

## NEW EU DIRECTIVE SEEKS TO HARMONISE CRIMINAL ENFORCEMENT OF EU SANCTIONS REGIMES

In the more than two years since the Russian invasion of Ukraine in February 2022, the European Union ("EU") has significantly expanded the volume and variety of restrictive measures (*i.e.* sanctions measures) it has imposed in response, including a broad range of new asset freezes, travel bans, import and export restrictions, other trade controls, investment restrictions and services bans.

As individual Member States are responsible for the enforcement of EU sanctions, the types and severity of penalties that apply for violating these restrictive measures can differ across countries.

In an effort to enhance and harmonise enforcement, as well as to limit circumvention, the European Commission proposed a **Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures** (the "EU Directive") on 5 December 2022.

In mid-April 2024, the Council of the EU gave its final approval on the directive and it was published in the Official Journal of the EU on 29 April 2024. The directive will enter into force on the twentieth day following publication. Member States will then have 12 months to implement the EU Directive by incorporating its provisions into their national legislation.

**Main takeaways:**

- On 12 April 2024, the **Council of the EU approved the EU Directive** to establish minimum rules concerning the definition of criminal offences and penalties for violations of EU sanctions, in an effort to harmonise enforcement and ensure consistency.
- As of 19 May 2024 (which is when the directive comes into force), Member States will have 12 months to ensure their laws are amended in line with the EU Directive, in particular by **providing "effective, proportionate, and dissuasive" criminal penalties**. This includes criminal penalties applicable to violations by **individuals and legal entities**.
- The directive sets minimum standards for the maximum penalty that can be imposed. Specifically, Member States will be required to stipulate that, in the event of sanctions violation, the maximum specified **prison sentence** should be at least **1 to 5 years** (depending on the offence), and can include disqualification from holding certain public offices. The minimum specified maximum penalty for legal entities should be a **fine of at least 1% to 5% of their total worldwide turnover of the year preceding the offence or of penalty imposition, or EUR 8 million to EUR 40 million** (depending on the offence). Entities can also incur additional penalties, such as placement under judicial supervision or exclusion from public tenders.

## **WHAT ARE THE KEY PROVISIONS OF THE NEW EU DIRECTIVE?**

**Criminalisation of EU sanctions violations:** Article 3 of the EU Directive states that Member States must ensure that violations of EU restrictive measures are criminal offences in national law. Criminal offences must apply in respect of intentional conduct which is in violation of EU asset freezing measures, travel bans, restrictions on transaction with specified entities, trade controls, financial services bans, other services bans and circumvention.

The EU Directive gives examples of specific conduct which shall be a criminal offence, including (in the context of circumvention):

- using, transferring to a third party, or otherwise disposing of, funds or economic resources directly or indirectly owned, held, or controlled by a designated person, entity or body, which are to be frozen, in order to conceal those funds or economic resources;
- providing false or misleading information to conceal the fact that a designated person, entity or body is the ultimate owner or beneficiary of funds or economic resources which are to be frozen; and
- failing to comply with an obligation to provide the competent administrative authorities with information on frozen funds or economic resources or information held about funds or 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, where such information was obtained in the performance of a professional duty.

Article 4 of the EU Directive requires Member States to ensure that attempting to commit an offence, and inciting, and aiding and abetting the commission of an offence is also punishable as a criminal offence.

While offences must be criminalised when conduct is "*intentional*", the EU Directive requires that "*serious negligence*" should also be criminalised at least

where it relates to conduct in breach of trade controls concerning certain military or dual-use items.

**Exceptions to criminal liability:** Article 3 states that Member States may provide that certain offences, such as failure to freeze funds or breach of specified trade controls, are not criminal offences where the value of the funds, economic resources or goods at issue is less than 10,000 EUR.

**Individual criminal liability:** Article 5 states that Member States must have in place maximum penalties for criminal violations by individuals.

The maximum prison sentence must be specified in law as at least 1, 3 or 5 years, depending on the specific offence. Member States are also required to provide that individuals found guilty of violations may also be subject to accessory penalties including monetary fines proportionate to the gravity of the conduct, withdrawal of permits or authorisation to pursue certain activities related to the offence, disqualification from holding a leading position in certain legal entities, and a temporary ban on running for public office.

