INSTITUTE
OF LEGISLATIVE
IDEAS

EU Directive on the criminalisation of sanctions violations: Overview and recommendations for Ukraine

2024

INSTITUTE
OF LEGISLATIVE
IDEAS

EU Directive on the criminalisation of sanctions violations: Overview and recommendations for Ukraine

The study analyses the European Union Directive on the definition of criminal offences and penalties for circumvention of sanctions and the main principles of criminalisation of non-compliance with restrictive measures in Ukraine.

The publication was produced with the support of the Prague Civil Society Centre

Publisher: think tank 'Institute of Legislative Ideas'.

Authors: Andriy Klymosyuk, Mykola Rubashchenko

2024

Violations of restrictive measures in the EU have long been grounds for various types of liability. Recently, the most serious violations of sanctions have been recognised as a criminal offence at the EU level and all Member States are obliged to ensure their prosecution under their national legislation within a year. Ukraine has been widely advocating for the strengthening of the sanctions regime, combating its circumvention and seeking to use the confiscated funds for the benefit of Ukraine. At the same time, there is virtually no legal liability for sanctions violations in Ukraine. The draft laws registered in the Parliament have significant shortcomings and remain pending. The study analyses the main provisions of the new EU Directive and outlines a vision on the key principles of how to criminalise the violation of restrictive measures in Ukraine, in particular:

1. Introducing an **independent basis for criminal liability for violation of restrictive measures** in Ukraine is an urgent need. This task should and could have been completed at least before the full-scale aggression of the Russian Federation. The existing fragmented and insufficiently strict administrative and criminal measures are not sufficient to ensure the effective operation of sanctions.

2. Practice demonstrates numerous cases of violations of sanctions legislation, and the existing enforcement measures **have no deterrent effect.**

3 The criminalisation of restrictive measures violations should be carried out in a manner that ensures **harmonisation** with the EU directive, to the extent possible without fundamental changes to existing legal institutions.

4. **At the very least, the objective is to criminalise violations of the sanctions provided for in the EU Directive.** This refers primarily to the most important and sensitive restrictive measures for sanctioned entities - asset freezes and other financial or economic (trade) sanctions. Circumvention of sanctions, in particular in the forms set out in the EU Directive, as well as violation of licence conditions that allow for actions prohibited by sanctions, are also subject to criminalisation.

5. Violation of other sanctions may result in **non-criminal enforcement measures** (within the framework of the Code of Administrative Offences or measures taken by regulators). At the same time, the use of criminal remedies does not preclude the parallel use of non-criminal remedies.

6. Criminalisation should relate not only to violations by designated individuals or legal entities' representatives, **but also to institutions implementing sanctions and their officials, as well as other (third) parties.**

7. Without simultaneous **amendments to the Law on Sanctions** and other laws and regulations, criminalisation of sanctions violations would result in legal prescriptions that would be difficult, if not impossible, to enforce.

8. **The list of institutions implementing sanctions**, as well as the scope of their powers, including the application of sanctions to offenders, needs to be clearly defined. Regulations should provide for obligations and prohibitions for different categories of actors corresponding to criminal law, the violation of which would constitute grounds for criminal liability.

9. In order to ensure the effectiveness of restrictive measures, general prevention of sanctions circumvention and creation of an additional source of compensation for damage caused by the aggression against Ukraine, it is necessary to develop and implement **a simplified procedure for confiscation of assets** in the framework of criminal prosecution for sanctions circumvention.

CONTENT

SECTION I
OBJECTIVES AND MAIN PROVISIONS OF THE DIRECTIVE OF THE EUROPEAN UNION (EU)

I. Context

EU restrictive measures are specific foreign policy steps **aimed at changing the policies/activities** of a target country, organisations or individuals. Decisions on the application of restrictive measures are taken by the EU Council within the framework of the Common Foreign and Security Policy (CFSP) and take the form of binding legislation with direct effect in all EU member states.

Since the beginning of Russia's full-scale invasion of Ukraine on 24 February 2022, the restrictive measures and bans imposed by the EU against Russia have reached an unprecedented scale. Their number, scope and regulatory framework have undergone qualitative changes. Although the sanctions against Russia cannot lead to an immediate cessation of its armed aggression, they have a certain positive effect, reducing the economic and military capabilities of the authoritarian regime.

Unlike the EU sanctions legislation, which is adopted in a centralised manner and is therefore the same for all member states, the **implementation of sanctions and ensuring their effectiveness is a decentralised process:** each country has its own specific system of responsible authorities, a mechanism for monitoring compliance with sanctions, penalties for violations, specifics of investigation, etc.

The decentralised approach to the implementation of sanctions in the EU has led to significant differences in the definition and scope of sanctions violations, types and amounts of penalties and other measures applied for violations. Institute of Legislative Ideas (ILI) has previously highlighted the diversity in the type and extent of liability, which makes it possible for potential violators to choose the most favourable jurisdictions to circumvent sanctions, despite the fact that such violations occur across borders. Ultimately, decentralisation significantly reduces the effectiveness of coordination and cooperation between authorised bodies within different states. In other words, the **objectives of sanctions cannot be achieved to a sufficient extent by the efforts of individual Member States alone.**

The introduction of EU restrictive measures has shown the **difficulty of identifying assets** belonging to oligarchs who hide them **in different jurisdictions** through complex legal and financial schemes. This is facilitated by legal loopholes caused by differences in the provisions on violation of EU sanctions in different countries. The inconsistent application of restrictive measures also undermines the Union's ability to speak with one voice.

In order to overcome the fragmentation of the system of ensuring the effectiveness of sanctions, the EU decided to activate the obligation of member states to harmonise their national legislation with the EU Directive. Pursuant to Article 83 of the Treaty on the Functioning of the European Union (TFEU), The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, 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. Considering the exceptional growth of “sanctions crime” after the outbreak of Russia's war of aggression against Ukraine, on 28 November 2022, **the EU Council decided to classify the violation of EU sanctions as a crime** that meets the criteria set out in Article 83(1) TFEU.

On 2 December 2022, the European Commission drafted a proposal for a future directive on the definition of criminal offences and penalties for breaches of sanctions. The Commission has also proposed **new and enhanced rules on asset forfeiture and confiscation**, which will also contribute to the effectiveness of the EU's restrictive measures. On 12 March 2024, the European Parliament adopted the Resolution "Definition of criminal offences and penalties for breaches of Union restrictive measures (COM(2022)0684 - C9-0401/2022 - 2022/0398(COD))" under the ordinary procedure, which was approved by the Council of the EU on 12 April. It will soon enter into force, and Member States will have 1 year to transpose the provisions of the Directive into their national legislation.

