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9

Criminalisation of EU Sanctions Violations

FRANCESCA FINELLI AND JACOB ÖBERG*

9.1 INTRODUCTION

Safeguarding international peace and security, preventing conflicts, upholding values in its relations with the wider world, are the primary objectives the Union's Common Foreign and Security Policy (CFSP).[1] These objectives shape the Union's global actorness, including the imposition of restrictive measures (sanctions) against third countries and foreign actors,[2] while they have not traditionally guided the use of EU criminal law. Nonetheless, this chapter intends to shed light on how recent geopolitical developments, particularly Russia's invasion of Ukraine and the urgent need to ensure an effective response to this full-scale aggression at the border with Europe, have led to new interconnections between CFSP objectives and EU criminal law. In this unprecedented context,[3] the effectiveness and credibility of restrictive measures have been intertwined with the resort to criminal law measures. Since February 2022, the imperative to impose tough sanctions on Russia has, in fact, been translated into the need to approximate national enforcement systems and harmonise criminal rules and penalties to counter violations, including circumvention tactics. In other words, the need to strengthen the impact of EU sanctions (and induce Russia to stop its war of aggression against Ukraine) has resulted into a new emphasis on criminal punishment and deterrence of sanctions breaches.

* The authors have jointly developed the ideas underpinning this chapter. Francesca Finelli has authored sections 9.1, 9.3 and 9.5; Jacob Öberg has authored sections 9.2 and 9.4. The conclusions in section 9.6 were jointly written by both authors.

[1] see Art 3(5) and 21 Treaty on European Union (TEU).

[2] see Art 29 TEU and Art 215 TFEU. The terms 'restrictive measures', 'economic sanctions' and 'sanctions' shall be intended as identifying decisions adopted by the Council of the EU according to those two legal basis.

[3] See Alexandra Hofer, 'The EU's "Massive and Targeted" Sanctions in Response to Russian Aggression, a Contradiction in Terms' (2023) 25 *Cambridge Yearbook of European Legal Studies* 19; Katharina Meissner and Chiara Graziani, 'The Transformation and Design of EU Restrictive Measures against Russia' (2023) 45 *Journal of European Integration* 377.

Although Member States have previously been entrusted with the task of designing 'effective, proportionate and dissuasive' penalties for sanctions violations within their respective jurisdictions,[4] in 2022, the EU legislator argued that it could no longer place full trust in national authorities. In light of a pressing geopolitical context, it proposed to enforce restrictive measures by (common) criminal law measures. In this manner, the war in Ukraine, the urgency to ensure the effective application of sanctions against Russia, and to counter the phenomenon of circumvention, has led the Union to conclude, for the first time, that the harmonisation of criminal rules and penalties was a pressing necessity. Undoubtedly, the criminalisation of sanctions violations has been driven by a specific political momentum – where the Union seeks to maximise the effectiveness and credibility of its foreign policy decisions with the view of constraining Russia's capacity to wage war. Yet, this process amounts to a *structural* reform that affects EU restrictive measures *tout court* – not only those related to Russia's aggression.[5]

This chapter seeks to critically examine the legal and normative justification for criminalising breaches of EU sanctions. It first looks at the fast-track criminalisation process pursuant to Article 83(1) Treaty on the Functioning of the European Union (TFEU), and the negotiation history of Directive (EU) 2024/1226 (section 9.2). Subsequently, it examines the rationale behind this criminalisation process (section 9.3), and illustrates the extent to which the introduction of a new Eurocrime is in line with the legal preconditions for exercising the competence in Article 83(1) TFEU (section 9.4). Then, this chapter analyses, in detail, the approximation of criminal offences and penalties in the new Directive (section 9.5). Finally, the chapter has some broader reflections on the impact and potential for this Directive being transposed into national laws (section 9.6).

9.2 THE FAST-TRACK CRIMINALISATION OF EU SANCTIONS VIOLATIONS

The criminalisation of sanctions violations can be defined as the process according to which the EU legislator defines (intentional) non-compliance with restrictive measures as a new criminal offence and requires Member States to punish it accordingly under their domestic laws.[6] This process creates a new

[4] According to the 'Greek Maize' formula, see Case C-68/88, *Commission v Greece* EU:C:1989:339, para 24. See also standard clause in Regulations imposing sanctions, such as Art 15(1) 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 [2014] OJ L78/6.

[5] Sara Poli and Francesca Finelli, 'Context Specific and Structural Changes in EU Restrictive Measures Adopted in Reaction to Russia's Aggression on Ukraine' (2023) 3 *Eurojus* 19.

[6] For a more general account of the criminalization of restrictive measures see Jacob Öberg, 'Criminalisation of Sanctions Violations' in Clara Portela, Andrea Charron and Mirko Sossai (eds), *Elgar encyclopedia of international sanctions* (Edward Elgar Publishing, 2025).

legal environment where Member States are asked to engage in the investigations, prosecution and, ultimately, the imposition of criminal penalties against those responsible for violation of EU sanctions.

One of the key ideas behind criminalisation is to deter individuals and companies who contemplate breaching EU sanctions, including those who intentionally infringe import–export restrictions against Russia, participate in circumvention schemes with third countries, or fail to freeze the asset of designated oligarchs.[7] This criminalisation seeks to combat wilful non-compliance by raising the awareness of EU citizens and economic operators, exposing them to new enforcement risks. In particular, the approximation of criminal law measures is intended to fight impunity, by limiting the uneven implementation and enforcement of sanctions across 27 national jurisdictions. Such approximation is pursued by means of the legal basis of Article 83 TFEU which empowers the EU to harmonise domestic substantive criminal laws in relation to specific offences.[8]

According to this provision, the European Parliament and the Council may, by means of directives, establish minimum rules concerning the definition of criminal offences and penalties in the areas of *particularly serious crime* with a *cross-border dimension* resulting from the nature or impact of such offences or from a special need to combat them on a common basis (emphasis added). The Article already lists 10 offences,[9] which are considered to be of a particularly serious nature and a cross-border dimension, and for which the EU has a right to establish minimum rules concerning the definition of criminal offences and penalties. Violation of EU sanctions were not initially included in that list. Nonetheless, according to the final subsection of Article 83(1) TFEU, the Council may identify *other areas* of crime that meet the criteria specified in this provision – by acting unanimously and after obtaining the consent of the Parliament.

Following this procedure, in May 2022, the Commission put forward an unprecedented proposals to redesign the national enforcement of EU restrictive measures.[10] Furthermore, in November 2022, the Council unanimously decided[11]

[7] Francesca Finelli, 'Who Are the Russian Oligarchs? Recent Developments in the Case Law of the European Court of Justice' (2024) 2023 *European Papers*.

