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EU strategic trade controls and sanctions: are we talking about the same thing?

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Abstract

Strategic trade controls and sanctions might sometimes be considered interchangeable terms or concepts due to the fact that both are instruments that are used to interfere in international trade for political reasons. On the one hand, sanctions are usually an instrument that states use to exert pressure on one another, often regardless of the intended uses of the goods transferred; on the other, strategic trade controls focus on the potential end use of items and may pursue diverse objectives, from the non-proliferation of weapons of mass destruction to the protection of cultural goods. This contribution investigates the relationship between strategic trade controls (or export controls) and sanctions (or restrictive measures). The article analyses their respective scopes, objectives, decision-making processes, implementation, lifting and revision procedures, and prosecution of violations within the European Union. Furthermore, the contribution specifically outlines the competences granted to the Union with regard to export controls and sanctions, as well as their evolution over time. The article concludes that strategic trade controls and sanctions are not synonymous. It specifies their peculiarities, their differences and similarities in light of the scopes, objectives, and procedures that the research has identified. Finally, based on this categorization, the article establishes general trends and principles.

Keywords

Export control law; foreign direct product rules; rule follows the part; de minimis rule; legislative jurisdiction; extraterritorial legislation; principles of jurisdiction; protective principle.

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Introduction

Strategic export controls,[1] (or as they are more classically called, export controls), and sanctions might be seen as synonymous, as the intention of both—notably in the European Union (EU)—is politically motivated interference in the transnational free movement of persons, goods, services, and capital. However, their respective objectives justifying their decisions for the restriction of such movements are not necessarily the same.

The present contribution will analyze the evolution of competences conferred on EU institutions regarding strategic trade controls and sanctions, and attempt to identify their similarities and differences. If external trade policy has been an EU-exclusive competence since the establishment of the European Economic Community,[2] it was not until the eighties that the EU started to impose politically motivated sanctions or strategic trade restrictions. Over the years, and especially after the creation of the Common Foreign and Security Policy (CFSP) in the early nineties, the frequency and sophistication of the practice has increased, so that it is now possible to speak of an EU sanctions policy.[3]

Following the analysis of the EU's competence in trade control and sanctions, this contribution will focus on its implementation and will identify the respective objectives, scopes, and procedures for each instrument.

The respective scope of sanctions and trade restrictions adopted by the EU may concern various different sectors. A sanction is usually an instrument that is used by states to exert pressure on one another, often regardless of the intended uses of the goods transferred. On the other hand, strategic trade controls focus on the potential end use of the goods and may pursue very diverse objectives, from the non-proliferation of chemical weapons to the protection of wildlife.

The World Trade Organization Enabling Clause, as implemented by the EU's Generalised Scheme of Preference (GSP),[4] does not lie within the scope of

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[1]Strategic items, dual-use items, sensitive items are terms that have been used indistinguishably since the Coordinating Committee for Multilateral Export Controls (CoCom) adopted in the 1950s a list of items that could not be exported to a Warsaw Pact member state without the prior unanimous consent of the group of states that were members of the Committee. For the avoidance of doubt, the term "strategic goods" in this paper includes any goods that could potentially be used by the end-user for unethical reasons. Specifically, this concerns instruments adopted under the EC and EU frameworks on trade in arms, dual-use goods, conflict minerals, diamonds, goods related to torture and the death penalty, and cultural goods.

[2] Treaty establishing the European Economic Community, 1957.

[3] Clara Portela, "Where and why does the EU impose sanctions?", *Politique européenne* 2005/3 (n° 17), Éditions L'Harmattan, p 84.

[4] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, 2012, O. J. (L 303).

this paper. Although it could be considered a trade control instrument,[5] due to the fact that it could serve as incentive to convince states to align their trade control policy with that of the EU (as it is the case for other EU bilateral trade agreements imposing political conditionality, such as those including the non-proliferation clause), it does not rule on strategic item transactions and will therefore not be considered by the present contribution.[6] However, the possibility of allowing the EU to temporally withdraw a country from the benefit of GSP (if it perpetrated serious and systematic violations) might be a process that could be extended to strategic trade control systems. The inclusion of international conventions related to strategic trade in the GSP's list of international conventions might offer the EU a strong incentive to convince third states to align their strategic trade control policies with that of the EU.[7] The efficiency of such a "carrot and stick" instrument unfortunately demonstrated its limits when the EU attempted to include its non-proliferation clause in the negotiation of trade agreements with third countries.[8]

Strategic trade controls and sanctions: history of an EU competence

In the EU, sanctions (or restrictive measures)[9] could be perceived primarily as an instrument of the Common Foreign and Security Policy (CFSP) implemented by way of Common Commercial Policy (CCP) instruments, whereas strategic trade control is rather a CCP instrument constrained by CFSP principles.

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[5] Alexander Keck and Patrick Low, "Special and Differential Treatment in the WTO: Why, When and How?", Staff Working Paper ERSD-2004-03, World Trade Organization, Economic Research and Statistics Division, May, 2004. The World Trade Organization Enabling Clause as implemented by the EU's Generalised Scheme of Preference could be considered a trade control instrument, as it offers the possibility of granting tariff preferences to certain developing countries in exchange for the ratification and implementation of several international conventions.