It should be noted that Article 83 TFEU provides only for **a "minimum method of harmonisation"**: Member States may maintain or introduce stricter legislation, i.e. criminalise conduct not covered by the Directive or impose stricter penalties. As for the violations not criminalised by the Directive, it is up to the Member States to determine the type and extent of liability for them (criminal, administrative, disciplinary, etc.).

II. What is criminalized?

The Directive primarily establishes general minimum rules for determining offences related to the breach of restrictive measures of the Union (i.e. describes the forms of behaviour that should be recognised as criminal offences).

Minimum rules of the Directive in terms of criminalisation (general overview)

- the Directive sets out **an exhaustive list of offences** to be criminalised; other possible offences are left to Member States to decide at their own discretion;
- the generic characteristic of the defined offences is that they violate **specific prohibitions and obligations** set out in EU law or national law of a Member State;
- as a general rule, violations must be **intentional**, but criminalisation of **negligent** violations is required in the case of trade in military or dual-use goods;
- the Directive establishes **an optional threshold for criminalisation** - it gives Member States the right, if they consider it appropriate, not to criminalise actions with assets, goods, transactions with an aggregate value of less than EUR 10,000. This threshold can also be reached through a series of related offences, even if each of them does not reach it on its own and does not involve military/dual-use goods. However, Member States are generally encouraged not to provide for such a threshold;
- **complicity** in these violations should be punishable;
- **attempted** violations should also be punishable.

(1) TOMÁŠEK, M., ŠMEJKAL, V. et al. Commentary on the Treaty on the Functioning of the EU, the EU Treaty and the Charter of Fundamental Rights of the EU. Prague: Wolters Kluwer ČR, 2024. C. 365.

Within the scope of the violations defined by the Directive, the general types of ***violations ("violation of Union restrictive measures")*** are distinguished - eight "traditional" types of evasion of sanctions provided for in paragraphs (a) - (g) and (i) of Part 1 of Article 3, as well as those recognised ***as circumventing a Union restrictive measure*** - four types provided for in paragraph (h) of Part 1 of Article 3.

<table>
<tr><th>CRIMINALISED ACTS</th><th>MAXIMUM PENALTY
(for individuals)</th></tr>
<tr><td colspan="2">Intentional violations of prohibitions and obligations that constitute a restrictive measure of the Union or that are set out in national legislation implementing EU sanctions, committed by way of:</td></tr>
<tr><td>providing assets for or in favour of a sanctioned person</td><td rowspan="2">at least five years of imprisonment when they involve funds or economic resources of a value of at least EUR 100 000</td></tr>
<tr><td>evading the blocking (freezing) of such assets</td></tr>
<tr><td>allowing a sanctioned person to enter the territory of a Member State or transit through the territory of a Member State</td><td>at least three years of imprisonment</td></tr>
<tr><td>conducting transactions with third countries prohibited or restricted by EU restrictive measures (violation of sectoral sanctions)</td><td rowspan="4">imprisonment for at least 5 years:

- if the violations relate to goods, services, transactions or activities worth at least EUR 100,000;

- if they relate to military or dual-use goods, regardless of their value;</td></tr>
<tr><td>trading, importing, exporting, selling, purchasing, transferring, transiting or transporting goods, as well as providing services related to these goods*.

* this behaviour should be punishable even in cases of negligence, at least in relation to military/dual-use goods</td></tr>
<tr><td>providing financial or other (e.g., legal, trust, consulting) services</td></tr>
<tr><td>violation of the terms of licences - general or special permits to take actions that would otherwise be considered a violation of sanctions</td></tr>
</table>

The circumvention of restrictive measures is actually the result of the development of sanctions law, a reaction to the ingenuity of designated persons.

<table>
<tr><th>CRIMINALISED ACTS</th><th>MAXIMUM PENALTY
(for natural persons)</th></tr>
<tr><td colspan="2">Circumventing restrictive measures of the Union,
committed by:</td></tr>
<tr><td>using or disposing of assets owned, held or controlled by a sanctioned person and subject to the blocking measures in order to conceal them</td><td rowspan="2">imprisonment for at least 5 years if the offences relate to assets worth at least EUR 100,000</td></tr>
<tr><td>providing false information concealing the fact that the sanctioned person is the ultimate owner of the assets subject to the blocking;</td></tr>
<tr><td>failure of the sanctioned person to fulfil the obligation to report to the competent authorities on assets within the jurisdiction of a Member State owned, held or controlled by them</td><td rowspan="2">imprisonment for at least 1 year if the offences relate to assets worth at least EUR 100,000</td></tr>
<tr><td>failure to comply with the obligation to provide the competent authorities with information obtained in the course of their professional duties on:

a) blocked assets, or

b) assets within the jurisdiction of a Member State owned, held, custodied or controlled by the sanctioned persons but not blocked</td></tr>
</table>

III. What are the legal consequences of violating/circumventing sanctions?

The second main objective of the Directive is to establish minimum rules on the availability of effective, dissuasive and proportionate measures for violations of the Union's restrictive measures

Minimum rules of the Directive in terms of **penalisation** (general overview)
• The Directive requires that certain offences, complicity in their commission or attempted **commission, be punishable by effective, proportionate and dissuasive** criminal penalties; • The basic rule is that Member States must ensure that the violator of the sanctions will face **imprisonment** (as the most severe penalty), which does not exclude the possibility of providing for less severe alternative penalties alongside imprisonment; • Depending on the degree of severity of the offence, taking into account the cost criterion, the Directive sets out requirements for determining the **maximum limit of** imprisonment at the level of at least **1, 3 or 5 years** (see tables above); • Member States must ensure that violations of sanctions are also punishable **by additional penalties or non-criminal measures**, which may include, inter alia, fines, revocation of authorisations and powers to carry out activities, deprivation of the right to hold office, temporary bans on running for public office, publication of a personalised judgment.

The Directive also provides for the mandatory consideration **of aggravating** and **mitigating** circumstances, to the extent that these circumstances are not part of the elements of the offence. That is, if they do not constitute elements of the crime, these circumstances should have an appropriate impact on the final punishment of the person.

Aggravating circumstances

Committing an act:	**The offender:**
• **by an organised group;** • **by a public official or professional service provider** in breach of official/professional duties; • caused significant f**inancial benefits or avoidance of significant costs;** • combined with the **destruction of evidence** or **intimidation** of witnesses or complainants.	• provides competent authorities with information they would not otherwise be able to obtain, helping them **to identify or prosecute other offenders;** • provides competent authorities with information that they would not otherwise be able to obtain, helping them **to locate evidence.**

Mitigating circumstances

Other criminal law consequences of sanctions violation/circumvention

Since sanctions can be circumvented through the use of corporate loopholes and multi-component schemes involving a large number of legal entities, the Directive also requires that **legal persons be held liable.**

Articles 6 and 7 of the draft EU Directive require that legal persons be held liable for a total of **two types of violations:**

- violations committed for their benefit by any person holding a managerial position in a legal person, acting individually or as part of a body of a legal person;
- violations that consisted of improper supervision or control over a subordinate, which made it possible for him to commit a criminal violation of sanctions in favour of a legal entity.

