Enforcing Restrictive Measures Against Russia Through Criminal Law
A Truly Effectiveness-enhancing Choice?

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"The lack of effectiveness is a luxury that criminal justice cannot afford"[1]

A. INTRODUCTION

Today, it seems natural to discuss about European Union (EU) criminal law as a subject as pertinent and significant as any other topic within EU law. Indeed, addressing the need of combating emerging transnational crimes is becoming increasingly paramount to the European Union's goal of strengthening and preserving its Area of Freedom, Security and Justice (AFSJ), placing the EU at the forefront of global actors promoting fundamental rights and the rule of law in a globalised and uncertain world.

In this evolving landscape, the concept of 'effectiveness' has historically played a crucial role in the development of EU criminal law, and increasingly so in recent years. The idea that criminal law can be used when *essential* to ensure the *effective enforcement* of EU law and policies is generally regarded as a crucial argument to justify the harmonisation of criminal norms and penalties at the European level.[2] This seems the road the EU has decided to undertake firstly in the field of environmental crimes, and subsequently with the Lisbon Treaty, where effectiveness as a rationale for expanding EU competences in criminal matters has been codified in Article 83(2) of the Treaty on the Functioning of the EU (TFEU).

More recently, the recognition of the 'super-effectiveness' of criminal law interventions in addressing sensitive cross-border phenomena has been the catalyst for a new wave of criminalisation, with the Russian invasion of Ukraine in 2022 serving as the newest test case in this realm. In particular, to enhance the effectiveness of the sanction enforcement system adopted to compel Russia and its allies to cease their unlawful military activities, the EU legislator put forward an unprecedented legislative strategy to tackle on this brand-new transnational criminal phenomenon: the violation or circumvention of EU restrictive measures has become an EU crime as per Article 83(1) TFEU.

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[1] Carlo Enrico Paliero, 'Il principio di effettività del diritto penale' (1990) RIDPP, 430, 471.
[2] On this topic, see *passim* Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law,* (Hart Publishing 2012).

This paper's starting point is the acknowledgement that the EU elected criminal law as the principal – and in fact exclusive – tool through which ensure the *effective enforcement* of the EU economic sanctions enforcement regime. Yet, we argue that employing criminal law as the most suitable effectiveness-enhancing tool *vis-à-vis* non-criminal frameworks characterised by a suboptimal enforcement may lead to complexities, or tensions, in the context of core principles of substantive criminal law as well as over-criminalisation, which conversely often produces ineffective results.

Against this backdrop, the aim of the present paper is twofold. The first part sets the stage by examining the general concept of effectiveness in relation to the foundational principles of criminal law (harm principle, proportionality, *ultima ratio*) and to the theory of 'legal goods' (*Rechtsgut*) rather than symbolic criminal legislation (§ 2). Next, we shift our focus to a critical assessment of a prevailing trend within EU law: the increasing over-reliance on the super-effectiveness of criminal sanctions as a panacea for ensuring the "enforcement of EU law" (§ 3). In particular, we observe this trend "in action" by analysing the recent decision to criminalise conduct that breaches or circumvents EU restrictive measures, using it as a case study to evaluate the broader implications of prioritising effectiveness in EU criminal law (§ 4).

Ultimately, we aim to address a provocative question which underlies the very justification and limits for the exercise of EU criminal law competences: do we really need criminal sanctions for the enforcement of EU law, in general, and of EU sanctioning system, in particular?[3]

B. IN THE BEGINNING WAS THE WORD: *EFFECTIVENESS* AS A GENERAL PRINCIPLE OF CRIMINAL LAW

Since the focus of the present analysis is not the 'general effectiveness' of EU law[4] but rather the 'effectiveness of criminal sanctions' in relation to the enforcement of EU law, we should start by clarifying the meaning of this concept in the criminal law domain. In fact, why is it important and what exactly is meant by it seems still somewhat unclear.[5]

The notion of effectiveness as a legal principle is a very broad subject with deep philosophical underpinnings, particularly regarding the very essence and objectives of criminal law.[6] At its core, effectiveness serves as a measure

[3] This question was first posed in these terms by Jacob Öberg, 'Do We Really Need Criminal Sanctions for the Enforcement of EU Law?' (2015) 5(3) NJECL 370.

[4] Since the early days of the EU, effectiveness has played a crucial role in the process of European integration. This principle is often held to stem from the more general loyalty obligation enshrined in Article 4(3) of the Treaty on European Union (TEU), and requires Member States to guarantee the 'full effectiveness' of EU law. See Herlin-Karnell (n 2) 42ff. See also Matej Accetto and Stefan Zleptnig, 'The principle of effectiveness: rethinking its role in community law' (2005) 11 ELRev, 375; Malcolm Ross, 'Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality' (2006) 31 ELRev 476.

[5] Herlin-Karnell, 'Effectiveness and constitutional limits in European criminal law' (2014) 5(3) NJECL, 273.

[6] Herlin-Karnell (n 2) 43.

of a system's capacity to achieve its intended outcome. In criminal law, this concept evokes an instrumental conception of crime which revolves around the idea of *goal of protection*. But protection of what, exactly? Going back to the first classic doctrinal elaboration of this idea by Von Liszt, "criminal law is a coercive instrument that infringes upon fundamental liberties (of the perpetrator) to protect basic legal interests (of the society as a whole)".[7] The author emphasises the dual nature of the *jus terribile* both as a 'means to an end' (the end being social control), and also as a mechanism which responds to suffering (in the form of to serious violations of basic legal interests) by allocating more suffering (in the form of criminal sanctions).[8]

This allows us to infer a value judgment and a criminal policy corollary. First, criminal law is admittedly the harshest and most dysfunctional mechanism States employ to achieve social control; it is a 'double-edged sword' that produces its own 'victims' as well as high social costs, thus being the least efficient tool for the resolution of social conflicts. This, in turn, leads to a corollary: a decision to criminalise any given socially harmful conduct is *legitimate* insofar as it is *effective* in order to safeguard a concrete *object of protection*.[9] Such position takes into account both the common law tradition that has justified criminalisation based on the 'harm principle',[10] as well as the doctrinal 'theory of legal goods' (*Rechtsgut*) accepted in certain civil law jurisdictions.[11] In particular, the harm principle entails a rational test which prevents abstract moral, ethical, religious or ideological interests (eg peace or mankind) from being included in the sphere of legal protection (so-called 'symbolic criminal law'[12]), which ought to be avoided in a liberal criminal justice system oriented towards concrete objects of protection (eg other individuals' physical integrity or property interests); on the other hand, at least according to some of its interpretations, the *Rechtsgut* principle not only lends material substance to the otherwise empty (harm to what?) harm principle, but also plays an important 'critical-selective function' by limiting the State's power to criminalise conduct.[13]

However, while the principle of protecting fundamental legal interests is crucial for determining when criminal measures *could* be adopted, it does not

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[7] Translation from Von Listz, *Der Zweckgedanke im Strafrecht. Zeitschrift für die gesamte Strafrechtswissenschaft* (Berliner Wissenschafts-Verlag 2002) 161.

