

Ending Impunity for the Violation of Sanctions through Criminal Law

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ABSTRACT

This article discusses the two-step approach proposed by the Commission to end impunity for those violating sanctions (“Union restrictive measures”) following Russia’s invasion of Ukraine. The first step concerns a proposal for a Council Decision 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. The Council is expected to formally adopt that Decision in October 2022, which will be the first time that the list of EU crimes is extended. This will allow the Commission to then immediately put forward a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures as a second step. In this regard, the Commission already suggested elements for such a future Directive in a Communication. Appropriate consultations are ongoing to ensure a high-quality text which empowers law enforcement and judicial authorities, while respecting criminal law principles and fundamental rights.

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I. Introduction

1. Union restrictive measures

Preserving international peace and security is critical in the current context of Russia's invasion of Ukraine. Council Regulations adopted pursuant to Article 215 of the Treaty on the Functioning of the European Union (TFEU)¹ have put in place a series of Union restrictive measures against Russian and Belarusian individuals and companies, some of which date back to 2014.² They include targeted individual measures, i.e., asset freezes and restrictions on admissions (travel bans), as well as sectoral measures, i.e. arms embargoes and economic/financial measures (e.g. import and export restrictions, restrictions on the provision of certain services, such as banking services).³

The implementation and enforcement of restrictive measures are primarily the responsibility of EU Member States. Competent authorities in Member States must assess whether there has been an infringement of the relevant Council Regulation and take adequate steps. These Regulations generally include:

- The restrictive measures;
- The anti-circumvention clause, which prohibits knowing and intentional participation in activities that seek to circumvent the restrictive measures in question⁴;
- Other obligations, in particular to report on steps taken to implement the restrictive measures (e.g. reporting to authorities the amount of assets that have been frozen).

The Council Regulations also systematically include a penalty provision that requires Member States to adopt national rules providing for effective, proportionate and dissuasive penalties, to be applied in the event of infringements of their provisions. The penalty provisions of the most relevant Regulations⁵ have recently been strengthened in response to the Russian aggression against Ukraine. They now oblige Member States "to lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of the Regulation".⁶ However, Art. 215 TFEU cannot serve as a legal basis for the approximation of criminal definitions and the types and levels of criminal penalties.

2. Lack of a common approach on criminal law enforcement

In the absence of such harmonisation at the Union level, national systems differ significantly as far as criminalisation of the violation of Union restrictive measures is concerned. In 12 Member States, the violation of Union restrictive measures is solely a criminal offence. In 13 Member States, the violation of Union restrictive measures can amount to an administrative or a criminal offence.⁷ As far as these 13 Member States are concerned, the criteria according to which the conduct falls within one or the other category are usually related to its gravity (serious nature), either determined in qualitative (intent, serious negligence) or quantitative (damage) terms,⁸ but they are different in each Member State. In two Member States, the specific offence of violation of Union restrictive measures can currently only lead to administrative penalties.⁹

Penalty systems also differ substantially across the Member States. As regards prison sentences, in 14 Member States, the maximum length of imprisonment is between 2 and 5 years. In eight Member States, maximum sentences between eight and 12 years are possible.¹⁰ The maximum fine that can be imposed for the violation of Union restrictive measures – either as a criminal or as an administrative offence – varies greatly across Member States, ranging from €1,200 to €500,000.¹¹

14 Member States provide for criminal liability of legal persons for the violation of Union restrictive measures.¹² In addition, twelve Member States provide for administrative penalties, notably fines, which may be imposed on legal persons when their employees or their management violate restrictive measures. Maximum fines for legal persons range from €133,000 to 37.5 million.¹³

Therefore, law enforcement and judicial authorities currently do not have the right tools and resources available to prevent, detect, investigate and prosecute the violation of Union restrictive measures, including through cross-border cooperation facilitated by EU agencies, notably Europol and Eurojust. For example, Member State A imposes a higher monetary threshold for an offence related to the violation of Union restrictive measures to be deemed serious enough for it to be treated under criminal law or imposes a significantly lower minimum-maximum sentence, which could also be caused by differences in aggravating circumstances, than Member State B. The consequence of these differences could be that either cross-border law enforcement and judicial cooperation might be hampered or similar investigative tools might not be available.

