Mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, pursuant to Human Rights Council resolution 49/6.

In this connection, I would like to bring to your attention the following comment on the text of the **European Commission's 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** (hereafter "Directive Proposal").[1] Information received by my mandate indicates that the Directive Proposal is currently in a consultation phase at the European Parliament with the purpose of receiving input and proposals from the different groups.

At the outset, I wish to acknowledge the efforts by the European Commission to continuously reflect and propose avenues for harmonisation of the legal framework, policies and practices among the EU Member States, as well as to strengthen coordination and cooperation towards convergence and common positions in various policy areas. The Directive Proposal appears to constitute one such measure. In the Explanatory Memorandum, the EU Commission clearly outlines the rationale behind this Directive Proposal, namely the inconsistent enforcement of Union restrictive measures that undermines their efficacy; the differences among Member States' criminal definitions and penalties; the lack of criminal investigations and prosecutions; and, the absence of appropriate and effective tools and resources available to judicial authorities to prevent, detect and investigate and prosecute violations of Union restrictive measures.

As a UN Special Rapporteur working on thematic and country-specific issues pertaining to the adverse human rights and humanitarian impact of unilateral coercive measures, including unilateral sanctions, I maintain a principled position on the illegality of the measures taken by states and regional organizations without authorization of the UN Security Council and which do not correspond to criteria of countermeasures or retortions. I also have serious concerns about any measures aimed to enforce or implement such restrictive measures. Some of the concerns have been presented in my thematic report to the UN Human Rights Council in September 2022 (A/HRC/51/33)[2].

[1] 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, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0684

[2] https://www.ohchr.org/en/documents/thematic-reports/ahrc5133-secondary-sanctions-civil-and-criminal-penalties-circumvention

In this context, I wish to share in a spirit of constructive dialogue several reflections for consideration by the European Commission and other EU institutions with competence in the area of decision-making and implementation of these restrictive measures with reference to possible human rights violations and adverse humanitarian impact.

Firstly, I wish to address a general comment on the overall procedure with possible broader legal implications. The Directive Proposal seeks to affirm and harmonise the EU Member States' existing framework of criminalisation of assumed or reported incidents of interactions by EU nationals, individuals or entities, with designated individuals or entities, or with entities owned or controlled by designated individuals or entities. Such designations and sanctions listings are decided at the level of European Council and approved by the heads of the EU Member States and their Governments. In other words, it appears to provide guidance for the determination of criminal responsibility for EU or EU-based individuals or entities who engage with designated individuals or entities who are not themselves subject to criminal proceedings and for whom in certain cases there is no conclusive evidence about any criminal conduct. It derives such guidance on foreign policy decisions and provides for the use of criminal prosecution to impose penalties on individual or entities it deems criminally responsible.

In addition, the veracity of such designations may be questioned as there have been cases of erroneous sanctions listings of individuals. It thus may occur that a criminal conviction of an EU or EU-based individual or entity for engaging with a designated individual or entity, may be based on an initial erroneous listing of the designated individual or entity. This may entail potential serious violations of the rights to due process, fair trial as well as the presumption of innocence enshrined in international human rights instruments, including articles 14 and 15 of the International Covenant on Civil and Political Rights.

Another general consideration relates to the timing between the adoption of the Directive Proposal, the finalisation of its transposition by EU Members States, and the implementation assessment carried out by the EU Commission. According to article 19 of the Directive Proposal, this process may take more than five-and-a-half years with no specific reference to any mechanism for consistent and regular monitoring of its implementation in accordance with the EU law and the EU Member States' international human rights obligations, or for monitoring of any potential adverse humanitarian impact. In addition, it is not clear whether the European Commission and other competent EU institutions will be tasked to ensure that the proposed by this Directive "minimum rules" regarding the definition of criminal offences and penalties will not be interpreted excessively by national authorities with the risk of disproportionate penalties and/or irregularities in the administration of justice for alleged circumvention/violations of EU restrictive measures.

Furthermore, although a certain political context may have triggered the momentum for the elaboration of this Directive Proposal, it is nonetheless important to underscore its potential broader implications and impact on a wide range of actors, including donors, civil society organisations and humanitarian operators with presence and activities in countries targeted by unilateral sanctions, and who could be further discouraged from pursuing their life-saving and other humanitarian operations for fear of potential criminal and other repercussions.

