



EU cracks down on the criminal enforcement of sanctions violations

14 December 2022

“Harmonising penalties for violating EU sanctions means no more loopholes, no more safe havens and no more playing the system”

Věra Jourová, Vice-President for Values and Transparency

With a ninth sanctions package against Russia in the making, the EU’s sustained response to the war in Ukraine has demonstrated that sanctions will remain at the forefront of EU policymaking. The array of sanctions adopted in 2022 is unprecedented (see our dedicated collection on Russia sanctions [here](#)), and many businesses with an international footprint are now having to navigate an ever more complex regulatory landscape.

Turning its attention to enforcement, and following on the Council’s earlier decision to recognise sanctions violations as an ‘EU crime’, the European Commission has now issued a proposal for a **Directive** to harmonise the criminal enforcement of sanctions across the EU (the **Proposed Directive**).

If the Proposed Directive is adopted, many national legislators are likely to have to revise their current enforcement frameworks, and may seize this opportunity to move away from an often patchy approach to enforcement to adopt a more comprehensive approach as the intensity and importance of sanctions continues to increase. For companies within the scope of applicability of EU sanctions, the Proposed Directive is therefore likely to mean that they will want to review the robustness of their sanctions compliance framework in light of the significant penalties

mandated for violations and the proposed liability framework for enforcing against companies which may make it easier for enforcement actions to be brought.

We summarise the key takeaways of the Proposed Directive below, provide some initial thoughts on what the Proposed Directive may mean for the enforcement of sanctions in Belgium, Germany and the Netherlands, and share our perspective on recent enforcement developments in the UK.

Should you have any questions on the matters discussed in this article, please contact any of its authors or your usual contact at Allen & Overy LLP.

Background

The European Commission has identified the need to harmonise the criminal enforcement of EU sanctions for three main reasons:

- the enforcement of EU sanctions is currently inconsistent across the EU;
- the criminal definitions and penalties in different EU Member States are inconsistent; and
- despite recent efforts by Europol and Eurojust in support of national authorities, there still is a noticeable lack of criminal investigations and prosecutions of sanctions violations.

The European Commission considers that these shortcomings have led to the ineffective application of EU sanctions, which frustrates the underlying objectives of these measures, i.e. safeguarding EU values, maintaining international peace and security and consolidating and supporting democracy, the rule of law and human rights.

To overcome these challenges, the European Commission wants EU Member States to “*speak with one voice*” and criminalise EU sanctions violations in accordance with common standards.

List of criminal offences

Under the Proposed Directive, EU Member States would need to ensure that violations of EU sanctions are designated a criminal offence. In particular, the European Commission wants to see the following conduct criminalised:

- making funds or economic resources available to, or for the benefit of, a designated person, entity or body in violation of a prohibition set by EU sanctions;
- failing to freeze without undue delay funds or economic resources belonging to or owned, held or controlled by a designated person, entity or body in violation of an obligation to do so imposed by EU sanctions;
- enabling the entry of designated natural persons into the territory of an EU Member State or their transit through the territory of an EU Member State in violation of a prohibition set by EU sanctions;
- entering into transactions with a third State, bodies of a third State, entities and bodies owned or controlled by a third State or bodies of a third State, which are prohibited or restricted by EU sanctions;
- trading in goods or services whose import, export, sale, purchase, transfer, transit or transport is prohibited or restricted by EU sanctions, as well as providing brokering services or other services relating to those goods and services;
- providing financial activities which are prohibited or restricted by EU sanctions, such as financing and financial assistance, providing investment and investment services, issuing transferrable securities and money market instruments, accepting deposits, providing specialised financial messaging services, dealing in banknotes, providing credit rating services, and providing crypto assets and wallets;
- providing other services which are prohibited or restricted by EU sanctions, such as legal advisory services, trust services, public relations services, accounting, auditing, bookkeeping and tax consulting services,

business and management consulting, IT consulting, public relations services, and broadcasting, architectural and engineering services.

These offences would be punishable not only when committed intentionally, but also if they are the result of “*serious negligence*”. The European Commission refers in this respect specifically to “*professionals, such as [those] in legal, financial and trade services*” and their duty to exercise appropriate due diligence to prevent any violations of EU sanctions. Additionally, inciting, aiding and abetting the offences will be punishable as a criminal offence.

