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From:	Presidency
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Subject:	Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures - Presidency note

Following the examination of the proposal in the COPEN Working Party on 16–17 January 2023, the Presidency would invite delegations to continue, at the meeting of JHA Counsellors/experts on 8 February, the examination on the basis of the tentative amended text in annex to this note.

Delegations are thereby kindly requested to – in preparation of the meeting – reflect on the questions included in italics throughout the text in preparation of the meeting, and in particular on the content and structure of Article 3 (an enumeration of offences as proposed in Article 3(2) or a more general provision?). Indeed, a key objective of the Presidency in the meeting of 8 February is to gain clarity on the positions of Member States with regard Article 3.

Modifications in relation to the original proposal are indicating in **bold** or ~~striketrough~~.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the definition of criminal offences and penalties for the violation of Union restrictive measures

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

[...]

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Subject matter

This Directive establishes minimum rules concerning the definition of criminal offences and penalties with regard to the violation of Union restrictive measures.

Article 2
Scope and definitions

(1) This Directive applies to violations of Union restrictive measures. Those Union restrictive measures cover **restrictive measures adopted by the Union on the basis of Article 29 TEU or Article 215 TFEU.**

- ~~(a) measures concerning the freezing of funds and economic resources;~~
- ~~(b) prohibitions on making funds and economic resources available;~~
- ~~(c) prohibitions on entry into, or transit through, the territory of a Member State~~
- ~~(d) sectoral economic and financial measures; and~~
- ~~(e) arms embargoes.~~

[The Presidency suggests mentioning the types of restrictive measures in a recital.]

(2) For the purposes of this Directive, the following definitions apply:

- ~~(a) ‘Union restrictive measures’ are restrictive measures adopted by the Union on the basis of Article 29 TEU or Article 215 TFEU; [...]~~
- [(b) ‘designated person, entity or body’, means those natural or legal persons, entities or bodies subject to Union restrictive measures consisting in the freezing of funds and economic resources and the prohibition to make funds and economic resources available;

(c) ‘funds’ means:

- (i) cash, cheques, claims on money, drafts, money orders and other payment instruments;
- (ii) deposits with financial institutions or other entities, balances on accounts, debts and debt obligations;
- (iii) publicly- and privately-traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;
- (iv) interest, dividends or other income on or value accruing from or generated by assets;
- (v) credit, right of set-off, guarantees, performance bonds or other financial commitments;
- (vi) letters of credit, bills of lading, bills of sale;
- (vii) documents showing evidence of an interest in funds or financial resources;
- (viii) crypto assets **as defined in the Regulation xxx/2023 on Markets in Crypto-assets;^{1]}**

(d) ‘economic resources’ means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services;

¹ Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (MiCA) ...

- (e) ‘freezing of funds’ means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or any other change that would enable the funds to be used, including portfolio management;
- (f) ‘freezing of economic resources’ means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them.]
- (g) **‘legal person’ means any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations.**

[The Presidency suggests adding the standard definition of legal persons. The other definitions are best discussed after deciding on the structure on Article 3, as they will not be needed if Member States opt for a more general provision on offences.]

Article 3

Violation of Union restrictive measures

[A majority of Member States have voiced different concerns regarding Article 3. Several Member States have raised the issue that the legislative technique makes it difficult to understand the link between the Directive and all current Union restrictive measures. It has also been pointed out that the provision is not future proof, in the sense that it would not cover violations of new types of restrictive measures that may be adopted in the future.]

One way to go could be to strike out the definitions of specific forms of violations and just refer to the restrictive measures. The Presidency has attempted to find an example of language that goes in that direction:

(1) Member States shall take the necessary measures to ensure that **conduct infringing/breaching² the violation of any provision concerning a Union restrictive measures, adopted on the basis of Article 29 TEU or Article 215 TFEU, including national provisions implementing such measures,** constitutes a criminal offence when committed intentionally ~~and provided it falls in one of the categories defined in paragraph 2.~~

² The term infringing is used in the most recent sanction regime (Haiti), while the term breaching is used in the EU Best Practises Paper.

