



FinTech, the TFR and Sanctions **Assoc.-Prof. Dr. Stanisław Tosza**

Faculty of Law, Economics and Finance, University of Luxembourg

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UNIVERSITÉ DU
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State of play of the proposal

- Council Decision 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union
- European Commission 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 of 2 December 2022 (COM/2022/684 final)

State of play of the proposal (cont'd)

European Commission 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 of 2 December 2022 (COM/2022/684 final).

- Council's General Approach – 9 June 2023
- EU Parliament's Position – 6 July 2023
- Three trialogues: 12 July, 26 September, 30 November 2023 (supposed to be the last).
- Adoption: Winter 2024? 6-12 months for implementation

Rationale

➤ Lack of harmonization:

- In 12 Member States, the violation of Union restrictive measures is solely a criminal offence,
- while 2 Member States categorise it as an administrative offence (ES, SK)
- 13 Member States provide for the possibility of sanctions violations being either criminal or administrative offences, depending on their gravity (e.g., under Lithuanian law, a sanctions violation is only a criminal offence if it causes major damage to the interests of the Republic of Lithuania)
- In States which categorise sanctions violations as a criminal offence, the period of imprisonment to which the person can be sentenced ranges from 6 months to 12 years
- Consistent application of the Union policy on restrictive measures
- Forum shopping
- Urgency: no impact assessment
- Applicable to violations of restrictive measures adopted on the basis of Article 29 TEU or Article 215 TFEU

Criminalisation – list of courses of conduct considered violation of restrictive measures:

- Making funds or economic resources available to a natural or legal person subject to restrictive measures
- Failing to freeze funds or economic resources belonging to a natural or legal person in violation of an obligation to do so
- Enabling the entry into the territory of a Member State or transit of natural persons subject to restrictive measures
- Entering or continuing transactions which are prohibited or restricted
- Engaging in trade, commercial or other activities prohibited or restricted
- Providing (or performing) financial or other services that are prohibited or restricted
- Circumventing a restrictive measure (e.g., transferring funds to conceal them; concealing the real identity of the owner of funds)
- Breaching applicable conditions under authorisations by competent authorities to conduct certain activities

Punishable when committed intentionally (Council)

or also with serious (Commission) or even simple negligence (EU Parliament)

+ inciting, aiding and abetting (Art. 4)

+ criminal penalties for natural persons (Art. 5)

Criminalisation – Penalties:

➤ Natural persons

- monetary threshold of EUR 100 000 (EU Parliament → EUR 50 000)
- maximum penalty of at least one year of imprisonment as regards conducts in Art. 3(2),(h)(iii),(iv) and (v)
- at least 5 year for the others
- + additional penalties
- EU Parliament → maximum fine of EUR 10 million (where the offences involve funds of at least EUR 100 000)

➤ Legal persons

- criminal or non-criminal fines, exclusion from entitlement to public benefits or aid, exclusion from access to public funding + other penalties
- fines = not less than 1 percent of the total worldwide turnover (EU Parliament → 5 percent) (Council → possibility for MS to set absolute amounts of EUR 8 or 40 million respectively)

Link with AML - current preventive framework

Art. 3 (4) AMLD 4/5: ‘criminal activity’: (f) all offences [...] as defined in the national law of the Member States, which are punishable by deprivation of liberty or a detention order **for a maximum of more than one year** or, as regards Member States that have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order **for a minimum of more than six months**

Application of the current definition of predicate offence to violation of Union restrictive measures:

- If an administrative offence under national law: not applicable (e.g., Spain)
- If a criminal offence:
 - Maximum deprivation of liberty ≤ 1 year: not applicable in Greece (max. 6 months)
 - Applicable in all other MSs (maximum imprisonment between 2 to 12 years)

Link with AML – proposal for the Sanctions Directive

- Under the proposal → It depends
 - Imprisonment – depends on national law
 - maximum imprisonment of at least one year – depends on national law
 - maximum imprisonment of at least of five years – it is covered
- Amendments to Directive (EU) 2018/1673 added to the definition of ‘criminal activity’ (predicate offence): ‘(w) violation of Union restrictive measures’ (Art. 2 (1))
 - (but this does not affect AML4/AML5 as they are now, but....)