TYPE OF VIOLATION	PENALTY FOR A LEGAL PERSON
violation of the reporting/notification obligations provided for in subparagraphs (iii) and (iv) of paragraph (h) of part 1 of Article 3 of the Directive	**not less than 1%** of the total global turnover of the legal person or the amount corresponding to **EUR 8 million**
all other violations	**not less than 5%** of the total global turnover of the legal person or the amount corresponding to **EUR 40 million**

The Directive provides for severe penalties for legal persons. In addition to the severe fines described in the table above, it also includes:

- deprivation of the right to state benefits or assistance;
- denial of access to state funding, including tender procedures, grants and concessions;
- deprivation of the right to engage in entrepreneurial activity;
- cancellation of permits and powers to carry out activities;
- placement under judicial supervision;
- judicial liquidation;
- closure of establishments used to commit a criminal offence.

Article 10 of the draft EU Directive also requires Member States to take measures to ensure **the freezing and confiscation of** the proceeds and instrumentalities of criminal circumvention of sanctions, as well as the confiscation of the assets themselves in respect of which the sanctioned person commits or participates in the commission of a violation/circumvention of sanctions.

It is worth noting that, thanks to the initiative of the European Commission, the EU has adopted a new consolidated version of the Asset Recovery and Confiscation Directive, which provides for the expansion of the grounds for confiscation and new types of confiscation. This Directive provides for the possibility of using confiscated property to support third countries affected by situations in response to which restrictive measures have been taken by the Union. These provisions pave the way for the activation of additional areas of compensation for damage caused by the Russian Federation to Ukraine.

Article 5 of the EU Directive requires that **minimum limitation periods** be provided for:

- no less than a five-year statute of limitations for bringing to criminal liability for violations for which the maximum penalty is imprisonment for a term of at least 5 years;

- at least a five-year statute of limitations on the execution of a sentence in case of conviction to a sentence of imprisonment for a term exceeding 1 year or to a sentence of imprisonment in case of an offence for which the maximum sentence of imprisonment is not less than 5 years.

IV. Procedural part

In addition to the "substantive part" dedicated to the minimum rules of criminalisation, penalisation and other legal consequences of violating/circumventing sanctions, the EU Directive also contains **procedural provisions:**

- **jurisdictional rules** (Art. 12); unlike US criminal law, which largely provides for extraterritorial application of sanctions, this Directive is limited to the **territorial principle** (residence or registration of the offender in the territory of the Member State, conducting business in the territory of the Member State, etc;)

- the **requirement to ensure that investigations** of sanctions violations are conducted with the most effective special procedural tools, in particular for cases of organised crime or other serious crimes (Article 13);

- ensuring the possibility **of secure reporting** of violations of EU restrictive measures and protection of persons reporting such violations (Article 14);

- **coordination and cooperation** between the competent authorities of the Member States, the Commission, Europol, Eurojust, and the European Public Prosecutor's Office (Article 16);

- maintaining **statistical reports** (Article 17).

SECTION II
VIOLATION OF RESTRICTIVE MEASURES IN UKRAINE

I. What are the consequences for violating the domestic sanctions legislation?

The Law of Ukraine "On Sanctions" provides for the mandatory implementation of the decision to impose sanctions after they come into force, but does not contain any provision on potential liability for its violation. The codified acts on criminal and administrative liability - the Criminal Code of Ukraine and the Code of Administrative Offences, respectively - do not contain any reference to the failure to comply with or other violation of restrictive measures.

In this regard, it may seem that the Ukrainian legislator relies on the high moral qualities of sanctioned persons and other entities who will comply with the sanctions legislation of Ukraine only because their compliance is recognised as mandatory. However, despite the delay in criminalisation, the current legislation still contains certain legal means of responding to and preventing sanctions violations.

Measures within the framework of "state supervision"

First of all, violation of restrictive measures may result **in the application of enforcement measures within the framework of state supervision over compliance with the legislation on the implementation of sanctions of the relevant type.**

Examples:

- ***The Law of Ukraine "On State Regulation of Capital Markets and Organised Commodity Markets"***(Articles 11-12) provides that the National Securities and Stock Market Commission may impose financial sanctions on legal entities for offences in the capital markets and organised commodity markets, suspension/revocation of licences, association registration certificates, and appointment of a temporary administrator of a professional participant in the depository system of Ukraine.

- ***The Law of Ukraine "On Banks and Banking Activities"*** (Art. 73) provides for various sanctions that may be imposed by the National Bank of Ukraine in case of violation of the sanctions legislation by banks or other persons that may be subject to inspection by the NBU, ranging from a written warning to imposition of fines, revocation of a banking licence and liquidation of a bank.

- ***Legislation on notaries, state registration of legal entities,*** individual entrepreneurs and public associations, and state registration of real rights to immovable property and their encumbrances provides for the powers of the Ministry of Justice of Ukraine in connection with violations of legislation on sanctions in the performance of notarial and registration acts. The Ministry of Justice may, inter alia: cancel access to the State Register of Real Property Rights; submit a request to the Higher Qualification Commission of Notaries to cancel a certificate of the right to practice notary; and cancel registration actions.

Examples of the Ministry of Justice's exercise of such powers can be found here.

Although these measures play an important role in preventing and counteracting sanctions violations, they are not enoughbecause they:

- apply exclusively to the subjects implementing the sanctions and **do not apply to the sanctioned persons themselves** or other (third) parties;

- are provided **for the violation of certain types of sanctions** (in particular, asset freezing, prohibition to prevent the withdrawal of capital from Ukraine; suspension of economic and financial obligations), while most other sanctions do not have corresponding state regulation measures;

- have mainly a **non-punitive** (economic or disciplinary) impact, and therefore cannot replace criminal law measures;

- are mostly applied only **to legal entities** (in particular, enforcement actions by the NSSMC and the NBU), which excludes personal liability (if a bank employee helped a sanctioned entity circumvent sanctions, enforcement actions will be applied to the bank itself, and the employee will only face disciplinary liability).

Administrative (misdemeanour) liability

The current CAO does **not currently have a separate article on violations** of restrictive measures. At the same time, there are a number of provisions that may cover certain violations of sanctions legislation.

