UPDATE

EU-Russia Sanctions: 14th Package is out

On 24 May 2024, the Council of the European Union adopted the 14th package of sanctions against Russia. The amendments and inclusions concern both individual sanctions[1] and sectoral sanctions[2].

*The following update addresses the **individual sanctions regime** pursuant to Council Regulation (EU) 269/2014 (as amended).*

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In a nutshell

The 14th package introduces into Regulation 269/2014:

- New Derogations for frozen funds owned by non-sanctioned persons, but transferred through or from sanctioned banking institutions (new paragraphs 5h and 5i of Art. 6b[3]);
- Stricter circumvention standard(?) - Amendment of Art. 9(1);
- Establishment of EU jurisdiction for damage claims (new Art. 11a);
- Amendment of the information exchange clause (Art. 12);
- Introduction of a voluntary self-disclosure procedure on national level as a mitigating factor (Art 15);
- Extension of professional secrecy in relation to sanctions-related documents held by certain EU institutions (Art. 16a).

1. New Derogations

The new derogations in paragraph 5h and 5i apply to scenarios where funds are frozen as a result of being transferred between non-sanctioned persons through or from an **(intermediary) sanctioned bank** (such frozen funds being referred to as "**Transferred Funds**").

Paragraph 5h applies to Transferred Funds which are frozen because of a transfer through an **intermediary sanctioned bank**. **Paragraph 5i** applies to Transferred Funds being **transferred from a sanctioned bank**. This derogation is necessary because in practice, the receiving bank located in a Member State refuses to accept such transfer as it deems the Transferred Funds as frozen.

The scenarios addressed in the new derogations are, however, not new. In 2019, the **European Commission** already issued an **opinion** dedicated to such cases of 'trapped funds'.[4] The Commission

[1] Council Regulation (EU) 2024/1739 of 24 June 2024 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L, 2024/1739)

[2] Council Regulation (EU) 2024/1745 of 24 June 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L, 2024/1745).

[3] Unless stated otherwise, references to articles refer to articles contained in Regulation 269/2014.

[4] Commission Opinion C(2019) 5175 final of 4 July 2019 on a request for interpretation concerning the freeze of funds of a non-designated person transferred into a Member State from a designated bank and the derogation for "extraordinary expenses" under Article 28 of Council Regulation (EU) 267/2012

viewed Transferred Funds as frozen for they were 'held' by a sanctioned bank.[5] However, in the Commission's view, the affected person (i.e. either the transferor or the transferee) could apply for a derogation available under the applicable regulation.

In the case reviewed by the Commission for the purposes of the Commission Opinion, the affected person had to use the funds for the **purchase of a house**. The Commission confirmed that the derogation to release frozen funds to pay for **extraordinary expenses** shall apply to a non-sanctioned person who suffers **knock-on effects** of his or her funds being held by a sanctioned bank. However, the Commission further stated that the purchase of a house does not amount to an 'extraordinary expense' and "*that It is for the national competent authority to ascertain whether, in the specific circumstances of the pending case, [the purchase of a house] indeed constitutes [extraordinary expenses]*".

While the referenced Commission Opinion was issued in light of Iran sanctions, the same situation can arise in relation to Transferred Funds under Regulation 269/2014 as many Russian banks are listed in Annex I. **Without the new derogation**, the affected person cannot dispose over the Transferred Funds unless the requirements for any of the available derogations are fulfilled.

The new derogations **facilitate the release** of such Transferred Funds. The **prerequisites** for the application of the new derogations are: (i) the transfer is carried out between non-sanctioned persons; (ii) the transfer is carried out using accounts at credit institutions that are not sanctioned,[6] and (iii) the transfer is not in breach of Art. 2(2) or Art. 9. Furthermore, under paragraph 5i, only one (1) authorisation per applicant may be granted.

Moreover, under both derogations, the **beneficiaries of the transfer** must be **nationals** of a Member State, of a country member of the European Economic Area or of Switzerland, or natural persons having a **temporary or permanent residence permit** in a Member State, in a country member of the European Economic Area or in Switzerland.

Finally, the **derogations do not apply** to frozen funds or economic resources held by Central securities depositories within the meaning of Regulation (EU) No 909/2014.

2. Stricter circumvention rules?

Art. 9(1) was amended as follows (inclusions underlined in red):

"*It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the prohibitions set out in this Regulation, including by participating in such activities without deliberately seeking that object or effect but being aware that the participation may have that object or effect and accepting that possibility.*"

Prima facie, the amendment lowers the threshold for breaching Art. 9(1). This is because before the 14th Package a person had to participate **knowingly** and **intentionally** in activities which aimed at circumventing sanctions. Now, to breach Art. 9(1), it is sufficient to **accept the possibility** that certain activities might circumvent sanctions.

