Financial sanctions: legal framework and implementation in Germany

With the outbreak of the second Gulf war, the financial sanctions imposed on Iraq by the United Nations in 1990 again became a focus of public attention. On 20 March 2003 the President of the United States ordered the seizure of frozen account balances of various Iraqi public institutions. In Germany the Deutsche Bundesbank asked the banking industry to report all bank accounts, safe custody deposits or other assets belonging to Iraq, official bodies in Iraq or their authorised representatives. In the light of these events, this article gives an overview of the legal framework of the financial sanctions which have been imposed by the United Nations, the European Union or European Community and the national authorities and which currently apply in Germany and an outline of the role played by the Deutsche Bundesbank in their implementation. It also deals with the closure of an existing regulatory gap.

Financial sanctions currently in force

In addition to the measures against Iraq, financial sanctions to combat terrorism[1] and those against the Taliban of Afghanistan,[2] the

1 Council Regulation (EC) No 2580/2001 of 27 December 2001, OJ L 344 p 70, as last amended by Council Decision of 12 December 2002, OJ L 337 p 85.
2 Council Regulation (EC) No 881/2002 of 27 May 2002, OJ L 139 p 9, as last amended by Council Regulation No 561/2003 of 27 March 2003, OJ L 82 p 1.

Federal Republic of Yugoslavia,[3] Burma/Myanmar[4] and Zimbabwe[5] are currently in force in Germany. The financial sanctions against Libya are currently suspended. These sanctions are partly governed by Community law and partly by national law. They also do not have a common regulatory structure. For that reason a few basic comments will first be made and then individual aspects of the various financial sanctions will be examined.

Legal framework and regulatory structures of financial sanctions

International/ supranational basis for financial sanctions

Nowadays financial sanctions may originate in measures undertaken by the United Nations (UN) or the European Union. If they are based on measures taken by the UN, it must be remembered that the UN cannot legislate directly in its member states. In accordance with Article 41 of the Charter of the United Nations, the UN Security Council can simply decide to impose sanctions on a country; these must then be implemented by the member states in accordance with Article 48 of the UN Charter. In the EU member states these sanctions are implemented regularly by legal instruments at EU/Community level, the reason being that the authority which EU member states originally possessed to adopt measures to restrict capital movements and payments was transferred to the Community when the Maastricht Treaty came into force. Apart from embargoes which had been imposed before the Treaty came into force and which are still valid, any authority that the EU member states still have to adopt financial sanctions is restricted to exceptional cases.

Implementation of UN and EU sanctions

Regardless of whether the imposition of financial sanctions was due originally to a (political) decision by the UN Security Council or by the Council of Ministers within the framework of the EU's common foreign and security policy, implementation at the Community level follows the same procedure. Initially, joint actions (Article 14 of the EU Treaty[6]) or common positions (Article 15 of the EU Treaty) which envisage a response from the Community are necessary. Joint actions and common positions are generally adopted unanimously. In exceptional cases they can be adopted by a qualified majority if a (unanimously agreed) common strategy (Article 13 of the EU Treaty) is being implemented. As the joint actions or positions do not apply directly in the EU member states, they are implemented, as a rule, through EC regulations which the Council of Ministers adopts by a qualified majority on a proposal from the Commission. The EC regulations are directly applicable within the Community.

As already mentioned above, it is only in exceptional cases that the EU member states have national legislative powers with respect to restrictions on capital movements and

3 Council Regulation (EC) No 2488/2000 of 10 November 2000, OJ L 287 p 19, as last amended by Commission Regulation (EC) No 1205/2001 of 19 June 2001, OJ L 163 p 14.
4 Council Regulation (EC) No 1081/2000 of 22 May 2000, OJ L 122 p 29, as last amended by Commission Regulation (EC) 1883/2002 of 22 October 2002, OJ L 285 p 17.
5 Council Regulation (EC) No 310/2002 of 18 February 2002, OJ L 50 p 4, as last amended by Commission Regulation (EC) No 1643/2002 of 13 September 2002, OJ L 247 p 22, and extended by Council Regulation (EC) No 313/2003 of 18 February 2003, OJ L 46 p 6.
6 Treaty on European Union of 7 February 1992 as amended up to 26 February 2001.

