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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**

EXPLANATORY MEMORANDUM

(1) CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

(1) Introduction

Restrictive measures are an essential tool for the promotion of the objective of the Common Foreign and Security Policy ('CFSP'), as set out in Article 21 of the Treaty on European Union ('TEU'). These objectives include safeguarding the Union's values, maintaining international peace and security as well as consolidating and supporting democracy, the rule of law and human rights.

For the sake of preserving these values, the Union may impose restrictive measures against third countries, entities or individuals. These measures include targeted individual measures, i.e., targeted financial sanctions (asset freezes) and restrictions on admissions (travel bans), as well as sectoral measures, i.e. arms embargoes or economic and financial measures (e.g. import and export restrictions, restrictions on the provision of certain services, such as banking services)¹. Preserving international peace and security, is of particular pertinence in the current context of Russia's invasion of Ukraine. The Union has put in place a series of restrictive measures against Russian and Belarusian individuals and companies, some of which date back to 2014. In this context, in order to enhance Union-level coordination in the enforcement of these restrictive measures, the Commission set up a 'Freeze and Seize' Task Force². Besides ensuring coordination among Member States and Union Agencies such as Europol and Eurojust, it seeks to explore the interplay between restrictive measures and criminal law measures.

Currently, the Union has over forty regimes of restrictive measures in place. Some of these implement restrictive measures by the United Nations; others are adopted autonomously by the Union. In addition to regimes addressing country-specific situations, the Union has also adopted horizontal regimes targeting proliferation and use of chemical weapons, cyberattacks, human rights violations and terrorism³. Restrictive measures are binding on Union Member States and on any person or entity under the jurisdiction of the Member States (EU operators)⁴. Inconsistent enforcement of restrictive measures undermines their efficacy and

¹ The Council adopts restrictive measures. The Council first adopts a CFSP Decision under Article 29 TEU. The measures envisaged in the Council Decision are implemented either at Union or at national level. It has been the practice so far that measures such as arms embargoes or restrictions on admission are implemented directly by the Member States, which are legally bound to act in conformity with CFSP Council Decisions. Other measures interrupting or reducing, in part or completely, economic relations with a third country as well as individual measures freezing funds and economic resources, prohibiting the making available of funds and economic resources, are implemented by means of a Regulation adopted by the Council, acting by qualified majority, on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, under Article 215 TFUE. Anti-circumvention provisions can be found in both types of acts.

² Enforcing sanctions against listed Russian and Belarusian oligarchs: Commission's "Freeze and Seize" Task Force steps up work with international partners, Press release European Commission, 17.03.2022, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1828; 'Freeze and Seize Task Force': Almost €30 billion of assets of Russian and Belarusian oligarchs and entities frozen by the EU so far, Press release European Commission, 08.04.2022, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2373.

³ For an overview, see the EU sanctions Map, available at <https://www.sanctionsmap.eu/#/main>.

⁴ EU restrictive measures apply within the jurisdiction (territory) of the Union: to EU nationals in any location: to companies and organisations incorporated under the law of a Member State- including branches of EU companies in third

the Union's ability to speak with one voice⁵. The implementation and enforcement of Union restrictive measures is primarily the responsibility of Member States. The competent authorities in the Member States have to assess whether there has been a breach of the relevant Council Regulation adopted under Article 215 of the Treaty on the Functioning of the European Union ('TFEU') and to take adequate measures.

These Regulations generally include:

Article 215 TFEU provides a legal basis for the Council to adopt the ‘necessary measures’ in the case of an adoption of Union restrictive measures. However, the legal basis for the adoption of restrictive measures does not allow for the approximation of criminal law definitions and the types and levels of criminal penalties⁸.

Against this background, the Commission proposes to add 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 ('TFEU'). Once the Council reaches agreement and the European Parliament grants its consent to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the TFEU, the Commission will be in a position to propose a Directive under the ordinary legislative procedure, which could approximate the definition of criminal offences and sanctions.

5 Communication from the Commission, The European economic and financial system: fostering openness, strength and resilience, COM(2021) 32 final of 19.01.2021, section 5 (strengthening the implementation and enforcement of EU sanctions), p. 16, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0032&from=EN>; In the same Communication the Commission notes that the implementation [of EU restrictive measures] is not as uniform across the EU as it ought to be. This creates distortions in the Single Market as EU companies, including EU subsidiaries of foreign companies, can circumvent prohibitions. This also creates uncertainty among operators. As cited, inconsistent enforcement undermines the efficacy of [restrictive measures] and the EU's ability to speak with one voice. Among other initiatives, the strategy calls for further coordination work between the Commission and Member States to ensure that national penalties for breaching EU restrictive measures are effective, proportionate and dissuasive.

