



BUNDESRECHTSANWALTSKAMMER

Position no. 04/2023

January 2023

Register ID: 25412265365-88

Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures (COM(2022) 684 final) of 2 December 2022

Members of the Criminal Law Committee

Rechtsanwalt Prof. Dr. Jan Bockemühl
Rechtsanwalt Prof. Dr. Alfred Dierlamm
Rechtsanwalt Prof. Dr. Dr. Alexander Ignor (Chair)
Rechtsanwalt Prof. Dr. Björn Gercke
Rechtsanwalt Thomas C. Knierim (Rapporteur)
Rechtsanwalt Dr. Daniel M. Krause
Rechtsanwalt Prof. Dr. Holger Matt (Rapporteur)
Rechtsanwältin Anke Müller-Jacobsen
Rechtsanwalt Prof. Dr. Ralph Neuhaus
Rechtsanwalt Prof. Dr. Tido Park
Rechtsanwalt Dr. Jens Schmidt
Rechtsanwältin Dr. Annette von Stetten
Rechtsanwältin Dr. Anne Wehnert

Prof. Dr. Dominik Brodowski, LL.M. (UPenn) (Rapporteur)

Rechtsanwältin Ulrike Paul Vice President of the Bundesrechtsanwaltskammer
Rechtsanwalt Frank Johnik, Bundesrechtsanwaltskammer, Berlin

Members of the European Affairs Committee

Rechtsanwalt und Notar a.D. Kay-Thomas Pohl (Chair and Rapporteur)
Rechtsanwalt Dr. Hans-Joachim Fritz
Rechtsanwältin Dr. Margarete Gräfin von Galen
Rechtsanwalt Marc André Gimmy
Rechtsanwalt Andreas Max Haak
Rechtsanwalt Dr. Frank J. Hospach
Rechtsanwalt Guido Imfeld
Rechtsanwalt Dr. Christian Lemke

Bundesrechtsanwaltskammer

The German Federal Bar
Barreau Fédéral Allemand
www.brak.de

Büro Berlin – Hans Litten Haus

Littenstraße 9 Tel. +49.30.28 49 39 - 0
10179 Berlin Fax +49.30.28 49 39 - 11
Deutschland Mail zentrale@brak.de

Büro Brüssel

Avenue des Nerviens 85/9 Tel. +32.2.743 86 46
1040 Brüssel Fax +32.2.743 86 56
Belgien Mail brak.bxl@brak.eu

Rechtsanwalt Andreas von Máriássy
Rechtsanwalt Maximilian Müller
Rechtsanwältin Dr. Kerstin Niethammer-Jürgens
Rechtsanwalt Dr. Hans-Michael Pott
Rechtsanwalt Jan K. Schäfer, LL.M.
Rechtsanwältin Stefanie Schott
Prof. Dr. Gerson Trüg

**Rechtsanwalt und Notar Dr. Thomas Remmers, Vice President of the
Bundesrechtsanwaltskammer**
Rechtsanwältin Astrid Gamisch, LL.M., Bundesrechtsanwaltskammer, Brussels
Ass. jur. Sarah Pratscher, Bundesrechtsanwaltskammer, Brussels
Ass. jur. Viliana Ilieva, Bundesrechtsanwaltskammer, Brussels
Ass. jur. Frederic Boog, LL.M. Bundesrechtsanwaltskammer, Brussels

The Bundesrechtsanwaltskammer (The German Federal Bar, BRAK) is the umbrella organisation of the self-regulatory bodies of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 166,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

Position

On 2 December 2022, the European Commission presented its Proposal for a Directive on penalties for the violation of Union restrictive measures. The Commission has set a deadline for stakeholders to submit comments until 30 January 2023. In parallel, the German Federal Ministry for Economic Affairs and Climate Protection gave stakeholders the opportunity to comment on the draft Directive until 13 January 2023.