If Member States believe that this model or something similar would be the way forward, clarifications could be made in the recitals. The recitals could make clear that criminalisation should cover all violations of existing and future restrictive measures and apply to anyone bound by them. They could furthermore underline that this legislative technique excludes from the scope of the offence any conduct that is not in contravention of a restrictive measure, either because it follows directly from the restrictive measure (for instance when a regulation excludes conduct such as that referred to in paragraph 6) or because the conduct is authorised by competent authorities by way of derogation as provided for under the restrictive measures in question. Drawing inspiration from the Commission's proposal for Article 3, the recitals could characterise (in more or less detail) the kinds of violations that are possible under current sanction regimes, i.e. breaching, failing to comply, circumventing etc. They could also clarify that Member States can choose to implement the Directive either by general provisions (similar to a revised Article 3) or provisions that specifies the conducts that are criminalised (similar to the Commissions' Article 3).

Another way forward would be to stick to the structure of the Commission proposal and adjust Article 3 in line with comments and suggestions from Member States. As a basis for further discussion, the Presidency has summarized delegations' input under each part of the provision.

If delegations consider criminalisation according to either model too far reaching, it would be possible to limit the scope of the Article in various ways, e.g. by introducing a value threshold or exempting certain types of violations or persons. For violations not covered by the article, Member States would still be bound by the obligations under the sanctions regimes to apply effective, proportionate and dissuasive (criminal or administrative) penalties.

Member States are kindly invited to discuss the different ways to go forward with the basic structure of Article 3.]

(1) Member States shall take the necessary measures to ensure that the violation of a Union restrictive measure constitutes a criminal offence when committed intentionally and provided it falls in one of the categories defined in paragraph 2.

(2) For the purposes of this Directive, the following shall be regarded as violation of a Union restrictive measure:

Some questions raised and comments made by Member States

Monetary limit to qualify violations to be criminalised. Specify whether the offences relate to the behaviour of third parties or behaviour of designated persons and entities. Paragraph 2 seems to contain certain circular references where both the introductory phrase as well as the respective letters refer to violations of EU restrictive measures. Too casuistic – problems of interpretation and transposition? Will Member States be able to transpose the directive by a general provision covering all the specific conducts referred to in the list?

- (a) making funds or economic resources available to, or for the benefit of, a designated person, entity or body in violation of a prohibition by a Union restrictive measure;

Question raised by Member State

Does this cover making funds or economic resources available both in a direct and an indirect way?

- (b) failing to freeze without undue delay funds or economic resources belonging to or owned, held or controlled by a designated person, entity or body in violation of an obligation to do so imposed by a Union restrictive measure;

Some questions raised and comments made by Member States

Funds and other economic resources are to be treated as frozen from the very moment that an EU designation enters into force. The “failure to freeze” would not be a violation in itself. Transactions involving these assets (solely) seem to be covered as a circumvention of restrictive measures. It would be more appropriate to define it as acting in violation of a freezing of funds or “disposal of frozen funds or economic resources”. What does “without undue delay” mean?

- (c) enabling the entry of designated natural persons into the territory of a Member State or their transit through the territory of a Member State in violation of a prohibition by a Union restrictive measure;

Some questions raised and comments made by Member States

Should not refer to the violation of a Union restrictive measures but rather to the violation of the measures of a Member State implementing a Union restrictive measure. Clarification in the wording, the provision only applies to “enabling the entry of designated natural persons”, no criminal liability for designated persons themselves. Third parties liable under Art. 4 (1) (“aiding”)? Additional failure to prevent a designated person from entering (omission)? Criminal liability for Member States’ public officials who do not correctly implement a decision under Art. 29 (2) TEU? Consequences for the way in which Member States implement prohibitions to enter the territory of a Member State?

- (d) entering into transactions with a third State, bodies of a third State, entities and bodies owned or controlled by a third State or bodies of a third State, which are prohibited or restricted by Union restrictive measures;

Some questions raised and comments made by Member States

How is “transactions” to be defined? Concrete examples. Limited to provisions containing explicitly the term “transaction” or in a much broader understanding, including legal transactions?

