Proposal for a directive on the violation of Union restrictive measures

OVERVIEW

The European Union (EU) has established over 40 regimes of sanctions against third countries, entities, and legal and natural persons. These restrictive measures include arms embargoes, import and export bans, freezing of funds and economic resources, and travel bans. Whereas the adoption of EU sanctions is centralised at EU level, their implementation and enforcement lies with the Member States. The significant differences between national systems, particularly in terms of offences and penalties for breaches of EU sanctions, are thought to weaken their efficacy and the EU's credibility.

Following the Council's decision to add the violation of EU sanctions to the areas of 'particularly serious crime with a cross-border dimension', the European Commission issued, in December 2022, a proposal for a directive to harmonise criminal offences and penalties for such violations.

On 9 June, the Council adopted its general approach. In the European Parliament, the Committee on Civil Liberties, Justice and Home Affairs adopted its report on the proposal on 6 July 2023, along with a decision to enter into trilogue negotiations.

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

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<th>Committee responsible:</th>
<th>Civil Liberties, Justice and Home Affairs (LIBE)</th>
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<td>Rapporteur:</td>
<td>Sophia In’t Veld (Renew, the Netherlands)</td>
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<td>Leopoldo López Gil (EPP, Spain)</td>
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<td>Shadow rapporteurs:</td>
<td>Thijs Reuten (S&amp;D, the Netherlands)</td>
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<td>Saskia Bricmont (Greens/EFA, Belgium)</td>
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<td>Patryk Jaki (ECR, Poland)</td>
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<td>Anders Vistisen (ID, Denmark)</td>
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Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Introduction

European Union (EU) restrictive measures (or sanctions) are imposed under the framework of the common foreign and security policy (CFSP), in order to promote the EU’s objectives on the international stage, which include safeguarding the EU’s values, fundamental interests and security; preserving peace and strengthening international security; and consolidating and supporting democracy, the rule of law, human rights and the principles of international law. Today, the EU has over 40 sanctions regimes in place against third countries, entities, and legal and natural persons, either implementing United Nations Security Council (UNSC) sanctions or based on autonomous EU decisions. Restrictive measures include arms embargoes, import and export bans on certain objects or substances, freezing of funds and economic resources and travel bans. Most measures are targeted at individuals and entities, and consist of asset freezes and travel bans.

Whereas the adoption of EU sanctions is centralised at EU level, their implementation and enforcement remains with the individual Member States. This has led to discrepancies between national systems and a lack of uniform implementation of EU sanctions, arguably undermining the EU’s ability to act as a united front and the efficacy of the measures. Member States are obliged to adopt national rules providing for effective, proportionate and dissuasive penalties for infringements. Yet, national legislations differ significantly in this respect. The violation of EU sanctions is not considered a criminal offence in all Member States, and the penalty systems vary widely from one Member State to another. Furthermore, few prosecutions and convictions have taken place for violations of sanctions, as evidenced by an expert report (Genocide Network, Eurojust) published in 2021. The report argues that ‘investigating and prosecuting such violations could prove critical in the overall fight against impunity for core international crimes, including genocide, crimes against humanity and war crimes .... ’ In the context of Russia’s aggression against Ukraine, it has become essential for the EU to ensure the effective and consistent implementation of the packages of sanctions adopted, including trade and economic sanctions, asset freezes and travel bans against designated Russian and Belarusian individuals and companies.

In order to make it easier to investigate, prosecute and punish violations of EU sanctions and ensure their uniform implementation in all Member States, on 2 December 2022 the Commission adopted a proposal for a directive to harmonise criminal offences and penalties for such violations. The EU was granted the competence to harmonise measures in this area by the Council’s unanimous Decision of 28 November 2022 to add the violation of EU restrictive measures to the areas of ‘particularly serious crime with a cross-border dimension’ set out in Article 83(1) of the Treaty on the Functioning of the European Union (TFEU).

