

The New Directive on the Violation of Union Restrictive Measures in the Context of the EPPO

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ABSTRACT

This article outlines the new Directive on the violation of Union restrictive measures (EU sanctions), adopted on 24 April 2024. This legislation, initiated by the European Commission in the aftermath of Russia's war of aggression against Ukraine, above all aims to harmonise across the Member States criminal offences and penalties for the violation of EU sanctions, to strengthen the enforcement of EU sanctions, and to facilitate the confiscation of assets subject to EU sanctions. Lastly, the article examines the possible extension of the competence of the European Public Prosecutor's Office (EPPO) to the criminal offences harmonised by the new Directive.

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I. Introduction

Union restrictive measures (EU sanctions) are an essential tool to promote the objectives of the Common Foreign and Security Policy (CFSP), as set out in Art. 21 of the Treaty on European Union (TEU). Such objectives include safeguarding the Union's values, fundamental interests, security, independence and integrity; consolidating and supporting democracy, the rule of law, human rights, and the principles of international law; and preserving peace, preventing conflicts, and strengthening international security in accordance with the aims and principles of the United Nations Charter. The European Union has in place more than 40 sanctions regimes against third countries, non-state entities, and individuals, adopted either on its own initiative or to implement United Nations Security Council resolutions. EU sanctions may include obligations to freeze funds and economic resources owned by targeted individuals and entities, prohibitions on entry into or transit through the territory of a Member State (visa/travel bans), arms embargoes as well as sectoral economic and financial measures (such as imports and exports restrictions).

While EU sanctions are adopted by the Council, their enforcement lies with the EU Member States. In particular, Member States' competent authorities are responsible for assessing whether there has been an infringement of the relevant Council Regulations and for taking adequate steps. To this end, Council Regulations setting out EU sanctions systematically include a provision on penalties that require Member States to adopt national rules providing for effective, proportionate and dissuasive penalties to be applied in the event of a breach of their provisions. In response to the Russian aggression against Ukraine, such provision has been strengthened by requiring Member States to "lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of the Regulation."¹ Nonetheless, in the absence of EU level harmonisation, implemented penalties provisions for sanctions violations currently differ significantly among the Member States, as highlighted in a comprehensive report published by the Genocide Network in December 2021.²

To address the current fragmentation and strengthen the enforcement of EU sanctions across the Member States, the European Commission took a two-step approach.³ First, on 25 May 2022, the Commission tabled a Proposal for a Council Decision on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Art. 83(1) of the Treaty on the Functioning of the European Union (TFEU).⁴ The Council Decision was adopted on 28 November 2022.⁵ Second, and on that basis, the Commission put forward a proposal for a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures (2 December 2022).⁶ After one year of negotiations, a political agreement on the text of the Directive was reached in December 2023. The Directive was then adopted on 24 April 2024⁷ and entered into force on 19 May 2024. It will have to be transposed into national law within 12 months from the date of its entry into force (i.e., by 20 May 2025).

II. Main Provisions of the Directive

1. Criminal offences

Art. 3 of the Directive provides for a detailed list of criminal offences related to the violation of EU sanctions. Such offences tackle the violation of individual measures (i.e., asset freezes and travel bans), the violation of economic and financial sectoral measures and arms embargoes as well as the circumvention of EU sanctions. The circumvention offence notably addresses cases in which designated persons, entities, and bodies use, transfer to a third party, or otherwise dispose of funds or economic resources directly or indirectly owned, held, or controlled by them in order to conceal these funds or economic resources. It also applies to

cases in which false or misleading information is provided to the competent authorities in order to conceal frozen funds or economic resources. In addition, such offence also covers the failure to report assets belonging to, owned, held, or controlled by designated persons, entities, or bodies and also includes the failure to provide the competent authorities with information on frozen funds or economic resources in breach of the relevant obligations set out in the Council Regulations laying down Union restrictive measures.

Overall, Art. 3 of the Directive maintains the scope and structure of the Commission's initial proposal, with the exception of the proposed criminal offence on the failure to cooperate with the competent authorities, which was taken out in the course of the negotiations.

