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SUMMARY OF MARCH 3RD, 2022 OF THE ECONOMIC SANCTIONS ADOPTED BY THE EU IN RESPONSE TO THE WAR IN UKRAINE: IMPACTS ON THE ACTIVITY OF RUSSIAN SUBSIDIARIES OF EUROPEAN GROUPS AND POSSIBILITY OF USING THE FORCE MAJEURE SHIELD

| 03/03/22 | Olivier Attias

On February 21st, 2022, the President of the Russian Federation signed a decree recognizing the independence and sovereignty of the two separatist Ukrainian republics in the Donbas region, the republics of Donetsk and of Luhansk, and decided to send in troops to Ukraine. The European Union reacted immediately, through the voice of its High Representative for Foreign Affairs and Security Policy, by announcing as of February 22nd the unanimous adoption by the 27 Member States of several successive packages of sanctions targeting the Russian economy.

A **first package of sanctions** approved by the Council of the EU on February 23rd via 4 decisions^[1] and 5 regulations, ^[2] introduced targeted measures to freeze the assets and resources of close to 400 individuals and entities and measures significantly restricting trade between the EU and the regions of the Donbas.

A **second set of sanctions**, adopted on February 25th,^[3] added new names to the list of persons subject to targeted measures and, above all, drastically restricted trade between the European Union and the whole of Russia, coming in addition to those adopted back in 2014 in response to the illegal annexation of Crimea and Sevastopol (see dated February 24th and 28th, 2022).

On February 28th, a **third package of sanctions** was published by the Council of the EU to add an additional twenty persons to the list of persons subject to targeted measures^[4] and in particular to ban the overflight of aircraft owned by Russian persons from its airspace.^[5]

An additional list of 22 individuals was published on March 2nd, supplementing the list of individuals subject to targeted measures. On the same day, the Council of the EU also decided to extend sanctions to include certain activities with **Belarus** due to its implication in the Russian military aggression against Ukraine.^[6]

The sanctions adopted by the European Union to date can be summarized as follows:

- Freeze on the assets and resources of more than 700 Russian persons

The EU has imposed numerous measures to freeze assets and resources and, as a result, prohibited the making available, directly or indirectly, of funds or resources to more than 700 Russian individuals or entities:

.Responsible for actions or policies threatening the territorial integrity of Ukraine (including all of the lawmakers in the Russian Duma, President Putin, many ministers, the members of the Russian National Security Council and military leaders);

.Providing material or financial support to actions threatening Ukraine's sovereignty and independence, or to the Russian government and decision-makers responsible for the annexation of Crimea and the Donbas region (in particular Promsvyazbank, Vnesheconombank VEB.RF and Bank Rossiya);

. Conducting transactions with separatist groups in the Donbas region;

. Involved in economic sectors providing a substantial source of revenue to the Russian government (influential businesspeople, oligarchs and directors of public corporations).

A consolidated list of these persons is held by the National Asset Freeze Register maintained and updated by the French Treasury Department.

- Ban on exporting and selling certain products in Russia

This prohibition concerns the sale, supply or export, directly or indirectly, of the following goods and technology to any individual or entity, regardless of nationality, in Russia or for use in Russia:

.Dual-use goods and technology;

.Goods and technology that might contribute to Russia's military and technological enhancement or to the development of its defense and security sector, as listed in Annex VI of Regulation (EU) 2022/328;

.Goods and technology suited for use in oil refining, as listed in Annex IX of Regulation (EU) 2022/328;



.Goods and technology suited for use in aviation or in the space industry, as listed in Annex X of Regulation (EU) 2022/328.

It should be noted that these bans extend for the most part to the **provision of related services** such as the provision of insurance and reinsurance services, maintenance and technical assistance, or the provision of financing or financial assistance.

- Ban on all transactions with the Central Bank of Russia

- Ban on carrying out certain financial transactions with Russia

The transactions prohibited under these measures are the direct or indirect purchase, sale, provision of investment services for or assistance in the issuance of transferrable securities and money-market instruments issued after April 12th, 2022 that might contribute to *strengthening the Russian economy*.