Pursuant to Article 83 (1) TFEU, the Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. The areas of crime previously listed on the basis of this article were only terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. This catalogue of "EU criminal offences" was extended by a unanimous Council decision of 28 November 2022 ((EU) 2022/2332) to include the violation of Union restrictive measures. The European Commission's legislative proposal establishes minimum standards for the investigation, prosecution and criminal-law penalties for violations of sanctions, as well as requirements for judicial cooperation. The issue enjoys top political priority at the European level. At the same time, the draft Directive touches on fundamental questions, for example with regard to national criminal law, criminal procedural law and the professional law of lawyers (confidentiality, protection of professional secrecy).

The Proposal's core is a list of violations of EU sanctions which are to constitute a criminal offence, including the provision of punishable legal advisory services and, as a circumvention of a measure, the breach of an obligation under Union restrictive measures to provide information to the competent administrative authority (Article 3(2)). The violation of Union restrictive measures is also to be considered a predicate offence for money laundering. Article 5 contains penalty frameworks for natural persons, Articles 6 and 7 the liability of and penalties for legal persons. Article 11 deals with jurisdiction rules, Article 14 with persons who report offences and Article 13 with the coordination and cooperation between the competent authorities in the Member States. According to Recitals 24 and 25, fundamental rights, such as the right of defence and the procedural rights of suspects and accused persons in criminal proceedings, shall be safeguarded, as well as, according to Article 3(4), the fundamental right of defence to not incriminate oneself.

The German Federal Bar fundamentally welcomes and endorses the Commission's legal policy project. The Directive is intended to contribute to the effective enforcement of EU sanctions - currently in particular with regard to the Russian war of aggression in Ukraine, which is contrary to international law. It contains minimum rules for the definition of criminal offences and sanctions. Legal professionals are also to be subject to the Directive insofar as they provide legal services that are "prohibited or restricted by Union restrictive measures, such as legal advisory services" (Article 3(2)(g)). As regards reporting obligations covered by Article 3 (2) ("to report information"), an exemption is provided for information obtained in the course of certain legal activities, unless the professional participated in the violation, the legal advice was given for the purposes of the violation, or the professional knows "that the client is seeking legal advice for the purposes of violating Union restrictive measures" (Article 3(5)); such knowledge "can be inferred from objective factual circumstances" (Recital 7). However, Article 3(2)(g) does not contain a reporting obligation punishable under criminal law for lawyers; rather, Article 3(6) excludes the application of paragraph 2 to "failure to report such activities". Instead, reporting obligations are only provided for pursuant to Article 3(2)(h).

The German Federal Bar considers the following points to be particularly important:

1. Criminalisation of legal advice (Article 3(2)(g))

Article 3(2)(g) of the proposed Directive seeks to impose an obligation on the Member States to make "legal advisory services" that is prohibited by restrictive measures subject to a penalty. This ties in with the distinction between "legal advice" and "legal representation" as introduced by the "8th Sanctions Package" (Article 1 No. 12 of Council Regulation (EU) 2022/1904¹) in Article 5n(2) of Council Regulation (EU) No 833/2014. German and European professional law for lawyers, however, does not provide for suitable criteria for a distinction between and delimitation of legal advisory services and legal representative services. Rather, lawyers in Germany are independent organs of the administration of justice (§ 1 Federal Lawyers Act, *Bundesrechtsanwaltsordnung*, BRAO), who are mandated and authorised to provide comprehensive advice and representation to

¹ Cf. also the Commission's latest FAQs dated 21 December 2022.