**Corporate criminal liability:** Article 6 states that Member States must have in place maximum penalties for criminal violations by legal entities where offences are committed for the benefit of those legal persons by any person who has a leading position within the legal person concerned, based on a power of representation of the legal person, an authority to make decisions on behalf of the legal person or an authority to exercise control within the legal person. The EU Directive requires that offences should be created for legal persons where a lack of supervision or control of such a person has made possible the commission of an offence by a person under its authority and for the benefit of the legal person.

Article 7 states that penalties for legal entities shall include criminal or non-criminal fines and that these should be at least either 1% or 5% of the worldwide turnover of the legal entity in the business year preceding commission of the offence or the imposition of the penalty, or (if higher) a fixed amount of either EUR 8 million or EUR 40 million (depending on the offence).

In addition, Member States must provide that legal entities may be subject to accessory penalties such as exclusion from public benefits or aid, exclusion from public funding (such as tendering procedures and grants), disqualification from exercising certain business activities, withdrawal of permits or authorisations to pursue activities related to the offence, placement under judicial supervision, and, potentially, closure of the establishment.

**Aggravating factors:** Article 8 states that Member States must ensure their laws provide that specified aggravating factors are considered when determining the applicable penalty. The specified aggravating factors include if the offence was committed in the framework of organised crime, if it involved false or forged documents, if it was committed by a professional service provider in violation of their professional duties or by a public official when performing their public duties, if it generated or was expected to generate substantial financial benefits or to avoid substantial financial expenses, if it involved the destruction of evidence or the intimidation of witnesses, or if it involved a person or entity that had already been convicted by a final judgment of the offences set forth in the directive.

**Mitigating factors:** Article 9 states that Member States must ensure their laws provide that specified mitigating factors are considered when determining the applicable penalty, including if the offender provides authorities with information they would not have otherwise been able to obtain to help identify other offences or relevant evidence.

**Freezing & confiscation of assets:** Under Article 10, Member States must take necessary measures to enable the freezing and confiscation of any

proceeds from criminal offences set forth in the EU Directive. We note that the EU has indicated it will be adopting a separate piece of legislation related to this topic.

**Statute of limitations:** Under Article 11, Member States are required to adopt a limitation period of at least 5 years for most of the criminal offences specified.

**Territorial jurisdiction:** Article 12 provides that Member States shall ensure that they have jurisdiction over offences committed in whole or in part within their territory, on a ship or aircraft registered under their flag or by their nationals (wherever located).

Importantly, the article also sets forth optional avenues for extending territorial jurisdiction that Member States may choose to adopt after having first informed the European Commission of the decision to do so. This includes where:

- (a) the offender is a habitual resident in its territory;
- (b) the offender is one of its officials who acts in his or her official duty;
- (c) the offence is committed for the benefit of a legal person which is established in its territory; or
- (d) the offence is committed for the benefit of a legal person in respect of any business done in whole or in part on its territory.

## **WHAT IMPACT WILL THE NEW EU DIRECTIVE HAVE ON NATIONAL REGIMES?**

Member States will be required within 12 months of the new EU Directive entering into force (which is on 19 May 2024) to bring their national regimes in line with the requirements of the EU Directive. The steps that this will require vary across countries and depend on the actual current state of national legislation.

**Belgium:** The offences set forth in the EU Directive are broadly already criminalised under Belgian law, including conduct that attempts to violate, or that aids or abets violations of EU restrictive measures. However, Belgian law does not provide for specific mitigating and aggravating factors when deciding on the appropriate penalty for sanctions violations. While Belgian criminal law provides for general rules relating to the application of mitigating factors, which would also apply to sanctions violations, the legal framework will therefore have to be amended in this regard. In addition, the penalty framework will need to be amended, as the maximum penalties for breaches of sanctions under Belgian law are currently far more limited than those set forth in the EU Directive. Note that under Belgian law, administrative penalties (non-criminal fines) ranging between EUR 250 and EUR 2,500,000 may also be applicable (both to individuals and legal entities), subject to a prohibition on double jeopardy when it comes to the combination of criminal and administrative penalties. The accessory penalties provided for by the EU Directive, such as withdrawal of permits or authorisation to pursue certain activities or professional disqualifications, already mirror those provided for by Belgian criminal law.