Further, breaching or failing to fulfil conditions under authorizations granted by competent authorities to conduct activities, which in the absence of such an authorization are prohibited or restricted under EU sanctions, would also be an offence.

The European Commission also expressly notes that legal entities should be held accountable for a lack of supervision and control that has made the commission of an offence possible for the benefit of that entity.

Focus on circumvention

The circumvention of EU sanctions is a core issue in the Proposed Directive. The European Commission considers that the practice of transferring funds, property or economic resources to third parties with a view to circumvent EU sanctions is “*increasingly widespread*”, and it is determined to address this.

As such, the EU Member States would also need to criminalise the circumvention of EU sanctions, which is defined by reference to:

- concealing funds or economic resources owned, held, or controlled by a designated person, entity or body, which should be frozen in accordance with EU sanctions, by the transfer of those funds, or economic resources to a third party;
- concealing the fact that a person, entity or body subject to restrictive measures is the ultimate owner or beneficiary of funds or economic resources, through the provision of false or incomplete information;
- failing by a designated person, entity or body to comply with an obligation under EU sanctions to report funds or economic resources within the jurisdiction of an EU Member State, belonging to, owned, held, or controlled by them;
- failing to comply with an obligation under EU sanctions to provide without undue delay information on funds or economic resources frozen or information held about funds and economic resources within the territory of the EU Member States, belonging to, owned, held or controlled by designated persons, entities or bodies and which have not been frozen, to the competent administrative authorities;
- failing to cooperate with the competent administrative authorities in verification of information upon their reasoned request.

For circumvention, unlike for ‘ordinary’ breaches of sanctions, EU Member States would not be required to set the *mens rea* standard at “*serious negligence*”. As such, circumvention would still need to be committed “*knowingly*” and “*intentionally*” to be punishable.

Harmonised penalties

In addition to defining what conduct should be punishable, the European Commission also proposes minimum standards in terms of punishment, both for natural persons and legal entities.

For natural persons, EU Member States would need to ensure that the maximum penalty provides for imprisonment, along with additional penalties including fines. For more serious offences exceeding a monetary

value of EUR 100,000.00, the maximum term of imprisonment should be at least five years (and at least one year for certain types of circumvention).

For legal entities, the penalties should include fines (criminal or non-criminal), their exclusion from the entitlement to public benefits or aid and their exclusion from access to public funding, including tender procedures, grants and concessions. In addition, a number of other, optional penalties may be foreseen at the national level, including:

- disqualifying the legal entity from practicing business activities;
- withdrawing permits and authorisations enabling the legal entity to pursue activities that have resulted in the commission of the offence;
- placing the legal entity under judicial supervision;
- judicially winding-up the legal entity;
- closing establishments that have been used in the commission of the criminal offence.

Again, the European Commission proposes to set minimum standards for the size of the penalties: for legal entities, the maximum limit of the fines should not be less than five percent of the total worldwide turnover in the business year preceding the fining decision (or one percent for certain types of circumvention).

In many EU Member States, the proposed standards would require national legislators to amend current enforcement regimes. And in a hurry: the Proposed Directive provides for an implementation period of only six months. We highlight a few immediate thoughts for a number of jurisdictions below:

- In **Belgium**, violations of EU sanctions are currently punishable as a criminal offence and subject to a criminal fine of up to EUR 960,000.00 for legal entities. Since 2019, breaches may also be sanctioned by the Treasury of the Belgian Ministry of Finance, with administrative fines of up to EUR 2.5 million. The Belgian enforcement regime currently does not allow the imposition of fines based on a percentage of total worldwide turnover of the legal entity (if this relative amount is higher than the absolute maximum set by law). The Proposed Directive may also be an opportunity to resolve the current disparities in the Belgian sanctions enforcement regime. As we reported **earlier**, a comprehensive revision of the Belgian sanctions regime would be welcome, especially if the intensity and importance of sanctions continues to increase as we expect.
- In **Germany**, intentional violations of EU sanctions are punishable as a criminal offence with a prison sentence from three months up to five years for natural persons. Negligent violations of EU sanctions constitute administrative offences, which can be sanctioned with administrative fines of up to EUR 500,000 per case. While there is no corporate criminal liability in Germany, EU sanctions violations by managers or employees of a company provide the basis for corporate administrative fines of up to EUR 10 million (for criminal offences) or EUR 500,000 (for administrative offences). Higher fines can be imposed in individual cases, but only in order to skim off any additional economic benefits from the sanctions violation. Germany strongly advocates in favour of harmonizing the enforcement of sanctions in the EU.
- In **The Netherlands**, intentional violations of EU sanctions by a legal entity are considered a serious offence and may result in a fine of up to EUR 900,000 per offence. If this fine is not sufficient for an adequate punishment, the fine may be increased to up to 10% of the annual revenue of the legal entity per offence. If criminal intent cannot be established, e.g. due to negligence, violations of sanctions result in simple offences carrying the same maximum penalties for legal entities. If a natural person is sentenced for a serious sanctions offence, penalties can be up to six years of imprisonment, 240 hours of community service or a fine of up to EUR 900,000 per offence. For a simple offence, penalties can be up to twelve months of imprisonment, 240 hours of community service or a fine of up to EUR 22,500 per offence. Prior to the proposed Directive, the Dutch Sanctions Coordinator researched the Sanctions Act, which resulted in