- (e) trading in goods or services whose import, export, sale, purchase, transfer, transit or transport is prohibited or restricted by Union restrictive measures, as well as providing brokering services or other services relating to those goods and services;

Some questions raised and comments made by Member States

2 d and e apparently criminalizes public procurement contracts in violation of such sanctions, clarification necessary. Clarify that the classification of a legal transaction under national civil contract law should not influence the classification as an infringement of an EU restrictive measure. The wording “as well as providing brokering services or other services related to those goods or services” covers only acts directly prohibited or restricted by Union restrictive measures or also apply to forms of aiding which have to be penalized according to Article 4 (1)? “Trading in” does not constitute a violation of EU restrictive measures, but rather the factual act of “import, export, [...]”? Does the provision cover import and export as a whole?

- (f) providing financial activities which are prohibited or restricted by Union restrictive measures, such as financing and financial assistance, providing investment and investment services, issuing transferrable securities and money market instruments, accepting deposits, providing specialised financial messaging services, dealing in banknotes, provide credit rating services, providing crypto assets and wallets;

Some questions raised and comments made by Member States

Vague formulations, clarifications needed. “Financing and financial assistance” difficult to define, further clarification needed. Does “financial activities” cover all financially related forms of action in the respective EU restrictive measure? Terms listed in the second half of the sentence to be understood as typical examples of such measures? Does the scope result from the concrete restrictive measure? More legal clarity to use the term “financing or financial assistance”? Overlap between “financial activities” and “services”? What is meant by “accepting deposits”, refers to deposits larger than 100.000 Euro? Consequences for the banking sector to be assessed carefully.

- (g) providing other services which are prohibited or restricted by Union restrictive measures, such as legal advisory services, trust services, public relations services, accounting, auditing, bookkeeping and tax consulting services, business and management consulting, IT consulting, public relations services, broadcasting, architectural and engineering services;

Some questions raised and comments made by Member States

Vague formulations, clarifications needed. Could “restricted” create confusion about legal advice? Misunderstood as requiring to criminalize legal advice in general? How is “legal professional” defined? Clarify that e.g. tax advisors or accountants are also covered by legal professional privilege.

- (h) circumventing a Union restrictive measure by:

Some questions raised and comments made by Member States

These obligations are not (all) precisely described as “circumvention” in the respective EU restrictive measures themselves.

A more general reference should be added, could include creating non necessary legal mechanisms to avoid restrictive measures without concealing funds or resources.

Suggestion to add following points: “(vii) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to property, funds or economic resources owned, held, or controlled by a designated person, entity or body; “(viii) entering into transactions or creating a scheme or series of schemes considered to be non-genuine and/or not put in place for valid business reasons that reflect economic reality with the objective of avoiding application of Union restrictive measures”.

- (i) concealing funds or economic resources owned, held, or controlled by a designated person, entity or body, which should be frozen in accordance with a Union restrictive measure, by the transfer of those funds, or economic resources to a third party;

Some questions raised and comments made by Member States

Which actions are covered by "concealing"? What is meant by “which should be frozen”?

Intended to apply to the concealing of funds or economic resources (shortly) before a designation under an EU restrictive measure comes into force? How can "concealing" be delineated from legal forms of hiding assets? Other forms of preventive concealment of assets (e.g. for tax avoidance) may remain unpunished. The principle of equal treatment. Is the transfer of funds to a third party not yet covered by the provision? Evident that there are more and varied ways in which funds can be concealed from seizure and put on the market as seemingly legal than simply transferring them to another person.

- (ii) concealing the fact that a person, entity or body subject to restrictive measures is the ultimate owner or beneficiary of funds or economic resources, through the provision of false or incomplete information;

Some questions raised and comments made by Member States

May raise concerns with a view to legal certainty and the rule of law, the aim is not sufficiently clear. Basis for the obligation to provide information, so that providing “false or incomplete information” could be a criminal offense? Who could commit the offence? Not linked to a "breach of an obligation within the framework of restrictive measures of the Union" or applicable EU restrictive measures?

- (iii) failing by a designated person, entity or body to comply with an obligation under Union restrictive measures to report funds or economic resources within the jurisdiction of a Member State, belonging to, owned, held, or controlled by them;

Some questions raised and comments made by Member States

The offences defined in (iii), (iv) and (v) are violations of reporting, information or cooperation obligations that support Union restrictive measures but they do not constitute a violation of a restrictive measure according to Article 29 TEU or Article 215 TFEU. A statement of the Council Legal Service on this issue seems necessary.