Existing situation

Enforcing EU sanctions: discrepancies between Member States

One of the most important tools in the EU’s foreign policy arsenal, the adoption of EU restrictive measures, requires a Council CFSP decision under Article 29 of the Treaty on European Union (TEU), agreed unanimously by the Member States. Measures such as arms embargoes or travel bans are implemented directly by the Member States. For the freezing of assets and/or other types of economic or financial restrictions, an implementing Council regulation under Article 215 TFEU is also needed, requiring a qualified majority vote. The Council regulations are directly and uniformly applicable in all Member States, but in practice additional legislation at national level may be necessary. Unlike their adoption, which is a centralised process, the implementation and enforcement of EU sanctions are the purview of Member States; the European Commission monitors their correct and uniform implementation and offers guidance to Member States. In addition, Member States must keep each other and the Commission informed about any interpretation, implementation and enforcement issues, including information in respect of national measures to implement sanctions; of violation and enforcement problems and judgments of national courts; of derogations granted; and of accounts and amounts frozen, in line with relevant legal requirements.
The Council decisions and regulations imposing restrictive measures include, besides the restrictions, an anti-circumvention clause, which prohibits knowing and intentional participation in activities that seek to circumvent the restrictive measures. They also comprise the obligation for Member States to take the necessary measures to ensure compliance with the restrictive measures, and to provide for ‘effective, proportionate and dissuasive penalties’ for their infringement.

In light of these general provisions, Member States have had the freedom to design their national frameworks on sanctions, to designate the competent authorities in charge of implementation and enforcement and to decide which powers they should have, and to adopt laws that penalise violations of sanctions and set penalties for these breaches.

- Heterogeneity of national authorities involved in sanctions implementation and enforcement

With few exceptions, most Member States have designated several national bodies as competent authorities responsible for sanctions implementation at national level. Overall, more than 180 national authorities are involved in sanctions implementation and enforcement in the EU, with some Member States having officially notified more than 10 authorities (Denmark, Latvia, Lithuania, Romania, Sweden), while others have just one or two (Croatia, Malta, Finland, Cyprus, Germany, Portugal). According to some experts, this ‘web of enforcement actors’ is undermining the legitimacy of CFSP sanctions in the long term. In addition, these national agencies present significant differences in terms of size, resources and expertise, impacting their ability to detect, investigate and prosecute breaches of sanctions. This fragmentation also has a negative impact on cross-border cooperation.

- Uneven implementation of sanctions across the EU

Regarding the implementation of sanctions, experts point to the difficulty of translating EU legal acts instituting the sanctions into tangible actions, as exemplified by some cases of sanctions evasion. They also underline that the Commission has not launched any infringement proceedings in response to insufficient or incorrect sanctions enforcement. According to other authors, some Member States may not have the necessary resources or political will to implement and enforce sanctions stringently. For example, in the case of the restrictive measures against Russia, the Commission reported that only seven Member States were responsible for the €17 billion in asset freezes under the Russia sanctions regime in October 2022. In November 2022, the top asset-freezing states were Belgium (€3.5 billion), Luxembourg (almost €2.5 billion), Italy (€2.3 billion), Germany (€2.2 billion), Austria and Ireland (€1.8 billion each), France (€1.3 billion), and Spain (more than €1 billion), making up around 90% of the total amount of assets frozen in the EU. On the other hand, there may be discrepancies in the reporting of frozen assets, as some Member States have, in reality, frozen higher amounts under their own national regime than those reported to the Commission in connection with the EU regime. One example is Poland, which implements an autonomous sanctions regime in addition to applying EU and UN sanctions. Belgium is another example, with €250 billion frozen, while the reported amount under the EU sanctions regime against Russia is put at €3.5 billion.

Besides variations across Member States in national authorities’ resources and capabilities to enforce sanctions, the process of implementing sanctions depends greatly on the private sector, including banks and financial services providers, which experience a series of challenges in ensuring compliance with the sanctions regimes. It has been argued that sanctions have become more complex, hence private sector actors must invest in additional resources to ensure compliance, in particular companies that are active across jurisdictions with different requirements.

- Few enforcement actions against violations of sanctions

By 2021, Member States had conducted few enforcement actions against infringements of restrictive measures, seen as a sign of the insufficient priority given by Member States to investigating and prosecuting violations of EU sanctions. Currently, the number of enforcement actions seems to be on the rise, particularly in the context of the sanctions against Russia. The Dutch
Public Prosecution Service has launched, since 2022, 45 criminal investigations concerning suspected circumventions of sanctions against Russia. In France, 19 investigations have so far been opened in connection with sanctions against Russia, and Germany has also taken a tougher stance in recent years in enforcement. Even Member States who were criticised for low enforcement of sanctions breaches have promised to take severe measures against sanctions violations.

- Differences regarding the criminalisation of sanctions violations and penalties

National legislation shows significant differences, not only when it comes to criminalising the violation of EU sanctions, but also with regard to the types and levels of penalty imposed. The Commission argues that this ‘fragmented approach’ creates the risk of ‘forum shopping’ by individuals and companies and undermines the credibility of the EU’s objectives.

