



# ARTICLE

## SANCTIONS AGAINST RUSSIA - THE COMMISSION'S LONG-AWAITED UPDATE ON THE NOTION OF "BEST EFFORTS" AS PER ARTICLE 8A OF REGULATION 833/2014



Compliance | 22/11/24 | Olivier Attias Sophie Peter Noureen Nhari

On November 22nd, the Commission finally published an update to its Russia Sanction FAQs providing long-awaited guidance on the notion of "best efforts" in the context of article 8a of Regulation 833/2014.

As a reminder, since June 24th, 2024, article 8a of the Regulation provides that "*natural and legal persons, entities and bodies shall undertake their best efforts to ensure that any legal person, entity or body established outside the Union that they own or control does not participate in activities that undermine the restrictive measures provided for in this Regulation.*"

### 1. First definition of the notion of "best efforts" introduced by article 8a of Regulation (EU) 833/2014

This wording left the companies wondering about the notion of best efforts and its scope.

The FAQs now provide the following guidance : "*Best efforts should be understood as comprising all actions that are suitable and necessary to achieve the result of preventing the undermining of the restrictive measures in Regulation (EU) No 833/2014*" and lists the following potential measures : "*implementation of appropriate policies, controls and procedures to mitigate and manage risk effectively, considering factors such as the third country of establishment, the business sector and the type of activity of the legal person, entity or body that is owned or controlled by the Union operator.*"

### 2. Clarification regarding the notion of undermining

The FAQs also clarify the distinction between the concepts of "*circumvention*" and "*undermining*". Circumvention refers to activities that, under the guise of formal compliance, avoid the key elements constituting a breach of a restrictive measure, with the intent or effect of allowing the actor to evade its application. On the other hand, undermining involves activities that produce outcomes contrary to the objectives of the restrictive measures, effectively negating their intended effect.

### 3. Article 8a does apply to Russian entities owned or controlled by an EU operator

Another point which had raised substantial questions with regards to article 8a is also clarified since the FAQs unequivocally state that the best-efforts obligations concern "entities that are owned or controlled by these EU operators and located anywhere outside the EU – **including in Russia**".

As a result, EU companies will have to exercise due diligence to prevent the circumvention of European sanctions via their subsidiaries located in third countries.

### 4. Implementation of these obligations

Essentially, EU operator's best efforts will be assessed based on the operator's (i) nature, (ii) size and (iii) the relevant factual circumstances.

In practice this could be achieved, for instance, through internal compliance programs, systematic sharing of corporate compliance standards, sending newsletters and sanctions advisories, setting up mandatory reporting or organizing mandatory sanctions trainings for staff, as well as setting up procedures to rapidly react to sanctions violations, including by reporting them to the EU operator that has ownership or control.

In addition, the non-EU entity may consider publicly stating its intent not to engage in any activities that risk undermining EU sanctions or the compliance and governance policies of the EU operator that has ownership or control.

Crucially, the Commission also somehow limits the scope of best efforts by adding that "*at the same time, best efforts should be understood as comprising only actions that are feasible for the Union operator in view of its nature, its size and the relevant factual circumstances, in particular the degree of effective control over the legal person, entity or body established outside the Union. Such circumstances include the situation where the Union operator, due to reasons that it did not cause itself, such as the legislation of a third country, is not able to exercise control over a legal person, entity or body that it owns.*"

It is also made clear that an EU operator who knows that a controlled entity is compromising sanctions, and who fails to act to prevent this, is in breach of article 8a. This violation may be aggravated if the operator fails to exercise due diligence.

Yet, the response under question 4 of the FAQs also provides clarifications regarding the actions to be taken when the implementation of article 8a is prohibited by local law: when an operator is unable to exercise control over an entity due to external factors beyond its control (e.g. third-country legislation), its liability may be mitigated. However, poor risk management or imprudent decisions may increase liability.

### 5. Best efforts approach to export operations



**Export of prohibited goods to Russia:** an EU operator is in breach if goods produced by an entity it controls, and covered by an export ban, arrive in Russia. This includes goods manufactured using transferred intellectual property rights or trade secrets. This will necessarily entail a strengthening of the due diligence measures implemented by EU operators regarding their exports in third countries.

**Export to Belarus:** if prohibited goods arrive in Belarus via a Russian entity owned and controlled by an EU operator, this may constitute a violation of sanctions, particularly regarding the obligations set out in Regulation (EC) No. 765/2006.

**Intra-group trade in prohibited goods:** these prohibitions also apply to intra-group trade in restricted goods produced in Russia. If these activities create income for the Russian economy, the EU operator can be held responsible for failing to prevent this situation.

*This addition to the Commission's FAQs restates and affirms the EU Commission's position on the scope of the EU sanctions and their impact on EU operators' activities abroad. The exact scope of the obligations resulting from Article 8a and their implementation will require a close case-by-case analysis by the EU operators.*

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