Another example relates to the mutual recognition of freezing and confiscation orders. Art. 3(2) of Regulation (EU) 2018/1805¹⁴ provides for the verification of dual criminality for offences, which are not listed in Art. 3(1), which applies in the case of the violation of sanctions. This means that the recognition and/or execution of freezing and confiscation orders from issuing authorities in Member States which have not criminalised the violation of Union restrictive measures, may be refused by executing judicial authorities in Member States which have criminalised it. As a result of these impediments, in practice only very few individuals or legal persons responsible for the violations of Union restrictive measures are effectively held accountable. For instance, due to a lack of cross-border cooperation, individuals and entities whose assets are theoretically frozen or whose activities are restricted, continue to be able to access their assets in practice and support regimes that are targeted by Union restrictive measures. Also, the proceeds generated by the exploitation of goods and natural resources traded in violation of Union restrictive measures may allow the individuals targeted by those restrictive measures to purchase arms and weapons with which they can continue to perpetrate their crimes.

3. Commission response

Against this background, on 25 May 2022 the Commission adopted (as a first step) a proposal for a Council Decision identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Art. 83(1) TFEU.¹⁵ If the Council accepts the violation of restrictive measures as an EU crime under Art. 83(1) TFEU Commission would be enabled, as a second step, to propose a Directive under the ordinary legislative procedure to approximate the definition of criminal offences and penalties in this regard. Consequently, the Commission adopted in parallel a Communication entitled ‘Towards a Directive on criminal penalties for the violation of Union restrictive measures’,¹⁶ in which the Commission committed itself to putting forward a proposal for a Directive immediately after said Council Decision is adopted. The annex to this Communication suggests elements for such a future criminal law Directive. The proposal for a Council Decision and the Communication will be further discussed in sections II and III below, followed by a short discussion of the way forward in section IV.

II. Proposal for a Council Decision to Include the Violation of Restrictive Measures as EU Crime

The Commission submits that the criteria, referred to in Art. 83(1) TFEU, for identifying a new area of EU crime relating to the cross-border dimension of that area of crime, namely the nature, or impact of criminal offences and the special need to combat on a common basis, are met.¹⁷

This is the case because the violation of Union restrictive measures is a particularly serious area of crime, which – in terms of gravity – is of a similar degree of seriousness to the areas of crime already listed in Art. 83(1) TFEU, since it can perpetuate threats to international peace and security. Furthermore, violations of Union restrictive measures have a clear and, at times, even inherent cross-border dimension. Their violation therefore equates to conduct on a cross-border scale requiring a common cross-border response at Union level. In addition, the fact that Member States have very different definitions and penalties for the violation of Union restrictive measures hinders the consistent application of Union policy on restrictive measures. They can even lead to forum shopping by offenders and a form of impunity because they could choose to conduct their activities in those Member States that provide for less severe penalties for the violation of Union restrictive measures.

Enhancing the dissuasive effect of criminal sanctions by raising the possibility of being criminally prosecuted, the proposal will strengthen the enforcement of restrictive measures in the Member States. It thereby complements the penalty provisions of the Regulations adopted on the basis of Art. 215 TFEU (see above). In particular, the harmonisation of definitions and sanctions will help to overcome the current fragmented approach. It will also decrease the risk of forum shopping by offenders and increase the deterrent effect of sanctions. In conclusion, the violation of Union restrictive measures should be identified as an area of crime for the purposes of Art. 83(1) TFEU.

It should also be considered that the proposed Council Decision and subsequent Directive, approximating criminal definitions and sanctions related to the violation of Union restrictive measures, complement and ensure consistency with other policy areas. In particular, they will complement the Commission proposal for a Directive on asset recovery and confiscation, which was also presented on 25 May 2022.¹⁸ Following the adoption of all three instruments, the rules on tracing and identification, freezing, and confiscation measures will become applicable to property related to the violation of Union restrictive measures. In the end, proceeds of the violation of Union restrictive measures, for example in instances where individuals and companies would make funds available to those subject to targeted financial sanctions (i.e. asset freezes), could become the object of confiscation measures. At the same time, instrumentalities used to pursue the violation of restrictive measures could be confiscated as well.

