

Ashurst briefing

EU Sanctions on Russia: do they affect me?

The EU has imposed sanctions following a referendum in Crimea which strongly supported unification with the Russian Federation. Published on 17 March 2014, the sanctions target a number of high-ranking Russian and Ukrainian individuals. The funds and economic resources in the EU of those individuals have now been frozen and travel restrictions imposed upon them.

The sanctions are broadly drafted. It is possible the list of targets will be expanded in the near future. If the list expands, so will the number of businesses and individuals that will be affected.

Context

On 5 March 2014, in response to the escalating crisis in the Ukraine, the EU enacted Council Regulation 208/2014 concerning restrictive measures directed against certain persons, entities and bodies (primarily members of the former Ukrainian government) (the [Ukrainian Sanctions](#)).

Following a failure by Russia to prevent Crimea's pro-Russian authorities from holding a referendum on Crimea's unification with Russia, the EU has now enacted further sanctions (the **Russian Sanctions**). They take the form of asset freezes and travel restrictions against 21 Russian and Ukrainian individuals. A list of the designated individuals can be found at Annex 1 to the Regulation.

The sanctions came into effect on 17 March 2014, following publication in the Official Journal of the EU of Regulation 269/2014 (the [Regulation](#)). In parallel, the United States has announced sanctions on seven Russian and four Ukrainian individuals. Both the United States and the EU have suggested that the scope of the sanctions, and the targets thereof, may be expanded.

Overview of the EU/UK Sanctions regime

The EU imposes sanctions via regulations, which implement the sanctions in each EU Member State without further legislation being required by the Member States. However, each Member State is responsible for the enforcement and administration of EU sanctions and for implementing the penalties for their breach. HM Treasury is the administering body in the UK.

EU sanctions are generally targeted against particular individuals, entities or government bodies. The targeted persons are listed in an annex to each regulation that imposes sanctions. The aim of the sanctions is to achieve a political or humanitarian objective by imposing financial leverage on certain persons. They usually take the form of asset freezes, trade restrictions and/or travel bans.

The Russian Sanctions could have wide implications. We consider below some of the key questions they give rise to:

1. What is prohibited by the Russian Sanctions?

The asset freezing measures imposed by the Russian Sanctions require that:

(a) *"all funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them, as listed in Annex 1 shall be frozen"* (Article 2.1 of the Regulation); and

(b) *"no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of, natural persons or natural or legal persons, entities or bodies associated with them listed in Annex 1"* (Article 2.2 of the Regulation).

The target of the Russian Sanctions, be it the individual or natural or legal persons associated with

the individual, must be listed in the Annex to the Regulation. It is those designated natural or legal persons who will have their assets frozen. However, there may be situations where companies owned or controlled by designated persons could also be treated as if they were designated (see below).

2. What are "funds" and "economic resources"?

The Regulation states that:

(a) "funds" will mean financial assets and benefits of every kind, including, but not limited to: cash, balances on accounts, debts, stocks and shares, interest, and dividends;

(b) "economic resources" will mean 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;

(c) "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 or hiring or mortgaging them; and

(d) "freezing of funds" will mean 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.

These definitions are widely drafted in an attempt to prevent any circumvention of the asset freeze measures.

3. Whom do the Sanctions apply to?

The Russian Sanctions are broad in scope and the following are obliged to comply with them:

(a) "any person inside or outside the territory of the EU who is a national of a Member State", e.g. this extends to any EU nationals who are directors or employees of any company, anywhere in the world;

(b) "any 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", e.g. any business incorporated in the EU;

(c) "any legal person, entity or body in respect of any business done in whole or in part within the EU" e.g. business done in the EU, irrespective of whether the

individual is an EU national or the company is incorporated in the EU; and

(d) within the territory of the EU, including its airspace and on board any aircraft or vessel under the jurisdiction of a Member State.

Any individual, or any company, falling within one or more of these categories must comply with the Russian Sanctions. This means all EU businesses must ensure that the transactions they are involved in, or the services they provide, will not involve the funds or economic resources of a designated person or benefit a designated person, whether directly or indirectly.

4. What are the penalties for breaching the sanctions?

The penalties for breaching EU sanctions are imposed by the governments of each Member State. As each Member State has discretion as to the penalties, they may be different across the EU. The Regulation requires only that penalties be "effective, proportionate and dissuasive" (Article 15(1) of the Regulation). The penalties in the UK are imposed by statutory instruments enacted by the UK Government.

In respect of the Russian Sanctions, the relevant statutory instrument is The Ukraine (European Union Financial Sanctions) (No.2) Regulations 2014 (the [UK Statutory Instrument](#)). The penalties imposed by that statutory instrument, are:

(a) for an individual, imprisonment for a term not exceeding two years, or a fine, or both; and

(b) for a company, a fine and directors or officers of the company who consented, or connived, in the contravention may also be imprisoned or fined.

5. Can I continue dealing with a company that is owned by a designated person?

Article 2 of the Regulation extends to funds and economic resources "owned, held or controlled" by a designated person.

