SANCTIONS 101

A brief introduction into EU sanctions against the Russian Federation

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The following script provides a brief overview of the EU sanctions regime against the Russian Federation ("**Russia**"). It covers both the **individual sanctions** (e.g. asset freeze measures) and the **sectoral sanctions** (imposing import and export bans on certain goods). Because this script looks at EU sanctions law from a *bird's eye* perspective, the frequent amendments of EU sanctions against Russia with each 'sanctions package' generally do not impact the content of this script. Nonetheless, sanctions law is a highly dynamic matter and subject to constant change – thus, anyone reading this script must be mindful of any amendments of EU sanctions after the date hereof. Note that this script shall not be viewed as a complete elaboration of EU sanctions against Russia. Anyone who faces a particular issue under sanctions law will likely not solve such an issue based on this script alone (in particular if the issue relates to [highly detailed] sectoral sanctions). In such case, the review of the text of the relevant law in combination with case law (if available) and any other secondary source is warranted.

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After the annexation of the Crimean Peninsula in 2014, the EU imposed a set of economic sanctions on Russia. On the one hand, these sanctions targeted **individuals** close to the Russian government and imposed on these individuals a **travel ban** and **asset freeze measures**. On the other hand, certain Russian **economic sectors** were targeted by the so-called **sectoral sanctions**. After Russia's invasion of Ukraine in February 2022, the Union – as well as the United Kingdom, the US and other *Western* nations – significantly extended these sanctions against Russia.

More persons were targeted by the individual sanctions, including leading businesspersons, also known as *Oligarchs*. Additionally, sectoral sanctions were expanded to further weaken Russia's economy. Hence, when speaking about sanctions, it needs to be distinguished between the individual (financial) sanctions and the sectoral sanctions. The former aim at individuals and their *fortunes*, whereas the latter aim at weakening the Russian economy by sanctioning specific Russian business sectors and goods. Both the individual and the sectoral sanctions shall increase the cost of war on Russia and dissuade Russia from continuing its aggression against Ukraine.

2. Sources of sanctions law

EU Sanctions on Russia are introduced by way of regulations. Generally, the Union introduces laws by way of **directives** and **regulations**. Directives must be transposed into national law; thus, each Member State is obliged to enact a corresponding national law which introduces the content of the directive in the respective Member State. Parties usually are bound (only) by the respective national law and only in exceptional cases, the directive applies to the individual directly. Conversely, **regulations are directly binding** in the Member States and require no transformation by the Member States into national law.

In the case of EU sanctions on Russia, the so-called **individual sanctions** are regulated in Regulation 269/2014[1] and **sectoral sanctions** are regulated in Regulation 833/2014.[2] For the purposes of this script, Regulation 269/2014 will be referred to as "**Regulation 269**" and Regulation 833/2014 will be referred to as "**Regulation 833**" (both regulations will be referred to as "**Regulations**").

Since the Regulations are directly binding, **Member States cannot impose their *own* sanctions** against Russia. The Union - as a bloc - imposes sanctions by way of directly binding regulations. Consequently, Member States cannot apply sanctions to persons who are not on the EU sanctions list (i.e. Annex I to Regulation 269); Member States also cannot restrict the import or export of goods not covered by Regulation 833. Moreover, a Member State cannot apply *stricter* restrictive measures compared to what is laid down in the Regulations. For example, Regulation 269 freezes the assets of sanctioned persons. Such asset freeze deprives the concerned sanctioned person from (financially) benefiting from his or her frozen asset(s). For example, a Member State cannot – in addition to the freeze – expropriate this asset purely on the basis of sanctions as this would be an excessive application of sanctions. Certainly, national laws – e.g. criminal laws – might allow such expropriation if the respective frozen asset was acquired by the sanctioned person with criminally incriminated funds. In such case, the expropriation would be based on the national criminal law and not under the applicable provision in Regulation 269. Despite the Regulation being directly applicable some Member States enact their *own* national sanctions against Russia (and Belarus). These national sanctions even extend to persons who are

[1] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (as amended from time to time).
[2] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (as amended from time to time).

not targeted by EU sanctions (or US or UK sanctions).[3] Whether or not such national sanction laws are in line with Union law must – for the purposes of this script – remain open.[4]

Another source of sanctions law is **case law** of the General Court and the Court of Justice of the European Union ("**CJEU**"). While case law in relation to the sanctioning of certain persons constantly increases due to the high number of sanctioned individuals, case law on specific questions under the Regulations remains currently sparse. This is (likely) because questions on the application of the Regulation usually run through the national court system before being referred to the CJEU for a preliminary ruling. We can expect rulings in the near future as plenty of issues under the Regulations warrant an interpretation by the CJEU.

Finally, a practically relevant source of EU sanctions law are **guidance documents** issued by the Council of the European Union ("**Council**")[5] and the European Commission ("**Commission**")[6]. In addition, authorities of (some) Member States have issued their own FAQs in relation to sanctions. In these guidance documents, the authorities interpret sanctions law and provide the practitioner with some **helpful guidance** on how to navigate through the thick forest of sanctions. Be that as it may, such **guidance documents are not binding** as only the CJEU can interpret EU law in a binding way[7]. Furthermore, these guidance documents not always provide clarity to particular issues. This is the case when authorities change their opinion on a certain

[3] As an example, Poland passed in April 2022, the Law on special solutions in relation to Russia's aggression against Ukraine (*Ustawa z dnia 13 kwietnia 2022 r. o szczególnych rozwiązaniach w zakresie przeciwdziałania wspieraniu agresji na Ukrainę oraz służących ochronie bezpieczeństwa narodowego*). In the respective annex, persons who are on the EU sanctions list, but also persons who are not on any sanctions list (such as US or UK) are placed under *Polish* sanctions.

[4] However, it is worth referring to Commission Opinion of 8 November 2019, C(2019) 8007 final, where the Commission states: *The Commission takes the view that the unilateral adoption of national asset freeze measures for reasons related to the achievement of the CFSP objectives as set out in Article 215 TFEU would have a clear impact on the functioning of the internal market and would undermine the purpose and effectiveness of the above-mentioned provision of the TFEU. Therefore, they would not be compatible with EU law.*

[5] See EU Best Practices for the effective implementation of restrictive measures, updated on 27 June 2022 (https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf).

[6] See Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014, last updated on 2 April 2024 (https://finance.ec.europa.eu/document/download/66e8fd7d-8057-4b9b-96c2-5e54bf573cd1_en?filename=faqs-sanctions-russia-consolidated_en.pdf).

[7] See C-124/20, Bank Melli Iran v Telekom Deutschland (ECLI:EU:C:2021:1035) (see para 61 "*That [guidance] note does not establish binding rules or legal interpretations. Regulation No 2271/96 alone is binding, as stated in paragraph 5 of the preamble to that note, and only the Court has the power to give legally binding interpretations of the acts of the institutions, as stated in paragraph 6 of the preamble to that same note*.").

topic[8] or when authorities have a different opinion on certain issues.[9] Nonetheless, in practice, these (non-binding) documents have significant relevance, often being cited by authorities or even courts in their decisions.