**Czech Republic:** While many of the requirements of the EU Directive have already been integrated into Czech national legislation, achieving full alignment necessitates legislative refinement. Currently, an implementation bill has been prepared by the Czech Ministry of Justice and is being reviewed by relevant stakeholders. The primary focus of the proposal is to revise the elements of the existing criminal offense and criminalise acts currently not covered, particularly allowing the entry (or movement) of sanctioned individuals into (through) Czech territory. Furthermore, the bill addresses a crucial gap by introducing the

possibility of criminal liability for such an offense to be committed through gross negligence. Additionally, the bill defines more precisely the concept of "greater extent" in relation to breach of international sanctions, as this term acts as a key threshold for criminal liability under these provisions. In line with the EU Directive, the bill further proposes amendments to the national legislation allowing confiscation of a broader group of assets that are subject to sanctions. This anticipated improvement in the legal framework is expected to enhance enforcement capabilities.

**France:** The offences set forth in the EU Directive are broadly already criminalised under French law, including conduct that attempts, aids or abets violations of EU restrictive measures. However, French law does not provide for specific mitigating and aggravating factors when deciding on the appropriate penalty for sanctions violations. In addition, the method for calculating maximum financial penalties for both individuals and legal entities liable for sanctions violations under French law differ from that found in the EU Directive (currently, the French Customs Code provides that violations of EU restrictive measures are punishable by a maximum penalty of 5 years' imprisonment and a fine), although some of the non-criminal penalties that may be imposed on both individuals and legal entities mirror those found in the EU Directive.

**Germany:** Although current German sanctions criminal law already complies with a large part of the requirements laid down in the EU Directive, the EU Directive will require certain amendments within the German legal system. The EU Directive provides, *inter alia*, that sanctions circumvention activities with respect to asset freeze measures against designated persons under EU sanctions should be prosecuted under criminal law, whereas this currently does not constitute a distinct criminal offence under German law. In addition, the penalty framework for legal entities will need to be amended. As mentioned above, the EU Directive provides for fines of up to 1% to 5% of the legal entities' total worldwide turnover or EUR 8 million to EUR 40 million, whichever is higher (depending on the offence). By contrast, German law currently generally provides for a (not specifically turnover-related) statutory maximum corporate administrative fine of EUR 10 million. Furthermore, the directive requires that certain sanctions violations be prosecuted as criminal offences even if committed only with "serious negligence" (and not intentionally). Under current German law, such violations can, apart from certain exceptions, only be prosecuted as administrative offences (*Ordnungswidrigkeiten*) which may result in administrative fines (*Geldbußen*). Therefore, in that regard criminal liability must be created, evidently leading to more severe penalties.

**Italy:** In the effort to align with European standards, recent legislation was issued in 2023 with the aim of criminalising and punishing more severely certain conduct, which until then was solely considered as administrative offences. The implementation of the EU Directive will further extend the scope of conduct that will be considered as a criminal offence, in part by introducing new mechanisms to calculate the penalty. A theme that is novel in the EU Directive compared to the current state of Italian legislation is the introduction of criminal liability for corporate entities for these crimes. This circumstance will likely have a twofold effect: on the one hand, this will reflect the need for corporates to update their internal systems and controls, and on the other hand, it will impact enforcement trends.

**Luxembourg:** The current criminal sanctions applicable in Luxembourg date from respectively 2018 and 2022, when the legal framework relating to restrictive measures, including the applicable administrative and criminal offenses was completely modernised. The existing criminal sanctions are, to a

large extent, compliant with the requirements of the EU Directive. Various adjustments will still need to be made, notably to introduce the new attenuating and aggravating circumstances, which are currently inexistent under Luxembourgish law. In addition, once the EU Directive will be implemented, certain violations of the relevant laws which were only subject to administrative fines from the supervisory authorities will become genuine criminal offenses.