7 It is noted that that this clause is also applicable if the restrictive measures have not been breached; it is enough to participate in schemes created to that end.

In view of the urgent need to hold listed individuals and entities involved in the violation of Union restrictive measures accountable, today the Commission is also adopting a Communication, which has an annex that sets out the main elements that a future Directive on criminal sanctions for the violation of Union rules on restrictive measures could contain.⁹

The sections below examine the problems the current proposal seeks to tackle, together with their underlying causes and the negative consequences caused by the current state of play. This will be followed by a presentation of the objectives of the proposal, and its added value, including the reasons why it complies with the criteria for adding an area of crime to Article 83(1) TFEU.

(2) Problems the proposal addresses

As the adoption of Union restrictive measures has intensified over the last decades¹⁰, so too have the schemes to evade them, including by those on a restrictive measures list that are well resourced and able to avail themselves of “facilitators” (lawyers, notaries etc.) and “tools” (complex legal structures to hide beneficial ownership of the assets for instance) to escape their application.

In this regard, a 2021 report by the European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (‘Genocide Network’)¹¹ is of particular relevance. Based on a comparative assessment of the situation in the Member States, the Genocide Network report points out that in practice, very few individuals or legal persons responsible for the violation of Union restrictive measures are effectively held accountable¹². However, it also notes that ‘a positive trend can be observed recently in the number of enforcement actions launched and the rise in penalties imposed by certain national authorities’¹³.

Despite the positive trends in some Member States, there seem to be only a few in which there are ongoing judicial proceedings related to the violation of Union restrictive measures¹⁴. This can serve as an indication that insufficient priority is given to investigating and prosecuting the violation of Union restrictive measures in many Member States. In addition, law enforcement authorities face significant hurdles due to the specific category of offenders, victims and the complex nature of the (combination of) offences concerned.

Violations of Union restrictive measures often have a cross-border nature. For example, a company may buy equipment via a foreign intermediary, knowing that the true vendors are

⁹ Communication from the Commission to the European Parliament and the Council, Towards a Directive on criminal penalties for the violation of Union restrictive measures, COM (2022) 249 of 25.05.2022.

¹⁰ See the EU Sanctions Map, supra note 1.

¹¹ Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (2002/494/JHA) Eurojust, Genocide Network, see <https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network?msclid=de6a1668cf6011eca5681e93e0033be2>.

¹² Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 4. An overview of the relevant legislation from Member States and Network Observer States is provided in the annex to the expert report, see https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf; In view of a presentation in the Council Working Party on Judicial Cooperation in Criminal Matters (COPEN) the report was also published in Council doc. 7274 of 16 March 2022.

¹³ Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 13.

¹⁴ For a selection of cases see Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 14.

countries, entities and individuals subject to restrictive measures¹⁵. In the realm of asset freezes, for instance, an international bank may facilitate the transfer of a “frozen” yacht owned by a listed individual. Such a prohibited transfer could involve a law firm, which aids in the commission of the crime by drafting the papers for the sale of the yacht and, in some cases, a corrupt government official who allows for its change in ownership. Money laundering and/or shell companies might also be accessory means to conceal the origins of the payment for the yacht.

As there are often no direct victims of the violation of restrictive measures, their investigation and prosecution depend on detection by national competent authorities. Furthermore, reports by whistleblowers¹⁶ or complaints by civil society organisations¹⁷ play an important role in reporting violations of restrictive measures.

As regards the interaction of the Member States’ approach towards the criminalisation of violations of Union restrictive measures with confiscation measures, it should be pointed out that in most Member States, confiscation is only possible based on a criminal conviction, or at least established links with criminal activities. Nevertheless, even if in several Member States the violation of restrictive measures has been criminalised, differences among Member States can lead to a fragmented approach in cross-border cases.

(3) Underlying causes of the problems

Those involved in illicit practices concerning Union restrictive measures may profit from the fact that Member States have very different definitions and penalties for the violation of Union restrictive measures under their administrative and/or criminal law¹⁸. Some Member States use broad definitions, such as ‘breach of UN and EU sanctions’ or ‘breach of EU regulations’¹⁹. Other Member States have more detailed provisions in place, for instance providing a list of prohibited conduct²⁰.

Based on the replies received to a questionnaire circulated by the Genocide Network, its further consultations²¹ and additional research carried out by the Commission in view of this proposal, it can be concluded that in 13 Member States the violation of Union restrictive measures can amount to either an administrative or criminal offence. The criteria according to

¹⁵ Idem, p. 19-20.