- Bans on trade with the Donbas_

These sectoral bans are similar to those imposed by the EU back in 2014 following the annexation of Crimea and concern:

.the export of certain goods and technology that can be used in the sectors of transport, telecommunications, energy or the prospecting, exploration and production of oil, gas and mining resources;

.the import of goods (for contracts entered into prior to February 23rd, 2022, this ban will take effect on May 24th, 2022);

.any new financial or real estate investments; and

.the provision of tourism services.

- Bans involving European airspace

These sanctions, which are primarily binding on national authorities responsible for regulating and supervising air transport and aviation activities in general, prohibit landing, taking off and flying over the entire territory of the EU by:

.Russian air carriers;

.aircraft registered in Russia;

.aircraft not registered in Russia but owned, chartered or controlled by a Russian person.

- Bans involving trade with Belarus

The sanctions adopted by the EU on March 2nd, 2022 extend the scope of some of the restrictions that have been in force since June 2021 and introduce new restrictions. It is now prohibited to:

.sell, supply, transfer or export, directly or indirectly, dual-use goods and technology to Belarus or for use in Belarus, regardless of the use made thereof;

.sell, supply, transfer or export, directly or indirectly, goods and technology that might contribute to the military and technological enhancement of Belarus or to the development of its defense and security sector, as listed in Annex II of Regulation (EU) 2022/355;

.import into the EU, directly or indirectly, wood, cement, steel or rubber products originating in or exported from Belarus;


.sell, supply, transfer or export, directly or indirectly certain machinery (steam, turbine, nuclear, etc.) in Belarus; as listed in Annex XII of Regulation (EU) 2022/355.

In addition, bans on the sale and export of goods used for the production or manufacturing of tobacco products, as well as the purchase and importing of mineral and petroleum products, and products based on potassium chloride ("potash") were extended as per the respective lists contained in Annexes V, VI and VII of Regulation (EU) 2022/355.

- SWIFT network

The European Commission, France, Germany, Italy, the United Kingdom, Canada, and the United States agreed on excluding 7 Russian banks from the **SWIFT** messaging system to disconnect them a bit more from the international financial system:[7]





.Bank Rossiya, Promsvyazbank and Vnesheconombank VEB (which were already the subject of targeted measures on the part of the EU);

.VTB Bank, Bank Otkritie, Novikombank and Sovcombank (which were already the subject of U.S. sanctions).

The possibility of additional restrictions in the future to limit the circumvention of sanctions already in place through the use of cryptocurrencies cannot be ruled out.

What are the practical implications for the operations of subsidiaries of European companies?

By way of reminder, the sanctions adopted by the EU apply to:

- All individuals nationals of, or residing in, an EU Member State;
- All entities registered in a Member State or operating from the territory of a Member State.

It is a **criminal offense** in France (§459-1 bis of the Customs Code) for any natural or legal person to contravene or attempt to contravene European sanctions.

The penalties for this offense can go up to **5 years' imprisonment** and a **fine** of at least the amount and at most double (tenfold for legal entities) the amount of the prohibited transaction; and can be accompanied by additional penalties such as disqualification from public contracts, prohibition from serving as a corporate director, etc.

This being the case, the principle is that sanctions are not intended to be binding on local law entities established abroad, including the Russian subsidiaries of European groups, provided they operate independently of their European parent or sister company.

Otherwise, if a Russian company depends, operationally or financially, on another European company of the group to which it belongs, by continuing to do business there is a risk that the liability of the European company on which it depends could be incurred in case of violation of the restrictive measures adopted by the EU.

In the absence of detailed case law in this respect, everything could depend on the instructions that could be given to the prosecution authorities.

Also, considering the scope of the sanctions in force, which affect the financial system as much as the logistics sector, it is to be anticipated that Russian companies whose chain of value is primarily located in Europe, in the United States or in any other country having associated itself to the sanctions adopted by the EU, will encounter supply difficulties that could jeopardize their economic viability.