payments. Article 60 (2) of the EC Treaty[7] enables a member state, for serious political reasons and on grounds of urgency, to take unilateral measures to restrict capital movements and payments as long as the Council of Ministers has not taken any measures. In Germany this is the responsibility of the Federal Ministry of Economics and Labour. It has exercised this option several times in the past and, in agreement with the Federal Foreign Office and the Federal Ministry of Finance as well as in consultation with the Bundesbank, has adopted restrictive (emergency) measures by virtue of section 2 (2) and section 7 (1) of the Federal Foreign Trade and Payments Act. As a rule, these (emergency) measures implement sanctions with a minimum of delay and are taken ahead of measures agreed by the European Union or the European Community. The national restrictions imposed on the basis of the Foreign Trade and Payments Act are repealed once relevant measures under European law have come into force.

Targets of financial sanctions

Classic targets of financial sanctions are third countries such as Burma/Myanmar or Zimbabwe. This can be seen from the authorisation principles under Community law laid down in Article 60 and Article 301 of the EC Treaty, which deal with the suspension of economic relations with one or more third countries. In view of the efforts being made to combat the financing of terrorism, however, recent sanctions have also increasingly been directed at natural persons or groups of persons without any explicit connection to third countries. In this respect, a distinction has to be made between persons and groups of persons identified by the Sanctions Committee of the United Nations in accordance with UN Security Council Resolutions 1267 (1999) and 1390 (2002)[8] and such persons and groups of persons on whom the EU member states have been imposing sanctions independently by virtue of UN Security Council Resolution 1373 (2001) and who are listed not by the UN but by the EU.[9]

No basis under Community law for sanctions against targets domiciled in EU

If the persons or groups of persons listed by the EU have their main place of residence within the EU, however, the measures amount to nothing more than providing the greatest possible degree of administrative assistance in preventing and combating terrorist attacks within the framework of police and judicial cooperation in criminal matters. Owing to the absence of links with third countries, there is no basis under Community law for authorising more radical measures here. Any such justification exists only in the case of listed persons or groups of persons domiciled outside the EU; the measures cited in footnote 1 are directed at these persons alone.

Targets of financial sanctions

The various legal instruments governing financial sanctions vary slightly in respect of the assets covered by the financial sanctions. As a rule, they involve funds and economic resources of the countries or the group of persons in question. The term "funds" within the meaning of Community law covers not

7 Treaty establishing the European Community of 7 February 1992 as amended up to 26 February 2001.
8 These were implemented within the Community by the restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, see footnote 2.
9 Restrictive measures directed against certain persons and entities with a view to combating terrorism, see footnote 1.

only cash, cheques, claims on money, drafts, money orders or other payment instruments but also, for example, instruments of export financing. Economic resources are defined in these legal instruments as assets of any kind which, regardless of whether they are tangible or intangible and movable or immovable, are not funds but which can be used to acquire funds, goods or services.

Freezing of funds etc

Funds and economic resources are frozen by virtue of the legal instruments governing the financial sanctions in order to prevent further use of the assets. The ownership and other rights with regard to these funds and economic resources remain unchanged.

Ban on the provision of funds etc

Financial sanctions also regularly prohibit making funds directly or indirectly available to the countries or group of persons concerned. Additionally, one legal instrument prohibited the provision of financial services. Some of these legal instruments permit exceptions to be made, for example, on humanitarian grounds. However, the exemptions and procedures to achieve these vary.