Extending the list of EU crimes under Art. 83(1) TFEU requires unanimity in the Council after obtaining the consent of the European Parliament. Following swift negotiations in the Council, an agreement on the text was reached on 29 June 2022.¹⁹ The Council also requested the European Parliament to consent under the urgent procedure, which it did on 7 July 2022.²⁰ Given the requirement of a unanimous Council position, the final adoption of the Decision by the Council will, however, only take place in autumn, as Germany needs to pass domestic legislation²¹ before it may vote in favour.

III. Future Criminal Law Directive on Restrictive Measures

The suggested main elements of a future Directive on criminal penalties for the violation of Union restrictive measures have been set out in the annex to the Commission Communication (see above). The future Directive will cover a range of criminal law issues that are customary in EU Directives adopted on the basis of Art. 83 TFEU, notably Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ("PIF Directive")²² and Directive 2014/57/EU on criminal sanctions for market abuse ("Market Abuse Directive")²³. The following explains the scope of the Directive, definitions of the criminal offences, and penalties for natural and legal persons, as well as the rules on jurisdiction, on limitation periods, on cooperation and on the protection of whistleblowers.

1. Scope and definitions

The Directive will apply to violations of Union restrictive measures that the Union has adopted on the basis of Art. 29 TEU or Art. 215 TFEU, such as measures concerning the freezing of funds and economic resources, the prohibitions on making funds and economic resources available, the prohibitions on entry into the territory of a Member State of the European Union, and sectoral economic measures, including arms embargoes.

2. Criminal offences

The provisions on the offences to be approximated by the Directive will include precise definitions of various criminal offences related to violations of Union restrictive measures, such as:

- Making funds, property or economic resources available directly or indirectly, to, or for the benefit of, a designated natural or legal person, entity or body in violation of a prohibition by a Union restrictive measure;
- Failing to freeze funds, property or economic resources belonging to or owned, held or controlled by a designated natural or legal person, entity or body in violation of an obligation to do so imposed by a Union restrictive measure;
- Engaging in financial activities which are prohibited or restricted by a Union restrictive measure;
- Engaging in trade, commercial or other activities where it is prohibited or restricted by a Union restrictive measure;
- Breaching applicable conditions under authorisations granted by competent authorities to conduct certain activities which in the absence of such an authorisation are prohibited or restricted under a Union restrictive measure;
- Failure to comply with an obligation to provide information to the competent authorities;
- Engaging in conduct that seeks to directly or indirectly circumvent a Union restrictive measure;
- Failure to report a violation of a Union restrictive measure, or conduct that seeks to circumvent such a measure in violation of a specific obligation to report contained in a restrictive measure.

The offences to be approximated, unless otherwise provided, will require intent, or at least serious negligence.

The Directive will also include related offences, e.g. money laundering. For the latter, a provision will oblige Member States to take the necessary measures to ensure that the money laundering offence, as described in Art. 3 of Directive (EU) 2018/1673²⁴, applies to property and proceeds derived from the criminal offences covered by the Directive.

The Directive will furthermore contain a provision obliging Member States to take the necessary measures to ensure that inciting, aiding and abetting the commission of the criminal offences referred to in the Directive, as well as the attempt to commit such offences, are punishable as criminal offences.²⁵

3. Penalties for natural and legal persons

The future Directive will also contain a provision on penalties for natural persons. These penalties will be applicable to all offences mentioned above, and equally require Member States to apply effective, proportionate and dissuasive penalties as well as to set out a certain minimum of the maximum criminal penalties. Member States must also ensure that such penalties will be proportionate in relation to the considerable seriousness of the offences.²⁶

In addition, the Directive will include provisions on the liability of legal persons. In accordance with the proposal, Member States would need to provide for the liability of legal persons:

1. for any of the criminal offences referred to above committed for their benefit by persons having a leading position within the legal person; or
2. for the lack of supervision or control by persons in a leading position which has made possible the commission, by a person under their authority, of any of the above-mentioned criminal offences for the benefit of that legal person.²⁷

The Directive will also approximate sanctions applicable to legal persons. In particular, the Member States will be required to take the necessary measures to ensure that a legal person held liable pursuant to the relevant offences is subject to effective, proportionate and dissuasive sanctions, including:

