Council of the European Union
General Secretariat

Brussels, 28 April 2023

WK 5606/2023 INIT

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NOTE

From: To:	General Secretariat of the Council Delegations
N° Cion doc.:	ST 15653 2022 INIT
Subject:	Violation of restrictive measures – drafting suggestions

Please find in Annex drafting and policy suggestions from three delegations.

ANNEX

CZECH REPUBLIC

The question of transposition of the provision on criminal offences remains of particular importance to us. Understanding the reasons for which it might be difficult to take on board our previously proposed wording, we worked together with other Member States and drafted a new wording of such recital that uses the language of the pertaining CJEU case law.

The following proposal uses the language, in particular, of judgments *Commission v Luxembourg, case C-32/05, EU:C:2006:749, point 34*, and *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, case 14/83, EU:C:1984:153, point 15*:

„The criminalization of violations of Union restrictive measures under this Directive is aimed to ensure that these violations will be punishable as criminal offences and enforceable in every Member State. In line with the case law of the Court of Justice of the European Union, Member States may choose the form and method for implementing this requirement, and specific express legal provisions do not always have to be adopted. Although this Directive leaves Member States to choose the ways and means of ensuring its implementation, that freedom does not affect the obligation imposed on all Member States, to which the Directive is addressed, to adopt in their national legal systems all the measures necessary to ensure that the Directive is fully effective, in accordance with the objective which it pursues.“

The proposal is co-sponsored by Bulgaria, the Czech Republic and Hungary. We expect support also by several other Member States.

GERMANY

Position paper

Legal advice privilege in Article 3 (5) of the Proposal for a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures

Binding **protection of the professional secrecy of legal professionals** is **essential** for the **Rule of Law**. Legal representation of the interests of those seeking legal advice in accordance with EU law can only be ensured if **confidentiality and professional secrecy is guaranteed.** The **deletion of the legal advice privilege** should therefore be **reversed** and **Article 3 (5) of the Draft** in the version of the fourth revision of the Presidency should be **retained**.

The fifth revision of the Presidency weakens considerably the protection of professional secrecy:

- So far Article 3 (5) **always contained** an **explicit legal advice privilege.** It reflected the joint outcome of the negotiations of the draft directive and is in line with the EU money laundering regulations. It **protects legal professionals** from being subject to criminal sanctions because of exercising their duties required by the Rule of Law.
- However, in the last Council Working Group on 20 April 2023 and in the fifth revision of the Presidency, the **legal advice privilege has now been deleted.** The deletion of the legal advice privilege could criminalise compliance with the obligation of confidentiality of legal professionals, in particular with regard to reporting obligations.
- Contrary to what is stated by COM, the **recitals do not sufficiently protect professional secrecy. Why?**
    - They only concern exceptions, but assume that as a general rule reporting obligations apply to legal professionals.
    - The protection of professional secrecy cannot be based on the provision of recitals as this creates legal uncertainty. This also happened with regard to Council Regulation (EU) No 269/2014. In this regulation the professional secrecy was expressly recognised only in the recitals, but only with an unclear provision in the text. COM now denies that, in the absence of any express provision in the text of the regulation itself, professional secrecy can be based on the recitals. This shows clearly that mentioning the professional secret in the recitals is not sufficient.

This privilege is well established in international and European law:

- Only recently the ECJ has declared the reporting obligation set out in Directive 2011/16/EU does not comply with Article 7 and 8 **of the EU Charter of Fundamental Rights** [1]. The **ECJ** has explicitly emphasised that **professional secrecy must be explicitly protected,** as lawyers are entrusted with a **central role in democratic society** with the defence and advice of individuals (**ECJ**, Judgment of the Court of 8 December 2022, Orde van Vlaamse Balies and Others, C-694/20, ECLI:EU:C:2022:963, No. 28; **ECHR**, Judgement of 6 December 2012, Michaud/France, 12323/11, No. 118, 119). It is essential that individuals can freely turn to their lawyer and that **loyalty of the lawyer towards his client exists and can exist** (see ECJ, Judgment of the Court of 8 December 2022, Orde van Vlaamse Balies and Others, C-694/20, ECLI:EU:C:2022:963, No. 28; ECJ, Judgment of the Court of 18 May 1982, Legal privilege, 155/79, ECLI:EU:C:1982:157, No. 18). We therefore consider that it is very important that the Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures provide a clear protection for professional secrecy.
- In addition, the professional secret is also protected under international law. No. 22 of the "UN Basic Principles on the Role of Lawyers" of September 7, 1990 also explicitly establishes the obligation to ensure confidentiality between lawyer and client: *"Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."*
- In line with that, No. 6 of the "Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer" also guarantees professional secrecy for legal professionals: *"All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law"*.

In compliance with the aforementioned European, constitutional and international rules and principles, German law does not provide for a sanction by lawyers to report or notify offences already committed. Different to the draft directive, there is an obligation to report only in the case of plans to commit very serious crimes (e.g. murder, homicide, genocide, trafficking in human beings). In addition, lawyers are exempt from punishment if they make serious efforts to deter the offender from committing the offence or to prevent success.

[1] ECJ, Judgment of the Court of 8 December 2022, Orde van Vlaamse Balies and Others, C-694/20, ECLI:EU:C:2022:963, No. 28

HUNGARY

with a view to facilitate discussions tomorrow, please find below a proposal on recital 4.

The Presidency text, to recap, reads as follows:

(4) The effective application of Union restrictive measures calls for common **minimum rules concerning the** ~~criminal~~ definitions of **criminal** conduct ~~infringing~~ **violating prohibitions and obligations included in** Union restrictive measures **or, where national implementation is required, national provisions implementing those measures**. Member States should ensure that this conduct constitutes a criminal offence when committed with intent**, in so far as it amounts to an infringement of a prohibition or an obligation set out in a Union restrictive measure or set out in a national provision implementing a Union restrictive measure, where national implementation of these measures is required.** ~~as well as with serious negligence, in case the natural or legal person knew or should have known, that their conduct would infringe Union restrictive measures~~. **The Directive should cover only serious violations. Thus, it should not apply to violations involving funds, economic resources, goods, services, transactions or activities of a value of less than EUR 10 000. Furthermore, minor cases of violations related to travel bans should be excluded from its scope. As this Directive establishes only minimum rules, Member States may decide whether to extend their national criminal law to such conduct. The exclusion of less serious violations from the scope of this Directive does not affect any obligations set out in Union restrictive measures to ensure that violations are punishable by effective, proportionate and dissuasive criminal or other sanctions.**

The term *minor cases* is open for interpretation, there is no definition of it in the text. For this reason, we deem it necessary to include a recital, or add this text to recital 4, with the following wording: *"With regard to the criminal offence provided for in Article 3 (1) (c) of this Directive, the notion of minor cases should be interpreted in accordance with national law.*

In addition, we note that the first and the second sentences of recital (4) are almost identical or at least very closely mean the same thing. The newly added text of the second sentence is based on the current wording of Article 3, and it would be more appropriate to keep it. The first sentence thus became superfluous and it may be useful to consider if the removal would improve the recital.