So what can a French contracting party do when international sanctions make it impossible to continue a contract with a Russian counterparty?

Based on the foregoing, and in the absence of any real transition period before the sanctions referred to above take effect, many French companies with contractual dealings with Russian counterparts may find themselves unable to fulfil their contractual obligations and facing the possibility of their liability being incurred.

The first defense that comes to mind – and rightly so – is that the French contracting party should invoke force majeure.

Without it being useful to further expound on the concept of force majeure, it suffices to recall that in application of §1218 of the Civil Code,[8] three requirements must be met to be able to invoke force majeure (i) the event must be unforeseeable (the event “*could not have been reasonably foreseen at the time the contract was entered into*”), external (performance of the obligation is prevented by “*an event external to the party owing the obligation*”) and (iii) beyond the control of the party owing the obligation (“*the effects could not have been avoided by taking appropriate measures*”).

As regards the sanctioned entity, the French Supreme Court (*Cour de cassation*) held in 2020 that the freezing of the assets of a sanctioned person or entity because of his, her or its activities does not constitute a case of force majeure for that person or entity as the element of externality is missing.[9]

This being the case, a French company that finds itself unable to perform its contract due to the sanctions pronounced in recent days, may usefully invoke force majeure to suspend the performance of its contract.

It should also be noted that it is entirely possible, and even advisable, to contractually adjust the force majeure regime.

Depending on the risk level identified for the activities covered by the contract (for example, when they are linked to a country where the diplomatic situation is unstable or a conflict zone), it could be useful to anticipate the possibility of commercial transactions being subject to restrictions during the course of performance of the contract.



In effect, the reference to typical events defining force majeure may not be sufficient if performance of the contract is not, strictly speaking, prevented by the evolution of international sanctions.

This could be the case in the assumption that the counterparty has been designated in a list of U.S. sanctions to which the French company is not, in principle, directly subject or else because the adoption of sectoral or local restrictive measures might make banks reluctant to engage in transactions having any connection with the concerned region.

We would therefore recommend **including a specific reference to international sanctions** in the contractual definition of force majeure to avoid any sterile discussion about the continued pursuit of the contract and organize the possibility of suspending its performance.

Lastly, the French party should be careful to give **prompt notice of the occurrence of the event of force majeure to the other party**, as is typically contractually required, otherwise it will risk losing the benefit of the possibility of suspending the contract without any risk of its liability being incurred.

[1] Council Decisions (CSFP) 2022/264 of February 23rd, 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; 2022/265 and 2022/267 of February 23rd, 2022 amending Decision 2014/145/CSFP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; Council Decision 2022/266 of February 23rd, 2022 concerning restrictive measures in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas

[2] Council Regulations (EU) 2022/259, 2022/262 and 2022/263 of February 23rd, 2022 amending Regulation (EU) 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; Implementing Regulations (EU) 2022/260 and 2022/261 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

[3] Council Decision (CFSP) 2022/327 of February 25th, 2022, amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; Decision 2022/329 and 2022/331 of February 25th, 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; Council Decision 2022/333 of February 25th, 2022 on the partial suspension of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation.

Council Regulation (EU) 2022/328 of February 25th, 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; Council Regulation (EU) 2022/330 of February 25th, 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

[4] Council Implementing Regulation (EU) 2022/336 of February 28th, 2022 implementing Regulation (EU) No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

[5] Council Decision (CSFP) 2022/335 of February 28th, 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Article 1

[6] Council Regulation (EU) 2022/355 of March 2nd, 2022 amending Regulation (EC) No. 765/2006 concerning restrictive measures in view of the situation in Belarus

[7] European Commission – Statement, Joint Statement on further restrictive economic measures, Brussels, February 26th, 2022

[8] Applicable if the contract is subject to French law, it being specified that most laws have a similar assessment of the notion of force majeure

[9] Cass., ass. plén., July 10th, 2020, P+B+R+I, No. 18-18.542 and 18-21.814