- (iv) failing to comply with an obligation under Union restrictive measures to provide without undue delay information on funds or economic resources frozen or information held about funds and economic resources within the territory of the Member States, belonging to, owned, held or controlled by designated persons, entities or bodies and which have not been frozen, to the competent administrative authorities;

Some questions raised and comments made by Member States

Clarification needed. A punishable "everyone's duty" far-reaching against the background of legal certainty and proportionality. Sufficient clarity about the scope of criminal liability needed. Who could commit the offence?

- (v) failing to cooperate with the competent administrative authorities in any verification of information under points (iii) and (iv), upon their reasoned request;

Some questions raised and comments made by Member States

May raise concerns with a view to legal certainty and rule of law, the obligation to cooperate would have to be specified, or the provision should be deleted as it doesn't add any value. Suggestion to add following point: "(vi) "failure to give or not responding to requests for additional information made to them by the competent authorities within the time limits determined by them.";"

- (i) breaching or failing to fulfil conditions under authorizations granted by competent authorities to conduct activities, which in the absence of such an authorization are prohibited or restricted under a Union restrictive measure.

Some questions raised and comments made by Member States

Why no provision for acting without a necessary permit or in violation of a permit? Include respective actions without an authorization required? Should the directive also foresee criminal liability in this case? May the "breaching or failing to fulfil conditions under authorizations granted by competent authorities" be equivalent to acting in "absence of such an authorization", at least when this consequence follows from applicable national administrative and criminal law? May be cases in which the non-fulfilment of merely formal requirements may not be materially equivalent to the other cases of the article. Room for discretion? Clarification that minor cases of permit infringements do not necessarily lead to criminal liability? Possible that Member States may decide in which cases the non-fulfilment of a condition is equivalent to acting without any authorization, e.g. under established principles of national administrative law? Should this be clarified in a recital?

- (3) The conduct referred to in paragraph 2, points (a) to (g) shall constitute a criminal offence also if committed with serious negligence.

Some questions raised and comments made by Member States

Some Member States requests the deletion of the reference to “serious negligence”, while another proposes deleting points b, c, f, g from this list. Raises concerns with proportionality and further analysis is required. May be appropriate for the violation of weapons embargoes and similar restrictive measures but appears not to be strictly necessary for other transactions. Any definition of gross negligence should be avoided. If and to what extent will public officials have to be criminalized, of particular importance in relation to border controls and public procurement contracts.

[Paragraph 3 depends on the legislative technique in paragraph 1. If Member States choose to adopt the alternative model outlined by the Presidency, it will not be possible to refer to paragraph 2, points (a) to (g). However, should Member States wish to criminalise certain negligent conduct, reference could be made to relevant types of violations.]

~~(4) — Nothing in paragraph 2 shall be understood as imposing obligations on natural persons contrary to the right not to incriminate oneself and to remain silent as enshrined in the Charter of Fundamental Rights of the European Union and Directive (EU) 2016/343.~~

[(5) Nothing in paragraph 2 shall be understood as imposing an obligation on legal professionals to report information which is obtained in strict connection with judicial, administrative or arbitral proceedings, whether before, during or after judicial proceedings, or in the course of ascertaining the legal position of a client. Legal advice in those circumstances shall be protected by professional secrecy, except where the legal professional is taking part in the violation of Union restrictive measures, the legal advice is provided for the purposes of violating Union restrictive measures, or the legal professional knows that the client is seeking legal advice for the purposes of violating Union restrictive measures.

(6) Paragraphs 1, 2 and 3 shall not apply to:

- the provision of goods or services of daily use for the personal use of designated natural persons, such as food and healthcare products and services, or of petty cash, where it is clearly limited to fulfilling the basic human needs of such persons and their dependent family members,
- to the failure to report such activities;
- to humanitarian aid provided for persons in need.]

[Several Member States wish to remove paragraphs 4 to 6 from the operative part of the Directive. At this point, the Presidency suggests deleting paragraph 4 and welcomes further discussion.]

Article 4

Inciting, aiding and abetting, and attempt

- (1) Member States shall take the necessary measures to ensure that inciting, aiding and abetting the offences referred to in Article 3 is punishable as a criminal offence.
- (2) Member States shall take the necessary measures to ensure that the attempt to commit any of the offences referred to in Article 3 (2), points (a) to (g), (h (i), (ii) and point (i), is punishable as a criminal offence.