**Netherlands:** The Netherlands historically has chosen to enforce sanctions violations primarily through criminal law. Consequently, Dutch criminal law already provides for offences that are the subject of the EU Directive. Amendments will be required to ensure full alignment with the provisions of the EU Directive; such amendments however are not expected to materially impact the scope of existing penal provisions. Relevant Dutch legislation further provides for criminal liability of corporate entities and fine caps that are generally compatible with penalty maximums provided for in the EU Directive. The Dutch government expects limited additional amendments to be required to fully implement the EU Directive.

**Poland:** Current Polish law already criminalises most of the offences set forth in the EU Directive, including inciting, aiding, abetting, and attempt, which are generally punishable under Polish criminal law. At the same time, Polish law provides for administrative penalties for (i) violating the obligations under EU law related to asset freezes or the prohibition on making them available to individuals and entities on the EU sanctions list, (ii) failing to adhere to the obligation to report information required under EU sanctions regulations, and (iii) violating the non-circumvention prohibition. Moreover, while Polish sanctions law does not provide for specific mitigating and aggravating factors for sanctions violations, such factors are considered in general Polish criminal law. Penalties provided by the Polish Sanctions Act will have to be amended to reflect the differentiation between maximum penalties depending on the value of the funds, economic resources or goods. Similarly, the maximum amount of administrative fines will have to be adjusted as they cannot exceed PLN 20,000,000 as of now. According to press reports, Poland is already working on adjusting its Sanctions Act to reflect the provisions of the EU Directive.

## **BOLSTERING THE ENFORCEMENT TOOLKIT: INCREASED COOPERATION WITHIN AND BETWEEN NATIONAL AND REGIONAL AUTHORITIES**

The EU Directive also seeks to reinforce the tools available to national enforcement authorities through two avenues. First, Article 13 requires member states to "*take the necessary measures to ensure that effective and proportionate investigative tools are available*" for the investigation and enforcement of the prohibited behaviours set forth in the EU Directive (emphasis added). This requires that, where appropriate, those tools shall include special investigative tools, such as those used in combatting organised crime or in other serious crime cases. Although the EU Directive provides limited guidance with respect to what effective investigative tools could constitute as well as what measures would be considered sufficiently proportionate, this obligation encourages Member States to ensure that sufficient resources – both financial and human power – are dedicated to the enforcement of EU restrictive measures in the national arena.

Second, the EU Directive calls for increased cooperation and coordination both within and between Member States. Under Article 15, Member States must appoint a unit within their competent authorities which will be responsible for

ensuring cooperation between the national enforcement authorities and the body responsible for implementing EU restrictive measures. In particular, this body will ensure that the necessary information is exchanged between the relevant administrations for strategic purposes which will go towards capitalising on the information obtained and decreasing the risk of duplicating work.

Article 16 encourages the competent authorities of Member States to share information with their counterparts in cases of suspected cross-border offences. Member States and the relevant EU institutions (including Europol, Eurojust, the European Public Prosecutor's Office and the European Commission) are required to cooperate in order to combat the violation of EU restrictive measures. In furtherance of this mission, Europol, Eurojust and a network of experts to be established by the European Commission if necessary may be called upon to provide technical and operational assistance to national authorities. Member States must also share with their counterparts and the European Commission information related to the patterns of circumvention in order to facilitate the identification of such activity across the EU. Again, this pooling of information will allow Member States to benefit from the knowledge obtained by their peers.

## OUTLOOK ON ENFORCEMENT TRENDS

As the enforcement of the EU sanctions regime takes place at national level, the current state of enforcement activity varies by country. Discord between Member States was one of the drivers of the EU Directive, which seeks to harmonise the enforcement landscape across countries. Even once the new EU Directive has been fully implemented on national level – which will likely not be for a minimum of 12 months – we can expect that differences in the level of enforcement activity between Member States will remain. These variations result from differences in terms of available resources as well as political priorities. Nevertheless, the general outlook across the EU is an expectation that we will see an uptick in enforcement actions with respect to sanctions matters.

The enforcement of sanctions breaches remains limited in the **Czech Republic**, as the first conviction for the breach of sanctions was only declared by a Czech court early this year. Nevertheless, sanctions have been in the focus of broader legislative efforts, with a national sanctions list being introduced in early 2023. The national sanctions list is updated continuously and the latest entries were added in March 2024.

