

EU Updates Existing Sanctions Against Russia; US Issues Guidance and Moves to Impose Additional Sanctions

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On December 5, 2014, the EU issued [Council Regulation 1290/2014](#) (the “Updating Regulation”) amending its restrictive measures against Russia. The Updating Regulation includes important clarifications on the scope and definition of the existing EU sanctions (which we discussed in our [September 13](#) and [July 30](#) alerts), set out in EU Council Regulation 833/2014, as amended by Council Regulation 960/2014 (the “Regulation”).

In addition, on December 11, 2014, the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) issued guidance on several key questions regarding the interpretation of the U.S. sectoral sanctions against Russia. The U.S. Commerce Department’s Bureau of Industry and Security (“BIS”) has likewise issued frequently asked questions (“FAQs”) on the Russia-related restrictions it administers.

This past week, the U.S. Congress also passed the [Ukraine Freedom Support Act of 2014](#) -- which if signed by the President would, among other things, provide for new sanctions on Russia’s defense and energy sectors and financial institutions that facilitate certain sanctionable activities for persons with respect to which sanctions are imposed under the Act.

Updated EU Sanctions Provisions

Since February 2014, the EU has adopted several restrictive measures against Russia. However, these measures have not always been clearly worded, leading to ambiguities for businesses and regulators seeking to interpret these laws. The Updating Regulation now provides greater clarity by redefining certain terms used in the regulations, among them:

- **Definitions of “Arctic,” “deepwater,” and “shale” in relation to the oil exploration and production industry** - Article 3 of the Regulation imposed a prohibition on the sale, supply, transfer, or export, after August 1, 2014, of certain “technologies” contained in Annex II, where those projects relate to deepwater oil exploration and production, Arctic oil exploration and production, or shale oil projects in Russia. This was expanded by Regulation 960/2014 (Article 3a) to include a prohibition on the supply of “associated” services, such as drilling and well-testing, which were considered necessary for Arctic and deepwater exploration and production and shale oil projects in Russia.

Up until the issuance of the Updating Regulation, Member State authorities had debated the exact scope of the terms “Arctic,” “deepwater,” and “shale” projects with many Member States choosing to follow industry standards, U.S. guidance, or definitions issued by institutions like the Arctic Council. In line with some of these existing understandings, the Updating Regulation now states that:

- “deepwater” is water depths greater than 150 meters;
- “Arctic” is the offshore area north of the Arctic Circle; and
- “shale” projects are those that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing, as opposed to projects that require drilling through shale formations to locate or extract oil from non-shale reservoirs.

The EU’s newly adopted definition of shale projects therefore mirrors the recent guidance issued by OFAC and BIS, discussed below.

- **Scope of the “Russian Territory” in relation to the oil and gas industry** - As we note above, the Regulation restricted the sale, supply, transfer, or export of certain listed technologies (set out in the Annex II list) to any party in Russia or for use in Russia. Further, the Regulation also restricted the supply of “associated” services necessary for deepwater oil exploration and production, Arctic oil exploration and production, or shale oil projects in Russia. The Updating Regulation clarifies that the territorial scope of Russia includes Russia’s Exclusive Economic Zone and Continental Shelf.

Again, the EU’s updated clarification regarding the territorial scope of Russia, although arguably narrower, is not dissimilar to that issued under recent [BIS guidance](#). BIS has stated that, for the purposes of the August 6 and September 17 Final Rules, Russia includes the territory of Russia and any other territory or marine area (including the Exclusive Economic Zone and Continental Shelf) over which the Russian Government claims sovereignty, sovereign rights, or jurisdiction, provided that the Russian Government exercises partial or total de facto control over the area or derives a benefit from economic activity in the area pursuant to international arrangements.

