

EU Introduces “Best Efforts” Requirement for Non-EU Subsidiaries Not to Undermine EU Sanctions Against Russia

The EU’s 14th “package” of sanctions against Russia introduces anti-circumvention measures targeting the non-EU subsidiaries of EU entities and creates new restrictions, including on LNG.

This Client Alert is published in the context of ongoing developments and should be read in conjunction with Latham’s [previous sanctions updates](#). This Client Alert is not intended to take the form of official legal advice. Given the frequency with which different jurisdictions impose new sanctions, and the detailed and nuanced nature of the sanctions updates, businesses exposed to sanctions-related developments should obtain up-to-date legal advice before taking any steps that may have legal consequences.

On 24 June 2024, the EU adopted its 14th “package” of sanctions following Russia’s 2022 invasion of Ukraine. This package introduced enhanced measures, including sanctions targeting Russian liquid natural gas (LNG), and measures aimed at tightening existing sanctions. These new anti-circumvention measures include a “best efforts” obligation for EU entities to ensure their non-EU subsidiaries do not undermine the EU trade sanctions contained in [Regulation 833/2014](#). This Client Alert addresses these changes in further detail and summarises the main aspects of the 14th package.

The 14th Package — Key Changes

As with its previous sanctions packages, the EU’s 14th package updates [Regulation 833/2014](#) (Regulation 833) and [Regulation 269/2014](#) (Regulation 269), which are the main pieces of EU legislation containing Russia-related sanctions.

The substantive changes for Regulation 833 are contained in [Regulation 2024/1745](#) of 24 June 2024 (the Update).

Regulation 833 — Updates

The Update implements numerous amendments to Regulation 833, including:

- the extension of the EU ban on investing in the Russian energy sector to include projects under construction for the production of LNG. This measure further prohibits the sale, supply, transfer, or export of goods for the completion of LNG projects in Russia (Articles 3a and 3t) along with a

prohibition on providing reloading and associated services “for the purposes of transshipment operations” of certain Russian-origin LNG (**Article 3r**).

- closing certain loopholes regarding EU sanctions against Russian air travel (**Article 3d**), sea travel (**Article 3ea**), and road transportation (**Article 3l**);
- amending the existing restrictions on the export and import to or from Russia of targeted goods (**Articles 3i and 3k**);
- amending the ban on the import of Russian-origin diamonds (**Article 3p**);
- new restrictions on dealing with Ukrainian cultural items where there are reasonable grounds to suspect that they have been illegally removed from Ukraine (**Article 3v**);
- creating a legal basis whereby the EU may designate certain vessels which should be denied port access and become subject to other sanctions (to be listed in a new Annex XLII) (**Article 3s**);
- a prohibition on listed persons (to be listed in a new Annex XLIII) who have “lodged a claim before a Russian court against an [EU person] to obtain an injunction, order, relief, judgment or other Court decision pursuant to Article 248 of the Arbitration Procedure Code of the Russian Federation or equivalent Russian legislation, in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under [Regulation 833 or Regulation 269]” (**Article 5ab**). This new measure is presumably intended to target Russian entities that have ignored non-Russian dispute resolution clauses and sued western companies for having taken steps to comply with EU and other sanctions;
- a prohibition on EU banks outside Russia from connecting to Russia’s SWIFT replacement, the System for Transfer of Financial Messages (SPFS), and enabling EU authorities to impose sanctions on listed persons who use the SFPS (**Article 5ac**);
- creating a legal basis whereby the EU may designate listed persons who provide crypto-asset services in order to circumvent certain sanctions (**Article 5ad**);
- restrictions on the ability of EU-based intellectual property offices to accept applications from Russian persons (**Article 5s**);
- a prohibition on European political parties, NGOs, and media service providers from accepting donations from the Russian government or entities it owns or directs (**Article 5t**);
- expanding the obligation for EU operators to include a so-called “no Russia” clause in sales contracts regarding certain sensitive goods. As of 26 December 2024, contracts relating to “intellectual property rights or trade secrets” shall be required to include a clause to ensure that such rights are not used in connection with the sale, supply, transfer, or export of such sensitive goods to, or for use, in Russia (**Article 12ga**); and
- obliging EU operators selling sensitive items affected by the “no Russia” clause, as of 26 December 2024, to perform proportionate risk audits and implement appropriate policies, controls, and procedures (**Article 12gb**).

The Update also provides for the additional articles described below.

Article 8a — “Best Efforts” Obligation

The new Article 8a requires EU persons to “undertake their best efforts” to “ensure that any legal person, entity, or body established outside the Union that they own or control does not participate in activities that undermine” the sanctions contained in Regulation 833.

To date, the EU’s limited guidance on this new measure, which has a potentially far-reaching impact, is contained in Preamble (27)-(30) of the Update. The Preamble indicates that the measure is intended “to prevent, for example, that a recipient in Russia obtains goods, technology, financing or services of a type that is subject to prohibitions under [EU sanctions]”. It suggests that appropriate “best efforts” to prevent this “can include, for example, the implementation of appropriate policies, controls and procedures to mitigate and manage risk effectively”.

The Update’s Preamble also indicates that the obligations may arise if the EU person owns “50% or more” of the non-EU entity. This mirrors a recent change to the EU’s [“Best Practices”](#) document, in which the EU altered its previous position that majority ownership occurred if the parent entity owned “more than 50%” of the subsidiary. On 3 July 2024, the EU updated this to indicate that majority ownership occurs if a person has “possession of 50% or more of the proprietary rights of an entity”.