According to the report by the Genocide Network, 12 Member States treat the violation of sanctions as a criminal offence, another 13 categorise sanctions violations as either criminal or administrative offences, while in two Member States the violation of sanctions is an administrative offence. 4

The criteria according to which Member States with both an administrative and criminal sanctioning regime classify a sanctions breach as an administrative or criminal offence vary. Usually, the gravity of the act is taken into account, whether it was committed intentionally or with negligence, whether it caused serious damage or led to substantial benefit for the perpetrator, if it was committed within the framework of an organised crime group, etc. In one case (Austria), a violation is considered criminal rather than administrative if the financial or other legal transaction made in breach of EU sanctions exceeds €100 000. In Lithuania, the violation of sanctions is classified as a criminal offence if it causes major damage to the interests of the Republic.

Regarding penalties, in countries classifying sanctions violations as a criminal offence, these include imprisonment and/or criminal fines. Maximum prison terms vary from two years to 12 years (see Figure 1). 5 In cases of negligence or serious negligence, some Member States provide for lower maximum prison terms or for financial penalties only.

Figure 1 – Maximum prison sentences in EU Member States, in years

![Figure 1](image_url)

Source: Genocide Network report, 2021, with updates by the author.

Regarding financial penalties (criminal or administrative), their level varies greatly across Member States and they can be applied to natural and legal persons. The potential maximum criminal fine for an individual varies from €1 200 in Estonia (300 fine units) to €5 million in Malta, and even up to €10.8 million in Germany (i.e. 360 full daily rates). For legal persons, the potential maximum fine for sanctions breaches ranges from €6 000 in Romania (administrative contravention) and €133 000 in Croatia to €10 million in Malta and Spain, and even €37 million in Latvia. Some Member States may impose fines based on a percentage of the annual turnover of the legal person. In Lithuania, recently amended legislation states that, in cases of repeated sanctions breaches or where the value of the goods, services or funds that are the subject of the violation is more than €100 000, a fine of up to
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5% of the gross annual income of the legal person may be imposed, but not less than the value of the goods or funds constituting the violation and not less than €20,000. In Spain, the financial penalty for very serious infringements is set at a maximum of 5% of the net assets of the legal person, double the value of the operation or €1.5 million, whichever is greater. In Portugal, fines for legal persons are calculated in relation to the prison sentence envisaged for individuals (up to 600 days of fines, with one day totalling between €100 and €10,000, resulting in up to €6 million). National laws may envisage additional penalties, such as confiscating assets or proceeds from the breach of sanctions, suspending or withdrawing the license to operate certain activities, etc.

Efforts to address the problems

The need to standardise and strengthen implementation of EU sanctions has been recognised for almost two decades. In 2003, the Council adopted guidelines on implementation and evaluation of CFSP restrictive measures (sanctions), which have been updated several times. They provide technical guidance for drafting, implementation and monitoring of CFSP sanctions. In 2004, the Council adopted EU best practices for the effective implementation of restrictive measures focused on the listing process and implementation of financial sanctions, last updated in June 2022.

In 2021, the Commission’s communication on ‘the European economic and financial system: Fostering openness, strength and resilience’ included initiatives to strengthen implementation and enforcement of EU sanctions, such as: the Sanctions Information Exchange Repository, a database which would enable the exchange of information between Member States and the Commission on the implementation and enforcement of sanctions (its state of development is unclear); a single contact point for enforcement and implementation issues with cross-border dimensions (state of play unclear); and a system to report sanctions violations anonymously (see below).

However, it has been Russia’s war against Ukraine which prompted a sense of urgency and increased interest by the Member States and the Commission in improving sanctions enforcement, in order to ensure the credibility and effectiveness of the sanctions regime instituted against Russia. Experts claim the war in Ukraine has greatly changed the design of EU sanctions. In particular, new obligations aim to ensure more effective tracing of assets, while a stronger focus on criminal enforcement is meant to counter circumvention and maximise the impact of sanctions. Council Regulation (EU) 269/2014 on sanctions in respect of actions threatening the territorial integrity, sovereignty and independence of Ukraine, as amended, institutes the obligation for all natural and legal persons, entities and bodies under EU jurisdiction to provide to Member State authorities and the Commission information not only on assets already frozen, but also on assets not yet treated as frozen. Also, for the first time, listed persons and entities must disclose to national competent authorities funds or economic resources belonging to, owned, held or controlled by them which are located in the EU. The failure to report on time would be treated as a breach of EU sanctions, with consequences under each Member State’s national legislation, including criminal penalties. This obligation has been contested before the Court of Justice of the EU. Furthermore, Council Regulation (EU) 2023/426 of 25 February 2023 obliges EU financial operators to report information regarding assets moved, used, transferred or accessed in the two weeks prior to the listing of the person or entity. In addition, Council Regulations (EU) 833/2014 on sanctions over Russia’s actions in Ukraine, and 269/2014 (mentioned above), called on Member States to introduce in their national law ‘appropriate criminal penalties’ for the breach of the measures included therein, and now include the Member States’ obligation to provide for appropriate measures to confiscate the proceeds of infringements to their provisions.