[8] Jacob Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* (Hart Publishing, 2017); Petter Asp, *The Substantive Criminal Law Competence of the EU: Towards an Area of Freedom, Security & Justice - Part 1* (Jure, 2012).

[9] Terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

[10] See 'Ukraine: The Commission proposes rules on freezing and confiscating assets of oligarchs violating restrictive measures and of criminals' Press release (25 May 2022). On the Commission's role of 'leading promoter of closer European integration' see A Bradford, *The Brussels Effect: How the European Union Rules the World*, 1st edn (Oxford University Press, 2020) 15.

[11] 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 [2022] OJ L308/18. The Council Decision followed the consent of the European Parliament, see document P9 TA (2022) 0295.

to extend the list of Eurocrimes, thereby adding the violation of EU restrictive measures to the areas of crime meeting the criteria imposed by Article 83(1) TFEU.[12] Subsequent to this, the Council together with the European Parliament, acting together as co-legislators, adopted Directive (EU) 2024/1226 harmonising the Member States' criminal laws in respect of those criminal offences.[13]

In little more than two years from the beginning of Russia's invasion against Ukraine, the EU legislator has not only progressively expanded the magnitude of restrictive measures imposed on the aggressor state,[14] but also introduced a new Eurocrime, and established minimum rules for the definition of criminal offences and penalties to counter sanctions violations and circumvention.[15] In this way, the Union has successfully completed, for the first time, the procedure set forth in Article 83(1) TFEU, and ultimately expanded its competences to address a new area of particularly serious crime with a cross-border dimension. According to this fast-track criminalisation process, the adoption of Directive (EU) 2024/1226 was rushed through to ensure that those responsible for violating EU sanctions are duly prosecuted and held accountable for their crimes.

As the Commission did not conduct an impact assessment, one may argue that the establishment of common criminal rules at the Union level was accelerated on the *assumption* that it was necessary to create a level playing field among the 27 Member States and enhance law enforcement and judicial cooperation in addressing the violation of restrictive measures. In the words of the Commission, 'given the exceptional urgency, no impact assessment could [have been] conducted, and the relevant obligation was lifted'.[16] However, as further illustrated in the next sections, the lack of such an assessment is problematic. As a matter of fact, the exceptional circumstances of the war in Ukraine appear to have eclipsed one the most important *ex ante* guarantees for the creation of evidence-based legislation, in particular, evidence-based criminalisation.[17] The absence of evidence to support the criminalisation process gives rise to

[12] See also the Commission's proposal for a Council Decision, COM(2022) 247 final, of 25 May 2022.

[13] 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 [2024] OJ L. See also the first European Commission's proposal for a Directive, COM(2022) 249 final, of 25 May 2022.

[14] For a full timeline of the restrictive measures adopted since 2022 see https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en#measures-adopted-since-2022.

[15] On the two-step approach proposed by the Commission to end impunity see Wouter Van Ballegooij, 'Ending Impunity for the Violation of Sanctions through Criminal Law' (2022) 17 *The European Criminal Law Associations' Forum* 146.

[16] See COM(2022) 247 final (n 12).

[17] Jannemieke Ouwerkerk, 'Evidence-Based Criminalisation in EU Law: Evidence of What Exactly?' in Jannemieke Ouwerkerk and others (eds), *The Future of EU Criminal Justice Policy and Practice* (Brill Nijhoff, 2019). See also COM(2015) 215 final, 'Better Regulation for Better Results – An EU Agenda'.

many questions, particularly whether the resort to criminal law measures can positively contribute to the implementation of EU sanctions, thereby eradicating impunity and countering sanctions violations more effectively than other non-criminal enforcement tools.[18]

9.3 THE RATIONALE BEHIND THE CRIMINALISATION PROCESS

Since May 2022, the Commission has clearly indicated that the criminalisation process seeks to target one major problem – the ultimately weak enforcement of EU sanctions – which, so far, has not been able to deter circumvention, close legal loopholes, prevent forum shopping, and therefore ensure the Union's ability to speak with one voice.[19]

In this regard, the Commission has employed a 2021 report by Genocide Network[20] as pivotal evidence to illustrate the extent to which the enforcement of EU sanctions varies significantly across the Union, resulting in a situation where, in practice, very few individuals or legal persons responsible for the violation of Union restrictive measures are effectively held accountable. This comparative study illustrates that some countries categorise sanctions violation as a *criminal* offence, others consider it as an only *administrative* offence, whilst a third category of states envisage the possibility of sanctions violations being categorised *either* as criminal *or* administrative offences, depending on their gravity or repeated violations. In the EU, it is reported that 12 Member States fall into the first category, as they ensure that the violation of EU restrictive measures is a criminal offence,[21] whilst only two Member States (Spain and Slovakia) fall into the second category, punishing EU sanctions breaches as a mere administrative offence. Lastly, the violation of these sanctions amounts to *either* an administrative or a criminal offence in 13 Member States.[22] The criteria according to which the unlawful conduct amounts to an administrative or a criminal offence are different in each country, but they are usually related to the gravity (serious nature) of the violation, determined in qualitative (intent, serious negligence) and quantitative (damage) terms.[23] With regard to the severity of penalties, the criteria for punishing non-compliance also differ substantially across Member

[18] On this question see Jacob Öberg, 'Do We Really Need Criminal Sanctions for the Enforcement of EU Law?' (2014) *5 New Journal of European Criminal Law* 370.

[19] See 'Ukraine: The Commission proposes rules on freezing and confiscating assets of oligarchs violating restrictive measures and of criminals' Press release (25 May 2022) https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3264.

[20] Genocide Network Secretariat, 'Prosecution of Sanctions (Restrictive Measures) Violations in National Jurisdictions: A Comparative Analysis' (2021). See also COM(2022) 247 final (n 12).

[21] Denmark, France, Croatia, Cyprus, Latvia, Luxembourg, Hungary, Malta, the Netherlands, Portugal, Finland, and Sweden.

[22] Belgium, Bulgaria, Czech Republic, Germany, Estonia, Ireland, Greece, Italy, Lithuania, Austria, Poland, Romania and Slovenia.

[23] See COM(2022) 247 final (n 12).

States. Focusing on criminal penalties, in 14 Member States, the maximum length of imprisonment is between two and five years, whilst maximum prison sentences of between eight and 12 years are possible in eight Member States. In terms of legal persons, 14 Member States provide for criminal liability of such persons for the violation of EU restrictive measures, whereas 12 Member States provide for administrative penalties, notably fines, which may be imposed on legal persons when their employees or their management violate restrictive measures.