[8] Maria Kaiafa-Gbandi, 'The importance of core principles of substantive criminal law for European Criminal Policy Respecting Fundamental Rights and the Rule of Law' (2011) 1 ECLR 7.

[9] Ibid 12.

[10] On the harm principle, see *ex multis* Nina Peršak, *Criminalising harmful conduct. the harm principle, its limits and continental counterparts* (Springer 2007) 104ff; Andrew Perry Simester and Alexander von Hirsch, *Crimes, Harms, and Wrongs. On the Principles of Criminalisation* (Hart Publishing 2014) 21; Joel Feinberg, *The Moral Limits of the Criminal Law – Volume 1: Harm to Others* (OUP 1987) 36.

[11] See Johannes Keiler and David Roef, *Comparative Concepts of Criminal law* (Intersentia 2019) 35-82. See also Claus Roxin, *Strafrecht Allgemeiner Teil 1* (Verlag C. H. Beck 2006) 8ff.

[12] On 'symbolic criminal offense', see Jacob Turner, 'The expressive dimension of EU criminal law' (2012) AJCL 555.

[13] See Santiago Mir Puig, 'Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct' (2008) 11(3) NCLR, 409.

guarantee that these measures will always be liberal or just. In other words, the conclusion that a criminal sanction pursues a legitimate aim does not immediately lead to the conclusion that the legislator *should* use its criminalisation powers. Given the sensitive nature of criminal law, other factors and moderating principles must also be considered alongside the doctrine of legal goods to ensure that criminal law is both just and liberal: proportionality and necessity of penalty (or *ultima ratio*).[14]

A general principle of EU law,[15] the so-called *material proportionality*, is a typical standard of material rationality requiring that the *means* (legislative action) should not exceed what is necessary to achieve the *goals* (policy objectives). It answers the question of whether the legislator should act at all.[16] This principle features a three-pronged test: criminal sanctions must be *appropriate*, *necessary* and *proportionate stricto sensu* to achieve a certain goal of protection that is deemed to be legitimate.[17] Firstly, the appropriateness test prescribes that a criminal measure is deemed disproportionate if it is inadequate to control the conduct at hand and to achieve an *Rechtsgut*.[18] Second comes necessity (or *ultima ratio*), which constitutes the second parameter of the test. Generally, this test can be declined both in terms of *positive* and *negative* necessity of penalty. On the one hand, necessity can entail a *utilitaristic* policy judgment stating that criminal law should be used only if it is proven to be the most efficient and cost-effective means available for controlling the conduct at hand. On the other hand, a second understanding of necessity links it more to the 'subsidiary' and the 'fragmentary' nature of criminal law, whereby it should only be used as the 'last resort' in exceptional cases.[19] Here, the basic idea is that criminal sanctions should be reserved, in the absence of adequate milder means, to provide subsidiary protection against the

[14] SS Buisman, 'The Future of EU Substantive Criminal Law. Towards a Uniform Set of Criminalisation Principles at the EU level' (2022) 30 EJCCLCJ 161. In other words, there is a distinction between discussing whether certain conducts *could* be criminalised and arguing that they *should* be criminalised. The former analysis involves precisely defining the behaviours to be prohibited, thereby enabling an assessment of their harmfulness, wrongfulness, and/or their interference with protected legal interests. The latter scrutiny, differently, involves other principles, such as necessity and proportionality, that comes to the fore at a later stage. For a practical application of this twofold test, see Lorenzo Bernardini and Sara Dal Monico, 'A Way Forward: Criminal Law as a Possible Remedy in Addressing Gynaecological and Obstetric Violence?', in Gert Vermeulen, Nina Peršak and Stéphanie De Coensel (eds), *Researching the boundaries of sexual integrity, gender violence and image-based abuse* (Maklu 2024), § 4.2 of the manuscript and the references cited therein, forthcoming.

[15] This principle is codified in Article 5(4) TEU, which obliges the European Union legislator to comply with the proportionality principle when exercising its powers. See Jacob Öberg, *Limits to EU Powers* (Hart 2017) 32.

[16] Buisman (n 14) 172ff.

[17] On the proportionality test, see Jannemieke Ouwerkerk, 'Criminalisation powers of the European Union and the risks of cherry-picking between various legal bases: the case for a single legal framework for EU level criminalisation' (2017) 23 CJEL 504, 532.

[18] The intention here is not to embark on any grand tour of proportionality and subsidiarity, as these principles have already been extremely well dissected in the legal doctrine. On material proportionality, see Carlo Sotis, 'Les principes de nécessité et de proportionnalité' in Geneviève Giudicelli-Delage and Christine Lazerges (eds), *Le droit pénal de l'Union européenne au lendemain du Traité de Lisbonne* (Société de Législation Comparée 2012) 59.

[19] Herlin-Karnell (n 2) 124. See also Martin Bose, 'The principle of Proportionality and the Protection of Legal Interests' (2011) 1 ECLR 35, 39-40; Sakari Melander, '*Ultima Ratio* in European Criminal Law' (2013) 3(1) Oñati Socio-legal Series 42, 54-57.

most serious breaches of specific legal goods worthy of protection; less serious misconduct, in turn, can be more appropriately dealt with by civil law or by administrative regulation.[20] Thirdly, proportionality *stricto sensu* entails a reasonable balancing of *costs* and *benefits* of criminalisation, requiring that the criminal measure does not have excessive effects on individuals affected by the measure considering the importance of the aim pursued.

In light of these fundamental principles, the concept of effectiveness acquires crucial importance as a parameter for assessing the legitimacy of criminalisation choices.[21] First, the legislator must show that criminal law is 'effective' in adequately safeguarding a legal good worthy of protection. Secondly, the legislator must demonstrate that criminal sanctions are more 'effective' than non-criminal sanctions. In other words, criminal sanctions should not be applied in an 'absolute' manner (from the Latin *ab-soluto*: detached from any meaningful goal or purpose), but rather judiciously, recognising that criminalisation entails significant social costs and should only be utilised when other, less intrusive measures are insufficient to address the underlying issues. In fact, an absolute approach to criminal law, one that imposes strict and inflexible rules without consideration for the necessity and appropriateness of sanctions, would not only lack constitutional legitimacy but could also undermine the overall effectiveness of criminal prohibitions. After all, a criminal justice system that over-criminalises behaviours is *always* ineffective for several reasons: it not only strains law enforcement resources, diverting attention and efforts away from addressing more serious crimes, but also can result in unfair and disproportionate punishments, eroding public trust in the justice system and potentially violating constitutional principles of justice and fairness, as well as reducing the overall deterrent effect of the law.[22]

Ultimately, considering all these factors, it is only reasonable to expect that the effectiveness principle should also constrain a supranational entity such as the EU when it comes to the justification and limits of its criminalisation powers. Indeed, it cannot be denied that "both the EU and its Member States are equally bound to establish substantive grounds for resorting to the harshest form of social control in a democratic society based on a concrete object of protection justifying criminal punishment".[23] The next section will closely examine how the reasoning of effectiveness manifests in EU criminal law, with a specific focus on the competence provision of Article 83(2) TFEU and recent developments.

