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From Policy to Punishment— The Rise of 'Crimeffectiveness' in EU Law Enforcement

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Abstract

This working paper explores the concept of 'crimeffectiveness' in EU law enforcement, adopting Article 83(2) TFEU as a benchmark of analysis. Said concept would embody EU criminal law that has been adopted for the sole—or predominant—purpose of enhancing the enforcement of a given EU policy (teleological ground); and without substantive evidence of whether: (a) criminal law in that field *does* enhance such enforcement (suitability ground); and (b) criminal law—compared to other mechanisms—is *essential* in order to ensure said enforcement (essentiality ground). The paper critiques the increasing reliance on criminal sanctions to enhance the enforcement of non-criminal EU policies, without sufficient empirical evidence to demonstrate the necessity or effectiveness of such measures. By analysing the main features of the EU ancillary competence in criminal matters (Article 83(2) TFEU), the paper argues that this trend risks overcriminalization, undermining the traditional objectives of criminal law, such as the protection of fundamental legal interests and the prevention of harm. Instead, criminal law is increasingly viewed as a utilitarian tool to ensure policy compliance, creating tensions between proportionality, *ultima ratio*, and effectiveness itself. This working paper will highlight case examples—including environmental crimes and violations of economic sanctions—to demonstrate how EU criminal law often lacks a solid evidence-based foundation, thereby jeopardizing both its legitimacy and enforcement efficacy. Ultimately, the paper calls for a more evidence-driven approach to criminalization, ensuring that criminal law remains a legitimate and effective mechanism for protecting legal interests.

Keywords:

Criminal law, Effectiveness, Enforcement, Article 83(1) and (2) TFEU, Over-criminalization

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'There are two grounds on which
we might find our current systems of criminal justice
to be punitively extravagant.
First, we might think that even if they are pursuing
legitimate aims, the means used are often, even if effective,
inconsistent with other values. (...)
Our use of [criminal law] should be constrained
not only by the demand that is be used effectively,
but by other values, such as proportionality. (...)
Or we might, second, find a more fundamental fault
in our current criminal law—
that it is not now pursuing the aims that
criminal law ought to pursue:
what is amiss is not just the means used
in pursuit of legitimate ends, but the ends themselves'.[1]

I. Introduction

This paper will be structured into three parts. First, I will present an overview of whether, and to what extent, the EU legislator has relied on a 'crimeffectiveness' rationale in formulating its criminal policy under Article 83(2) TFEU (Section II). Next, I will undertake a structural analysis of the recent criminalisation of violations of EU economic sanctions – an initiative that appears to reveal certain elements of the 'crime-effectiveness' rationale under discussion (Section III). Finally, I will offer some reflections on the suitability of this effectiveness-based approach. In this regard, I will propose potential avenues for shaping criminal policies at the EU level, emphasizing the need to carefully consider, on one hand, the legal interests protected by (EU) criminal law, and, on the other, the evidence available to justify the criminalisation process (Section IV).

II. The rise of 'crimeffectiveness' in EU law

(1) What is 'crimeffectiveness'

Though so much has been written on the significance of the principle of effectiveness in EU law, there seems to remain at least one decisive question when it is considered within the realm of EU criminal law. The issue relates as to what extent criminal law can (or should) be employed in order to enhance the effectiveness of EU policies, that is, non-criminal frameworks characterised by a suboptimal enforcement. In other words, is it safe to argue that criminal law holds an effectiveness-enhancing power *vis-à-vis* non-criminal policies? That these and similar questions hold importance nowadays would rely on the fact that, as will be maintained, there is an growing legislative trend to see criminal law as a 'panacea' to the shortcomings within the enforcement of EU policies.

I will term such an approach towards EU criminal law, its purposes, its boundaries and its employment with the blend 'crimeffectiveness'. More specifically, a criminal provision adopted at the EU level would be said to be influenced by a 'crimeffectiveness' rationale where it has been adopted:

(i) for the sole—or predominant—purpose of enhancing the enforcement of a given EU policy (teleological ground);

and, *if so*

(ii) without substantive evidence of:
  (a) whether criminal law in that field *does* enhance such enforcement (suitability ground);
  (b) whether criminal law—compared to other mechanisms—is *essential* in order to ensure said enforcement (essentiality ground).

[1] RA Duff, 'A Criminal Law for Citizens' (2010) 14 Theoretical Criminology 293, 296.

Where both grounds are satisfied, it would result that a criminal provision *x* has been adopted on the basis of a *presumption* that it can amend ineffectiveness of a non-criminal framework *y*. Presuming the effectiveness of *x* in relation to *y* would entail, precisely, that *x* has been adopted not to directly protect legal interests and/or preventing harmful behaviours (or, at least, not precisely for this purpose), but rather to enhance the implementation of EU policies. This represents the first limb of the test. If it is found that *x* is primarily focused on safeguarding legal interests and/or thwarting harmful conduct, then it is not necessary to go further. Nevertheless, where it is found that *x* is predominantly and inextricably linked to the enforcement of *y* (a circumstance that, indeed, would put into question the legitimacy of criminal law intervention *per se*), the second limb of the test applies.

It should therefore be assessed—on a factual, conclusive and reliable basis—whether *x* is both suitable and essential in this respect. This assessment would imply, at the very first stage, pinpointing the 'effectiveness' of a given system and a therefore answer to the question – in which circumstances could *y*'s enforcement be deemed 'effective'? And according to which indicators? Subsequently, both compliance with both suitability and essentiality requirements would be scrutinised: (a) should both grounds be lacking, *x* can be said to have been adopted under a 'crimeffectiveness' rationale; (b) should both grounds be satisfied, *x* can be said to have been adopted on an effectiveness-driven rationale yet with clear evidence that criminal law is both suitable and essential for that purpose.

In light of the current studies on criminal law and effectiveness, and their mutual relationships, this concept could appear redundant, at the very first glance. Or, perhaps, unnecessary. After all, there is already plenty of comprehensive and influential studies in this field; and one could wonder whether this brand-new concept would add something new to the existing debate. However, I believe that adopting the paradigm of 'crimeffectiveness' to analyse EU criminal law would prove useful for three main reasons.

Firstly, 'crimeffectiveness' will involve *two different notions* that are sometimes addressed separately in legal doctrine, namely, (1) the effectiveness-based rationale that characterises some criminal provisions *and* (2) the lack of factual evidence that could substantiate the effectiveness-enhancing impact of said provisions. In my understanding, only where a provision has been employed with said purpose *and* without said evidence, the approach taken by the EU legislator could be said to be characterised by 'crimeffectiveness'. This would entail the fact that, among other sanctions, criminal law is employed with an effectiveness-driven purpose (something that could be questioned in itself, as will be illustrated, as risks jeopardising traditional principles of criminal law, such as *extrema ratio* and proportionality)[2] but without conclusive data that would justify its employment. In other words, this standpoint could depict that, in those cases, it is *presumed* that criminal law would provide an added value in terms of enforcement of a given EU policy.