In addition, Art. 3(2) of the Directive introduces monetary thresholds allowing Member States to distinguish between criminal and administrative offences. This provision, which was inserted by the Council to ensure respect for the criminal law principles of proportionality and *ultima ratio*, enables Member States not to criminalise criminal conduct respectively involving funds, economic resources, goods, services, activities, or transactions of a value of less than €10,000. This threshold does not apply to violations of travel bans.

In terms of *mens rea*, all criminal offences covered by the Directive require intent. Serious negligence, the definition of which is left to national law, is required as a standard for culpability at least for the criminal offence related to the violation of trade restrictions when involving arms or dual-use items.

Lastly, the Directive introduces a specific exclusion from criminal liability for the provision of "humanitarian assistance for persons in need or activities in support of basic human needs provided in accordance with the principles of impartiality, humanity, neutrality and independence and, where applicable, with international humanitarian law." This provision is particularly necessary to ensure sufficient legal clarity and foreseeability for every citizen, especially humanitarian actors, on any possible (criminal) consequences of their actions, so as not to discourage the provision of humanitarian aid when needed and to avoid unintended spillover effects that EU sanctions may produce.

2. Penalties

One of the key objectives of the Directive is to ensure that violations of EU sanctions have similar legal consequences throughout the Union and thus create a level playing field for natural and legal persons. As regards natural persons, Art. 5 of the Directive lays down a graduated system of minimum maximum imprisonment penalties of one, three, and five years (in addition to the general obligation for Member States to lay down effective, proportionate and dissuasive penalties). This system is differentiated on the basis of the gravity of the criminal offence concerned and is applicable once the monetary threshold of €100,000 has been reached. Again, this threshold does not apply to violations of travel bans. In addition to imprisonment, Member States must also provide for ancillary penalties, which may include fines, withdrawals of permits and authorisations, disqualification from holding a leading position within a legal person, etc.

With reference to legal persons, Art. 7 of the Directive obliges Member States to provide for fines as the main penalty for sanctions violations. In this context, one of the novelties introduced by the Directive, compared to previous criminal law instruments, is the calculation method for setting fines at the national level: it is to be based either on the annual worldwide turnover generated by the legal person in the business year preceding the fining decision or the commitment of the offence or on fixed minimum maximum amounts ranging from €8 million to €40 million, depending on the gravity of the offence in question. The introduction of this alternative calculation method is consistent with the approach recently also adopted in the new Directive on the protection of the environment through criminal law.⁸ Even though the Commission's proposal previously relied only on annual global turnover figures, which was considered the most effective and fair calculation

method for setting fines at the national level, the alternative method based on fixed amounts considerably increases the average fine levels currently applicable in the Member States for sanctions violations.

In addition to fines, Member States can also decide to provide for additional penalties applicable to legal persons in their national systems, such as exclusion from entitlement to public benefits or aid; exclusion from access to public funding, including tender procedures, grants, and concessions; disqualification from the practice of business activities; withdrawal of permits and authorisations; placing under judicial supervision, etc.

3. Confiscation

Another main objective of the new Directive is to facilitate the confiscation of assets and resources subject to EU sanctions when there is a link with a criminal activity. This objective is ensured, in particular, through the interlinkage between this Directive and the new Directive on asset recovery and confiscation,⁹ replacing *inter alia* Directive 2014/42/EU (with regard to the Member States bound by the new Directive). Compared to Directive 2014/42/EU, the new Directive on asset recovery and confiscation in fact allows for the confiscation of assets (proceeds or instrumentalities) stemming from a wider set of crimes, including violations of Union restrictive measures.

In addition, the Directive on the violation of EU sanctions introduces a new confiscation regime targeting assets subject to EU sanctions (Art. 10 of the Directive) even where such assets might not be considered proceeds or instrumentalities under the Directive on asset recovery and confiscation. However, this new confiscation regime can only apply in specific cases of sanctions circumvention, i.e., cases in which a listed person (i) uses, transfers to a third party, or otherwise disposes of frozen assets or (ii) provides false or misleading information on frozen assets in order to conceal these assets; in these cases, confiscation must be enabled vis-à-vis a designated natural person, or a representative of a designated entity or body, who has directly committed or participated in the criminal offences concerned. The new regime will have to apply in accordance with the provisions of the Directive on asset recovery and confiscation, particularly regarding the procedural safeguards laid down therein as well as non-standard confiscation methods (i.e., value-based confiscation, third party confiscation, or non-conviction-based confiscation).