For example, Article 166-11 of the Code of Administrative Offences provides for liability **for violations of the legislation on state registration of legal** entities, individual entrepreneurs and public associations. These violations include failure to submit or late submission to the state registrar of information about the ultimate beneficial owner (UBO) of a legal entity or its absence, or documents to confirm information about the UBO of a legal entity. Such an owner may also be a sanctioned entity, so timely submission of information on its presence or change is important for the effective operation of sanctions. At the same time, the administrative penalty established for such actions in the form of a fine of 1000 to 3000 tax-free minimum incomes (UAH 17,000 to 51,000) for the head of a legal entity or a person authorised to act on behalf of a legal entity (executive body) **does not look convincing and is unlikely to have a deterrent effect.**

A number of articles of the Code of Administrative Offences formally also cover the violation of sanctions, which take the form of **non-compliance with the procedure or rules for conducting financial transactions** in terms of the implementation by authorised officials of such sanctions as blocking assets, suspension of financial liabilities or financial transactions, prohibition of transactions, etc. For example:

- violation of the procedure for conducting currency transactions (Article 162-1);

- violation of the procedure for issuing securities (Article 163);

- violation of banking legislation, legislation in the field of state regulation of non-banking financial services markets, currency legislation, legislation regulating the transfer of funds in Ukraine, and regulations of the National Bank of Ukraine (Art. 166-5);

- violation of the procedure for state registration of real rights to immovable property and their encumbrances (Art. 166-23);

- failure to comply with the legal requirements of the NSSMC (Article 188-30) and some others.

What unites these regulations:

- they provide for liability for violations committed **by subjects implementing the sanctions**, but not by the sanctioned entities themselves or third parties;
- administrative penalties **do not ensure** prevention and fair punishment for relevant violations;
- sanctionable violations **are scattered across different articles** of the Code of Administrative Offences, which complicates enforcement.

Criminal liability

The absence of separate articles in the Criminal Code on violations of restrictive measures, of course, does not mean that none of the sanctions violations can be qualified as a criminal offence. The current CC has an arsenal of provisions that can be applied under certain conditions. In particular, **a trade transaction with the aggressor state** or its legal entity **prohibited by a sanction** may be covered by Articles 110-2 (financing of actions aimed at changing the boundaries of the territory of Ukraine), 111 (high treason) or 111-2 (aiding and abetting the aggressor state).

However, for this purpose, the law enforcement officer must establish a number of elements of the crime, including **the purpose of unconstitutional change of the borders of Ukraine or causing damage to Ukraine, the intent to harm the national security of Ukraine**, etc. In many cases, despite the violation of sanctions, these elements will be absent (the person did not set such a goal and did not intend to harm national security), while in other cases it will be difficult for the investigating authority to prove their existence due to their subjective nature.

If the decision of the High Anti-Corruption Court (HACC) to recover the blocked assets for the state's revenue comes into force, further attempts to avoid actual recovery may qualify as a **failure to comply with the court decision** (Article 382 of the Criminal Code), but assets "hidden", transferred or transferred to third parties before that moment remain outside the scope of this article. In addition, only one of the more than 30 types of sanctions is imposed through a court decision.

In some cases, the circumvention of restrictive measures involves **the preparation of deliberately false documents, entering false data into valid official documents and their illegal use.** This creates grounds for liability under Article 358 of the Criminal Code (under parts 1, 2 and 4 - only a criminal offence) or under Article 366 of the Criminal Code (under part 1, in the absence of grave consequences, also only a criminal offence).

Violation of the sanction **to ban entry into the territory of Ukraine** is punishable (Article 4(21) of the Law). In particular, Art. 332-2 of the Criminal Code provides for liability for crossing the state border of Ukraine by a person who is prohibited from entering the territory of Ukraine.

Officials and other categories of actors responsible for the implementation of the sanctions policy may be held liable for **abuse of power** (Articles 364, 364-1, 365-2 of the CC) or **negligence** (Article 367 of the CC).

However, the corpus delicti of these crimes provide, firstly, for a limited list of subjects (officials and persons providing public services), and, secondly, given the content of the note to Article 364 of the Criminal Code and its interpretation by the Supreme Court, the mandatory element is the occurrence of a consequence in the form of property damage in the amount of at least 100 tax-free minimum incomes (currently UAH 151,400), which must also be causally related to the violation of sanctions. As a result, it is **virtually impossible to prove the existence of such damage** in case of withdrawal (or attempts to withdraw) of blocked assets from the sanctions, in respect of which there is no decision on their recovery to the state revenue or no claim has been filed at all.(2)

Finally, foreign criminal law **does not link the grounds for liability for sanctions violations to the actual damage caused** and provides for a separate article (separate provisions) defining the subject's actions and criminal law measures for their commission.

The most important thing is that this small arsenal of criminal law options leaves out the **most common** and **“effective”** forms of circumvention of sanctions from the practical point of view, namely:

- change of the ultimate beneficiary to a non-sanctioned one;
- re-registration of assets to nominee holders;
- division of assets (property);
- withdrawal of capital from the jurisdiction of Ukraine and the reach of law enforcement agencies of Ukraine, etc.

As a result, **the realistic prospect** of criminal prosecution is, if not illusory, then insignificant. In view of this, the current criminal legislation of Ukraine has at least the following shortcomings in relation to the criminalisation of sanctions circumvention:

- extremely low coverage of various manifestations of sanctions violations, **limited by a number of additional conditions and features;**
- almost "zero charge" of the potential for **preventive and punitive influence** on circumvention of restrictive measures;
- **the scattering** of this limited scope of de jure criminalised violations of restrictive measures in different articles of the Special Part of the Criminal Code;
- **the absence of independent provisions** within a separate article aimed specifically at prosecuting violations of sanctions and their circumvention and liability for their commission;
- **inconsistency with the provisions of the EU Directive** (after its entry into force) both in terms of defining violations and in terms of penalties and other enforcement measures.

(2) It should be noted that under the current legislation, “asset freezing” and “asset recovery” are two autonomous and independent sanctions that differ significantly in terms of both the grounds for application and the procedure. De facto, only a small portion of all assets blocked by sanctions are subject to the state asset forfeiture procedure.

The inadequacy of the available tools to influence sanctions violators and their weak preventive effect are clearly demonstrated **by examples of** blatant disregard for domestic sanctions legislation and sanctions circumvention

1. The official website of the Ministry of Justice contains dozens of orders of this body in cases of appealing against registration actions, which **allow sanctioned persons to conduct property transactions and circumvent sanctions with impunity.** This is not surprising, as such violations result in restricted access to the register for the state registrar (notary) and, at most, the cancellation of his/her professional licence, while the sanctioned entity faces no threat at all (collusion and bribery are usually virtually impossible to prove). *One of the many examples:* as a result of the registration actions, the notary changed the composition of the shareholders, the director, the location, the ultimate beneficial owner, the name, types of economic activity and information for communication (BLUMING PRIDE LLC), which, in particular, was subject to a sanction prohibiting the withdrawal of capital from Ukraine. The registration action resulted in the change of the shareholder from a resident to a non-resident, which created conditions for the withdrawal of capital from Ukraine (in the form of dividends or the value of a share in the authorised capital in case of withdrawal) and thus violated the relevant sanction.

