

THE BANKING SURVEILLANCE OF N.B.R. – A COMPONENT OF INTERNATIONAL REGULATIONS

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Abstract: *In their positive form, sanctions are a powerful tool of social control. A sanction is imposed through the coercive powers of the state. A sanction comprises the consequences of failing to comply with regulations and is defined as the measures that competent authorities of the state can take against persons in violation of legal provisions or against individuals failing to comply with the requirements of the law. Sanctions are always presented in the final chapter of the law and their goal is to re-establish order, to discourage future law-breaking and to rehabilitate those found guilty.*

Key words: *banking surveillance, competent authorities, N.B.R.*

1. Introduction

Unlike local regulations, international law does not stipulate a set of given sanctions for failure to comply with its provisions, but this doesn't mean such provisions are in any way dispensable.[6]

As states are the ones drawing international regulations, via treaties or customary practices, they are presumably acting in good faith, in light of international regulations. In conclusion, public international law is not generally based on coercion, although the latter is not excluded in certain cases [3].

International public law stipulates sanctions are to be used when an actor takes illegal action against another or when an actor breaks a peremptory norm ("*jus cogens*"), committing an international crime, for example.

The UN, the interested parties and other

regional organizations have the competence of asserting whether a certain action or deed is illegal and thus impose sanctions.

International sanctions consist in restrictions or obligations imposed to the government of a state, to non-state actors or to legal and natural persons, as ruled by the UN Security Council, by the EU or by other international organizations or by the unilateral decision of a state, the final goal consisting in: preventing or fighting against terrorism, insuring human rights and fundamental freedoms, developing and consulting democracy and the rule of law and other goals found in conformity with the objectives of the international community, international law and EU law.

The use of international sanctions has been argued in favor of by the need to increase the efficiency of the political tools acting in the service of diplomacy [1].

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Sanctions address the ruling elites mainly, in the sense of directly and immediately affecting their conduct.

Those drafting, elaborating and implementing individual sanctions focus on respecting human rights and fundamental freedoms, with special regard to the right of the sanctioned entities or persons to a fair trial and to effective ways of appeal [4].

The implemented measures are also to be proportional with their aim and to be accompanied by exceptions taking into account the basic needs of those sanctioned.

After the end of the Cold War, the sanctions imposed by the UN and later on by the EU were increasingly used as intermediate tools between negotiations and coercive action. Such tools aim to induce the desired behavior without the use of armed force.

As the use of sanctions became increasingly frequent, their characteristics were altered under the pressure of having to avoid collateral effects, while increasing the impact over the targeted groups.

Since 2008, Romania has been in the position of creating the legal framework required in order to respect its international and European engagements [4].

Both the UN, via the Security Council, and the EU, via the Common Foreign and Security Policy, pursue the fulfillment of the member states' obligation of adopting and applying the legislative measures required for the implementation of international sanctions. The legal framework aims to:

- nominate the competent *authorities*, in terms of settling the petitions of natural and of legal persons found under private law for the defense of the latter's rights and legitimate interests that could be affected by the international restrictive measures,

- determine sanctions for failure to comply with the obligations set by *binding instruments adopted* internationally,

- prevent bringing the Romanian state to justice, in front of the national courts, in front of the EU Justice Court and of the European Human Rights Court,

- create the legal framework required for the national implementation of international sanctions with non-binding characteristics adopted by international organizations or by other states, as well as of those adopted via unilateral decisions of Romania or of other states.

2. Regulations

2.1. European regulations

a. Directive 2005/60/EC of the European Parliament of the Council of October 26th, 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

b. Directive 2009/110/EC of the European Parliament of the Council of September 16th, 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (art. 19)[7].

2.2 International regulations

a. The resolutions of the UN Security Council or other decisions based on art. 41 of the Charter of the United Nations;

b. Regulations, decisions, joint positions, joint actions and other legal tools of the EU.