The Freeze and Seize Task Force was set up in March 2022 to coordinate actions between the Member States, the Commission and EU agencies such as Eurojust and Europol, but also with third countries, such as the United States and Ukraine, to seize assets of designated persons and entities. The Task Force operates alongside the G7 REPO Task Force. The Commission also unveiled the EU sanctions whistle-blower tool, where citizens may voluntarily report information about past, ongoing or planned sanctions violations and circumvention attempts, while a high-level expert
A group on sanctions implementation gathers representatives from all Member States and the Commission. Moreover, Europol’s Operation Oscar has supported national investigations in identifying links to organised crime and money laundering of designated individuals and entities and supporting the tracing and seizure of criminal assets. The EU also appointed an International Special Envoy for the Implementation of EU sanctions, who is in charge of reaching out to third countries to address circumvention of sanctions.

A Dutch proposal to establish a sanctions enforcement headquarters at EU level, where Member States can exchange information on possible circumvention of sanctions, has reportedly received some support. Other ideas touted include enhancing the mandate of the Anti-Money-Laundering Agency to receive information on any violations or circumvention of financial sanctions, or extending the competence of the European Public Prosecutor’s Office (EPPO) to violations of EU restrictive measures. However, the most significant attempt to reform the national enforcement of EU sanctions consists of the three-step approach of listing the violation of EU restrictive measures as a serious crime in Article 83 TFEU (Council Decision (EU) 2022/2332 of 28 November 2022), followed by the proposals to harmonise the definitions and penalties for violation of sanctions and to reform the asset recovery rules to allow confiscation of assets following violations of EU sanctions.

Some Member States have recently amended their legislation to improve the implementation of restrictive measures. For example, Germany granted national competent authorities the necessary powers to deal with frozen funds and economic resources of persons under sanctions and introduced the obligation for such persons to report on their funds and assets. It also set up a central authority for the enforcement of sanctions, with the competence to investigate and seize assets of persons and companies subject to sanctions and to cooperate with foreign authorities. In the Netherlands, a National Coordinator for Sanctions Compliance and Enforcement was appointed to enhance operational cooperation between the national institutions involved in implementing the sanctions against Russia, and to cooperate with international partners. Lithuania amended its law on international sanctions to include the possibility of imposing national restrictive measures; other legislation was amended to provide for increased fines on individuals and legal entities for violating restrictive measures (both national and international).

**Parliament's starting position**

On several occasions, the European Parliament has called for the 'full and effective implementation of existing sanctions throughout the EU'. In its resolution of 7 April 2022, Parliament called on the Member States to create a legal basis in national jurisdictions (if they do not already exist) for full and effective compliance with sanctions and ‘to ensure that national penalties for breaching EU sanctions are effective, proportionate and dissuasive’. The Commission and EU supervisory authorities should monitor implementation and address circumvention. Parliament also welcomed the ‘announcement of a sanctions information repository and a roadmap ... for moving from the detection of systematic non-compliance with EU sanctions to infringement procedures before the Court of Justice of the European Union’. Parliament also called on the Commission to ‘propose the creation of a dedicated body to monitor the enforcement of financial sanctions and other EU restrictive measures’ and to map and publish the assets frozen and seized by each Member State.

In its resolution of 19 May 2022, Parliament demanded that all relevant assets held by listed Russian oligarchs in the EU be confiscated in accordance with the EU’s legal framework. In its resolution of 23 November 2022 recognising Russia as a state sponsor of terrorism, Parliament called on the Member States to actively prevent, investigate and prosecute any circumvention of the sanctions.