- Exclusion from entitlement to public benefits or aid;
- Temporary exclusion from access to public funding, including tender procedures, grants and concessions;
- Temporary or permanent disqualification from the practice of business activities;
- Withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;
- Placing under judicial supervision;
- Judicial winding-up; and
- Temporary or permanent closure of establishments used for committing the offence.²⁸

In addition, the Directive will oblige Member States to ensure that legal persons that benefit from the commission by others of offences in violation of Union restrictive measures are punishable by fines. The maximum limit should be not less than a certain percentage of the total worldwide turnover of the legal

person in the business year preceding the fining decision. The liability of legal persons would not exclude the possibility of criminal proceedings against natural persons who are the perpetrators of the criminal offences mentioned above.

4. Jurisdiction rules

The Directive will also include rules on jurisdiction. Following the example of Art. 11 of the PIF Directive and Art. 19 of Directive (EU) 2017/541 on combating terrorism²⁹ and taking into account the specific nature of the violation of Union restrictive measures,³⁰ each Member State will need to establish jurisdiction over the offences referred to above in the following situations:

- Where the criminal offence is committed in whole or in part within its territory;
- Where the offence is committed on board of any aircraft or any vessel under the jurisdiction of the Member State;
- Where the offender is one of its nationals or habitual residents;
- Where the offence is committed for the benefit of a legal person, entity or body which is established on its territory;
- Where the offence is committed for the benefit of a legal person, entity or body in respect of any business done in whole or in part within the Union.

In cases where the offender is one of their nationals or habitual residents, Member States would not be allowed to make the exercise of jurisdiction subject to the condition that a prosecution can only be initiated following:

1. a report made by the victim in the place where the criminal offence was committed; or
2. a denunciation from the State of the place where the criminal offence was committed.

5. Limitation periods

The Directive will require the establishment of a minimum limitation period applicable to all offences mentioned above, and of the limitation period for the enforcement of penalties following a final conviction. A relevant example may be found in Art. 12 of the PIF Directive. Thus, Member States have to:

1. prescribe limitation periods for a sufficient period of time after commission of the criminal offences referred to in the Directive in order for those criminal offences to be tackled effectively, with minimum limitation periods applying to offences punishable by a maximum penalty of at least four years of imprisonment;
2. take the necessary measures to enable penalties to be enforced.

6. Cooperation between Member States, Union institutions and bodies, offices and agencies

To enhance the investigation of cases with a cross-border element, the Directive will include a provision which will require mutual cooperation between Member States' competent authorities, Union institutions, bodies, offices and agencies, including Eurojust and Europol.³¹ This provision will also facilitate the sharing

of information on practical issues with authorities in other Member States and with the Commission, notably information on patterns of circumvention, e.g. structures to hide the true ownership/control of assets.

7. Reporting of offences and protection of whistle-blowers

To enhance the effectiveness of the Union restrictive measures, the Commission recently launched the EU Sanctions Whistleblower Tool.³² Due to the importance of the whistleblowers' contribution to the proper application of the Union restrictive measures, the Commission proposal will ensure that the protection granted under Directive (EU) 2019/1937³³ is applicable to persons reporting criminal offences referred to in the Directive on the violation of restrictive measures.

IV. Way Forward

The approximation of criminal definitions and penalties for the violation of Union restrictive measures is a key priority for the Commission in order to put an end to impunity. Once the Council Decision identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Art. 83(1) TFEU is adopted, the Commission will be in the position to immediately propose a Directive under the ordinary legislative procedure. The Directive will include rules on the definition of criminal offences and penalties for the violation of Union restrictive measures and other related provisions in the spirit of other criminal law Directives adopted on the basis of Art. 83(1) TFEU. Appropriate consultations will ensure a high-quality text which will empower law enforcement and judicial authorities, while respecting criminal law principles and fundamental rights. This approach should facilitate the swift adoption of the text by co-legislators. Afterwards, Member States have to transpose the Directive into their domestic criminal legal order so that practitioners can apply the provisions to stop impunity for violations of Union restrictive measures.