All this suggests that national legal systems differ significantly in terms of their criminalisation of sanctions violations. This is not surprising, since Member States have had the freedom to decide which competent authorities are in charge of the implementation and enforcement of EU sanctions,[24] and what penalties they can impose for punishing non-compliance (as far as they result in effective, proportionate and dissuasive penalties). Before 2022, the principle of subsidiarity[25] allowed national autonomy to overshadow harmonisation. In that context, the Union trusted Member States to counter sanctions breaches within their respective jurisdictions – without interfering with national laws or enforcement capabilities.

Yet, in light of the pressing geopolitical context post-February 2022, the Commission has firmly pointed to the divergent legal frameworks among Member States, the inconsistent enforcement of restrictive measures, and the deficit in criminal investigations and prosecutions.[26] Lacking appropriate and effective tools to counter sanctions violations, the Commission has highlighted the risk that non-compliance will remain unpunished and that circumvention will proliferate. For instance, designated individuals whose assets are supposed to be frozen in the Union (eg, designated Russian oligarchs whose funds are immobilised in EU financial institutions) may continue to benefit from their assets[27] or even support their governments, targeted by restrictive measures, thus frustrating the objectives of those measures. Similarly, the money generated by the exploitation of natural resources traded through the violation of Union restrictive measures may allow the regimes targeted by those restrictive measures to purchase arms and weapons with which they execute their crimes. These violations and circumvention tactics may, in fact, survive and even thrive in the absence of effective enforcement across the Union – thereby undermining the credibility of EU sanctions. Moreover, the Commission has

[24] Clara Portela and Kim Olsen, 'Implementation and Monitoring of the EU Sanctions' Regimes, Including Recommendations to Reinforce the EU's Capacities to Implement and Monitor Sanctions' (European Parliament, 2023). See also Francesco Giumelli and others, 'United in Diversity? A Study on the Implementation of Sanctions in the European Union' (2022) 10 *Politics and Governance* 36.

[25] Art 5(3) TEU. See also Jacob Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences' 36 (2017) *Yearbook of European Law* 391.

[26] See COM(2022) 247 final (n 12).

[27] On the legality of family-based designations under EU sanctions regimes see Francesca Finelli, 'Countering Circumvention of Restrictive Measures: The EU Response' (2023) 60 *Common Market Law Review*.

emphasised that the same infringement, or circumvention scheme, might be punished differently in different Member States.[28] This may lead to forum shopping by offenders and could ultimately result into their impunity in case they choose to conduct their activities in the Member State(s) that provide for less severe penalties or have a record of being lenient in the prosecution for sanctions violations.[29]

The Commission has considered such an inconsistent enforcement landscape to be unacceptable, particularly in the context of the sanctions regime imposed in response to Russia's invasion against Ukraine. This is due to the potential of such a situation to frustrate the (CFSP) objectives pursued by sanctions, including the safeguarding of international peace and security, and the promotion of EU common values in the wider world. Thus, in May 2022, the Commission concluded that 'there [was] a special need for common action at EU level, by means of criminal law to address the violation of Union restrictive measures'.[30]

The fundamental question that remains unanswered is why a criminal law response is needed to address these issues. Notwithstanding the uncontested urgency to enhance national enforcement strategies, the Commission regrettably has failed to provide a satisfactory explanation as to why criminal law measures were appointed as the best regulatory tool to ensure the effective application of EU sanctions across 27 countries. It does not explain why criminal law measures are perceived to be the most effective tool to investigate, prosecute and punish sanctions breaches. Rather,

> we do not have any evidence that a failure to criminalise the violation of sanctions in some Member States, or the existence of dual administrative and criminal regimes in others, is the reason for low levels of detection, prosecution and conviction for the offence.[31]

Whilst there seems to be a presumption at the EU level that criminal law is the most effective response to non-compliance, we lack clear data concerning investigations and punishment of sanctions breaches across the Union. The criminalisation process appears difficult to reconcile with evidence-based decision-making – as well as the *ultima ratio* principle, which requires the legislator to resort to criminal law only when alternative measures have proved insufficient to achieve the desired objectives.[32]

[28] ibid.

[29] ibid.

[30] COM(2022) 684 final, Proposal for a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures (Brussels, 2 December 2022).

[31] See Report of the European Parliament on the proposed Directive (A9-0235/2023), Minority position (Ms. Clare Daly on behalf of The Left).

[32] On the notion of *ultima ratio* in EU criminal law, see Sakari Melander, 'Ultima Ratio in European Criminal Law' (2013) 3 *Oñati Socio-legal Series* 42; Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2004) 2 *Ohio State Journal of Criminal Law* 521.

9.4 THE EU'S COMPETENCE TO CRIMINALISE SANCTIONS VIOLATIONS PURSUANT TO ARTICLE 83(1) TFEU

When proposing new criminal legislation, the EU legislator needs to conform to the criteria set out in Article 83 TFEU. This provision enshrines two key normative justifications for criminalisation: the 'particularly serious' criterion (also known as the harm principle);[33] and the 'cross-border' criterion. These two criteria are cumulative, and both need to be satisfied for all new offences that are added to the list of Eurocrimes.[34]

9.4.1 The 'Particularly Serious' Criterion

The wording of Article 83(1) TFEU suggests that certain behaviours are particularly serious, because of the significant harm caused to society, thus pointing to the need for criminalisation. The harm principle is also more generally accepted as a guiding principle by the EU institutions in respect of the EU's substantive criminal law competence. In this context, the Council affirms that 'criminal provisions should focus on conduct causing actual harm or seriously threatening the rights or essential interests which is the object of protection'.[35] The European Commission stresses that criminalisation should proceed based on clear factual evidence about the serious nature or grave effects of the crime in question.[36] The European Parliament further argues that criminalisation should focus on the conduct that causes 'significant pecuniary or non-pecuniary damage' to the society or individuals.[37] Accordingly, the EU legislator needs to substantiate the serious harm, damage and effects of a certain conduct before it can subject it to regulation.

In the enumeration of Eurocrimes, the harm principle evidently transpires through the crimes listed in Article 83(1) TFEU. It has been argued that the

[33] On the harm principle, see *ex multis* Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others*, 1st edn (Oxford University Press, 1987); Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (Springer Science & Business Media, 2007); Andrew Perry Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011); Jacob Öberg, 'Public Goods and Harm as Justificatory Frameworks for Supranational Criminalisation' in Jannemieke Ouwerkerk and others (eds), *The boundaries of criminalisation: rethinking public goods and legal interests in domestic and transnational criminal law* (Brill Academic Publishers, 2026).

[34] Asp (n 8) 18–20.

[35] Council, 'Council Conclusions on model provisions, guiding the Council's criminal law deliberations' (2979th Justice and Home Affairs Council meeting, Brussels, 30 November 2009) 3.