Current State of Play

- Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD), modified by:
 - Directive (EU) 2018/843
 - Directive (EU) 2019/2177 (introduction of virtual currencies)
 - Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets (TFR2) (adaptation of AMLD to the vocabulary of the MiCA on crypto-assets)
- Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law

Proposal for a reform: EC 2020 Action Plan

1. Proposal for a Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism
2. Proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing
3. Proposal for a Directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing
4. Proposal for a Regulation on information accompanying transfers of funds and certain crypto-assets

>>>> Regulation (EU) 2023/1113 of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849

Objectives

- Ensuring effective implementation of the existing EU AML/CFT framework
- Establishing an EU single rulebook on AML/CFT
- Bringing about EU-level AML/CFT supervision
- Establishing a support and cooperation mechanism for FIUs
- Enforcing EU-level criminal law provisions and information exchange
- Strengthening the international dimension of the EU AML/CFT framework

Link with AML – Penalties' threshold in the AML Reform

Proposal for the Regulation

'money laundering' means the conduct as set out in Article 3, paragraphs 1 and 5 of Directive (EU) 2018/1673 including aiding and abetting, inciting and attempting to commit that conduct, whether the activities which generated the property to be laundered were carried out on the territory of a Member State or on that of a third country. Knowledge, intent or purpose required as an element of that conduct may be inferred from objective factual circumstances

- Applying the predicate offence definition of Directive 2018/1678
- Including all violations of EU restrictive measures according to the Proposal amendment

- **Proposal for a Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism**
 - EP adds a possible direct supervision of the AMLA on certain crypto-assets service providers

- **Proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing**
 - Includes many provisions of the AMLD but through a regulation
 - Uses vocabulary of MiCA
 - Enhanced CDD on CASP for cross-border correspondent relationships & for self-hosted addresses
 - Prohibition of correspondent relationships with unregistered or unlicensed entities providing crypto asset services
 - Regulating payments in crypto-assets without the involvement of a CASP
 - Prohibition of anonymous crypto-asset wallets

- **Proposal for a Directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing**
 - Complement the Regulation & repeals the AMLD
 - Mandates contact points for CASP
 - Including of crypto-assets wallets in bank account registers

- **Proposal for a Regulation on information accompanying transfers of funds and certain crypto-assets**
 - Already adopted: TFR: extend the obligation of payment service providers to accompany transfers of funds with information on the payer and payee to crypto assets
 - Amends the AMLD to be consistent with the MiCA (from virtual currencies to crypto-assets) and for enhanced CDD on CASP for cross-border correspondent relationships & for self-hosted addresses

Shortcomings of the Reform

- Uses the vocabulary of MiCA: same shortcomings:
 - Legal uncertainty:
 - Delineation between MiCA and other financial regulation
 - Delineation between non, partially or fully decentralized services
 - Jurisdiction: national supervisory authorities and AMLA
 - Extension to NFTs?
 - Application depends on other technical norms/guidelines (how to apply CDD by CASP?)

Restrictive measures (sanctions) in the reform

- Extension of the AML/CFT scope through the concept of non-implementation or evasion of the targeted financial sanctions
 - Limited to proliferation financing in many provision of the EC
 - Extended to all targeted financial sanctions by the EP
- In particular (added by EP):
 - Proposal on the AMLA: supervision of targeted financial sanctions
 - Proposal for a Regulation: mandatory internal policies, controls, procedures, risk assessment of obliged entities to apply targeted financial sanctions
 - Proposal for a Directive: risks of non-implementation of targeted financial sanctions in the supra-national risk assessment by the Commission and in the national assessment by the MSs; national supervisors to monitor the implementation of targeted financial sanctions by obliged entities

Restrictive measures (sanctions) and crypto

- Council Regulation 2022/394 amending Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine now states that while "it is commonly understood that loans and credits can be provided by any means, including crypto assets, given their specific nature it is appropriate to further specify the notion of "transferable securities" in relation to such assets."
- "transferable securities" means the following classes of securities, including in the form of crypto-assets, which are negotiable on the capital market, with the exception of instruments of payment..."
- EU's fifth sanctions package went a step further by directly imposing a €10 000 limit on digital wallets held by Russian persons or entities
- Decision (CFSP) 2022/1909 removed the threshold for the prohibition on the provision of crypto-asset wallet, account or custody services to Russian persons and residents, thereby banning the provision of such services regardless of the total value of such crypto-assets
- Proposal for the Directive: notion of "crypto assets " appears at Article 2 among the definitions of "funds" (Article 2 (2)(c)(viii)). Moreover, the proposal explicitly mentions "providing crypto assets and wallets" among the violations listed at Article 3 (Article 3(2)(f))

Sum-up

- 1. AML as the main enforcement mechanism of restrictive measures**
- 2. Crypto as a way to circumvent restrictive measures**
- 3. Incomplete regulation and AML enforcement against crypto**

Thank you for your attention!!!

stanislaw.tosza@uni.lu