report about the Dutch Sanctions Act that highlighted the need for harmonised implementation of sanctions to safeguard a level playing field for businesses in the EU. The proposed Directive would address at least part of these concerns.

The UK position

The Proposed Directive will bring the enforcement position in the EU Member States into greater alignment with the position in the UK. Under the UK's sanctions, violations are already subject to criminal and civil penalties and there is a suite of offences associated with circumventing and enabling or facilitating violations of sanctions. Generally, violations of UK financial sanctions carry a maximum penalty of imprisonment for a term not exceeding 7 years or a fine (or both) and violations of UK trade sanctions carry a maximum penalty of imprisonment for a term not exceeding 10 years or a fine (or both). Directors, managers, secretaries or other similar officers of the company can also be subject to criminal liability in certain circumstances where a company commits an offence.

A key distinguishing factor between the UK's financial sanctions-related civil enforcement regime and the enforcement regime mandated by the Proposed Directive is the fact that Part 3 of the Economic Crime (Transparency and Enforcement) Act 2022, which came into force on 15 June 2022, introduced strict liability for breaches. In other words, persons within the jurisdictional scope of the UK's financial sanctions may face civil liability for inadvertent breaches of financial sanctions, including where due diligence has been carried out and there was no reasonable cause to suspect a breach (see our article [here](#)).

Other points to note

The Proposed Directive also clarifies a number of other interesting points, including the following:

- **Jurisdiction** – In terms of territorial scope, the European Commission reaffirms that EU sanctions apply not just to EU nationals and legal entities incorporated in the EU, but to any non-EU persons outside the EU in respect of any business with an EU nexus. This is at risk of creating a conflict of laws, and it remains to be seen whether national criminal courts will effectively pursue criminal enforcement against foreign persons.
- **Aggravating and mitigating circumstances** – EU Member States should establish specific aggravating circumstances, including if the offence is committed by a professional service provider in breach of their professional obligations, by a public official or by another person performing a public function. Similarly, mitigating factors should apply, including if information is provided on other offenders or EU sanctions violations.
- **Limitation periods** – In order to ensure effective enforcement, EU Member States would be required to set sufficiently long limitation periods to allow the competent authorities to investigate, prosecute and adjudicate criminal offences. The European Commission proposes limitation periods of at least five years from the time when the offence was committed (or at least three years, provided that the period may be interrupted or suspended).
- **Cooperation with EU institutions and a move to EU enforcement?** – EU Member States, Europol, Eurojust, the European Public Prosecutor's Office (EPPO) and the European Commission would all be required to cooperate in order to facilitate investigations and prosecutions. National authorities are expected to share practical information, in particular on patterns of circumvention (including on structures to conceal beneficial ownership and the control of assets). As we reported [earlier](#), this might suggest another step in the intention to prosecute these offences at the European level – indeed, just a few weeks ago, the German and French Justice Ministers jointly advocated for EPPO to be given the competence to prosecute EU sanctions violations, and the EU will shortly appoint a sanctions envoy to spearhead the European Commission's push for more sanctions enforcement.

- **Whistleblowing** – EU Member States should take the necessary measures to ensure that the protections granted to whistle-blowers under the **EU Whistleblowing Directive** are applicable to the reporting of EU sanctions violations.

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