

## Russia sanctions: Non-EU subsidiaries to comply with EU law

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On 24 June 2024, the EU adopted the 14<sup>th</sup> package of sanctions against Russia, introducing new restrictions on goods and services and listing more individuals and legal persons. In practice, more relevant may be the novel provisions that target "circumventions" and introduce new compliance requirements and liabilities for EU operators, especially concerning the conduct of their non-EU subsidiaries.

In addition to these new compliance obligations on which we focus in this article, other relevant changes brought about by the 14<sup>th</sup> package include:

- Sectoral sanctions targeting Russia's LNG sector, including restrictions relating to infrastructure, investments and transportation, but without prohibiting imports into the EU.
- Additional sectoral restrictions on trade in goods and services including restrictions on imports and exports, in particular on further advanced technology goods have been added and the sanctions targeting the transport sector (i.e. shipping, air and road transport) have been extended.
- Additional listings of 116 natural and legal persons, which are now subject to asset freezes and the prohibition to make funds and economic resources available to them.
- A ban for EU banks to use the financial messaging system SPFS (i.e. the Russian equivalent of SWIFT) and for third-country operators connected to this system.
- Possibility to seek the recovery of damages resulting from a decision under Russian laws to place assets owned by investors associated with "unfriendly" States under temporary administration, and from individuals or entities benefitting from such a decision.

For most of the new restrictions grace periods apply and various exemptions and authorisations are available.

Important existing exemptions have been extended, including:

- The exemption for the provision of certain services otherwise prohibited under Art. 5n to Russian subsidiaries owned or controlled by EU operators has been prolonged until 30 September 2024.
- The exemptions meant to facilitate the Russia exit of EU operators in Art. 12b have been prolonged again until 31 December 2024.

## EU operators to use "best efforts" to stop non-EU subsidiaries from undermining sanctions

While until now EU sanctions only applied to legal entities incorporated or constituted under the law of a Member State, the 14<sup>th</sup> sanctions package introduces a novel provision in Art. 8a requiring EU operators:

"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 restrictive measures provided for in "[the Russia Sanctions Regulation]."

While the exact notion of "best efforts" will still have to be developed, the rule can in essence be

understood to require EU operators to instruct their non-EU subsidiaries to comply with EU sanctions as if they were EU entities. Some justifications for non-compliance by their non-EU subsidiaries are available, but all in all this is a dramatic departure from the (previous) principle that EU rules should not have extraterritorial effects.

The concept of "own or control" requires that EU operators have a "decisive influence" over their non-EU subsidiaries. What is new, however, is that ownership has now been defined in the recitals to mean being in possession of 50 % or more of the proprietary rights. Hence, in line with the approach taken by the US, a majority interest is no longer required. It remains to be seen whether this seemingly new concept of ownership will be applicable throughout the EU sanctions regimes. The question could become highly relevant when assessing whether funds or economic resources can be made available to a non-listed entity "owned" by a listed person.

## New compliance standards and minimum levels of diligence?

It has long been an established principle that EU operators should not be held liable, including criminal liable, if they did not know, and had no reasonable cause to suspect, that their actions infringed EU sanctions (Art. 10).

In many Member States, Art. 10 was understood to mean that economic operators are under no obligation to actively investigate facts but that they may not close their eyes to the obvious. The existence of red flags triggered additional diligence measures and requirements.

Somewhat hidden in recital 36, Regulation (EU) 2024/1745 now appears to introduce a new minimum standard, denying operators the ability to rely on the non-liability clause when they did not carry out "simple checks or inspections". It remains to be seen how national authorities and courts will interpret this potentially far-reaching introduction of a minimum level of diligence.

## New "no Russia" clauses

In addition to the known obligation to foresee "no Russia" clauses when exporting certain products to non-privileged countries, Brussels has now introduced in Art. 12ga a comparable clause relating to high priority items important for Russia's war efforts. The clause concerns licencing and other agreements related to intellectual property and prohibits their use when relating to goods destined for Russia or for use in Russia.

Additionally, Art. 12gb expressly obliges EU exporters of high priority items important for Russia's war efforts to implement certain minimum diligence requirements, in particular risk assessments, documentation, policies, controls and procedures as well as management measures to prevent the export or re-export of these items to Russia or for use in Russia. These measures must also be implemented in non-EU subsidiaries as of 26 December 2024.

## Update to the circumvention prohibition

The known circumvention prohibition in Art. 12, which prohibits "participating knowingly and intentionally" in circumvention activities has been amended to include "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". This amendment merely reflects the interpretation given to this prohibition through case-law of the European Court of Justice.

## Summary

The 14<sup>th</sup> sanctions package introduces new rules concerning specific economic sectors, and while these rules will mostly affect actors in these sectors, all operators need to assess to what extent these rules will impact their businesses. More importantly, any EU operator with decisive influence over non-EU entities must now reconsider how to instruct and control these entities regarding compliance with EU sanctions. EU operators may have to recalibrate their general compliance structures to reflect the levels of diligence that the 14<sup>th</sup> sanctions package has introduced.

For more information on sanctions against Russia, contact your usual CMS contacts or local sanctions experts.

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