2.3. Local regulations

a. The Romanian Constitution, art. 115, para. 4

b. GEO No. 202/2008 on the implementation of international sanctions, enforced with modifications via

c. Law No. 217/2009, including subsequent amendments and additions

d. GEO No. 128/2010 that brought amendments and additions to GEO No. 202/2008

e. Law No. 535/2004 on the prevention of and fight against terrorism

f. Government Resolution No. 594/2008 that authorized the Enforcement Regulation of Law No. 656/2002 on the prevention and sanctioning of money laundering and on the enforcement of measures preventing and fighting against the financing of terrorist acts, including subsequent amendments and additions

g. Government Resolution No. 1541/2009 that authorized the Regulation on the organization and functioning of the Inter-Institutional Council.

2.4. Special Regulations

a. N.B.R. Regulation 9/2008 on "know-your-customer" rules for the prevention of money laundering and terrorist financing, as subsequently amended

b. N.B.R. Regulation No. 28/2009 on overseeing the enforcement of international sanctions imposing the freezing of funds

c. Regulation No. 136/2013 of The National Officer For Prevention and Control of Money Laundering on the approval of the Methodological Norms for the notification and settlement of the requests for authorizing financial transactions

d. Romanian National Securities Commission (C.N.V.M.) Regulation No. 5/2008 on the prevention and control of money laundering and terrorist financing through the capital market[10]

e. C.N.V.M. Regulation No. 9/2009 on the supervision of the enforcement of

international sanctions on the capital market.

3. Romanian authorities

Depending on the nature of international sanctions discussed, the Council may require participation to its meetings of representatives of other authorities or public institutions (art. 13, para. 2 of GEO No. 202/2008).

According to art. 14, para. 1 of GEO 202/2008, The Inter-Institutional Council has the following attributions [7]:

a) to ensure consultation in order to harmonize the activities of authorities and public institutions in Romania in the field of implementation of international sanctions;

b) to ensure the consultation between the Romanian authorities and public institutions in order to fundament Romania's position regarding the adoption, modification, suspension or termination of international sanctions;

c) to prepare and issue, at the request of the relevant competent authority, advisory opinions on the basis of decisions relating to the application of international sanctions;

d) to submit to the Prime Minister of Romania recommendations on the advisability of adopting at national level non-binding international sanctions;

e) to present whenever necessary, but at least once a year, information on measures adopted by Romania in the implementation of international sanctions, to fundament the Prime Minister's reports referred to in art. 6;

f) to ensure, whenever possible, the dissemination of information to natural and legal persons that own or control property in connection with the imminent adoption of international sanctions under art. 1, in order to allow their implementation, from the time of the adoption and afterwards, without delay.

The Council is coordinated by the Ministry of Foreign Affairs, through the head of the Office for Implementation of International sanctions (art. 13, para. 3 of GEO No. 202/2008).

4. International authorities

Supervision of the implementation of international sanctions in terms of freezing funds is performed by the public authorities and institutions competent for regulating, authorizing, or prudential supervision of the financial sector, by the management structures of liberal professions, and, respectively, by the National Office for Prevention and Control of Money Laundering, for natural and legal persons within their area of activity, according to the regulations in force in the field of preventing and combating money laundering and terrorist financing. (art.17, para. 1) [8-9].

The competent authorities for the five categories of sanctions can be classified as follows:

A. Blocking/freezing funds

a. for the information and supervision of credit institutions in relation to foreign international sanctions: N.B.R.

b. for regulated and supervised institutions that operate on the equity market, in insurance and private pensions: The Financial Supervisory Authority (A.S.F.).

c. for those entities that are not subjected to the prudential supervision of institutions: The National Office for Prevention and Control of Money Laundering.

B. Blocking/freezing goods and economic resources

- **The Ministry of Public Finances**

- **The National Tax Administration Agency.**

C. Trade restrictions:

- **The Foreign Trade Department of The Ministry of Economy** (the General Trade Policies Direction, to be more exact)

- **The National Customs Authority (Ministry of Economy)** – The Supervision, Duties and Customs Operations Direction.