their clients in all fields of law (§ 3 BRAO). These legal services are provided irrespective of whether the legal questions to be assessed are directly or indirectly related to the proceedings of the authorities, courts, arbitral tribunals or mediation bodies, or whether legal representation vis-à-vis outside third parties is indicated. In Germany, lawyers even have the duty to provide risk-oriented legal advice in every accepted case, which, depending on the specific circumstances of the individual case, also includes advising against contentious formal proceedings or conducting negotiations and agreements outside formal proceedings. Consequently, the prohibition of legal services applies comprehensively; it is impossible to split legal services – at random or arbitrarily in retrospect - into "legal advice" which is subject to punishment and "legal representation" which is not. In the EU Member States, the prohibition has the effect of, *inter alia*, restricting access to qualified legal services provided by lawyers admitted to the Bar (Articles 47, 48 CFR), restricting the freedom to communicate with lawyers (Article 7 CFR), as well as jeopardizing the protection of professional secrecy (Articles 7, 47, 48 (2) CFR, Articles 6, 8 ECHR). It is also unlikely to withstand current CJEU case law (CJEU – Grand Chamber, Judgment of 8.12.2022 – C-694/20; cf. also 3. below). The administrative and criminal procedural possibilities of control against the will of the lawyers and clients concerned that go hand in hand with the prohibition are disproportionate to the sanctions' objectives. Reversing the burden of proof to provide (lawful and) regular legal services causes an undue restriction of the principles of the rule of law and professional secrecy.

Overall, The German Federal Bar would like to recall its criticism regarding the Regulation's associated restrictions of the rule of law, expressed in the letter of 7 October 2022 from The German Federal Bar's President, Rechtsanwalt und Notar Dr. Ulrich Wessels, to the Federal Minister of Justice, Dr. Marco Buschmann, as well as to The German Federal Bar's parallel position on the restrictions of services in the field of legal advice by Council Regulation (EU) 2022/1904 of 6 October 2022, OJ 259 I/3, on the basis of Decision (CFSP) 2022/1909.

2. Derogation in Article 3(5)

The exemption of legal professionals contained in Article 3(5) mentioned above, only includes reporting obligations ("to report information") that are subject to sanctions, but explicitly refers to both, information obtained in direct connection with judicial proceedings (or administrative or arbitral proceedings) and to information obtained in the course of ascertaining the "legal position of a client". This clarification in Article 3(5) and Recital 7 is most welcome. However, the question still arises as to which punishable reporting obligations this exemption in Article 3(5) is supposed to refer to (presumably Article 3(2)(h)), since Article 3(6) excludes the failure to report the respective activities anyway. In this respect, the draft Directive takes an important step in the right direction, but falls short of the essential point: legal advisory services, like legal representation services, must in principle be allowed for natural and legal persons, "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" (exact wording of the exception to

the exception, but only with reference to reporting obligations in Article 3(5); this is discussed in greater detail below under 4). Thus, according to the wording of Article 3(5), it is obviously and correctly assumed that legal advice ("ascertaining the legal position of a client") - outside legal representation in the narrower sense of specific proceedings - is permissible and subject to the lawyer's professional secrecy and the protection of confidentiality. Corresponding clarifications should also be made in other legal instruments as soon as possible (cf. 1. above).

The institutions have recently communicated with a lack of clarity and understanding, thinking that confidentiality could be limited to the extent that only the legal representation in proceedings is fully guaranteed. Thus, the FAQs of 2 December 2022 on the proposal for a Directive ² also deal with the guarantees for legal professionals. On the one hand, they should not have to incriminate themselves (right to remain silent within the meaning of the Charter of Fundamental Rights and Directive (EU) 2016/343), i.e. fundamental rights are safeguarded with regard to those who initially have nothing to do with the lawyer's professional activities, even if the clarification in Article 3(4) is helpful. Consequently, no information would have to be reported which was obtained in connection with legal proceedings (or administrative or arbitration proceedings); here, however, the reference to ascertaining the legal position for the client is (unfortunately) still missing. It was eventually included when it was introduced in the present proposal for a Directive of 2 December 2022 (Article 3(5), Recital 7), thus providing appropriate clarification.

