



Changes to the EU Sanctions Best Practices

On 3 July 2024, the Council of the European Union (Council and EU) published its [Update of the EU Best Practices for the effective implementation of restrictive measures](#) (EU Best Practices). This guidance, subject to permanent review by the Council, contains non-exhaustive recommendations and identifies key elements in the implementation of EU sanctions.

The EU Best Practices are non-binding recommendations, as only the Court of Justice of the European Union (CJEU) is competent to interpret EU law under Article 267 TFEU. This means that, despite the authority of the Council's interpretations of EU sanctions, the CJEU can overrule these positions.

In any event, the EU Best Practices remain an authoritative source providing practical guidance both for EU operators and national competent authorities (NCAs).

Below, the changes implemented in the latest revision of the EU Best Practices are summarised:

The concept of “ownership”

As anticipated in [Recital 28](#) of Council Regulation (EU) 2024/1745 amending Regulation (EU) 833/2014 (the so-called “14th package”), the criterium of **ownership** has been changed to “50% or more” of the proprietary rights of an entity, where before the threshold was “more than 50%”.¹ The Council is thus aligning with the so-called “50% rule” of the US Office of Foreign Assets Control (OFAC).² Interestingly enough, the EU had already taken this approach in the context of the terrorist sanctions regime in 2001.³

Additionally, the **aggregated ownership** of designated persons or entities should be taken into account when assessing ownership levels.⁴ Accordingly, where the sum of the ownership percentages of all designated persons or entities in a non-designated entity is 50% or more, this will result in the latter being considered sanctioned, regardless of whether the designated persons or entities are acting in concert in the exercise of their ownership rights. This approach was already reflected in the position taken by the European Commission on 8 April 2022 in its [FAQs](#).⁵ Similarly, the [50% rule](#) of OFAC also applies the aggregated ownership principle.

The concept of “control”

A new paragraph has been inserted **clarifying that assets owned by a non-designated entity that in turn are owned or controlled by designated persons or entities must be frozen provided that the control of the designated person effectively extends to the assets of the non-designated**

entity.⁶ This new paragraph can be considered to override the previous plausible interpretation that there was a rebuttable presumption, according to which the control of a designated person or entity owning or controlling a non-designated entity extends to all the assets of that entity.

The changes to the EU Best Practices also refer to the **criteria indicating control over non-designated entities**. In this regard, the inclusion of the words “**de facto**” in criteria (e) of the non-exhaustive list set out in paragraph 64 explicitly adds the situation where a designated person or entity exercises a dominant influence over a legal person or entity, without any legal authority to that extent.

In addition, a separate **non-exhaustive list of “red flag” circumstances** has been created. These circumstances may indicate that a designated person or entity has control over a non-designated entity and may warrant the need to analyse whether one of the criteria regarding control are fulfilled:⁷

1. Majority shareholding – situations where a designated person is the largest shareholder of a company.
2. Buyback option – situations where a designated previous owner can buy back the company under favourable conditions.
3. Transfer of relevant shares at a time close to the designation – situations where a designated person transfers a relevant number of shares, meaning any number of shares allowing the designated seller to be no longer considered as the owner, within a non-designated entity.
4. Use of front persons – situations where the new owner on a personal or professional level is closely related to the designated person, and, where the sale price was too low or abnormal otherwise; situations where the advisor of the entity has decision power over the entity’s activities, even though this does not follow from its title or function; agreements providing that a non-shareholder or a minority shareholder can solely decide on the business of the entity, or, persons in charge of the entity have their decisions made by the designated person.
5. Use of trusts, shell companies and limited liability companies – situations where an entity has a needlessly complex corporate structure, involving companies such as shell or limited liability companies and/or trusts, and, where some of these entities shortly after the adoption of the sanction regimes were set up or changed their identity, and/or, have no credible business activity. The same may apply, when through trusts assets are received from the entity owned or controlled by the designated person and the management of the trusts involves professionals from the jurisdiction where the trusts were formed.