¹⁶ EU Sanctions Whistle-blower Tool, available at: <https://eusanctions.integrityline.com/frontpage>.

¹⁷ An example is the *Lafarge* case based on a criminal complaint by two civil society organisations, together with 11 former Syrian employees of Lafarge discussed in Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, section 4.2., p. 17; case number 19-87.367 - Cour de Cassation (France), 7 September 2021, English translation available at https://www.eurojust.europa.eu/sites/default/files/assets/21.09.07_cour_de_cassation_decision.pdf.

¹⁸ Idem, section 5, p. 22.

¹⁹ For instance, Article 459 of the French Customs Code (*Code des douanes*) provides that ‘any person who infringes or attempts to infringe upon economic and financial restriction measures decided (i) at EU level on the basis of Article 215 of the TFEU or (ii) on the basis of international agreements ratified by France faces up to five years of imprisonment. Legal persons may also be prosecuted for such offences.’, see Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, annex; For the original version in French see <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006071570/?msclid=ad92a692cece11ec9180daeb34a1af50>; Belgium, Cyprus, the Czech Republic and Lithuania have similar provisions in place, see Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, annex.

²⁰ For example Article 18(2) and 19(5) of the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*), see https://www.gesetze-im-internet.de/awg_2013/?msclid=77c4bc27ced011ecad0f49edf9add31e. Other Member States where national law goes beyond simply providing for the criminalisation of violations of Union restrictive measures are, for instance, Hungary and Slovenia, see Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, section 5, annex.

²¹ Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, annex.

which the conduct falls within one or the other regime are different in each Member State, but they are usually related to their gravity (serious nature), or determined in qualitative (intent, serious negligence) or quantitative (damage) terms²². In 12 Member States, the violation of Union restrictive measures is a criminal offence only. However, in two Member States, the specific offence of violation of Union restrictive measures can only result in administrative penalties²³.

Table: Categorisation of the violation of Union restrictive measures

Categorisation of the violation of Union restrictive measures	Member States
The violation of restrictive measures is either criminal or administrative offence	BE, BG, CZ, DE, EE, IE, EL, IT, LT, AT, PL, RO, SI
The violation of restrictive measures is a criminal offence	DK, FR, HR, CY, LV, LU, HU, MT, NL, PT, FI, SE
The violation of restrictive measures is an administrative offence	ES, SK

As regards prison sentences, in 14 Member States the maximum length of imprisonment is between 2 and 5 years whereas in eight Member States, maximum sentences between 8 and 12 years are possible²⁴. The maximum fine that can be imposed for the violation of Union restrictive measures – either as a criminal or as an administrative offence – varies greatly across Member States, ranging from EUR 1200 to EUR 500,000²⁵. Fourteen Member States provide for liability of legal persons for the violation of Union restrictive measures²⁶. Twelve Member States provide for administrative penalties, notably fines, which may be imposed on legal persons when their employees (or at least management) violate sanctions²⁷. Maximum fines for legal persons range from EUR 133,000 to 37, 5 million²⁸.

Finally, the violation of Union restrictive measures is punished by means of criminal law in a number of third countries as well, such as Canada²⁹ and the United States ('US'). The US Department of Justice has criminal jurisdiction over wilful violation of restrictive measures in accordance with the International Emergency Economic Powers Act ('IEEPA')³⁰ and the Trading with the Enemy Act.³¹ Pursuant to Section 206 of the IEEPA, criminal penalties for wilful violation of restrictive measures include a maximum 20-year term of imprisonment and

²² Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, section 5.1., p. 22.

²³ Idem.

²⁴ Idem, section 5.2., p.23.

²⁵ Idem, section 5.1., p.24.

²⁶ Idem, based on the report of the Genocide Network and further investigation by the Commission.

²⁷ Idem, section 5.3., p.24.

²⁸ Idem, section 5.1., p.24.

²⁹ Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 13.

³⁰ 50 U.S.C., paragraphs 1701-06(2011); Congressional Research Service, *The International Emergency Economic Powers Act: Origins, Evolution and Use*, March 2022, available at <https://crsreports.congress.gov/product/pdf/R/R45618/8>.

³¹ 50 U.S.C., paragraphs 4301-41 (2009).

a maximum USD 1 million fine³². US authorities have imposed heavy criminal fines for the violation of restrictive measures.

(4) Negative consequences of the status quo

In the absence of law enforcement, and judicial authorities having the right tools and resources available to prevent, detect, investigate and prosecute the violation of Union restrictive measures, designated individuals and legal persons whose assets are frozen continue to be able to access their assets in practice and support regimes that are targeted by Union restrictive measures.