Secondly, the 'crimeffectiveness' test could be potentially applied to *all* EU criminal law provisions. Its added value would thus lie in the fact that it can disclose a 'crimeffectiveness' rationale even in relation to those criminal provisions that has been apparently adopted without effectiveness-driven purposes.

Thirdly, the degree of 'crimeffectiveness' may be an *useful indicator* to assess how much EU criminal law is holding an effectiveness-based characterisation, instead of being based on the protection of legal interests and/or prevention of harmful conduct. It would act, in other words, as a litmus to measure the degree of (presumed) effectiveness-driven rationale of a given criminal provision; it would disclose the cases in which the EU legislator aimed at reaching an objective (the enforcement of an *y* EU policy) via the employment of an *x* criminal provision but without the relevant data to prove that such intervention was suitable and necessary in the material case. After all, 'deciding whether criminal sanctions are really necessary requires more than a mere effectiveness assessment, even in the field of economic and financial crime and even with respect to legal persons; this "need" should be evaluated in light of the protected legal interests and values'.[3] What is more, the concept of 'crimeffectiveness' would provide interesting hints as to what extent EU criminal law would be

[2] Vanessa Franssen, 'EU Criminal Law and Effet Utile: A Critical Examination of the Union's Use of Criminal Law to Achieve Effective Enforcement' in Joanna Beata Banach-Gutierrez and Christopher Harding (eds), *EU Criminal Law and Policy: Values, Principles and Methods* (Routledge 2016) 84.
[3] ibid 85.

primarily focused on promoting core values and political identity of the EU and, most importantly, whether such an heavy reliance on criminal law actually led to overcriminalisation phenomena (that, in turn, causes a lack of enforcement in the policy sector concerned).

It is noteworthy that 'crimeffectiveness' is not a *unique feature* of the EU legal order. In other systems, similar employment of criminal law may be observed. Several studies have emphasised the frequent effectiveness-based employment of criminal law in domestic frameworks, that is, the creation of criminal offences (and the establishment of criminal penalties) for regulatory purposes, in spite of the principle of necessity/*extrema ratio*.[4] What is more, 'crimeffectiveness' is not a *brand-new* phenomenon within the EU. Its seeds were planted some years ago, with one landmark judgement given by the Court of Justice which elaborated for the first time the so-called theory of the 'implied powers'[5] – this empowered the EU with wide-ranging criminalisation powers, criminal penalties becoming one among the tools available to safeguard the smooth implementation of EU policies. Many scholars already attempted to outline the main features of such instrumental use of criminal law, praising or refuting – depending on the perspective adopted – the view that criminalisation may serve, under certain circumstances, as a means to an end (i.e., the effective implementation of a given EU policy).

In the following paragraphs, I will provide a brief analysis of the EU effectiveness-driven competence in criminal matters (subsection 2), some concrete examples on how the 'crimeffectiveness' rationale has been developed in EU criminal law (subsection 3) and, finally, some *interim* conclusions (subsection 4)

(2) From 'implied powers' to the codification in the Lisbon Treaty

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,[6] 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.[7] Importantly, in a seminal ruling known as the *Environmental Crimes* judgment,[8] 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. With the words of the Court:

> 'As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (…). However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective'.[9]

In the subsequent *Ship-Source Pollution* judgment,[10] the Court further elaborated on this vague and broad legislative competence, suggesting 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.[11] Thus, it has been pointed out that the CJEU developed 'an ancillary or annex competence in areas

[4] ibid and further references cited therein.
[5] See *infra* subsection 2.
[6] For an historical overview, see Leandro Mancano, 'Ampliación de La Competencia de La UE En Materia Penal Mediante Políticas. La Directiva Antifraude Como Caso de Estudio' (2019) 67 Estudios de Deusto 97.
[7] Lorenzo Bernardini and Leonardo Romanò, 'Enforcing Restrictive Measures Against Russia Through Criminal Law — A Truly Effectiveness-Enhancing Choice?' (2024) 1 Edinburgh Student Law Review forthcoming.
[8] Case C-176/03, *Commission v Council* [2005] ECR-I-7879.
[9] ibid paras 47–48.
[10] Case C-440/05, *Commission v Council* [2007] ECR-I-09097, paras 68–69.
[11] Kimmo Nuotio, 'A Legitimacy-Based Approach to EU Criminal Law: Maybe We Are Getting There, after All' (2020) 11 New Journal of European Criminal Law 20, 22–28.

of environmental crime and ship-source pollution based on the doctrine of "implied powers" or *effet utile*'.[12] In other words, should the EU aim at developing effectively a certain policy, and this would necessarily infer the adoption of criminal provisions, it does hold the competence to lay appropriate *criminal* penalties to this end. Such a brand-new competence entailed an instrumental view of criminal law, the latter being considered as a powerful device capable of enhancing the 'compliance with Community rules'.[13]

This ancillary competence was expressly codified in the Treaty of Lisbon. Article 83(2) TFEU indeed would capture the 'legacy' of said jurisprudence.[14] More precisely, it would constitute a kind of 'prolongation' of the CJEU's progressive course of action since 2005.[15] According to some authors, the adoption of Article 83(2) TFEU should be regarded as the most important innovation of the Lisbon Treaty in the area of judicial cooperation in criminal matters.[16] The rationale behind said provision—and the previous CJEU case-law—is indeed that criminal law may be of paramount importance *vis-à-vis* the effective implementation of EU policies.[17] Criminal law may enhance the *effet utile* of EU law. Most importantly, it will avoid the creation of safe havens for criminals, given the breadth of the harmonization powers conferred to the EU.[18]

A first important caveat may be developed. EU criminal policies, even before the Treaty of Lisbon, has been influenced by the role of the principle of effectiveness of EU law, following the rationale underlying the creation of the Internal Market.[19] That being said, the analysis will focus now to Article 83(2) TFEU and its main features.

