

The EU Undertakes Fundamental Reform of the Legal Basis for Sanctions Enforcement

At present, almost every aspect of the enforcement of sanctions varies from member state to member state across the EU. The EU publishes regulations, but then it is up to each member state to implement those into domestic law. The EU's regulations do not deal with most aspects of enforcement; penalties, limitation periods, defences, ancillary offences, even the necessary mental element for the offence are all left to the domestic law of each member state. Indeed, in some member states the breaching of sanctions is not even a criminal offence, while in others the prosecution can choose between criminal or administrative enforcement.¹ The result is a legal patch work across the EU.

To address this on May 25, 2022, the EU Commission issued a proposal that would add sanctions to the very short list of so-called "EU crimes".² The practical effect of this would be to place sanctions on the same level as crimes such as money laundering and mean that the EU itself could legislate via directives.

The European Parliament, the Council and the Commission are now involved in the legislative process in order to adopt this proposal. Most recently on 7 July the European Parliament consented to the Council's proposal. In the coming weeks it is expected that the various required steps will be taken, following which the EU Commission will propose a Directive which, once adopted, will need to be transposed into the national law of all Member States.

The text of the proposed Directive has not yet been published. It is likely, however, that it will follow (no doubt with some changes) the Commission's original proposal. That proposal contains a series of far-reaching proposals which will combine to bring about a fundamental change to almost every aspect of the enforcement of EU sanctions. These changes are set out below.

Reporting Obligations

Currently EU sanctions regulations contain a provision which asks that

¹ Communication from the Commission, Towards a Directive on criminal penalties for the violation of Union restrictive measures, COM(2022) 249 final.
https://ec.europa.eu/info/sites/default/files/2_191746_comm_cri_ann_en.pdf.

² Proposal for a COUNCIL DECISION on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, COM/2022/247 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:0247:FIN>.

“Without prejudice to the applicable rules concerning reporting, confidentiality and professional secrecy, natural and legal persons, entities and bodies shall:

- a) supply immediately any information which would facilitate compliance with this Regulation, such as information on accounts and amounts frozen”.*

Such provisions, because they contain no offence of failing to report, are not currently transposed into domestic member state law. The proposal, however, would create new failure to report offences for (amongst others) not reporting a sanctions breach, or not reporting activities that seek to circumvent sanctions. In many ways this would align the EU with the position in the UK where, since 2017, there has been a positive reporting obligation in relation to breaches of sanctions, and since Brexit a wider reporting obligation in relation to frozen assets and of entities owned or controlled by a designated person. It remains to be seen what the precise extent of the proposed reporting obligations will be and on which types of entities and individuals the reporting obligation will fall.

Offences for Legal Persons

The Commission’s proposal also includes wholly new criminal offences for legal persons which would significantly expand the exposure for companies and other businesses. Both proposals appear to be designed to address issues of criminal attribution to companies. In some member states it can be difficult to attribute actions by staff or management to the company. The first proposal deals with just such a situation – it makes it an offence for a company, which has not otherwise committed an offence, where a “leading person” in the company commits a breach of sanctions for the benefit of the company.

The second proposal goes a step further. If implemented it would create a “failure to prevent” offence. A company would commit this offence if, through a lack of supervision or control by those in leading positions within the company, an offence was committed by others. The precise scope of this offence remains to be seen, but as it stands it looks very much akin to the “failure to prevent” offence under the UK’s *Bribery Act*, where if an “associated person” commits bribery for the benefit of a company, that company commits the offence unless it can show that it had implemented “adequate procedures” designed to prevent the bribery in question. The adoption of such an offence in the sanctions sphere would be unprecedented.

The Required Mental Element for an Offence

The Commission proposal also seeks to address the current variations in the required mental element for the commission of criminal offences. The proposal is clear that “intent” should be sufficient, but there is then uncertainty as to what other categories may be sufficient. The proposal mentions that gross negligence based on “knowledge”

may be sufficient, but this is not fleshed out. It is unclear what would constitute gross negligence, and it is unclear what would constitute knowledge. Would *actual* knowledge be the requirement, or would constructive knowledge be enough? The proposal then adds that “ignoring restrictive measures or related legal prohibitions (wilful blindness)” also may come to be sufficient. We may have to await the draft Directive to better understand the detail of what is proposed.