Moreover, the fact that Member States have very different definitions of, and heterogeneous penalties for, the violation of Union restrictive measures under their administrative and/or criminal law indicates that the same infringement might be punished with different penalties and different enforcement levels. Politically, this weakens the enforcement of Union restrictive measures and undermines the credibility of the Union's objectives.

Finally, the proceeds generated by the exploitation of goods and natural resources traded in violation of Union restrictive measures may also allow the entities or individuals targeted by those restrictive measures to purchase arms and weapons with which they could perpetrate their crimes³³. The violation of import restrictions could furthermore contribute to the illegal exploitation of goods and natural resources in the country targeted by those restrictive measures³⁴, with subsequent environmental and social harm.

(5) Objectives of the proposal

Against this background, and in view of the urgent need to end impunity for violations of restrictive measures following Russia's invasion of Ukraine, this proposal aims at initiating the procedure set out in Article 83(1), third subparagraph TFEU. In accordance with this procedure, based on developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in Article 83(1) TFEU. These should be 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'³⁵. The Council acts unanimously after obtaining the consent of the European Parliament.

Article 83(1) TFEU currently does not allow for establishing minimum rules concerning the definition and penalties for any violation, including circumvention, of Union restrictive measures since the violation of Union restrictive measures as such is not yet covered by the areas of crimes listed in that Article. The areas of crime currently listed are terrorism, trafficking in human beings, sexual exploitation of children, drug trafficking, arms trafficking,

³² IEEPA, section 206: § 510.701 Penalties: '(a) Section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) (IEEPA) is applicable to violations of the provisions of any license, ruling, regulation, order, directive, or instruction issued by or pursuant to the direction or authorization of the Secretary of the Treasury pursuant to this part or otherwise under IEEPA (...) (3) A person who wilfully commits, wilfully attempts to commit, wilfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition may, upon conviction, be fined not more than \$1,000,000, or if a natural person, be imprisoned for not more than 20 years, or both.'

³³ Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 14.

³⁴ *Idem*, p. 5.

³⁵ Article 83(1) TFEU.

corruption, money laundering, counterfeiting of means of payment, computer crime and organised crime. The violation of Union restrictive measures may however be related to criminal offences covered by some of the listed areas of crime, such as terrorism and money laundering.

The criteria referred to in Article 83(1) TFEU relating to the cross-border dimension of an area of a crime, namely the nature, or impact of criminal offences and the special need to combat on a common basis are inter-linked and should not be assessed in isolation. In the case of the violation of Union restrictive measures, these criteria are met because:

- First, the violation of Union restrictive measures should be qualified as an area of crime in order to ensure the effective implementation of the Union's policy on restrictive measures. The violation of restrictive measures is already categorised as a criminal offence by a majority of Member States. Among those Member States which categorise the violation of restrictive measures as a criminal offence, some have broad definitions in place, such as 'breach of UN and EU sanctions' or 'breach of EU regulations', whereas others have more detailed provisions, for instance providing a list of prohibited conduct. The criteria according to which the conduct falls within the scope of criminal law vary among Member States, but they are usually related to their gravity (serious nature), either determined in qualitative (intent, serious negligence) or quantitative (damage) terms.
- Second, this is a particularly serious area of crime, which presents, in gravity, a similar seriousness to the areas of crime already listed in Article 83(1) TFEU, since it may perpetuate threats to international peace and security, undermine the consolidation and support for democracy, the rule of law and human rights and result in significant economic, social/ societal and environmental damage. Designated individuals and legal persons whose assets are frozen, continue to be able to access their assets in practice and support regimes that are targeted by restrictive measures. Similarly, the money generated by the exploitation of natural resources traded through the violation of Union restrictive measures may also allow the regimes targeted by those restrictive measures to purchase arms and weapons with which they execute their crimes. The violation of Union restrictive measures could furthermore contribute to the illegal exploitation of goods and natural resources in the regime targeted by those restrictive measures.
- Third, violations of Union restrictive measures have a clear and at times even inherent cross-border dimension. Not only are they usually committed by natural persons and legal entities operating on a global scale but in some cases Union restrictive measures, such as import and export restrictions and restrictions on banking services even forbid cross-border operations. Hence, by definition, their violation is conduct on a cross-border scale requiring a common cross-border response at Union level.
- Fourth, the fact that Member States have very different definitions and penalties for the violation of Union restrictive measures under their administrative and/or criminal law suggests that the same infringement might be punished with different penalties and different enforcement levels. This undermines Union objectives to safeguard international peace and security and uphold Union common values. Therefore, there is a special need for common action at Union level to address the violation of Union restrictive measures by means of criminal law.