[6] Ingo Borchert, Paola Conconi, Mattia Di Ubaldo, and Cristina Herghelegiu, "The Pursuit of Non-Trade Policy Objectives in EU Trade Policy", RSCAS 2020/26, *Robert Schuman Centre for Advanced Studies Global Governance Programme-39*, (April 2020), European University Institute.

[7] On the GSP and GSP+ and possibility to suspend beneficiaries see Clara Portela and Jan Orbie, "Sanctions under the EU Generalised System of Preferences and foreign policy: coherence by accident?", *Contemporary Politics*, (2014) 20:1.

[8] Lina Grip, "The European Union's weapons of mass destruction non-proliferation clause: a 10-year assessment", *Non-proliferation papers* No. 40 (April 2014), EU non-proliferation consortium.

[9] As commonly defined in EU terminology. The Council has defined sanctions as follows: "In general terms, restrictive measures are imposed by the EU to bring about a change in the policies or activities of the targeted country, part of the country, government, entities or individuals, in line with the objectives set out in the CFSP Council Decision. "They include, inter alia, the freezing of funds and economic resources, restrictions on admission, arms embargoes on equipment that might be used for internal repression, other export restrictions, import restrictions and flight bans" in Council of the EU, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, 5664/18 (2018), paras. 4 and 14.

The CCP has, since the adoption of the Treaty establishing the European Economic Community (TEEC) in 1958, been a competence allocated to the

Community.[10] Article 113 states that: "After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly…export policy and measures to protect trade such as those to be taken in case of dumping or subsidies." Consequently, as trade control is an element of export policy, a decision to regulate or prohibit the movement of goods to a third country will require, in principle, the adoption of a Regulation by the Council of Ministers (hereinafter referred to as the Council) that would allow for such derogation.

However, such an interpretation was not necessarily shared by all Member States. The implementation of the United Nations Security Council Resolutions (UNSCR) adopting a trade embargo against Southern Rhodesia between 1965 and 1968 initiated the controversy regarding who, between the European Economic Community (EEC) and its Member States, should be in charge of its implementation. "On the one hand, due to its economic nature, imposition of a trade embargo relied on governance resources subsumed under the CCP. Therefore, article 113 TEEC would have been applicable. On the other hand, the purpose of using economic means was motivated by genuine foreign policy considerations. The EEC's Member States had in no sense authorized the Community to interfere with matters of high politics."[11] Moreover, they were considering that the implementation fell under Article 224,[12] enabling Member States to act unilaterally in order to carry out their undertakings for the purpose of maintaining peace and international security. To prevent the functioning of the common market being affected by such unilateral decisions, Member States are required to consult each other with a view to taking any steps that might be required together. It was in this context that the "Rhodesia doctrine" was put forward.[13]

So, until the early eighties, no consensus could be reached among EEC Member States regarding the adoption of an EC Regulation based on Article 113 to implement sanctions decided by a United Nations (UN) Resolution. If the Council succeeded in the adoption of a decision on the necessity to adopt trade restrictions against South Rhodesia and Iran, it consists essentially of a declaration expressing a willingness to act collectively on the basis of shared interests.[14]
The situation started to change in the early eighties, however, as a reaction

[10] Treaty establishing the European Economic Community, 1957.
[11] Kevin Urbanski, *The European Union and International Sanctions, A Model of Emerging Actorness*, New Horizons in European Politics series, (UK: Edward Elgar Publisher, 2020), p. 5
[12] Consolidated Version of the Treaty on the Functioning of the European Union art. 347, October 26, 2012, 2012 O.J. (C 326/47) [hereinafter TFEU], (almost unchanged).
[13] Panos Koutrakos, *Trade Foreing Policy & Defence in EU Constitutional Law*, (Oxford: Portland, 2001), p.58.
[14] Kevin Urbanski, *The European Union and International Sanctions",* p. 52.

to the USSR's interference in Afghanistan and, later, Poland. EEC Member States considered that a substantial limitation of imports from the USSR would constitute an appropriate response. The question of the EC competence and the potential use of Article 113 was again tabled. Compared to previous cases that concerned exports and imports, the case of the USSR concerned only a potential limitation of imports of certain goods. Moreover, the free release in the Community of certain Soviet Union goods was allowed by CCP Council Regulation.[15] Therefore, for most Member States, it was acceptable that the implementation of their Foreign Policy Decision—which would have the consequence of restricting the import of goods—should also be ruled according to an EC Regulation based on Article 113.[16] It was the first Regulation adopted by the EEC under Article 113.[17]

The process was reiterated in 1986 with the invasion of the Falkland Islands by Argentina. The EEC adopted a Regulation that resulted in the boycott of Argentinian-originating products. It is noteworthy that the Regulation referred not only to Article 113 but also to Article 224 as the UK had already adopted national restrictions.[18]

Contrary to the USSR and Argentina cases, the principle to consider that restrictive trade measures fall under Article 113 was rejected in the case of South Africa. In June 1986, the European Council decided to consult with other industrialized countries on the necessary complementary measures that could be adopted alongside a prohibition on new investments or the import of coal, steel, and gold.[19] This decision, including a steel embargo adopted under the informal intergovernmental framework of the European Cooperation Policy, was, as stated by the Commission, an exclusive member state competence and "neither the Commission nor any other Community body is competent to verify the national application of the decision of the Member States meeting within the Council on 16 September 1986 imposing an embargo on imports of certain steel products originating in South Africa."[20]