With regards to the specific articles of the Directive Proposal, I wish to first draw the attention to article 3(6) which seeks to provide for a general exemption on humanitarian grounds. However, the scope of this exemption appears to be extremely limited as it includes only goods or services of daily use for the personal use of designated natural persons and humanitarian aid provided for persons in need, without taking into consideration the broader scope of humanitarian and operational engagement by humanitarian and other actors, which may ultimately be necessary for an effective and sustainable humanitarian action.

Article 3(2)(a-h) outlines the different types of criminal acts violating or circumventing a Union restrictive measure, including concealing funds or economic resources of designated persons, bodies or entities, concealing the beneficial ownership of these funds or economic resources, failing to freeze them without undue delay, engaging in trade on prohibited goods and in the provision of financial and brokering services, and providing other types of prohibited services, including legal advisory services, trust services, public relations services, accounting, auditing, bookkeeping and tax consulting services, business and management consulting, IT consulting, public relations services, broadcasting, architectural and engineering services. The categories provided by this article may appear clear and understandable, but at the same time their comprehensiveness and scope could exacerbate the existing uncertainty and fear among various actors, including businesses and the financial sector, which often takes the form of over-compliance and excessive de-risking, by completely disengaging from any transaction with any national or entity from countries targeted by EU restrictive measures, with potentially serious adverse effects on the rights of people in the targeted by such measures countries.

In particular, I wish to highlight the broad and all-encompassing wording of article 3(2)(d), which prohibits *"entering into transactions with a third State, bodies of a third State, entities and bodies owned or controlled by a third State or bodies of a third State, which are prohibited or restricted by Union restrictive measures."* The absence of clarity of the term "entering into transactions" may result in arbitrary interpretations to include specific types of activities of broader humanitarian nature, as well as financial transactions for the delivery of humanitarian assistance, or investment on critical infrastructure rehabilitation, all of which may fall outside the limited scope of permissible activities listed in article 3(6), namely "humanitarian aid provided for persons in need".

It could possibly also have adverse effects on actors, individuals, businesses or humanitarian operators who may not have the capacity in terms of both human and financial resources to navigate the complex regulations of EU restrictive measures and who may not have a clear legal understanding of the term of *"owned or controlled"*, and who would thus prefer to over-comply and completely disengage from any interaction with a targeted country, its bodies, institutions and entities.

Article 3(2)(i) criminalises the *"breaching or failing to fulfil conditions under authorizations granted by competent authorities to conduct activities, which in the absence of such an authorization are prohibited or restricted under a Union restrictive measure"*. This provision refers to the system of derogations/exceptions, which requires concerned parties (including humanitarian operators) to apply for licenses to the competent authority of an EU Member State and wait for the approval of such licence in order to be in the position to conduct certain types of activities in countries targeted by EU restrictive measures. An issue to consider is the addition in

this article of the term "failing to fulfil" alongside "breaching". The criteria of assessing "breach" of the obligations under a granted licence may be clearly determined by the specific provisions on derogations as stipulated in EU Council regulations and decisions, and in the annexes of these documents. The assessment, however, of "failing to fulfil" may not be as clear and may ultimately include procedural matters which are not clearly defined and regulated by the EU regulations and decisions, and instead may be left to the discretion of each national authority, with the risk of inconsistency of implementation among EU Member States. Again, this article needs to be read jointly with article 3(6) which provides for a limited scope of permissible activities for humanitarian operators, which may compound the possible adverse impact of article 3(2)(i).

In addition, the same article 3(2)(i) does not include a clear statement indicating that the referred conduct will not constitute a criminal offence if committed with negligence, which may further exacerbate fear and over-compliance, in particular for humanitarian operators, including non-traditional humanitarian operators such as faith-based organisations, whose activities may not be perceived as falling within the permitted category described in article 3(6), namely "humanitarian aid provided for persons in need".

Article 3(5) criminalises the provision of legal advisory services by a legal professional *who "knows that the client is seeking legal advice for the purposes of violating Union restrictive measures"*. There are several questions that may be raised with regards to this provision. In particular, it is not clear whether the stipulated "knowledge" by the legal professional concerns the type of activity the client engages in or whether it refers broadly to the reputation of the client. In addition, will a hypothetical legal advice about the trade in "dual-use" goods be considered as a provision of legal advisory services to a client who seeks to violate EU restrictive measures? Furthermore, the implementation of this provision may be contingent upon the possible different standards applied among EU Member States pertaining to the issue of legal privilege and safeguards for the independence of the legal profession, in particular on matters pertaining to the application of and compliance with EU restrictive measures, and might additionally impede access to justice for natural and legal persons.