- Fifth, the different definitions of, and heterogeneous sanctions for, the violation of Union restrictive measures under Member States' administrative and/or criminal law represent an obstacle to the consistent application of the Union policy on restrictive measures. They may even lead to forum shopping by offenders and ultimately their impunity because they could choose to conduct their activities in the Member States that provide for less severe responses to the violation of Union restrictive measures. Harmonisation would also increase the deterrent effect of sanctions for the violation of Union restrictive measures.

Beyond complying with the criteria referred to in Article 83(1) TFEU, common action at Union level would not only contribute towards a level playing field among Member States, but also contribute towards a global level playing field and law enforcement and judicial cooperation in countering the violation of restrictive measures.

As will be further discussed below, the proposal to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU complements the Commission proposal³⁶ that aims to revise the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union and the Council Decision on Asset Recovery Offices³⁷. The proposed new Directive on asset recovery and confiscation would apply to the violation of Union restrictive measures insofar as this offence would be harmonised under Union law.

Once the Council, after obtaining the consent of the European Parliament, agrees to add the violation of Union restrictive measures as an area of crime under Article 83(1) TFEU, the Commission will be able to propose a Directive on the violation of Union restrictive measures under the ordinary legislative procedure. As mentioned, today the Commission is also adopting a Communication, which has an annex that sets out the main elements that a future Directive on criminal sanctions for the violation of Union rules on restrictive measures could contain³⁸.

- **Consistency with existing policy provisions in the policy area**

Article 2 of the Treaty on European Union ('TEU') lays down the Union's common values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The effective enforcement of restrictive measures, including through criminal law measures aimed at addressing the violation of restrictive measures, supports the upholding of such common values within and outside the Union.

Furthermore, the Union constitutes an area of freedom, security and justice with respect for fundamental rights and different legal systems and traditions of the Member States. It aims to ensure a high level of security through measures including preventing and combatting crime, racism and xenophobia. Under Article 83(1) TFEU, the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and penalties in

³⁶ European Commission, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, COM (2002) 245 of 25.05.2022.

³⁷ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, p. 39–50; Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, OJ L 332, 18.12.2007, p. 103–105.

³⁸ Communication from the Commission to the European Parliament and the Council, Towards a Directive on criminal penalties for the violation of Union restrictive measures, COM (2022) 249 of 25.05.2022.

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.

As previously mentioned, enabling the approximation of criminal definitions and penalties for the violation of Union restrictive measures will complement the Commission proposal for a Directive on asset recovery and confiscation, implementing the Security Union Strategy³⁹ and the EU strategy to tackle organised crime⁴⁰.

This proposal aims at strengthening the capabilities of national authorities to trace and identify, freeze and manage property which is the proceeds or instrumentalities of crime. Furthermore, it provides for a reinforced legal framework on confiscation including specific cases where a conviction for a specific crime is not possible.

In addition, the new proposal contributes to the effective implementation of restrictive measures by requiring Member States to enable the tracing and identification of property linked to violations of Union restrictive measures as defined under national law and by making the revised rules on asset recovery and confiscation applicable to the criminal offence of the violation of Union restrictive measures.

Following the adoption of a Directive approximating the definitions and sanctions related to the violation of Union restrictive measures, potential elements of which are discussed further in the aforementioned Communication also adopted today, the rules on tracing and identification, freezing, management, and confiscation measures would become applicable to property related to the violation of Union restrictive measures. In the end, proceeds of the violation of Union restrictive measures, for example in instances where individuals and companies would make available funds to those subject to targeted financial sanctions (i.e. asset freezes), could become the object of confiscation measures. At the same time, instrumentalities used to pursue the violation of restrictive measures could become the object of confiscation as well.

- **Consistency with other Union policies**

Council Regulations on Union restrictive measures

The establishment of minimum rules concerning the criminal law definition of and penalties for the violation of restrictive measures based on Article 83(1) TFEU would strengthen the enforcement of restrictive measures in the Member States, thereby complementing measures taken in accordance with Article 29 TEU and Article 215 TFEU. The Commission and the High Representative for Foreign Affairs and Security Policy have proposed to strengthen the provision on penalties in Regulations 833/2014 and 269/2014 in the framework of the sixth package of restrictive measures in response to the Russian aggression against Ukraine. The amended provisions would oblige Member States to lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of these regulations and to take all measures necessary to ensure that they are implemented. The penalties must be effective, proportionate and dissuasive. Member States must also provide for appropriate measures of

³⁹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy, COM (2020) 605 final of 24.07.2020.