Article 83(2) TFEU reads as follows:

> 'If the approximation of criminal laws and regulations of the Member States **proves essential** to **ensure** the **effective implementation** of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76'.[20]

To be compliant with Article 83(2) TFEU, approximation of criminal provisions 'in an area which has been subject to harmonisation measures' should comply with at least 3 requirements:

(i) it shall be suitable in ensuring the effective implementation of a EU policy (suitability ground); *and*

(ii) Among other measures—e.g., civil or administrative mechanisms—, said approximation shall be essential in that respect, that is, only criminal provisions can ensure said enforcement (essentiality ground); *and*

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[12] Jan Stajnko, Petra Weingerl and Miha Šepec, 'Further Areas' in Kai Ambos and Peter Rackow (eds), *The Cambridge Companion to European Criminal Law* (1st edn, Cambridge University Press 2023) 206–207.
[13] *Commission v Council* (n 8) para 68.
[14] Marta Miglietti, 'The First Exercise of Article 83(2) TFEU under Review: An Assessment of the Essential Need of Introducing Criminal Sanctions' (2014) 5 New Journal of European Criminal Law 5, 7.
[15] Julie Alix, 'Les Frontiéres de l'harmonisation Autonome' 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) 149.
[16] Patrizia De Pasquale and Celeste Pesce, 'Article 83 [Minimum Harmonisation] (Ex-Article 31 TEU)' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *Treaty on the Functioning of the European Union – A Commentary*, vol 1 (Springer 2021) 1590.
[17] European Commission, 'Commission Communication "Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law"' (2011) COM(2011) 573 final 3 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0573>.
[18] Alessandro Bernardi, 'La competenza penale accessoria dell'Unione europea: problemi e prospettive' (2012) 2 Diritto Penale Contemporaneo - Rivista Trimestrale 43, 45–46.
[19] Sakari Melander, 'Effectiveness in EU Criminal Law and Its Effects on the General Part of Criminal Law' (2014) 5 New Journal of European Criminal Law 274, 285.
[20] Emphasis added.

(iii) Essentiality of approximation of criminal law in relation to said effective enforcement shall be proven with factual evidence (evidence ground).

The reasoning now will try to answer to the question as to whether criminal legislation adopted under Article 83(2) TFEU can be deemed characterised by a 'crimeffectiveness' rationale or not.

1. The purpose of Article 83(2) TFEU

The first ground related to 'crimeffectiveness' concerns the *purpose* of the measure under scrutiny, namely, whether it has been adopted for the sole—or predominant—purpose of enhancing the implementation of a given EU policy.

At a first glance, it is hard to deny that 'effectiveness' triggers *de facto* the *ius puniendi* of the EU, as evocatively pointed out by Meyer.[21] It becomes a sort of meta-principle, an ideal benchmark that should orient the development of an effectiveness-driven EU criminal law. At the same time, it is also a rule of competence – if employed with such purpose, criminal provisions may be enacted by the EU legislator.[22] The very purpose of this ancillary competence in criminal matters thus relies on a functionalised view of the criminalisation process, in that criminal law is not considered here as a self-standing policy but rather as 'a means to an end and enabling the Union to achieve effectiveness with regard to its policies and objectives'.[23] What is more, the employment of criminal law is not primarily founded on the 'need to protect core moral or social values, but on an instrumental need to strengthen the *effet utile* of EU law'.[24] It seems therefore that Article 83(2) TFEU establishes a kind of doubly ancillary competence—on the one hand, because it develops 'in parallel' to the EU 'core crimes', covering additional criminal phenomena which are not mentioned in the exhausted list of Article 83(1) TFEU; on the other, because it is employed as a tool to achieve a given result, namely, the effective implementation of EU policies, following an 'instrumental or functional' standpoint.[25] After all, the efficient realisation of other EU policies has been and still is a pivotal aim of EU criminal law. In this light, approximation mechanisms allowed under Article 83(2) TFEU would reveal a utilitarian approach towards criminalisation processes.[26]

To understand how broad criminalisation powers conferred to the EU are in this realm, suffice it to note that the scope of application of Article 83(2) TFEU *has not been exhaustively fixed*. No list of areas of crime is provided, as in Article 83(1) TFEU. Article 83(2) embodies therefore a *wide criminalisation authority*,[27] as criminal law is here connected with other EU policy areas whenever deemed concretely suitable and essential for their enforcement.[28] In this respect, it has been evocatively maintained that criminalisation powers under Article 83(2) TFEU are so imprecise that there is an 'overwhelming need for limiting principles'.[29]

Another argument could be developed to demonstrate that Article 83(2) TFEU is extremely wide in its scope of application. As Mitsilegas pointed out, the notion of 'effectiveness' listed in Article 83(2) TFEU is linked to Union *policies* and not Union *objectives*.[30] While even the latter definition could have had blurred

[21] Frank Meyer, 'Functions and Constitutional Dimensions of Effectiveness' (2023) 9 <https://jmn-eulen.nl/wp-content/uploads/sites/575/2023/09/Functions-and-Constitutional-Dimensions-of-Effectiveness_Research-Paper_Meyer_final-002.pdf>.
[22] Carlo Sotis, 'Les Principes de Nécessité et de Proportionalité' 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) 75.
[23] Valsamis Mitsilegas, 'From Overcriminalisation to Decriminalisation: The Many Faces of Effectiveness in European Criminal Law' (2014) 5 New Journal of European Criminal Law 416, 419.
[24] Franssen (n 2) 99–100.
[25] Kai Ambos, *European Criminal Law* (Cambridge University Press 2018) 322.
[26] Merita Huomo-Kettunen, 'EU Criminal Policy at a Crossroads between Effectiveness and Traditional Restraints for the Use of Criminal Law' (2014) 5 New Journal of European Criminal Law 301, 313–316.
[27] Sakari Melander, 'Ultima Ratio in European Criminal Law' (2013) 3 European Criminal Law Review 45, 58.
[28] Ton Van Den Brink, 'The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU – Member State Relations' (2017) 19 Cambridge Yearbook of European Legal Studies 211, 221.
[29] Melander (n 27) 61.
[30] Mitsilegas (n 23) 420–421.

boundaries, the fact remains that, at least, it would have related to some sort of European common goods (e.g., dignity, freedom, security and justice) and not to the wide-ranging, ever-evolving and flexible idea of 'Union policy'.

The link between criminal law and non-criminal policies can therefore be depicted as a *variable geometry criminalisation* – EU criminal competence varies according to the extension of EU policies.[31] As long as a given EU policy expands, so does—in principle—EU criminal law. The question as to whether a behaviour should or not be criminalised under Article 83(2) TFEU relates, first and foremost, to the three requirements above listed (suitability, essentiality and evidence). Read in this light, ancillary competence in criminal matters has been aptly described as 'very ambiguous'.[32] Indeed, it would represent the quintessential concretisation of an instrumental and blurred approach to criminal law. Such flexible legislative approach can effectively lead to an excessive extension of the areas in which the EU holds competence in criminal matters, thus outlooking the 'selective function' of legal interests to be protected via criminal law.[33] Criminal law would thus become a mere effectiveness-enhancing tool through which foster the enforcement of EU policies,[34] leading to a 'serious extension of criminal law jurisdiction', as the German Constitutional Court labelled it.[35]

In light of the foregoing, it would be said that the *first ground* of the 'crimeffectiveness' test has been satisfied. Criminal provisions are enacted for the sole—or predominant—*purpose of enhancing the enforcement of a given EU policy* as per Article 83(2) TFEU. Now it is time to assess whether the second ground (i.e., the lack of evidence on the effectiveness-enhancing choice effect) is satisfied or not.