[36] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law' COM(2011) 573 final, 3, 7–10.

[37] European Parliament, 'Resolution of 22 May 2012 on an EU approach to criminal law' P7 TA (2012) 0208, 2.

particularly serious nature usually reflects an 'EU-wide consensus about the harmfulness of the crimes' registered therein as similar conduct has already been recognised as deserving of criminalisation in the predominant majority of the EU Member States.[38] In other words, the harm principle is usually satisfied when there is an EU-wide consensus regarding the necessity of criminalising a particular conduct. Nonetheless, this wide consensus *cannot* be found for the criminalisation of sanctions breaches. In fact, prior to legislative developments of 2022, the majority of Member States had *not* opted for exclusive criminal enforcement to tackle the violation of sanctions in their domestic jurisdiction. In 13 Member States, the violation of restrictive measures would amount to either an administrative or criminal offence, and in two Member States, it would only result in administrative penalties. Together, these 15 states chose not to rely solely on criminal enforcement. Accordingly, one may wonder whether Article 83(1) TFEU requires a *pre-existing* EU-wide consensus on the necessity of employing criminal law measures – or whether the particularly grave nature of specific conduct can be criminalised even in the absence of a unanimous decision by all individual Member States. The criminalisation of sanctions breaches under Article 83(1) TFEU proves that the second scenario is possible – yet, it does not clarify to what extent the harm principle can be stretched to safeguard the effectiveness of EU law (in this case, the effectiveness of EU restrictive measures).[39]

Regrettably, in its legislative proposals, the Commission does not clarify the extent to which criminalising sanctions violations satisfies the harm criterion. On the one hand, it simply states that the violation of EU sanctions

> is a particularly serious area of crime, which, in terms of gravity, is of a similar degree of seriousness to the areas of crime listed in Article 83(1) TFEU, since it can perpetuate threats to international peace and security, undermine the consolidation of and support for democracy, the rule of law and human rights and result in significant economic, social, societal and environmental damage.[40]

On the other hand, it claims that there are often no direct victims of the violation of restrictive measures.[41] In this way, the Commission has not identified who are the specific 'beneficiaries' of the criminalisation process.

The Commission has invoked very little evidence to substantiate its legislative proposals – reaching only the minimum threshold of Article 296 TFEU.[42]

[38] Nina Peršak, 'Principles of EU Criminalisation and Their Varied Normative Strength: Harm and Effectiveness' (2022) 27 *European Law Journal* 463, 475–76.

[39] Which would be required to legislate under Art 83(2) TFEU which demands that criminal laws are 'essential' for the enforcement of an EU policy. See Öberg (n 18).

[40] See COM(2022) 247 final (n 12). See also recital 10 Council Decision (EU) 2022/2332 of 28 November 2022.

[41] ibid.

[42] Martin Shapiro, 'The Giving Reasons Requirement' (1992) *University of Chicago Legal Forum* 179.

It has not illustrated the specific damage caused by sanctions violations, nor the specific victims. Rather, the criminalisation of sanctions breaches appears to protect *a wide community* – and supranational legal interests. Differently from other Eurocrimes, the criminalisation process looks at the impact that sanctions violations have on the international society, and ultimately identifies the need to protect peace and security in a broader sense – even beyond the EU borders. Ultimately, given, the quite limited demands imposed by the Court of Justice on the justification for EU legislation,[43] it seems that the Directive – if contested – will likely satisfy the threshold imposed by Article 83(1) TFEU in addressing a 'particularly serious' crime.

9.4.2 The 'Cross-border' Criterion

This criterion suggests that the offence in question may have a cross-border dimension resulting either from its *nature*, its *impact* or a special *need to combat them on a common basis*. This requirement is typically satisfied when the offence involves the crossing of borders, such as smuggling of goods or trafficking human beings. The cross-border dimension may also result from the impact of the offence in question where the offence affects more than one country, including serious environmental offences and forgeries of the euro (neither of these offences impact only one country, nor stop at national borders).[44]

In respect of sanctions violations, the Commission claims these violations have an inherently cross-border dimension. Not only are they usually committed by natural persons and legal entities operating on a global scale but, in some cases, the Union precisely prohibits cross-border operations (such as import and export restrictions between the Union and third countries).[45] By definition, these violations imply cross-border activities which, according to the Commission, require a common EU response.[46] To illustrate, circumvention schemes often involve multiple jurisdictions – and rarely concern one single country. In the realm of asset freezes, for instance, a bank in one Member State may unfreeze funds or approve transfers of economic resources owned by a designated person, for the benefit of a company located in another Member State. These assets may reach a family member, who can act on behalf of the sanctioned relative, and move the unfrozen assets outside the Union, thereby undermining the effectiveness (and credibility) of EU sanctions via multiple cross-border operations. This suggests that the consistent and effective application of EU sanctions can

[43] Jacob Öberg, 'The Rise Of The Procedural Paradigm - Judicial Review Of EU Legislation In Vertical Competence Disputes' (2017) 13 *European Constitutional Law Review* 248.

[44] For a more comprehensive analysis of this criterion, see Jacob Öberg, *The Normative Foundations for EU Criminal Justice: Powers, Limits, and Justifications* (Hart Publishing, 2024) ch 4.

[45] See COM(2022) 247 final (n 12). See also recital 13 Council Decision (EU) 2022/2332 of 28 November 2022.

[46] ibid.

be better achieved at EU level rather than Member State level, by reason of the effects of the conduct at stake. A common EU response can also prevent forum shopping by offenders because they can no longer choose to exploit Member States that provide for less severe penalties for sanctions violations.

Hence, there are quite plausible arguments for claiming that the criminalisation of EU sanctions breaches under Article 83(1) TFEU satisfy the cross-border criterion. First, it is difficult to deny that infringing restrictive measures is an attack against common EU policies, or more precisely, CFSP decisions taken at the unanimity of 27 Member States.[47] It has been argued that some crimes 'would simply not exist without the EU' (eg, fraud against the EU budget, misappropriation of EU funds, corruption of EU officials) and that the Union therefore has a responsibility to protect the interests underlying such crimes.[48] This could definitively apply to the criminalisation of EU sanctions breaches. Second, restrictive measures typically have a cross-border character. For instance, travel bans, prohibitions on arms exports, asset freezing, and restrictions on goods and services always involve multiple jurisdictions, and at least two countries (typically a Member State and a third country, or a third-country national). Therefore, sanctions violations have, by nature, a cross-border character, and the Union is better placed to combat them on a common basis. Overall, there is a sufficient justification to substantiate that the criminalisation process is in line with the cross-border criterion in Article 83(1) TFEU.