C. FROM WORDS TO ACTION: EFFECTIVENESS OF CRIMINAL LAW IN RELATION TO THE ENFORCEMENT OF EU LAW

There is today a fierce ongoing legal debate on the proper role for criminal sanctions in ensuring the 'effective enforcement of Union policies'. Before delving further into this question, however, some repetition can be helpful.

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[20] Cfr. Bernardini and Dal Monico (n 14) § 4.1 of the manuscript, and references cited therein, forthcoming.
[21] Von Liszt (n 7) 19.
[22] Douglas Husak, *Overcriminalization. The limits of the criminal law* (OUP 2007) 17ff.
[23] Kaiafa-Gbandi (n 8) 16.

The starting point when discussing effectiveness in EU criminal law is to account for its role in the development of EU competences in criminal matters. Prior to the Lisbon Treaty, when the EU only had an indirect and limited influence on national criminal laws, there have been a number of important cases before the Court of Justice of the EU (hereinafter 'CJEU' or simply 'the Court') where effectiveness has constituted an important parameter in the decision on whether to grant the EU a criminal law competence. Importantly, in a seminal ruling known as the *Environmental Crimes* judgment, the Court adopted an innovative approach towards effectiveness by stating that the imposition of criminal penalties at EU level is justified insofar as they are 'essential' to ensure the 'full effectiveness of EU law' when pursuing the protection of the environment.[24] In the subsequent *Ship-Source Pollution* judgment, the Court further elaborated on this vague and broad legislative competence, pointing out that 'effectiveness' refers to the capacity of criminal penalties to ensure compliance within the concerned policy area and contribute to the achievement of the underlying Union objectives.[25]

More recently, the idea that the effective enforcement of EU law would require criminal sanctions has been codified in Article 83(2) TFEU, providing for an explicit legal basis for EU criminalisation process.[26] In particular, the second paragraph of this provision allows for the approximation of criminal law if proved "*essential* to ensure the *effective implementation* of a *Union policy* in an area which has been subject to harmonisation measures" (emphasis added). In other words, Article 83(2) TFEU takes a functional view of criminalisation, as it considers criminal law as "a means to an end, the end being the effective implementation of other EU policies".[27]

In any case, this 'poorly worded provision'[28] has drawn criticism from both criminal and constitutional law perspectives concerning its effectiveness-based view of criminal law.[29] Among other issues, a first fundamental question that needs to be answered is *what* the new legislation is meant to protect.[30] According to the *Rechtsgut*-theory, we must *always* assume that criminal law

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[24] See Case C-176/03, *Commission v Council* (Environmental Crimes) [2005] ECR I-7879, para 48. For a critical view, see Valsamis Mitsilegas, *EU criminal law* (Hart 2009) 75-79 and Herlin-Karnell (n 2) 29ff.

[25] See Case C-440/05 *Commission v Council* (Ship-Source Pollution) [2007] ECR I-09097, paras 68-69.

[26] For an overview of the historical background that led to the evolution of the EU's criminal law competence and the provision of Article 83 TFEU, see Öberg (n 3).

[27] See Valsamis Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart 2016) 117. A second legal basis for the harmonisation of criminal law is provided by Article 83(1) TFEU, which allows the European Union to "establish minimum rules concerning the definition of criminal offences and sanctions" in certain areas of serious crime with a cross-border dimension (so-called 'securitised criminalisation'). To this end, it provides for an exhaustive list of 'euro-crimes' that pose global security threats, including money laundering, human trafficking and computer crime.

[28] Cfr. Buisman (n 14) 176ff, making a distinction between 'securitised' and 'functional' EU criminalisation powers.

[29] See *ex multis* Valsamis Mitsilegas, 'The transformation of criminal law in the area of freedom, security and justice' (2007) 26(1) YEL 1; Herlin-Karnell (n 5) 268.

[30] Kaiafa-Gbandi (n 8) 12.

protects a fundamental legal interest from a harmful and wrongful conduct.[31] Similarly, the harm principle implies that the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent conduct causing harm to others, individually or collectively.

Yet, as will be argued, the capacity of these doctrines to shape the normative foundations of EU criminal law remains limited, with the main reason being that normative limits of EU-level criminalisation have so far predominantly been articulated under Article 83(2) in terms of the 'effectiveness' rationale.[32] In fact, the issue lies not in the term 'essential' itself, which theoretically implies even stricter criteria than the more common 'necessary', but rather in the lack of specificity regarding the object of protection. Instead of being tied to a specific object of protection (i.e. a *legal good*), the test of essentiality appears to be linked to the broader concept of 'effective enforcement of a Union policy' (i.e. a *legal provision* or *framework*).[33] Consequently, it is not always clear whether EU criminal offences are intended to *directly* safeguard fundamental legal interests, or if they are designed to *indirectly* protect these interests by primarily achieving higher compliance with substantive EU law. Depending on the particular benchmark of the essentiality test (whether it pertains to a legal good or a legal framework), we may transition from a 'teleological' to a 'normativist' criminalisation paradigm.

A clear example of the first paradigm is the EU fraud recently codified by the so-called PIF Directive[34] Such conduct *directly* affects a core *Rechtsgut* of the EU (i.e. the financial interests of the European Union) thus justifying criminalisation at the supranational level.[35] Similarly, there are various other examples of criminal measures which protect certain fundamental rights as EU *Rechtsgüter*, demonstrating that the scope of European criminalisation extends far beyond those legal interests directly linked to the EU itself or its internal market.[36]

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[31] Cfr. Jannemieke Ouwerkerk, 'Old wine in a new bottle: Shaping the foundations of EU criminal law through the concept of legal interests (*Rechtsgüter*)' (2022) 27(4-6) ELJ 426, arguing that the concept of legal interests is essential to further shape the normative foundations of EU criminal law.

[32] For a discussion on the meaning of the 'essentiality' condition from a linguistic, systematic, contextual and functional perspective, see Öberg (n 3) 7ff.

[33] See Carlo Sotis, 'I principi di necessità e proporzionalità della pena nel diritto dell'Unione europea dopo Lisbona' (2012) 1 DPC 111, 120-121. Other scholars hold an opposing view, asserting the legitimacy of the normativist criminal paradigm. Cfr. Alessandro Bernardi, 'La competenza penale accessoria dell'Unione Europea: problemi e prospettive' (2012) 1 DPC 43.

[34] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198 (PIF Directive). See Grazia Bruzzese and Leonardo Romanò, 'La directive sur la lutte contre les fraudes portant atteinte aux intérêts financiers de l'Union' (2023) 672 RUE 544.

[35] Other examples of core EU *Rechtsgüter* are the protection of fair competition, the environment and the integrity of the public administration.

[36] Cfr. 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) 652ff.

At the same time, however, there are other examples where criminal measures play a rather complementary or 'accessory' function in relation to the respective non-criminal harmonisation legal framework.[37] This is clearly illustrated, for instance, in the Directive on the protection of the environment through criminal law, which compels Member States to criminalise even conduct that violates mere administrative regulations (i.e. 'regulatory offenses').[38] When viewed from the perspective of the doctrine of legal goods, such regulatory offences cannot be deemed 'necessary' or, even more so, 'essential', precisely because they prove to be inadequate in protecting the environment. This inadequacy often arises due to the difficulty in establishing a causal link between the conduct and the vast, complex, and sometimes abstract concept of the environment.