⁴⁰ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU strategy to tackle organised crime, COM (2021) 70 final of 14.04.2021.

confiscation of the proceeds of such infringements. However, as previously mentioned, Article 29 TEU and Article 215 TFEU are not a legal basis for the approximation of criminal definitions and the types and levels of criminal penalties.

2021 Commission Communication on the European economic and financial system

Furthermore, in its 2021 Communication entitled ‘The European economic and financial system: fostering openness, strength and resilience’⁴¹, the Commission notes that the implementation [of Union restrictive measures] is not as uniform across the Union as it ought to be. This creates distortions in the Single Market, as Union companies, including EU subsidiaries of foreign companies, can find means to circumvent the restrictive measures. This also creates uncertainty among operators. As cited, inconsistent enforcement undermines the efficacy of [Union restrictive measures] and the Union’s ability to speak with one voice. Among other initiatives, the strategy calls for further coordination work between the Commission and Member States to ensure that national penalties for breaching EU restrictive measures are effective, proportionate and dissuasive.

(2) LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• **Legal basis**

Under Article 83(1) TFEU, the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions 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. Those areas of crime, which are listed in this article, are the following: 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. As it currently stands, this list does not allow for establishing minimum rules concerning the definition of and sanctions for the violation of restrictive measures.

The present proposal aims at initiating the procedure set out in Article 83(1), third subparagraph TFEU. In accordance with this procedure, based on developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in Article 83(1) TFEU, in this case the violation of Union restrictive measures. The Council acts unanimously after obtaining the consent of the European Parliament. The justification for how the criteria specified under Article 83(1) TFEU are met in this case have been discussed in section 1.5 above.

• **Subsidiarity (for non-exclusive competence)**

The objective of this Decision, namely adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU, has to be achieved at Union level. It therefore complies with the principle of subsidiarity as set out in Article 5 TEU. In this

⁴¹ COM(2021) 32 final of 19.01.2021

particular case, the need for action at Union level was further demonstrated when discussing why the criteria specified under Article 83(1) TFEU are met (section 1.5 above).

- **Proportionality**

In accordance with the principle of proportionality, any measure proposed by the Commission should not exceed what is necessary to achieve its purpose. The decision to add the violation of Union restrictive measures to the list of EU crimes in Article 83(1) TFEU would be proportionate in view of the fact that the criteria specified under Article 83(1) TFEU are met. Moreover, this decision would be without prejudice to the actions that could be undertaken in a second step. In particular, it does not determine or pre-empt the scope and content of the secondary legislation that could be subsequently proposed.

- **Choice of the instrument**

The present proposal aims at initiating the procedure set out in Article 83(1), third subparagraph. In accordance with this procedure, based on developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in Article 83(1) TFEU, in this case the violation of restrictive measures. It shall act unanimously after obtaining the consent of the European Parliament.

(3) RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Collection and use of expertise**

Following Russia's invasion of Ukraine, the Commission set up the 'Freeze and Seize' Task Force at the beginning of March 2022. Its aim is to ensure coordination among Member States in the enforcement of the Union restrictive measures concerning Russian and Belarusian listed individuals and companies, and to explore the interplay between Union restrictive measures and criminal law measures. These exchanges of views included meetings with national competent authorities for the implementation of sanctions, Eurojust and the Genocide Network⁴², the Secretariat of which is hosted by Eurojust.

A specific subgroup of the 'Freeze and Seize' Task Force is dedicated to the enhancement of the implementation of Union restrictive measures. In particular, it tackles questions raised by national authorities and explore possible ways to identify assets proactively. Representatives and national competent authorities of the Member States participate in this subgroup. During the exchanges of views taking place in the context of this subgroup, the difficulties in holding individuals and legal persons involved in the violation of Union restrictive measures accountable emerged on several occasions. Participants in such exchange also argued in favour of a common criminal law approach to the violation of Union restrictive measures.

Evidence of the need for such a common approach is specifically provided for in a report prepared by the Genocide Network⁴³ and published in December 2021. This report highlights

⁴² Eurojust, Genocide Network, see <https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network?msclkid=de6a1668cf6011eca5681e93e0033be2>.

⁴³ Genocide Network, *Expert Report on Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021.

the need for the penalisation of the violation of Union restrictive measures to ensure that individuals or legal persons responsible for such violations are effectively held accountable.⁴⁴ It furthermore concludes that ‘prosecuting sanctions violations can offer a safety net to avoid impunity’, especially regarding the link with core international crimes⁴⁵.

