

TRAINING & DEVELOPMENT PROGRAMME

Knowledge Network

Webinar Series

EU Sanctions against Russia

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Peter Osborne, Audrey Byrne, Fiona O’Beirne, Michael Coonan and Joanne O’Rourke



Introduction and Format

- The context (legislative and McCann FitzGerald LLP policy) (*Peter Osborne*)
- Sanctioned persons and companies and associated persons and entities (asset-freezes and prohibitions); sanctioned territories; sanctioned products (*Audrey Byrne*)
- Practical guidance on due diligence and compliance (*Audrey Byrne*)
- Sanctioned trade and finance arrangements (*Joanne O'Rourke*)
- Enforcement and penalties (*Fiona O'Beirne*)
- Derogations, exemptions and qualifications to liability (*Michael Coonan*)
- Sectoral sanctions (Aviation and Energy) (*Peter Osborne*)
- Q & A

The Context *(Peter Osborne)*

- EU sanctions only
- Ireland never imposes sanctions or other restrictive measures unilaterally – they always are pursuant to a UN or an EU decision
- Two aspects:
 - Directly-effective EU Regulations
 - Irish SIs providing for enforcement and penalties
- The most recent sanctions are additions to the framework of sanctions against Russia that has been in force since the annexation of Crimea in 2014
- McCann FitzGerald LLP policy: the firm will not undertake any new Russian or Belarusian mandate, or continue with any existing mandate, that directly or indirectly supports:
 - either of those regimes, or
 - any entity, business or individual connected to either of those regimes

Sanctioned Persons and Entities (and “Associated”) (*Audrey Byrne*)

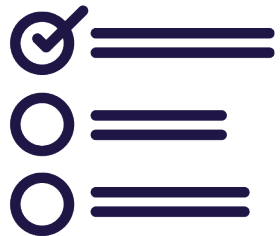
Council Regulation (EU) No 269/2014

- The Regulation concerns restrictive measures in respect of actions undermining the territorial integrity, sovereignty and independence of Ukraine and imposes economic sanctions such as asset freezes on certain listed individuals and legal entities listed in the annexes to the Regulation.
- There are currently **702 individuals** and **53 entities** and entities and which are being added to with each package of restrictive measures. The list of sanctioned persons and entities are kept under constant review and subject to periodic renewals by the Council
- The Regulation applies to:
 - a) every legal person, entity or body inside or outside the territory of the EU, which is incorporated or constituted under the law of a Member State; and
 - b) every legal person entity or body in respect of any business done in the EU

Assets-Freezes and Prohibitions

- **Article 2(1):** *“all funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex 1, shall be frozen.”*
- **Article 2(2):** *“funds or economic resources shall not be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, listed in the Annex.”*
- **“Funds”, “Economic Resources”, “Transactions” and “Freezing of economic resources and funds”** are all defined broadly.
- **“Associated”** is not defined and is broadly interpreted for the purpose of the sanctions. There is presently no clear guidance. There is an analogous test at Article 5 of Regulation (EU) 833/2014 (more than 50% ownership in a Russian state owned company) It is not sufficient to rely on this test. Consider the MLD4 test for beneficial ownership.
- When determining whether a person is associated with a sanctioned person, it is necessary to consider the relevant fact pattern to determine relevance and proximity by reference to the purpose of the particular sanction and what it is aiming to achieve.

Practical Guidance on Due Diligence and Compliance



- **Desktop searches** on sanctions lists are a useful starting point so as to understand the status of the entity under consideration. The situation is evolving quickly and what might be true today may no longer be true tomorrow so this should be kept under consideration.
- Understanding the **corporate structure** of an entity under consideration is also important – Russian owned corporate groups are frequently structured with an EU entity as the point of contact. It is important to understand that not all Russian businesses are sanctioned even if they have links to the regime.
- Understanding the potential **associates** of an entity under consideration can be difficult and it may be necessary to carry out a detailed due diligence with the assistance of a **specialist forensics/sanctions team**.