Articles 11a and 11b — Legal Basis for Claims for Compensation

Articles 11a and 11b introduce the legal basis for new mechanisms by which EU persons can claim damages from persons who have either: (a) lodged claims in non-EU courts regarding contracts affected by EU sanctions; or (b) benefitted from Russian legislation which [provides for the expropriation](#) of EU persons’ assets in Russia — in both cases, providing that the EU persons concerned do not have “effective access to remedies under the relevant jurisdiction”. The [EU’s accompanying Q&A](#) indicates the measures “enable EU companies to recover [appropriate] damages from the Russian counterpart’s possible assets in the EU”.

These measures, along with the new Article 5ab referenced above, seem intended to provide a mechanism for EU persons to recover compensation when Russian counterparties have ignored foreign arbitration or other dispute resolution clauses and brought proceedings in Russia, when EU persons have acted to comply with EU sanctions, or when EU persons’ assets in Russia have otherwise been expropriated.

As yet, no guidance is available on these mechanisms, which would presumably need to operate before the courts of EU Member States.

Articles 5n and 12b — Extension of Wind-Down Deadlines

As described in this [Client Alert](#), the EU has imposed sanctions on the provision of various “professional services” to Russian legal persons. Before the EU’s 12th package, these sanctions generally did not apply if EU persons provided the services to the Russian-incorporated subsidiaries of parent entities based in the EU, EEA, Switzerland, or various so-called “partner countries”. The 12th package implemented a wind-down which aimed to terminate this exception by 20 June 2024. The 14th package has amended Article 5n(7) and extended that deadline to 30 September 2024.

As described in a previous [Client Alert](#), the EU has introduced a temporary licensing regime regarding divestments from Russia that involves goods affected by export/import/transfer sanctions and which were already in Russia when those sanctions were imposed. The European Commission’s [“Divestment FAQs”](#) have clarified that it considers these sanctions also apply if a person covered by EU jurisdiction is selling “shares of a Russian subsidiary” that holds such goods. The national competent authorities of EU

Member States have a time-limited derogation permitting them to issue authorisations for the sales of such assets and shares. The 14th package amends Article 12b to extend this deadline until 31 December 2024.

Regulation 269 — Updates

Regulation 269 designates persons, entities, and bodies under the EU's "asset-freeze" sanctions. Such "designated persons" are listed in Annex I of Regulation 269. The 14th package updates Regulation 269 by virtue of [Regulation 2024/1739](#) and [Regulation 2024/1746](#). The headline changes are as follows:

New Designations

Regulation 2024/1746 designates a further 69 individuals and 47 entities for asset-freeze sanctions under Annex I. A European Commission [press release](#) described these as including "military companies, companies active in space engineering, in the chemical sector or in the explosives sector and leading Russian energy companies".

Circumvention

Regulation 2024/1739 expands the existing description of "circumvention" such that it not only includes participating "knowingly and intentionally in activities the object and effect of which is to circumvent [EU sanctions]" but also "participating in such activities without deliberately seeking that object or effect but being aware that the participation may have that object or effect and accepting that possibility".

Penalties

As set out in this previous [Client Alert](#), the EU is taking steps to harmonise criminal penalties for breaches of EU sanctions. In alignment with this, Article 15 has been amended to permit Member States to consider voluntary self-disclosure of infringements to operate as a mitigating factor when assessing criminal penalties for sanctions violations.

Updates to the EU Best Practices Guidance

On 3 July 2024, the Council of the European Union published its revised EU Best Practices guidance on the effective implementation of restrictive measures. The guidance focuses particularly on the tests for determining "Ownership" or "Control" of an entity by a designated person and applies across all EU sanctions regimes (not just in relation to the EU sanctions against Russia). The key changes include:

Updated Ownership Test

- **Threshold Change:** The threshold for determining ownership has been amended from "more than 50%" to "50% or more" of the proprietary rights of an entity. This change aligns the EU's position with the US Office of Foreign Assets Control (OFAC) 50% Rule, but diverges from the UK's approach of "more than 50%".
- **Aggregation of Ownership:** The revised guidance confirms that ownership percentages held by designated persons should be aggregated when determining control.

Expanded Control Criteria

- **Dominant Influence:** The criteria for assessing control have been expanded to include situations where a designated person has the "de facto" power to exert a dominant influence over a legal entity outside of a formal legal relationship.
- **Potential Red Flags for Control:** The guidance introduces a non-exhaustive list of red flags indicating potential control by a designated person, such as buyback options in favour of a designated

person, a designated person's status as the largest (even if not the majority) shareholder in an entity, the use of complex corporate structures including trust and shell companies, the use of front persons, and a transfer of shares in an entity by a designated person shortly before or after their designation.

Clarification on Acting on Behalf or at the Direction Of

The guidance also clarifies the criteria for determining whether an entity is acting "on behalf or at the direction of" a designated person or entity. This test is relevant to certain EU restrictions, such as those restricting the access by certain major state-owned Russian entities in the energy, military, and finance sectors to the capital and financing markets, and the transaction-ban restrictions of Article 5aa of Regulation 833/2014. While the guidance clarifies that "acting on behalf or at the direction of" an entity targeted by these restrictions is still a distinct test and separate to ownership and control, the tests should now be considered on an equal footing given the significant crossover in the criteria relevant to each test.

What's Next?

Latham & Watkins actively tracks sanctions developments across all regions closely and is well positioned to advise on the legal and practical impacts of these measures.

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