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NATIONAL SANCTIONS ON VIOLATIONS OF EU RESTRICTIVE MEASURES IN RESPONSE TO THE CRISIS IN UKRAINE: THE ITALIAN CRIMINAL LAW PERSPECTIVE

The recent massive recourse to commercial and financial restrictions on Russia by the European Union has raised a number of questions as to their effects and enforcement, especially at the national level of each Member States.

The European sanctions target Russian and Belarusian individuals, entities and institutions, also imposing bans on certain transactions towards Russia which collaterally and heavily hit European citizens and companies. Italian nationals, as well as all any national of European countries, are inevitably affected, being significantly hindered in, or totally banned from, doing business with Russia and Belarus.

In the light of the continuous legislative developments and surge in sanctions, the consequences of any violation by European citizens of such bans and restrictions have become of pivotal interest, with particular emphasis on the potential criminal consequences at the domestic level.

With specific reference to Italy, could any Italian company or individual now trading with Russia, in breach of the European bans, be held criminally liable for such violations? From an Italian criminal law perspective, the answer to these doubts entails a twofold analysis of the legislation in force, both at European and national level.

1. The European legal framework

1.1. In general: the consequences of direct breaches of EU regulations and directives

It is common knowledge that European countries have mostly maintained legislative autonomy on criminal law. Despite a growing interest in the development of a more integrated European criminal system, the European Union legislative powers on criminal matters is in fact limited the scope of article 83 TFUE regarding judicial cooperation in criminal matters, according to which:

*“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.**”*



Paragraph 2 of Article 83 TFUE further establishes that the areas of “*particularly serious crime with a cross-border dimension*” are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime; a list that may be widened “*on the basis of the developments in crime*”, but is always limited to the “*minimum rules concerning the definition*” of each criminal offence, with the ultimate aim of harmonizing the European legislations.

As stated by Article 83 TFUE, the European Union’s legislative powers on criminal matters can be exploited only through directives, as Article 83 substantially excludes regulations as legal acts for such specific purposes. Furthermore, and even through regulations, the European Union cannot but cause Member States to punish certain conducts, without intervening directly with sanctions on European citizens. Each Member State therefore maintains control over the sanctioning choices and system, only aligning with the minimum harmonized standards when requested.

As a consequence, when a European subject breaches a regulation or directive prescribing a certain behaviour, such regulation or directive, or any other legal act of the European Union, cannot provide for any sanction, let alone criminal sanction, to punish such breach. Directives and regulations can **only impose to single Member States to enact specific sanctioning laws** to ensure the enforcement of the European prescriptions and are therefore totally deprived of direct sanctioning effects.

1.2. The Russian case: European legal acts imposing to Member States the enforcement of sanctions

The European legislation on trade sanctions to Russia mainly stems and develops from the 2014 legislation enacted by the Council to respond to the Crimean annexation, in particular:

- **Council Regulation (EU) No. 833/2014 of 31 July 2014** concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine;
- **Council Regulation (EU) No. 269/2014 of 17 March 2014** concerning restrictive measures related to actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine;
- **Council Regulation (EU) No. 692/2014 of 23 June 2014** concerning restrictions on imports into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol.

The numerous amendments adopted immediately after Russia’s February attack to Ukraine¹ have widened the scope of the sanctions originally provided by such Regulations, which now encompass,

¹ As of March 7, 2022:

Regulations and Decisions dated February 23, 2022: Council Regulation (EU) 2022/259, Council Implementing Regulation (EU) 2022/260, Council Implementing Regulation (EU) 2022/261, Council Regulation (EU) 2022/262, Council Regulation (EU) 2022/263; Council Decision (CFSP) 2022/264, Decision (CFSP) 2022/265, Council Decision (CFSP) 2022/266, Council Decision (CFSP) 2022/267.



among others, the **prohibition of dual-use goods exports** to military end-users, restrictions on the **export and provision of financial assistance** in relation to certain goods and equipment in the oil sector, **financial restrictions on transactions** with certain Russian subjects and **restrictions** - for certain Russian banks and companies in the military and energy sectors - **on access to capital markets**, and other sanctions relating to the oil and gas, economic and financial sectors.

In the view of ensuring total adherence to the restrictions by each Member State, and in compliance with the attributions of the Union as explained in the previous paragraph, Article 8 of Regulation no. 833/2014, for instance, states that:

“Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify the rules referred to in paragraph 1 to the Commission without delay after the entry into force of this Regulation and shall notify it of any subsequent amendment.”

Article 8 does not specify the nature of the sanctions to be implemented by Member States, whether administrative or criminal, provided that they are *“effective, proportionate and dissuasive”*.

The Council adopted the same language in Article 8 of Regulation no. 692/2014 and Article 15 of Regulation no. 269/2014, **therefore delegating Member States to identify and enforce sanctions for any breaching behaviour undermining the bans imposed by such European Regulations.**

2. The Italian legal framework

As of today, we are not aware of any measure enacted by Italy to specifically take up the sanction enforcement imposed by Regulations no. 833/2014, no. 692/2014 and no. 269/2014, as recently amended.