National responsibilities within the framework of financial sanctions

The Federal Ministry of Economics and Labour bears the main responsibility for matters connected with the implementation of financial sanctions as part of foreign trade and payments law. In individual cases, it consults the Federal Foreign Office, the Federal Ministry of Finance and the Bundesbank. The Bundesbank assumes a special role with respect to financial sanctions. Pursuant to section 28 (1) read in conjunction with (2) number 1 of the Foreign Trade and Payments Act, it has sole responsibility in the field of capital movements and payments for granting authorisations by virtue of the Foreign Trade and Payments Act and the regulations issued in connection with this Act and by virtue of legislation enacted by the Council and the Commission of the European Community. Accordingly, Community legislation names the Bundesbank as the responsible authority in Germany for matters concerning capital movements and payments.

Right to demand information, penalties

Both the Foreign Trade and Payments Act and the legal instruments governing financial sanctions under Community law grant the bodies responsible for implementing financial sanctions the right to collect information, especially information from credit institutions on frozen funds and other assets. This right to demand information was first exercised in connection with the financial sanctions against the Federal Republic of Yugoslavia.

Sections 33 and 34 of the Foreign Trade and Payments Act provide for the possible punishment of infringements against financial sanctions either as a breach of administrative regulations or as a criminal offence, depending on the type of legal instrument governing the financial sanctions.

Notes on individual legal instruments governing financial sanctions

Financial sanctions before and after the Maastricht Treaty came into force

As already mentioned, the EU member states themselves were solely responsible for imposing financial sanctions on third countries before the Maastricht Treaty came into force. A distinction has therefore to be made

between financial sanctions which were adopted before the Treaty came into force and those adopted afterwards.

Financial sanctions against Libya and Iraq

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The financial sanctions which were enacted prior to the entry into force of the Maastricht Treaty and which are still relevant are the measures against Libya and Iraq. While no decision has so far been taken on the final repeal of the sanctions against Libya which were suspended in April 1999, the sanctions against Iraq still apply. It is against this background that one is to see sections 52 and 69e of the Foreign Trade and Payments Regulation which are based on section 7 (1) of the Foreign Trade and Payments Act. These sections were added to the Foreign Trade and Payments Regulation immediately after the Iraqi attack on Kuwait in August 1990, their purpose being to implement Resolution 661 (1990) of the UN Security Council. Pursuant to section 52 of the Foreign Trade and Payments Regulation, bank accounts, safe custody deposits or other assets that are held in safe custody or are managed and which belong to Iraq, official bodies in Iraq or their authorised representatives are "blocked" in Germany in such a way that access to such assets requires the authorisation of the Bundesbank. Additionally, payments to the aforementioned group of persons and persons closely associated with that group, among others, require authorisation which is subject to the permissibility conditions laid down in section 69e of the Foreign Trade and Payments Regulation.

Granting exemptions

Authorisations to release assets that had been blocked under the Iraqi embargo were granted by the Bundesbank in individual cases in the past. This was done, for example, to enable German enterprises to enforce claims that had arisen prior to August 1990, for purposes associated with operations authorised by the United Nations outside the scope of the "oil-for-food" programme and for withdrawals from accounts held by the Iraqi embassy for use by the embassy.

Oil-for-food programme

The granting of authorisations described above has no connection with the United Nation's oil-for-food programme. This programme is aimed at generating funds from the sale of oil to buy, for example, humanitarian goods and to repay Iraq's war debts. The proceeds from the sale of oil are credited to a trust account which was set up by the Secretary-General of the United Nations and which is not operated in Germany. In principle, all payments associated with this programme have to be made from this account.

Financial sanctions against the Federal Republic of Yugoslavia, Burma/Myanmar and Zimbabwe

The financial sanctions imposed on the Federal Republic of Yugoslavia, Burma/Myanmar and Zimbabwe to implement EU sanctions are among the legal instruments governing financial sanctions which were adopted after the Maastricht Treaty had come into force.