2. Despite the ban on any alienation of property of Rosatom, the state registrar of the Podil District State Administration re-registered a non-residential building owned by a company belonging to Rosatom. The state registrar was accused of committing **official negligence**, and if it is proved that his actions caused property damage, he will face no more than 5 years in prison.

3. Earlier, the ILI has already reported on the identified legal entities in the extractive industry (subsoil use) that, **thanks to unscrupulous registrars, changed their sanctioned UBOs.** It was a group of legal entities associated with V. Novynskyi, the Unigran group of companies and PJSC Korostyshivskyi Quarry. As for the latter two, the State Service of Geology and Subsoil of Ukraine renewed their subsoil use permits based on changes in their registration data .

II. Criminalisation of sanctions violation/circumvention: a thorny path

Since the adoption of the Law of Ukraine "On Sanctions", a number of draft laws have been registered in the Parliament to improve the sanctions policy. However, only a few of them address the introduction of criminal sanctions for violations of restrictive measures.

1. Draft Law No. 4002 of 01.09.2020 (on amendments to certain legislative acts of Ukraine on establishing liability for violation of the requirements of the sanctions regime in force to protect the national security and territorial integrity of Ukraine) proposes to supplement the Criminal Code with Article 2092 **"Intentional violation of the requirements of the legislation on the application of special economic and other restrictive measures (sanctions)"** and to define a criminal offence as intentional actions aimed at failure to comply with special economic and other restrictive measures (sanctions), if such actions caused significant damage to the rights, freedoms or interests of citizens protected by law, state or public interests or interests of legal persons. The violation under part 1 of the proposed article qualifies as a criminal offence, and if it is committed with qualifying features (large or especially large amount of the violation, committed by an official or by prior conspiracy of a group of persons), it is a minor (part 2) or serious crime (part 3).

2. Draft law No. 5193 of 02.03.2021 provides for the addition of two articles to the Criminal Code:

- Article 1103, which describes grave crimes involving the violation of restrictions and prohibitions imposed on sanctioned persons if such acts threaten Ukraine's independence, sovereignty and territorial integrity, national security or are aimed at changing the constitutional order by force or unlawful seizure of state power;

- Article 2092, which defines such unlawful acts:
  - **failure** to report or untimely reporting of violations of the sanctions legislation, if such actions caused significant damage to the rights, freedoms or interests of citizens protected by law, state or public interests or interests of legal persons;
  - intentional **violation of restrictions and prohibitions** imposed on sanctioned persons;
  - intentional **evasion of fines** imposed for violation of the sanctions legislation.

3. The Committee draft law No. 8384 of 25 January 2023 proposes to supplement the Criminal Code with Article 1113 **"Violation of the requirements of the legislation on sanctions"**, which defines such violations as failure to comply with, obstruction of or evasion from the implementation of special economic and/or other restrictive measures (sanctions), which is recognised as a serious crime, and, if there are a number of qualifying features (the size of the violation, the presence of a certain form of complicity, and the commission by special subjects), as a particularly serious crime.

OVERALL ASSESSMENT OF THE DRAFT LAWS	
ADVANTAGES	**DISADVANTAGES**
The fact that these drafts exist shows that there is **an awareness of the need for criminalisation**, and in this context, this is definitely a positive development. As the saying goes, awareness of a problem is the first step to solving it.	All of these draft laws have good grounds for criticism, which is reflected in the relevant conclusions of the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine. The common problem for them is: • the inability to clearly answer the question of what exactly and **for whom criminal liability is proposed to be introduced;** • the high risk of covering purely '**"formal"** (insignificant) violations of sanctions legislation by criminal law; • the procedural complexity of proving them due to the specific wording. These drawbacks are primarily related to the fact that criminalisation is proposed to be implemented without significant changes to the regulatory legislation on sanctions, the violation of which is actually subject to criminalisation, and which is unfortunately full of often contradictory or ambiguous wording and gaps.

Imperfect legislation on sanctions

The effectiveness of the provisions on legal liability for circumvention of sanctions directly depends on the quality of the regulatory legislation - proper regulation of the procedure for implementing the relevant restrictive measures. The current Law of Ukraine "On Sanctions" actually contains only **a list (types) of sanctions** and **the procedure for their application**, but does not provide for either general or specific **obligations or prohibitions on their implementation.**

The sanctions legislation literally legalised only the application of sanctions, but it does not create grounds for liability for their violation. At the same time, criminalisation requires that the act for which the perpetrator is held liable must be **unlawful**, i.e. it must violate a certain rule that contains an obligation or prohibition for a certain person.

The list of sanctions set out in Article 4 of the Law "On Sanctions" needs to be reviewed and updated. The types of sanctions in this Law and in the decrees of the President on their application are formulated in such a way that they often **do not imply obligations and/or prohibitions**, and it is not clear to whom they are addressed, who should comply with them and how. Some sanctions overlap in content, and some have lost their relevance due to changes in the relevant legislation. **The wide range of sanctions** (over 30 types) and their eclecticism complicate the criminalisation process, as they require the search for legislative wording that could cover the range of violations in various areas of relations, takinginto account the specifics of the subjects of their violation, etc.

Some sanctions de jure oblige **only authorised bodies to** take certain actions or abstain from them, but do not apply to sanctioned persons. These include, in particular, sanctions on the cancellation of permits, visits or negotiations, termination of cultural exchanges, scientific cooperation or international agreements, and deprivation of state awards. Who can evade such a sanction (not to cancel a permit, not to terminate cooperation, not to deprive an award)? In this case, it is unlikely that the sanctioned person itself will be the evader. However, he may persuade to do so, bribe, order, etc.

Some sanctions are described in such a way that they apply **exclusively to the sanctioned person**, for example, a prohibition to use something or do something (in particular, Article 4(6) (1), (7), (8), (10), (11), (12) of the Law). However, other persons may assist in the failure of the sanctioned persons to comply with such a sanction, and competent officials may fail to enforce the sanction (e.g., by granting entry to a person prohibited by the sanction).

The asset freeze sanction prohibits the sanctioned person from using and disposing of an asset, but at the same time, a number of **other actors** (banks, other financial institutions, professional capital market participants, notaries, etc.) are also subject to a number of special prohibitions and obligations that ensure that such a freeze is in fact enforced.

Thus, from the perspective of the sanctions implementation mechanism, there are at least **three different categories of actors**, and in order to hold them liable, the law must contain relevant obligations and/or prohibitions, the violation of which would give rise to liability.