[This Article is likely to be modified as regards its exact scope, in particular in function of the modifications that will be introduced to Article 3. It will be clarified that it applies only to intentional offences, in line the Commission's intention as clarified in the first meeting.]

Article 5

Criminal penalties for natural persons

- (1) Member States shall ensure that the criminal offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties.

- (2) Member States shall take the necessary measures to ensure that the criminal offences referred to in Article 3 are punishable by a maximum penalty which provides for imprisonment.
- (3) Member States shall take the necessary measures to ensure that the criminal offences referred to in Article 3(2), points (h)(iii), (iv) and (v), are punishable by a maximum penalty of at least one year of imprisonment when they involve funds or economic resources of a value of at least EUR 100 000. Member States shall ensure that the threshold of EUR 100 000 or more may also be met through a series of linked offences referred to in Article 3(2), points (h)(iii), (iv) and (v), when committed by the same offender.
- (4) Member States shall take the necessary measures to ensure that the criminal offences referred to in Article 3(2), points (a) to (g), (h)(i) and (ii), and point (i), are punishable by a maximum penalty of at least five years of imprisonment when they involve funds or economic resources of a value of at least EUR 100 000. Member States shall ensure that the threshold of EUR 100 000 or more may also be met through a series of linked offences referred to in Article 3(2), points (a) to (g), (h)(i) and (ii), and point (i), by the same offender.
- (5) Member States shall take the necessary measures to ensure that natural persons who have committed the offences referred to in Articles 3 and 4 may be subject to additional **criminal or non-criminal sanctions or measures which may penalties.** ~~Those additional penalties shall include fines.~~

[It will need to be clarified that paragraphs 3 and 4 apply only to intentional offences, in line the Commission's intention as clarified in the first meeting. These paragraphs are also likely to be modified as regards their exact scope, in particular in function of the modifications that will be introduced to Article 3.]

Additional or alternative ways of distinguishing between offences in terms of seriousness could also be considered. It has, for instance, been suggested that violations of weapons embargoes should carry a higher penalty than other offences.

Paragraph 5 has been aligned with the Environmental Crimes General Approach.]

Article 6

Liability of legal persons

- (1) Member States shall ~~take the necessary measures to~~ ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 **where such offences have been committed for their benefit by any person who has a leading position within the legal person**, acting either individually or as part of an organ of the legal person, ~~and having a leading position within the legal person~~, based on:
- (a) a power of representation of the legal person;
 - (b) an authority to take decisions on behalf of the legal person;
 - (c) an authority to exercise control within the legal person.
- (2) Member States shall also ~~take the necessary measures to~~ ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 ~~of this Article~~ has made possible the commission, ~~by a person under its authority~~, of any of ~~the criminal~~ offences referred to in Articles 3 and 4 for the benefit of ~~that~~ legal person **by a person under its authority**.
- (3) Liability of legal persons under paragraphs 1 and 2 of this Article shall not exclude ~~the possibility of~~ criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4.

[The Article has been aligned with the Environmental Crimes Directive General Approach.]

Article 7

~~Penalties~~**Sanctions** for legal persons³

- (1) Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 67 is **punishable by**~~subject to~~ effective, proportionate and dissuasive **criminal or non-criminal sanctions or measures**~~penalties~~, which shall include criminal or non-criminal fines,~~exclusion from entitlement to public benefits or aid, exclusion from access to public funding, including tender procedures, grants and concessions~~ and may include other **criminal or non criminal sanctions or measures**~~penalties~~, such as:
- (a-1) exclusion from entitlement to public benefits or aid;**
 - (a-2) exclusion from access to public funding, including tender procedures, grants and concessions;**
 - (a) disqualification from the practice of business activities;
 - (b) withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;
 - (c) placing under judicial supervision;
 - (d) judicial winding-up;
 - (e) closure of establishments, which have been used for committing the criminal offence.

³ The title of the Article has, in the interest of achieving consistency in the Union legislation, been aligned with the terminology used in the recent Union acquis. The Presidency will in due time consult the quality adviser and the lawyer linguists on the terminology to be used in this provision, in order to exclude any risk of confusion with the term “sanctions” as in “sanctions regime”.