“Acting on behalf” or “at the direction of”

The revised EU Best Practices introduce and clarify the notion of “acting on behalf or at the direction of” a natural or legal person, entity or body, explicitly referred to in several prohibitions under EU sanctions regulations. While distinct, this notion **can be placed on an equal footing with ownership and control**, as the CJEU noted in *HTTS v. Council* with the objective of ensuring the effectiveness of the measures.⁸ The following **criteria** are proposed to determine whether a person, entity or body acts on behalf or at the direction of a designated person or entity:

- the precise ownership or control structure, including links between the persons, entities or bodies;

- the nature and purpose of the transaction, coupled with the stated business duties of the legal person, entity or body;
- previous occasions where the entity has acted on behalf or at the direction of a designated person, entity or body; and
- disclosure by third parties obtained from credible, reliable and independent sources or factual evidence indicating that the person, entity or body gave directions.⁹

Conclusion

The aforementioned changes to basic concepts demonstrate how EU restrictive measures have rapidly evolved in the context of the Russia-related regime. Some of the above clarifications have been long-due, but much more remains to be clarified, especially with regards to the definition of control. Despite the limited clarifications at the Council and Commission levels, the practical application of the concepts of “ownership” and “control” will continue to pose difficulties to EU operators, which cannot rely on fragmented and sometimes differing guidance from the NCAs.

Ongoing CJEU cases are also impacting the interpretation of EU sanctions. As mentioned, the guidance provided by the Council and Commission is not legally binding and the CJEU has in certain cases rejected these interpretations. For instance, the Advocate General of the CJEU in its recent opinion, refuted the interpretation of the Commission in its FAQs on the notary services under the Russian sanctions legal services ban, affirming that only the CJEU is competent to interpret EU law.¹⁰ Also, the CJEU overruled an interpretation of the Commission. In the *Rosneft* case, the CJEU rejected the broad interpretation of the Commission of the term “financial assistance” under their guidance note.¹¹

¹Council of the European Union, Update of the EU Best Practices for the effective implementation of restrictive measures, para. 63.

²OFAC’S Revised guidance on entities owned by persons whose property and interests in property are blocked, 13 August 2014, [download \(treasury.gov\)](#).

³Article 1(5) of the Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed...

¹Council of the European Union, Update of the EU Best Practices for the effective implementation of restrictive measures, para. 63.

²OFAC’S Revised guidance on entities owned by persons whose property and interests in property are blocked, 13 August 2014, [download \(treasury.gov\)](#).

³Article 1(5) of the Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

⁴Council of the European Union, Update of the EU Best Practices for the effective implementation of restrictive measures, para. 63.

⁵European Commission, Commission consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014, Question 8.

⁶Council of the European Union, Update of the EU Best Practices for the effective implementation of

restrictive measures, para. 62.

⁷Council of the European Union, Update of the EU Best Practices for the effective implementation of restrictive measures, para. 67.

⁸Council of the European Union, Update of the EU Best Practices for the effective implementation of restrictive measures, para. 71. Judgement of 10 September 2019, *HTTS Hanseatic Trade Trust & Shipping GmbH v. Council*, C-123/18 P, EU:C:2019:694, para. 69, 77-79.

⁹Council of the European Union, Update of the EU Best Practices for the effective implementation of restrictive measures, para. 72.

¹⁰European Commission, Provision of Services Related Provision: Article 5n of Council Regulation 833/2014, Frequently Asked Questions – As of 2 July 2024, Question 21; Opinion of Advocate General Medina delivered on 11 April 2024, *Jemarak, GM, ON v PR*, C-109/23, para. 69.

¹¹Judgement of the Court 28 March 2017, *PJSC Rosneft Oil Company*, C-72/15, ECLI:EU:C:2017:236, para. 174-184; European Commission, Commission Guidance Note on the implementation of certain provisions of Regulation (EU) No 833/2014, C(2017) 5738 Final, Question 1.