These shortcomings of the legislation on sanctions cause the problem of formulating the disposition of the future article. There is a dilemma regarding the proper textual reflection of the **forms of crime** (types of acts) in it.

On the one hand, if the obligations and prohibitions and the subjects of their compliance are not sufficiently **specified**, overly general formulations of acts (e.g., "violation", "failure to comply", etc.) do not satisfy the requirements of legal certainty, create the risk of broad discretion of investigating authorities (and thus corruption risks), and will lead to criminal prosecution of any violations, regardless of their actual ability to cause significant damage to protected values.

On the other hand, the text of the criminal law should be free from **excessive casualness** and therefore should not consist of a broad list of specific forms of violations. This means that the specification of acts should be done in a form-based manner, including by defining these acts or the relevant prohibitions and obligations in the regulatory Law on Sanctions, striking a balance between abstractness and concreteness.

In the legislation of many of Ukraine's partner countries, the description of the act and specific sanctions for its commission are provided in the laws governing the application of the relevant restrictive measures, which greatly simplifies criminalisation in this area. However, the national criminal law of Ukraine is based on the principle of **monism** of sources of criminal law: the criminality and punishability of an act can be established exclusively by the Criminal Code.

The above-mentioned examples of circumvention of sanctions for the cancellation of subsoil use permits demonstrate the urgent need not only to criminalise such violations, but also to improve the legislation on sanctions.

III. Taking due account of the EU Directive and the problems of criminalisation

The significance of the EU Directive for Ukraine

EU directives are binding on each member state and are part of the acquis communautaire, the EU legal system. Since Ukraine has been granted the status of a candidate for EU membership, and the degree of approximation of a candidate country to EU membership from a formal point of view is largely determined by the degree of adaptation of its legislation to the acquis, the national legislation is de facto **subject to harmonisation** with the future Directive, which is one of the many conditions for EU accession. Ultimately, the harmonisation of Ukrainian laws and other regulatory acts with the *acquis communautaire* in accordance with the current legislation of Ukraine is seen as a priority element of Ukraine's integration into the EU, which in turn is a priority area of Ukraine's foreign policy.

However, focusing on the EU Directive is not just a formal requirement. It is the result of the work of leading European experts and the best international practices in this area, so it can serve as a high-quality model to follow. Synchronisation of domestic legislation with the EU Directive will also facilitate understanding and cooperation on international assistance in relevant investigations.

With regard to taking into account the EU Directive, it should be borne in mind that under EU law, directives provide only ***a "minimum method of harmonisation".***

Scope of criminalisation and requirements of the EU Directive

Insufficient or fictitious criminalisation undermines the efforts of the state and the international community to ensure the effectiveness of restrictive measures. On the other hand, excessive criminal repression in the area of compliance with sanctions legislation can lead to injustice, the expenditure of limited state resources on cases of violations that are not worth such expenditures, the outflow of professional staff from areas with an excessive risk of being subjected to criminal justice for any indiscretion, etc.

In view of this, the EU Directive repeatedly mentions the principle of **proportionality** ("proportionate punishment", "proportionality to the gravity of the offence", "proportionate investigative tools", etc.) The limited list of sanctions violations set out in Article 3 of the EU Directive clearly indicates the need to ensure a balanced level of repression also in determining the forms of violations subject to criminalisation.

So the first question to be answered is: what kind of sanctions violations should be subject to criminal liability?

The Directive requires criminalisation of violations of **financial and economic** sanctions (non-blocking of assets, provision of assets, trade transactions, provision of financial and other services), as well as sanctions **on the prohibition of entry of** certain persons.

The restrictive measures mentioned in Article 3 are more or less in line with the domestic analogues provided for in paragraphs 1, 2, 3, 4, 5, 6, 7, 12, 24-1, 24-2, 24-3, 24-4, 25 of Article 4 of the Law on Sanctions. However, the need for strict repression of violations of a number of other domestic sanctions raises reasonable doubts. In particular, it relates todeprivation of state awards of Ukraine, other forms of recognition, termination of international agreements, cancellation of official visits, meetings, introduction of additional measures in the field of environmental, sanitary, phytosanitary and veterinary control.

Another issue is the threshold at which criminal liability should begin.

In other words, it is not enough to determine the list of sanctions for which criminal liability should be imposed, it is also necessary to decide whether each (even formal) violation of such a sanction is subject to the most severe means available under criminal law.

ЩоIn this regard, the EU Directive provides for the possibility for Member States to refuse to criminalise violations if they relate to assets, goods, services or transactions worth less than EUR 10,000. Of course, given the domestic economic realities and the fact that Ukraine is a direct victim of Russian aggression, these thresholds may be ignored. However, the establishment of strict liability even for "penny" violations will negate the consideration of the gravity of the crime, leading to a discrepancy between its legislative assessment and its concrete manifestation in real practice.

In this regard, the banking sector's concerns are quite reasonable, as any establishment of business contacts (including opening accounts) or any financial transaction creates serious risks for responsible employees to be held criminally liable even if there is no potential for causing significant damage to Ukraine's national interests.

Establishing criminal liability for violations that do not constitute a criminal level of public danger violates the principles of ultima ratio and economics of criminal repression (the costs of criminal prosecution of a person are prohibitively higher than the effect of repression achieved). In this context, measures applied within the framework of **state supervision** in the relevant areas (e.g., fines against banks or capital market participants), as well as administrative and/or disciplinary liability, may be more effective means of responding to violations of sanctions that do not have a significant harmful potential.

This raises another issue - the differentiation of liability for violation of sanctions shall depend on the degree of damage actually caused or on the risk of damage to national interests.

There are different types of liability (criminal and administrative) and qualifying features.

Due to the significant degree of unregulated procedure for the implementation of many types of sanctions, the absence in many cases of specific prohibitions and obligations for both the subjects of their implementation and non-sanctioned entities (other, third parties), total criminalisation will lead to **legal uncertainty** and significant problems in the application of the criminal law.

In this regard, a justified step may be to criminalise only to the extent that the current sanctions legislation allows, as it is unlikely to be fundamentally revised in the near future. This option can be called a "minimum task" that Ukraine should implement as soon as possible. This would cover, first of all, financial and economic sanctions, which can obviously be considered the main (most important) ones, and would ensure synchronisation with the provisions of the EU Directive. As the procedure for implementing other types of sanctions is regulated, criminalisation may be expanded.

Violation of the terms of licences (permits)

Paragraph "I" of Part 1 of Article 3 of the EU Directive recognises violation or failure to comply with the terms of licences (permits) as a separate type of violation of restrictive measures.

