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Best approaches to criminal prosecution of sanctions violations: Ukrainian and international context

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The need to criminalize the violation and circumvention of sanctions in Ukraine is a long-standing issue. At the same time, our foreign partners are already effectively prosecuting sanctions violators and those who facilitate sanctions evasion through criminal law. Moreover, the latest EU sanctions packages are aimed at closing loopholes that allow sanctions to be circumvented and increasing liability for such actions, as evidenced by the adoption of EU Directive 2024/1226 in April 2024. ‘On the definition of criminal offenses and penalties for breaches of Union restrictive measures.

That is why, when developing the Ukrainian model of criminalisation of sanctions violations, the Working Group consisting of the NGO ‘Institute of Legislative Ideas’, the Ministry of Justice of Ukraine, the Office of the President of Ukraine, the SSU, the PGO, the Ministry of Internal Affairs, the Ministry of Economy, the NACP, the NBU, the NSSMC was guided by the best international practices and EU approaches, which Ukraine, due to its European integration processes, should implement in its legislation.

This document demonstrates the Working Group's comprehensive approach to criminalizing sanctions violations and strengthening Ukraine's sanctions policy in this area, as well as the relevant international experience taken into account by the law's drafters.

1. Amendments to the Criminal Code to introduce liability for violations and circumvention of sanctions

The Ukrainian model of criminalisation	International experience
The disposition of the article provides for 2 alternative forms (actions): **violation of the sanction and circumvention of the sanction.** Violation of a sanction may be committed in various forms, in particular by failing to comply with it or obstructing its implementation. It seems inappropriate to provide for all possible acts in the CC.	Partner countries define a criminal act in the broadest possible terms. In the US and EU countries, the crime is defined mainly as a **'violation of a sanction', 'violation of restrictions', 'violation of duties '**, etc.
Not every sanction should be punishable, but only the most significant sanctions, the punishability of which is typical for the criminal law of the partner countries: **a) sectoral sanctions, b) individual personal sanctions** (e.g., asset freeze, trade restrictions, prevention of capital withdrawal, suspension of obligations). The criminalization of violations of other sanctions, such as the sanction of suspension of cultural exchanges, seems excessive.	The EU Directive requires EU member states to criminalize a minimum list of offenses (e.g. failure to freeze assets, conduct of prohibited transactions, trade, import, export, transit of goods, provision of prohibited services).
Violations of sanctions involving material resources or assets are punishable only if the **'value threshold' of 100 n.m.d.h.**(≈ €3,000) is reached. The exception is military/dual-use goods.	For most offenses, the EU Directive recommends that Member States set a **'value threshold' for the criminalization of €10,000**, but it may be lower. For dual-use/military goods, such a threshold *is prohibited.*
Sanctions circumvention is defined as actions that do not directly violate sanctions but are aimed at facilitating and concealing such violations. The list of specific types of circumvention is proposed to be defined in the Law of Ukraine 'On Sanctions' (e.g., acquisition of 'blocked' assets).	Partner countries also punish violations of additional obligations imposed in connection with the imposition of sanctions. The EU Directive defines the circumvention of sanctions separately from the violation of sanctions and covers, in particular: providing false information about the ownership of assets subject to freezing (blocking); failure of a sanctioned person to report (declare) assets owned, held or controlled by him/her. A separate type is the violation of the terms of a permit granted to carry out activities restricted or prohibited by a sanction.

Formal corpus delicti is assumed (consequences are not a mandatory feature). In the first form, the crime is completed from the moment of violation of the sanction itself, i.e. the prohibition or restriction that constitutes its essence, and not any provisions of the 'sanctions legislation', and, if there is a 'value threshold', when it is reached. In the second form - from the moment of circumvention. The subject of the crime may be both the sanctioned person and other (third) persons, officials, and persons providing public services.	Currently, in most partners, violation of sanctions is punishable regardless of the occurrence of a socially dangerous consequence (except the Lithuanian Criminal Code) and can be committed by any person, not just those subject to sanctions.
The form of guilt in case of violation of sanctions is **intentional or reckless**, and in case of **circumvention** of sanctions - only **intentional**. Ukraine needs to show that it is most interested in prosecuting sanctions violators, so it is important to enshrine the possibility of liability for negligence.	The form of guilt in some cases is only intentional (USA, UK), in others both intentional and negligent (Germany, Austria, Sweden, Denmark, Croatia, Norway, Switzerland, Poland).
The offense is presumed to be a serious one. All three parts provide for imprisonment (under Part 1 - from 2 to 6; under Part 2 - from 3 to 7; under Part 3 - from 6 to 10), and the first two also provide for a fine as an alternative punishment.	The severity of the punishment varies from country to country and is enhanced in the presence of qualifying circumstances. The maximum term of imprisonment varies from several years (Cyprus - 2, Norway - 3) to 10 years (Hungary, the UK, Bosnia and Herzegovina) or even 12 years (Malta). The EU Directive encourages strict punishment for sanctions violations by requiring that the maximum prison term be at least 3 or 5 years, depending on the type of violation.