On 16 February 2023, Parliament’s resolution on one year of Russia’s invasion and war of aggression against Ukraine calls on the Commission and the Member States to ensure the swift implementation and strict enforcement of all sanctions, and demands the rigorous prosecution of companies, associations and individuals who participate in the circumvention of sanctions.
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European Council and Council starting position

In its conclusions on Ukraine of 30 May 2022, the European Council invited the Council 'to swiftly examine' the Commission's proposal on criminal law measures in cases of violation of EU sanctions. In its June 2022 conclusions, the European Council demanded work be swiftly finalised on the Council decision adding the violation of EU sanctions to the list of EU crimes. In its October 2022 conclusions, the European Council stressed the importance of ensuring effective implementation of sanctions, preventing circumvention and its facilitation. The European Council's conclusions of 23 March 2023 underline 'the importance and urgency of stepping up efforts to ensure effective implementation of sanctions at EU and national level'. The European Council invited the Council and Commission to strengthen all necessary enforcement instruments and to develop, together with the Member States, a fully coordinated approach. In its conclusions of 29 March 2022 on the EU's economic and financial strategic autonomy, the Council expressed support for efforts to identify and combat practices that aim to circumvent EU sanctions and underlined the importance of enforcing strictly and uniformly all sanctions that are adopted.

Preparation of the proposal

To prepare for the proposal, the Commission conducted consultations with the Member States, as well as Europol and Eurojust, in the autumn of 2022, based on a questionnaire regarding potential provisions on offences, penalties, jurisdiction rules and cross-border cooperation to be included in the proposed directive. The above-mentioned 2021 report by the Genocide Network secretariat at Eurojust has been another source of expertise. Furthermore, participants in the specific subgroup of the Commission's Freeze and Seize Taskforce, dedicated to strengthening the implementation of EU sanctions, have expressed support for a common criminal law approach to tackle violations of EU sanctions. The Commission's Expert Group on EU Criminal Policy also welcomed the proposal to harmonise definitions and penalties for the violation of EU sanctions.

The Commission has argued that adopting harmonised rules on the definition of criminal offences and penalties regarding the violation of EU restrictive measures was a matter of urgency, thereby justifying the lack of an impact assessment for the proposal. However, experts have criticised the choice not to carry out an impact assessment for what is considered a significant reform of the way restrictive measures are enforced.

The changes the proposal would bring

The proposed directive is based on Article 83(1) TFEU, which now covers, following the adoption of Council Decision 2022/2332, the violation of EU restrictive measures as a serious cross-border crime. Its main objectives are to: approximate definitions of criminal offences related to the violation of Union restrictive measures; ensure effective, dissuasive and proportionate penalty types and levels for criminal offences related to the violation of EU restrictive measures; foster cross-border investigation and prosecution; and improve the operational effectiveness of national enforcement chains to foster investigations, prosecutions and sanctioning. Denmark is not bound by the Directive due to its Treaty opt-out, while Ireland notified, on 3 March 2023, its intention to take part in the adoption and application of the Directive. The transposition deadline is set at six months after its entry into force.

Scope and definitions

According to Article 2, the proposed directive will apply to violations of EU restrictive measures adopted on the basis of Article 29 TEU and Article 215 TFEU. Article 2 also includes the definitions of terms used throughout the proposal, such as 'designated person, entity or body', 'funds' and 'economic resources','freezing of funds' and 'freezing of economic resources'.

[7]
Offences covered by the proposed directive

Article 3 of the proposal provides an exhaustive list of offences that must be criminalised by the Member States, if committed intentionally, and covering:

- Violations of the prohibitions and restrictions contained in EU restrictive measures.
  These include: making available funds or economic resources to designated persons and entities; failing to freeze the funds and economic resources belonging to designated persons or entities; enabling entry or transit through the territory of a Member State of designated persons; doing business with a third State, which is prohibited or restricted under EU sanctions; engaging in prohibited trade in goods or services, as well as providing brokering or other services related to those goods and services; engaging in prohibited or restricted financial activities; providing other services restricted under EU sanctions, such as legal advice, accounting, engineering services, etc.;

- Conduct intended to circumvent EU restrictive measures.
  This refers to: the transfer of funds and economic resources of designated persons, entities or bodies to a third party with the intention of concealing them; providing false or incomplete information to conceal that a designated person, entity or body is the ultimate owner or the beneficiary of funds and economic resources; failure by a designated person, entity or body to report funds or economic resources owned, held or controlled by them; and failure to cooperate with the competent authorities in verifying related information;

- Breaching conditions under authorisations granted by competent authorities to conduct certain activities otherwise prohibited by the restrictive measures.