- **Scope of grandfathering provisions** - The Updating Regulation also clarifies the scope of the grandfathering provisions set out under Articles 2, 3, 3a, and 4 of the Regulation. For example, under Article 2, the Regulation prohibits the export of dual-use technology to any party in Russia or for use in Russia if those items are or may be intended for military use or a military end-user. The Regulation provides an important carve-out, however, allowing Member State authorities to grant a licence if the export concerns the execution of an obligation arising from a contract or an agreement concluded before August 1, 2014. A similar carve-out was contained in Article 3 and Article 4.

However, a potentially broader carve-out was provided in the Article 3a “associated services” provision; that carve-out extended to any “obligation arising from a contract or a framework agreement concluded before 12 September 2014 *or ancillary contracts necessary for the execution of such contracts.*” The lack of a reference to “ancillary contracts” in Articles 2, 3, and 4 created some uncertainty over the scope of those grandfathering provisions.

The Updating Regulation seeks to address this issue, clarifying that the grandfathering provisions include ancillary agreements for each of Articles 2, 3, and 4. Notably, however, unlike Article 3a, Articles 2, 3, and 4 still do not include reference to “framework agreements” concluded before the effective date of the Regulation. It is unclear whether that omission is meant to strike a substantive distinction between the grandfathering provision in Article 3a and those in the other provisions of the Regulation.

- **Exemption to the loan restrictions** - Article 5(3) of the Regulation prohibits the making or being part of an arrangement to make new loans or credit with a maturity exceeding

30 days to any party listed in Annexes, III, V, or VI after September 12. The Updating Regulation amends a carve-out to Article 5(3), and now allows for loans or credits that have a specific and documented objective to provide financing for non-prohibited imports or exports of goods and non-financial services between the Union and any third State. This clarifies the exemption to allow for trade between the EU and any third country, as opposed to trade between the EU and Russia (as reflected in the original version of the carve-out).

- **Regulation of loan drawdowns** - The Updating Regulation also clarifies that the prohibition in Article 5(3) shall not apply to drawdowns or disbursements made under a contract concluded before September 12, 2014, provided that the following conditions are met: (i) all terms and conditions of such drawdowns or disbursements were agreed before September 12, and have not been modified on or after that date; and (ii) before September 12, a contractual maturity date has been fixed for the repayment in full of all funds made available and for the cancellation of all the commitments, rights, and obligations under the contract. The provision later states that in relation to the terms and conditions of drawdowns and disbursements, this includes the length of the repayment period for each drawdown or disbursement, the interest rate applied or the interest rate calculation method, and the maximum amount.
- **Updated list of Annex II “items”** - Finally, the Updating Regulation revises the reference in Article 3 to the “list of technologies” contained in Annex II and replaces this with the “list of items.” Thus, the Updating Regulation clarifies the confusion over whether Annex II covered the list of hardware in Annex II, or whether, by referencing “technologies” it covered transactions related to technical data. In addition, the Updating Regulation revises the following CN codes contained in Annex II:
 - 8413 50 previously excluded those pumps of subheading 8413 11 and 8413 19, fuel, lubricating or cooling medium pumps for internal combustion piston engine and concrete pumps. However, the entry now includes a restriction on “[r]eciprocating positive displacement pumps for liquids, power-driven with a maximum flow-rate greater than 18 m³/hour and a maximum outlet pressure greater than 40 bar, specially designed to pump drilling muds and/or cement into oil wells.” The same change has also been made with respect to the entry at 8413 60.
 - ex 8431 39 00 has been updated to include parts suitable for use solely or principally with the oil field machinery of heading 8428.
 - ex 8431 43 00 has also been updated to include those parts suitable for use solely or principally with the oil field machinery of subheadings 8430 41 or 8430 49.
 - ex 8431 49 has been replaced by parts suitable for use solely or principally with the oil field machinery of heading 8426, 8429 and 8430.