However, it has been established by **case law** of the CJEU that the requirements for circumvention are met where the operator "*deliberately seeks that object or effect or is at least aware that its*

[5] 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 I, shall be frozen*" (emphasis added).

[6] Applicable only to paragraph 5h.

participation may have that object or that effect and accepts that possibility".[7] This is also recognized by the Council in recital (4) of Regulation 2024/1739 ("*In order to* ***ensure alignment*** *with the interpretation of the Court of Justice of the European Union in Case C-72/11 […]*" [emphasis added]).

3. Establishment of EU jurisdiction for certain damage claims

By way of **background**, the new Art. 11a is connected to Art. 11 (no-claims clause) and to Art. 17(c) and (d). The **no-claims clause** stipulated in Art. 11 essentially prohibits EU operators to satisfy claims[8] made by sanctioned persons provided these claims derive from contracts or transactions the performance of which has been affected by the sanctions.

Art. 17 sets forth the **territorial scope** of Regulation 269/2014. Letters (c) and (d) cover EU nationals and legal entities incorporated in the Union. According to these letters, Regulation 269/2014 applies to both EU national and legal persons **inside and outside of the Union**.

Consequently, if EU operators are sued outside of the Union, they shall not comply with any verdict rendered against them in the respective third-country jurisdiction as they would be breaching Art. 11 (and likely Art 2(2) as well).

The **new Art. 11a allows** concerned EU operators to recover, in judicial proceedings **before the competent courts of the Member State**, any damages, including legal costs, incurred by that EU operator as a consequence of claims lodged with courts in third countries by sanctioned persons, or persons acting on behalf of such sanctioned persons, provided that the EU operator concerned does not have **effective access to the remedies** under the relevant (third-country) jurisdiction.

4. Amendment of the information exchange clause

To improve the effectiveness of the sanctions, the Commission and the Member States shall share information regarding the derogations granted by Member States and in respect of violation and enforcement problems and judgments handed down by national courts.

The 14th package amends letter (b) of Art. 12 as follows: "*in respect of violation and enforcement problems, penalties applied for infringements of the provisions of this Regulation and judgments handed down by national courts*".

5. Introduction of a voluntary self-disclosure procedure

Regulation 269/2014 applies directly in the Member States without the need to transpose the restrictive measures into national law. However, Art. 15 assigns to Member States the competence to lay down the rules on penalties, including appropriate criminal penalties, applicable to infringements of the provisions of Regulation 269/2014.

The amended Art. 15 allows Member States to take the **voluntary self-disclosure** of infringements of the provisions of Regulation 269/2014 into account as a **mitigating factor**.[9]

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[7] CJEU C-72/11, Afrasiabi and Others (ECLI:EU:C:2011:874), para 68.
[8] The term "claim" is defined in Art. 1(a).
[9] A similar provision has been introduced into Art. 8 of Regulation 833/2014.

More likely than not, many Member States will already have in place provisions in criminal law or administrative (criminal) law considering any form of cooperation by the accused, such as voluntary self-disclosure, as a mitigating factor. Furthermore, note that in order to **harmonize the penalties for sanctions breaches**, Member States are obliged to implement Directive (EU) 2024/1226[10] until 20 May 2025.

6. Extension of professional secrecy in relation to sanctions-related documents

This new paragraph 2 of Art. 16a apparently aims to protect sanctions-related information from leaking to the public. Paragraph 2 applies to documents held by the Council, the Commission or the High Representative of the Union for Foreign Affairs and Security Policy. Such documents containing sanctions-related information are subject to professional secrecy and enjoy the protection afforded by the rules applicable to the Union institutions.

Without such protection, the information contained in those documents could be used to obstruct the enforcement of sanctions or to compromise their effectiveness, given that the persons and entities concerned by the sanctions could act in such a way as to prevent their enforcement.[11]

According to the second sub-paragraph (of paragraph 2), the disclosure of any documents or proposals referred to in the first subparagraph would harm the security of the Union or that of one or more of its Member States or the conduct of their international relations.

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[10] Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673 (OJ L, 2024/1226, 29.4.2024).

[11] See also recital (8) of Regulation 2024/1739, which states the reasons behind this amendment.

[12] This document is for information purposes only. It shall not be viewed as legal advice.