3. Individual Financial Sanctions – Regulation 269

3.1. In a nutshell

Persons (natural and legal) targeted by individual sanctions are subject to a **travel ban** and **asset freezing measures**. In essence, assets owned or controlled by the sanctioned person are frozen. Simply put, EU operators[10], for example a bank, must freeze the sanctioned person's **funds** located on its bank account so as to prevent access to such funds by the sanctioned person. A similar concept applies to **economic resources**, whereas EU operators must prevent such frozen economic resources from being used as *surrogate currency*. Furthermore, EU operators are **prohibited from making funds or economic resources available** directly or indirectly to the sanctioned person. For example, an EU operator (natural or legal) is generally prohibited from making a payment to a sanctioned person or otherwise make available a financial benefit to the sanctioned person. These prohibitions are not absolute; sanctioned persons can apply for **derogations** to use frozen funds or economic resources for certain purposes. Finally, both EU operators and the sanctioned persons are subject to specific **reporting obligations** in relation to frozen assets.

[8] As seen in Germany where the, where in April 2023, the German Federal Ministry for Economic Affairs and Climate Action changed its position on the repayment of advance payments made in connection with sanctioned-affected contracts; as of April 2023, such repayments are viewed as prohibited by the German Ministry.

[9] For example, the Commission FAQ view shareholder rights, in particular voting rights, as fully banned, whereas the respective FAQ in Luxembourg generally allow the voting of sanctioned shareholders (see. https://mfin.gouvernement.lu/dam-assets/dossiers/sanctions-financi%C3%A8res-internationales/documentation/guidesheader2021/Guide-de-bonne-conduite-Sanctions-financi%C3%A8res-Non-TF-EN.pdf).

[10] The term 'EU Operator is not legally defined. It is being used for persons who must apply the sanctions. Mostly, EU nationals or EU companies are covered by this term; however, even a third-party national could fall under this term if as long this person is within Union territory or on a EU vessel or aircraft.

3.2. Listing Grounds & Legal Remedies

Persons who are listed in Annex I to Regulation 269 ("**Annex I**") are considered as *sanctioned*. However, assets (formally) belonging to non-sanctioned persons may also be frozen under certain circumstances. In practice, this is the case if the non-sanctioned person is somehow associated with a sanctioned person and by way of a (rebuttable) presumption, the assets of this non-sanctioned person are deemed controlled by the sanctioned person (see below point 3.3). This does not turn the formal owner of such asset somehow into a sanctioned person, but the asset freeze at least extends to such asset, and, thus indirectly to that person.

Any person listed in Annex I must fall under (at least) one of the listing grounds stated in Article 3 of Regulation 269. **For example**, **letter (a)** covers "*natural persons responsible for, supporting or implementing actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security in Ukraine, or which obstruct the work of international organisations in Ukraine*". **Letter (g)** covers "*leading businesspersons operating in Russia and their immediate family members, or other natural persons, benefitting from them, or businesspersons, legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine*".

Once a person – in the opinion of the Council – falls under at least one listing ground, the Council will issue a decision (CFSP) and implement a regulation which adds the person into Annex I (note that the Council usually covers multiple persons in one decision).

Consequently, the concerned person will appear in Annex I. The column 'reasons' in Annex I contains the Council's justification for listing a particular individual. They can be formulated as follows:

> *[Name] is a leading businessperson, owner of [Company], one of the world's largest companies in the global aluminium industry. In March 2022, he attended the Krasnoyarsk Economic Forum, one of the key Russian economic conferences*

focusing on regional development. He is also the beneficial owner of [Company], a Russian automotive conglomerate which includes the [Company], a major arms and military equipment provider to the Russian armed forces.

[Name] is a leading businessperson operating in Russia and a businessperson involved in an economic sector providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine. Furthermore, he is responsible for, supporting or implementing actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security in Ukraine.

In terms of **judicial legal remedies**, each sanctioned person can file an **application for annulment** with the aim to have his or her listing **annulled by the General Court**. The application for annulment must contain certain pleas on which the sanctioned person bases its application; the plea ***error of assessment*** is the most frequently used pleas by the 'applicants' (i.e. the sanctioned persons) in their respective applications. In essence, the applicants state that the reasons in Annex I are or became inaccurate; for instance, him or her having retired from a political position or having relinquished control over a particular company.

Each listing is re-assessed by the Council **every 6 months** and **extended** for another 6 months if necessary (which is mostly the case). The sanctioned person can file a **separate application for annulment** (or simply modify the existing application if the re-listing does not warrant a new application) against an extension. Such application might succeed if the personal or professional circumstances of the sanctioned person have in the meantime changed. Take for instance the cases of Mr. Ovsyannikov (Case T-714/20) and Mr. Shulgin (Case T-364/22). Both individuals won their cases because the Council failed to prove the accuracy of the (original) listing grounds.

Taken the first plea from the case Ovsyannikov it states: "*First plea in law, alleging manifest error in the assessment of the facts on which the contested restrictions are based at the*

time those restrictions were extended, in so far as those restrictions were extended in respect of the applicant without any genuine factual or evidential basis".

Finally, a sanctioned person can file an **application for an interim measure** requesting to suspend the effects of the restrictive measures as otherwise irreparable (non-monetary) harm would occur. One noteworthy decision concerns ex Formula 1 driver, Nikita Mazepin (Case T-743/22 R). Mr. Mazepin was listed in Annex I to Regulation 269 and, thus, was subject to the travel ban. This travel ban, however, hindered his pursuit to continue his professional racing career as he was not allowed to travel into the EU and to try out for F1 teams. The President of the General Court granted the order and the travel ban did not apply to Mr. Mazepin.

However, the application for **interim measures is not without risk for the applicant**. This is because the applicant must demonstrate that his or her case in the main proceedings has a reasonable chance to succeed (*Fumus boni iuris*). If the General Court **rejects an application** for interim measures, it can also state in its ruling that the applicant's has little chances to prevail in the main procedure, thus, *spoiling* the outcome of the main procedure.

3.3. Asset freeze

The assets owned or controlled by a person listed in Annex I are subject to the asset freeze measures imposed by Article 2 of Regulation 269[11]. The asset freeze measures are comprised of two elements, namely (i) the freeze of the sanctioned person's funds and economic resources (paragraph 1) and (ii) the prohibition to make funds or economic resources available (directly or indirectly) to the sanctioned person (paragraph 2).

Regulation 269 provides the following **definitions**, which are worth quoting for the purposes of this chapter:

[11] Article 2 reads as follows:
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 I, shall be frozen.
2. No funds or economic resources shall 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, as listed in Annex I.

*'**freezing of funds**' means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or any other change that would enable the funds to be used, including portfolio management;*

*'**freezing of economic resources**' means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them;*

*'**funds**' means financial assets and benefits of every kind, including, but not limited to:*

(i) cash, cheques, claims on money, drafts, money orders and other payment instruments;

(ii) deposits with financial institutions or other entities, balances on accounts, debts and debt obligations;

(iii) publicly- and privately-traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;

(iv) interest, dividends or other income on or value accruing from or generated by assets;

(v) credit, right of set-off, guarantees, performance bonds or other financial commitments;

(vi) letters of credit, bills of lading, bills of sale; and

(vii) documents showing evidence of an interest in funds or financial resources;

*'**economic resources**' means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services;*

Who must implement the freeze? The freeze is implemented by the EU-operators (see footnote 9 for a description of the term). For example, banks must block accounts if the funds belong to a sanctioned person. It is not for the national competent authorities to impose a freezing order in relation to the concerned assets (because of the direct application of the Regulation 269). Thus, the concerned assets are supposed to be frozen **by operation of** Regulation 269.[12] In non-legal terms, the assets covered by Article 2(1) are deemed as frozen once the *owner* has been listed in Annex I.