The Council waited until 1992 to adopt a third Regulation, based on Article 113, to restrict the export (and not only the import) of goods to a third country. The objective of the Regulation was to implement the UNSCR 732(92) that called for the Libyan Government "to commit itself to cease all forms of

[15] Council Regulation (EEC) 925/79 of 8 May 1979 on common rules for imports from State-trading countries, 1979, O. J. (L 131).
[16] Council Regulation (EEC) 596/82 of 15 March 1982 amending the import arrangements for certain products originating in the USSR, 1982, O. J. (L 072).
[17] Panos Koutrakos, *Trade Foreing Policy & Defence in EU Constitutional Law*, p.60.
[18] Council Regulation (EEC) No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina, 1982, O. J. (L 102).
[19] Declaration on South Africa, European Council Meeting, The Hague June 26/27, 1986.
[20] Written Question 667/89 by Mrs Barbara Simons (S) to the Commission of the European Communities, 1989, O. J. (C 63), p. 1.

terrorist action and all assistance to terrorist groups" and that also required EC Member States to prevent the supply of aircraft and aircraft components to Libya.[21] With the adoption of this Regulation, the Council formally recognized that the implementation of the UNSCR by Member States required "recourse to a Community instrument in order to ensure uniform implementation throughout the Community of certain of these measures."[22]

However, considering the CCP competence, it was surprising that prior to 1992 the Council had never adopted a Regulation prohibiting the export of certain goods to one or more identified countries, with the exception of the export of weapons. This exception seems even more peculiar given that it is precisely weapons export that is excluded from the common commercial policy and is, therefore, a Member State's exclusive competence.[23] Thus, in 1989, under the provisions of Title V "Provisions on European cooperation in the sphere of foreign policy" of the Single European Act and in consideration of the Tiananmen Square repression, the European Council adopted a decision against China inviting Member States to apply an embargo on trade in arms.[24]

In addition to the CFSP's decision on an arms embargo on China of 1989, very few declarations had been adopted by the European Council concerning trade restrictions prior to 1992.[25]

The Libya Order 1992 initiated the process of the adoption of an European Community (EC) legislative act while implementing a UNSCR requiring trade restrictive measures. This first Regulation was followed by another prohibiting the export of certain goods from the EU customs union to Libya, essentially in relation to crude oil extraction.[26] This Regulation itself was preceded by a CFSP Council Decision on the reduction of economic relations

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[21] Council Regulation (EC) No 945/92 of 14 April 1992 preventing the supply of certain goods and services to Libya, 1992, O. J. (L 101).

[22] Council Regulation (EC) No 945/92 of 14 April 1992.

[23] Even if the principle of excluding weapons from the CCP could be debated, it seems that a general political consensus on such exclusion is shared by the Commission and the Council as mentioned for the first time by the Commission in the following document. Question 563/76 from M. Glinne to the Commission: vente d'armes à l'Afrique, 1976, O. J. (C 294), p. 57.

[24] Presidency Conclusions, Madrid European Council (June 26 and 27, 1989), Annex II.

[25] Common Position of 28 October 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union, on Burma/Myanmar (96/635/CFSP), 1996, O. J. (L 287). Myanmar was also subject to the EU Member States' embargo on arms, munitions and military equipment adopted in 1990, but the first Common Position on this country was not adopted until October 1996. It confirmed previous sanctions and added new ones. See also "The EU's relations with Burma/Myanmar", DG RELEX, European Commission, https://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/dase20050419_003/dase20050419_003en.pdf

[26] Council Regulation (EC) No 3274/93 of 29 November 1993 preventing the supply of certain goods and services to Libya, 1993, O. J. (L 295).

with Libya.[27]

The entry into force of the Maastricht Treaty that established the European Union in January 1993[28]—formalizing EU Foreign Policy—is most probably the main reason why it was considered necessary for the Council to adopt a Decision and a Regulation to implement a trade restriction. The new Article 228 A (Treaty of European Community) states "where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission." Therefore, considering the adoption by the Council of a Common Position on Libya, the Commission took the initiative to implement Article 228 A by tabling a Regulation preventing the supply of certain goods and services to, and restricting the use of funds or other financial resources owned or controlled by, Libya.[29]

Ever since, this specific dual instrument mechanism – CFSP Decision and CCP Regulation – has been used systematically by the Council when adopting trade-restricting measures against a third state. The amended Treaties of Nice, Amsterdam, and Lisbon did not fundamentally review this dual system. The fact that the Regulation was adopted by a qualified majority is of little consequence as the CFSP's Council Decision triggering the adoption of the Regulation still required unanimity of Member States to be adopted.[30] Presently, around 30 countries are the targets of EU sanctions of differing categories.[31]

It was not until the nineties that the EC adopted the first set of strategic trade control rules. This could be explained by the Council's understanding of the Treaty provisions. For the Council, commercial measures necessary for controlling transfers of strategic goods to third states according to political motivations (implementing an UNSC Resolution) were not considered an EU competence and did not fall within the scope of Article 113 of the European Economic Community (EEC) Treaty.[32] The EC was viewed as a separate entity to its Member States and was not responsible for implementing these