Similarly, a recent example of the use of Article 83(2) is the Market Abuse Directive (MAD).[39] This directive sets out criminal sanctions to ensure compliance with the rules on preventing and fighting market abuse in the form of market manipulation, unlawful disclosure of inside information and insider dealing.[40] Once again, one of the most difficult problems posed by the prohibition of market abuse is defining the protected legal interest. While MAD states that its objective is to *ensure the integrity of securities markets and enhance investor confidence in those markets,* these legal interests find no precise definition in the regulatory texts. Commonly, the term 'market integrity' can be negatively defined as *a market that is free from market abuse practices*.[41] The difficulty is, however, that while avoiding prohibited trading behaviours is crucial, the absence of abuse does not automatically guarantee market integrity. True market integrity encompasses a broader spectrum: transparency from issuers and market participants, non-discriminatory access to the market, ethical conduct by intermediaries, etc; in essence, a truly 'integral' market resembles the theoretical ideal of a 'perfect market'.[42] It therefore contributes little to maintain that the objective of the prohibition of market abuse is market integrity, as impairment of this interest is not specific to market abuse conducts and hence does not suffice to justify the necessity of criminal

[37] On the 'accessory' function of Article 83(2) TFEU, see Rosaria Sicurella, 'EU competence in criminal matters' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstantinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 62.

[38] Directive 2008/99/EC, L 328 of 6 December 2008, as recently replaced by Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC [2024] OJ L.

[39] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L 173.

[40] The MAD has complemented the regulatory framework laid down in Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance [2014] OJ L 173 (Market Abuse Regulation or MAR). For a general introduction to the MAR administrative sanctions regime, cfr. Vanessa Franssen and Solène Vandeweerd, 'Supranational Administrative Criminal Law' (2019) 90(2) RIDP 13, 34ff.

[41] See Ester Herlin-Karnell and Nicholas Ryder, *Market Manipulation and Insider Trading Regulatory Challenges in the United States of America, the European Union and the United Kingdom* (Hart Publishing 2021), ch 2.

[42] Ester Herlin-Karnell, 'White-collar crime and European financial crises: getting tough on EU market abuse' (2012) 47(4) ELRev 481.

intervention in this field. What seems clear is that the need for the effective implementation of the EU market abuse framework becomes the primary focus of the criminalisation process, thus overshadowing the underlying legal good.[43]

Ultimately, these examples suggest that EU criminal offences are intended to *directly* safeguard the effectiveness of EU law rather than protect the underlying legal interests. This, however, may pose significant challenges. Firstly, there is a presumption that, in certain (sensitive) areas of EU policies, criminal law represents the most suitable means to ensure the effective implementation of EU law.[44] Secondly, this over-reliance on the perceived 'super-effectiveness' of criminal law *vis-à-vis* supposedly ineffective non-criminal frameworks characterised by suboptimal enforcement may jeopardise the 'critical-selective function' of the legal good, since a criminal measure can be perfectly *appropriate* to ensure the overall compliance with a certain legal framework – for example, by establishing what is right and what is wrong or indicating the correct scale of values at stake – but, at the same time, be completely *inadequate* to effectively protect the underlying legal interest.[45] Thirdly, this seems to be in direct conflict with the *ultima ratio* principle, as the need for 'effective enforcement of EU law' might give the Union *carte blanche* to legislate in criminal matters thus leading to over-criminalisation.[46]

One thing is for sure: the unique nature of criminal law cannot allow it to be reduced to a panacea for rectifying perceived deficiencies in non-criminal frameworks. This raises a critical question: can the essentiality test, grounded on the effectiveness rationale, continue to serve as an adequate constitutional parameter for justifying criminalisation decisions at the EU level? What are its limits (if any)? In other words, while effectiveness is undoubtedly a crucial consideration in the development and application of criminal law, its over-reliance must be carefully scrutinised in light of the constitutional identity of criminal law.

As anticipated, the remainder of this paper will try to tackle this question in relation to the most recent test case in this realm: the use of criminal law tools in order to enhance the overall effectiveness of the EU restrictive measures enforcement regime, in the wake of the Russian military invasion and aggression of Ukraine.

D. A BRAND-NEW, EFFECTIVENESS-BASED, CRIMINALISATION INITIATIVE. THE CASE OF THE ENFORCEMENT OF EU RESTRICTIVE MEASURES VIA CRIMINAL LAW

[43] For a focus on the European Central Bank (ECB) reporting duties with respect to potential market abuse crimes, cfr. Silvia Allegrezza, 'Information Exchange Between Administrative and Criminal Enforcement: The Case of the ECB and National Investigative Agencies' (2020) 4 Eucrim 302.
[44] Herlin-Karnell (n 2) 56.
[45] Sotis (n 33) 120.
[46] Kaiafa-Gbandi (n 8) 19.

While several issues may arise from considering criminal law as a means to enhance the effectiveness of other areas of EU law, this conviction has nonetheless remained steadfast in the mind of the EU legislator.

Indeed, a recent legislative initiative exemplifies the emerging trend of viewing criminal law as inherently effective in enhancing the effectiveness of non-criminal legal frameworks – the enforcement of EU restrictive measures via criminal law. This unexpected convergence between the EU's restrictive measures framework and criminal law is a relatively new phenomenon, catalysed by the Russian military invasion of Ukraine in 2022. Despite its novelty, the underlying logic of this legislative initiative remains consistent – when a certain area of EU policy requires stronger enforcement, criminal law is typically deemed suitable for this purpose. The methodology adopted involves criminalizing behaviours that seemingly hinder the effectiveness of that policy area. The belief is that by prohibiting (and punishing) these behaviours, the system at stake will become more effective, as those attempting to undermine it will face criminal penalties. However, when it comes to restrictive measures, the situation is even more complex, as will be discussed in the following paragraphs.

But what exactly are 'restrictive measures'? Why were they previously ineffective? And to what extent does the EU legislator believe that criminalizing their violations can provide an added value to this legal framework?

To address these questions, we will first provide an overview of the relevant EU legislative framework concerning restrictive measures, delineating their *nature* and *scope of application* (§ 4.1). Next, we will examine the main issues related to their lack of enforcement and the recent criminalisation package proposed by the EU legislator aimed at enhancing the economic sanctions' regime. This analysis will include identifying which *violations of EU restrictive measures* now constitute *criminal offences* (§ 4.2). Finally, we will critically discuss the principal drawbacks of this strategy, emphasizing that without a precise definition of what constitutes 'effectiveness' within the EU restrictive measures legal framework, the employment of criminal law should be cautiously reconsidered (§ 4.3).