The sanctions legislation of the EU and its partner countries provides for the possibility of issuing licences for legal non-compliance with sanctions requirements. A licence is **a permit to perform an act** (transaction, operation) that would otherwise be considered a violation of a prohibition or restriction arising from a sanction. At the same time, certain exceptions to prohibitions and restrictions are established directly in the sanctions legislation and thus do not require a licence.

For example, Article 3(1)(4) and (5) of the EU Directive stipulates that, firstly, the violations defined in this article should not oblige lawyers to disclose certain information in the course of performing the task of defending or representing that client, and secondly, criminalisation cannot cover humanitarian assistance to persons in need or activities in support of basic human needs provided in accordance with the principles of impartiality, humanity, neutrality and in accordance with international law.

However, in most cases, the sanctioned person or any other person (including one that has a relationship with the sanctioned person) must comply with the terms of a general licence or obtain a special permit for conduct that violates the sanctions. General licences may provide for certain types of behaviour that, under certain conditions and for a certain period of time, will not be considered a violation of sanctions. Specific licences permit such conduct by or in relation to a particular person, usually for a specified period of time and subject to certain conditions.

The justification **for derogations from the prohibitions and restrictions** imposed by sanctions may be based on various circumstances, including:

- the need to enter into agreements and transactions aimed at winding down its operations in the sanctioned country;
- ongoing maintenance of frozen assets;
- avoiding negative consequences for the economy;
- humanitarian aid;
- maintenance of diplomatic missions;
- emergency events, etc.

For example, the well-known problems with the actual cessation of operations of a number of Ukrainian extractive companies due to the cancellation of subsoil use permits due to sanctions against the owners could be partially neutralised, among other things, through the licensing mechanism.

At present, the national regulatory law on sanctions completely ignores this important aspect of sanctions administration.

As a first step, the introduction of a licensing mechanism involves **identifying an appropriate authority** that will be empowered to issue general and special permits.

Such a body could be, for example, ***the National Security and Defence Council.*** As the body that decides on the application of sanctions, this body could naturally also decide on the issue of granting permission to legally circumvent them.

Another option is to grant such a right to the relevant authority ***(NBU, NSSMC, ministries, central executive authorities)***, which is responsible for overseeing the implementation of a particular type of sanction.

However, in the latter case, the legislator must first determine the list of these authorities.

The next step is to **approve the procedure (procedures) for granting permits** for acts that violate sanctions prohibitions, as well as for restricting and monitoring compliance with the terms of the permits.

Circumventing sanctions

In view of the widespread practice of concealing assets and avoiding their freezing by alienating them or transferring them to nominal ownership of other persons, Article 3(h) of the EU Directive requires the criminalisation of **four types of sanctions circumvention**. Given their content, they actually refer to the circumvention of sanctions in the form of freezing (blocking) of assets. This is not surprising, since this sanction is rightly considered the most significant, most undesirable for the subject, and systemic. The Ukrainian legislator should borrow the experience of its European counterparts and specify possible forms of circumvention of sanctions. Defining these forms directly in the law (the Criminal Code or the Law on Sanctions) would help to avoid problems of interpretation and application in practice of more general wording such as "evasion of sanctions", etc.

The circumvention of the sanction in the form of **an asset freeze by the sanctioned** person may involve the use of assets or the disposal of assets owned, held or controlled by the person directly or indirectly.

However, **other persons** (third parties) may be involved in circumventing this sanction and thus contribute to the proceeds. In this context, it is worth considering the possibility of criminalising the intentional actions of such persons with blocked assets. A model for criminalisation may be Article 209 of the Criminal Code, which provides for liability for legalisation (laundering) of the proceeds of crime.

For example: *"Acquisition, possession, use, disposal of assets in respect of which the actual circumstances indicate that they belong to a person subject to an asset freeze, or taking actions aimed at concealing, disguising the origin or possession of such assets, the right to such assets, their source of origin, location, if these acts are committed by a person who knew or should have known that such assets directly or indirectly, in whole or in part, belong to a person subject to an asset freeze"* (at the same time, the legislator should establish a certain property or other threshold to ensure that small domestic transactions or actions in relation to low-value items are not considered criminal).

Providing false or misleading information to conceal the fact that the sanctioned person is the ultimate owner of the assets subject to the asset freeze should be considered a separate form of sanctions circumvention. If necessary, it may be appropriate to amend the regulatory legislation to clarify the obligations in the field of state registration of legal persons.

The essence of the asset freeze sanction is precisely the temporary **deprivation of the right to use and dispose of** assets. Possession of these assets by a sanctioned person does not constitute a violation of the sanction. However, in most cases, only a small proportion of the assets in respect of which sanctioned persons have ownership, disposal or other similar rights are visible to the state authorities and relevant sanctions enforcement bodies. They are often held by another person.

Therefore, for state authorities, especially under martial law and limited institutional capacity, a significant portion of assets remains invisible, as does the activity in relation to them. This requires the establishment of an obligation to report or notify existing or known assets. Article 3(h)(3)(iii) and (iv) of the EU Directive rely on the respective obligations of the sanctioned person and persons engaged in professional activities in connection with which they may learn information about assets (e.g., a notary, state registrar, financial institution official, etc.).

In fact, Ukraine may go further and provide for a similar **obligation to report the assets** of a sanctioned person to other individuals or legal entities if they own, use or control them. In this case, not only will the competent state authorities have a more complete picture of the assets of the sanctioned person, but third parties will also be able to insure themselves against potential liability for actions with such assets.

However, regardless of how broad the list of subjects of notification (reporting) is, such an obligation and the procedure for its implementation should be regulated with sufficient clarity in the sanctions legislation (who should report to whom, within what timeframe and in what manner, in relation to which assets, etc.)

Stages of the offence, complicity in the offence, form of guilt

Article 4 of the EU Directive requires Member States to ensure **that complicity in and attempted violation of sanctions is criminalised.** The peculiarity of national criminal law (as compared to the criminal laws of a number of EU countries) is the direct correlation between the acts described in the disposition and the grounds for liability for an unfinished crime and complicity in it. In other words, criminalisation of an act actually means criminalisation of complicity in it and its preliminary stages - preparation (taking into account part 2 of Article 14 of the CC) and attempt.

Another important issue is the form of guilt as a sign of a criminal offence.

US and UK criminal laws provide for liability for intentional violation *of sanctions*. The EU Directive requires the establishment of liability for intentional violation *of restrictive measures.* However, violations of EU sanctions by trading, importing, exporting, selling, purchasing, transferring, transiting or transporting goods, as well as providing brokerage, technical assistance or other services related to these goods, are criminalised even in the case of "serious negligence", at least in relation to military or dual-use goods.

National criminal law links liability for negligent acts mainly to crimes that cause certain consequences (e.g. property or physical damage) and usually to highly regulated areas. In view of this, the "minimum objective" is now to criminalise at least the intentional violation of sanctions legislation.