[27] Council Decision of 22 November 1993 on the Common Position defined on the basis of Article J.2 of the Treaty on European Union with regard to the reduction of economic relations with Libya (93/614/CFSP), 1993, O. J. (L 295/7).
[28] With the Maastricht Treaty the European Community has been replaced by the European Union.
[29] *Proposal for a Council Regulation preventing the supply of certain goods and services to Libya and restricting the use of funds or other financial resources owned or controlled by Libya,* COM (1994) 94(1) final, (March 25, 1994).
[30] Consolidated version of the Treaty on European Union, art. 29 and art. 215, June 7, 2016, 2016, O. J. (C202/3), [hereinafter TEU].
[31] "EU Sanction Map", European Commission, https://sanctionsmap.eu/#/main
[32] Written Question 526/75 by Mr Patijn to the Council of the European Communities, Subject: Implementation by the EEC of sanctions against Rhodesia, November 20, 1976, O. J. (C 89), p. 6.

decisions. The Council considered that, as the measures in question were necessary to fulfil commitments concerning the maintenance of peace and international security, it was covered by the exception to Article 224 of the EEC Treaty. This exception allows Member States to adopt measures in the event of "serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security." Consultation should be organized within the Council "with a view to taking together the steps needed to prevent the functioning of the internal market being affected."

In June 1991, the EC adopted its first strategic trade control Decision under the framework of the CFSP. In June 1992, it adopted the eight conventional arms export common criteria and a common list of nuclear goods and nuclear-related dual-use goods.[33] The criteria and the list of items consist of the political commitment by all Member States to control and assess diversion risks while considering potential export.

However, facing the completion of the internal market in January 1993 and the end of customs controls within the Schengen zone, it appeared necessary for Member States to take measures to ensure that exports of strategic goods, like dual-use or cultural goods, were subject to uniform controls at the Community's external borders. They feared that the non-harmonization of national restrictive measures would be subverted by exporting goods via other Member States not adopting the same controls and, therefore, hampering both security and fair trade by not ensuring a level playing field. Several working groups were established within the Council to identify common lists of goods that would be subject to national restrictions and to seek to maximize the commonality of practice implementing these controls. The first Regulation controlling the export of cultural goods was adopted in December 1992.[34]

The situation for dual-use goods was more problematic as long as the non-harmonization of export control rules increased the risk of WMD proliferation. If the list of controlled items and the export criteria were defined nationally, the risk was that items not listed and therefore not controlled by one member state but listed by another might be exported without the approval of the former. However, obtaining a consensus among Member States on common principles of control was difficult as long as, for some of them, such policy fell under the purview of their exclusive foreign policy competence. After lengthy discussions within the Council, a compromise was achieved in

[33] Presidency Conclusions, Luxembourg European Council (June 28 and 29, 1991); Presidency Conclusions, Lisbon European Council (June 26 and 27, 1992).
[34] Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods, 1992, O. J. (L 395).

1994;[35] the Council adopted, on the one hand, a regulation defining the principles and procedures of an EU export control system,[36] and on the other, a decision defining a list of criteria to be considered and a list of dual-use goods to be controlled.[37] The principle behind the consensus for this dual system was that the defining list and criteria of sensitive goods were not included in the common commercial policy and should remain individual Member States' exclusive competence. However, to avoid the risk of discrepancies, a coordination of national lists, by way of an CFSP instrument, was considered necessary. This concept was invalidated by the European Court of Justice in 1995,[38] and an initial comprehensive regulation, including lists of goods and criteria, was adopted in June 2000.[39]

Later, several dedicated strategic trade control systems were adopted by the EU.

In 2002, implementing Member States' commitments, within the Kimberley Process, the Council adopted a Regulation setting out the criteria for importing or exporting rough diamonds.[40]

In 2005, under pressure from the European Parliament, a regulation on trade in certain goods that could be used for capital punishment, torture, or other cruel, inhuman, or degrading treatment or punishment was adopted.[41]

Finally, in 2017, a Regulation was adopted that lay down supply chain due diligence obligations for Union importers of certain minerals.[42]

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[35] "The European Council noted with satisfaction the conclusion of a common list of nuclear goods and nuclear-related dual-use goods to be controlled by Member States, when exported." Point 15 Non-proliferation and arms export, Presidency Conclusions, Lisbon European Council (June 26 and 27, 1992), (SN3321/2/92 rev2), p. 28.

[36] Council Regulation (EC) No 381/1994 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, 1994, O. J. (L 367).

[37] Council Decision 94/942/CFSP of 19 December 1994 on the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods, 1994, O. J. (L 367).

[38] Case C-83/94 - Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer v Federal Republic of Germany, 1995, ECR 1995 I-03231.

[39] Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, 2000, O. J. (L 159).

[40] Council Regulation 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds, 2002, O. J. (L 358).

[41] Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, 2010, O. J. (L 239M).

[42] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, 2017, O. J. (L130).