Furthermore, discussions within the subgroup of the Task Force on investigations and confiscation demonstrated the importance of a proactive approach and coordination among authorities competent for the implementation of Union restrictive measures. Financial Intelligence Units, law enforcement authorities and customs authorities, along with international partners, civil society and investigative journalists, should cooperate and exchange information in order to obtain the leads that will enable law enforcement to start an investigation.

The Commission also consulted its Expert Group on EU Criminal Policy on 13 May 2022⁴⁶, which welcomed the idea of harmonising definitions and sanctions at Union level.

- **Impact assessment**

Given the exceptional urgency, no impact assessment could be conducted, and the relevant obligation was lifted. The proposal to add the violation of restrictive measures to the areas of crime laid down in Article 83(1) TFEU does not have, in itself, any impact on national governments, regional or local authorities, economic operators or citizens.

- **Fundamental rights**

This proposal does not determine or pre-empt the scope and content of the secondary legislation to be subsequently proposed by the Commission once the Council decides, after obtaining the consent of the European Parliament, to add the violation of Union restrictive measures to the list of EU crimes under Article 83(1) TFEU. The approximation of criminal definitions and sanctions will have to take into account the differences between the criminal justice systems of the Member States, including as regards penalties. Moreover, the subsequent Directive would need to comply with the fundamental rights and observing the principles laid down in the Charter of Fundamental Rights of the European Union (‘the Charter’)⁴⁷.

(4) BUDGETARY IMPLICATIONS

This proposal to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU does not create, in itself, any financial or administrative burden for the EU, national governments, regional or local authorities, economic operators or citizens.

⁴⁴ Idem, p. 4.

⁴⁵ Idem, p. 26.

⁴⁶ European Commission, Expert Group on EU Criminal Policy, <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?do=groupDetail.groupDetail&groupID=2760&msclkid=56005123cfaf11ec8de3edb643537b59>.

⁴⁷ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

(5) OTHER ELEMENTS

- **Detailed explanation of the specific provisions of the proposal**

Article 1

In accordance with Article 1, the violation of Union restrictive measures will be added as an area of crime within the meaning of Article 83(1) TFEU.

Article 2

Article 2 concerns the entry into force of the Council Decision. In view of the urgent need for action this shall be on the first day following that of its publication in the Official Journal of the European Union.

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1), third subparagraph thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament⁴⁸,

Whereas:

- (1) The purpose of this Decision is to add 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 ('TFEU').
- (2) Article 29 of the Treaty on European Union ('TEU') provides that the Council can adopt decisions defining the approach of the Union to a particular matter of a geographic or thematic nature, including restrictive measures.
- (3) Article 215 TFEU enables the Council to adopt restrictive measures against natural or legal persons and groups, or non-State entities, or to adopt measures providing for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, on the basis of a decision pursuant to Article 29 TEU. Member States should have effective, proportionate and dissuasive penalties in place for violations of Council Regulations on Union restrictive measures.
- (4) For the purposes of this decision, Union restrictive measures are measures falling within the scope of Article 29 TEU and Article 215 TFEU, such as for example measures of freezing of funds and economic resources, prohibitions to make funds and economic resources available and prohibitions of entry into the territory of a Member State of the European Union, as well as sectoral economic measures and arms embargoes.
- (5) Member States should have effective, proportionate and dissuasive penalties in place for the violation of all Union restrictive measures, including obligations, such as reporting, established therein. Those penalties should also address the circumvention of Union restrictive measures.
- (6) The Commission ensured coordination among Member States and EU agencies in the enforcement of the restrictive measures adopted in the context of Russia's aggression against Ukraine and explored the interplay between restrictive measures and criminal law measures.

⁴⁸OJ C , , p. .