(1) The multifaceted nature of EU restrictive measures

In line with established international practices, economic sanctions – more accurately termed 'restrictive measures' within the European legal framework – serve as the EU's most frequently employed foreign policy tool.[47] Historically, the EU has integrated United Nations (UN) sanctions into its own legal order,

[47] Luigi Lonardo, *EU Common Foreign and Security Policy After Lisbon* (Springer 2023) 73ff. The historical and legal analysis and reconstruction of the EU restrictive measures against Russia and its allies in the following sections draw upon some reflections already developed in Lorenzo Bernardini, 'Criminalising the violation of EU restrictive measures: towards (dis)proportionate punishments vis-à-vis natural persons?' (2024) 14 EuCLR 4, 4-10.

either by direct adoption or by implementing additional measures.[48] However, the cornerstone of the EU's Common Foreign and Security Policy (CFSP) lies in its *autonomous* economic sanctions. These are measures adopted *independently* of the UN and other regional organisations. They typically include economic, non-military penalties against States, entities, or individuals ('the targets'), as *tools to achieve foreign policy and security objectives*.[49]

As early as 2004, the EU openly committed to using 'sanctions' as a pivotal instrument for maintaining and restoring international peace and security, aligning with the principles of the UN Charter and CFSP.[50] This commitment was enabled by Article 301 of the Treaty Establishing the European Community (TEC), which broadly permitted the interruption or reduction of economic relations with third countries, granting considerable discretion to EU institutions to adopt the 'necessary urgent measures'.[51] The need to clarify the scope of this article led to its amendment.[52] Following the Lisbon Treaty, the legal basis for adopting restrictive measures is now found in Article 215(1) and (2) TFEU.[53]

It is no secret that the current geopolitical scenario, particularly the Russian invasion of Ukraine, has stressed the crucial role of *autonomous restrictive measures*. Despite their fragmented and heterogeneous nature, these measures have emerged as a primary means of exerting pressure on global actors threatening EU values. A close analysis of the economic sanctions implemented by the EU reveals their intrinsic nature as an alternative, albeit not entirely oppositional, to military activities.[54] To identify their main characteristics,

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[48] A well-known case is the EU sanctions against the Democratic People's Republic of Korea (North Korea), which not only directly implement those established at the international level (UN) but also include additional and more stringent measures.

[49] Considering the *scope of application* of restrictive measures and their *impact* on the targets, they may be distinguished into two categories:

- *sectoral sanctions*, i.e., restrictive measures which aims at affecting specific market sectors. Prominent examples may be (i) arms embargoes; (ii) import/export bans; (iii) restriction on access to financial markets and services and (iv) investment bans;
- *individual sanctions*, i.e., restrictive measures which aims at affecting specific individuals. Examples of those measures may be (i) travel bans or (ii) asset freezes.

[50] 'Basic Principles on the Use of Restrictive Measures (Sanctions)' (*Council of the European Union*, 7 June 2004) <https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/en/pdf> accessed 20 May 2024.

[51] Article 301 TEC maintains that "where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission."

[52] Tarcisio Gazzini and Ester Herlin-Karnell, 'Restrictive Measures Adopted by the European Union from the Standpoint of International and EU Law' (2011) 36 ELRev 801, 801ff; Nadia Zelyova, 'Restrictive measures – sanctions compliance, implementation and judicial review challenges in the Common Foreign and Security Policy of the European Union' (2021) ERA Forum 167, 167ff.

[53] Francesco Giumelli, 'Implementation of sanctions: European Union', in Masahiko Asada (ed), *Economic Sanctions in International Law and Practice* (Routledge 2019) 120ff.

[54] While it is not possible to fully explore the relationship between restrictive measures and military activities here, it is worth recalling the famous observation by US President Woodrow

the package of restrictive measures against the Russian Federation and its allies will be used as a benchmark. This is due, firstly, to the significant scope of this specific sanctions regime, which accounts for approximately 45% of all measures currently in force within the EU legal order.[55] Secondly, because it was the need to enforce *this* specific sanctions *regime* that triggered the EU criminalisation initiative under analysis.

Despite only two EU legal acts containing the principal restrictive measures adopted in this context,[56] the regulatory framework remains particularly heterogeneous. It has been frequently reconsidered, amended, and revised over the years, resulting in a somewhat inconsistent approach. This is unsurprising, as the European Union's actions since February 2022 have *had* to adapt rapidly to a swiftly changing historical and military context, influenced by numerous economic and political factors that precluded the creation of a harmonious legal framework.[57] It is crucial to remember that the current events involving Russia and Ukraine should be viewed in their entirety, as the latest phase of a prolonged military conflict – the so-called Russo-Ukrainian war – that began in February 2014.[58]

Indeed, it was following the invasion of Crimea in the same year that the *first restrictive measures* against the Moscow government were implemented. These measures aimed to deter Russia from threatening European (and global) order and security by destabilizing neighbouring EU and NATO Member States.

Regulation 269/2014 was adopted to this end, forming the cornerstone of the economic sanctions against 'certain persons' close to the Russian regime, listed in Annex I (the so-called blacklist).[59] In March 2014, this list

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Wilson, who asserted that economic sanctions represent "something more tremendous than war […] apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon that nation" (as cited in Hamilton Foley, *Woodrow Wilson's Case for the League of Nations* (Princeton University Press 1923) 67ff). For a more recent critique in a similar vein, see Neil Arya, 'Economic sanctions: the kinder, gentler alternative?' (2008) 24 Medicine, Conflict and Survival 25, 25ff, and Keyvan Shafiei, 'Sanctions Are Not an Alternative to War' (*The American Prospect*, 2020) <https://prospect.org/world/iran-us-sanctions-not-an-alternative-to-war/> accessed 20 May 2024. Conversely, and supporting the implementation of economic sanctions as an alternative to military activities, see James Pattinson, *The Alternative to War: From Sanctions to Nonviolence* (OUP 2018) 39ff, particularly the author notes that "they more fairly distribute costs" (ibid 69).

[55] 'EU Sanctions Tracker' (data.europa.eu, 2024) <https://data.europa.eu/apps/eusanctionstracker/> accessed 19 May 2024.

[56] They are: (i) 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 L 78, 6–15; and (ii) Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L 229, 1–11.

[57] Alexandra Hofer, 'The EU's 'Massive and Targeted Sanctions' in Response to Russian Aggression, a Contradiction in Terms' (2023) CYELS 1, 1ff.

[58] André Härtel, Anton Pisarenko and Andreas Umland, 'The OCSE's Special Monitoring Mission to Ukraine' (2020) 31 Security & Human Rights 121, 121ff.

[59] Regulation 269/2014 explicitly refers to Council Decision 2014/145/CFSP, adopted on March 17, 2014, which was the first to require Member States to implement the necessary measures

included 21 individuals whose “funds” and “economic resources” were to be “frozen”, with a concurrent prohibition on making funds or resources available to blacklisted individuals.[60] The Regulation stipulated that only those responsible for actions threatening Ukraine’s territorial integrity, sovereignty, or independence could be listed in Annex I.[61] These were thus *‘individual’ restrictive measures*, targeting specific persons (both natural and legal), subjecting them to limitations on certain fundamental rights, notably property rights (due to asset freezes) and freedom of movement (due to travel bans).