However, some Member States took measures tantamount to national freezing orders; for example, one Member State issued an informal list of companies which in the authority's view were under the control of a sanctioned person. The effect of such informal list was the *de facto* sanctioning of such (non-listed) companies; as mentioned above, some Member States even impose their own national sanctions and placing on the 'national list' persons who are not listed by the Union.

How to freeze? Once the EU operator has identified assets of a sanctioned person, the EU operator must apply the asset freeze measures to the respective assets. Examples for the freeze of assets or economic resources include a bank blocking the accounts of a sanctioned person, a port or harbor not allowing a frozen vessel to depart or an airport refusing to give a (frozen) aircraft the take-off permission. The prime example for the prohibition to make funds or economic resources available is an EU operator making a payment (directly or indirectly) to a sanctioned person. The above examples appear straight forward, however, practice shows that these questions are usually more complex. Because of this complexity, and the obligation to act swiftly, EU operators are exposed to liability risk if they *get it wrong*. Thus, Regulation 269 protects EU operators against liability resulting from *excessive* freezing if they applied the restrictive measures in good faith. However, no protection exists if negligence on the part of the EU operator can be proven (see point 5.1).

[12] In relation to the extent of the asset freeze, the review of the recent decision by the German Supreme Court (*Bundesgerichtshof*) IX ZR 19/22 is recommended (it references also pertinent CJEU case law).

Which assets are covered by the asset freeze measures? Article 2(1) states that 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 I, shall be frozen*". Hence, it is generally irrelevant who the legal owner is, as funds or economic resources which are controlled by the sanctioned person, are also covered by the asset freeze.

In practice this leads to a **knock-on effect of sanctions** to close relatives of sanctioned persons (authorities assuming that the sanctioned person controls such funds) and companies which were (or still are) under the control of the respective sanctioned person. Hence, determining whether or not a company is owned or controlled by a sanctioned person is of highly practical relevance. Alas, the Union does not define the terms 'ownership' and 'control' in the Regulations. However, the Council has in its Best Practices established criteria for assessing ownership and control. As these terms are crucial in every-day sanctions practice, it is worth repeating them verbatim:

> ***Ownership****: The criterion to be taken into account when assessing whether a legal person or entity is owned by another person or entity is the possession of more than 50% of the proprietary rights of an entity or having majority interest in it. If this criterion is satisfied, it is considered that the legal person or entity is owned by another person or entity.*
>
> ***Control****: The criteria to be taken into account when assessing whether a legal person or entity is controlled by another person or entity, alone or pursuant to an agreement with another shareholder or other third party, could include, inter alia:*
>
> *(a) having the right or exercising the power to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person or entity;*

(b) having appointed solely as a result of the exercise of one's voting rights a majority of the members of the administrative, management or supervisory bodies of a legal person or entity who have held office during the present and previous financial year;

(c) controlling alone, pursuant to an agreement with other shareholders in or members of a legal person or entity, a majority of shareholders' or members' voting rights in that legal person or entity

(d) having the right to exercise a dominant influence over a legal person or entity, pursuant to an agreement entered into with that legal person or entity, or to a provision in its Memorandum or Articles of Association, where the law governing that legal person or entity permits its being subject to such agreement or provision;

(e) having the power to exercise the right to exercise a dominant influence referred to in point (d), without being the holder of that right;

(f) having the right to use all or part of the assets of a legal person or entity;

(g) managing the business of a legal person or entity on a unified basis, while publishing consolidated accounts;

(h) sharing jointly and severally the financial liabilities of a legal person or entity, or guaranteeing them.

If one (or more) of these criteria are met, the legal entity is deemed to be controlled by another person.[13] Consequently, according to the Union, it is presumed that the assets of such controlled company are in fact controlled by the sanctioned person and, therefore, need to be frozen. Such presumption can be **rebutted** by the concerned legal entity; in practice, the concerned company must *convince* the respective EU operator (in many cases a bank) about its control status and the lack of control exerted by a sanctioned person. However, such **negative**

[13] For the sake of completeness, the Commission has also introduced control criteria in its Commission Opinions in relation to sanctions. However, these criteria essentially follow the above criteria.

proof is in practice difficult to adduce. Moreover, the Regulations do not provide for a process where a competent authority eventually decides by way of an order whether or not frozen assets are indeed under the control of a sanctioned person. The concerned company is, therefore, often left to lodge civil-law claims against the respective freezing measure.

To conclude, determining the status of a legal entity, i.e. answering the question whether or not the company is owned or controlled by a sanctioned person, is highly relevant in the practice of EU sanctions.

What about personal use? Yes, theoretically, a sanctioned person can use their frozen assets. This is even the official position of the Union expressed in the Best Practices. Hence, a sanctioned person can drive his or her own car or live in his or her house; these economic resources merely cannot be used to generate income (e.g. driving it as a taxi or renting out the house; although in such cases it is the customer who pays the fare or the rental fee and, thus, makes funds available to the sanctioned person). In relation to sanctioned persons, these scenarios are rather of theoretical nature as the sanctioned persons are subject to a travel ban; thus, the question of personal use of frozen assets rarely appears. However, scenarios do exist where (non-sanctioned) relatives of sanctioned persons could use, for example, a house or even a boat of a sanctioned person. In practice, however, these (frozen) houses or boats are usually not just frozen but also **seized** by the authorities, making any use essentially impossible (and – as outlined below – there is **no derogation** available to get a personal use of a frozen asset approved). Whether or not such asset seizures are in line with Regulation 269 is certainly a tricky question which must remain open for the purposes of this script.

3.4. Concept of Derogations

No financial restrictive measure is absolute. A sanctioned person can apply for so called '**derogations**' to use frozen funds or economic resources for certain purposes. An authority – when approached with a derogation request by the sanctioned person – has discretion in relation to the derogation. In other words, a sanctioned person has no right to get his or her funds released, but has merely the right to apply for such derogation.

Derogations are available for different purposes. For instance, a sanctioned person may ask to release funds to pay for **basic needs**, insurance or taxes (this includes basic needs of dependent family members of the sanctioned person) (see Article 4). A sanctioned person may ask to pay his or her **service providers**, such as attorneys or other professional services. A sanctioned person may also ask the authority to **maintain** a frozen asset; take for instance a vessel; a (frozen) vessel requires constant maintenance. Even when docked in the harbor, a minimum crew (a so-called skeleton crew) is usually on board to keep the vessel safe and to maintain it. A sanctioned person who (indirectly) owns such vessel, could apply for a derogation to pay for such maintenance costs. However, sin some instances Member State have seized assets. Such seizure is usually accompanied with the Member State's obligation to maintain the seized asset as the Member State must return the seized asset in the same condition as it was before the seize. Whether or not the concerned sanctioned person may pay for the maintenance of the asset is not regulated in the Regulation 269 and must be addressed under the laws of the Member State who has seized the respective asset.

