

POSITION PAPER



ESBG Position Paper to the draft Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures

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The European Savings and Retail Banking Group (ESBG) welcomes the initiative to harmonize the definitions of criminal offences and penalties for the violation of EU restrictive measures. We believe it would ensure a more consistent enforcement of restrictive measures between EU Member States, even if this enforcement is not centralized at EU level.

Therefore, we identified the below three main considerations to the draft directive. At the end of this document, we provide some observations on the particular draft Articles.

1. Limiting the directive to offences committed with intention

The draft directive not only penalizes criminal offences when committed with intent, but also includes serious negligence (Article 3(3)).

Compliance officers in credit institutions might have a more reluctant approach to difficult cases considering that a human error could be classified as a serious negligent behaviour resulting in severe penalties.

Example:

The accidental hitting of the sanctions filter by an employee would inadvertently result in a false positive. This error would subsequently be classified as a serious negligent behaviour.

Despite the many different quality assurance measures credit institutions have in place (e.g. trainings, four-eyes principle, several 'lines of defence') to avoid or correct such errors, sanction checks still include manual steps that potentially result in human errors. The draft directive does not take into account that such errors cannot be completely ruled out and might lead to a criminalisation of employees.

This increased liability risk will hamper the recruitment of new staff members in the area of sanctions compliance at a time where credit institutions already face difficulties in hiring qualified employees to carry out these important tasks, not at least due to the high performance pressure it puts on employees.

Moreover, credit institutions would have to ensure that normal banking business does not constitute an 'aggravating circumstance' within the meaning of Article 8. In our opinion, the human error of a compliance officer should not be stronger punished than someone's intentional engagement in evasion activities or the concealment of such.

Against this background, we suggest removing the penalization of serious negligent violations.

2. Introducing a non-punishable voluntary self-disclosure

We believe that the directive should provide for a voluntary self-denunciation to exempt oneself from the criminal consequences of a human error. The mitigating circumstances in Article 9 do not sufficiently protect employees from the criminal

consequences of their mistakes. National laws foresee such provisions in various cases such as the German tax law (§ 371 Abgabenordnung).

Therefore, we would welcome a provision introducing a non-punishable voluntary self-disclosure.

3. Stipulating the rights and obligations of economic operators clearly

Criminal liability requires a clear and precise conceptual delineation of rights and obligations of the involved actors.

For example, credit institutions often do not have the necessary background information to uncover concealment tactics. Accordingly, it is essential to factor in if institutions have access to the necessary information that would allow them to uncover such behaviour.

Consequently, we think that clear and precise provisions and implementation instructions, accompanied by an appropriate implementation period, are needed.

Please find below further observations on the draft directive.

| Article | Comment |
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| Article 1 - Subject matter | The Directive must be limited to crimes in accordance with the legislative power imposed by Article 83 TEU. |
| Article 2 - Scope and definitions | There should be no differentiation between an export violation mistake and an asset freezing mistake as both are work errors. A different approach for export violations and for financial sanctions violations would not comply with the principle of equivalence. |
| Article 2(2)(c) - Definition of 'funds' | The definition of 'funds' should be coherent with the related sanction regulations. |
| Article 3(2)(b) - Failure to freeze funds or economic resources belonging to, owned, held or controlled by a designated person, entity or body without undue delay | Given the two working days deadline imposed in some national legislations, we propose to change the provision to the following: Failure to freeze funds or economic resources belonging to, owned, held or controlled by a designated person, entity or body within two working days. |
| Article 3(2)(d) - Entering into transactions with a third state, bodies of a third state, entities and bodies owned ... | The terms 'bodies' and 'entities' in the context of this provision should be clearly defined. Moreover, the exact meaning of 'control' should be clarified as, in application of the strict list principle, transactions with non-listed subsidiaries are not necessarily |



| Article | Comment |
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| | prohibited. A uniform definition with the sanction regulations is necessary. |
| Article 3(2)(h) - Term 'circumvention' | The term 'circumvention' needs to be clearly defined in order to trigger penalties. The proposed wording is too vague. |
| Article 3(2)(h)(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 | We are in favour of a more proportionate approach in the context of this provision. Depending on the severity of the case, there should also be room for a misdemeanour rather than immediately applying penalties. |
| Article 3(2)(h)(v) - Failing to cooperate with the competent administrative authorities in any verification of information under points (iii) and (iv), upon their reasoned request | No one is bound to incriminate themselves. Therefore, this cannot be a should not be a serious crime. |
| Article 3(2)(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 | Does this negligence provision mean that only intent can be considered as an offence by definition for breaches of (h)? Paragraph 3 should also be excluded, even if it refers to 'serious negligence'. Even 'conditional intent' is broadly defined here, anything below that cannot be a 'serious crime'. |
| Article 3(3) - The conduct referred to in paragraph 2, points (a) to (g) shall constitute a criminal offence also if committed with serious negligence | A criminalisation of mere work errors is not appropriate and would lead to credit institutions being even more restrictive in the implementation of sanctions ('overcompliance') in order to limit the liability risk. We therefore ask for the complete deletion of Article 3(3). |
| Article 5(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 | This would not be adequate for negligence offences (unless Article 3(3) is deleted). |
| Article 5(3) - Member States shall take the necessary measures to | The amount in an unfrozen account is not a useful criterion for processing |

| Article | Comment |
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| <p>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</p> | <p>errors, e.g. false positives. The subjects of filtering transactions are:</p> <ul style="list-style-type: none"> • Client • Payee • Affiliated institutes • Intended use <p>An amount limit is unsuitable for assessing the seriousness of the accusation. For this purpose, there is the distinction between slight/gross negligence and intent. Criminal liability should only apply to sanction violations committed intentionally. An amount limit would then be redundant.</p> |
| <p>Article 5(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.</p> | <p>See above.</p> |
| <p>Article 7(1), (2) and (3) - Reference to Article 7</p> | <p>Reference is wrong and should be changed to 'Article 6'.</p> |
| <p>Article 8(b) - The offence was committed by a professional service provider in breach of his professional duties</p> | <p>Normal banking business should be explicitly exempted from an 'aggravating circumstance' within the meaning of Article 8.</p> |
| <p>Article 9 - Mitigating circumstance</p> | <p>This provision does not sufficiently protect employees of credit institutions from criminal consequences in case of mistakes. We rather suggest a general exemption from penalty.</p> |
| <p>Article 13(b) - Exchange of information for strategic and operational purposes</p> | <p>We would welcome the implementation of legal exchange options and information obligations for private sector actors as it would improve the detection of circumvention offences.</p> |
| <p>Article 16(2) - Member States' competent authorities shall also regularly share information on</p> | <p>The concerned obliged parties should be included in this exchange.</p> |



| Article | Comment |
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| 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 | |



About ESBG (European Savings and Retail Banking Group)

ESBG represents the locally focused European banking sector, helping savings and retail banks in European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. ESBG members have total assets of €6,38 trillion, provide 313 billion euros in loans to SMEs and serve 163 million Europeans seeking retail banking services. ESBG unites at EU level some 871 savings and retails banks, which together employ 610.000 people driven to innovate at more than 41.000 branches.



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