Objectives of EU sanctions and strategic trade control systems

With regard to objectives, sanctions and strategic trade control systems are in two different temporalities. Sanctions usually pursue short- or medium-term objectives and will be lifted when their objectives are achieved, while strategic trade control systems are, in principle, established to last and will not be withdrawn unless replaced by revised ones.

Formally, EU sanctions are imposed in pursuance of the CFSP objectives, as listed initially by the Maastricht Treaty, and can be summarized as follows: "to safeguard the common values, fundamental interests, independence, and integrity of the Union; to strengthen the security of the Union; to preserve peace and strengthen international security; to promote international co-operation; to promote democracy, rule of law, and respect for human rights and fundamental freedoms."[43]

Analyzing sanctions' decisions adopted by the EU, it appears that their objectives are usually intended to encourage the targeted government, entities, or individuals to realign their policies and activities to common standards and values. In this regard, EU sanctions can be divided into three main categories.

The first includes sanctions consisting in the implementation of decisions made by the United Nations (UN) Security Council. Their objectives are usually the same as those contained in the UN Resolution in question and are related to any threat to peace, breach of peace, or act of aggression.[44] Most EU sanctions fall into this category, even if the EU decisions do not necessarily perfectly correspond to their respective UN resolutions. A detailed comparative analysis would certainly reveal that differences between the UN resolutions and its EU implementing regulations are virtually negligible and essentially related to certain targeted goods, persons and entities. The EU regulations might be more or less comprehensive. The difference might last only a few months, such as in the case of Somalia where the control of chemical precursors was included by the EU in February 2020 and by the UN a few months later, in November 2020.[45] The EU scope of controls might well be slightly broader by its inclusion of more entities or more detailed lists than UN Resolutions. Finally, as in the case of Mali, one more criterion could be added to the criteria already listed by the UN

[43] Clara Portela and Jan Orbie, "Sanctions under the EU Generalised System of Preferences and foreign policy: coherence by accident?", p. 66.
[44] UN Charter, Chapter VII.
[45] UN Security Council Resolution 2551 (2020) adopted at its 8775th meeting, on 12 November 2020 and Council Regulation (EU) 2020/169 of 6 February 2020 amending Regulation (EC) No 147/2003 concerning restrictive measures in respect of Somalia, 2020, O. J. (L 36).

resolution.[46]

The second category includes sanctions adopted independently from the UN but pursuant to similar objectives like the respect of democracy and human rights, the respect of a state's constitution, or a peace settlement agreement, as was the case for Guinea in 2010[47] and Burundi in 2015.[48] The capacity of the EU to unilaterally adopt economic sanctions on third states was introduced by Article 228A of the Maastricht Treaty.[49]

The third category includes sanctions adopted by the EU pursuant to a specific action to be taken by the targeted third country. This may concern, for instance, freedom of the press, or respect for the rule of law, by requiring the targeted government to re-engage in a process of meaningful and results-oriented national dialogue;[50] third country territorial integrity, by requiring the withdrawal of troops from an occupying territory;[51] halting executions and putting a stop to repressive actions against those who legitimately claim their democratic rights;[52] or the respect for an international treaty, like the prohibition of nuclear weapons, by requesting the acceptance of access for IAEA inspectors to certain nuclear facilities.[53]

With regard to EU strategic trade controls, their objectives are instead directly related to the category of items, which serve to monitor the flow. In this respect, two categories could be identified.

The first is pursuing the fight against a potential misuse, by the end user, of the goods and technologies that might be transferred. If the definition of misuses might differ when considering the type of goods, they all share the same objective: preventing the material, equipment, or technology in question from contributing to something that is prohibited. For dual-use items, such misuses include those contributing to weapons of mass destruction, to missiles used to supply WMDs, or to military goods listed by EU Member

[46] A seventh criteria concerning the identification of persons and entities has been added. "Article 2.3(h)…h. Knowingly facilitating the travel of a listed person in violation of the travel restrictions". Council Regulation 017/1770 of 28 September 2017 concerning restrictive measures in view of the situation in Mali, 2017, O. J. (L 251).
[47] Council Common Position 2009/788/CFSP of 27 October 2009 concerning restrictive measures against the Republic of Guinea, 2009, O. J. (L 281).
[48] Council Decision (CFSP) 2015/1763 of 1 October 2015 concerning restrictive measures in view of the situation in Burundi, 2015, O. J. (L 257).
[49] Presently article 215 of the TFEU.
[50] Council Decision (CFSP) 2019/1720 of 14 October 2019 concerning restrictive measures in view of the situation in Nicaragua, 2019, O. J. (L 262).
[51] Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, 2014, O. J. (L 229).
[52] Political Declaration of European Council made in Madrid, 27 June 1989 in relation to the events at the Tiananmen Square protests of 1989.
[53] Council Common Position 2007/140/CFSP of 27 February 2007 concerning restrictive measures against Iran, 2007, O. J. (L 61).