Furthermore, derogations are in place to allow a sanctioned person to **comply with arbitral, judicial or administrative decisions** rendered against the sanctioned person and the frozen funds. The respective decision must have been rendered prior the listing of the sanctioned person and it must be rendered and enforceable in the Union (see Article 5).

Another important set of derogations concern the **performance of prior contracts**. A sanctioned person can **pay** his or her contractual obligations if the contract was entered prior to the sanctioned person being included on the sanctions list (Article 6(1)). This derogation is useful in cases where the EU contractual partner has already performed its part under the respective contract (e.g. supplied the products, carried out the works or rendered the services).

At this stage, it is worth mentioning that **EU operators** can under certain circumstances **make payments to frozen accounts**. For instance, an EU operator can make payments due under contracts, agreements or obligations that were concluded or arose before the date on which the sanctioned person was listed. The same applies to payments due under judicial, administrative or

arbitral decisions rendered in a Member State or enforceable in the Member State concerned. However, any of such **funds must remain frozen** after having been credited to the respective account (see Article 7 of Regulation 269).

Several derogations address the **divestment of proprietary rights** held by sanctioned persons in EU companies. Another derogation (already expired) was specifically made for a Russian truck manufacturer to dissolve its joint ventures in the Union; a similar derogation was made for a leading Russian bank to sell its EU participations.

The Council also introduces derogations to accommodate economic realities, and to remedy negative effects of sanctions on the economy of the Union and its Member States. For instance, many companies associated with sanctioned persons were affected by the sanctions for they were treated as *de facto* sanctioned (so called knock-on effect of sanctions). This had a negative impact on the business performance of such affected companies, consequently impacting the local economy (unemployment, less tax revenue, price surges of certain goods). The Union recognized this issue and allowed such companies to implement so called '**firewalls**' i.e. measures which **remove control** over the company by the sanctioned person and also assure that the company does not make available funds or economic resources to the sanctioned person (see above for the control criteria). Service providers can apply for a specific derogation to set up, evaluate or certify such firewall (and also request the release of frozen funds in order to get paid for the rendered services) (Article 6b(5d)). Surprisingly, the respective Article 6b(5d) does not prescribe the right of the concerned company to obtain a 'firewall approval' from a competent authority. Consequently, even after a service provider (e.g. audit company) has certified a firewall, the concerned company is still at the mercy of the EU operator holding the (frozen) funds as these operators are not required to release such funds despite having been presented with the (certified) firewall. If an EU operator wants to maintain the freeze, it can do so; the concerned company can resort to civil law action to getting the funds released, arguing that the EU operator is not maintaining the freeze in good faith.

3.5. Mandatory reporting

EU operators as well as sanctioned persons are subject to specific reporting obligations. EU operators must supply any information to the national competent authority which would facilitate the implementation of Regulation 269. This includes information about **assets of sanctioned persons which are located within the Union** but which have not been treated as frozen.[14] Moreover, EU operators must report any assets of sanctioned persons which have been **transferred in the two weeks preceding the sanctioning** of the concerned sanctioned person. These reporting obligations exist notwithstanding the applicable rules concerning reporting, confidentiality and professional secrecy, and consistent with respect for the confidentiality of communications between lawyers and their clients guaranteed in Article 7 of the Charter of Fundamental Rights of the European Union (see Article 8).

Any sanctioned person must report within 6 weeks of his or her listing funds or economic resources owned by him or her within the jurisdiction of a Member State to the national competent authority of the Member State where those funds or economic resources are located (see Article 9(2)). The reporting obligation explicitly applies to assets located within the Union. Conversely, assets **outside of the Union** need not to be reported, even if the owner (i.e. sanctioned person) is an EU national.

[14] This is an interesting formulation as assets of sanctioned persons are frozen by operation of Regulation 269 (regardless whether or not an EU operator factually blocks them). This wording suggests that an asset is only *frozen* if an EU operator has factually blocked it – which is not the case according to the sources. In the author's view it is better to say "assets which are frozen but have not been blocked by an EU operator" (this can mainly apply to frozen funds on bank accounts; other assets, such as real estate or motor vehicles, cannot be blocked (i.e. seized) by the Member States as such assets are already frozen by operation of Regulation 269; hence any government seizure would technically constitute an excessive application of sanctions).

4. Sectoral Sanctions – Regulation 833

4.1. In a nutshell

Sectoral sanctions aim to weaken Russia's economic, industrial and warfare capabilities. One of the key objectives of EU sanctions is to increase the cost of war on Russia. Thus, the Union identified sectors and industries of the Russian economy which are – in the Union's opinion – crucial for Russia's war efforts. Hence, to weaken Russia's economic and industrial capabilities, the Union imposes a plethora of import and export restrictions. Moreover, the Union puts restrictions on the flow of financial means between the Union and Russia by, for example, excluding major credit institutions from the SWIFT messaging system, thus inhibiting international transfers. Furthermore, EU operators are prohibited to enter into any transaction with certain Russian state-owned companies. Finally, certain EU service providers are prohibited to render services to persons with a Russian nexus.

Unlike individual sanctions, sectoral sanctions target the Russian economy as a whole. For example, products subject to an export restriction cannot be sold to a Russian buyer (irrespective of who that Russian buyer is). Only in exceptional cases, sectoral sanctions apply to particular legal entities, such as the SWIFT ban or the *transaction ban* (i.e. the prohibition to enter into transaction with certain state-owned companies). Note that companies targeted by sectoral sanctions need not necessarily be targeted by individual sanctions as well. Though, some legal entities are indeed targeted by both Regulations, e.g. Sberbank,[15] other legal entities are only targeted by sectoral sanctions. One good example is Gazpromneft, which is only targeted by sectoral sanctions, but not by individual sanctions.

4.2. Exceptions and derogations

Before diving into the plethora of restrictions imposed by sectoral sanctions, first, it is worth outlining the exceptions and derogations available under Regulation 833. Because – same as the restrictions imposed by Regulation 269 – the restrictions in Regulation 833 are **not absolute** but

[15] Which is listed in Annex I to Regulation 269 and covered by the SWIFT ban stipulated by Regulation 833.

subject to exceptions and derogations. Thus, no matter what restriction is at issue, anyone who deals with sanctions in whatever capacity should assess if a particular case falls under an exception, or, if a derogation is available.

In case of an **exception**, the respective prohibition does not apply if the prerequisites of the exception are met. Conversely, in case of a **derogation**, parties can apply to the national competent authority to have a certain transaction approved. The national competent authority, however, has usually a broad range of discretion and it can also subject the approval to conditions.