4. Enforcement

In view of the overall objective of strengthening the enforcement of EU sanctions, the new Directive introduces two specific provisions concerning internal and external cooperation.

As regards internal cooperation, (Art. 15 of the Directive lays down an obligation for Member States to designate, from among their competent authorities, a dedicated unit or body to ensure coordination and cooperation between law enforcement authorities and authorities in charge of implementing EU sanctions. It also further specifies the tasks of such a unit or body, which include promoting common priorities and an understanding of the relationship between criminal and administrative enforcement, exchanging information for strategic purposes, and ensuring consultation in individual investigations.

In addition, the Directive provides for specific rules on cooperation between Member States' competent authorities, the Commission, and other relevant EU Institutions, Bodies, Offices, and Agencies (IBOAs) such as Eurojust, Europol, and the European Public Prosecutor's Office (EPPO), whose respective roles would come into play within their current competences (Art. 16 of the Directive). The same provision also allocates a specific role to the Commission, which could provide non-operational assistance where appropriate, including via the setting up of an *ad hoc* network of experts and practitioners to share best practices and provide assistance to the competent national authorities. Indeed, the Commission is already playing a

relevant coordination role in the field of sanctions enforcement and implementation, notably in the context of the Task Force “Freeze and Seize”, set up in the aftermath of Russia’s war of aggression against Ukraine, as well as in other relevant Expert Groups already established in the field of Union restrictive measures.

Similarly, the Directive pays heed to the importance of ensuring international cooperation in this field, already ongoing especially through regular exchanges between the Commission, G7 partners, Ukraine, and other relevant third countries.

III. The Possible Extension of the EPPO’s Competence to Violations of Union Restrictive Measures

The possibility of extending the competence of the EPPO to violations of Union restrictive measures has been extensively debated over the past several months, especially in conjunction with a statement from the German and French Ministers of Justice of November 2022,¹⁰ speeches of the European Chief Prosecutor,¹¹ and calls from the European Parliament advocating the extension of the EPPO’s competence.¹²

In terms of procedure, pursuant to Art. 86(4) TFEU, an extension of the EPPO’s competence to any area of “serious crime having a cross-border dimension” (i.e., beyond crime affecting the EU’s financial interests) requires a unanimous decision of the European Council, i.e., by all heads of state or government of the 27 EU Member States. This decision is to be taken after obtaining the consent of the European Parliament and after consulting the Commission.

Furthermore, once the EPPO’s competence has been extended, the Council would need to adopt a revision of the EPPO Regulation, so as to give effect to the new competence for the EPPO and introduce any adjustment that may be required for the EPPO to exercise its investigation and prosecution powers on the new criminal offences. This decision of the Council also needs to be taken unanimously by the Member States participating in enhanced cooperation. If this avenue is pursued, the necessary financial, technical, and human resources implications for the EPPO will have to be assessed as well.

From a substantive point of view, there may be a case for extending the EPPO’s competence to the criminal offences harmonised by the new Directive. First, as outlined above, Union restrictive measures are an essential tool by which to promote the CFSP objectives. Therefore, as with the EU budget, their effective enforcement could be considered as an interest pertaining to the Union itself, thus justifying criminal enforcement at the EU level.

In addition, the violation of EU sanctions is an area of crime that would be in line with the EPPO’s current mandate, as it often requires cross-border investigations into complex economic and financial crimes. This also implies that, at least to a certain extent, the EPPO’s staff would already be equipped with the necessary knowledge and expertise in investigating and prosecuting such criminal offences.

Another argument in favour of extending the EPPO’s competence is that the EPPO is already competent to handle certain cases of violation of Union restrictive measures as long as they are “inextricably linked” to criminal offences affecting the Union’s financial interests. This may be the case, for instance, if customs fraud involves the import into the territory of a Member State of certain goods whose import, export, transit, or transport is prohibited under EU sanctions. In such cases, the EPPO could exercise its competence in accordance with Art. 25(3) of the EPPO Regulation. As outlined above, the new Directive acknowledges this possible role for the EPPO in Art. 16.