States for a country under an arms embargo.[54]

For cyber-surveillance goods, it concerns internal repression, and serious violations of human rights and international humanitarian law. For torture-related goods, it concerns torture or other cruel, inhuman, or degrading treatment or punishment, including judicial corporal punishment by a law enforcement authority or any natural or legal person.[55]

Finally, for conventional weapons, it concerns internal repression, international aggression, and contribution to regional instability.[56]

The second category is intended to counter the financing of armed conflicts whose aim is to undermine a legitimate government. The objective is to prevent illicitly exported goods from entering the customs union, preventing cultural goods and natural resources from being used for terrorist financing and money laundering activities. It doesn't concern a potential misuse of the items, but rather the benefits that its trade might confer to the supplier. In the EU, the Regulation essentially covers three categories of goods: conflict minerals,[57] diamonds,[58] and archaeological artefacts.[59] The specificity of this category is also related to the focus on import control rather than on export control. The three procedures established for each regulation allow for industries and other actors processing such material to guarantee that they are not related to criminal activities.

Decision-making process of EU sanctions and strategic trade control systems

As detailed above, the EU sanctions and strategic trade control system do not follow the same decision-making process. The trade control system is primarily considered to be a common commercial policy instrument that allows for implementation of external policy principles, whereas sanctions are primarily a common foreign policy instrument requiring the implementation of common commercial policy legislation.

All sanctions are adopted by a Council Decision based on Article 29 of the

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[54] Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), art. 4 and 5, 2021, O. J. (L 206).
[55] Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which may be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, art. 12, 2019, O. J. (L 30).
[56] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, Preamble 4, 2008, O. J. (L 335).
[57] Regulation (EU) 2017/821 of the European Parliament and of the Council.
[58] Council Regulation 2368/2002 of 20 December 2002.
[59] Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods, 2009, O. J. (L 151).

Treaty on the European Union (TEU).[60] The Decision usually includes trade restriction principles in relation to the targeted country or entity in its initial articles. It may consist of a prohibition to export, import, transit or broker, a restriction on admission or freezing of funds and economic resources. An expiration date and a procedure to amend or extend the measures are also included. It is not until the Decision is adopted that the Council may formally, on the basis of Article 216 of the Treaty on the Functioning of the European Union (TFEU), adopt the regulation that all but duplicates the content of the Decision, with the exception of certain conventional weapons or admission or transit of listed persons through Member States' territories that are presently not considered as falling within the scope of common commercial policy.

Trade control rules are established, on the basis of Article 207 of TFEU, directly by a Regulation adopted by the Council and the Parliament in ordinary legislative procedure.[61] Only conventional weapons, which are still considered by Member States to represent an exception to the CCP, are adopted by Council Decision. Article 346 of TFEU provides that Member States may adopt "any measures that they consider necessary for the protection of the essential interests of their security that are connected with the production of a trade in arms, munitions and war material". In 1958, the Council adopted a list identifying goods that could benefit from such an exception. It remained confidential until 2008 when the Council finally decided to make it publicly available.[62] The list is divided into 15 broad categories of goods that are subdivided into broad entries. For example, category 4 includes bombs, torpedoes, rockets and guided missiles subdivided into two entries; one includes military devices specifically designed for handling, assembly, dismantling, firing or detection of the weapons listed above. Normally, the scope of the exception and consequently the possibility that Member States might adopt national measures for the protection of their essential security interests must be strictly limited to those goods that are listed. Since being adopted in 1958, the list has never been reviewed or updated and Member States consider its wording to be sufficiently generic to cover all present and future development of military technology.

Therefore, even if the broad scope of the Article 346 exception was doubtful, Member States were not prepared to accept an EU conventional weapons Regulation. To avoid the risk of arms trade discrepancies between EU Member States, a consensus was found for the adoption by the European Council, in June 1991 and in June 1992, of eight common conventional arms

[60] See Francesco Giumelli, "How EU sanctions work: A new narrative", *Chaillot Papers*, n 129, May 2013, pp. 10-12, for further information on the decision-making process pursuant to article 30 and 31.

[61] The ordinary legislative procedure is defined in article 294 of the TFEU.

[62] Extract of Council Decision 255/58 of 15 April 1958, EU Monitor, https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vj6iphyztvvu.

export criteria that must be unilaterally applied by all Member States. Such an approach was confirmed by the Council Common Position in 2008 and has not been disputed since then.[63]

The adoption of the dual-use trade control regulation,[64] based on CCP (Article 207b, TEEC) was less controversial.[65]

Its scope is defined with due consideration for the Member States' commitments and obligations that they have accepted as parties to the international non-proliferation regimes and export control arrangements. Most of these regimes revise their respective control lists once a year; consequently, the EU has to amend its list annually as well. Initially, the revision of the list was undertaken by the Council, but since the entry into force of the Lisbon Treaty, the procedure has required the approval of the Council and the Parliament (ordinary legislative procedure). Such a procedure usually takes more than a year, and is thus clearly incompatible with the need for an annual update.[66] Consequently, and after lengthy negotiation between the Parliament and the Council, it was decided in 2014 to empower the Commission to amend, by delegated act, the list of goods and the list of beneficiaries of EU General Export licenses set out in the Annexes of the Regulation.[67] This procedure allows the Export Control System to be more resilient to instability in the international situation, as it was the case in May 2022 when Russia had to be removed from the benefits of the European Union General Export Authorisation (EUGEA).[68]

For the Regulation on diamonds as well as the one on certain minerals, the necessity to adopt a Regulation was essentially motivated by the need to implement EU and Member States' commitments in international organizations. For diamonds, this essentially concerns origin verification measures, whilst for conflict minerals it focuses on the due diligence principles to be considered by importers. Both do not establish a comprehensive trade control system but rather constitute a first step towards such a potential objective.