International and partner country sanctions

The Ukrainian parliament registered draft laws that propose to synchronise domestic and international sanctions and sanctions imposed by Ukraine's partner countries in connection with Russia's aggression against Ukraine, which raises the issue of criminalising the violation of these sanctions. In general, such an approach should be introduced in the future in the context of Ukraine's rapprochement with the EU and harmonisation of domestic legislation with EU legislation.

However, at present, the relevant EU acts are not formally binding in Ukraine, and even less so are the acts of the partner countries. Although Ukraine has the official status of an EU candidate, according to the Constitution of Ukraine and the legal system of Ukraine, EU legislation is not de jure part of the national legislation of Ukraine until the relevant treaty is ratified or a law is adopted to that effect.

The unlawfulness of an act cannot be determined by the failure to comply with an act that is not legally binding in Ukraine. Therefore, there is currently **an indirect** mechanism for the implementation of such sanctions: restrictive measures of partner countries, the EU, the GA or the UN Security Council are the basis for the imposition of sanctions by Ukraine within the powers of the NSDC (but are not directly applied).

Harmonisation of criminal law measures with the EU Directive

The EU Directive should be a guideline for the national legislator in determining **the degree of punishment** and other criminal consequences of violations of sanctions legislation. The larger the range of forms of violations of the sanctions legislation that give rise to criminal liability, the more tools the court should have to individualise punishment.

In the process of penalisation, it should be ensured that the types of offences similar to those provided for in Article 3 of the EU Directive can be punished by imprisonment. However, this does not preclude the possibility of providing for other alternative penalties, including a fine, the amount of which may not only be tangible for the offender, but also affects the determination of the gravity of the offence.

Punishing violations of sanctions with imprisonment and ensuring that the maximum term of this punishment is not less than a certain amount (1 year for circumvention of sanctions in the form of violation of the notification/reporting obligation, 3 or 5 years for most other types of violations) not only ensures that the punishment is sufficiently severe, but ensures that:

- criminal law actually operates space-wise and person-wise (taking into account Article 8 of the Criminal Code of Ukraine);
- punishability of preparation for a crime (taking into account part 2 of Article 14 of the Criminal Code);
- proper limitation periods for bringing to criminal liability (Article 49 of the Criminal Code);
- applicability of special confiscation.

The linkage of the term of imprisonment to the criterion of the value of assets in Article 5 of the EU Directive may be the basis for **differentiating liability** in the future version of the article depending on the size of the asset (e.g., significant, large, especially large). Along with this, traditional qualifying features may also be used: the presence of a certain form of complicity (in particular, an organised group), and the commission of a violation by a special subject.

The requirement to apply additional criminal and non-criminal measures to individuals who violate sanctions within the framework of the current legislation can be implemented in several parallel and complementary ways.

Firstly, the deprivation of the right to hold certain positions and engage in certain activities should serve as **an additional** punishment to the main one. The term of this penalty should be sufficient, for example, the same as for collaborators (10 to 15 years). Its application should not be limited solely to those perpetrators who held the relevant positions or carried out the activity at the time of the offence; this approach has recently been adopted by the Supreme Court.

Secondly, within the framework of state regulation, the authorities responsible for supervising the implementation of a particular type of sanction should be able to apply **various measures of influence** (e.g., cancellation of access to state registers, removal from office, etc.). However, this mechanism, again, requires that these bodies be defined in the legislation and vested with the appropriate competence.

Thirdly, the relevant laws regulating access to certain types of activities may limit the relevant **opportunities for sanctions violators** (e.g., access to professional activities in the capital market, work in banks or other financial services institutions, etc.)

The way to harmonise the rules on liability of **legal persons** with the provisions of the EU Directive seems to be more difficult. *On* the one hand, it is unlikely to be problematic to expand the grounds for applying criminal law measures to legal entities under Article 96-3 of the CC. *On the other hand*, the list of these measures is limited to fines, liquidation and confiscation of property. In EU countries, traditional criminal penalties (measures) for legal entities also include deprivation of various rights, benefits, access to credit, cancellation of permits, etc. In addition, the EU Directive provides for **fines** for legal entities that are much more serious than those in Article 96-7 of the CC, and are tied to a certain percentage (not less than 1% or 5%) of the total global turnover of the legal entity or to a minimum fixed amount.

According to the EU Directive, the minimum fine for a breach of the reporting/notification obligation in hryvnia terms should be UAH 336 million, and for other violations - over UAH 1,500 million. *For comparison*, the maximum possible fixed fine for a legal entity under Article 96-7 of the Criminal Code is UAH 1.7 million.

The introduction of new instruments to the system of criminal legal measures and its improvement in general go beyond the narrow objectives of the law aimed at criminalising violations of sanctions legislation and have a more global dimension (i.e., should be addressed in a separate law). Therefore, currently, such measures can only be applied within the framework of state regulation of **the relevant area** (e.g., the relevant powers of the NBU and the NSSMC). This approach will generally be in line with the Directive, as the latter requires the application of appropriate measures regardless of whether they are criminal or non-criminal (administrative) in nature.

Ensuring the harmonisation of criminal law measures will also require amending Article 96-1 of the Criminal Code to recognise the violation of restrictive measures as an automatic ground for special confiscation, i.e. the compulsory free-of-charge **seizure** of **assets that were/should have been the subject of sanctions evasion**, used to circumvent or otherwise violate sanctions, or were the proceeds of such a violation. At the same time, Ukraine needs to finally start working on improving the confiscation measures provided for by the criminal legislation of Ukraine in order to align them with the best international practices, as well as to intensify work on the implementation of civil forfeiture mechanisms for criminal assets.

To ensure compliance with the provisions on the statute of limitations for criminal prosecution and the statute of limitations for the execution of a conviction, taking into account Articles 49 and 80 of the Criminal Code, it is necessary to ensure appropriate **types and amounts of penalties in the form of fines** and **imprisonment** for violations of the sanctions legislation (e.g., for a simple, unqualified violation - at least five years' imprisonment and a fine of more than 10 thousand NMDG). Alternatively, the statute of limitations for such violations may not apply (e.g., if the violation of sanctions is criminalised as a crime against the foundations of Ukraine's national security).

INSTITUTE
OF LEGISLATIVE
IDEAS

The Institute of Legislative Ideas is an independent think tank that studies the implementation of anti-corruption policy in Ukraine and its compliance with international anti-corruption standards. We analyse the institution of asset recovery and the possibilities for its improvement and expansion. In the current environment, we see one of the main tasks as ensuring compensation for the damage caused by the Russian aggression against Ukraine at the expense of Russian assets.

izi.institute
office@izi.institute
+38(063)7638509