9.5 THE APPROXIMATION OF CRIMINAL OFFENCES AND PENALTIES FOR EU SANCTIONS VIOLATIONS

Adopted on 24 April 2024, Directive (EU) 2024/1226 establishes common minimum rules concerning the definition of criminal conduct and penalties for the violation of restrictive measures.[49] These rules require Member States to criminalise specific conduct when it is 'in violation of a prohibition or an obligation that constitutes a Union restrictive measure or that is set out in a national provision implementing a Union restrictive measure, where national implementation of that measure is required'.[50] Importantly, these are *minimum* rules – meaning that Member States can add to them as part of their criminal law and introduce further definition or higher penalties. In addition, they apply to breaches of sanctions as 'EU' foreign policy decisions while they do not give

[47] Art 29 TEU.

[48] Pedro Caeiro, 'Beyond Competence Issues: Why and How Should the EU Legislate on Criminal Sanctions?' in Robert Kert and Andrea Lehner (eds), *Vielfalt des Strafrechts im internationalen Kontext. Festschrift für Frank Höpfel zum 65. Geburtstag* (Neuer Wissenschaftlicher Verlag, 2018) 652.

[49] Directive (EU) 2024/1226 (n 13).

[50] See Recital 4, Directive (EU) 2024/1226 (n 13).

the Union the power to harmonise criminal law as regards the breach of purely 'national foreign' policy sanctions.

In terms of its material scope, the Directive addresses non-compliance in a fairly comprehensive way, covering violations of *all types* of EU sanctions: not only asset freezes and travel bans imposed against designated persons, but also sectoral restrictions (such as economic and financial restrictions), as well as arms embargoes against third countries. More precisely, the Directive requires Member States to criminalise *nine* types of violations, which encompass the following conduct: a) making funds or economic resources available to a designated person; b) failing to freeze assets belonging to or owned, held or controlled by a designated person; c) enabling the entry into, or transit through, the territory of the Union, of a designated person; d) entering into transactions with sanctioned entities, including sanctioned third countries; e) trading in goods or services covered by sanctions; f) providing financial services covered by sanctions; g) providing other-than-financial services covered by sanctions; h) circumventing sanctions; and lastly i) breaching authorisations granted by national competent authorities.[51] Member States will have the option to exempt from criminalisation breaches involving sums *less than* EUR 10,000 – presumably because such breaches are not considered to be worthy of criminal prosecution.[52] However, in instances where multiple minor breaches are linked, Member States are obliged to aggregate them in order to attain the EUR 10,000 threshold, thereby enabling criminal prosecution.[53]

In every case, it is important to note that only *intentional* breaches are subject to criminalisation. For instance, only intentional failures to freeze assets of a designated person or intentional facilitation of their entry in the EU territory. The Directive does not contemplate strict (criminal) liability for non-compliance, nor the prosecution of gross negligence. Similarly, it does not criminalise circumvention tactics *tout court* – but it requires an intentional participation in a certain structure or scheme that frustrates the effectiveness of EU sanctions. Although the Commission initially proposed that infringing sanctions should constitute a criminal offence 'when committed with intent *as well as with serious negligence*' (particularly in cases where the natural or legal person knew, or should have known, that their conduct would infringe EU sanctions),[54] the Directive ultimately leaves out the criminalisation of gross negligence. Only in one case – presumably the most serious violation of sanctions, namely intentional trade in arms or dual use goods subject to restrictive measures – 'serious negligence' resulting in that breach will have to be criminalised.[55] But, despite this single exception, the Directive's focus remains firmly on the *deliberate*

[51] ibid, Art 3(1).
[52] ibid, Art 3(2).
[53] ibid.
[54] See COM(2022) 684 final (n 30).
[55] Art 3(3) Directive (EU) 2024/1226 (n 13).

engagement in sanctions violation, including inciting, aiding, abetting, as well as attempting the commission of such a violation.[56]

By providing an extensive list of conduct to be subject to criminal prosecution, and clarifying the requirement of *dolus* (and, exceptionally, serious *culpa*), the Directive aims to overcome the previously illustrated fragmented, inconsistent and ultimately weak enforcement of EU sanctions. However, it remains to be seen whether the exhaustive list of criminal offences introduced by the Directive will be sufficiently broad to encompass all forms of sanctions violations, and circumvention tactics – or whether a non-exhaustive list could have offered greater adaptability in the fight against non-compliance. Moreover, the effectiveness of these common criminal rules will heavily rely on the ability of national authorities to investigate and prove the intent of sanctions breaches. In practice, this could become a real challenge, as obtaining direct evidence of deliberate violations necessitates significant human capabilities and resource-intensive investigations.

Moving to common criminal penalties, the Directive introduces minimum–maximum penalties for both natural and legal persons, seeking to advance deterrence and a more consistent approach to prosecution of sanctions violations across 27 jurisdictions. It identifies two distinct categories of penalties: lighter penalties for minor offences; and more severe penalties for serious offences.

With regard to *natural* persons, the Directive establishes minimum–maximum penalties, in the form of imprisonment, of at least one year for minor offences, and of at least five years for serious offences.[57] To illustrate, failure to provide the national competent authorities with information on frozen assets (where such information was obtained in the performance of a professional duty), which amounts to a minor offence, shall be punishable by a minimum–maximum of one year of imprisonment, while, providing false or misleading information to conceal the fact that a designated person owns or control those assets, which amounts to a serious offence, shall be punishable by a minimum–maximum of five years. In this context, the Directive requires Member States to take the necessary measures to criminalise conduct that involve goods, services, transactions or activities of a value of at least EUR 100,000 on the date the offence was committed. Violations that involve a lower value still fall under the scope of the Directive – and common criminal rules – but Member States are invited to design their own criminal penalties, as long as they are 'effective, proportionate and dissuasive criminal penalties'.[58]

With regard to *legal* persons, the Directive offers a wider spectrum of criminal and non-criminal penalties, including exclusion from public benefits or aid;

[56] ibid, Art 4 (n 13).

[57] ibid, Art 5.

[58] On the proportionality of these penalties see Lorenzo Bernardini, 'Criminalising the Violation of EU Restrictive Measures: Towards (Dis)Proportionate Punishments Vis-à-Vis Natural Persons?' (2024) 14 *European Criminal Law Review* 4.

disqualification from business activities; withdrawal of permits and authorisations to pursue the activities that have resulted in the criminal offence, etc.[59] The Directive also codifies monetary fines. For minor offences, the maximum level of such fines is set to at least one per cent of the total worldwide turnover, or EUR 8,000,000. For serious offences, the minimum–maximum is increased to at least five per cent of the total worldwide turnover, or EUR 40,000,000.[60] It is worth noting that the Commission's initial proposal only contained a reference to the percentages of the total worldwide turnover – not providing for any alternative.[61] But, in its final version, the Directive establishes two alternatives, leaving Member States the choice to set the minimum–maximum level of penalties for legal persons according to their national preferences. Accordingly, each Member State retains a margin of manoeuvre in transposing the new provisions, as the Directive does not offer a definitive solution to punish sanctions breaches and evasion when (intentionally) committed by legal persons.

