German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

on the European Commission's proposal for a directive on the definition of criminal offences and penalties for the violation of Union restrictive measures

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The German Banking Industry Committee (GBIC) welcomes the initiative of the European Commission, the European Council and the European Parliament to implement the restrictive measures of the European Union more uniformly and thus more effectively. This is to be achieved with the "Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures" proposed by the European Commission.

In the meantime, the European Council on 17 May 2023 and the European Parliament's Committee on Civil Liberties, Justice and Home Affairs on 3 May 2023 have proposed amendments to the European Commission's proposed directive.

We would like to comment on this as follows:

Core petitions:

1. Directive must be limited to intent

We support the European Council's position not to follow the EU Commission's proposal that serious negligence - and no longer only intent - should be punishable. The European Council's proposed deletion of Article 3(3) of the EU Commission's draft directive must therefore be supported.

Serious negligent violations should continue not to be punished by criminal law means. Otherwise, there is a danger that due to a possible oversight by an employee, a so-called hit, i.e. the hitting of the sanctions' filter, will inadvertently be assessed as false positive and this error will subsequently be classified as seriously negligent by a public prosecutor. Credit institutions take their legal obligation to carefully observe the sanction regulations very seriously and have many different quality assurance measures (training, dual control principle, several "lines of defence") to avoid errors or to correct them quickly. Nevertheless, the sanction check consists of "classic" manual work and work errors cannot be completely ruled out.

With the massive expansion of sanctions against Russia and Belarus, the Union's restrictive measures have reached an unprecedented level of complexity. To the same extent, credit institutions have had to take into account non-specialist areas of law, such as export control law, when implementing the restrictive measures. Since the restrictive measures regularly enter into force without a deadline for implementation, errors and misjudgements in implementation cannot be ruled out. Particularly in view of the short lead time, decisions must be made at short notice. It cannot be ruled out that some of the measures taken are based on erroneous assumptions which, from the point of view of investigating public prosecutors, may be classified as seriously negligent. In this respect, however, administrative offence law and supervisory law offer sufficient possibilities to intervene. This does not require an extension of criminal law.

In addition, we would like to take this opportunity to point out that some errors made by credit institutions may stem from the fact that the underlying transaction, for example of an exporter, may contain errors under sanctions law. In particular, since the rights and obligations of all parties involved in an economic transaction are not clearly defined, there is also a not inconsiderable legal risk for credit institutions here that, in the event of a sanction violation, the public prosecutor's office will accuse a credit institution involved of a (seriously) negligent sanction violation if it assumes that information from the exporter was only insufficiently checked.

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2. Banking business must not constitute an "aggravating circumstance"

Particularly as far as pure payment transactions are concerned, credit institutions regularly do not have the necessary knowledge or background information on the underlying transaction in order to obtain a corresponding transparency, which would, for example, make it possible to uncover concealment tactics. This aspect becomes even more important in connection with the intended tightening of measures to prevent the circumvention of sanctions in the Russia Regulation. This is another reason why Article 8 of the draft directive should be worded in such a way that normal banking business does not constitute an "aggravating circumstance". It is not acceptable that a compliance officer who makes a work mistake is punished more severely than someone who deliberately engages in concealment or evasion activities.

For the reasons outlined above, the punishment proposed in the present draft of the EU Parliament's Committee on Civil Liberties, Justice and Home Affairs, even for (slightly) negligent violations, should not be taken up.

3. Voluntary self-disclosure analogous to the regulation in German foreign trade law should be provided for

The Directive should provide for the possibility of voluntary self-disclosure, which should be as comprehensive as possible and exempt from punishment. Article 9 of the draft directive provides for "mitigating circumstances", which, however, do not sufficiently protect employees from the criminal consequences of mistakes, especially in the case of criminal liability for negligent violations. What is needed is the most comprehensive possible exemption from punishment in the case of voluntary self-disclosure, which goes beyond the possibilities currently contained in the German Foreign Trade and Payments Law (AWG), for example as in German tax law (§ 371 I AO). The German Foreign Trade and Payments Law also refrains at national level from administrative offences committed through negligence under Section 19 III-V AWG in the case of voluntary self-disclosure under Section 22 IV AWG. Such a procedure promotes legal certainty and creates an incentive for economic operators beyond the general reporting obligations to provide the competent authorities with helpful information on potential sanction violations.

4. Uniform formulations

It must be ensured throughout that the formulations and definitions of legal terms in this Directive and the Sanction Regulations are identical and comply with the principle of certainty in order to create legal certainty. From the point of view of criminal law, there must be no different definitions of terms.

5. Circumventing restrictive measures

In its opinion, the Council has reworded the term "circumventing restrictive measures" in Article 3(2)(h), which we very much welcome. However, in our opinion, this wording still does not fulfil the principle of certainty. Furthermore, with the wording in (h)(i) "transferring funds...which are to be frozen" we see the risk that making a payment the day before the sanctioning (which is legal and unavoidable) could be considered as circumvention. In our view, there is also a risk that the wording in (h)(iv) could be considered any late reporting also as a circumvention. Instead of "Failing to comply with", a formulation such as "Deliberately withholding information..." would be more appropriate in our view.