

Insights

ADOPTION OF DIRECTIVE (UE) 2024/1226 ON CRIMINALISATION OF VIOLATIONS OF EU SANCTIONS

WHAT ARE THE STAKES INVOLVED IN TRANSPOSING IN INTO FRENCH LAW?

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On 19 May, Directive (EU) 2024/1226 on the definition of criminal offences and sanctions for breaches of EU restrictive measures, adopted by the EU Council on 24 April, entered into force.

By harmonizing the laws of the Member States on this point, the aim of the Directive is to make the EU's restrictive measures more effective. Until now, Member States were not obliged to criminally prosecute the violations of these measures.

From now on, each Member State is obliged to provide for the criminal prosecution of conduct constituting a criminal offence within the meaning of Directive (EU) 2024/1226 (e.g. trade in goods or services the import or export of which is prohibited or restricted; making funds or economic resources available to sanctioned persons; circumvention of EU restrictive measures), subject to the possibility of applying a threshold for transactions or activities with a value of less than EUR 10,000. In addition, a prison sentence of one to five years, in addition to fines and supplementary penalties (e.g., the ban on holding a managerial position within a company of the same type as that used to commit the criminal offence), must systematically be imposed on natural persons and the fine incurred by legal persons must be between 1% and 5% of their total turnover or between €8 million and €40 million depending on the criminal offence and the method of calculation, in addition to additional penalties (i.e. exclusion from public funding; placement under judicial supervision).

Member States have until 20 May 2025 to transpose these new provisions.

What is the current state of French law in this area, and should we expect any major changes in the coming months?

As French law currently stands, the violation of restrictive measures taken by the European Union is already punishable under Article 459 of the French Customs Code, which provides for a prison sentence of five years and a fine equal to "*at least the amount and at most twice the sum to which the infringement relates*". In France, however, breaches of restrictive measures almost never give

rise to prosecution, and, to our knowledge, no criminal convictions have yet been handed down (see our article on this subject in our Gazette of 10 July 2023).

From this point of view, French law already complies with the requirements of Directive (EU) 2024/1226 (although a slight revision will be necessary to increase the fines applicable to legal entities).

What is really new, however, is the characterization of an offence as grossly negligent.

While the Directive requires criminal offences to be committed intentionally (see Recital 4), it specifies that trade in goods or services the import or export of which is prohibited or restricted also constitutes a criminal offence when carried out with gross negligence, "*at least where such conduct relates to items on the Common Military List of the European Union or to dual-use items listed in Annexes I and IV to Regulation (EU) 2021/821*" (Article 3).

The key question will therefore be how the concept of "*gross negligence*" will be transposed and interpreted in French law, as this concept does not currently exist in French criminal law.

This is not the first time that European legislators have referred to the concept of "*gross negligence*". Indeed, the 5th Anti-Money Laundering Directive (Directive (EU) 2018/1673 of 23 October 2018) provides that "*Member States should be able, for example, to provide that an act of money laundering constitutes a criminal offence if it was committed recklessly or as a result of gross negligence*" (Recital 13). However, when transposing the Directive, the French legislator maintained the strictly intentional nature of the offence of money laundering (unlike the Spanish and Belgian legislators) and therefore did not take the opportunity to incorporate the concept of "*gross negligence*" into French criminal law.

To date, in French law, the concept of "*gross negligence*" is only used in relation to civil liability for unauthorized payment transactions (Articles L.133-16 and L.133-19 of the French Monetary and Financial Code). In this context, negligence is qualified as "serious" when it is established that the damage could have been avoided or reduced with a little discernment, which is assessed not in terms of the person and his or her qualities, but in terms of the average behavior of an individual.

Admittedly, in criminal matters, article 121-3, paragraph 3 of the Criminal Code refers to the notion of "*negligence*", stating that "*there is also an offence, where the law so provides, in the case of recklessness, negligence or failure to fulfil an obligation of prudence or safety laid down by law or regulation, if it is established that the perpetrator failed to take all reasonable care, having regard, where appropriate, to the nature of his duties or functions, his powers and the means at his disposal*". However, in the absence of more precise legal criteria, the difficulty in practice is to determine the threshold between simple negligence and gross or gross negligence. A reading of the judgments handed down in this area shows that seriousness is often not so much a question of conduct as of its consequences.

So what does this mean for the future transposition of Directive (EU) 2024/1226?

- That only the consequences of the breach (*e.g.* in terms of the amount of money at stake) will determine the culpability of the accused? This is undesirable given the severity of the penalties incurred.
- On the model of civil liability for payment fraud, will it be possible to refer to the average behavior expected of those liable? This is unlikely when it comes to implementing restrictive measures taken by the European Union, which by their very nature are complex and generally require the deployment of a tailor-made system adapted to the sector and the specific characteristics of the entity.

Given the stakes involved in the creation of such an unintentional offence for French companies - which, as a reminder, are all, without exception, subject to the obligation to implement restrictive measures taken by the European Union - it is to be hoped that, when transposing Directive (EU) 2024/1226, the French legislator will appreciate the importance of precisely defining the concept of “gross negligence”, unless putting litigants in yet another situation of legal uncertainty in this area...

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