Further restrictive measures against Russia and its allies were established a few months later by Regulation 833/2014. These were *‘sectoral’ economic sanctions*, designed to restrict or prohibit certain commercial or financial transactions in specific economic sectors. The broader scope of these sanctions aimed to “increas[e] the costs of Russia’s actions to undermine Ukraine’s territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis”.[62] Among other provisions, the regulation banned transactions involving “dual-use goods and technologies […] to any person, entity, or body in Russia or for use in Russia, if the items might be for military use or a military end-user”.[63] It also required prior authorisation for selling, supplying, transferring, or exporting listed goods to Russia or for use in Russia.[64]

It goes without saying that the 2022 invasion of Ukraine imposed a review of these measures in light of evolving historical events. The two key regulations of the sanctions package have been amended multiple times since. Their scope has been expanded to enhance the effectiveness of these measures.

Specifically, Regulation 269/2014 has undergone two significant amendments. Firstly, it now includes provisions not only for asset freezes – the original core of this piece of legislation – but also for information and cooperation obligations imposed on all potential “natural and legal persons, entities and bodies”.[65] These obligations involve providing information to facilitate the implementation of the regulation, such as identifying the person who owns or controls the funds, the amount, and type of funds.[66] This is accompanied by a new prohibition against participating in activities designed to circumvent the asset freezes (anti-circumvention clause).[67] Secondly, the list of

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to introduce the so-called travel ban. This measure aimed to prevent “the entry into, or transit through, their territories of the natural persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, and of natural persons associated with them”. The Decision included an exhaustive list of individuals subject to the travel ban in Annex I (the so-called ‘blacklist’).

[60] Regulation No 269/2014 (n 56) art 2(1) and (2).

[61] Ibid, art 3(1).

[62] Regulation No 833/2014 (n 56) Recital 2.

[63] Ibid, art 2(1).

[64] Ibid, art 3(1). This was not an excessively extensive list, which included, among other items, line pipes, drill pipes, liquid elevators, and sea-going light vessels.

[65] Regulation 269/2014 (n 56) art 8(1).

[66] Ibid, art 8(1a).

[67] Ibid, art 9.

individuals subject to asset freezes has been significantly extended. As of January 2024, the list includes 1,584 individuals and 249 entities.

Similarly, the illicit behaviours covered by Regulation 833/2014 now span a wide range of economic, commercial, and financial sectors. The list of prohibited goods has been substantially expanded (eg to include luxury goods, precious minerals, cigarettes, caviar, shellfish, and textiles), resulting in 40 annexes associated with Regulation 833/2014.

In this highly complex regulatory framework, a crucial issue, extending beyond the restrictive measures adopted in the context of the Russian invasion, has quickly emerged – *how to ensure the effectiveness of the EU's economic sanctions system*? In other words, how can restrictive measures be made genuinely *effective* and *practically enforceable*?

(2) A lack of enforcement that called for a criminalisation strategy

To prevent the violation of restrictive measures, the EU legislator has largely relied on *national legal systems*. Traditionally, Member States have been empowered to establish "rules on penalties" applicable to relevant violations, provided that such penalties are "effective, proportionate, and dissuasive".[68] However, the EU legislator did not specify the *nature* of the sanctions to be implemented at the national level for those who violate or circumvent the restrictive measures.

As a result, some legal systems opted for purely administrative sanctions (primarily fines), others adopted a twin-track system (combining administrative and criminal penalties depending on the severity of the offence), and some imposed exclusively criminal sanctions.[69] Additionally, there has been significant divergence in defining the criminal offences of 'violation of restrictive measures' domestically, as well as the sanctions imposed (eg varying levels of fines).[70]

The lack of a harmonised approach in imposing penalties for violations of restrictive measures has led to numerous inconsistencies, rendering the entire enforcement system ineffective. This is evidenced by a 2021 Eurojust report, which indicated that only a limited number of violators have been held accountable at the national level.[71] Moreover, this regulatory fragmentation has hindered the objectives of the CFSP and encouraged forum shopping, allowing violators to conduct their illicit activities in Member States with more lenient penalties.[72] To close these loopholes, the European Commission (herein after

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[68] Regulation 269/2014 (n 56) art 15 and Regulation 833/2014 (n 56) art 8.

[69] Francesco Giumelli and others, 'United in Diversity? A Study on the Implementation of Sanctions in the European Union' (2022) 01 Politics and Governance 36, 40ff.

[70] 'Prosecution of sanctions (restrictive measures) violations in National Jurisdictions: A Comparative Analysis' (*Eurojust*, December 2021) <https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf> accessed 20 May 2024.

[71] Ibid.

[72] Ibid.

'the Commission') launched an unprecedented legislative initiative in May 2022, approximately three months after the Russian invasion of Ukraine, unfolding in three phases.[73]

Initially, the Commission proposed to criminalise violations of economic sanctions by identifying such conduct as a criminal offence to be included in the list of 'Euro-crimes' under Article 83(1) TFEU.[74] This proposal was eventually approved in November 2022.[75]

As a second step, the Commission presented a draft directive aimed at harmonising the 'definition of criminal offences and penalties for the violation of Union restrictive measures'.[76] The primary objective was to standardise the definitions of offences and criminal penalties for these violations across all Member States, thereby ending impunity for those currently violating or circumventing restrictive measures. This directive was recently approved in April 2024.[77]

Lastly, as the third and final step, the Commission proposed a directive on the 'recovery and confiscation of assets'. Once approved, the rules on freezing, confiscating, tracing, identifying, and managing assets instrumental to a crime or constituting the proceeds of a crime – applicable to all 'Euro-crimes' – will also extend to assets related to violations of EU restrictive measures. This directive includes provisions to facilitate the swift tracing and identification of assets owned or controlled by individuals or entities subject to such restrictive measures.[78] This not only supports the effective implementation of economic sanctions but also empowers national authorities to consider funds linked to violations of restrictive measures as 'proceeds' of crime, subject to freezing and confiscation, and potentially available for post-war reconstruction efforts in Ukraine.[79] This directive was also approved in April 2024.[80]

The primary outcome of this three-pillared legislative strategy is clear: violations of EU restrictive measures are now classified as *criminal offences*, obliging Member States to *impose criminal penalties* on wrongdoers. In the

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[73] Francesca Finelli, 'Countering circumvention of restrictive measures: The EU response' (2023) 60 CMLRev 733, 747.
[74] 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 [2022] COM(2022) 247 final. See n 27.
[75] 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 L 308. This represents the first expansion of the catalogue laid down in Article 83(1) TFEU.
[76] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the definition of criminal offences and penalties for the violation of Union restrictive measures [2022] COM(2022) 684 final.
[77] Directive (EU) 1226/2024 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.
[78] Michael Kilchling, 'Beyond Freezing?' (2022) Eucrim 136, 136ff.
[79] Alan Rosas, 'From freezing to confiscating Russian assets?' (2023) ELRev 337, 337ff.
[80] Directive (EU) 1260/2024 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation [2024] OJ L.

context of subsequent criminal proceedings aimed at determining the culpability of those accused persons, authorities may issue orders to *freeze* the assets involved in the criminal conduct. Where applicable, and as provided by national law, these assets may also be subject to *confiscation*. Thus, criminal law has become the *principal tool* for managing – and ideally deterring – conduct that violates or circumvents restrictive measures.

(3) Looking for Godot – what is effectiveness, exactly?