There has been limited enforcement of EU restrictive measures in **France** thus far although local prosecutors have publicly stated that, as early as mid-2022, the French Ministry of Justice has considered the enforcement of sanctions regulations related to Russia to be a priority for the government.

Lately, a change in approach by public prosecutors and customs authorities has become apparent in **Germany**: while sanctions violations were only sporadically prosecuted in the past, recently more criminal and administrative offences proceedings have been initiated for alleged sanctions violations and investigative measures (such as dawn raids, seizures, etc.) have been carried out, also due to the political implications. To our knowledge, a large number of criminal and administrative offences proceedings are currently pending. For instance, prison sentences have already been imposed for EU Russia sanctions violations. Overall, there have been legislative efforts to enhance the enforcement of financial sanctions, including the creation of a Federal Central Office for Sanctions Enforcement. The EU Directive and the resulting further tightening of sanctions criminal law in Germany are in line with this development

and will certainly lead to even more attention being paid by politicians and authorities to prosecution of sanctions violations.

Before the promulgation by the EU of numerous recent sanctions packages up to the new legislation in 2023, the enforcement on sanctions breaches in **Italy** was very limited, in part due to the fact that only certain breaches could trigger criminal liability. With the recent criminalisation of certain conduct and the introduction of corporate criminal liability through the EU Directive, we expect to see an increase in investigations in the upcoming years.

The Dutch Public Prosecution Service faced public scrutiny over the limited number of enforcement actions in relation to Russian sanctions (*e.g.*, limited number of court proceedings initiated; no published criminal settlements). The intake of criminal investigations in the **Netherlands** subsequently has increased, from around 45 active investigations in March 2023 to around 75 in October 2023 (latest figure publicly available update). Investigative activity appears to focus *inter alia* on individuals and companies that are involved in evasive constructions, such as trade-lines through third countries commonly used to circumvent restrictive measures. The Dutch government further considers implementation of a framework that allows for administrative enforcement of sanctions, which would result in a further expansion of enforcement capacity.



## CONTACTS



**Michael Lyons**  
Partner  
London  
T +44 207006 4317  
E michael.lyons  
@cliffordchance.com



**Charles-Henri Boeringer**  
Partner  
Paris  
T +33 1 4405 2464  
E charles-henri.boeringer  
@cliffordchance.com



**Dorothee Vermeiren**  
Partner  
Brussels  
T +32 2 533 5063  
E dorothee.vermeiren  
@cliffordchance.com



**Ada Schmitt**  
Partner  
Luxembourg  
T +352 48 50 50 435  
E ada.schmitt  
@cliffordchance.com



**Gerson Raiser**  
Counsel  
Frankfurt  
T +49 69 7199 1450  
E gerson.raiser  
@cliffordchance.com



**Jan Dobry**  
Counsel  
Prague  
T +420 222 55 5252  
E jan.dobry  
@cliffordchance.com



**Roel de Jong**  
Counsel  
Amsterdam  
T +31 20 711 9116  
E roel.dejong  
@cliffordchance.com



**Ann Du**  
Senior Associate  
Paris  
T +33 1 4405 5293  
E Ann.Du  
@cliffordchance.com

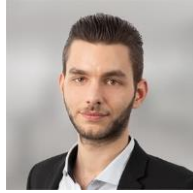


**Ludovica D'Alberty**  
Senior Associate  
Milan  
T +39 02 8063 4278  
E ludovica.dalberty  
@cliffordchance.com



**Arthur Leonhardt**  
Senior Associate  
Frankfurt

**T** +49 69 7199 2256  
**E** Arthur.Leonhardt  
@cliffordchance.com



**Laurent Dimmer**  
Senior Associate  
Luxembourg

**T** +352 48 50 50 213  
**E** laurent.dimmer  
@cliffordchance.com



**Yolanda Ghita-  
Blujdescu**  
Senior Associate  
Luxembourg

**T** +352 48 50 50 489  
**E** yolanda.ghita-  
blujdescu  
@cliffordchance.com



**Anna Miłoszewska**  
Advocate  
Warsaw

**T** +48 22429 9683  
**E** Anna.Miloszewska  
@cliffordchance.com

**Liselotte Dupont**  
Lawyer  
Brussels

**T** +32 2 533 5821  
**E** liselotte.dupont  
@cliffordchance.com