- (7) Article 83(1) TFEU currently does not allow for establishing minimum rules concerning the definition and penalties for the violation of Union restrictive measures, since their violation as such is not yet covered by the areas of crimes listed in that Article. The areas of crime currently listed are terrorism, trafficking in human beings, sexual exploitation of children, drug trafficking, arms trafficking, corruption, money laundering, counterfeiting of means of payment, computer crime and organised crime. The violation of Union restrictive measures may however be related to criminal offences covered by some of the listed areas of crime, such as terrorism and money laundering.
- (8) The criteria referred to in Article 83(1) TFEU relating to the cross-border dimension of an area of a crime, namely the nature, or impact of criminal offences and the special need to combat on a common basis are inter-linked and should not be assessed in isolation.
- (9) The violation of restrictive measures should be qualified as an area of crime in order to ensure the effective implementation of the Union's policy on restrictive measures. The violation of restrictive measures is already categorised as a criminal offence by a majority of Member States. Some Member States which categorise violation of restrictive measures as a criminal offence, have broad definitions in place, such as 'breach of UN and EU sanctions' or 'breach of EU regulations', whereas others have more detailed provisions, for instance providing a list of prohibited conduct. The criteria according to which the conduct falls within the scope of criminal law vary among Member States, but they are usually related to their gravity (serious nature), either determined in qualitative (intent, serious negligence) or quantitative (damage) terms.
- (10) The violation of Union restrictive measures is a particularly serious area of crime, which presents in gravity, a similar seriousness to the areas of crime already listed in Article 83(1) TFEU, since it may perpetuate threats to international peace and security, undermine the consolidation and support for democracy, the rule of law and human rights and result in significant economic, social/ societal and environmental damage. Because of such violations, individuals and entities whose assets are frozen or whose activities are restricted continue to be able to access their assets and support regimes that are targeted by restrictive measures or continue to access State funds that were allegedly misappropriated. Similarly, the money generated by the exploitation of goods and natural resources traded in violation of Union restrictive measures may also allow the regimes targeted by those restrictive measures to purchase arms and weapons, with which they execute their crimes. The violation of Union restrictive measures relating to trade could furthermore contribute to the illegal exploitation of natural resources in the jurisdiction targeted by those restrictive measures;
- (11) In its Resolution 1196 (1998) of 16 September 1998, the United Nations Security Council highlighted the importance of strengthening the effectiveness of arms embargoes as a means to diminish the availability of arms with which to pursue armed conflicts. It also encouraged States to consider, as a means of implementing their obligations to carry out decisions of the Security Council on arms embargoes, the adoption of legislation or other legal measures making the violation of arms embargoes established by the Security Council a criminal offence.
- (12) The fact that Member States have very different definitions and penalties for the violation of Union restrictive measures under their administrative and/or criminal law suggests that the same infringement might be punished with different penalties and

different enforcement levels. This undermines the Union objectives to safeguard international peace and security and uphold Union common values. Therefore, there is a special need for common action at Union level to address the violation of Union restrictive measures by means of criminal law.

- (13) Violations of Union restrictive measures have a clear and at times even inherent cross-border dimension. Not only are they usually committed by natural persons and legal entities operating on a global scale but in some cases Union restrictive measures, such as restrictions on banking services even forbid cross-border operations. Hence, by definition, their violation is conduct on a cross-border scale requiring a common cross-border response at Union level.
- (14) The different definitions of, and heterogeneous sanctions for, the violation of Union restrictive measures under Member States' administrative and/or criminal law represent an obstacle to the consistent application of the Union policy on restrictive measures. They may even lead to forum shopping by offenders and their impunity because they could choose to conduct their activities in the Member States that provide for less severe responses to the violation of Union restrictive measures. Harmonisation would also increase the deterrent effect of sanctions for the violation of Union restrictive measures.
- (15) The violation of Union restrictive measures should therefore constitute an "area of crime" as it meets the criteria set out in Article 83(1) TFEU.
- (16) Common action at Union level would not only contribute towards a level playing field among Member States, and enhance law enforcement and judicial cooperation in addressing the violation of Union restrictive measures; it would also contribute towards a global level playing field in terms of law enforcement and judicial cooperation with third countries on the violation of Union restrictive measures.
- (17) The objective of this Decision, namely adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU has to be achieved at Union level. It therefore complies with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality as set out in that Article, this Decision does not go beyond what is necessary in order to achieve this objective.
- (18) Therefore, extending the list of the areas of crime in Article 83(1) TFEU to cover the violation of Union restrictive measures is necessary, as a first step, to enable, as a second step, the adoption of substantive secondary legislation, *inter alia* establishing minimum rules on the definitions and penalties for the violation of Union restrictive measures.
- (19) This Decision should not affect the actions that may be undertaken in a second step. In particular, it should not determine or pre-empt the scope and content of the secondary legislation to be subsequently proposed.
- (20) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (21) [non-participation:] In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that protocol, Ireland is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

OR [participation:] In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, Ireland has notified [, by letter of...], its wish to take part in the adoption and application of this Decision.

- (22) This Decision should enter into force as a matter of urgency on the day following that of its publication in the *Official Journal of the European Union* in order to urgently enable the adoption of secondary legislation establishing minimum rules on the definitions and penalties for the violation of Union restrictive measures,

HAS ADOPTED THIS DECISION:

Article 1

The violation of Union restrictive measures shall be an area of crime within the meaning of Article 83(1) TFEU.

Article 2

This Decision shall enter into force on the first day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the Council
The President