Exceptions and **derogations** can be summarized into the following **categories**:

(i) goods intended for **humanitarian purposes**, health emergencies, the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health and safety or the environment or as a response to **natural disasters**;

(ii) goods intended for **medical** or **pharmaceutical** purposes;

(iii) **grandfather clauses**; i.e. transaction falling under a transition period and, thus, not being subject to the prohibition (e.g. a contract concluded before day X can be executed until date Y);

(iv) **Quota exceptions**: certain (banned) products may be imported into the Union up to certain annual quantity;

(v) **'Counter-party exceptions'**: certain (banned) transactions can be concluded and implemented if the Russian counterparty is controlled by a legal entity from the Union an EEA member state, Switzerland or a 'partner country' listed in Annex VIII; (which are currently US, Japan, UK, South Korea, Australia, Canada, New Zealand, Norway and Switzerland; further referred to as "**Partner Country**") .

Certainly, the above **categories are not exhaustive** as Regulation 833 contains a myriad of specific exceptions (sometimes only applicable to one particular Member State). Moreover, the above categories mainly apply to the prohibitions targeting import/export of certain goods.

Prohibitions addressing services have different exceptions. However, in a nutshell, anyone facing a sectoral prohibition should ask the following **initial questions** to easier identify an exception (or derogation):

a. The purpose of the goods/services at issue;

b. The timing (when was the contract concluded and when were the goods to be supplied);

c. The legal seat of the contractual counter-party (follow up question: if it is a Russian company, does it have non-Russian shareholders, and if so, where are they from?).

Finally, the so-called '**divestment clause**' provides for several derogations allowing certain transactions or the provision of services if they are necessary for the **divestment from Russia** or the **wind-down of business activities in Russia** (Article 12d). This divestment clause 'benefits' **service providers** covered by Article 5n as they may continue to provide services until (currently) 31 July 2024 (provided these services are strictly necessary for the divestment from Russia and the wind-down of business activities in Russia). Furthermore, **legal advisory services** can be rendered (currently) until 31 March 2024 if these legal advisory services are necessary for the completion of a **sale or transfer or proprietary rights** directly or indirectly owned by a Russian legal person in a legal person established in the Union; put simply, a Russian company aiming to sell its direct or indirect participation in an EU company can retain counsel who can provide legal advisory services in relation to this transaction (Article 12b(2b)). Note that the deadline of 31 March 2024 recently expired. It is to be seen if the Union extends this period in the next sanctions package.

4.3. Restricted Goods – Export and Import Restrictions

Sectoral sanctions mainly target the export and import of certain products to, or from, Russia. On the one hand, Russia shall be cut off from certain revenue streams, and, on the other hand, Russia shall not receive products that could be somehow used for military purposes or otherwise

strengthen Russia's industrial capabilities. Thus, we distinguish between **export restrictions** and **import restrictions**.

In terms of structure of each restriction, the respective legal provisions in Regulation 833 address either an export or an import restriction. This can be easily identified. For example, Article 2 Regulation 833 reads as follows:

> *It shall be prohibited to sell, supply, transfer or export, directly or indirectly, dual-use goods and technology, whether or not originating in the Union, to any natural or legal person, entity or body in Russia or for use in Russia.*

Based on this text, it is evident that this provision addresses an **export restriction**. Usually, a prohibition is comprised of two parts, the first part being the specific Article in Regulation 833 prohibiting the export or the import of a product, and the second part being the respective annex where the specific products are listed. For example, Article 3c reads as follows (in pertinent part):

> *It shall be prohibited to sell, supply, transfer or export, directly or indirectly, goods and technology suited for use in aviation or the space industry, **as listed in Annex XI**, [....]* (emphasis added)
>
> **Annex XI** (partly) reads as follows:
>
> **List of goods and technologies referred to in Article 3c(1)**
> **Part A**

CN Code	Description
88	Aircraft, spacecraft, and parts thereof

Conversely, an **import restriction** reads as follows:

> *It shall be prohibited to purchase, import, or transfer, directly or indirectly, goods which generate significant revenues for Russia thereby enabling its actions*

destabilising the situation in Ukraine, as listed in Annex XXI into the Union if they originate in Russia or are exported from Russia. (See Article 3i)

Any import or export restriction is coupled with **accompanying restrictions**, and with exceptions and derogations. One of the accompanying restrictions concerns **services** in relation to the prohibited export or import (see below in more detail). The other restriction concerns the **financing or financial assistance** related to the banned goods for any sale, supply, transfer or export of those goods and technology. This **financing prohibition also extends** to 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.

Regulation 833 provides a **definition** of 'financing or financial assistance'; it means "*any action, irrespective of the particular means chosen, whereby the person, entity or body concerned, conditionally or unconditionally, disburses or commits to disburse its own funds or economic resources, including but not limited to grants, loans, guarantees, suretyships, bonds, letters of credit, supplier credits, buyer credits, import or export advances and all types of insurance and reinsurance, including export credit insurance; payment as well as terms and conditions of payment of the agreed price for a good or a service, made in line with normal business practice, do not constitute financing or financial assistance*".

4.4. Restricted Services

Regulation 833 restricts the provision of a plethora of services to persons with a *Russian nexus*. Generally, any export or import restriction is accompanied with a ***service restriction***. In essence, this means that not only the export or import of certain goods is prohibited, but also the provision of services in relation to such export or import. For example, paragraph 2(a) of Article 3i reads as follows:

2. It shall be 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 in relation to the prohibition in paragraph 1;

These restrictions are ancillary to the respective export or import restriction. Furthermore, Regulation 833 outright prohibits the provision of certain services. One of the key restrictions concerns the provision of **trust services** if the settlor or beneficiary is *Russian* (see Article 5m Regulation 833).

Moreover, according to Article 5n, EU service providers are prohibited to provide the following services to the Government of Russia or legal persons, entities or bodies established in Russia:

(i) accounting, auditing, including statutory audit, bookkeeping or tax consulting services, or business and management consulting or public relations services;

(ii) architectural and engineering services, legal advisory services and IT consultancy services;

(iii) market research and public opinion polling services, technical testing and analysis services and advertising services.

As with any restriction, exceptions and derogations exist and each case is to be **assessed on a case-by-case basis**. For example, legal advisory services can be rendered if these services are **strictly necessary** to ensure **access to judicial, administrative or arbitral proceedings** in a Member State. According to the Commission's FAQs, *[t]he term **strictly** means that there is no other way […] to exercise the right of defense other than to rely on the provision of these otherwise prohibited services*. Services listed in Article 5n can be rendered until **20 June 2024**, provided the Russian company is owned by, or solely or jointly controlled by, a legal person, entity or body which is incorporated or constituted under the law of a Member State, a country member of the European Economic Area, Switzerland or a Partner Country. After 20 June 2024, a **derogation** needs to be obtained to provide such services (see Article 5n(7) in connection with Article 5n(10)(h)). This will certainly have an impact on intra-group services; until the 12th

"package", such services to Russian subsidiaries were subject to the exception (with no deadline and the no *switch over* to the derogation-regime).

Moreover, trust services can be rendered if the settlor or beneficiary has a nexus to a Member State, a member state of the EEA or Switzerland (for example, if the trustor or settlor is a national or holds a residence title in one of these states).

4.5. Prohibition to acquire new interests and finance companies in certain sectors

EU operators are – in essence – prohibited to expand their business into the Russian **energy, mining and quarrying sector**. It is prohibited to purchase a new interest or extend any existing participation in a Russian company (or any third-country company) which is operating in the energy sector in Russia (see Article 3a). It is furthermore prohibited to provide funds to such *energy companies* by way of debt or equity or to enter into joint ventures with such companies.