(2) Member States shall take the necessary measures to ensure that, **at least** for legal persons held liable pursuant to Article 76, ~~the criminal~~ offences referred to in Article [3(2), *points (h) (iii) to (v)*]⁴, are punishable by **criminal or non-criminal** fines, the **amount of which shall be proportionate to the seriousness of the conduct and to the individual, financial and other circumstances of the legal person concerned. Member States shall take the necessary measures to ensure that the maximum level** ~~limit~~ ~~of the fines is which~~ ~~should be~~ not less than:

(a) 1 percent of the total worldwide turnover of the legal person, **either in the business year preceding the one in which the offence was committed, or in the business year preceding the fining decision, for offences referred to in Article [...], and 5 percent of the total worldwide turnover of the legal person, either in the business year preceding the one in which the offence was committed, or in the business year preceding the fining decision, for offences referred to in Article [...]**;

or, alternatively

(b) **an amount corresponding to EUR 8 million for offences referred to in Article [...] and EUR 40 million for offences referred to in Article [...]**

When providing for fines pursuant to Article 7(2) point (a), Member States may provide for rules for cases where it is not possible to determine the amount of the fine on the basis of the total worldwide turnover of the legal person in the business year preceding the one in which the offence was committed, or in the business year preceding the fining decision.

(3) [...]

⁴ This Article is likely to be modified as regards its exact scope, in particular in function of the modifications that will be introduced to Article 3.

[The Article has been aligned with the Environmental Crimes General Approach. At this point it is not, however, suggested to limit the applicability of paragraph 2 to cases of liability under Article 6(1), thereby excluding cases of liability due to lack of supervision or control. Even if the General Approach would be regarded as new standard provision on sanctions for legal persons, the Presidency perceives this as a variable element that – like percentages and amounts – could be used to tailor the provision to the specific circumstances of each directive.]

Article 8

Aggravating circumstances

In so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Articles 3 and 4, Member States shall take the necessary measures to ensure that one or several of the following circumstances may, **in accordance with the relevant provisions of national law**, be regarded as aggravating circumstances:

- (a) the offence was committed in the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA⁵;
- (b) the offence was committed by a professional service provider in violation of his **or her** professional obligations;
- (c) the offence was committed by a public official when performing his or her duties **or another person performing a public function**;
- ~~(d) the offence was committed by another person when performing a public function.~~

[The chapeau has been aligned with the Environmental Crimes General Approach. Littera (c) and (d), which concern similar circumstances, have been merged.]

⁵ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime OJ L 300, 11.11.2008, p. 42-45.

Article 9

Mitigating circumstance

Provided this is not already an obligation under Union restrictive measures, Member States shall take the necessary measures to ensure that, in relation to the offences referred to in Articles 3 and 4 ~~, the following may,~~ **and in accordance with the relevant provisions of national law, be it may** be regarded as a mitigating circumstance: ~~(a) that the offender provides the competent authorities with information they would not otherwise have been able to obtain, helping them to identify or bring to justice the other offenders or ; (b) — the offender provides the competent authorities with information they would not otherwise have been able to obtain, helping them to find evidence.~~

[Littera (a) and (b) have been merged, in line with how this mitigating circumstance is treated in the Environmental Crimes General Approach.]

Article 10

Freezing and confiscation

Member States shall take the necessary measures to ensure that funds or economic resources subject to Union restrictive measures in respect of which the designated person, entity or body commits or participates in an offence referred to in Article 3(2), points (h)(i) or (ii), are considered as ‘proceeds’ of crime for the purposes of Directive (EU) [.../...] [Directive on asset recovery and confiscation].

[The proposed Article applies to “listed” persons, entities and bodies that commit or participate in offences consisting in circumventing a restrictive measure by concealing funds, economic resources or ownership structures. In these cases, funds or economic resources subject to Union restrictive measures are to be considered as proceeds of crime, a term otherwise understood as an economic advantage derived from a criminal offence. The Article thus alters the concept for a specific set of offences, enabling confiscation in more situations than would follow from the general rules on confiscation. In the Presidency’s understanding, the idea behind the proposal would be to enable confiscation of property subject to such circumventions without it being proceeds in the normal sense. For example, a house could be transferred from a listed person to someone else. Under the proposed Article, not only the value derived from such a transaction would be considered proceeds, but the entire property would.]

The current rules on confiscation do not apply to violations of restrictive measures. The proposed Directive on asset recovery and confiscation, however, does.

Member States are kindly invited to reflect on the following questions:

- Should this Directive (as proposed by the Commission) introduce a requirement to confiscate funds or economic resources that goes beyond the provisions of Union legislation on confiscation? If so, should this be done by redefining an established concept (i.e. proceeds) or in some other way?*
- Should this Directive include a reference to Union legislation on confiscation? Cf. Article 10 of the Environmental Crimes General Approach:*

Member States shall take the necessary measures to enable the freezing and confiscation of instrumentalities and proceeds from the criminal offences referred to in Articles 3 and 4.

Member States bound by Directive 2014/42/EU of the European Parliament and of the Council shall do so in accordance with that Directive.]

Article 11

Jurisdiction rules

- (1) ~~Each~~ Member States shall take the necessary measures to establish its jurisdiction over the criminal offences referred to in Articles 3 and 4 where:
- (a) the criminal offence was committed in whole or in part within its territory, ~~including its airspace;~~
 - (b) the criminal offence was committed on board ~~of any~~ **a ship or an aircraft registered in it or flying its flag** ~~any vessel under the jurisdiction of a Member State;~~
 - (c) the offender is one of its nationals ~~or habitual residents;~~
 - ~~(d) the offender is one of its officials who acts in his or her official duty;~~
 - ~~(e) the offence is committed for the benefit of a legal person which is established on its territory;~~

~~(f) — the offence is committed for the benefit of a legal person in respect of any business done in whole or in part on its territory.~~

(1a) A Member State shall inform the Commission where it decides to extend its jurisdiction to one or more offences referred to in Articles 3 and 4 which have been committed outside its territory, where:

- (a) the offender is one of its habitual residents;**
- (b) the offender is one of its officials who acts in his or her official duty;**
- (c) the offence is committed for the benefit of a legal person which is established on its territory;**
- (d) the offence is committed for the benefit of a legal person in respect of any business done in whole or in part on its territory.**

(2) Where an offence referred to in Articles 3 and 4 falls within the jurisdiction of more than one Member State, these Member States shall cooperate to determine which Member State is to conduct criminal proceedings. The matter shall, where appropriate, be referred to Eurojust in accordance with Article 12 of Council Framework Decision 2009/948/JHA⁶.

(3) In cases referred to in paragraph 1, point (c), Member States shall take the necessary measures to ensure that the exercise of their jurisdiction is not subject to the condition that ~~a prosecution can be initiated only following a report made by the victim in the place where the criminal offence was committed, or a denunciation from the State of the place where the criminal offence was committed.~~

[The Article has been aligned with the Environmental Crimes General Approach. Part of paragraph 3 has been deleted as the offences in this Directive do not appear to have individual victims.]

⁶ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328 of 15.12.2009, p. 42.

Article 12
Limitation periods

- (1) Member States shall take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 3 and 4 for a sufficient period of time after the commission of those criminal offences, so that those criminal offences can be tackled effectively.
- (2) Member States shall take the necessary measures to enable the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 3 and 4 which are punishable by a maximum penalty of at least five years of imprisonment, for a period of at least five years from the time when the offence was committed.
- ~~(3) By way of derogation from paragraph 2, Member States may establish a limitation period that is shorter than five years, but not shorter than three years, provided that the period may be interrupted or suspended in the event of specified acts.~~
- (4) Member States shall take the necessary measures to enable the enforcement of:
- (a) a penalty of more than one year of imprisonment; or alternatively
 - (b) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum penalty of at least ~~five~~^{four} years of imprisonment,
- imposed following a final conviction for a criminal offence referred to in Articles 3 and 4, for at least five years from the date of the final conviction. ~~That period may include extensions of the limitation period arising from interruption or suspension.~~
- (5) By way of derogation from paragraphs 2 and 3, Member States may establish a limitation period that is shorter than five years, but not shorter than three years, provided that the period may be interrupted or suspended in the event of specified acts.**

[The Article has been aligned with the Environmental Crimes General Approach.]