2. The limiting principles of Article 83(2) TFEU

The second part of the 'crimeffectiveness' test concerns the analysis on whether the legislation under scrutiny can be adopted even without substantive evidence of the *suitable* and *essential* employment of criminal law for effectiveness-enhancing choices.

At this stage of the analysis, we can look into the three-pronged test contained in Article 83(2) TFEU, in order to depict more precisely the boundaries to said wide and functional EU ancillary competence in criminal matters. In particular, it will be scrutinised whether Article 83(2) TFEU requires criminal law to be suitable and essential for the aforementioned purposes.

A preliminary consideration, nevertheless, seems appropriate here. The reason why it is important to talk about 'limits' of criminalisation powers it that, simply, the abuse and/or overuse of criminal regulations leads to *overcriminalisation* which implies, in turn, both an unjust oppression against individuals' fundamental liberties and a lack of enforcement (e.g., economic impact on law enforcement, courts, and corrections; criminal justice overload…).[36] As Suominen pointed out, while a symbolical application of criminal law is made at the EU level, such phenomenon might lead to overcriminalisation and thus to ineffectiveness.[37] Assessing the substance of the essentiality and suitability requirements (and to what extent they can hinder overcriminalisation phenomena) is also appropriate on another angle. Since the main purpose of Article 83(2) TFEU is to enhance the effective implementation of EU policies, it would be paradoxical if the EU legislature did not provide appropriate mechanisms to prevent overcriminalisation phenomena which, as anticipated, are a source of ineffectiveness *per se*.

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[31] Alix (n 15) 151.
[32] Ester Herlin-Karnell, 'What Principles Drive (or Should Drive) European Criminal Law?' (2010) 11 German Law Journal 1115, 1122.
[33] Lucia Siracusa, 'Il Transito Del Diritto Penale Di Fonte Europea, Dalla «vecchia» Alla «nuova» Unione Post-Lisbona' (2010) 23 Rivista trimestrale di diritto penale dell'economia 780, 799.
[34] Konstantinos Zoumpoulakis, 'Approximation of Criminal Sanctions in the European Union: A Wild Goose Chase?' (2022) 13 New Journal of European Criminal Law 333, 342.
[35] As reported in Ambos (n 25) 322.
[36] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (1st edn, Oxford University Press 2007).
[37] Annika Suominen, 'Effectiveness and Functionality of Substantive EU Criminal Law' (2014) 5 New Journal of European Criminal Law 388, 409.

That being said, among the grounds listed in Article 83(2) TFEU stands the *essentiality* requirement. I would analyse it first because it seems, from a literal perspective, to safeguard the idea that criminal law should be used as a last resort, thus avoiding overcriminalisation. More precisely, it has been suggested that this criterion could act as a 'limiting factor' narrowing the 'overcriminalisation potential' of the effectiveness-driven soul of Article 83(2) TFEU.[38] Indeed, requiring for criminal law to be 'essential' would be tantamount to say that criminal law shall be *necessary* in the material case.[39] This would imply an assessment, on the one hand, on whether other-than-criminal measures could not sufficiently achieve the objective at stake and, on the other, whether criminal law could address the problem more efficiently. Things seems not so straightforward, though.

The notion of 'essentiality' is defined neither in Article 83(2) nor elsewhere; however, it has been suggested that its substance would embody *at least* the principles of proportionality and subsidiarity, as general principles of EU law that needs to be complied with, in any event, by the EU legislator.[40] Thus, in this realm, the latter will be forced to consider whether less restrictive measures—that is, non-criminal tools—could be effectively employed in the material case instead of approximation of criminal law (proportionality/*ultima ratio*) and whether and how adopting a common criminal action at the EU level prevents more effectively the offence in question (subsidiarity).[41] Essentiality requirement would serve as a limit of EU criminalisation powers in this field.

I am not entirely convinced, however, that, even if this is the case, these limits could operate as a constraint to overcriminalisation at the EU level. The issue lies into the wording of Article 83(2) TFEU – approximation of criminal shall prove 'essential' *to ensure the effective implementation of a Union policy*. The essentiality requirement is instrumentally linked to the enforcement of a non-criminal framework. Accordingly, the substance of this test concerns the effectiveness of EU law, *not the essential character of the underlying value or legal interest*.[42]

There is a sort of *glissement*, a shift, in how the benchmark of 'essentiality' is shaped in Article 83(2) TFEU – from protecting legal interests and preventing harmful and wrongful conducts (i.e., the traditional perspective embodied in liberal criminal law) to the effectiveness of EU policies (i.e., a more functionalistic approach on criminalisation). In fact, the notion of criminal law as a last resort implies that criminalisation shall only take place in order to protect fundamental legal interest from a wrongful or an harmful conduct. Similarly, the harm principle implies that the only purpose for which coercive powers can be exercised against an individual is to prevent conduct causing harm to others, individually or collectively. In other words, the issue here is not in the term 'essential' in itself—theoretically even stricter that the 'necessity' principle[43]—but rather in the fact that 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.[44] Should criminal law be linked to said purposes (protection of legal interests from harmful and wrongful conduct) its 'selective function' can be said to be respected, that is, only some behaviours deserve to be punished via criminal sanctions.

More precisely, as Jareborg pointed out, only *some* legal interests are protected via criminal law ('fragmentary' nature of criminal law).[45] Not all of them, indeed, deserve to be protected via criminal law. Civil or administrative fines, admittedly, may be suitable for this purpose (e.g., breach of contract which implies economic harm). When those measures cannot effectively protect legal interests, criminal law may be used

[38] Nina Peršak, 'Principles of EU Criminalisation and Their Varied Normative Strength: Harm and Effectiveness' (2021) 27 European Law Journal 463, 470.
[39] Perrine Simon, 'Quelle Politique d'incrimination Pour l'Union Européenne ?' (2019) n° 41 Archives de politique criminelle 21, 25.
[40] Miglietti (n 14) 8.
[41] Cfr. Melander (n 28) 54–56; Ester Herlin-Karnell, 'Subsidiarity in the Area of EU Justice and Home Affairs Law—A Lost Cause?' (2009) 15 European Law Journal 351, 355–356.
[42] Franssen (n 2) 107.
[43] Jacob Öberg, 'Do We Really Need Criminal Sanctions for the Enforcement of EU Law?' (2014) 5 New Journal of European Criminal Law 370, 376–379.
[44] See Bernardini and Romanò (n 7) forthcoming.
[45] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 Ohio State Journal of Criminal Law 521, 524.

provided that it manages in safeguarding effectively those interests ('subsidiary' nature of criminal law). Both aspects are part of the 'selective function' of criminal law.[46]

On the contrary, it seems that Article 83(2) TFEU does not acknowledge the importance of such a 'selective function', as it allows criminalisation processes that—albeit potentially appropriate to enhance the enforcement of EU law—could nonetheless be inappropriate to protect legal interests from legal wrongs.[47] What is protected here, in other words, is a *norm* (i.e., enforcement), not an interest.[48] This entails that the ground of 'essentiality' risks making criminal law a 'means to an end' that might neglect 'its essential value-laden characteristics'.[49]

So far, the 'essentiality' requirement seems to be useless for avoiding overcriminalisation phenomena. As long as it is linked to the effective enforcement of EU law, the EU competence in criminal matters could dramatically expand. However, it is noteworthy that this principle is not a stand-alone criterion. *Suitability* and *evidence* grounds shall be complied with, according to the wording of Article 83(2) TFEU. Not only criminal law shall 'support the realisation of the Union objective at issue by specifically achieving higher compliance with the substantive EU rules' (suitability),[50] but its employment as the *sole available and effective means* in the material case (essentiality) shall be demonstrated by factual and reliable data (evidence).