Article 4 of the Directive Proposal provides for the criminalisation of *"inciting, aiding and abetting the commission of criminal offences referred to article 3"*. Such broad terminologies could be misunderstood by concerned parties, and in some cases arbitrarily interpreted by the competent authorities tasked to investigate and prosecute the alleged perpetrators, thus further exacerbating uncertainty and fear for possible transgressions of the law, resulting in over-compliance. This could potentially entail human rights violations, including the right to freedom of expression, including by means of public advocacy against specific regulations of the EU restrictive measures or expressed open criticism about certain types of prohibited by these regulations goods or services.

Matters relating to due process and risks for over-compliance and excessive de-risking among humanitarian actors, businesses and the financial sector can also be raised with regards to the wording of article 5.4. This specific article provides that *"Member States shall take the necessary measures to ensure that criminal offences referred to article 3(2), points (a) to (g), (h)(i) and (ii), and point (i), are punishable by a maximum penalty of at least five years of imprisonment when they involve funds*

or economic resources of a value of at least EUR 100,000. Member States shall ensure that the threshold of EUR 100,000 or more may also be met through a series of linked offences referred to in article 3(2), points (a) to (g), (h)(i) and (ii), and point (i), by the same offender". Due to the serious challenges in identifying possible ties of individuals or entities with designated individuals or entities, due also to cases of complex corporate relationships and structure, as well as in ensuring that there is no misuse or deviation of a reported transaction that might ultimately involve a designated individual or entity, the stipulation in article 5.4 may seriously discourage humanitarian operators from engaging in transactions with countries targeted by sanctions of a cumulative value of EUR 100,000 and above, thus potentially limiting the scope of their work. Similarly, businesses, banks or other money service providers may choose to block financial or in-kind transactions which are cumulatively equal to or higher than EUR 100,000, either on their behalf or on behalf of humanitarian operators, notwithstanding any provided assurances about the beneficiaries of these transactions.

The same article invites ("shall ensure") Member States and by extension their national competent authorities (including investigative and prosecutorial ones) to meet the EUR 100,000 threshold by adding other linked offences. Such a provision may be arbitrarily implemented resulting in potential violations of due process and fair trial guarantees, including by means of possible pressures for self-incrimination for alleged violations linked to a pecuniary value of less than EUR 100,000.

Article 7.3 provides guidance for the amount of pecuniary penalty imposed on liable legal persons, which *"should not be less than 5 percent of the total worldwide turnover of the legal person in the business year preceding the fining decision"*. It appears that this wording establishes only the minimum percentage by leaving to the discretion of the national competent authorities the determination of the actual level of the pecuniary penalty, which may be ultimately decided arbitrarily and in certain cases in a discriminatory manner. Possible excessive fines against humanitarian operators, including non-traditional humanitarian actors such as faith-based organisations, in particular those with limited resources, may be catastrophic for their overall operational existence with adverse effects on the lives of the peoples they support.

Another element that may open the door for possible arbitrary interpretation and application is the inclusion of "criminal organisation" as an aggravating circumstance for the offences referred to in both articles 3 and 4 of the Directive Proposal. Article 8(a) of the Directive Proposal refers to offences "committed in the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA". It is not clear whether the "meaning" refers only to article 1 of the said Framework Decision, namely the definition of "criminal organisation", or whether it also considers the other provisions, including article 2, which provides for the offences relating to the participation in a criminal organisation, and which includes among others the elements of "intent", "knowledge" about the intent and activities, as well as the "recruitment of new members".

Finally, in terms of other safeguards, reference can be made to article 16 of the Directive Proposal and the need to ensure full protection of the human rights of persons under investigation, including right to privacy and protection of personal data, particularly in the context of cross-border cooperation, cooperation among EU Member States and authorities, as well as cooperation with the Commission, Europol,

Eurojust and the European Public Prosecutor's Office, in line with international human rights standards, as well as the criteria laid down in the EU data protection legislation and the relevant articles of the EU Charter of Fundamental Rights.

This communication, as a comment on pending or discussed resolutions, regulations or policies, and any response received will be made public via the communications reporting website after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council. I remain open for any further interaction and discussion on this matter.

Please accept, Excellency, the assurances of my highest consideration.

Alena Douhan
Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights