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ANNEX

ANNEX

to the Communication from the Commission to the European Parliament and the Council

Towards a Directive on criminal penalties for the violation of Union restrictive measures

1.1. Introduction

Adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union ('TFEU') would enable the Commission to propose a Directive under the ordinary legislative procedure, which could approximate the definition of criminal offences and penalties.

Such a Commission proposal would need to comply with the principles of subsidiarity and proportionality governing all EU action¹. It would also need to be in line with Better Regulation requirements². Furthermore, the proposal would need to consider the specificities of criminal law³. In particular, the approximation of criminal law definitions and penalties would have to take into account the differences between the criminal justice systems of the Member States, including as regards penalties.

Moreover, the subsequent Directive would need to respect fundamental rights and observe the principles laid down in the Charter of Fundamental Rights of the European Union ('the Charter')⁴. Notably, compliance of the provisions of the Directive with the rights to liberty and security, the protection of personal data, the right to property, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, the principles of legality, including the principle of non-retroactivity of criminal penalties and proportionality of criminal offences and penalties, as well as the principle of *ne bis in idem*, would need to be ensured.

The future Directive would cover a range of criminal law issues which are customary in Union Directives based on Article 83 TFEU. The following is an illustrative list of possible provisions to be included in the future legislative proposal.

1.2. Scope

The first provision would set out the purpose and scope of the Directive, and in particular clarify that it applies to the violation of Union restrictive measures. These restrictive measures are adopted pursuant to Article 29 of the Treaty on European Union (TEU) and Article 215 TFEU and include targeted individual measures, i.e., asset freezes, prohibitions to make available funds and economic resources and restrictions on admissions (travel bans), as well as sectoral restrictive measures, i.e. arms embargoes or economic and financial measures (e.g. import and export restrictions, restrictions on the provision of certain services, such as banking services).

¹ Articles 5(1) and 5(4) of the Treaty on European Union; Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

² Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM (2011) 573 final, 20.09.2011; Council conclusions on guidelines for future criminal law in EU legislation, Council doc. 14162/09 of 9.10.2009; European Parliament resolution of 22 May 2012 on an EU approach to criminal law, OJ C 264E, 13.9.2013, p. 7–11.

⁴ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

1.3. Definitions

This Article of the Directive would contain all relevant definitions, including, when appropriate by means of cross-referencing the provisions of the Council Regulations and Decisions on restrictive measures. These definitions would include, among others ‘restrictive measures’, ‘designated entity’ and ‘designated person’. A relevant example of a criminal law measure in which the use of similar cross-references in the provision on definitions are included, is Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive)⁵.

1.4. Criminal offences, including incitement, aiding, abetting and attempt

The Articles on the offences to be approximated by the Directive would include precise definitions of various criminal offences related to violations of Union restrictive measures, such as:

- making funds or economic resources available directly or indirectly, to, or for the benefit of, a designated person/entity;
- failing to freeze funds or economic resources belonging to or owned, held or controlled by a designated person/entity;
- engaging in prohibited financial activities, such as providing prohibited loans or credit;
- engaging in prohibited trade, commercial or other activities, such as importing or exporting goods and technology covered by trade bans, or providing prohibited services;
- breaching applicable conditions under authorisations granted by competent authorities;
- failure to comply with any obligation to provide information to the authorities, such as the obligation to declare any assets belonging to, owned, held or controlled by a designated person/entity;
- engaging in actions or activities that seek to directly or indirectly circumvent the restrictive measures, with knowledge and intent, including by being involved in schemes designed to conceal the assets or involvement of designated persons/entities, by assisting the targets of restrictive measures to evade their impact, or by providing misleading information to authorities;
- non-reporting a violation of restrictive measures, or activities that seek to circumvent them, in violation of a specific obligation to report.

The offences to be approximated, unless otherwise provided, would require intent, or at least gross negligence based on knowledge that the conduct concerns persons, entities, activities or property subject to restrictive measures, or ignoring restrictive measures or related legal prohibitions (wilful blindness).

The Directive would also include related offences, such as money laundering. For the latter, a provision would oblige Member States to take the necessary measures to ensure that the money

⁵ 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, Article 2.

laundering offence, as described in Article 3 of Directive (EU) 2018/1673⁶, applies to property derived from the criminal offences covered by the Directive.

The Directive would furthermore contain a provision obliging Member States to take the necessary measures to ensure that inciting, aiding and abetting the commission of the criminal offences referred to in the Directive, as well as the attempt to commit such offences, are punishable as criminal offences⁷.

1.5. Penalties for natural and legal persons

Council Regulations adopted under Article 215 TFEU systematically include a provision requiring Member States to adopt national rules providing for effective, proportionate and dissuasive penalties to be applied in the event of infringements of the provisions of the relevant Regulation⁸. As this obligation leaves significant gaps between the levels and types of penalties, the future Directive should contain an Article on penalties for natural persons. These penalties would be applicable to all offences mentioned in section 1.4. above, and equally require Member States to apply effective, proportionate and dissuasive penalties as well as to set out a certain minimum of the maximum criminal penalties, including fines for natural persons. Such penalties should be proportionate in relation to the considerable seriousness of the offences⁹.

In addition, the Directive would include a provision on the liability of legal persons. This provision would be applicable to all offences mentioned in section 1.4 above. In accordance with this provision, Member States would need to provide for penalties and the liability of legal persons:

- (i) for any of the criminal offences referred to in section 1.4. committed for their benefit by persons having a leading position within the legal person; or
- (ii) for the lack of supervision or control by persons in a leading position which has made possible the commission, by a person under their authority, of any of the above-mentioned criminal offences for the benefit of that legal person¹⁰.

The Directive would also approximate penalties applicable to legal persons. In particular, the Member States would be required to take the necessary measures to ensure that a legal person held liable pursuant to the relevant provisions discussed in section 1.4. is subject to effective, proportionate and dissuasive penalties, including:

- criminal or non-criminal fines;
- temporary exclusion from access to public funding, including tender procedures, grants and concessions;
- temporary or permanent disqualification from the practice of business activities;

⁶ Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, OJ L 284, 12.11.2018, p. 22 -30.

⁷ Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ('PIF Directive'), OJ L 198, 28.7.2017, p. 29–41, Article 5; Market abuse directive, Article 6.

⁸ For an example, see Article 8 of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, consolidated text available at [EUR-Lex - 02014R0833-20220413 - EN - EUR-Lex \(europa.eu\)](#).

⁹ See also PIF Directive, Article 7; Market abuse directive, Article 7.

¹⁰ See also PIF Directive, Article 6; Market abuse directive, Article 8.

- withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;
- placing under judicial supervision;
- judicial winding-up; and
- temporary or permanent closure of establishments used for committing the offence¹¹.

In addition, the Directive could provide that Member States should take the necessary measures to ensure that legal persons that benefit from the commission by others of offences in violation of Union restrictive measures are punishable by fines, the maximum limit of which should be not less than a certain percentage of the total worldwide turnover of the legal person in the business year preceding the fining decision.

The liability of legal persons would not exclude the possibility of criminal proceedings against natural persons who are the perpetrators of the criminal offences provided for in section 1.4.

1.6. Aggravating and mitigating circumstances

The Directive would also contain an Article setting out the aggravating circumstances to be taken into account when penalties are applied for an offence referred to in section 1.4. above. Those aggravating circumstances could include:

- grave consequences of the breach in view of the purposes of the restrictive measures;
- high value of the funds, economic resources, goods or technology in question;
- the offence was committed by a public official when performing his/her duties;
- the offence was committed in the context of private professional activity, including by breaching one's professional duties;
- commission of the offence within the context of a criminal organisation in the sense of Framework Decision 2008/841/JHA¹²;
- the offence involved the use of false or forged documents;
- the offender committed similar previous infringements of Union law on restrictive measures;
- the offender actively obstructed investigation activities, or intimidated or interfered with witnesses; and
- the offence generated or was expected to generate substantial financial benefits (with the notion of substantial financial benefits to be further defined in a recital).

The Directive would equally contain an Article setting out mitigating circumstances to be considered when penalties are applied to an offence referred to in section 1.4. above. In particular, in accordance with this Article, the Member States would be obliged to ensure that, in relation to the above-mentioned offences, certain facts would be regarded as a mitigating circumstance. This would for example apply to the fact that an offender provided the

¹¹ See also PIF Directive, Article 10; Market abuse directive, Article 9.

¹² 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.

administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to identify or bring to justice the other offenders or find evidence.

1.7. Jurisdiction rules

The Directive would also include a provision on jurisdiction rules. Inter alia, following the example of Article 11 of Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ('PIF Directive'), a Member State would need to establish jurisdiction over the offences referred to in section 1.4., where the criminal offence would be committed in whole or in part within its territory or where the offender is one of its nationals. Furthermore, Member States would be obliged to inform the Commission if they decide to extend their jurisdiction over offences committed:

- (i) by habitual residents in their territory;
- (ii) for the benefit of a legal person established in their territory; or
- (iii) by one of their officials acting in his or her official duty.

In cases where the offender is one of their nationals, Member States would not be allowed to make the exercise of jurisdiction subject to the condition that a prosecution can only be initiated following:

- (i) a report made by the victim in the place where the criminal offence was committed; or
- (ii) a denunciation from the State of the place where the criminal offence was committed.

Council Regulations adopted under Article 215 TFEU systematically include the following jurisdiction clause:

"This Regulation shall apply:

- (a) within the territory of the Union, including its airspace;
- (b) on board any aircraft or any vessel under the jurisdiction of a Member State;
- (c) to any person inside or outside the territory of the Union who is a national of a Member State;
- (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;
- (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union."

This would also be reflected in the Directive. In particular, following paragraph (e) above, Member States would be required to extend their criminal jurisdiction to non-EU persons outside EU territory insofar as their business has an EU nexus (which may, by extension, also concern their assets).

1.8. Limitation periods

The Directive would include a provision applicable to all offences mentioned in section 1.4 above, which would require the establishment of a minimum limitation period, as well as a provision on the limitation period for the enforcement of penalties following a final conviction.

A relevant example may be found in Article 12 of the PIF Directive. In accordance with this Article, Member States have to:

- (i) prescribe limitation periods for a sufficient period of time after commission of the criminal offences referred to in the Directive in order for those criminal offences to be tackled effectively, with minimum limitation periods applying to offences punishable by a maximum penalty of at least four years of imprisonment;
- (ii) take the necessary measures to enable penalties to be enforced.

1.9. Cooperation between Member States, Union institutions, bodies, offices and agencies as well as with third states

To enhance the investigation of cases with a cross-border element, the Directive would include a provision which would require mutual cooperation between Member States' competent authorities, Union institutions, bodies, offices and agencies, including Eurojust and Europol¹³. This provision of the Directive would also facilitate the sharing of information on practical issues (in particular, patterns of circumvention, e.g. structures to hide the true ownership/control of assets) with authorities in other Member States and with the Commission.

1.10. Whistle-blowers

To enhance the effectiveness of the Union restrictive measures, the Commission recently launched the EU Sanctions Whistle-blower Tool¹⁴. Due to the importance of the whistle-blowers' contribution to the proper application of the Union restrictive measures, the Commission proposal would provide for an obligation for Member States to take the necessary measures to ensure that the protection granted under Directive (EU) 2019/1937¹⁵ is applicable to persons reporting criminal offences referred to in the Directive. Furthermore, Member States would be obliged to take all necessary measures to ensure that persons reporting offences referred to in the Directive and providing evidence or otherwise cooperating with the investigation, prosecution or adjudication of such offences, were given the necessary support and assistance in the context of criminal proceedings¹⁶.

2. WAY FORWARD

Once the Council reaches an agreement and the European Parliament grants its consent to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU, the Commission would be in the position to immediately propose a Directive under the

¹³ See also PIF Directive, Article 15.

¹⁴ European Commission, Overview of sanctions and related tools, available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/overview-sanctions-and-related-tools_en#whistleblower.

¹⁵ 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.

¹⁶ See also Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021)851 final, 15.12.2021, Article 13.

ordinary legislative procedure, which could approximate the definition of criminal offences and penalties.

Such a Commission proposal would need to comply with the principles of subsidiarity and proportionality governing all EU action.¹⁷ It would also need to be in line with Better Regulation requirements¹⁸.

¹⁷ Articles 5(1) and 5(4) TEU; Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

¹⁸ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14.