



The EU shifts focus to sanctions enforcement, asset recovery and confiscation

2 June 2022

Over the last three months, the EU has imposed unprecedented sanctions against Russia and Belarus in response to the war in Ukraine (see our dedicated collection [here](#)). While adopting further sanctions is getting ever more complicated due to political gridlock, the European Commission issued **a number of legislative proposals** last week, shifting its focus to the enforcement of EU sanctions - not only against Russia, but in relation to any restrictive measures imposed by the EU against regimes, territories, persons and entities across the globe. For any business with an EU nexus, ensuring compliance with EU sanctions is now more important than ever.

Even though the European Commission states that it aims to address “*the urgent need to end impunity for violations of restrictive measures following Russia’s invasion of Ukraine*”¹, the published proposals transcend the context of the Russian invasion. In particular, they seek to qualify sanctions violations as a criminal offence across the EU, include an array of measures such as common criminal standards (including a single *mens rea* standard) and penalties, whistleblower protection, reinforced asset recovery and confiscation options, and possibly open the door to prosecution by the European Public Prosecutor’s Office (the **EPPO**).

¹ **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, 25 May 2022, at p. 6.

The proposed legislation will require unanimity from all EU Member States but, if adopted, would be another significant step in the EU's increased role in criminal law and procedure, an area that was long within the exclusive remit of the national legislature.

Making sanctions evasion an 'EU crime'

The EU currently recognises 10 areas of crime that are considered so serious and cross-border in nature that they require harmonisation in accordance with one minimum standard across all EU Member States. The current list of these so-called 'EU crimes' includes terrorism, trafficking in human beings and the sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, market abuse, computer crime and organised crime. The EU has adopted directives effectively harmonising the criminal laws in these areas².

The European Commission now **proposes** to add sanctions violations to the list of EU crimes, and this for three main reasons. First, the European Commission considers that sanctions violations are a particularly serious crime and have a clear and often inherent cross-border dimension, necessitating a harmonised approach. Second, the actual prosecution of individuals or legal entities responsible for sanctions violations remains rare. Whilst published data on this topic is sparse, the European Commission considers that there are only a few Member States that have initiated judicial proceedings relating to the violation of EU restrictive measures. Third, the European Commission considers that the existing national laws are a patchwork of measures, with EU Member States having "*very different definitions and penalties*"³ and "*different enforcement levels*"⁴: 13 EU Member States punish sanctions evasion both as a criminal and administrative offence, another 12 EU Member States as a criminal offence, and the two remaining EU Member States just as an administrative offence.

Once there is political agreement on recognising sanctions violations as an EU crime, the European Commission states that it will "*immediately*" propose a harmonised set of criminal penalties to apply to violations of EU sanctions⁵. Where national criminal laws often target any 'breaches of EU sanctions' in general, the European Commission seeks to specifically criminalise conduct by those who:

- make funds or economic resources available directly or indirectly, to, or for the benefit of, a designated person/entity;
- fail to freeze funds or economic resources belonging to or owned, held or controlled by a designated person/entity;
- engage in prohibited financial activities, such as providing prohibited loans or credit;
- engage in prohibited trade, commercial or other activities, such as importing or exporting goods and technology covered by trade bans, or providing prohibited services;
- breach applicable conditions under licenses granted by competent authorities;
- fail to comply with any obligation to provide information to the authorities, such as the obligation to declare any assets belonging to, owned, held or controlled by a designated person/entity;
- knowingly engage in actions or activities that seek to directly or indirectly circumvent the restrictive measures, including by being involved in schemes designed to conceal the assets or involvement of designated persons/entities, by assisting the targets of restrictive measures to evade their impact, or providing misleading information to authorities; or
- fail to report a violation of sanctions where there is a specific obligation to report.

² In December 2021, the European Commission **presented an initiative** to extend the list to also include hate speech and hate crime. However, this initiative has not yet been consolidated into any specific legislative proposal.

³ **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, 25 May 2022, at p. 4.

⁴ *Ibid*, at p. 6.

⁵ **Communication** from the Commission to the European Parliament and the Council dated 25 May 2022, "Towards a Directive on criminal penalties for the violation of Union restrictive measures".