What the 'essentiality' principle could not apparently do—limiting *concretely* EU effectiveness-driven criminalisation powers—could perhaps be done by the evidence principle. In other words, it is not sufficient to argue that without criminal sanctions, the effective implementation of a given EU policy cannot take place; but the EU legislator holds the burden of substantiating the case for criminal law harmonisation. To put it differently, it is necessary to *demonstrate* that other sanctions cannot, to an equal extent, achieve the same degree of implementation attained by criminal law. Further evidence is therefore required. Reference may be made to impact assessment, explanatory memorandum, statistical data, scientific articles, policy reports, empirical analysis.[51] Given the wording adopted in Article 83(2) TFEU ('*proves* essential to ensure…'), it can be maintained that evidence gathered should provide a strong basis—close to certainty—as to whether criminal law is the sole effectiveness-enhancing choice at the disposal of the EU legislator. Another caveat may be inferred from the adoption of the that verbal expression – should some doubts be raised as to the impact of criminal law in a given non-criminal framework, the legislator should refrain from approximating criminal laws and regulations. If the legislator is uncertain over the effects of the approximation *vis-à-vis* the degree of enforcement of EU law, then it should desist from its criminalisation purposes. This careful approach would comply with the principle *in dubio pro libertate*.[52]

This would mean, in other words, that EU criminal law adopted under Article 83(2) TFEU is enacted for effectiveness-driven purpose (and this is questionable *per se* under different grounds, as illustrated above) *but*, at least, on an evidence-based ground. Only those approximation of criminal law that *proves* essential for enhancing the enforcement of a given EU policy can be said to be legitimate within EU legal framework.

In conclusion, it seems that Article 83(2) TFEU would not allow the EU to develop criminal legislation affected by a 'crimeffectiveness' rationale. Although influenced by a (questionable) instrumental standpoint, the correct exercise of the ancillary competence in criminal matter entails the burden on the EU legislator to prove both the suitability and essentiality of approximation of criminal law in the material case. It appears therefore that,

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[46] ibid 524–525.
[47] Stefano Manacorda, 'Diritto penale europeo' (*Treccani*, 2014) <https://www.treccani.it/enciclopedia/diritto-penale-europeo_(Diritto-on-line)/> accessed 7 September 2024.
[48] Carlo Sotis, '« Criminaliser sans Punir »: Réflexions Sur Le Pouvoir d'incrimination (Directe et Indirecte) de l'Union Européenne Prévu Par Le Traité de Lisbonne' [2010] Revue de science criminelle et de droit pénal comparé 773, 776.
[49] Melander (n 27) 50–51.
[50] Öberg (n 43) 376.
[51] Cfr., also with regard to the subsidiarity principle, SS Buisman, 'The Future of EU Substantive Criminal Law: Towards a Uniform Set of Criminalisation Principles at the EU Level' (2022) 30 European Journal of Crime, Criminal Law and Criminal Justice 161, 178; Massimo Donini, 'Sussidiarietà penale e sussidiarietà comunitaria' (2003) 47 Rivista Italiana di Diritto e Procedura Penale 141, 157; De Pasquale and Pesce (n 17) 1593–1594.
[52] Jareborg (n 45) 531.

at least on the books, there would be no room for a *presumption* of effectiveness of EU criminal law enacted under Article 83(2) TFEU.

(3) Some examples

If the picture just provided is correct, we should find no 'crimeffectiveness' approach within EU secondary law enacted as per Article 83(2) TFEU. However, this is where the issue becomes particularly intriguing.

In theory, 'crimeffectiveness' holds no place in EU criminal law. This has been indirectly confirmed by some policy documents issued by European institutions. For instance, the European Parliament has emphasized that it is *insufficient* to rely on *abstract* concepts or *symbolic outcomes*. Rather, the need for new substantive criminal law provisions must be supported by concrete 'factual evidence'. This evidence must clearly demonstrate that: (i) harm has occurred; (ii) no less intrusive alternatives exist for addressing the behaviour in question; and (iii) the crime has a direct negative impact on the effective implementation of a Union policy.[53] Furthermore, EU institutions were urged to make deliberate 'policy choices' regarding whether to employ criminal law (as opposed to other measures, such as administrative sanctions) as a tool of enforcement. They must also decide which EU policies necessitate the use of criminal law as an additional enforcement mechanism.[54] This reflects the broader issue of employing criminal law as a means by which the EU can reinforce its values and shape its political identity.[55]

As has been emphasised, the question at the EU level 'is not so much about the criminalisation itself in the substantive sense, but rather justifying the harmonization of substantive criminal law'.[56] Some examples would demonstrate that, despite being refuted *on the books*, 'crimeffectiveness' rationale is well-established in the EU legislative *praxis*.

The Market Abuse Directive (MAD),[57] for instance, could serve as a perfect benchmark for this test. Adopted under Article 83(2) TFEU, it is designed to strengthen the integrity of the internal market by addressing serious financial crimes like insider trading and market manipulation. Its primary focus is on ensuring effective enforcement of EU policies, particularly maintaining public confidence in financial markets. The EU legislator made it clear that 'the introduction by all Member States of criminal sanctions for at least serious market abuse offences is therefore *essential* to *ensure the effective implementation* of Union policy on fighting market abuse'.[58] And, indeed, some conduct criminalised under the MAD seems holding little influence over the impairment of market integrity—whatever the exact meaning of this notion would be.[59] The first limb of the 'crimeffectiveness' test appears therefore to be satisfied.