Hence, the new Directive (EU) 2024/1226 introduces a comprehensive (and exhaustive) list of sanctions breaches to be subject to criminalisation, as well as minimum–maximum penalties for those breaches. Undoubtedly, it compels significant reforms across 27 jurisdictions, and Member States had until 20 May 2025 to transpose the Directive into their national law.[62] Nonetheless, it has been argued that each Member State retains a margin of manoeuvre,[63] as the Directive still leaves room 'for wide variance' across the Union.[64]

9.6 Final Reflections on the Criminalisation Process: A More Effective Enforcement for EU Sanctions – or a Still Fragmented One?

It has been illustrated that the criminalisation of sanctions violations pursuant to Article 83 TFEU is intended to address a new area of *particularly serious crime* with a *cross-border dimension*. Engaging in sanctions breaches now amounts to a new Eurocrime, and Directive (EU) 2024/1226 approximates rules and penalties to counter it. While the Directive introduces significant reforms and advancements in the effective enforcement of restrictive measures, legal

[59] Art 7 Directive (EU) 2024/1226 (n 13).

[60] On the proportionality of these penalties see Pedro Caeiro, 'Broadly Unknown, but Deservedly Unloved? Turnover-Based Fines and Their Transplant from Competition Law to EU Criminal Law' in Lorenzo Grossio, Valsamis Mitsilegas and Stefano Montaldo (eds), *Proportionality of Criminal Penalties in EU Law* (Bloomsbury Publishing, 2025).

[61] See COM(2022) 684 final (n 30).

[62] Art 20 Directive (EU) 2024/1226 (n 13).

[63] Jeff Nielsen, 'Considering the EU Commission's Proposal on Its Directive for Criminal Penalties for Violations of Restrictive Measures in the Context of a Comparative Analysis With US Sanctions Enforcement' (22 November 2022), papers.ssrn.com/sol3/papers.cfm?abstract_id=4283807.

[64] ibid, 6. For instance, with regard to penalties to legal persons, Art 7 affords considerable discretion to Member States. National legislators can, in fact, decide whether the maximum monetary penalty should be set according to a numerical cap or a percentage cap.

challenges and fragmentation still persist throughout the Union. Furthermore, the rapid criminalisation of sanction violations in the last couple of years gives rise to a number of unresolved issues. Chief among these is the question of whether the approximation of criminal rules and penalties will truly ensure a more effective implementation of EU sanctions across the Union.

9.6.1 A Symbolic (rather than Evidence-Based) Criminalisation

Following the Commission's proposal of May 2025, the Union has successfully completed, for the first time, the procedure set forth in Article 83(1) TFEU, thereby expanding its competences to address a new area of crime. This legislative process demonstrates that the Union's foreign policy and criminal law are now two *intertwined* areas of EU law. Together, they empower the Union to uphold and promote its values and interests, in its relations with the wider world. While sanctions *directly* contribute to the achievement of CFSP objectives, criminal law measures are now intended to support the Union's external action by ensuring the effective enforcement of its restrictive measures across the 27 Member States. Particularly in the context of Russia's war of aggression against Ukraine, the resort to criminal law measures has been presented as the optimal strategy to enhance deterrence against non-compliance with EU sanctions.

Yet, the EU legislator essentially relies on *one comparative study* (published by the Genocide Network in 2021) to prove the need to introduce common criminal rules in order to effectively counter sanctions breaches. The 2021 study illustrates how the enforcement of EU sanctions varies significantly across the Union. It shows inconsistencies, and indicates that only a limited number of violators have been held accountable at the national level. However, it does *not* present criminal law as the 'magical solution',[65] a panacea for ensuring that individuals and legal persons responsible for sanctions violations are held accountable.

Thus, it remains unclear to what extent criminal law is the most effective tool to counter sanctions breaches and deter circumvention tactics. In the absence of an impact assessment or any more detailed study exploring the advantages and disadvantages of difference enforcement strategies, it has not been proven than reliance on criminal law invariably results in enhanced deterrence or an increase in investigations throughout the Union. Rather, it seems that the exceptional circumstances of the war in Ukraine have overlooked any obligation to produce evidence-based criminal legislation, which risks leading to *over-criminalisation*, also referred to as 'precautionary criminalisation',[66] or 'purely symbolic crim-

[65] On the heavy reliance on the 'magic of criminal law' see SS Buisman, 'The Future of EU Substantive Criminal Law: Towards a Uniform Set of Criminalisation Principles at the EU Level' (2022) 30 *European Journal of Crime, Criminal Law and Criminal Justice* 161, 176.

[66] Ester Herlin-Karnell, 'The Development of EU Precautionary Criminalisation' (2011) 1 *European Criminal Law Review* 149. See also Douglas Husak, *Overcriminalization: The Limits of the Criminal Law*, 1st edn (Oxford University Press, 2007).

inalisation'.[67] In this way, criminal law appears to be presumed by the EU legislator to be the most effective means to correct deficiencies in the enforcement of restrictive measures – without any evidence to support this assertion.

The extension of EU competences and proliferation of legislative initiatives in this field is closely related to Russia's invasion of Ukraine. Moreover, while the use of those criminal law powers will not end the war, it is considered to contribute to the effective implementation of EU sanctions. Plus, it conveys a political message that the Union is stepping up their enforcement. This suggests, once again, that the criminalisation process has a strong *symbolic* and *communicative* dimension – rather than evidence-based one.[68] Consequently, it can be argued that the over-reliance on criminal law may ultimately conflict with the *ultima ratio* principle – and the obligation to resort to less intrusive means *before* resorting to criminal law, which shall 'always remain a measure of last resort'.[69] But, in the context of an ongoing war, the imperative to enhance sanctions effectiveness by criminal means appears to prevail over evidence-based criminalisation.