At least ten Member States have already expressed their support for a limited extension of the EPPO's competence to violations of EU sanctions, but, in view of the procedure laid down in Art. 86(4) TFEU, the agreement of all Member States on this initiative is of essence.

IV. Concluding Remarks

As stated on several occasions,¹³ the Commission is open to continuing its assessment of the feasibility of extending the EPPO's competence to violations of EU sanctions, most notably within the framework of the evaluation of the EPPO Regulation as required by Art. 119 of the EPPO Regulation,¹⁴ taking into account the position of the 27 EU Member States. Such an extension of material competence is obviously and primarily a political decision, as it involves a further transfer of national competences in the area of criminal prosecution to an EU body. When making such a decision, however, the main consideration should be that the EPPO has now given ample evidence of its added value in investigating and prosecuting crimes that threaten the Union's very fabric. This seems to be a clear case for sanctions violations.¹⁵

1. See Art. 15(1) of 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, OJ L 78, 17.3.2014, 6.↵
2. 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> accessed 23 May 2024.↵
3. For the two-step approach developed by the Commission and further details on the background behind this initiative, see W. Van Ballegooij, "Ending Impunity for the Violation of Sanctions through Criminal Law", (2022) *eucrim*, 146-151.↵
4. 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 final.↵
5. Council Decision (EU) 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 L 308, 29.11.2022, 18.↵
6. Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures, COM(2022) 684 final.↵
7. Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, OJ L, 2024/1226, 29.4.2024, 1.↵
8. Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, OJ L. On this topic, see: F. Giuffrida and P. Csonka, "The protection of the environment by means of criminal law in the European Union: recent trends and future perspectives", in: M. Luchtman (ed.), *Of swords and shields: due process and crime control in times of globalisation: Liber Amicorum Prof. dr. J.A.E. Vervaeke*, 2023, pp. 387-395.↵
9. Directive (EU) 2024/1260 of the European Parliament and of the Council on asset recovery and confiscation, OJ L, 2024/1260, 2.5.2024, 1.↵
10. See E. Dupond-Moretti and M. Buschmann, Op-Ed "Violations of EU sanctions must be prosecuted by the European Public Prosecutor's Office", *Le Monde*, 29 November 2022, available at: <https://www.lemonde.fr/en/opinion/article/2022/11/29/violations-of-eu-sanctions-must-be-prosecuted-by-the-european-public-prosecutor-s-office_6006013_23.html> accessed 23 May 2024.↵
11. See *inter alia* Speech of the European Chief Prosecutor, Laura Kövesi, at the Legal Affairs Committee of the Bundestag - 9 November 2022, <<https://www.eppo.europa.eu/en/media/news/european-chief-prosecutor-laura-kovesi-speaks-bundestag>> accessed 23 May 2024.↵
12. See *inter alia* European Parliament resolution of 18 January 2023 on the implementation of the common foreign and security policy – annual report 2022 (2022/2048(INI)), OJ C 214, 16.6.2023, p. 26, para 18: "... calls on the European Public Prosecutor's Office to be tasked with ensuring the consistent and uniform investigation and prosecution of such crimes throughout the EU". A reference to the possible extension of the EPPO's competence is also present in Amendment 5 of the LIBE draft report on the proposed Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures, PE746.946v01-00.↵
13. See *inter alia* Commissioner Didier Reynders' reply to the oral question addressed by the LIBE Committee at the EP plenary session of 14 June 2023, available at: <<https://www.europarl.europa.eu/plenary/en/vod.html?mode=unit&vodLanguage=EN&playerStartTime=20230614-19:29:53&playerEndTime=20230614-19:36:11#>>> accessed 23 May 2024.↵
14. Pursuant to Art. 119 of the EPPO Regulation, the Commission should, by 1 June 2026, commission an evaluation and submit an evaluation report on the implementation and impact of the Regulation, as well as on the effectiveness and efficiency of the EPPO and its working practices.↵
15. See P. Csonka, "La Directive relative à la violation des mesures restrictives de l'Union et le Parquet européen", (2023) 4 *Revue du droit de l'Union européenne*, 87-103.↵

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