Penalties and Sentencing Powers

To overcome the current differences between the member states, the proposal would also mean the imposition of standardized penalties, and the adoption of a broad range of significant sentencing powers. In terms of monetary penalties the proposal moots a penalty calculated as a un-specified percentage of worldwide turnover in the previous financial year. More wide-ranging still are some of the proposed non-monetary penalties which range from the winding up or liquidation of the defendant, through the temporary or permanent closure of local subsidiaries or branches that were involved in the commission of the particular offence, to the temporary or permanent disqualification from continuing a business line involved in the offence, and public procurement and public funding debarment. These are extraordinarily extensive sentencing powers.

The Commission’s proposal provides a list of aggravating factors that would need to be taken into account at sentencing. Such factors include the values at stake or the size of the benefit obtained, repeat offending, obstructing the investigation, or the use of false or forged documents. In an effort to target so-called “professional enablers” another aggravating factor is where “the offence was committed in the context of private professional activity, including by breaching one’s professional duties”. By contrast, the Commission’s proposal only provides one example of a mitigating factor which is cooperation with the investigation.

Limitation Periods

The Commission’s proposal also seeks to standardize the limitation periods for the commencement of a prosecution and for the enforcement of penalties. No period has, however, been specified as yet. Further, it is unclear whether the period would run solely from the date of the commission of the offence, or from the date of the discovery of the offence or how the rules might apply in a situation where the offence is continuing.

Ancillary Offences

As it stands it is entirely question of domestic member state law as to whether there are any ancillary offences attached to sanctions breaches, and if there are such offences what they are and the necessary elements. The Commission’s proposal will put an end to that. So far, the four ancillary offences proposed are incitement, aiding, abetting and

attempt. Whether others are added (such as conspiracy, procuring, counseling, or encouraging) remains to be seen.

Jurisdiction

The proposal would also see a significant expansion of the jurisdictional reach of the EU's sanctions, as well as giving to member states the option to expand their jurisdiction yet further. Currently EU sanctions regulations apply to a non-EU business "in respect of" any part of that business done within the EU. Under the proposal member states would be "required to extend their criminal jurisdiction to non-EU persons outside EU territory insofar as their business has an EU nexus (which may, by extension, also concern their assets)". This would mean that a Brazilian company could be prosecuted for breaches of EU sanctions committed in Thailand, if that Brazilian company has assets in the EU. This would be a significant change. Moreover, the proposal also states that criminal jurisdiction could be exercised if an offence was committed "in whole or in part" within the EU. Again, this would be a significant extension of EU jurisdiction where despite some part of the offence being committed outside the EU, the member state would still have jurisdiction.

The proposal would also allow member states to further expand their criminal jurisdiction over offences committed globally by those habitually resident in a member state (as opposed to the current rules which are limited to nationals), as well as over offences committed globally for the benefit of an EU legal person.

To allow for the easier assertion of criminal jurisdiction, the Commission's proposal bars any requirement in local criminal law of a victim's report or, where the offence took place outside a member state, a denunciation of the offence by the foreign state.

Asset Confiscation

The EU is also wanting to ensure that asset seizure powers are more readily available for sanctions breaches. In part the Commission's proposal seeks to achieve this by use of the existing confiscation and civil recovery powers under the relevant anti-money laundering legislation, with any funds obtained or retained through sanctions breaches being "criminal property". In addition, however, the Commission has put forward a proposal for a separate Directive on asset recovery and confiscation.³

³ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asset recovery and confiscation, COM/2022/245 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0245&qid=1653986198511>.

Conclusions

The proposals, if adopted, would be nothing short of a complete overhaul and reform of the legal basis for the criminal enforcement of sanctions across the EU. There is no doubt that this is timed in response to, and as part of, the unprecedented range and number of restrictive measures imposed against Russia and, to a lesser extent, Belarus. We will provide updates on these reforms to our friends and clients as they progress and develop.

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