In this context, we would like to recall the unclear (and, if misinterpreted, unacceptable) wording of the exemption from regulations for professionals subject to professional secrecy pursuant to Article 8 of Regulation (EU) 2022/1273³ amending Regulation (EU) No 269/2014⁴ concerning restrictive measures in respect of acts undermining or threatening the territorial integrity, sovereignty and independence of Ukraine of July 2022. This was amended in the course of revision, only to increase the risk of misunderstandings: previously, the sentence read "without prejudice to the applicable rules concerning reporting, confidentiality and professional secrecy, natural and legal persons, (...) shall", now it says "notwithstanding the applicable rules concerning reporting, confidentiality and professional secrecy, natural and legal persons, (...) shall". In its FAQs of 10 November 2022 on Regulation (EU) 2022/1273, the Commission only pointed out that information obtained in connection with legal representation in court does not fall under the reporting obligation; however, this is too short-sighted and would cause friction with the law governing the legal profession. This artificial division of legal activities into judicial and non-judicial activities is unacceptable with regard to the confidentiality characterizing the lawyer/client relationship (cf. also Article 4 of Directive 2013/48/EU) and to the professional secrecy lawyers have to observe – failure to do so is punishable under criminal law - and would be incompatible with the law governing the legal profession; furthermore, it would not be in line with CJEU and ECtHR case law either. In contrast to the Regulation, the wording used in the current proposal for a Directive is now unambiguous and refers

² https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7373

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022R1273>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?from=EN&uri=CELEX%3A32014R0269>

to legal representation and legal advice, and in this respect, the European legal profession's persistent efforts to obtain clarification are already reflected in the present Commission's draft Directive. It is a red line which the Commission has fortunately drawn here, thus providing clarity, and which must also be applied in the preceding legal instruments by way of interpretation – or, even better, by way of subsequent legislative clarification. This clear position, which the Commission has evidently also adopted in its current draft Directive, is now also expressly supported by current CJEU case law.

3. CJEU judgment of 8 December 2022 (C-694/20)

Even though the judgment of the Court of Justice of the European Union of 8 December 2022 was not yet available when the Commission published the proposal for a Directive on 2 December 2022, the judgment of 8 December 2022 (C 694/20) will be briefly discussed here. The CJEU derives the protection of lawyers' professional secrecy from Article 7 CFR and Article 8 ECHR, specifically in non-judicial proceedings. Article 47 CFR was not relevant to the CJEU's decision in case C-694/20. In paragraphs 63-64 and 66, the CJEU explicitly derives the protection of legal professional secrecy for out-of-court advice as being equivalent to the protection of information obtained in connection with proceedings from Article 7 CFR and Article 8 (1) ECHR and decided accordingly in this case.

As a general rule, all future legal instruments, and also existing legal instruments as soon as they are revised, must take into account both the fair trial aspect (Article 47 CFR) and the right to respect for private and family life within the meaning of Article 7 CFR and Article 8 ECHR. It must therefore be standard in all EU legal instruments that information obtained by a lawyer in the course of ascertaining the legal position of a client is protected in the same way as information obtained by the lawyer in direct connection with judicial, administrative or arbitral proceedings before, during or after the proceedings. We take the liberty of highlighting the following quotations from the CJEU on the legal framework (paras. 25-28):

25 In that regard, it should be noted that Article 7 of the Charter, which recognises that everyone has the right to respect for his or her private and family life, home and communications, corresponds to Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), while Article 47, which guarantees the right to an effective remedy and the right to a fair trial, corresponds to Article 6(1) ECHR.

26 In accordance with Article 52(3) of the Charter, which is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law, the Court must therefore take into account, when interpreting the rights guaranteed by Articles 7 and 47 of the Charter, the corresponding rights guaranteed by Article 8(1) and Article 6(1) ECHR, as interpreted by the

European Court of Human Rights ('the ECtHR'), as the minimum threshold of protection (see, to that effect, judgment of 2 February 2021, Consob, C-481/19, EU:C:2021:84, paragraphs 36 and 37).