Moreover, essentially the same prohibition applies to investments into companies (Russian or third country) operating in the **mining and quarrying** sector in Russia (see Article 3a(2)). The Regulation defines 'mining and quarrying sector' as "*sector covering the location, extraction, management and processing activities relating to non-energy producing materials*".

4.6. Restrictions to deal with certain state-owned legal entities – Transaction Ban

Regulation 833 prohibits EU operators from directly or indirectly **engaging in any transactions** with certain Russian companies (see Article 5aa) (hereinafter referred to as '**transaction ban**'). This transaction ban targets state-owned Russian companies as listed in Annex XIX. These companies are currently:

OPK OBORONPROM

UNITED AIRCRAFT CORPORATION

URALVAGONZAVOD

ROSNEFT

TRANSNEFT

GAZPROM NEFT

ALMAZ-ANTEY

KAMAZ

ROSTEC (RUSSIAN TECHNOLOGIES STATE CORPORATION)

JSC PO SEVMASH

SOVCOMFLOT

UNITED SHIPBUILDING CORPORATION

RUSSIAN MARITIME REGISTER of SHIPPING (RMRS)

RUSSIAN REGIONAL DEVELOPMENT BANK

Furthermore, (controlled) subsidiaries of the targeted companies, as well as companies acting on behalf or at the direction of a targeted company (or its controlled subsidiary) are covered by the transaction ban as well.

Neither the Regulation 833 nor any non-binding source of the Union define the term 'transaction'. It is, however, likely that the term ought to be interpreted broadly to cover as many possible scenarios. This understanding is supported by the fact that the transaction ban is not absolute. Political compromises had to be considered in the respective provision. For instance, the transaction ban does not apply to "*transactions which are strictly necessary for the direct or indirect purchase, import or transport of natural gas, titanium, aluminium, copper, nickel, palladium and iron ore from or through Russia into the Union, a country member of the European Economic Area, Switzerland, or the Western Balkans*".

Moreover, it can be assumed that even the rendering of legal advice is deemed a 'transaction' and is covered by the transaction ban; to allow access to effective legal remedy, the transaction ban is not applicable to transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State.

4.7. Restriction to accept deposits

Regulation 833 prohibits the acceptance of any deposits from Russian nationals, natural persons residing in Russia, Russian companies or EU companies controlled by the former persons if the total value of deposits per credit institution exceeds EUR 100,000 (see Article 5b). This

prohibition does not apply to nationals of a Member State, of a country member of the European Economic Area or of Switzerland (or to persons having a permanent or temporary residence permit in these states).

Article 5c prescribes a **derogation** under which the national competent authority can allow a financial institution to accept deposits, provided such deposits concern the payment by a sanctioned person for basic needs, reasonable professional fees, routine maintenance charges and extraordinary expenses.

Without Article 5c, a sanctioned person wanting to pay for basic needs (e.g. taxes in a Member States) could (only) apply for a derogation under Article 4 Regulation 269. However, the bank receiving the payments would be prohibited from crediting the funds if the amount exceeded EUR 100,000. Hence, Article 5c considers this predicament and allows EU banks to accept such deposits from Russians.

EU credit institutions are subject to **annual reporting obligations**. As of 27 May 2022, credit institutions must supply to the national competent authority a list of deposits exceeding EUR 100,000 held by Russian nationals, persons residing in Russia or Russian legal entities. The same restriction applies as of 27 May 2023 in relation to entities established outside of the Union and which are owned directly or indirectly for more than 50% by Russian nationals or natural persons residing in Russia. This reporting obligation is even applicable to persons residing in Russia but who have acquired the citizenship of a Member State or a residence right in a Member State through an **investor citizenship scheme** (i.e. golden passport) or an **investor residence scheme** (i.e. golden visa) (see Article 5g). The term 'investor citizenship scheme' and 'investor residence scheme' are defined and mean *the procedures put in place by a Member State, which allow third-country nationals to acquire its nationality [to obtain a residence permit in a Member State] in exchange for pre-determined payments and investments* (Article 1(l) and (m), respectively).

4.8. Restrictions on securities and money-market instruments

Sectoral sanctions heavily target the **Russian capital market**. The trade of certain **transferrable securities** and **money-market instruments** are restricted if issued by certain major Russian credit institutions (Article 5). The following banks are currently targeted: Sberbank, VTB Bank, Gazprombank, Vnesheconombank and Rosselkhozbank (see Annex III to Regulation 833). The prohibition in relation to these *Annex-III banks* extends to securities **issued after 1 August 2014**.

In addition to these *Annex-III banks*, the following credit institutions are also affected by the prohibition: Alfa Bank, Bank Otkritie, Bank Rossiya, and Promsvyazbank (see Annex XII). Unlike securities issued by the *Annex-III banks*, securities of these *Annex-XII banks* are covered by the prohibition if they were **issued after 12 April 2022**.

Further to securities issued by so-called *major credit institutions*, securities issued after **9 March 2022** by the **government of Russia and the Central Bank of Russia** are also subject to similar restrictions (Article 5a).

Not only are EU operators prohibited to deal with certain Russian securities, **EU issuers** are **prohibited to sell transferrable securities** denominated in any official currency of a Member State issued after 12 April 2022 (or in any other currency issued after 6 August 2023) to any **Russian national, natural person residing in Russia or Russian legal entity** (Article 5f).

4.9. SWIFT

One of the most publicized restrictions concerned the **exclusion** of several Russian banks from the **SWIFT messaging system** (see Article 5h). The targeted banks are listed in Annex XIV; they currently include: Bank Otkritie, Novikombank, Promsvyazbank, Bank Rossiya, Sovcombank, VNESHECONOMBANK (VEB), VTB BANK, Sberbank, Credit Bank of Moscow, and JSC Rosselkhozbank. **In addition** to the banks listed in Annex XIV, the restriction extends to legal entities established in Russia, which are owned for more than 50% by these banks.

4.10. Restrictions on shipping (Russian-flagged vessels)

As from **April 2022**, it is generally prohibited for **Russian flagged vessels** to access ports and locks in the territory of the Union. This prohibition also applies to vessels that have changed their Russian flag to a flag of any other state after 24 February 2022 (Article 3ea).

To **combat circumvention** of certain import restrictions (such as crude oil or petroleum products), the prohibition extends to vessels who – at any time of their voyage – engaged in **ship-to-ship transfer**; if a competent authority has reasonable cause to suspect a ship-to-ship transfer, the respective vessel cannot access EU ports or locks (Article 3eb). The same applies to vessels transporting crude oil or petroleum products who have at any point of their voyage failed to comply with particular provisions of the International Convention for the Safety of Life at Sea (SOLAS), in particular with the obligation to **operate an automatic identification system** (AIS) (Article 3ec).

Finally, not only are Russian flagged vessels prohibited form accessing EU ports or locks, EU operators are prohibited to sell, supply, transfer or export **maritime navigation goods** to any natural or legal person in Russia, for the use in Russia or for the placing on board of a Russian-flagged vessel.