Article 13

Coordination and cooperation between competent authorities within a Member State

Member States shall take the necessary measures to establish appropriate mechanisms for coordination and cooperation at strategic and operational levels among all their competent administrative, law enforcement and judicial authorities.

Such mechanisms shall be aimed at least at:

- (a) ensuring common priorities and understanding of the relationship between criminal and administrative enforcement;
- (b) exchange of information for strategic and operational purposes, **within the limits set out in applicable rules**;
- (c) consultation in individual investigations, **within the limits set out in applicable rules**;
- (d) the exchange of best practices;
- (e) assistance to [networks of] practitioners working on matters relevant to investigating and prosecuting offences related to the violation of Union restrictive measures,

and may take the form of specialised coordination bodies, memoranda of understanding between competent authorities, national enforcement networks and joint training activities.

[The Article has been aligned with the Environmental Crimes General Approach. The reference to networks in (e) has been put in square brackets as it is unclear whether such networks exist.]

Article 14

Reporting of offences and protection of persons who report offences related to the violation of Union restrictive measures or assist the investigation

[Member States shall take the necessary measures to ensure that the protection granted under Directive (EU) 2019/1937⁷, is applicable to persons reporting criminal offences referred to in Articles 3 and 4 of this Directive.]

[Some legal issues are being analyzed and this Article will be handled later.]

Article 15

Investigative tools

Member States shall take the necessary measures to ensure that effective **and proportionate** investigative tools **are** ~~, such as those which are used in investigating organised crime or other serious crime cases, are also~~ available for investigating or prosecuting offences referred to in Articles 3 and 4. **Where those offences are serious, special investigate tools, such as those used in countering organised crime, shall be available.**

[The Article has been aligned with the Environmental Crimes General Approach.]

⁷ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019, p. 17-56.

Article 16

Cooperation between Member States' authorities, the Commission, Europol, Eurojust and the European Public Prosecutor's Office

- (1) Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters, Member States' authorities, Europol, Eurojust, the European Public Prosecutor's Office, and the Commission shall, within their respective competences, cooperate with each other in the fight against the criminal offences referred to in Articles 3 and 4. To that end, the Commission, and where appropriate, Europol and Eurojust, shall provide technical and operational assistance in order to facilitate the coordination of investigations and prosecutions by the competent authorities.

[Some delegations have questioned the reference to the EPPO.]

- (2) Member States' competent authorities shall also regularly share information on practical issues, in particular, patterns of circumvention, e.g. structures to conceal the beneficial ownership and control of assets, with the Commission and other competent authorities.

Article 17

Amendments to Directive (EU) 2018/ 1673

In Article 2(1) of Directive (EU) 2018/1673, the following point is added:

‘(w) violation of Union restrictive measures’.

Article 18

Transposition

- (1) Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [OP- please insert the data- within [xx months] after entry into force of the Directive]. They shall immediately inform the Commission thereof. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by the Directive.

- (2) When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The method of making such a reference shall be laid down by Member States.

[A substantial number of delegations have requested that the transposition period should be longer than 6 months. The Presidency suggests returning to this question after finalising the other provisions of the Directive.]

Article 19

Evaluation and reporting

- (1) By [OP- please insert the date- two years after the transposition period is over] the Commission shall submit a report to the European Parliament and the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive. Member States shall provide the Commission with the necessary information for the preparation of that report.
- (2) Without prejudice to reporting obligations laid down in other Union legal acts, Member States shall, on an annual basis, submit the following statistics on the criminal offences referred to in Articles 3 and 4 to the Commission:
- (a) the number of criminal proceedings initiated, dismissed, resulting in an acquittal, resulting in a conviction and ongoing;
 - (b) the types and levels of penalties **and sanctions** imposed for violation of Union restrictive measures.
- (3) Member States shall submit the statistical data referred to in paragraph 2 to the Commission using the dedicated reporting tools set up by the Commission for reporting in the field of restrictive measures.

- (4) By [OP-please insert the data-five years after the transposition period is over], the Commission shall carry out an evaluation of the impact of this Directive and submit a report to the European Parliament and to the Council. Member States shall provide the Commission with necessary information for the preparation of that report.

[The amendment to paragraph (2)(b) is a consequence of the suggested change in terminology regarding legal persons, see Article 7.]

Article 20

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 21

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