In conclusion, this chapter sheds light on how the criminalisation process appears *functional* 'to ensure the effective application of Union restrictive measure'. Although it has been traditionally argued that the Treaties put forward 'a dual model of criminalisation',[70] namely a *securitised* model (reflected in Article 83(1) TFEU), which allows the Union to combat certain areas particularly serious crime with a cross-border dimension, and a *functional* model (reflected in Article 83(2) TFEU), which grants the Union with the competence to harmonise national criminal laws if such approximation 'proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures',[71] this chapter demonstrates that the criminalisation of sanctions breaches has blurred the traditional distinction between securitised and functionalised criminalisation.[72] The resort to EU criminal law, in fact,

[67] 'The stronger the pull of external factors, the stronger the necessity to have proper safeguards in place and, in particular, the stronger the need to follow a tailor-made, evidence-based approach. ... New initiatives should [not] be purely symbolic ...' See Nicholas Franssen and Anne Weyembergh, 'From Facts and Political Objectives to Legal Bases and Legal Provisions: Incremental European Integration in the Criminal Law Field' (2021) 27 *European Law Journal* 368, 376.

[68] Steve Peers, 'Foreign policy sanctions and criminal law harmonisation' EU Law Analysis, 18 January 2024, https://eulawanalysis.blogspot.com/2024/01/foreign-policy-sanctions-and-criminal.html.

[69] COM(2011) 573 final (n 36). See also Ester Herlin-Karnell, 'What Principles Drive (or Should Drive) European Criminal Law?' (2010) 11 *German Law Journal* 1115.

[70] Valsamis Mitsilegas, 'Substantive Criminal Law: From Securitised to Functional Criminalisation' in *EU Criminal Law* (Hart Publishing, 2022).

[71] See also Öberg (n 18); Vanessa Franssen, 'EU Criminal Law and Effet Utile: A Critical Examination of the Union's Use of Criminal Law to Achieve Effective Enforcement' in *EU Criminal Law and Policy: Values, Principles, and Methods* (Routledge, 2016).

[72] For preliminary reflections on the tension between *securitised* and *functionalised* criminalisation, see Lorenzo Bernardini and Francesca Finelli, 'Violations of EU Sanctions and Criminal Penalties: Proportionality at Peril?' in Lorenzo Grossio, Stefano Montaldo and Valsamis Mitsilegas (eds), *Proportionality of Criminal Penalties in EU Law* (Hart Publishing, 2025). See also Jörg

appears to be *a means to an end* (the end being the effective implementation of sanctions), rather than reflecting the securitised model traditionally enshrined in Article 83(1) TFEU.

9.6.2 Inevitable Fragmentation

Besides the illustrated criticisms with regard to the symbolic and functional dimension of the criminalisation process, in practice, the Directive (EU) 2024/1226 cannot completely eliminate fragmentation in the enforcement of EU sanctions – as Member States still remain free to adopt *different responses* against non-compliance and circumvention tactics. The Directive, in fact, offers a legal framework for the identification and punishment of *certain* criminal offences: it provides definitions and penalties intended to regulate intentional and serious violations of EU sanctions – presented in a closed, exhaustive list of crimes. But it does not fully regulate national responses to non-compliance.

Moreover, and most importantly, it does not harmonise national capabilities, resources, budgetary priorities and procedures to detect and prosecute sanctions violations.[73] In other words, enforcement capabilities remain fragmented in the 27 Member States, as well as the national appetite for (criminal) investigations. Furthermore, the Directive does not specify what should be the *interplay* between criminal *and* non-criminal enforcement actions. It does not regulate to what extent Member States can maintain non-criminal penalties (for instance, in case of serious negligence or wilful blindness), while resorting to criminal prosecution only for the most serious (and intentional) violations.[74] As a result, some countries may continue to rely on non-criminal enforcement actions – while referring to criminal prosecution only in limited circumstances.[75]

Since early spring 2022, some national authorities have reacted promptly to the drift towards criminalisation, strengthening their enforcement mechanisms (eg the Netherlands has conducted multiple arrests and investigations, and the Baltic states have shown a special commitment in the fight against circumvention). In contrast, other authorities appear to have been less proactive. In fact, in

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Monar, 'Reflections on the place of criminal law in the European construction' (2021) 27 *European Law Journal* 356.

[73] 'Member states have, together, officially designated more than 160 national authorities involved in the enforcement of EU sanctions. These are all, in turn, subject to greatly varying mandates, and have very different human and technical resources, and methods'; see Kim B Olsen and Simon Fasterkjær Kjeldsen, 'Strict and Uniform: Improving EU Sanctions Enforcement' [2022] DGAP Policy Brief. See also René Smits, 'Financial Sanctions: The Development of an EU Practice' in *International Sanctions: Monetary and Financial Law Perspectives* (Brill Nijhoff, 2024) 92.

[74] Francesca Finelli, 'Non-Criminal Penalties for Sanctions Violation' in Clara Portela, Andrea Charron and Mirko Sossai (eds), *Elgar Encyclopedia of International Sanctions* (Edward Elgar Publishing, 2025).

[75] Similarly, in the US and the UK, the enforcement of sanctions is predominantly administered by specialised agencies (OFAC and OFSI, respectively) which impose penalties on a *civil liability* basis.

June 2025, the European Commission even decided to open infringement procedures against 18 Member States (Belgium, Bulgaria, Czechia, Germany, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Hungary, Malta, Austria, Poland, Portugal, Romania and Slovenia) for failing to fully transpose the new Directive into national legislation by the 20 May 2025 deadline.[76] This shows that national enforcement systems are *still* not harmonised throughout the Union – even after the unprecedented commitment to ensure sanctions effectiveness through criminal law.[77] The political agreement (and the unanimity vote expressed within the Council) has not solved the inherent fragmentation in the implementation and enforcement of EU restrictive measures.

In conclusion, it remains to be seen what impact the criminalisation of sanctions violations will have in practice. Undoubtedly, the fragmentation of national willingness, resources and expertise to investigate and initiate prosecutions will not be easily resolved.

9.6.3 A Possible Way Forward: the Role of the EPPO

Directive (EU) 2024/1226 intends to foster supranational cooperation, providing for a stronger inter-institutional exchange of information among Member States' competent authorities, the Commission, Eurojust, Europol, and the European Public Prosecutor's Office (EPPO), whose respective roles would come into play within their respective competences, as well as competent authorities of third countries.[78] It fosters the creation of institutional networks to detect and punish non-compliance across the Union.

Moreover, the prospect of extending competence to the EPPO to include breaches of EU sanctions has been raised by some Member States and the European Parliament, and such a development would clearly entail much stronger and coordinated *criminal* enforcement.[79] Conferring powers to a centralised supranational prosecutor can be desirable in selected areas of transnational crime where there are compelling rationales to fight those crimes through common measures. If the EPPO could contribute to addressing complex

[76] See https://ec.europa.eu/commission/presscorner/detail/en/inf_25_1842.