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[63] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, 2008, O. J. (L 335), p. 99.
[64] Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, 1994, OJ L 367.
[65] Even if initially, a Council Regulation and a Council Joint Action have been adopted.
[66] It took almost three years to obtain the first list update under the ordinary legislative procedure (Regulation 388/2012 of the European Parliament and of the Council of 19 April 2012 amending Council Regulation (EC) No 428/2009 setting up a community regime for the control of exports, transfer, brokering and transit of dual-use items, 2012, O. J. (L 12).
[67] Regulation (EU) No 599/2014 of the European Parliament and of the Council of 16 April 2014 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, 2014, O. J. (L 173).
[68] Commission Delegated Regulation (EU) 2022/699 of 3 May 2022 amending Regulation (EU) 2021/821 of the European Parliament and of the Council by removing Russia as a destination from the scope of Union general export authorisations, 2022, O. J. C/2022/2885 (L 130 I).

Finally, the regulation on certain goods which could be used for capital punishment, torture, or other cruel, inhuman, or degrading treatment or punishment was an initiative of the European Parliament that was not otherwise directly based on any international treaties or conventions. The process was initiated in 2012 by the European Parliament's resolution urging the Commission to "act swiftly to bring forward an appropriate Community mechanism to control" a "list of non-military security and police equipment" and "ensure that this Community instrument includes a ban on the promotion, trade and export of police and security equipment whose use is inherently cruel, inhuman or degrading, including leg-irons, electro-shock stun belts and inherently painful devices such as serrated thumb cuffs."[69] The proposal was tabled by the Commission in December 2003 and a revised version was adopted by the Parliament and the Council in June 2005 under the ordinary legislative procedure. As with the dual-use regulation, the Commission was thus empowered to amend by delegated act the list of items, authorities, and beneficiaries of the EUGEA.

Lifting and revising processes of EU sanctions and strategic trade controls

Lifting measures are only relevant to sanctions, as strategic trade control measures are normally adopted to last. In consideration of the evolution of the different international regimes and treaties that underpin trade control systems, their scope might be revised and amended to align with new standards. As mentioned above, the EU has adopted, by way of Commission-delegated acts, for its dual-use trade control system, a reactive revision procedure that allows for the maintenance of the system in conformity with international regimes. For the anti-torture regulation, a similar mechanism has also been established but revisions are not constrained by Member States' international commitments. For conventional weapons, as the list and criteria have been defined by a CFSP instrument, a Council Decision is sufficient to review and amend it.

For sanctions, the question is more relevant as, in principle, sanctions should be lifted when their objectives have been achieved. The sanctions' objectives and their potential renewal should not be confused with the motivations employed for the designation of sanctions targets. Restrictive measures are implemented by way of an export prohibition of certain goods and services but also by way of financial and travel measures against persons and entities. Their identification is motivated by the role of those entities and persons in violation of the principles underpinning the sanction measures. Therefore,

[69] European Parliament resolution on the Council's Second Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, Paragraph 12, (13177/1/2000 - C5-0111/ 2001 - 2001/2050(COS)), 2002, O. J. (C 87 E/136), p. 139.

Council Decisions frequently included elements motivated the targets' selection, as was the case against Nicaragua in 2019 where measures were "imposed against persons and entities responsible for serious human rights violations or abuses, or for the repression of civil society and democratic opposition in Nicaragua, as well as for persons and entities whose actions, policies or activities otherwise undermine democracy and the rule of law in Nicaragua, and persons associated with them."[70]

The procedure to take the decision to lift measures or otherwise is often not detailed by the relevant EU restrictive decision and regulation. In the majority of cases, it will be left to the appreciation of the Council. However, the way to assess whether such objectives have been achieved remains unclear: how to determine, on a factual basis, whether human rights violations in a certain country have ended, or how to assess whether a specific country has ended its policy of internal repression.[71] The following standard paragraph is usually included in the Council document: the Decision "shall be kept under constant review. It shall be renewed or amended, as appropriate, if the Council deems that its objectives have not been met."[72] Only two exceptions have been identified. The first, for the restrictive measures taken against Mali, where a paragraph was added mentioning that the "Decision shall be amended or repealed as appropriate, in accordance with determinations made by the Security Council."[73] The second, for the restrictive measures taken against Russia in 2016, where recital 2 of the Council Decision precises "that the necessary measures would be taken to clearly link the duration of the restrictive measures to the complete implementation of the Minsk agreements, bearing in mind that the complete implementation was envisaged for 31 December 2015."[74]

If elements to decide how sanctions can be lifted are not often detailed, the objectives of sanctions and elements that have motivated their prolongation are also often not well defined. Some exceptions have been identified,

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[70] Council Decision (CFSP) 2019/1720 of 14 October 2019 concerning restrictive measures in view of the situation in Nicaragua, 2019, OJ (L 262), pp. 58-63; Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia, recital 2, 2011, OJ (L28); Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus, recital 6, 2012, OJ (L285).