The activities amounting to violations of the prohibitions and restrictions contained in EU restrictive measures also constitute a criminal offence when committed with serious negligence. Article 4 criminalises inciting and aiding and abetting the commission of criminal offences in Article 3, as well as the attempt to commit most of the offences listed in Article 3. Member States are also obliged to ensure liability of legal persons (Article 6), without excluding the possibility of criminal proceedings against natural persons who are perpetrators, inciters or accessories of offences in Articles 3 and 4.

The proposal amends the Anti-Money Laundering Directive (Directive (EU) 2018/1673) to include the violation of EU sanctions as a predicate offence for money laundering offences (Article 17).

Certain activities are exempted from criminalisation, such as the provision of goods and services meant to fulfil the basic human needs of designated persons and their dependent family members, as well as the delivery of humanitarian aid (Article 3(6)). Moreover, according to Article 3(5), legal professionals are not obliged to report information obtained in strict connection with judicial, administrative or arbitral proceedings, or when ascertaining the legal position of a client. In such circumstances, legal advice is protected by professional secrecy, unless the legal professional is taking part in the violation of EU restrictive measures or offers legal advice to this end, or knows that the client is seeking legal advice with the aim of violating EU sanctions.

Criminal penalties

The proposal sets minimum rules on penalties, for both natural and legal persons. For natural persons, Member States must introduce a penalty which provides for imprisonment for the offences in Article 3. The proposal sets a threshold of €100 000 to distinguish more serious offences, which should be punished with at least:

- One year imprisonment for conduct intended to circumvent EU restrictive measures, namely for failure to report by designated persons, entities or bodies funds owned or controlled by them, for failure to provide information on funds belonging to designated persons/entities not yet frozen, and for failure to cooperate with competent authorities in the verification of related information.
- Five years’ imprisonment for the rest of the offences in Article 3.
Member States must also ensure that additional penalties are available for natural persons having committed the offences in Articles 3 and 4. Penalties against legal persons must include criminal or non-criminal fines, exclusion from entitlement to public benefits or aid, exclusion from access to public funding, including tender procedures, grants and concessions, and may include other penalties detailed in the proposal, such as placing under judicial supervision, closure of establishments used for committing the offence, etc.

The proposal provides for rules for establishing jurisdiction and includes the obligation for Member States to provide for limitation periods that enable the investigation, prosecution, trial and judicial decision of criminal offences in Articles 3 and 4 for 'a sufficient period of time' after the commission of the offence. For those offences punishable by a maximum penalty of at least five years of prison, this limitation period should be set at a minimum of five years. Further conditions on limitation periods are set by the proposal. It also includes aggravating and mitigating circumstances (Articles 8 and 9) and obliges Member States to allow the use of investigation tools available for serious and organised crime for the investigation and prosecution of violations of EU sanctions.

Confiscation

Under Article 10 of the draft directive, Member States will have to ensure that funds or economic resources are considered proceeds of crime when the designated person, entity or body commits or participates in an offence of circumventing EU sanctions (by transferring these funds and resources to a third party in order to conceal them, and by providing false or incomplete information to conceal that a designated person, entity or body is the ultimate owner or beneficiary of funds and economic resources). In effect, circumventing an EU sanction would transform a frozen asset into proceeds of crime, meaning Member States would be able to confiscate the asset.

Other provisions

Member States must cooperate with each other and with other EU bodies, such as Europol, Eurojust, the EPPO and the Commission, within their respective competences. Member States must also send annual statistics to the Commission on the criminal offences in Articles 3 and 4 and related penalties. The Commission must report to the European Parliament and the Council on the transposition of the Directive into national law, two years after the transposition deadline. Five years after transposition, the Commission must evaluate the impact of the Directive.

Fundamental rights

Recital 24 mentions that the Directive respects the fundamental rights and principles enshrined in the EU Charter of Fundamental Rights, in particular the rights to liberty and security, the protection of personal data, the freedom to conduct a business, the right to property, to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, including the right not to incriminate oneself and to remain silent, etc. In transposing the Directive, Member States must ensure respect for these fundamental rights and principles and for the procedural rights of suspected or accused persons in criminal proceedings. The Directive would also protect whistleblowers who report information or give evidence in investigations on the violation of EU sanctions.