There have been financial sanctions against the Federal Republic of Yugoslavia since the end of the 1990s. The many changes made

Background to financial sanctions against the Federal Republic of Yugoslavia, Burma/ Myanmar and Zimbabwe

to these sanctions reflect the developments in the Balkan conflict and the political stance of the European Union in this conflict. The sanctions were limited in November 2000; since June 2001 they apply only to Mr Slobodan Milosevic and 12 of his close associates. The sanctions imposed in May 2000 and in February 2002 against Burma/Myanmar and Zimbabwe are to be seen as the EU's reaction to the continuing serious and systematic human rights abuses carried out by the Burmese authorities and the government of Zimbabwe.

It is worth mentioning in respect of these sanctions that the scope for granting exemptions is limited. While the financial sanctions against Burma/Myanmar contain no exemptions, exemptions are permitted as far as the financial sanctions against the Federal Republic of Yugoslavia and Zimbabwe are concerned although the rulings on these vary. No applications for the granting of exemptions under the currently valid regulations have so far been submitted to the Bundesbank.

Financial sanctions against the Taliban of Afghanistan and to combat terrorism

In the light of the terrorist attacks of 11 September 2001, the financial sanctions which were imposed on the Taliban of Afghanistan and those which were designed to combat terrorism, thus implementing the sanctions imposed by the UN Security Council, are of particular importance.

Seen in a historical context, the sanctions against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban of Afghanistan go back to the Afghanistan embargo of February 2000, which was intensified in March 2001 and lifted in May 2002. After the terrorist attacks in the United States the appendix to the EC regulation governing the sanctions, in which the persons and organisations covered by the sanctions are listed, was changed through eight further regulations. In anticipation of these regulations, the Federal Ministry of Economics and Labour, in consultation with the Bundesbank and other authorities, had issued restrictive measures that were based on the Foreign Trade and Payments Act and took the form of general administrative acts. As a result, access to assets of named persons and organisations and payments by German residents to these persons and organisations were made subject to the approval of the Bundesbank. These measures were repealed after the names of the persons concerned had been added to the annex of the aforementioned EC regulation.

Financial sanctions against the Taliban of Afghanistan

The restrictive measures that were directed against certain persons and organisations in an effort to combat terrorism are likewise to be seen in connection with the attacks in the United States in September 2001. These financial sanctions implement UN Security Council Resolution 1373 (2001). The EU list of the persons and organisations affected by the sanctions has been changed three times so far. The measures conform to the model described in this article.

Financial sanctions to combat terrorism

The financial sanctions against the Taliban of Afghanistan and those to combat terrorism

permit the granting of exemptions in individual cases. For obvious reasons, however, no applications for an exemption have so far been submitted to the Bundesbank.

European Union's regulatory authority restricted with respect to "internal EU terrorists"

Regulatory gap in national legislation on "internal EU terrorists"

Reference has been made in connection with the comments on targets of financial sanctions to the restricted regulatory authority of the European Union with respect to those persons and groups of persons who are to be subject to sanctions in the course of implementing UN Security Council Resolution 1373 (2001) and whose domicile is within the EU ("internal EU terrorists"). The legal instruments governing the financial sanctions described so far does not cover this area, with the result that a regulatory gap still exists. It would seem appropriate to close this regulatory gap through a regulation enshrined in the Foreign Trade and Payments Act, which would likewise be implemented by the Bundesbank. Even though both cross-border matters and purely internal German matters that do not come within the scope of the Foreign Trade and Payments Act are involved, the Foreign Trade and Payments Act is the proper place for such a regulation. Even in the case of domestic matters, a restriction of the capital movements and payments of the persons concerned is involved, with the result that there is an internal practical connection to the Foreign Trade and Payments Act. To avoid additional bureaucratic red tape and a division of responsibilities that would be difficult for outsiders to understand, especially in a regulatory matter that is already complicated enough, it is probably advisable not to create any new areas of public responsibilities but, instead, to use existing structures and the available experience for this area of sanctions, too. In the end, national responsibility for implementing sanctions should not depend on whether the person or group of persons concerned happens to have their usual place of domicile outside or inside the European Union or in Germany.