[71] Yuliya Miadzvetskaya, Celia Challet, "Are EU restrictive measures really targeted, temporary and preventive? The case of Belarus", *Europe and the World: A law review*, (2022) 6(1): 3, p.13.

[72] See e.g.: Council Decision (CFSP) 2017/2074 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela, art. 13, 2017, O. J. (L 295); Council Decision (CFSP) 2015/1763 of 1 October 2015 concerning restrictive measures in view of the situation in Burundi, 2015, O. J. (L 257); Council of the European Union, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy 5664/18 (2018), para 35.

[73] Council Decision (CFSP) 2017/1775 of 28 September 2017concerning restrictive measures in view of the situation in Mali, 2017, OJ (L 251).

[74] Council Decision (CFSP) 2016/1071 of 1 July 2016 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, 2016, O. J. (L 178).

however in the case of Russia, the Council stated quite clearly that "measures should be maintained until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States."[75]

It was also the case for the renewal of measures against Myanmar where the Council's Decision was motivated "On the basis of a review of Decision 2013/184/CFSP and in view of the continuing grave situation in Myanmar/Burma, including actions undermining democracy and the rule of law, as well as serious human rights violations, the restrictive measures in place should be renewed until 30 April 2023."[76]

This was also the case for the suspension of measures against Moldova, where the Council "in order to encourage progress in reaching a political settlement to the Transnistrian conflict, addressing the remaining problems of the Latin-script schools and restoring free movement of persons, the restrictive measures should be suspended until 31 March 2011. At the end of that period, the Council will review the restrictive measures in the light of developments, notably in the areas mentioned above. The Council may decide to reapply or lift travel restrictions at any time."[77]

Investigating and pursuing violations of sanctions and strategic trade control rules

If sanctions and strategic trade control rules are established by an EU regulation, investigation, prosecution, and judgment related to their violations is a Member State's exclusive competence. However, to avoid the risk of divergences in their implementation by Member States, the majority of EU Council regulations include a provision for infringements and penalties that require Member States to "lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of the provisions" and to "take all measures necessary to ensure that they are implemented". Member States are also invited to establish penalties "effective, proportionate and dissuasive" and shall provide for appropriate measures of confiscation of the proceeds of such infringements.[78]

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[75] Council Decision (CFSP) 2022/884 of 3 June 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, recital 20, 2022, OJ (L 153/128).

[76] Council Decision (CFSP) 2022/669 of 21 April 2022 amending Decision 2013/184/CFSP concerning restrictive measures in view of the situation in Myanmar/Burma, 2022 OJ (L 121).

[77] Council Decision 2010/573/CFSP of 27 September 2010 concerning restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova, recital 3, 2010, O. J. (L 253).

[78] See for example article 25.1 of Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast) 2921 OJ (L 206), p. 21

However, these provisions have only a limited impact on Member States, as penalties are not commonly defined even if the Directive based on Article 83 of the TFEU offers the possibility to establish minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime with a cross border dimension. In fact, Member States' systems often differ significantly. In its communication concerning criminalisation of the violation of Union restrictive measures, the Commission reported that in twelve MS the violation of Union restrictive measures is solely a criminal offense; in thirteen MS, it may amount to an administrative or a criminal offense; and in two MS, it may only lead to administrative penalties.[79]

The Commission has recently issued a proposal for a Council decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU.[80] This proposal has been approved by the Parliament,[81] and, indeed, the Council.[82] It enables the Commission, as a second step, to propose a Directive, under the ordinary legislative procedure, to approximate the definition of criminal offences and penalties.

A similar proposal has not been published by the Commission for a violation of a trade control rule. However, we might wonder whether the extreme proximity between sanctions and strategic trade control rules, especially regarding violations, might not encourage Member States to apply the definitions adopted to both systems.

Conclusion

Considering the question that initiated this contribution, as to whether strategic trade control rules and sanctions can be regarded as synonymous as long as both intend to interfere—due to political motivations—in the transnational free movement of goods, services and persons in the EU, can clearly be answered in the negative.

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[79] *Communication from the Commission to the European Parliament and the Council, Towards a Directive on criminal penalties for the violation of Union restrictive measures*, COM (2022) 249 final, 25 May 2022.

[80] *Communication from the Commission,* COM (2022) 249 final.

[81] European Parliament legislative resolution of 7 July 2022 on the draft Council decision on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union (10287/1/2022 – C9-0219/2022 – 2022/0176(NLE)).

[82] Council Decision 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union, OJ 29.11.2022 (L 308/18).

However, they have more similarities than differences. As identified, the differences essentially concern the lifting and revising process, where in principle sanctions will be lifted when their objectives have been achieved by the targeted country, whereas trade control rules are meant to last.

With regard to similarities, as unexpected as it might seem, the penalties for a violation could well represent an area where both instruments might become similar in the near future. If penalties will remain a Member State's exclusive competence and includes presently divergences between them, the risk of forum shopping by individuals and companies will stimulate a special need for common action at the Union level to address the violation of sanctions and, in all probability, strategic trade control rules.

Following the analysis of the EU's competence in trade control and sanctions, the contribution will focus on the implementation of the above and will identify the respective objectives, scopes, and procedures for each instrument.