HM Treasury guidance acknowledges that there are some instances where the assets of legal entities, who are not expressly designated as targets in the sanctions, may nevertheless have to be frozen due to them being so owned or controlled.

HM Treasury states that the question of "ownership" and "control" by a designated person will be assessed on a case-by-case basis. However, it has suggested

that guidance can be drawn from section 1162 of the Companies Act 2006, which states that a company will be a "parent undertaking" in relation to a "subsidiary undertaking" if:

- (a) it holds a majority of the voting rights in it; or
- (b) it is a shareholder of it and has the right to appoint or remove a majority of its board; or
- (c) it has the right to exercise dominant influence over it by virtue of the provisions contained in the subsidiary undertaking's articles of association or a control contract; or
- (d) it is a shareholder of it and controls alone, under an agreement with other shareholders, a majority of its voting rights; or
- (e) it has the power to exercise, or actually exercises, a dominant influence or control over it or both of them are managed on a unified basis.

The EU has provided its own guidance, which broadly follows the provisions of section 1162 of the Companies Act, in relation to the meaning of "Control" and states that "Ownership" means having "possession of more than 50 per cent of the proprietary rights of an entity or having a majority in it".

6. If I conduct business with a designated person, do I have to notify anyone?

Anyone conducting business with a designated person is potentially subject to two obligations to report to the relevant competent authority (HM Treasury in the UK). The obligations arise under the Regulations and/or the UK Statutory Instrument.

The Regulations require those natural and legal persons, entities and bodies that must comply with the sanctions to:

- (a) supply any information which would facilitate compliance with the Regulation, such as information on accounts and amounts frozen, to the competent authority (HM Treasury in the UK); and
- (b) co-operate with the competent authority in any verification of such information.

This obligation is without prejudice to the applicable rules concerning reporting, confidentiality and professional secrecy (Article 8 of the Regulations).

The UK Statutory Instrument contains similar provisions, however, it is only "relevant institutions" that are under an obligation to report. There are no restrictions on reporting, confidentiality or professional secrecy, although legally privileged information need not be disclosed.

A relevant institution will include, for example, a person who has permission to carry on regulated activities under Part 4A FSMA 2000. This will include banks and credit institutions in the UK.

If a business is deemed to be a relevant institution, they must report any findings to the Treasury, together with any additional information that would facilitate compliance with the Regulation and answer any information requests.

7. Would an individual or business be able to challenge the imposition of sanctions and, if so, how?

A designated person would be able to challenge any decision by the EU Council to list them as a target of the Russian Sanctions in the European Court of Justice.

In 2013, Bank Mellat (an Iranian bank) successfully challenged its status as a designated person under the EU and UK sanctions against Iran. The challenge was brought on both substantive and procedural grounds, although the courts recognised that governments should be given a wide margin of appreciation when deciding on whom to impose sanctions.

The Regulation expressly states that: (i) grounds will be provided for listing designated natural or legal persons, entities or bodies so as to give them an opportunity to submit observations; and (ii) where observations are submitted or substantial new evidence is presented, the European Council should review its decision in light of those observations and inform the person, entity or body concerned (Article 14 of the Regulation). A failure by the European Council to follow these steps could provide strong procedural grounds on which a person can challenge their designation.

8. If I comply with the sanctions, am I liable for any losses incurred by a designated person?

The refusal to make funds or economic resources available will not give rise to liability of any kind as long as it was carried out in good faith on the basis that such action is in accordance with the Russian Sanctions. Liability may arise, however, if it can be shown that funds and economic resources were frozen

or withheld as a result of negligence (Article 10.1 of the Regulation).

9. What happens if I have a contract with a designated person and I'm due money under the contract?

There is a derogation under the sanctions that allows national competent authorities (HM Treasury in the UK) to authorise payments due under a contract or agreement as long as it was concluded before 17 March 2014 (or in the case of subsequently designated persons, before such persons fell within the scope of the Russian Sanctions) (Article 6 of the Regulation).

The national competent authority will also need to have determined that:

- (a) the funds or economic resources shall be used for a payment by a designated person; and
- (b) the payment does not benefit the designated person.

10. Can a designated person still receive legal advice?

The Russian Sanctions do not prevent the provision of legal advice to designated persons. However, a licence will be required from the relevant competent authority to release/receive frozen funds or economic resources to pay for the legal services (Article 4(1)(b) of the Regulation). Similar exceptions apply in relation to payment for basic necessary goods and services.

11. Are there any other provisions that could affect me?

The Russian Sanctions also contain a "catch-all" provision, which prohibits participation, knowingly and intentionally, in activities the object or effect of which is to circumvent the other prohibitions in the sanctions (Article 9 of the Regulation).

Contacts



Ronnie King
Partner
T: +44 (0)20 7859 1565
E: ronnie.king@ashurst.com



Sergei Ostrovsky
Partner
T: +44 (0)20 7859 1821
E: sergei.ostrovsky@ashurst.com



Tom Cummins
Senior Associate
T: +44 (0)20 7859 1051
E: tom.cummins@ashurst.com



Robert Meade
Associate
T: +44 (0)20 7859 3381
E: robert.meade@ashurst.com

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