However, a piece of legislation dating back to 2017 had already been implemented by Italy in response to the European regulations on dual-use items, EU restrictive measures and trade embargoes.

Legislative decree no. 221/2017, relating to the *“adaptation of national legislation to the provisions of European legislation for the purposes of the reorganization and simplification of the procedures for the authorization of exports of dual-use products and technologies and the enforcement of sanctions in relation to trade embargoes, as well as for any type of export operation of proliferating materials”*, indeed implements the provisions contained, among others, in:

Regulations and Decisions dated February 25, 2022: Council Regulation (EU) 2022/328, Council Regulation (EU) 2022/330, Council Implementing Regulation (EU) 2022/332; Council Decision (CFSP) 2022/327, Council Decision (CFSP) 2022/329, Council Decision (CFSP) 2022/331, Council Decision (EU) 2022/333.

Regulations and Decisions dated February 28, 2022: Council Regulation (EU) 2022/334; Council Decision (CFSP) 2022/335 Council Decision (CFSP) 2022/338, Council Decision (CFSP) 2022/339.

Regulations and Decisions dated March 1, 2022: Council Regulation (EU) 2022/345, Council Regulation (EU) 2022/350, Council Decision (CFSP) 2022/346, Council Decision (CFSP) 2022/351.



1. Council Regulation (EC) no. 428/2009 of May 5, 2009, setting up a Community regime for the control of exports, transfer, brokering and transit of **dual-use items** (now refused in Regulation no. 821/2021);
2. Council Regulations (EU) **adopted pursuant to Article 215 of the Treaty on the Functioning of the European Union concerning restrictive measures against certain third countries subject to trade embargoes.**

Legislative decree no. 221/2017 provides for specific **administrative and criminal sanctions** under Articles 18 to 21, for – among others – **violations of Regulation no. 428/2009 and of the restrictive measures envisaged by the regulations falling in the second category.**

Even though only Regulation no. 428/2009 is expressly identified, the provisions of the Italian decree should be interpreted as implicitly referencing to **Regulations no. 833/2014, no. 692/2014 and no. 269/2014 in their 2022 updated versions**, thus including the new “*restrictive measures*” introduced by the recent legal acts adopted by the Council in February and March 2022².

This entails that, on one side, **any violation** of Regulation 428/2009, as implemented by Legislative decree 221/2017, **shall be sanctioned under Article 18 of Legislative Decree no. 221/2017** (“*Sanctions related to dual-use items and unlisted dual-use items*”), which punishes:

1. with criminal sanctions: **any export, transit or EU transfer operations of dual-use or non-listed dual-use items within the European Union**, or provision of intermediation services concerning such products, **without the relevant authorization**, or with an authorization based on false declarations, or **carried out in breach of the obligations laid down in the relative authorization;**
2. with obligatory **confiscation** of the things that served or were destined to commit such crimes, or of a value corresponding to the price or profit of the crime: all the conducts listed in the paragraph 1 above;
3. with administrative sanctions: any failure to provide the competent authority the required information on the final use of the exported items.

On the other side, any violation of **Regulations no. 833/2014, no. 692/2014 and no. 269/2014 shall be sanctioned under Article 20** (“*Sanctions relating to products listed by EU restrictive measures*”) which punishes:

1. **any export operations of products listed as a result of EU restrictive measures**, or provision of intermediation or technical assistance services concerning the same products, carried out **in violation of the prohibitions contained in the regulations (EU) concerning restrictive measures with imprisonment from 2 to 6 years;**

² Regulations no. 833/2014, no. 692/2014 and no. 269/2014 fall within the scope of such second category, having been adopted “*having regard to*” Article 215 of the Treaty on the Functioning of the European Union and specifically concerning “*restrictive measures*” against Russia, which was and still is subject to a trade embargo.



2. any conduct described under paragraph 1 above carried out **without the prescribed authorization**, or with an authorization based on false declarations, with **imprisonment from 2 to 6 years or a fine ranging from 25,000 to 250,000 euros**;
3. any failure to **comply with the obligations prescribed by the relative authorization**, with **imprisonment of from 1 to 4 years or with a fine ranging from 15,000 to 150,000 euros**;
4. all the conducts listed above, with **confiscation** of the things that served or were destined to commit the crimes, or of a value corresponding to the price or profit of the crime.

The sanctions provided for by Article 20 **are exclusively of criminal nature** due to the terminology used therein ("*imprisonment*" and "*fine*").

The core issue therefore resides in the definition of the single "*products*" targeted by the sanctions, for which reference must be made to the single provisions of Regulations no. 833/2014, no. 692/2014 and no. 269/2014 as recently amended.

On a final note, quite remarkably and despite the undisputed criminal nature of the sanctions contained in Article 20 above, **no decisions by Italian Courts based on the sanctions provided by Legislative decree no. 221/2017 seem to have been published in the recent years.**

3. Conclusions

In the light of the overall legal framework, the violation of bans and prohibitions imposed by the European legislation on the current Russian situation **does have theoretical criminal relevance** according to the Italian criminal law, due to Legislative decree no. 221/2017. Nonetheless, the criminal sanctions provided for by such decree do not seem to have been yet concretely enforced by Italian judges.

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