27 *As regards the validity of Article 8ab(5) of amended Directive 2011/16 in the light of Article 7 of the Charter, it is apparent from the case-law of the ECtHR that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients (see, to that effect, ECtHR, judgment of 6 December 2012, Michaud v. France, CE:ECHR:2012:1206JUD001232311, §§ 117 and 118). Like that provision, the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and to its existence. As the ECtHR has pointed out, individuals who consult a lawyer can reasonably expect that their communication is private and confidential (ECtHR, judgment of 9 April 2019, Altay v. Turkey (No 2), CE:ECHR:2019:0409JUD001123609, § 49). Therefore, other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.*

28 *The specific protection which Article 7 of the Charter and Article 8(1) ECHR afford to lawyers' legal professional privilege, which primarily takes the form of obligations on them, is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants (ECtHR, judgment of 6 December 2012, Michaud v. France, CE:ECHR:2012:1206JUD001232311, §§ 118 and 119). That fundamental task entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that any person must be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client (see, to that effect, judgment of 18 May 1982, AM & S Europe v Commission, 155/79, EU:C:1982:157, paragraph 18).*

4. Exception to the exception in Article 3(5) ("except where")

The problem with the present draft remains the exception to the exception in Article 3(5), which is intended to apply if the legal professional takes part in the violation of Union restrictive measures, the legal advice is given for the purposes of violating Union restrictive measures, or the legal professional knows that the client is seeking legal advice for the purposes of a violation. This exception to the exception is problematic for two reasons: first, it suggests that participation in a client's criminal acts is part of a lawyer's professional practice. Secondly, if a lawyer is accused of having committed a criminal offence as a perpetrator or participant, the right "not to incriminate oneself and to remain silent", expressly stated in Recital 24 and in Article 3 (4), would be violated. In the case of a lawyer's participation in a criminal offence, an obligation to report and a penalty linked to this obligation to report, would be the wrong sanction. The sanction actually provided for by law is criminal liability for criminal involvement. For this reason, The German Federal Bar suggests removing the exemption from Article 3(5) of the draft in the context of alleged reporting

obligations and explaining in a recital that legal professionals are not protected by professional secrecy if they are responsible as perpetrators or participants in the commission of punishable acts outside their legal practice. The consequence of this, however, is not a revival of a duty to report, but rather the criminal liability of such conduct.

5. Increased requirements for the criminal prosecution of lawyers

With regard to the criminal prosecution of lawyers, particularly high requirements for coercive measures in criminal proceedings must apply (degree of suspicion, proportionality) in order to effectively counter any abuse by state prosecution bodies (e.g. by circumventing legal prohibitions on seizure and by procedural violations of the protection of professional secrets).

6. Further fundamental suggestions based on criminal law doctrine

Article 3(2)(h)(v) is completely unclear as to what kind of conduct is to be made punishable by the Member States: is it supposed to mean that failure to provide any kind of additional information is to be made punishable under criminal law? As a minimum standard, The German Federal Bar suggests that the types of conduct specified in point (h) must be carried out with the intention of circumventing a restrictive measure. This would narrow down the scope of point (v) accordingly. In this context, the necessary exceptions for lawyers (cf. 1.-5. above) must of course be observed with rigour.

Article 3(3) of the draft Directive provides that conduct that is subject to punishment shall constitute a criminal offence also if it is committed with "serious negligence". The term "serious negligence" is indeterminate, at least as far as European law is concerned, and will lead to different legal practices in the Member States. Furthermore, paragraph 3 contradicts paragraph 1 ("committed intentionally"). This would also clarify, for example, the disputed legal question that (grossly) negligent ignorance of the fact that one is dealing with a listed person is sufficient to establish a criminal liability. At the same time, however, it becomes clear that the focus of punishable conduct is shifting from genuine punishable acts to the violation of due diligence rules, which is highly problematic, both with regard to the question of punishability and the *ultima ratio* principle, as well as with regard to the legal profession's role in a functioning administration of justice (cf. above on ECtHR and CJEU case law). The German Federal Bar suggests that Article 3(2)(g) (i.e. legal advisory services) be excluded from the references made in Article 3(3), if not to delete Article 3(3) altogether.

Article 4(1) of the draft Directive must be limited to intentional acts in accordance with Article 3(1). Otherwise, participation in acts of negligence would be punishable, which is not possible, at least according to German criminal law doctrine. The same applies as regards the attempt to commit a criminal offence pursuant to Article 4(2) of the draft Directive.