4.11. Restriction in relation to Russian aircrafts

Another noticeable restriction concerned **Russian aviation**. Essentially *Russian* aircrafts were **banned from EU airspace**. This ban covers aircrafts operated by Russian air carriers (e.g. Aeroflot, S7 etc), any Russian-registered aircrafts, or any non-Russian registered aircrafts which are owned or chartered, or otherwise controlled by any Russian national or Russian legal entity (Article 3d). The **ban does not apply** in the case of an **emergency landing** or an **emergency overflight**.

4.12. Road-transport restrictions

Put bluntly, ***Russian trucks* are banned from Union territory**. Pursuant to Article 3l, any **road transport undertaking** established in Russia is prohibited to transport goods by road within the

territory of the Union, including in transit. One **notable exception** to this prohibition relates to goods in transit through the Union between the Kaliningrad Oblast and Russia (provided, however, that the transport of such goods is not otherwise prohibited). **Derogations** are available in relation to, for example, pharmaceutical, medical, agricultural and food products, humanitarian purposes or the transfer or export to Russia of cultural goods which are on loan in the context of formal cultural cooperation with Russia.

4.13. Prohibition to re-export (No-Russia Clause)

As of **20 March 2024**, EU operators must – when dealing with contractual partners from third countries – **contractually prohibit** the **re-exportation** to Russia and re-exportation for use in Russia of certain goods (the "**No-Russia Clause**"; see Article 12g). The following goods or technology are covered by the No-Russia Clause:

- Annex XI (*Goods in relation to aircrafts*)
- Annex XX (*Jet fuel*)
- Annex XXXV (*Firearms*)
- Annex XL (*Common high-priority items*)

The obligation to include a No-Russia Clause does not apply if the contractual partner is from a '**partner country**' as listed in Annex VIII to Regulation 833, as these partner countries have similar sanctions in place and the risk of circumvention is deemed to be remote. These partner countries are currently: The US, Japan, UK, South Korea, Australia, Canada, New Zealand, Norway and Switzerland.

The overall prohibition is subject to a **grandfather clause** as it does not apply to the execution of contracts concluded **before 19 December 2023** until **20 December 2024** or until their respective expiry date, whichever is earlier; thus, if a contract concluded before 19 December 2023 has not been executed until 20 December 2024, such contract – as of 20 December 2024, needs to be amended accordingly to include the No-Russia Clause.

The No-Russia Clause must include adequate remedies in case the third-country counterparty breaches its obligations. Such adequate remedy may be the right to terminate the agreement for cause, or to claim a contractual penalty from the third-country counterpart.

The EU operator must inform the national competent authority where they are resident or established of any (known) breaches by the third-country counterparty.

Practice will show how efficient such No-Russia Clauses will be. Certainly, contractual penalties and any kind of damage claims based on such a clause will result in interesting cases at the crossroad between national contract law and EU law. In many cases, the third-country counterparty might not be the party which re-exports the goods to Russia. Thus, if the third-country counterparty complied with its obligations imposed in the contract by the EU operator (i.e. maintaining diligent end-destination checks or due-diligence checks on its counterparties), but the respective goods nevertheless ended up in Russia, the third-country counterparty might actually not be in breach of the No-Russia Clause – any contractual penalty might, therefore, be futile.

The Commission proposed in its FAQ a wording for a No-Russia Clause which reads as follows:

> *"(1) The [Importer/Buyer] shall not sell, export or re-export, directly or indirectly, to the Russian Federation or for use in the Russian Federation any goods supplied under or in connection with this Agreement that fall under the scope of Article 12g of Council Regulation (EU) No 833/2014.*
>
> *(2) The [Importer/Buyer] shall undertake its best efforts to ensure that the purpose of paragraph (1) is not frustrated by any third parties further down the commercial chain, including by possible resellers.*
>
> *(3) The [Importer/Buyer] shall set up and maintain an adequate monitoring mechanism to detect conduct by any third parties further down the commercial chain, including by possible resellers, that would frustrate the purpose of paragraph (1).*

(4) Any violation of paragraphs (1), (2) or (3) shall constitute a material breach of an essential element of this Agreement, and the [Exporter/Seller] shall be entitled to seek appropriate remedies, including, but not limited to: (i) termination of this Agreement; and (ii) a penalty of [XX]% of the total value of this Agreement or price of the goods exported, whichever is higher.

(5) The [Importer/Buyer] shall immediately inform the [Exporter/Seller] about any problems in applying paragraphs (1), (2) or (3), including any relevant activities by third parties that could frustrate the purpose of paragraph (1). The [Importer/Buyer] shall make available to the [Exporter/Seller] information concerning compliance with the obligations under paragraph (1), (2) and (3) within two weeks of the simple request of such information."

4.14. Reporting Obligations re transfer of funds exceeding EUR 100,000

The 12th "package" introduced new reporting obligations into Regulation 833. It mainly addresses legal entities established in the Union which are owned for more than 40% by a Russian company, a Russian national or a natural person residing in Russia (covered entity) (see Article 5r).

As of **1 May 2024**, covered entities must report to the respective national competent authority, within two weeks of the end of each quarter (the relevant quarter), any **transfer of funds exceeding EUR 100,000** (reporting threshold) out of the Union in the relevant quarter. Not only are direct payments *out of the Union* covered by the reporting obligation, but also indirect payments. The reporting threshold of EUR 100,000 may be exceeded in one or several operations.

The new Article 5r also imposes reporting obligations on **EU credit and financial institutions**. Starting from **1 July 2024**, such institutions must report to their respective national competent authority within two weeks after each semester (relevant semester) information on all transfers of funds out of the Union exceeding in total EUR 100,000 in the respective relevant semester. Subject to reporting are transfers which the respective institution initiated, directly or indirectly, for the covered entities (see Article 5r(2)). Note that these reporting obligations for EU

credit and financial institutions apply notwithstanding the applicable rules concerning reporting, confidentiality and professional secrecy.

For further details, reference is made to the Commission FAQ, which on 12 April 2024 included an entire section dedicated to outgoing transfers under Article 5r.

5. Joint Provisions applicable to both Regulations

5.1. Protection of EU Operators

Both Regulations contain provisions to protect EU operators against claims launched by their *Russian* contractual counterparties (see Article 11 in both Regulations). If an EU operator **refuses to perform** its obligations under a contract which has been affected by EU sanctions, such EU operator shall **not satisfy** any **claims** resulting out of the refusal to perform its obligations; this also applies to third parties who provided some form of **collateral** in relation to the fulfillment of the respective contract (e.g. third-party guarantee). Generally, such protection is reasonable as EU operators might face damage claims because of their refusal to perform under a contract which is affected by sanctions; the desired effect of sanctions would fall short if the *Russian* counterpart could claim damages for such non-performance from its EU contractual partner. Certainly, some scenarios are borderline. Take for instance the **return of an advance payment** by an EU operator to the Russian counterparty (which has transferred an advance payment for the purchased goods). For example, some authorities claim that an EU operator is not obliged to return such an advance payment to the Russian counterparty as long as sanctions are in place because of the prohibition to satisfy claims pursuant to Article 11.[16] This (practically relevant) matter will likely end up in the CJEU for a preliminary ruling. Because one can reasonably argue that the repayment of the

[16] Reference is made to the FAQ of the Federal Ministry of Economic Affairs and Climate Action, which in question 51 concerning the return of an advance payment respond (in pertinent part) as follows: "*Yes; according to the text of the law it is prohibited to satisfy any claims in relation to a (meanwhile) sanctioned transaction. The repayment of an advance payment, which is aimed at restoring a legal relationship into the state prior to the impositions of sanctions (status quo ante) is, therefore, prohibited. The same applies to claims in relation to an advance payment guarantee*" (free translation).

advance payment merely restores the contract status quo ante and, thus, does not fall under Article 11.