At first glance, this choice may not seem overly surprising. Criminal law has played, and continues to play, a crucial role in the European integration process. Thus, relying on it to implement EU restrictive measures stems from the (correct) perception that fragmented – and therefore ineffective – application of such measures undermines the European Union's ability to "speak with one voice" in such a sensitive area of the CFSP.[81]

However, while the *goal* of criminalising violations of restrictive measures is laudable, and entirely justifiable (i.e., make Russia and its allies pay for their crime of aggression against Ukraine), the increasingly prevalent trend of resorting to criminal law as a remedy for systemic deficiencies in non-criminal systems raises questions about the *legitimacy* and *appropriateness* of this strategy from a theoretical perspective. In other words, the recent criminalisation of violations of EU economic sanctions clearly reveals – once more – how criminal law is used by the EU legislator as a means to 'correct' deficiencies within a specific normative system characterized by poor application.

Notably, the Commission explicitly acknowledges that this is the fundamental aim of the entire criminalisation process, noting that "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".[82] To ensure the smooth enforcement of restrictive measures, imposing criminal sanctions for their violation should provide concrete assistance.

However, employing criminal law requires considering the multiple implications of its application, which the EU legislator seems not having thoroughly examined. For instance, the principles of *legality* and *ultima ratio* must be respected. One might question the compliance of the criminalisation initiative with these principles and, thus, the appropriateness and legitimacy of using criminal law in this context.[83]

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[81] 'Commission welcomes political agreement on new rules criminalising the violation of EU sanctions' (*EU Commission*, 12 December 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6535> accessed 20 May 2024.
[82] COM(2022) 247 final (n 74) 6.
[83] See, for further reflections on this issue, Bernardini (n 46) 7–10 and Lorenzo Bernardini and Francesca Finelli, 'Violation of EU Sanctions and Criminal Penalties: Proportionality at Peril?'

Against this background, we find the EU legislator's conviction that the *effective* application of EU restrictive measures can *only* be achieved through criminal sanctions unpersuasive.

The theoretical basis for criminalising the violation or circumvention of restrictive measures is justified by the European Commission in the following terms: "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*".[84] Despite its brevity, this statement encapsulates the rationale behind the entire criminalisation process under scrutiny. It has been emphasised that, according to the European legislator, there is a direct relationship between criminal law and the efficiency of the economic sanctions enforcement system. Using a mathematical metaphor, the two variables appear to be directly proportional: the more sanction violations are criminalised, the more effective the entire regime of restrictive measures becomes. Accordingly, the approach adopted by the EU legislator is primarily *teleological*, aiming at the effective implementation of economic sanctions, which should ostensibly be achieved *exclusively* through criminal sanctions for those who violate restrictive measures. In these terms, it is safe to argue that such a criminalisation initiative should have been developed under Article 83(2) TFEU.[85] This is why, although the criminalisation process took place under Article 83(1) TFEU, we find it useful to engage in an in-depth analysis of the effectiveness-based grounds on which the process is deeply entrenched.

Despite substantial academic contributions on restrictive measures, there is a lack of in-depth studies specifically exploring the advantages and disadvantages of *relying on criminal law* to counter violations of economic sanctions and enhance their enforcement regime. This research gap can likely be attributed to the absence of a universally accepted definition of what constitutes an 'effective' enforcement system for restrictive measures. Thus, what contribution can criminal law make to the effective implementation of restrictive measures if defining such 'effectiveness' is highly complex? The intangible nature of this concept makes justifying the use of criminal law difficult, preventing an *ex ante* or *ex post facto* evaluation of the alleged positive impact criminal law might have on enforcing economic sanctions.

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in Valsamis Mitsilegas, Stefano Montaldo and Lorenzo Grossio (eds), *Proportionality of Criminal Penalties in EU Law* (Hart 2024) ch 8, forthcoming.

[84] COM(2022) 247 final (n 74) 7 (emphasis added). This is a consideration the Commission deems necessary to address first, before other justifications for criminalisation: (i) the violation of restrictive measures threatens international peace and security and thus constitutes a particularly serious area of crime; (ii) the violation of restrictive measures is a conduct with a transnational dimension; (iii) there is a heterogeneous response at the domestic level to the violation of restrictive measures (ibid 7–8).

[85] I have already addressed this issue briefly in Lorenzo Bernardini, 'Strengthening the Biting Effect of EU Restrictive Measures Via Criminal Law – Some Critical Remarks' (*CELIS Blog*, 28 March 2024) <https://www.celis.institute/celis-blog/strengthening-the-biting-effect-of-eu-restrictive-measures-via-criminal-law-some-critical-remarks/> accessed 20 May 2024. In the same vein, see Bernardini and Finelli (n 83).

Nevertheless, we can attempt to give meaning to this expression. The 'effective implementation of the EU's policy on restrictive measures' can be associated with at least three different meanings. Not all of these perspectives, at least at first glance, seem to require a criminal law intervention for their implementation.

The first definition originates from political science and can be classified as the *means-end approach*, or the 'effectiveness of the means in relation to the ends'. In this perspective, restrictive measures that achieve their objectives (eg compelling a third country to cease hostilities due to the deterioration of its economic system) are considered effective. This requires evaluating both the economic and commercial impact of restrictive measures on the targets and, subsequently, the resulting behavioural change.[86] Various economic indicators, such as changes in trade patterns, investment flows, and economic growth rates, can be examined to determine how restrictive measures have affected the target's economy and to adjust actions accordingly to mitigate negative impacts on their economy.[87] If an effective enforcement system is one that successfully induces behavioural change in the targets, criminal law does not seem *necessary* to justify its use. There is no empirical evidence that criminalising the violation of EU restrictive measures directly leads to a behavioural change in the targets (countries, entities or individuals). Moreover, the perceived utility of criminal sanctions could be questioned by considering a broader use of administrative measures, which might more swiftly – and, thus, concretely – induce a shift in the targets' conduct.

A second approach to measuring the effectiveness of the enforcement system for restrictive measures could focus on the volume of frozen assets, money, or objects, or the number of individuals prosecuted and punished for violating economic sanctions, regardless of whether the measures prompted a behavioural change in the targets. This would be a *quantitative approach*, deeming systems effective if they achieve certain thresholds concerning the economic value of frozen assets or the individuals held accountable for violating restrictive measures. This perspective is also reflected in the Commission's considerations, where the low number of frozen assets and individuals investigated or convicted for violating economic sanctions is mentioned as a relevant factor describing the inefficiency of the *status quo*. Still, even this angle does not strongly justify the use of criminal law. Firstly, mere numerical factors are not inherently indicative of inefficiency. For instance, the low number of individuals investigated or convicted could be attributed to the limited resources allocated by Member States for conducting such investigations. Similarly, it might result from a lack of political will in certain jurisdictions to pursue violations

[86] On this point, see Mirko Sossai, *Sanzioni delle Nazioni Unite e organizzazioni regionali* (Roma TRE-Press 2020) 13ff. and references therein. The deterrent purpose of economic sanctions is also mentioned by Daniel P Ahn and Raymond D Ludema, 'The sword and the shield: The economics of targeted sanctions' (2020) 130 European Economic Review 1, 3ff, and Gary Clyde Hufbauer and Euijin Jung, 'Economic sanctions in the twenty-first century' in Peter A G van Bergeijk (ed), *Research Handbook of Economic Sanctions* (Edward Elgar 2021) 36. The latter authors also cite the retributive and rehabilitative purposes of economic sanctions (ibid 37–38).