Sanctioned Territories



Note: Data as of Feb. 25, 2022 at 1 p.m. ET

Source: Institute for the Study of War
Graphic: Renée Rigdon, CNN

Sanctions on Imports, Exports and Territories

- In **July and September 2014**, the EU imposed economic sanctions targeting exchanges with **Russia** in specific economic sectors:
 - limit access to EU primary and secondary capital markets for certain Russian banks and companies;
 - impose an export and import ban on trade in arms;
 - establish an export ban on dual-use goods for military use or Russian military end users;
 - impose an export ban in goods and technology in the aviation and space industry; and
 - curtail Russian access to certain sensitive technologies and services that can be used for oil production and exploration.
- **Council Regulation (EU) No 833/2014** provides for restrictions on the sale, supply, transfer or export to Russia (or for use in Russia) of dual-use goods and technology, as well as on listed goods and technology which might contribute to Russia's technological enhancement of its defence and security sector.

Sanctions on Imports, Exports and Territories (*cont'd*)

- **Council Regulation (EU) No 2022/266:** sanctions on all imports originating in the non-government controlled areas of the **Donetsk** and **Luhansk** oblasts of Ukraine unless they have certification from the Ukrainian Government.
- **Other restrictions on economic relations with Crimea, Sevastopol, Donetsk and Luhansk:**
 - an import ban on goods;
 - restrictions on trade and investment related to certain economic sectors and infrastructure projects;
 - a prohibition on supplying tourism services; and
 - an export ban on certain goods and technologies.
- **Restrictions on economic relations with Belarus:**
 - further restrictions on trade of goods used for the production or manufacturing of variety of products;
 - further restrictions on exports of dual-use goods and technology and on the provision of related services;
 - restrictions on exports of certain goods and technology which might contribute to Belarus's military, technological, defence and security development; and
 - individual and economic sanctions against Belarus.

Sanctioned Products

- **Council Regulation (EU) No 2022/263, Article 4(1)**: Prohibited to sell, supply, transfer or export goods and technology of a long list of banned products, listed in Annex II:
 - a) to any natural or legal person, entity or body in the specified territories, or
 - b) for use in the specified territories.
- The Annex II list includes certain goods and technologies for use in **transport, telecommunications, energy** and the prospecting, exploration and production of **oil, gas** and **mineral resources**.
- **Council Regulation (EU) No 2022/328, Article 2(2)**: prohibited to:
 - a) *provide technical assistance, **brokering services** or other services related to the goods and technology referred to in paragraph 1 and to the provision, manufacture, maintenance and use of those goods and technology, directly or indirectly to any natural or legal person, entity or body in Russia or for use in Russia;*
 - b) *provide financing or financial assistance related to the goods and technology referred to in paragraph 1 for any sale, supply, transfer or export of those goods and technology, or for the provision of related technical assistance, brokering services or other services, directly or indirectly to any natural or legal person, entity or body in Russia, or for use in Russia.*

Sanctioned Trade and Finance Arrangements (*Joanne O'Rourke*) (1)

'Pre-existing' financial restrictions: Regulation (EU) 833/2014

- Dealing with transferable securities and money market instruments
- Provision of new loans and credit

Expansion of scope: Regulation (EU) 2022/262

- Expands financial restrictions to capture Russia, its government and the Russian Central Bank

Further expansion: Regulation (EU) 2022/328

- Expands financial restrictions to capture further specified financial institutions and Russian corporates

Sanctioned Trade and Finance Arrangements (2)

New financial restrictions (Regulation (EU) 2022/328 contd.)

- **Deposits:** a prohibition on the acceptance of deposits with a total value exceeding €100,000 from Russian clients. Certain exceptions apply.
- **Trading Venues:** a prohibition on the listing and provision of services in relation to transferable securities of Russian state-owned entities on trading venues.
- **Central Securities Depositories:** a prohibition on CSDs providing specified services for transferable securities issued after 12 April 2022 to Russian clients.
- A prohibition on selling **euro-denominated transferable securities** issued after 12 April 2022, and on selling **units in collective investment undertakings providing exposure to such securities**, to Russian clients.

