the actions of the Russian and Belarusian authorities. In this context, the solutions adopted by the legislator meet the constitutional requirements and are in line with the EU recommendations indicated earlier, according to which Member States should have an additional legal framework, in relation to the EU, for freezing the funds and financial assets and economic resources of persons and entities subject to restrictive measures at the national level.

The application of these solutions to date proves their effectiveness as autonomous from EU freezing instruments, although, as indicated earlier, these solutions are partly based on European legislation. Undoubtedly, Poland's immediate neighbourhood with Russia and the Ukraine attacked by it, as well as with Belarus, requires additional measures that would go beyond EU-wide solutions and be based on a consensus at EU level. This is justified both from the perspective of the Polish raison d'état, conditioned by Poland's location and historical considerations, and from the perspective of national security. The scale of not only the Poland's involvement in helping Ukraine, but also the threat to Poland and its people, by virtue of its proximity to these states, is obviously different from countries far from the conflict zone, e.g. the Iberian Peninsula.

It is worth noting the effects of individual national restrictive measures referred to in the Sanctions Act. As of 1 January 2024, there were 498 persons and entities (425 persons and 73 entities) on the sanctions list maintained by the Ministry of the Interior and Administration. A total of 64 complaints against the decisions of the Minister of the Interior and Administration were submitted to the VAC in Warsaw, including 56 complaints against decisions on entry on the sanctions list, seven complaints against decisions on refusal to remove from the list and one against a decision amending a decision on entry on the list. In addition, the Minister of the Interior and Administration took nine decisions to remove persons or entities from the sanctions list. Two of them were issued due to the subsequent inclusion

of the covered one person and one entity in Annex I to Regulation 269/2014 (the deletion was due to the need to avoid duplication of national and EU sanctions). For seven entities, on the other hand, the decision to remove from the list was taken due to new factual circumstances, i.e. a change in ownership structure and thus the removal of the link with the person or entity constituting the reason for listing. This case illustrates well the real role of individual restrictive measures as temporary measures aimed at reducing or removing the link with the state structures of Russia or Belarus, rather than permanently eliminating the entity in question from trading.

As of 1 January 2024, the Voivodeship Administrative Court in Warsaw has dealt with 21 complaints concerning the issuance by the Minister of the Interior and Administration of a decision on entry into the sanctions list, a decision refusing to remove from the sanctions list, a decision changing the scope of individual restrictive measures applied or a decision on removal from the list. All of them were dismissed, which confirms the correctness of the entire decision-making process related to the inclusion of certain persons and entities in the restrictive measures. In addition, three complaints to the VAC were withdrawn by the complainant and, in a further four cases, the court rejected the complaints on formal grounds (they were filed out of time). The contested decisions on the listing of two entities became final. On the other hand, four entities (including one in two cases) and three individuals filed cassation appeals with the Supreme Administrative Court.

On the basis of national and EU individual restrictive measures, the NRA froze assets with a total value of approximately EUR 1.21 billion on the territory of Poland[59] (the way statistics are kept in this regard does not allow separate values for EU and national restrictive measures). In addition, the minister responsible for the economy applied receivership to seven entities.

The cited data show the wide application of the solutions adopted in the Sanctions Act and indicate their effectiveness. Thus, the EU Council's guideline on the need to adopt national solutions for individual restrictive measures is met, according to which:

> These measures should enable national authorities to order and implement without delay the freezing of all funds and economic resources within the jurisdiction of the Member State concerned

[59] The situation on 30 September 2023.

> belonging to, owned, controlled or held by the designated person or entity, and could also be directed at persons or entities within the European Union and conducting their main business there[60].

Another issue is to assess whether the solutions adopted by the Polish legislator are the target solutions. Considering the very title of the Sanctions Act, a negative answer to this question seems quite obvious. This is because the Act defines specific solutions only in terms of countering support for aggression against Ukraine and in the context of human rights violations in Russia and Belarus, and does not provide for its applicability in other circumstances. The mechanisms established therein, both those introducing an autonomous national system of individual restrictive measures and those designed to ensure the application of EU sanctions (such as the designation of a competent authority to prevent the circumvention of these sanctions or the introduction of provisions criminalising the violation of EU sanctions), are limited only to the actions of the Russian Federation and Belarus or explicitly designated EU regulations. Meanwhile, the UN and the EU impose restrictive measures on a number of other states because of their failure to comply with international law or human rights or their pursuit of policies or actions contrary to the rule of law or democratic principles. In this case, Poland is already deprived of legal instruments of influence analogous to those introduced by the Sanctions Act. As a result, it is not only possible to introduce its own restrictive measures, but above all to ensure the effective application of EU measures due to the failure to designate a competent authority in these matters and the lack of a criminal sanction for circumventing these measures. The exceptions are the issues related to the prevention of terrorism and the norms arising from the aforementioned Act on counteracting money laundering and terrorist financing.

The issue raised deserves a separate study, based in particular on an analysis of solutions in force in other countries. As an example, it is worth recalling the solutions adopted in the Czech Republic by Act no. 1/2023 on restrictive measures against certain serious acts in international relations[61], which entered into force on 3 January 2023. For an entity to be on the Czech

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[60] *Aktualizacja dobrych praktyk UE…*, point 26.

[61] *Zákon o omezujících opatřeních proti některým závažným jednáním uplatňovaných v mezinárodních vztazích (sankční zákon)*, https://www.mzv.cz/jnp/cz/o_ministerstvu/legislativa/pravni_predpisy_v_pusobnosti_mzv/zakon_c_1_2023_sb_o_omezujicich.html [accessed: 27 XI 2023].

national sanctions list, a condition under one of the EU sanctions regimes must be met. Another condition is that the application of restrictive measures against a specific natural or legal person is in the foreign policy or security interests of the Czech Republic. This therefore does not apply to restrictive measures introduced by the EU only with regard to Russia and Belarus, but also with regard to all other countries for which the EU would take such decisions. In this solution, the national list is complementary to the EU sanction mechanisms and is used when the discussion at EU level takes a long time or when there is a risk that its objective will not be achieved. As in the case of the Polish Sanctions Act, the inclusion of a person on the EU sanctions list in principle results in the removal of that person from the national list (where the reasons for including persons on both lists are the same). Exceptionally, if the Czech Republic applies sanctions to such a person to a greater extent than the EU, that person will remain on the national list precisely because of restrictive measures that go beyond specific EU sanctions.

On the ground of Polish law, it would be worth considering to use in a broader context the successful solutions adopted by the Sanctions Act and the experience resulting from its application. This would serve the purpose of undertaking work on a law introducing permanent solutions allowing for the application of individual restrictive measures depending on the changing international situation. They would be applied to persons and entities supporting other (not included in the Sanctions Act) state regimes against which the international community, including the EU, imposes sanctions.

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