[87] Niccolò Ridi and Veronika Fikfak, 'Sanctioning to Change State Behaviour' (2022) 13 Journal of International Dispute Settlement 210.

of restrictive measures. Additionally, the complexity of the investigations – whether administrative or criminal – required to identify the assets to be frozen (often located abroad) or the individuals to be investigated can also be a significant factor in this regard. Secondly, it should be noted that in 12 Member States, violations or circumventions of sanctions were considered exclusively criminal offences prior to the recent criminalisation process, while in another 13 Member States, such conduct was punished through a dual-track system of administrative and criminal penalties, depending on the severity of the offence. Despite this, the enforcement rate of economic sanctions has been particularly deficient. This suggests that the added value of criminal sanctions has not been conclusively demonstrated, at least at first glance. Whether greater reliance on administrative law could enhance the implementation of restrictive measures from a 'quantitative' perspective remains an open question, which the EU legislator does not seem to have fully considered.

Finally, the enforcement of restrictive measures could be deemed effective in achieving broader objectives beyond those directly related to the CFSP. In the current geopolitical scenario, this notion of effectiveness could aim not only to penalise Russia and its allies for their actions but also to establish the legal framework for repurposing frozen assets and funds to support the post-war reconstruction of Ukraine. This perspective, which can be classified as a *restorative approach*, suggests that, in the absence of better alternatives, national authorities should be equipped with adequate tools not only to freeze assets linked to the violation of restrictive measures but also to facilitate their subsequent use for the aforementioned purposes. Therefore, if only restrictive measures that ultimately enable the *concrete repair of damages* caused by the targets' conduct are considered effective, then the use of criminal law might, in theory, be appropriate.

Indeed, if we calibrate the concept of 'effectiveness' in this manner, it could be argued that the only legal instruments capable of definitively severing the *fil rouge* between an asset and its owner are those related to criminal procedure, specifically *confiscation* orders, typically preceded by *interim* freezing orders. This aspect is crucial. Restrictive measures may at least *freeze* assets or funds belonging to targets, but such a measure is provisional. As the Commission has stated, "sanctions in general and asset freezes in particular do not entail expropriation and are of a temporary nature".[88] However, it goes without saying that only assets *definitively* removed from their owner can be effectively repurposed for restorative purposes. In this light, the criminalisation process could find its own justification, as it would provide national authorities with the most appropriate tool (i.e., confiscation measures) to achieve the restorative purpose of ensuring the post-war reconstruction of Ukraine.[89]

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[88] 'Asset freeze and prohibition to provide funds or economic resources' (EU Commission, 24 July 2023) <https://finance.ec.europa.eu/system/files/2023-07/faqs-sanctions-russia-assets-freezes_en.pdf> accessed 19 May 2024.

[89] Rosas (n 79) 337ff. For an examination of the legal challenges and feasibility of investing the frozen assets of Russia's Central Bank and using the proceeds to support Ukraine's post-war reconstruction efforts, see Ron van der Horst, 'Illegal, Unless: Freezing the Assets of Russia's Central Bank' (2023) 34(4) EJIL 1021, 1021ff.; Menno T Kamminga, 'Confiscating Russia's

Nevertheless, even this approach presents several challenges. Given the foregoing, it is evident that the EU restrictive measures legal framework lacks mechanisms capable of *definitively* expropriating assets from a target. This highlights a fundamental misalignment with the 'restorative' approach, as restrictive measures are *inherently* designed to be *temporary*. Accordingly, their purposes – whatever they be – could never be that of post-war reconstruction, as this step requires, as anticipated, permanent expropriation measures not provided for within their frameworks. In this context, criminal law cannot be regarded as a tool for enhancing the effectiveness of the sanctions enforcement mechanism, since it does not inherently align with the temporary nature of these measures. Consequently, criminal law seems to be employed here to introduce an *ancillary tool* (i.e., confiscation orders) in this field that, although beneficial for restorative purposes, extends beyond the core objectives of the existing enforcement system.[90]

To sum up, none of the three proposed models adequately identifies what we are talking about when determining when and to what extent the enforcement of EU restrictive measures is to be deemed 'effective'. The notion of 'effectiveness' remains elusive, though at least one partial consideration can be made. Whatever grounds render such a system effective shall be linked to the temporary nature of restrictive measures. This is why a 'restorative' approach to effectiveness should be set aside, as it would disregard the fact that economic sanctions were not designed to be permanent. The difficulty in identifying an effective sanctions enforcement mechanism consequently clouds the determination of the necessity for criminal law-based legislative interventions. What added value can criminal law provide in this area if it is challenging to establish the criteria for such a framework to be effective? Without a clear and compelling justification for the *essentiality* of criminal law in a specific field, its application should be cautiously reconsidered.

E. CONCLUDING REMARKS

In conclusion, while criminalising the violation of restrictive measures may initially appear to offer a deterrent effect against such conduct, the multifaceted nature of 'effectiveness' in relation to the implementation of economic sanctions – which criminal law should seemingly support – suggests a need for a strategic shift in this regard.

Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?' (2023) 70 Netherlands International Law Review 1; Ivan Yakoviyk and Anna Turenko, 'Confiscation of Russian Assets for the Restoration of Ukraine: Legal Problems of Implementation' (2023) 161 Problems of Legality 6, 6ff.

[90] This contrasts with the previously discussed 'means-end' and 'quantitative' approaches. Although not fully consistent with the use of criminal law in this domain, these approaches at least propose that the criminalisation initiative could enhance the enforcement of restrictive measures – whether through inducing behavioural change in the relevant targets or creating a deterrent effect by freezing a significant number of assets. These approaches suggest that criminal law might strengthen the existing sanctions regime, provided that these objectives remain *temporary*.

Perhaps, other-than-criminal legal tools, such as those related to civil or administrative law, might better suit the matter at hand, avoiding the rigidity and complexities of criminal proceedings. Recalibrating the strategy to ensure meticulous, rigorous, and comprehensive adherence to the restrictive measures against (but not limited to) Russia could be the winning approach for achieving a tangible, swift, and effective implementation of these foreign policy tools.

The notion that restrictive measures are "easy to adopt, difficult to implement"[91] should not mistakenly lead one to believe that the same applies to criminal sanctions. Criminal sanctions should *never* be adopted lightly. This is especially true when employing the burdensome machinery of criminal justice to oversee a highly complex and technical area like the CFSP, which, in contrast, requires streamlined and functional tools to operate optimally.

In this context, the enduring relevance of the questions posed by Advocate General Mazák, which remain unanswered, merits further reflection – "When are rules in a specific field not sufficiently effective or not 'fully effective', thus necessitating the instrument of criminal law? What is the contribution of criminal penalties to the effectiveness of a law?".[92]

[91] Bryan R Early, 'Confronting the Implementation and Enforcement Challenges Involved in Imposing Economic Sanctions' in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill 2016) 43.
[92] Case C-440/05 (n 25) Opinion of AG Mazák, paras 116–117.