2. Amendments to the Law of Ukraine 'On Sanctions' to introduce a licensing mechanism (issuance of permits for acts prohibited by sanctions).

The introduction of liability for violation of sanctions without providing an opportunity in an emergency or other justified cases to commit acts prohibited by these sanctions may violate the Constitution of Ukraine (Constitution) and human rights guaranteed by it and international treaties of Ukraine, which may give rise to appeals to international institutions (ECHR), carries significant reputational risks and contradicts the sanctions legislation of the EU and partner countries.

The mechanism of issuing licenses (permits) for actions prohibited by sanctions has already been tested in Ukraine's partner countries (EU, USA, UK, Canada, Switzerland, Norway, Japan, etc.). It prevents human rights violations, allows for humanitarian purposes, and generally makes sanctions policy flexible to various challenges (a well-known case in Estonia is when a license allowed Estonia to get rid of highly hazardous agrochemicals owned by a Russian oligarch without lifting sanctions). The partner countries issue both general and individual licenses at the request of both the sanctioned person and any third party or organization).

It is proposed to introduce this mechanism in Ukraine in stages, when a license (permit) can be obtained in exceptional cases, only about a personal sanction and only at the request of the sanctioned person or his/her representative. The Law proposes to define the general legal framework and to regulate all the details of the process at the subordinate level.

Why is this important?	**International experience**
1) Currently, Ukraine does not have a mechanism for authorizing actions prohibited by the sanctions, but there is no liability for violating the sanctions. In practice, the persons subject to the asset freeze continue to dispose of their assets, and their counterparties continue to receive payments from the sanctioned persons. If liability is introduced, such actions will be punishable. This means that, for example, a person subject to the 'prohibition of transactions' and 'asset freeze' sanctions will not be able to receive professional legal assistance, which may be considered a violation of Article 59 of the CCU and Article 6 of the ECHR. Due to the blocking of assets, it will be impossible to pay for medical services or urgent medical operations, which may be a violation of Articles 27 and 49 of the CCU and Article 2 of the ECHR. Finally, if it is necessary to prevent a man-made disaster, the sanctioned company cannot carry out the necessary operations and take appropriate preventive measures. **Thus, the sanctioned persons will have grounds to apply to the ECHR against Ukraine, and the Ukrainian sanctions policy will be regarded by the partners as repressive and inconsistent with democratic standards.**	1) The US law provides for the possibility of issuing general and special licenses, i.e. licenses that allow certain types of transactions prohibited by sanctions under certain conditions. These powers are exercised by the Office of Foreign Assets Control (OFAC) by the provisions of the U.S. Code of Federal Regulations. 2) The general requirements for granting permits in the EU countries are established at the supranational level, in particular, by Council Regulation (EU) No. 269/2014 on restrictive measures against actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine. In general, the competent authorities of the EU Member States are empowered to partially derogate from the asset freeze provisions by granting special or general authorizations to release certain frozen funds or economic resources. The Regulation provides for several grounds for granting authorizations, in particular: humanitarian purposes in Ukraine (Article 2(2)(a)); meeting the basic needs of a person (Article 4(1)(a)); provision of legal services (Article 4(1)(b)); maintenance or servicing of frozen funds (Article 4(1)(c)); extraordinary expenses (Article 4(1)(d)), etc.