D. Restrictions of military and dual-use products exports

- **The National Agency of Exports Supervision**

- **The Ministry of Defense**

- **The Ministry of Economy**

E. Travel restrictions

- **The Romanian Border Police (Ministry of Internal Affairs)**

- **The National Visa Centre (Ministry of Foreign Affairs)**

5. Implementation of financial-banking sanctions

The institutional model proposed by GEO No. 202/2008 reflects the principle of using held competences according to local law. The Ministry of Finance becomes the sole authority responsible for the supervision of the implementation of financial-banking sanctions.

Therefore, for the solving of requests regarding sanctions, any interested natural or legal person may address competent authorities according to article 12.

As for granting waivers from the sanctions, the mechanism stipulated by article 8 is to be applied.

The immediate freezing/blocking funds or economic resources.

According to art. 24 of GEO No. 202/2008, natural or legal persons who are in a legal relationship or are in any other way in connection with any goods subject to international sanctions are required without delay and prior notification from competent authorities, not to perform any

operation with regard to those goods. Article 27 states that all that apply the provisions of GEO No. 202/2008 are exempted from civil, criminal or disciplinary accountability.

5.1. The mechanism of blocking funds and economic resources

The Ministry of Finance, via the National Tax Administration Agency, enforces through the order of The Minister of Economy the blocking of funds or economic resources found in property or control of natural and legal persons identified as being designated persons or entities, according to art. 19, para. 1[11].

The administration of the seized goods is performed by the National Tax Administration Agency (as central authority). As a general rule, the administration is performed by the person or entity that owns the funds/goods at the time they are seized, by the National Tax Administration Agency or by the public institution that is most competent in the administration of the respective assets.

The administration costs will be discounted from the value of the goods (art. 25).

6. Implementation and supervision of international sanctions [14–15]

The supervision of the implementation of international sanctions is performed by the competent authorities, as indicated by art. 12, para. 1, letter b).

According to art.17, para. 1 and 2, the supervision of the implementation of international sanctions concerning the freezing of funds is done by the public authorities and institutions competent for regulating, authorizing, or prudential supervision of the financial sector, by the management structures of liberal professions, and, respectively, by the

National Office for Prevention and Control of Money Laundering, for natural and legal persons within their area of activity, according to the regulations in force in the field of preventing and combating money laundering and terrorist financing.

Overseeing the implementation of international sanctions of freezing of funds by natural and legal persons that do not fall within the competence of the aforementioned authorities and public institutions, as well as the control of the implementation of international sanctions of blocking economic resources are done by the Ministry of Public Finance, the National Tax Administration Agency [12,13].

6.1. The contraventions and crimes concerning international sanctions

According to art. 26 of GEO No. 202/2008, failure to comply with its provisions is a contravention and is punishable with a fine of RON 10,000 to 30,000, as well as with the confiscation of the assets meant to be used, used or resulting from the contravention. According to art. 26, para. 2, if the contravention is committed by a person in public office, additional specific sanctions may be applied, besides the fine.

Article 4, para. 2 and 3 mentions the possibility of creating a specific legal framework designed for the incrimination of failure to comply with specific international sanctions.

6.2. The Role and attributions of the Ministry of Foreign Affairs in the implementation of international sanctions.

In order to comply with the duties set by GEO No. 202/2008 in relation to the implementation of international sanctions, the Ministry of Foreign Affairs:

a) posts the international decisions imposing international sanctions in the Official Gazette (by order of The Minister of Foreign Affairs);

b) provides correspondence between the members of the Inter-Institutional Council, aiming to coordinate the implementation of the international sanctions;

c) coordinates the activity of drafting the periodic report presented by the Prime Minister to the Superior Defense Council and Parliament on internal measures adopted for the implementation of international sanctions (art. 6 of GEO No. 202/2008);

d) acts as an interface between the state and international institutions or other states in relation with the implementation of international sanctions;

e) informs the international organizations issuing the sanctions about the actions taken locally for their implementation;

f) if possible, informs interested legal or natural persons about the probability of implementing sanctions;

g) carries out the publicity procedures referring to the authorities competent for applying sanctions.

7. The supervisory role of the National Bank in the field of international sanctions

The N.B.R. provides the prudential supervision of credit institutions that are Romanian legal persons, including the branches established by the latter in other member states or in third party states.

The central bank fulfills this role by drafting prudential regulations and indicators that are to be applied both at an individual level and at a consolidated or sub-consolidated level, as the situation demands it, in order to prevent and limit the risks that are specific to the banking activity.

The central bank monitors the non-banking financial institutions included in The General Register and conducts the prudential supervision of the NBFIs included in The Special Register, an activity carried out on Romanian soil.

For those undergoing supervision, the N.B.R. is the authority responsible for the implementation of Law No. 656/2002 for the prevention and sanctioning of money laundering and for the prevention and tackling of terrorist financing.

The central bank also has competences regarding the assessment of contraventions and the implementation of measures dedicated to the prevention and tackling of terrorist financing.

The attributions regarding international sanctions taking effect on the local financial-banking system imply:

1. supervising implementation of international sanctions, according to art. 17, para. (1) of GEO No. 202/2008 on the implementation of international sanctions amended by Law No. 217/2009, including subsequent amendments and additions;

2. informing the public about the enforcement of international sanctions on Romanian soil, according to art. 6, para. (1) of GEO No. 202/2008;

3. issuing specific regulations concerning the supervision of the implementation of international sanctions;

4. disposing specific measures or sanctions for failure to comply with the applicable legislation in force;

5. sending appointed representatives to the work meetings of The Inter-Institutional Council established via art. 13 of GEO No. 202/2008.

The European institutions responsible for the implementation of international sanctions with respect to the financial-banking system are:

- Common Security and Defense Policy (C.S.D.P.), Banking Federation of the European Union- F.B.E., European

Association of Co-operative Banks.
 European Association of Public Banks.
 European Association of Public Banks &
 Funding Agencies- E.A.P.B.. The
 Financial Action Task Force (F.A.T.F-
 G.A.F.I.). The Committee of Experts on
 the Evaluation of Anti-Money Laundering
 Measures and the Financing of Terrorism.

8. Actions without using armed forces

The UN Security Council and the European structures can take action without using armed force.

They may therefore decide to partially or entirely interrupt economic, cultural, political and maritime relations. Other interdictions may be added as a result of international treaties. For example:

- the annulment of treaties signed under the use of force or threat or those which fail to comply with international law;
- the cessation of the effects of a treaty for serious violations of its provisions by the other party;
- the exclusion or suspension from international organizations;
- criminal penalties applied to those guilty of crimes against peace and humanity.

The following examples can be provided:

a)The embargo imposed by The United States on Iranian exports after the hostage situation from the U.S. Embassy in Teheran in 1979.

b)The cereal embargo imposed to The Soviet Union in response to its military intervention in Afghanistan.

9. Conclusions

Preventing and settling conflictual aspects is based on the coordinating, not subordinating character of international law and the relations between states are not built on dependence, but independence.

(N.Titulescu).

In the light of all these doctrinaire aspects and in relation to the best practices for the efficient enforcement of restrictive measures we are to pose the following questions:

- Are the effects of enforced international sanctions truly effective?

- Does the fact that the alert lists feature names/designations mean that the denial of anonymity is a form of sanctioning?

- Does the sanction remain an instrument found between world order and self-command?

International law is not without sanctions and is not imperfect, while sanctions take effect when the interests of states converge towards a common goal.

The latter should serve international peace and security, as well as all states and peoples and should be kept aloof from strategic interests of domination, supremacy, as well as from the sphere of influence policies or from dominant positions in the global economy.

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