Advisory committees

On 22 March 2023, the European Economic and Social Committee (EESC) adopted its opinion, which welcomed the Commission's proposal, but regretted the lack of an impact assessment. Among other things, the EESC proposes to include humanitarian agencies and personnel in the humanitarian exception, and to ensure that the private sector and civil society are informed and given appropriate support in adjusting to the new requirements. Member States should ensure adequate resources are allocated to detect, prosecute and punish sanctions violations. Finally, the EESC underlines the need to guarantee the due process rights and other human rights safeguards of accused persons.
National parliaments

National parliaments could submit reasoned opinions on grounds of subsidiarity and proportionality until 21 February 2023. The German Bundesrat issued an opinion, which welcomed the objectives of the proposed directive but argued that Article 4(1) and (2) of the proposal should be reworded in a restrictive manner, so that only instigating and aiding and abetting intentionally committed criminal acts or attempting an intentional criminal act should be punishable.

Stakeholder views

Following the publication of the proposal, between 5 December 2022 and 30 January 2023, the Commission conducted a public consultation, which received 84 replies. The contributions of some non-governmental organisations welcomed the exclusion of humanitarian assistance from criminalisation (Article 3(6) of the proposal). The European Savings and Retail Banking Group proposed that the Directive should be limited to offences committed with intent and exclude serious negligence from its scope, so as to limit the risk of criminalisation of compliance officers in credit institutions due to human error. The Federal Bar Association and the German Bar Association, together representing more than 200,000 lawyers in Germany, consider the proposal problematic for legal professionals, particularly as it seeks to criminalise 'legal advice' which is prohibited by EU sanctions. Not only is it difficult to differentiate between legal advice and legal representation services (not prohibited), but also this approach may restrict freedom of communication with lawyers and threaten the protection of professional secrecy.

Some Member State governments also raised doubts about the proportionality of the provision to consider frozen assets as proceeds of crime when linked to the offence of circumventing sanctions. In November 2022, the French and German Justice Ministers called for the joint prosecution of breaches of sanctions at EU level, by extending the mandate of the European Public Prosecutors Office (EPPO). Answering a parliamentary question, the Commission says it has started assessing the role the EPPO could play in investigating and prosecuting violations of EU sanctions. However, as the EPPO mandate is restricted to crimes affecting the EU’s financial interests, any extension of its competences to other criminal areas listed in Article 83(1) TFEU would need the European Council’s unanimous decision and the revision of the EPPO Regulation. On 14 June 2023, the European Parliament held a debate with the Commission and Council on the extension of the EPPO’s mandate to the violation of EU restrictive measures.

Academic views

Some academics argue that the proposal leaves out certain aspects. For instance, the proposal is silent on the coexistence of the administrative and criminal enforcement regimes in those Member States which provide for both. The question that arises is over the extent to which those Member States will be free to apply their administrative regime instead of the criminal regime mandated by the Directive. Furthermore, the proposal does not address the evidentiary standards for initiating prosecutions and for conviction, nor the burden of proof for conviction, which would leave differences between Member States. Other experts have criticised the absence of an impact assessment, arguing that the proposed criminal reform will have an impact on the responsibilities of actors involved in enforcing EU sanctions. Moreover, they wonder whether criminalising the circumvention of sanctions may result in new burdensome standards for the Council and national authorities, by triggering stronger protection of the rights of the accused and stronger safeguards in criminal proceedings, ultimately risking jeopardising efforts to counter circumvention.

Legislative process

The Council had several discussions on the file. On 27 February 2023, the Council Presidency published a progress report on the negotiations on the proposal. On 9 June 2023, the Council adopted its general approach on the proposal.
The Council’s general approach sets out a number of changes to the proposal. First, it limits the scope of the Directive to serious violations, so that violations involving funds, economic resources, goods, services and transactions of a value of less than €10 000 should not be covered, as well as minor cases of violations related to travel bans. Moreover, the circumvention no longer covers failure to cooperate with authorities in verifying information related to supposed circumvention attempts. The Council also excludes acts committed with serious negligence from the scope of the Directive. The goods covered by the Directive now expressly include military goods and technology included in the EU Common Military List and dual-use items. While mentioning that exemptions or derogations from the EU restrictive measures may be granted, such as for the delivery of humanitarian aid, the draft text deletes the provision excluding the criminalisation of delivery of humanitarian aid. The Council also limits the situations where an attempt to commit a crime is punishable as a criminal offence by excluding the failure to freeze funds or economic resources; enabling the entry or transit through Member State territory of designated natural persons or the breach of authorisations granted by competent authorities.