The European Commission would also require the imposition of minimum and maximum criminal penalties on natural persons, as well as the ability to hold legal persons liable and to impose a wide array of sanctions on them, including fines (possibly linked to a certain percentage of the legal person's total worldwide turnover); their temporary exclusion from access to public funding, including tender procedures, grants and concessions; their temporary or permanent disqualification from practicing business activities; the withdrawal of their permits and authorisations; or even their subjection to judicial supervision, temporary or permanent closure, or judicial winding-up.

Significantly, in terms of the standard of criminal intent, the European Commission's position is that it should be sufficient that the person being prosecuted had knowledge that its conduct was prohibited by sanctions, or displayed a wilful blindness in ignoring sanctions. The proposed requirement to criminalise the aiding and abetting of sanctions violations as well as the subsequent concealment, conversion or transfer of any proceeds as money laundering, and to require EU Member States to bring sanctions violations within the scope of their national legislations transposing the EU Whistleblowing Directive, makes it even more important that businesses adopt their own, robust and up-to-date sanctions compliance measures.

Jurisdiction and prosecution - a future role for the EPPO?

In terms of territorial scope, the European Commission reaffirms the view that EU sanctions apply not just to EU nationals and legal persons incorporated in the EU, but to any non-EU persons outside the EU in respect of any business with an EU nexus⁶.

Under the current legislative proposals, the prosecution of sanctions violations would continue to fall within the remit of national prosecutors in each of the EU Member States. However, in view of the European Commission's own stated objectives, including that sanctions violations are inherently cross-border, constitute a serious financial crime to the detriment of the EU and require a "*global level playing field for law enforcement*"⁷, it is most likely just a matter of time before this criminal conduct is elevated to be prosecuted by the EPPO. Indeed, filling the enforcement gap for crimes that affect the financial interests of the EU and are insufficiently enforced by individual EU Member States was the very reason why the EPPO was launched in June 2021 (see our earlier post [here](#)).

Reinforced asset recovery and confiscation rules

Together with the proposed legislation to address the enforcement of sanctions, the European Commission has also issued its **long-awaited proposal** to reinforce the current EU minimum standards on asset recovery and confiscation. While the European Commission now announces that this initiative targets "*oligarchs violating restrictive measures*"⁸, it is also clear that, again, broadened options to confiscate assets will not only be relevant for Russian oligarchs, but for anyone that is suspected of having committed a financial crime. The objective is clear: despite existing rules on asset recovery and confiscation, it is reported that, generally, only 2% of criminal assets are frozen and only 1% are confiscated⁹. Specifically for sanctions against Russia and Belarus, however, the European Commission claims that almost EUR 10 billion in assets have now been frozen and more than EUR 22 billion blocked¹⁰.

⁶ **Communication** from the Commission to the European Parliament and the Council dated 25 May 2022, "Towards a Directive on criminal penalties for the violation of Union restrictive measures", Annex, at p. 5. For an example of how the territorial scope of EU sanctions is defined, see Article 17 **Council Regulation (EU) No 269/2014** providing for travel restrictions and asset freezes of persons and entities deemed responsible for actions against Ukraine.

⁷ **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, 25 May 2022, at p. 6

⁸ **Press release** dated 25 May 2022.

⁹ **Questions and Answers**: The Commission proposes rules on freezing and confiscating assets of oligarchs violating restrictive measures and of criminals, 25 May 2022.

¹⁰ **Answer to a parliamentary question** by the European Commission dated 30 May 2022.

In a legislative proposal that would extend to any EU crimes, including sanctions violations (if added to the list), the European Commission has set out a number of innovative rules in relation to asset recovery and confiscation. In particular, EU Member States would be required to make substantial changes to their national laws and put in place an extended confiscation regime allowing for:

- non-conviction based confiscation, including in cases where the facts are time barred so that conviction has become impossible¹¹; and
- the confiscation of unexplained wealth without a conviction.

The European Commission recognises the obvious legal challenge that could be made, ie the new confiscation model could interfere with fundamental rights, but it is of the view that this interference would be justified by the need to deprive criminals of their illicit assets¹². If these proposed new rules find their way into national legislation, it remains to be seen how national courts will apply the extended confiscation regime, and how they will balance due process and the protection of private property rights against the policy objective to ‘tackle the money’.

Parallel initiatives at EU Member State level

In parallel, individual EU Member States are also considering strengthening their sanctions enforcement regime.