However, the directive raises questions about the added value of criminal law under Article 83(2) TFEU. Specifically, some concerns would relate to the *lack of factual evidence that criminal law approximation would enhance the enforcement of market integrity* (i.e., the second limb of the 'crimeffectiveness' test). The directive does introduce minimum rules for criminal sanctions, aiming to harmonize legal responses across Member States and provide a stronger deterrent for market abuse. However, critics argue that the European Commission has not provided sufficient concrete evidence to justify the necessity of criminal sanctions, as required under Article 83(2) TFEU.[60] Specifically, there is limited proof that administrative sanctions are inadequate for

[53] European Parliament, 'European Parliament Resolution of 22 May 2012 on an EU Approach to Criminal Law (2010/2310(INI))' (2012) P7_TA(2012)0208 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012IP0208> point 3.
[54] European Commission (n 17) 6.
[55] Jenia Iontcheva Turner, 'The Expressive Dimension of EU Criminal Law' (2012) 60 The American Journal of Comparative Law 555.
[56] Melander (n 27) 46; Huomo-Kettunen (n 26) 313.
[57] 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), OJ L 173, 12.6.2014, p. 179–189.
[58] Recital 8, MAD.
[59] Bernardini and Romanò (n 7).
[60] Franssen (n 2) 92–99; Ernst E Van Bemmelen Van Gent, 'Harmonising Criminal Laws and EU's Significant Bankers: First Use of Article 83(2) TFEU, Rights of the Accused and Learning Organisations' in Jaap De Zwaan and others (eds),

ensuring compliance.[61] The directive itself lacks detailed analysis of *how* criminal penalties *directly* contribute to the effectiveness of EU policies in this field, beyond symbolic or deterrence-based enforcement.[62] This approach therefore complicates the evaluation of criminal law's effectiveness in achieving the *desired level* of market integrity—whatever it might be.[63] In short, the directive seems to focus more on achieving policy goals than on proving factual, conclusive and reliable data on the distinct benefits of applying criminal law in these cases.[64] Accordingly, the second limb of the 'crimeffectiveness' test seems not to be satisfied.

A second piece of legislation which has been recently adopted under Article 83(2) TFEU, that is, the Directive on the protection of the environment.[65] The protection of the environment has been thrusted into the spotlight nowadays, given the growing concerns expressed by the scientific community over the extent of environmental damages and pollution across the world. The EU demonstrated to take the issue seriously, ensuring that the fight against environmental crime is developed consistently and comprehensively across the Union. Against this background, the risk seems, again, that the adoption of EU criminal provisions would have been influenced by a *mere effectiveness-driven approach* which *lacks any empirical data* about the alleged effectiveness-enhancing impact of criminal law in that field.[66] However, when it comes to environmental crimes, the approach of the EU legislator has also (rightly) focused its attention on the protection of legal interests against harmful conducts.[67] Still, the fact remains that if criminal law shall 'prove' essential for the enforcement of environmental policy, according to Article 83(2) TFEU, it might be difficult to justify a criminalisation process based on the following assumptions (inter alia):[68]

> 'It was also noted that the **lack of reliable, accurate and complete statistical data on environmental crime proceedings in the Member States** not only hampered the Commission's evaluation but also **prevents national policy-makers and practitioners from monitoring the effectiveness of their measures**. (…)
>
> Policymakers and practitioners lack awareness of the nature and scale of environmental crime and the **effectiveness of law enforcement measures** due to **limited collection**, **processing** and **sharing** of **statistical data**.'

Accordingly, despite the lack of conclusive, factual and reliable data on the added value of criminal law in this field (and, most importantly, about the impact that previous EU legislation on environemtnal crimes has had so far), it seems *prima facie* that Directive 2024/1203 is not affected by a 'crimeffectiveness' rationale *stricto sensu*. What should be carefully considered, nevertheless, in order to reduce the effectiveness-driven rationale in said piece of legislation could be the *impact* that criminal law might (or might not) actually play a role in protecting the legal interests at stake. Among others, scholars have specifically emphasised such a lack of

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Governance and Security Issues of the European Union (TMC Asser Press 2016) 237–245; Miglietti (n 15) 14–25; Bernardini and Romanò (n 8).

[61] Van Bemmelen Van Gent (n 60) 243–244.

[62] Franssen (n 2) 98–99; Miglietti (n 14) 14–25.

[63] See Bernardini and Romanò (n 7).

[64] Jannemieke Ouwerkerk, 'Evidence-Based Criminalisation in EU Law: Evidence of What Exactly?' in Jannemieke Ouwerkerk and others (eds), *The Future of EU Criminal Justice Policy and Practice* (Brill | Nijhoff 2019) 54–56.

[65] 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 [PE/82/2023/REV/1], OJ L, 2024/1203, 30.4.2024.

[66] Michael Faure, 'European Environmental Criminal Law: Do We Really Need It?' (2004) 13 European Energy and Environmental Law Review 18.

[67] COM(2021) 851 final: 'Illegal conduct that causes death or serious injury of persons, substantial damage or a considerable risk of substantial damage for the environment or is considered otherwise as **particularly harmful** to the environment constitutes a criminal offence when committed with serious negligence (…) The acceleration of climate change, biodiversity loss and environmental degradation, paired with tangible examples of their **devastating effects**, have led to the recognition of the green transition as the defining objective of our time and a matter of intergenerational equity. (…) However, when new legal instruments prohibit new conduct **harmful** to the **environment**, this Directive should be amended in order to add to the categories of criminal offences also the new serious breaches of Union environmental law'.

[68] COM(2021) 851 final.

impact with regard to previous legislation,[69] thus emphasising the 'normativist' approach taken by the EU legislator at the time. While the brand-new Directive focuses heavily (and undeniably) on enforcement, it nonetheless seems to pay attention to the protection of legal interests – specifically the environment, public health, and safety. The offenses listed in Article 3 thereof (e.g., unlawful emissions, handling of hazardous waste, deforestation) reflect a focus on preventing substantial harm to human health, the environment, and ecosystems. The Directive also aligns with the harm principle, particularly when it criminalizes actions that cause serious injury to persons or substantial damage to ecosystems.[70] The lack of data, in any event, raises concerns about compliance with other fundamental principles that govern criminalization—both at the EU and national level—such as subsidiarity and proportionality.

An interesting analysis may be briefly developed about the recent proposal for a Directive preventing and countering the facilitation of unauthorised entry, transit and stay in the EU, adopted under Article 83(2) TFEU.[71] In brief, its purpose appears to be primarily effectiveness-based, aiming to harmonize criminal laws across Member States to *enhance enforcement actions against migrant smuggling*. However, said proposal also references the protection of fundamental rights, such as human dignity and the right to life, which suggests a broader goal of safeguarding fundamental legal interests. Its proposed Recital 1 reads as follows:

> 'The facilitation of unauthorised entry, transit and stay in the Union are criminal activities that **put human life in danger** and **disrespect the dignity of people** for the purpose of obtaining high profits, **undermining fundamental rights**. These criminal activities contribute to irregular migration, **undermining the migration management objectives of the Union**. The commission of such criminal activities is driven by increasing demand and the high profits obtained by criminal organisations. Preventing and countering those offences remains a priority for the Union'.