[77] See data and graphics on the enforcement of Russia and Belarus sanctions across the Member States, at https://blogs.duanemorris.com/europeansanctionsenforcement/2024/09/27/europe-hits-300th-concluded-sanctions-enforcement-action-since-2017/?lctg=281740899. See also European Banking Authority (EBA), Opinion on money laundering and terrorist financing risks affecting the EU's financial sector, EBA/Op/2023/08, (13 July 2023), para 3.1.1, www.eba.europa.eu/sites/default/files/document_library/Publications/Opinions/2023/1058335/EBA%20Op%202023%2008%20Opinion%20on%20MLTF%20risks%20EBA%20REP%202023%2021.pdf.

[78] Art 20 Directive (EU) 2024/1226 (n 13).

[79] See 'L'appel des ministres français et allemand de la justice: « Nous souhaitons l'extension de la compétence du parquet européen aux violations des sanctions prises par l'UE »' *Le Monde* (29 November 2022); European Parliament resolution of 18 January 2023 on the implementation of the common foreign and security policy — annual report 2022 (2022/2048(INI)) [2023] OJ C 214/26, para 18.

violations of EU restrictive measures by pooling expertise, competencies and investigative resources that individual Member States cannot muster, there is a *prima facie* case for an extension of the EPPO's powers in this field. In other words, EPPO appears better placed to enforce this type of legislation – limiting national fragmentation.[80] Yet, once again, it would offer a centralised tool for the investigations of *certain* types of sanctions breaches, namely criminal offences as listed in the Directive (EU) 2024/1226 – though it could not centralise the imposition of non-criminal penalties.

Csonka and Zoli have argued that, from a substantive perspective, there may be grounds to expand the EPPO's authority to include criminal offences harmonised by the new Directive.[81] In fact, restrictive measures are a crucial tool for advancing the objectives of the CFSP and, like fraud against the EU budget, the effective detection and punishment of non-compliance with EU provisions can be viewed as an interest of the Union itself, justifying criminal enforcement at the EU level. It is admittedly true that the crimes the EPPO would be empowered to investigate (ie, sanctions violations) are not primarily of national concern. With binding enforcement powers, the EPPO is capable of directing prosecutions and investigations into all the sanctions violations in all participating jurisdictions, thus ensuring a coherent and efficient prosecution of such offences. In addition, it is maintained that protecting the effectiveness of EU sanctions regimes is a collective asset belonging to the whole community, since the enforcement of EU sanctions is about protecting the common values and objectives of the EU in the external context.[82] The protection of EU sanctions are thus rightly conceived as 'European public goods',[83] which by their nature (since states alone do not have the expertise and resources to deal with this issue)[84] can only be protected on a European level, thus surpassing the notion of 'territory' and national public goods.

The key objections to conferring powers to the EPPO relates to sovereignty and legitimacy. Political legitimacy considerations nonetheless suggest that the Member States' interest in preserving national autonomy in this field should not be disregarded.[85] It is well known that most EU citizens regard themselves primarily as citizens of a Member State rather than of the EU. From this perspective, it is clear that the nation state regarded as the most legitimate entity for

[80] Jacob Öberg, 'The European Public Prosecutor's Office - Supranationalism, Sovereignty and Legitimacy' (2025) 50 *European Law Review* 705.

[81] Peter Csonka and Luca Zoli, 'The New Directive on the Violation of Union Restrictive Measures in the Context of the EPPO' Eucrim (2024), doi.org/10.30709/eu-crim-2024-006.

[82] Art 2 TEU.

[83] See Öberg (n 44) ch 2. See also Stephen Coutts, 'Supranational Public Wrongs: The Limitations and Possibilities of European Criminal Law and a European Community' (2017) 54 *Common Market Law Review* 771.

[84] Art 5(3) TEU.

[85] Art 4(2) TEU expresses a clear notion of state sovereignty. See Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 2011) 279–314. The authors offer an extensive analysis of primacy suggesting that whilst national courts in principle accepts the principle, there are limits imposed on this acceptance by national constitutional courts.

adopting legislation in the field of criminal justice.[86] Even though the traditional ('Bodian') notion of sovereignty[87] is not persuasive enough to reject the conferral of binding powers to the EPPO, criticism of the EPPO's legitimacy should be taken seriously.[88] This speaks to the issue of legitimacy and the (absence) of a strong fundamental rights framework encasing the operations of the EPPO. If we conjecture that the legitimacy of the EPPO is not only dependent on the success of its enforcement actions (ie, output legitimacy) but also its capacity to respect individual rights, there is a need for corresponding legal standards of rights of defence and judicial protection surrounding the operations of the EPPO to countenance the body's enforcement powers.[89] Stronger common EU measures for protecting the rights of the defendant particularly in respect of judicial remedies against the EPPO's actions, along with effective safeguards that form the basis for the exercise of the EPPO's powers, should be a central feature of a potential future amendment of the EPPO Regulation.[90] A robust legal framework surrounding the EPPO's operational action, combined with strong legal safeguards for individual defendants, is imperative for ensuring the overall legitimacy of this new unique supranational prosecutor. In the absence of such a framework it is highly doubtful whether it is justified to extend the EPPO's powers beyond Article 86 TFEU to also cover the prosecution of crimes against the EU's sanctioning regime.[91]

[86] The German Federal Constitutional Court has stated that nothing more strongly embodies the exercise of sovereign authority than the right to define and enforce the rules of criminal law, since a criminal justice system constitutes a legal community which expresses a code of conduct that is anchored in its moral values, see ('Lisbon' judgment) 2 BvE 2/08,2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (2009), paras 252–53, 355–56.

[87] Jean Bodin, *Bodin: On Sovereignty* (Cambridge University Press, 2012); Daniel Lee, *The Right of Sovereignty: Jean Bodin on the Sovereign State and the Law of Nations* (Oxford University Press, 2021).

[88] Paul P Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment' (1997) 3 *European Law Journal* 105; Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 *European Law Journal* 5.

[89] Christoffer C Eriksen and Jørgen A Stubberud, 'Legitimacy and the Charter of Fundamental Rights Post-Lisbon' *The Reach of Free Movement* (Springer, 2017); Craig and De Búrca (n 85).

[90] According to Art 119 EPPO Regulation, the Commission shall conduct an evaluation on the implementation and the impact of the Regulation and produce a report envisaged to be published in 2026. For the purpose of this evaluation Spark Consulting has produced two reports: i) 'Measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO")' (September 2023), www.europarl.europa.eu/cmsdata/280160/Final%20Report%20-%20DG%20JUST%20Study%20on%20the%20EPPO%20-%2029.09.2023_en.pdf, and ii) 'Extension of the Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO") (JUST/2022/PR/JCOO/CRIM/0004)' (September 2023), www.europarl.europa.eu/cmsdata/280163/Final%20Report%20on%20Extension%20Findings%20DG%20JUST%20Study%20on%20the%20EPPO_en.pdf.

[91] Öberg (n 80).