Regarding criminal penalties for natural persons, the Council draft removes the maximum penalty for the entry or transit through Member State territory of designated natural persons. Conversely, it maintains the five-year prison sentence for activities involving goods, services, transactions or activities of a value of at least €100 000; however, no threshold applies if the offence involves goods on the Common Military List or dual-use items. Moreover, Member States no longer have the obligation, only the option, to include fines as additional penalties to imprisonment. Regarding the maximum level of fines for legal persons, Member States are free to choose between using a percentage of the total worldwide turnover of that legal person or determining the fine in absolute amounts. Therefore, while maintaining the percentages set by the proposal (1 % and 5 % of total worldwide turnover, depending on the offence), Member States may also set absolute amounts, namely maximums of €8 million or €40 million respectively. Furthermore, the discretion of judges to impose appropriate sanctions in individual cases should be respected, and the actual fine imposed in an individual case should not have to reach the maximum level of fine determined by the Directive. The Council also modifies the article on legal professionals by removing the distinction between legal advice and legal representation. Finally, the transposition deadline is extended to 12 months after the Directive’s entry into force.

In the European Parliament, the file was assigned to the Committee on Civil Liberties, Justice and Home Affairs (LIBE); Sophia In’t Veld (Renew, the Netherlands) was appointed rapporteur. On 19 April 2023, the Committee on Budgets (BUDG) published its draft opinion, which stresses the crucial role the EPPO could play in investigating sanctions circumvention and calls to use assets confiscated as a consequence of circumventing the EU sanctions against Russia to compensate victims and rebuild the infrastructure in Ukraine. It also calls for the establishment of a joint sanction enforcement structure to support Member States in implementing EU sanctions.

The LIBE draft report was published on 3 May 2023. On 6 July 2023, LIBE members adopted the report with 36 votes in favour, 2 against and 2 abstentions and authorised the opening of interinstitutional negotiations. The report takes a harsher approach than the Commission proposal. For example, the violations of EU sanctions are to be considered criminal offences if committed with negligence, compared to serious negligence in the Commission’s proposal. It also includes new conduct that would count as circumvention and proposes more severe penalties. For those criminal offences in Article 3 which involve funds of at least €100 000 and are punishable by 1 year of prison under the Commission proposal, the LIBE report lowers the threshold to €50 000. Moreover, the report institutes a maximum fine of €10 million for natural persons, where the offences involve funds of at least €100 000 (the Commission proposal does not set an amount, leaving the decision on fines to the Member States). In addition, the report increases the fines applicable to legal persons: for certain circumvention offences, to 5 %, respectively 15 %, of the consolidated worldwide turnover in the business year preceding the fining decision, for the other offences in Article 3. It also adds aggravating circumstances to the list in the Commission’s proposal, including, for example, using
false or forged documents or actively obstructing inspection, controls, destroying evidence or interfering with witnesses. The directive should not apply to humanitarian aid and support. Member States should set up dedicated units for coordination and cooperation among all national competent authorities, which should meet regularly at EU level with the Commission, Europol, Eurojust, the EPPO and the European Anti-Fraud Office. Member States should also ensure appropriate resources for the effective investigation and prosecution of violation of EU restrictive measures. Furthermore, the report calls for extending the EPPO’s current competences to the criminal offences covered by the directive.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Cîrlig C.-C., Revision of the EU rules on asset recovery and confiscation, EPRS, European Parliament, 2023.


OTHER SOURCES

Definition of criminal offences and penalties for the violation of Union restrictive measures, 2022/0398(COD), Legislative Observatory (OEIL), European Parliament.

ENDNOTES

1 According to CJEU case law, circumvention covers not only acts that actually obstruct the goals of EU restrictive measures but also acts that aim to hinder those goals. See Case C-72/11, Afrasiabi and others, 2011.

2 In February 2023, the amount of assets frozen across the EU had risen to €21.5 billion.

3 More precisely, €191.9 billion in transactions and €58.7 billion in assets. These high amounts are due to the presence in Belgium of Euroclear, a financial services company with numerous Russian assets in deposit.

4 Sanctions violations are a criminal offence in CY, DK, FI, FR, HR, HU, LV, LU, MT, NL, PT and SE. Member States with both a criminal and administrative regime are: AT, BE, BG, CZ, DE, EE, EL, IE, IT, LT, PL, RO and SI. Spain and Slovakia have an administrative regime.

5 Romania is not included in the graph because the criminal offences are defined in a series of laws, such as the financing of terrorism (Law 535/2004 on the prevention and fight against terrorism) or the unauthorised export of military items (Emergency Ordinance 158/1999), etc. As such, it is difficult to establish the maximum prison sentence applicable.

6 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under ‘European Parliament supporting analysis’.

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eprs@ep.europa.eu (contact)

www.eprs.ep.parl.union.eu (intranet)

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