This would reveal that, while its purpose is linked to the effective implementation of EU migration policies, the proposed penalties are nonetheless designed to protect (effectively) fundamental legal interests, such as life and human dignity. There is a general consensus that those values should be protected from harmful and wrongful conduct via criminal law means,[72] as the same approach is also shared at the international level (e.g., the Palermo Protocol). That being said, it is likely that the first limb of the 'crimeffectiveness' test would not be satisfied with regard to the proposed Directive on migrant smuggling.

(4) *Interim* conclusions

The concept of 'crimeffectiveness' highlights the growing tendency within EU criminal law to view criminal sanctions as an instrument primarily aimed at enhancing the enforcement of non-criminal frameworks. As demonstrated through both theoretical analysis and specific examples of EU legislative initiatives, this approach raises significant concerns.

Firstly, the analysis of Article 83(2) TFEU has shown that this provision embodies a functionalist rationale for criminalisation. It permits the EU to approximate criminal laws in areas where it is deemed 'essential' for ensuring the effectiveness of Union policies. This competence, though codified and constrained by the Treaty, remains broad and has led to the adoption of criminal provisions that serve regulatory enforcement goals rather than the traditional objectives of criminal law, such as the protection of fundamental legal interests and the prevention of harm.

Secondly, although Article 83(2) TFEU theoretically requires the EU legislator to substantiate the necessity of criminal law through suitability, essentiality, and evidence grounds, the practical application of these criteria seems inconsistent. As illustrated by the examples of the MAD and the Directive on Environmental Crime, there is often a lack of reliable, empirical data proving that criminal sanctions are both the most suitable and essential means of enhancing compliance. In these cases, the legislation appears to be driven by an

[69] Sotis (n 22) 76.
[70] Recital 13 Directive (EU) 2024/1203.
[71] COM(2023) 755 final.
[72] Differently, it might be argued that the same consensus does not apply *vis-à-vis* the protection of market integrity—and this could also be demonstrated by the different views that scholars and stakeholders expressed over the MAD—despite the fact that it constitutes an important legal interest within the EU legal framework.

assumption—or, rather, a *presumption*—that criminal penalties will inherently improve enforcement, rather than by conclusive evidence supporting this assumption.

Moreover, while the EU legislative framework theoretically seeks to avoid overcriminalisation by adhering to principles such as proportionality and *ultima ratio*, the broad scope of Article 83(2) TFEU risks undermining these safeguards. The tendency to rely on criminal law as an enforcement tool without clear evidence of its necessity may lead to an expansion of EU criminal law that prioritises effectiveness over the protection of legal interests, ultimately resulting in overcriminalisation.

To sum up, these examples suggest that 'ancillary EU criminal offenses' are intended to *directly* safeguard the effectiveness of EU law rather than protect the underlying legal interests. This, however, may pose significant challenges.[73] 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. 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. 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. As a result, 'effectiveness' is acting so far as a 'catch-all concept or a powerful rhetorical device', or, more precisely, as a 'effective and versatile concept to achieve all sorts of goals'.[74]

III. A recent case-study – enforcing economic sanctions through criminal law[75]

While significant concerns arise from the tendency to view criminal law as a tool to enhance the effectiveness of non-criminal frameworks, this perspective has remained firmly entrenched in the approach of the EU legislator. The recent legislative initiative to criminalize violations of EU economic sanctions (or 'restrictive measures') in 2022—prompted by the Russian invasion of Ukraine—may exemplify this trend.

A brief historical recap is necessary here, in order to contextualise the relevant events.[76]

The shocking military incursion of Russia into Ukraine in 2022 will indelibly mark the annals of contemporary history as a watershed moment. Propelled by a necessity to terminate the violations inflicted upon Ukrainian civilians and to thwart Russia's blatant attempts to erode Ukraine's territorial integrity, sovereignty, and autonomy in violation of international law, the European Union has responded with a strategic deployment of 'restrictive measures', more colloquially termed '(economic) sanctions'. Broadly, they include *economic non-military penalties against states, entities, or individuals* (the 'targets'), *as tools to achieve foreign policy and security objectives*. Considering the scope of application of restrictive measures and their impact on the targets, they may be distinguished into two categories:[77]

- *sectorial sanctions*, i.e., restrictive measures which aims at affecting specific 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 travel bans or asset freezes.

[73] Bernardini and Romanò (n 7).
[74] Peršak (n 38) 469.
[75] This paragraph is partly based on the reasoning already developed in Bernardini and Romanò (n 8).
[76] See, for an in-depth historical and legal background, Lorenzo Bernardini, 'Criminalising the Violation of EU Restrictive Measures: Towards (Dis)Proportionate Punishments Vis-à-Vis Natural Persons?' (2024) 14 European Criminal Law Review 4.
[77] Francesco Giumelli, Fabian Hoffmann and Anna Książczaková, 'The When, What, Where and Why of European Union Sanctions' (2021) 30 European Security 1.

The EU holds a clear legal basis for the adoption of both kinds of restrictive measures. Article 215(2) TFEU provides for this possibility on the basis of the EU Common Foreign and Security Policy ('CFSP') to safeguard the Union's principles, such as fostering global peace, democracy, the rule of law, and human rights as stipulated in Article 21 TEU.

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'.[78] 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 offense), and some imposed exclusively criminal sanctions. Additionally, there has been significant divergence in defining the criminal offenses of 'violation of restrictive measures' domestically, as well as the sanctions imposed (e.g., varying levels of fines).[79]

The lack of a harmonized 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.[80] 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. To close these loopholes, the European Commission launched an unprecedented legislative initiative in May 2022, approximately three months after the Russian invasion of Ukraine, unfolding in three phases.[81]

- Initially, the Commission proposed to criminalize violations of economic sanctions by identifying such conduct as a criminal offense to be included in the list of 'Euro-crimes' under Article 83(1) TFEU.[82] This proposal was eventually approved in November 2022.[83]
- As a second step, the Commission presented a draft Directive aimed at harmonizing the 'definition of criminal offences and penalties for the violation of Union restrictive measures'.[84] The primary objective was to standardize the definitions of offenses 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.[85]
- 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. 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

[78] See, for instance, Article 15, Regulation 269/2014 and Article 8, Regulation 833/2014.
[79] Bernardini and Romanò (n 7).
[80] Eurojust, 'Prosecution of Sanctions (Restrictive Measures) Violations in National Jurisdictions' (2021) <https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf>.
[81] Francesca Finelli, 'Countering Circumvention of Restrictive Measures: The EU Response' (2023) 60 Common Market Law Review 733.
[82] COM(2022) 247 final.
[83] Council Decision (EU) 2022/2332 of 28 November 2022. This represents the first expansion of the catalogue laid down in Article 83(1) TFEU.
[84] COM(2022) 684 final.
[85] Directive (EU) 1226/2024 of 24 April 2024.

confiscation, and potentially available for post-war reconstruction efforts in Ukraine.[86] This Directive was also approved in April 2024.[87]

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

The convergence of criminal law with the enforcement of restrictive measures, particularly catalysed by the Russian military invasion of Ukraine in 2022, is a relatively new phenomenon. However, the underlying rationale remains consistent – *when enforcement of a particular policy area requires support, criminal law is perceived as the appropriate mechanism*. But is this new criminalisation process characterised by a 'crimeffectiveness' rationale?