Sanctioned Trade and Finance Arrangements (3)

Other financial restrictions

- **Trade/investment in Russia:** a prohibition on public financing or financial assistance for trade with/investment in Russia (**Regulation (EU) 2022/328**)
- **SWIFT:** the exclusion of seven Russian banks from the SWIFT messaging system. This restrictive measure takes on 12 March 2022 (**Regulation (EU) 2022/345**)
- **Banknotes:** a prohibition on the supply of euro banknotes to Russia. Certain exceptions apply (**Regulation (EU) 2022/345**)
- **Central Bank of Russia:** prohibition on transactions with the CBR (**Regulation (EU) 2022/334**)
- **Russian Direct Investment Fund:** prohibition on engagement with the RDIF (**Regulation (EU) 2022/345**)

Enforcement and Penalties (*Fiona O'Beirne*)

- Competent authorities
- European Union (Restrictive Measures Concerning Ukraine) (No 6) Regulations 2022 (SI 100 of 2022) (*but frequent change*)
 - Reporting Obligations
 - Enforcement
 - Power of competent authorities to give directions (offence not to comply)
 - Penalties:
 - Typically the maximum penalties upon conviction are:
 - summary: a class A fine (max €5k) and/or up to 12 months' imprisonment
 - on indictment: a fine not exceeding €0.5m and/or up to 3 years' imprisonment
 - Potential liability of directors and officers
- (Reputational considerations)

Derogations, Exemptions and Other Related Provisions (*Michael Coonan*) (1)

- **Comment on split between derogations or authorisations and baked-in exemptions**
- **Derogations and Exemptions** specific to **Asset Freeze & Prohibitions** (Regulation 269/2014, as amended)
 - *Article 4 - for **basic needs, professional fees, legal fees, charges and extraordinary expenses***
 - Competent Authority **may** authorise release of frozen funds or economic resources of sanctioned persons or entities, **subject to such conditions** as it deems **appropriate** and having determined that funds are to be used for those purposes
 - Member State **shall** inform other member states and the Commission of any derogations granted and in relation to (iv), notify two weeks in advance giving reasons why it intends to
 - *Article 5 - to facilitate **enforcement of arbitral award or judicial or administrative decision** against sanctioned person or entity*
 - Competent Authority **may** authorise the release of frozen funds or economic resources if (i) subject to arbitral decision or judicial decision (ii) used only to satisfy such claims (iii) no benefit to any sanctioned person or entity and (iv) recognition not contract to public policy
 - Member State **shall** inform other member states and the Commission

Derogations, Exemptions and Other Related Provisions (2)

- **Exemptions** relevant to Regulation **833/2014** (as amended and supplemented)
 - Specific **exemptions** for goods and related services which would otherwise be prohibited under Article 2 (**dual use**), Article 2a and 4 (**contribute to military**), Article 3/3a/3b (**Oil-related**)
 - Reasons to include for **humanitarian** purposes; **health** emergencies; **urgent prevention or mitigation of an event likely to have a serious impact on human health**; for goods intended for **medical or pharma purposes**, for **temporary** export of items for use **by news media**; **software** updates; use as **consumer communication** devices; **ensuring cyber security for persons or entities in Russia** (other than the Government) and **for personal use by persons travelling to Russia**
 - Exporter must **notify the competent authority** and mark goods, where applicable, as falling under the exemption, for customs purposes
 - Exemptions applicable to contracts not executed before transition date (Mar 2022) and concluded before Feb 2022 (*eg* Article 3, in respect of provision of aircraft)

Derogations, Exemptions and Other Related Provisions (3)

