

CCBE position on the Commission proposal for a Directive to harmonise criminal offences and penalties for the violation of EU restrictive measures 31/03/2023

EXECUTIVE SUMMARY

While the CCBE appreciates the European Commission's effort to harmonise criminal offences and penalties for the violation of EU restrictive measures through their proposed Directive, it has several concerns and considers that the following amendments should be made:

- The CCBE is concerned that Article 3(2)(g) of the proposed Directive may be misinterpreted to mean that the provision of any legal advisory services is prohibited in all circumstances, and it should be slightly modified in order to ensure clarity;
- The CCBE welcomes that Recital (7) of the Preamble and paragraph (5) of Article 3 acknowledges that legal professional privilege/professional secrecy applies in the outlined circumstances, and proposes that this should also be expressly acknowledged in Article 5n of Regulation 833/2014;
- The CCBE calls on the European Commission to remove the reference to "serious negligence" under Article 3(3) of the proposed Directive in order to ensure that the proposed measures are practical and legal;
- Lastly, the CCBE proposes that Article 7 should expressly provide that the provisions of paragraphs (1) (a) and (b) shall not apply in relation to legal persons licenced by a professional body as it fails to reflect that, for lawyers and other professionals, the powers related to disqualifications from practice and withdrawal of permits is and should remain within the powers of the Disciplinary Board of the respective professional body, rather than the courts or the government.

Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE has considered the Commission proposal of 2 December 2022 for a Directive on penalties for the violation of Union restrictive measures.¹ The CCBE would like to make the following comments in response to the Commission proposal.

a) Article 3(2)g

Article 3(2)(g) of the proposed Directive provides that the provision of legal advisory services is a violation of the Union restrictive measures. Although this seems to refer to Article 5n of 833/2014, as drafted, it could be interpreted to mean that the provision of any legal advisory services is prohibited in all circumstances.

We propose that the phrase “*to the extent prohibited by Union restrictive measures*” be inserted at the end of the paragraph, so that the matter is clarified and there is no room for misinterpretation.

Article 3

Violation of Union restrictive measures

(1) ...

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

*(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; **CCBE suggestion – insert “to the extent prohibited by Union restrictive measures”.***

b) Recital (7) of the Preamble and paragraph (5) of Article 3

Recital (7) of the Preamble and paragraph (5) of Article 3 recognise that legal professionals should not be obliged to report information obtained either in strict connection with judicial, administrative or arbitral proceedings or “... *in the course of ascertaining the legal position of the Client*”:

The relevant passage of Recital (7) reads as follows:

‘(...) There should, however, be exemptions from any obligation 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. Therefore, legal advice in those circumstances should remain subject to the obligation of 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. Knowledge can be inferred from objective factual circumstances.’

Article 3 paragraph (5) reads as follows:

“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

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0684>

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.”

We welcome that the above provision acknowledges that legal professional privilege/professional secrecy applies in these circumstances. However, this is not reflected (at least expressly) in Article 5n of Regulation 833/2014. We propose that this is a good and necessary opportunity to raise the matter and propose a respective amendment of Article 5n of Regulation. 833/2014.

c) Article 3(3)

Article 3(3) of the proposed Directive provides that it constitutes a criminal offence if conduct was committed with “*serious negligence*”.

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.”

In this respect, we refer to page 13 of the Explanatory Memorandum, where in relation to the explanations on Article 3, the following is inter alia mentioned:

“Certain violations of Union restrictive measures also constitute a criminal offence when committed with serious negligence. In particular, professionals, such as in legal, financial and trade services, should exercise due diligence to prevent any violation of Union restrictive measures.”

A number of issues arise in this regard.

- Firstly, “*serious negligence*” is a vague, unclear and undefined term. Although the term is sometimes used in agreements and other documents, there is no EU definition either under criminal law or civil law.
- Secondly, the reference to “*serious negligence*” does not reach the required standard of intent which is required in criminal law. It is not justifiable that the term “serious negligence” is being criminalised. In effect, the use of the term serious negligence gives rise to a serious consequence with respect to the reversal of the burden of proof in criminal proceedings. It should be explicit that an act is either intentional or not – criminalising “serious negligence” does not equate to intent to violate Union restrictive measures. The CCBE refers to the AML legislation in this regard which refers to the explicit requirement of intent.
- Thirdly, Article 3 (1) explicitly refers to the need for the violation of Union restrictive measure to be committed intentionally:

“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.”

Article 3 (1) explicitly acknowledges and recognises the need to have intent in order for a criminal offence to occur. This requirement for intention cannot be eliminated through the introduction of a lesser requirement for “serious negligence”.

In light of the above, the CCBE calls on the Commission to remove the reference to “serious negligence” in order to ensure that the proposed measures are practical and legal.

d) Sub-paras (a) and (b) of Article 7(1)

Sub-paras (a) and (b) of Article 7(1) provide for possible disqualification from practice and withdrawal of permits.

Article 7 - Penalties for legal persons “(1) Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 is subject to effective, proportionate and dissuasive 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 penalties, such as:

- (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) ...”*

In the case of lawyers and other professionals, this is (and should remain) within the powers of the Disciplinary Board of the respective professional body, not to the Courts or the Government.

We propose that Article 7 should expressly provide that the provisions of paragraphs (1) (a) and (b) shall not apply in relation to legal persons licenced by a professional body.

Conclusion

The CCBE is making every effort to ensure that its members are familiar with the obligations that arise under restrictive measures. The CCBE hopes its comment are of assistance and the CCBE is happy to elaborate on any aspect of the above.