Recent Guidance on U.S. Sectoral Sanctions

On December 11, 2014, OFAC published three new FAQs and responses concerning the interpretation of the U.S. sectoral sanctions against Russia imposed under Executive Order 13662. These [new FAQs](#) relate to the application of Directives 1, 2, and 3 to payment terms for the delivery of goods and services, and the interpretation of the terms “production” and “Arctic offshore projects” in Directive 4. In particular, FAQ No. 420 clarifies that the term “production” under Directive 4 does not include activities such as transportation or refining of crude oil once such oil has been transported out of a field production storage tank or otherwise off of a field

production site, even if such crude oil was produced from an Arctic offshore, deepwater, or shale oil project. FAQ No. 421 defines the term “Arctic offshore projects” to include only those projects that have the potential to produce oil from areas that (1) involve drilling operations originating offshore, and (2) are located above the Arctic Circle; the term does not include horizontal drilling operations originating onshore where such drilling operations extend under the seabed to areas north of the Arctic Circle. OFAC also recently published FAQ No. 418, which clarifies that the term “shale projects” under Directive 4 does not apply to exploration or production *through* shale to locate or extract crude oil or gas in reservoirs.

BIS also has recently issued on its website a [series of FAQs](#) about the Russia restrictions in the Export Administration Regulations (“EAR”), which cover topics such as the new license requirements on certain exports to Russia, and the interpretation of the term “shale projects” under §746.5 of the EAR. BIS clarified that for the purposes of the August 6 and September 17 final rules it issued, “shale projects” refer to exploration for, or production of, oil or gas from a shale formation, and not to projects that involve exploration or production through shale to locate or extract crude oil or gas in (conventional) reservoirs.

Ukraine Freedom Support Act of 2014

This past week, the U.S. Congress passed the [Ukraine Freedom Support Act of 2014](#), which is currently awaiting the signature of the President. If signed, the Act would impose additional sanctions with respect to Russia and would provide additional assistance to Ukraine. In particular, the Act directs the President to impose sanctions (subject to certain exceptions and waivers) on:

- Rosoboronexport (a state agency that promotes Russia’s defense exports and arms trade);
- Foreign persons that the President determines are owned or controlled by the Russian government or Russian nationals and that are knowingly manufacturing or selling defense articles into Syria, or into the territory of a specified country (defined as Ukraine, Georgia, and Moldova) without the consent of the internationally recognized government of that country, as well as foreign persons that transfer -- or broker or assist in the transfer of -- defense articles into Syria, or specified countries without the consent of the internationally recognized government of such countries, or that are knowingly providing financial, material, or technological support for, or goods or services to, such persons; and
- Gazprom, if the President determines that Gazprom is withholding significant natural gas supplies from NATO countries or further withholds significant natural gas supplies from countries such as Ukraine, Georgia, or Moldova.

The Act authorizes, but does not require, the President to impose sanctions against:

- Any foreign person that knowingly makes a significant investment in a special Russian crude oil project, which the Act defines as a project intended to extract crude oil from (i) Russia’s Exclusive Economic Zone in waters more than 500 feet deep, (ii) Russian Arctic offshore locations, or (iii) shale formations in Russia; and
- Any foreign financial institution that knowingly engages in significant transactions involving (i) the transfer of defense articles to Syria, or the above-noted specified countries without the consent of their internationally recognized governments, (ii) any

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curtailment of natural gas supplies by Gazprom as noted above, or (iii) significant investments in special Russian crude oil projects, in each case for persons with respect to which sanctions are imposed.

The Act also authorizes the President to impose additional licensing requirements for or other restrictions on the export or reexport of items for use in Russia's energy sector, including equipment for tertiary oil recovery.

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We are following these sanctions developments closely and will provide further updates as they continue to evolve. We are particularly well-positioned to counsel companies and individuals on compliance with the U.S. and EU sanctions related to the Ukraine crisis and to advise on the application of the Ukraine Freedom Support Act of 2014, as well as to advise on the broader impact of the crisis on foreign investment in both Ukraine and Russia and other legal and commercial interests in the region.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade Controls practice group:

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