The answer might be in the negative if we look at the legal basis of the criminalisation process, that is, Article 83(1) TFUE. This is a provision which conferred to the EU an *autonomous* competence in criminal matters. While we cannot dig into the features of these criminalisation powers, suffice it to say that, as aptly pointed out, they relate to a sort of 'harm-based criminalisation', in that the crime list contained therein (e.g., terrorism, human trafficking, money laundering) reflects an EU-wide consensus about the seriousness and harmfulness of said criminal offences.[88] One could thus consider useless to apply the 'crimeffectiveness' test to Article 83(1)-based initiatives. However, a deeper look on the aim of the criminalisation of EU economic sanctions' violation and circumvention would provide a different perspective.

In my understanding, the criminalization of economic sanctions violation and circumvention seeks to address gaps in the enforcement mechanism. This legislative initiative would reflect therefore a conviction that criminal penalties will bolster compliance by punishing those who breach or elude these measures, thereby enhancing the overall effectiveness of the sanctions regime.

Accordingly, the driving force behind this criminalization process is *not* the protection of legal interests in the traditional sense. Rather, it is rooted in a belief that criminal law can correct enforcement deficiencies. This approach aligns with a broader EU legislative trend where the primary objective of criminal sanctions is to reinforce compliance with non-criminal policy frameworks. The Commission's rationale for this initiative explicitly highlights the need to empower law enforcement and judicial authorities to detect, investigate, and prosecute violations, with the aim of ensuring that designated individuals are effectively prevented from accessing their assets.[89] In other words, the criminalization of restrictive measures is presented as a *necessary tool to secure the effective application of sanctions, rather than a means to address harm or protect fundamental legal interests directly*.

The theoretical basis for criminalizing the violation or circumvention of restrictive measures is indeed 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*'.[90] Despite its brevity, this statement encapsulates the rationale behind the entire criminalization process under scrutiny. There seems to be a direct relationship between criminal law and the efficiency of the

[86] Alan Rosas, 'From freezing to confiscating Russian assets?' (2023) ELRev 337, 337 ff.
[87] Directive (EU) 1260/2024 of 24 April 2024.
[88] Peršak (n 38) 468–469.
[89] See COM(2022) 247 final.
[90] ibid., emphasis added. This is a consideration the Commission deems necessary to address first, before other justifications for criminalization: (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).

economic sanctions enforcement system. Using a mathematical metaphor, the two variables appear to be directly proportional: *the more sanction violations are criminalized, 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.

This assumption, together with the lack of data on the impact of criminal law over the effective enforcement of economic sanctions, would allow us to conclude that even this new criminalisation process is characterised by a 'crimeffectiveness' rationale.

IV. (Not) concluding remarks

So far, the trajectory of EU criminal law seems to reveal a fundamental tension between the protection of legal interests and/or the prevention of harmful conduct, and the instrumentalization of criminal law for policy enforcement purposes. As the EU increasingly integrates criminal provisions into various sectors—driven by a pure effectiveness-based rationale and without reliable, conclusive and factual data—the risk of overcriminalization grows, raising concerns about proportionality and, ultimately, the material shortcomings in terms of ineffectiveness of the machineries of criminal justice that can follow. This trend, that I termed 'crimeffectiveness,' would demonstrate a potential *shift away from the core functions of criminal law*—such as the prevention of harm and protection of legal interests—*toward a more utilitarian approach that prioritizes the enforcement of non-criminal frameworks*.

The first issue to be assessed is whether criminal law can be used adopting a predominant effectiveness-driven rationale (the first limb of the 'crimeffectiveness' test). I have already criticised this functionalistic view of criminal law. In my view, the latter shall always comply with the principle of *extrema ratio* which implies a necessity test linked to the protected legal interest (or the prevention of harmful and wrongful conduct), not to the policy objectives at stake.

However, I was interested in understanding whether the EU legislator enacted criminal provisions under Article 83(2) TFEU because of the availability of data that, ultimately, would demonstrate the effectiveness of criminal law for enforcement purposes (the second limb of the 'crimeffectiveness' test). While criminal law which does not satisfy the first limb of the 'crimeffectiveness' test should be considered in contrast with traditional principles of criminal law (e.g., legal interest, harm principle, necessity, proportionality)—and therefore its employment should be discouraged—I aimed at demonstrating that, even if we accept such functionalistic paradigm, the EU legislator seems paradoxically *legislating without a factual evidence of the presumed effectiveness-enhancing power of criminal law in the field of interest*. The analysis provided so far, which embodied a scrutiny of the Article 83(2)-based pieces of legislation, shows that this has been the case almost always.

What is more, even a recent initiative—the criminalisation of violation/circumvention of restrictive measures—seems affected by the same 'crimeffectiveness' rationale, despite being adopted in the context of the harm-based criminalisation process as per Article 83(1) TFEU. These examples would suggest that EU criminal law is sometimes employed with a symbolical and functionalistic attitude whose concrete impact on enforcement, however, seems lacking a solid and factual basis. As already explained, this lead, in turn, to dangerous overcriminalisation phenomena (both for individuals' fundamental liberty and the enforcement itself).

To mitigate these risks, a more *evidence-based approach* to criminalization is paramount.[91] Criminal sanctions should not be employed merely for their perceived effectiveness in achieving regulatory goals but must be

[91] Steven N Zane and Brandon C Welsh, 'Toward an "Age of Imposed Use"? Evidence-Based Crime Policy in a Law and Social Science Context' (2018) 29 Criminal Justice Policy Review 280; Ouwerkerk (n 65); Daniel P Mears, 'Towards Rational and Evidence-Based Crime Policy' (2007) 35 Journal of Criminal Justice 667; Brandon C Welsh and Daniel P Mears, 'Evaluating Research and Assessing Research Evidence' in Brandon C Welsh, Steven N Zane and Daniel P Mears (eds), *The Oxford Handbook of Evidence-Based Crime and Justice Policy* (1st edn, Oxford University Press 2024); Jeffrey J Rachlinski, 'Evidence-Based Law' (2011) 96 Cornell Law Review 901; Daniel P Mears and Natasha A Frost, 'The Role

grounded in solid empirical evidence that demonstrates their *necessity* and *suitability* for the task at hand. This standpoint should be carefully considered by the EU legislator, as it is not only essential to curbing overcriminalization but also to ensure that the application of criminal law remains legitimate, particularly when its use extends beyond traditional criminal justice boundaries. By focusing, on an evidence-based perspective, on legal interests and preventing harmful conduct, rather than purely on effectiveness, the EU can strike a balance between robust law enforcement and the preservation of fundamental legal principles.

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