



STEPTOE OUTSIDE COUNSEL

The notion of circumvention under EU sanctions

The European Union (“EU”) has begun preparations to impose its 11th sanctions package against Russia, with the European Commission having tabled a proposal early May that is currently being discussed by EU Member States. A key focus of the eleventh package is to tackle the circumvention of EU sanctions, in order to plug leaks of existing sanctions.

In particular, the Commission’s proposal would target third countries as well as foreign entities that enable the circumvention of EU sanctions. Countries potentially in the cross-hairs

include China and Turkey, as well as less politically sensitive countries in Central Asia. With such measures, the EU would take another step away from its traditional concept of non-extraterritoriality of EU sanctions. This follows additional steps already taken in the context of the eighth sanctions package whereby new listing criteria were added allowing for the designation of persons or entities who facilitate the circumvention of EU sanctions against Russia.¹

While EU Member States hash out the details on these proposals with significant extraterritorial effect in what are likely to be complex negotiations, it is useful to more closely examine the notion of circumvention under EU sanctions in situations where EU sanctions jurisdiction applies. In other words, under what circumstances could, for instance, EU companies be considered to be circumventing EU sanctions.²

The relevant prohibition on the circumvention of the EU’s Russia sanctions provides that “[i]t shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent prohibitions in this Regulation.”³

According to the European Court of Justice, interpreting this concept under a different sanctions regime, circumvention “covers activities which, under cover of a formal appearance which enables them to avoid the constituent elements of an infringement of (...) the regulation, none the less have the object or effect, direct or indirect, of frustrating the prohibition laid down in that provision”. The Court also explained that “the terms ‘knowingly’ and ‘intentionally’ imply cumulative requirements of knowledge and intent, which are met where the person participating in an activity having such an object or such an effect deliberately seeks that object or effect or is at least aware that his participation may have that object or that effect and he accepts that possibility.”⁴

Under this interpretation, which dates from December 2011, there would have to be actual knowledge and intent. Since then, in April 2022, the Commission issued a notice to EU economic operators, importers, and exporters (“Commission’s notice”),⁵ to take adequate due diligence measures in order to prevent circumvention of the EU sanctions on Russia, such as putting in place contractual guarantees excluding the export of prohibited goods to Russia, and not to resell such goods to any third party that does not make the same commitment. Moreover, the Commission noted that, in order to prevent circumvention, EU customs authorities may carry out stricter controls and request conclusive evidence regarding compliance with applicable sanctions. In addition, pursuant to Commission guidance regarding due diligence in the context of the EU sanctions on Russia, EU operators have been recommended to put in place a risk-based approach that consists of risk assessment, multi-level due diligence, and ongoing monitoring.⁶

This suggests that the notion of circumvention under EU sanctions may now be interpreted somewhat more broadly, at least by the Commission, and could also cover cases where EU operators did not have in place adequate due diligence measures. ■

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¹ Council Regulation (EU) 2022/1905 of 6 October 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, Article 1.

² While the EU’s Russia sanctions regime is relied on for illustrative purposes, the present analysis can be applied more generally to all of the EU’s sanctions regimes.

³ Article 12 of 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 (“EU Russia sanctions Regulation”).

⁴ Case C-72/11 Afrasiabi and Others, para. 68.

⁵ Commission Notice to economic operators, importers and exporters 2022/C 145 I/01.

⁶ Commission’s Russia Sanctions FAQs, Section 2, FAQ 2, referring to previous guidance on due diligence for business with Iran.