2) The requirement to regulate the issue of permits is already provided for in Ukrainian legislation but has not yet been implemented in practice. Thus, when the CMU submits proposals for the application of sanctions by UN Security Council resolutions and EU Council decisions and regulations, it is determined that: **'measures to block assets are not applied if such assets, according to the decision of the state authorities of Ukraine: are necessary to cover basic expenses, ... are necessary to cover extraordinary expenses, ...'(CMU Order No. 254-p of 22 March 2024).** **Thus, the mechanism for making decisions on exemptions from sanctions (permits) is already provided for by law and is not a 'know-how'.** 3) EU Directive 2024/1226, which defines criminal penalties for violation of sanctions, requires criminalization of violation of the terms of permits to commit acts prohibited by the sanction. One of the key elements of the integration process is the harmonization of national legislation with the EU acquis communautaire, including directives. Therefore, Ukraine must implement the Directive, including the introduction of a mechanism for authorizations and penalties for violations of the terms of their implementation.	Violation or failure to comply with the terms of the permits is recognized as a violation of sanctions (**'violation of Union restrictive measures')** by clause (i) of part 1 of Article 3 of Directive (EU) 2024/1226. 3) In the UK, the possibility of granting permits (licenses) is provided for in the Sanctions and Anti-Money Laundering Act 2018. You can apply for a license by submitting the relevant form to the Financial Sanctions Implementation Office (OFSI). A license can be obtained to conduct financial transactions to cover basic needs, legal fees, fulfill obligations, etc. The OFSI can also issue general licenses, which allow several parties to engage in certain activities that would otherwise be prohibited under sanctions law without the need to obtain a special license.

3. Amendments to the Law of Ukraine 'On Sanctions' to introduce a mechanism for submitting information (declaration) on the assets of sanctioned persons.

The introduction of a mechanism for declaring blocked assets and disclosing ownership structure is an effective tool to counter sanctions violations and monitor compliance with sanctions restrictions.

This tool is used by partner countries as an effective way to control and prevent sanctions violations. In most countries, the obligation to declare is imposed on sanctioned persons and any other persons or organizations that control or have knowledge of the sanctioned assets.

It is proposed to introduce this mechanism in Ukraine in stages. Only persons subject to the blocking sanction and legal entities with a sanctioned CBO in their ownership structure will be required to file declarations. All details will be regulated at the bylaw level.

Why is this important?	International experience
1) Currently, when an asset freeze sanction is imposed, all assets of a person are blocked. However, the identification and search of such assets is the responsibility of the state and its competent authorities. International practice shows that the sanctioned person must 'report' and show all his/her assets subject to blocking, which greatly simplifies the identification and control of such assets. 2) The Ministry of Justice, in the process of applying a recovery sanction, spends huge resources on disclosing complex corporate schemes with sanctioned CBOs and identifying the assets of sanctioned persons. The obligation to disclose the ownership structure of sanctioned entities and to declare assets will shift this burden to the sanctioned entities, which will contribute to the effectiveness of the Ministry of Justice's enforcement of the sanction. 3) Asset declaration will significantly increase the effectiveness of criminal prosecutions for sanctions violations. In the absence of this mechanism, the movement of assets and changes in their ownership remain invisible to the state in many cases. Instead, the introduction of initial (first) and annual asset declarations will prevent violations of sanctions, as failure to submit or submission of false declarations will entail criminal liability At the same time, **this will allow for wider use of special confiscation of assets as an object of crime**, which will serve as a source of compensation for the damage caused by the aggressor, primarily at the expense of those who violate sanctions imposed in connection with the aggression.	In the United States, both sanctioned persons and any third parties, companies, or financial institutions that controlblocked assets must report their assets to OFAC. The reports on blocked, unblocked, or transferred blocked property include: initial blocking reports (31 CFR 501.603(b)(1); annual blocked property reports (31 CFR 501.603(b)(2); and reports on unblocked or transferred property (31 CFR 501.603(b)(3). The obligation to declare assets in the EU is provided for by Council Regulation (EU) No 269/2014. Natural or legal persons, entities, or bodies on the EU sanctions lists must declare the funds or economic resources owned, held, maintained, or controlled by them (Article 9(2)). In addition, any third parties must provide all information known to them about frozen and sanction-related assets (Article 8(1)). Financial or credit institutions are also required to report on the transfer of funds to frozen accounts (Article 7(1)). Failure of a sanctioned person to comply with the obligation to report assets to the competent authorities is recognized as circumventing a Union restrictive measure, by Article 3(1)(h)(iii) of Directive (EU) 2024/1226. The recent decisions of the EU Court of Justice in cases T-635/22 Friedman and Others v. the Council and T-644/22 Timchenko and Timchenko v. the Council dated 11.09.2024 confirmed the legitimacy of the reporting and cooperation obligation to ensure the effectiveness of the freezing measures.

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