Regulation 269 furthermore protects EU operators from liability if they – acting in good faith – freeze assets of sanctioned persons or refuse to make assets available (see Article 10 Regulation 269). However, the protection is not unlimited as EU operators can be held liable for an excessive application of the restrictive measures if it is proved that they acted with **negligence**. It depends on the facts of each particular case whether, or not, the EU operator negligently freezes funds which ought not to be frozen.

Lastly, both Regulations protect EU operators from liability of any kind in case they have not applied the restrictions imposed by the Regulations if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in this Regulation.

5.2. No-Circumvention

Both Regulations contain provisions aimed at combating circumvention of sanctions (Article 9 of Regulation 269 and Article 12 of Regulation 833). The text of the respective provisions reads as follows: "*It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred [in the respective Regulation]"*.

Whether or not certain actions qualify as circumvention, needs to be assessed on a case-by-case basis. However, in principle no circumvention takes place **before** particular sanctions were imposed. This is because sanctions **do not apply retroactively**.[17] For example, if a sanctioned person (transferor) – in anticipation of his or her sanctioning – transfers assets to a relative (transferee), neither the transferee nor the transferor can be held liable for circumvention of sanctions.[18] However, if the involved persons maintain such *structure* after the transferee has been sanctioned, it cannot be excluded that an authority views the maintenance of the structure as a

[17] See also Commission FAQ Chapter B.1., Question 5.
[18] The transferred assets could certainly remain frozen if there are reasonable grounds to believe that the transferor retains control over the transferred assets (see reference made in footnote 16; the response to question 5 outlines factors which shall help determine whether or not an asset shall remain frozen despite having been transferred to a non-sanctioned person).

circumvention by (at least) the transferee (the action that circumvents the sanction is in such case not the transfer itself but the holding of the respective asset after the transferor has been sanctioned). This is even more likely if the transferred assets were not treated as frozen because its beneficial owner (i.e. transferor) has been obfuscated by the transferee.

According to available case law, actions may constitute circumvention if the operator "*deliberately seeks that object or effect or is at least aware that is participation may have that object or that effect and accepts that possibility*" (See case *Afrasiabi*, C-72/11).

It is also worth mentioning that **failure** to comply with **reporting obligations** may qualify as **circumvention**. Take for instance Article 9(3) of Regulation 269 which states that failure to comply with the reporting obligation shall be considered as participation in activities the object or effect of which is to circumvent the financial restrictive measures.

Finally, anyone **assisting a sanctioned person** in circumventing sanctions, can be **directly listed** in Annex I to Regulation 269. The listing ground in Article 3 letter (h) specifically includes persons facilitating infringements of the prohibition against circumvention of the provisions of (among others) the Regulations (the so-called *enablers*).

5.3. Penalties for Breaches

Although, both Regulations are directly applicable, none of the Regulations contains penalties for breaches of sanctions. This is because the Member States have the legislative competence to lay down their own penalties. Member States, therefore, enacted national laws which contain penalties for breaches of international sanctions. Hence, this *area* of law has not yet been harmonized in the Union and differences in the severity of a breach (i.e. criminal offense or administrative offense) and severity of the punishment (i.e. imprisonment or monetary fine) still exist (which might invite shopping for a more convenient forum). Efforts exist on Union level to

raise breaches of sanctions to the level of an ***EU crime***. As of today, no directive has been passed in this regard.[19]

5.4. Territorial scope of the EU sanctions

Both Regulations contain an identical provision in relation to their territorial application (See Article 17 of Regulation 269 and Article 13 of Regulation 833). The Regulations apply (a) within the territory of the Union, (b) on EU flagged vessels and aircraft, (c) to EU nationals inside and outside of the Union, (d) to legal persons incorporated in the Union inside and outside of the Union and (e) to any legal person to extent business done within the Union.

The Regulation, therefore, applies to anyone within the Union irrespective of nationality or place of incorporation. For example, a Serbian national cannot make available funds to a sanctioned person from within the Union territory. Furthermore, the Regulation applies to EU nationals and EU companies inside and outside the Union. For example, an EU national is prohibited from providing legal services to Russian companies irrespective where he or she is located. Finally, even non-EU companies are subject to the Regulations, but only to the extent *business is done* within the Union. It is not entirely clear what 'business done' means in the context of the Regulations. For example, if a non-EU company purchases sanctioned goods from Russia, the Regulation generally does not apply to the conclusion of the contract; however, if the goods are shipped through EU territorial waters, one could argue that the transfer is business done in the Union and, hence, subject to EU sanctions. Whether only the shipping part is prohibited or whether the shipping part *poisons* also the prior contract is an interesting legal question which – for the purposes of this script – must remain open.

Though the Union is adamant that EU sanctions do not apply extraterritorially, some tendencies to extend the scope of the sanctions is visible. For example, Regulation 833 targets certain non-Russian companies. These entities are listed in Annex IV to Regulation 833. This Annex lists companies which have commercial or other links with or which otherwise support

[19] Note that on 3 April 2024, the Council has published a draft Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures (https://data.consilium.europa.eu/doc/document/PE-95-2023-INIT/en/pdf/).

Russia's defense and security sector. EU operators are prohibited to supply specific products to these companies (which include companies from among others China, the UAE or Iran). Another example is the worldwide application of sanctions to EU nationals and EU companies. Finally, because even non-EU companies are subject to EU sanctions to the extent their actions qualify as *business done within the Union*, scenarios are comprehensible where transactions outside of the scope of sanctions become (retroactively) *tainted* in its entirety because of one element which took place within the Union, for example, a short passage of the purchased goods through Union territory or a payment for purchased products using the Union financial system (e.g. a correspondent bank within the Union). For the purposes of this script, these issues must remain open.

6. Outlook

Sanctions against Russia (and Belarus) will remain in force for an unforeseeable duration. Since the inception of the Russian sanctions in 2014, the Union has now approved 13 sanctions packages. However, according to EU officials, Russia continues to adjust its economy to international sanctions, and, therefore, the **14th sanctions package** is in preparation.

The focus of sanctions visibly shifts from imposing new restrictions to measures ensuring the proper implementation of the existing sanctions. This extends to the closing of loopholes and fighting the circumvention of sanctions, especially in the maritime sector (to combat Russia's efforts to violate the oil-price cap). Interestingly, the Union might target EU companies in cases where its non-EU subsidiaries aid or abet the circumvention of sanctions. As the 14th sanctions package is scheduled for spring 2014, more details about new restrictions should be published in due course.