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1. Art. 215 TFEU enables the Council to adopt restrictive measures against natural or legal persons and groups, or non-State entities, or to adopt measures providing for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, on the basis of a decision pursuant to Art. 29 TEU.↵
 2. Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, O.J. L 229, 31.7.2014, 1 (consolidated version available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0833-20220604>>); Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, O.J. L 78, 17.3.2014, 6(consolidated version available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0269-20220604>>. All references to websites in this article were last accessed on 14 July 2022.↵
 3. For an overview, see European Commission, Sanctions adopted following Russia's military aggression against Ukraine, available at: <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russias-military-aggression-against-ukraine_en#sanctions>.↵
 4. For an example, see Art. 12 of Council Regulation (EU) No 833/2014, *op. cit.* (n. 2). It is noted that this clause is also applicable if the restrictive measures have not been breached; it is enough to participate in schemes created to that end.↵
 5. Council Regulation (EU) No 833/2014 and Council Regulation (EU) No 269/2014, *op. cit.* (n. 2).↵
 6. *Idem.*↵
 7. Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, Annex, available at: <https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf>. In view of a presentation in the Council Working Party on Judicial Cooperation in Criminal Matters (COPEN), the report was also published in Council doc. 7274/22 of 16 March 2022.↵
 8. Genocide Network, *Prosecution of sanctions*, *op. cit.* (n. 7), section 5.1., p. 22.↵
 9. *Idem.*↵
 10. *Idem*, section 5.2., p.23.↵
 11. *Idem*, section 5.3., p.24.↵
 12. *Idem*, based on the report of the Genocide Network and further investigation by the Commission.↵
 13. *Idem.*↵
 14. Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, O.J. L 303, 28.11.2018, 1.↵

15. European Commission, Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, COM (2022) 247 of 25 May 2022. Art. 83(1) TFEU reads: "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament."↵
16. 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 of 25 May 2022.↵
17. For a detailed explanation see the Commission Proposal, *op. cit.* (n. 15).↵
18. European Commission, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, COM(2022) 245 of 25 May 2022.↵
19. Council doc. 10287/1/22 REV 1 of 30 June 2022.↵
20. 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)), available at: <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0295_EN.html>.↵
21. In accordance with § 7(1) of the Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (*Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*), available at: <<https://www.gesetze-im-internet.de/intvg/BJNR302210009.html>>.↵
22. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, O.J. L 198, 28 July 2017, 29. See for the Directive the article by A. Juszczak and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PIF Directive)", (2017) *eucrim*, 80; W. van Ballegooij, "Protecting the EU's Financial Interests through Criminal Law: the Implementation of the "PIF Directive", (2021), *eucrim*, 177.↵
23. Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), O.J. L 173, 12.6.2014, 179.↵
24. Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, O.J. L 284, 12.11.2018, 22. For a summary, see T. Wahl, "New Directive on Criminalisation of Money Laundering", (2018) *eucrim*, 150-151.↵
25. Cf. Art. 5 of the PIF Directive, *op. cit.* (n. 22) and Art. 6 of the Market Abuse Directive, *op. cit.* (n. 23).↵
26. Cf. Art. 7 of the PIF Directive and Art. 7 of the Market Abuse Directive.↵
27. Cf. Art. 6 of the PIF Directive and Art. 8 of the Market Abuse Directive.↵
28. Cf. Art. 10 of the PIF Directive and Art. 9 of the Market Abuse Directive.↵
29. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, O.J. L 88, 31.3.2017, 6. For a summary, see T. Wahl, "Directive on Combating Terrorism Published", (2017) *eucrim*, 69.↵
30. Council Regulations adopted under Art. 215 TFEU systematically include the following jurisdiction clause: "This Regulation shall apply: (a) within the territory of the Union, including its airspace; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union." This would also be reflected in the Directive. In particular, Member States would be required to extend their criminal jurisdiction to non-EU persons outside the EU territory insofar as their business has an EU nexus (which may, by extension, also concern their assets).↵
31. See also Art. 15 of the PIF Directive, *op. cit.* (n. 22).↵
32. European Commission, Overview of sanctions and related tools, available at <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/overview-sanctions-and-related-tools_en#whistleblower>.↵
33. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, O.J. L 305, 26.11.2019, 17. For a summary, see T. Wahl, "Whistleblower Directive Published", (2019) *eucrim*, 238-239.↵

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