- **Derogations** relevant to **833/2014**
 - Competent authorities **may grant derogations**, similar to those that arise in the asset freezes
 - Determination that the goods or technology or related technical or financial assistance are for specific purposes related to **the Union's interests**, cooperation in **space programmes, maritime safety, civil nuclear cooperation, civilian communication networks**, intended for exclusive use **by EU controlled entities**, for **diplomatic purposes**
 - Existing **comprehensive regime** for **authorising and controlling exports, brokering, technical assistance, transit and transfer of dual-use items** (acting as effective exemptions) under **Regulation 821/2021**
 - **Derogations** may also be granted and sales authorised if competent authority has determined that goods or related services are due under contracts concluded before certain dates (February 2022) and provided authorisation is requested before certain dates (May 2022)

Derogations, Exemptions and Other Related Provisions (4)

The EU sanctions framework includes a number of qualified immunities and anti-blocking and anti-avoidance measures, including:

- Deposit-takers and others must **share information** relevant to asset-freezing orders, notwithstanding any rules concerning reporting, confidentiality and professional secrecy
- It is an offence to participate, knowingly and intentionally, in activities the object or effect of which is to **circumvent EU sanctions**
- If acting in good faith and in accordance with the EU Regulations, an entity **will not be liable** for freezing funds or for refusing to make funds available (unless the entity acts negligently)
- A person **will not be liable for breach** of the EU Regulations if the person did not know, and had no reasonable cause to suspect, that their actions would infringe the sanctions
- A sanctioned person does not have any claim for breach of contract or for **compensation** in consequence of the effects of the sanctions

Sectoral Sanctions: Aviation *(Peter Osborne)*

- EU ban on “Russian air carriers”
- Regulation (EU) 2014/833, Art 3c (as inserted by Regulation (EU) 2022/328). Key prohibitions:
 1. **Selling, supplying, transferring or exporting, directly or indirectly**, aircraft or aircraft parts, or technology suited for use in aviation, whether or not originating in the EU, to any person or entity **in Russia or for use in Russia** (*possible transition period to 28 March 2022*)
 2. Providing **insurance or reinsurance, directly or indirectly**, in relation to aircraft or aircraft parts, to any person or entity in Russia or for use in Russia (*however, permitted until 28 March 2022 in the case of insurance and reinsurance to leasing companies for aircraft subject to operating or finance lease arrangements signed before 26 February 2022, including when the aircraft is used in Russia*)
 3. Providing any of the following activities: overhaul, repair, inspection, replacement, modification or defect rectification of an aircraft or component, with the exception of pre-flight inspection, in relation to aircraft or aircraft parts, directly or indirectly, to any person or entity in Russia or for use in Russia
 4. Providing (*possible transition period to 28 March 2022*):
 - **technical assistance** (as defined), **brokering services** (as defined) or **other services related to aircraft or aircraft parts**, directly or indirectly, to any person or entity in Russia or for use in Russia
 - providing **financing or financial assistance related to aircraft** or aircraft parts for any sale, supply, transfer or export of those goods or technology, or for the provision of related technical assistance, brokering services or other services, directly or indirectly, to any person or entity in Russia or for use in Russia

Sectoral Sanctions: Energy (*Peter Osborne*)

Regulation (EU) 2014/833, Art 3b (inserted by Regulation (EU) 2022/328). Key prohibitions:

- **Selling, supplying, transferring or exporting, directly or indirectly**, goods or technology of any prescribed type suited for use in **oil refining**, whether or not originating in the EU, to any person or entity **in Russia or for use in Russia**
- Providing:
 - **technical assistance** (as defined), **brokering services** (as defined) or **other services** related to goods or technology of any prescribed type suited for use in oil refining, directly or indirectly, to any person or entity in Russia or for use in Russia
 - providing **financing or financial assistance** related to goods or technology of any prescribed type suited for use in oil refining for any sale, supply, transfer or export of those goods or technology, or for the provision of related technical assistance, brokering services or other services, directly or indirectly, to any person or entity in Russia or for use in Russia
- Possible **transition period** to 27 May 2022
- **Limited exemptions** available to protect human health and safety or the environment

Discussion and Q&A



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