In **Germany**, for example, the parliament is discussing a legislative proposal dated 10 May 2022, referred to as the First EU Sanctions Enforcement Act. It aims to amend a number of relevant German laws, including the German Foreign Trade and Payment Act (or the German Anti-Money-Laundering Act), the German Banking Act and similar financial regulations. The German legislator acknowledges that, in the interest of the effective operational execution of EU sanctions, both the expertise of various authorities and bodies at federal and state level and their swift collaboration is required. So far, the existing legal regulations have not been specifically geared towards enforcing EU sanctions and are therefore not deemed to be sufficiently effective. In anticipating further amendments at a later state, the new rules must be implemented quickly and easily. The proposed legislation contains tailor-made provisions allowing for investigations, house searches, the securing and confiscation of funds and economic resources as well as detailed provisions on how to comply with the notifications requirements already established under the EU sanctions regimes. Whilst the legislative proposal is still being debated, the German government has already announced its plan to enact a Second EU Sanctions Enforcement Act. This would involve setting up a national register for assets of unclear origin and for sanctioned assets, instituting an independent administrative procedure for investigating assets of unclear origin and a special whistleblower office.

The UK position

There has also been a renewed focus on sanctions enforcement in the UK. The Economic Crime (Transparency and Enforcement) Act 2022 (the **Act**) was enacted on 15 March 2022, having been expedited following calls to make it easier to identify and trace illicit wealth in response to Russia’s invasion of Ukraine. To this end, in relation to sanctions compliance, the Act lowers the liability threshold for the imposition of a civil monetary penalty for breaching financial sanctions, by removing the current knowledge requirement. At this stage it is unclear when this important change will come into force and, even though the proposed change would make it a lot easier to enforce sanctions violations, one queries how much resources the Office of Financial Sanctions Implementation, the relevant UK enforcement agency, actually has to bring multiple enforcement actions.

¹¹ **Proposal** for a Directive of the European Parliament and of the Council on asset recovery and confiscation, 25 May 2022, at p. 37.

¹² **Proposal** for a Directive of the European Parliament and of the Council on asset recovery and confiscation, 25 May 2022, at pp. 9-10.

The UK government has not announced concrete details for an equivalent scheme to the enhanced asset recovery and confiscation rules proposed in the EU. However, there have been policy discussions around introducing a similar scheme. The ideas include plans to seize UK land and property owned by certain Russian oligarchs that have been targeted with UK asset freezes, without paying any compensation in return. Similar concerns to those relating to the proposed EU rules arise in relation to these plans. Primary legislation would most likely be required, and the plans may be subject to legal challenge for undermining the right to peacefully enjoy private property.

Authors



Jonathan Benson
Counsel - UK
Tel +44 20 3088 1321
Mob +44 7799 074387
jonathan.benson@allenoverly.com



Thomas Declerck
Senior Associate - Belgium
Tel +32 2 780 24 83
Mob +32 473 57 30 34
thomas.declerck@allenoverly.com



Dr. Tim Mueller
Partner - Germany
Tel +49 69 2648 5996
Mob +49 151 197 63347
tim.mueller@allenoverly.com



Dr. Udo Olgemoeller
Partner - Germany
Tel +49 69 2648 5690
Mob +49 172 792 3946
udo.olgemoeller@allenoverly.com



Basil Saen
Associate - Belgium
Tel +32 2 780 25 23
Mob +32 470 97 22 37
basil.saen@allenoverly.com



Matthew Townsend
Partner - UK
Tel +44 20 3088 3174
Mob +44 7909 684 728
matthew.townsend@allenoverly.com



Dounia van Drooghenbroeck
Junior Associate - Belgium
Tel +32 2 780 26 27
Mob +32 477 98 06 73
dounia.vandrooghenbroeck@allenoverly.com

Global presence

Allen & Overy is an international legal practice with approximately 5,600 people, including some 580 partners, working in more than 40 offices worldwide. A current list of Allen & Overy offices is available at www.allenoverly.com/global/global_coverage

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy LLP is authorised and regulated by the Solicitors Regulation Authority of England and Wales (SRA number 401323). The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at our registered office at One Bishops Square, London E1 6AD.

allenoverly.com © Allen & Overy LLP 2022. This document is for general information purposes only and is not intended to provide legal or other professional advice. | EUS1 #2002368027