

EU clarifies scope of sectoral sanctions relating to Russia/Ukraine

In the face of significant uncertainty around the interpretation of aspects of the European Union's "sectoral sanctions" imposed in response to the situation in Ukraine, there was a widespread sense that further guidance was desirable. A long-anticipated response to some of this uncertainty has emerged in the form of Council Regulation (EU) No. 1290/2014 ("[Regulation 1290](#)"), published in the EU's Official Journal on 5 December 2014, following Council Decision 2014/872/CFSP of 4 December 2014 that it was "necessary to clarify" its prior Decisions in relation to the relevant restrictive measures.

Regulation 1290 amends Council Regulation (EU) No. 833/2014 ("[Regulation 833](#)") and the subsequent Council Regulation (EU) No. 960 ("[Regulation 960](#)") which in turn had amended Regulation 833.¹

Regulation 1290 addresses some of the provisions in the prior Regulations that had given rise to particular uncertainty; broadly, it appears aimed to align some aspects of the EU's measures with the similar sectoral sanctions implemented in the United States. Notwithstanding, important differences remain between the EU and US regimes.

The main features of Regulation 1290 - which entered into force on 6 December 2014 - are summarised below. They address issues arising with respect to the energy sector, and access to the capital market. Further references in this briefing to Regulation 833 are to that Regulation as amended by Regulation 960.

Restrictions on access to the capital market – new loans and credit

Regulation 960 had introduced into Regulation 833 prohibitions in a new Article 5(3) that related to the provision of new loans or credit with a maturity exceeding

30 days to certain entities listed in Annexes III, V and VI of Regulation 833, and other entities affiliated with them (as defined in Article 5(1) and (2)), after 12 September 2014. There had been a great deal of uncertainty over the term 'new loans or credit', particularly in the context of agreements concluded prior to 12 September 2014 pursuant to which funding had commenced, but which contemplated that further advances would be made after that date. Recital (6) to Regulation 960 included a sentence that read: "Loans are only to be considered new loans if they are drawn after 12 September 2014."

Regulation 1290 removes this sentence from Recital 6 of Regulation 960, and adds a new paragraph 4 to Article 5 of Regulation 833. This paragraph states that the prohibition in Article 5(3) shall not apply to drawdowns or disbursements made under a contract concluded before 12 September 2014, provided that all the terms and conditions of such drawdowns or disbursements were agreed before 12 September 2014 and have not been modified on or after that date; and, before 12 September 2014 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 terms and conditions of drawdowns and disbursements as referred to include provisions concerning 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.

¹ See our previous briefing [Expanded EU Sectoral Sanctions Targeting Russia](#)

Article 5(4) appears designed to broadly - but not exactly - correlate the position with the equivalent sectoral sanctions in the United States aimed at the provision of financing for and other dealings in 'new debt' to certain entities, and guidance that has been issued by the Office of Foreign Assets Control (OFAC) in the form of its FAQ 394 in relation to the impact of those restrictions on pre-existing agreements and future amendments thereto. The condition in Article 5(4)(b) introduced by Regulation 1290 does not, however, appear to reflect a specific requirement under OFAC regulations.

Regulation 1290 also re-states the two exceptions which apply to the prohibition on new loans or credit under Article 5(3), including a minor amendment to the first of those exceptions. Under that first exception as amended, the prohibition in Article 5(3) does not apply to new loans or credit that have a specific and documented objective to provide financing for non-prohibited imports or exports of goods and non-financial services between the EU and any third State (including expenditure for goods and services from another third State that is necessary for executing the export or import contracts). Previously, this exception had referred to non-prohibited imports or exports of goods and non-financial services between the EU and Russia, and had not referenced associated expenditures.

Restrictions relating to certain energy sector projects in Russia

Article 3 of Regulation 833 introduced restrictions on the sale, supply, transfer or export of specified "technologies" listed in Annex II thereof to or for use in Russia. An authorisation is required for such activity, and also, by virtue of Article 4(3), in respect of the provision of technical assistance, brokering services, financing and financial assistance related to the restricted "technologies". Regulation 833 provided that an authorisation may not be granted where the relevant competent authorities had reasonable grounds to determine that the activity was for certain energy sector projects in Russia.

Regulation 1290 clarifies that "Russia" for these purposes includes its Exclusive Economic Zone and Continental Shelf, thus defining the scope of application of the restrictions by reference to both the land and maritime jurisdiction of Russia. This gives rise to consequent amendments in Articles 3, 3a and 4 of Regulation 833.

Moreover, the use of the term "technologies" in Regulation 833 had proven confusing, because many of the items listed in Annex II would not, in the usual sense, be

regarded as technologies. Regulation 1290 replaces the term "technologies" in this context with the term "items". Article 1(8) of Regulation 1290 re-titles Annex II accordingly, as well as also introducing some amendments to the listed items and their descriptions set out in Annex II.

Article 1(3) of Regulation 1290 amends Articles 3(3) and 3a(1) of Regulation 833 to clarify the types of project that are targeted by Regulation 833 ("**restricted projects**"): namely, oil exploration and production in waters deeper than 150 metres; oil exploration and production in the offshore area north of the Arctic Circle; and projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing. Exploration and production through shale formations to locate or extract oil from non-shale reservoirs are excluded.

As noted, authorisations related to the sale, supply, transfer or export of Annex II items as referred to in Article 3 of Regulation 833 (and the provision of related technical assistance, brokering services, financing and financial assistance as set out in Article 4(3)) are to be refused by relevant competent authorities where there are reasonable grounds to determine that they are for restricted projects, unless they relate to certain pre-existing contracts, in which case the relevant competent authorities may grant authorisations. Under Regulation 833, the discretion to grant authorisations was stated to arise where the activity for which an authorisation was sought concerned the execution of an obligation arising from a contract or agreement concluded before 1 August 2014. Regulation 1290 removes the term 'agreement' from the provision, but states that an authorisation may be granted where relevant activity concerns the execution of an obligation arising from a contract concluded before 1 August 2014 and also in relation to ancillary contracts necessary for the execution of such a contract (see Article 3(5) of Regulation 833, as amended). This has important practical implications, because it suggests that authorisations may be granted in respect of contracts not yet concluded by 1 August 2014, but which are necessary to the execution of an obligation under a contract that did exist prior to 1 August 2014. This is likely to temper the impact of Regulation 833 on certain transactions and projects that were in train prior to 1 August 2014. However, it may not always be easy to determine whether a contract is 'ancillary' to or 'necessary' for the execution of contracts concluded before 1 August 2014.

The revisions to Article 3 in relation to pre-existing contracts bring that Article more in line in that respect with Article 3a which had been introduced into Regulation 833 in

September 2014 by Regulation 960. Article 3a operates by way of a prohibition on the provision of certain defined services for restricted projects, that prohibition being subject to an exemption for the execution of an obligation arising from a contract or a framework agreement concluded before 12 September 2014 or ancillary contracts necessary for the execution of such a contract. Article 3a therefore continues to operate by reference to pre-12 September 2014 contracts or framework agreements, in contrast to Articles 3 (and 4), the reference point for which is pre-1 August 2014 contracts.

Further guidance?

On 5 December 2014, HM Treasury issued a Financial Sanctions Notice, *Ukraine (Sovereignty) – additional restrictive measures in view of Russia's actions destabilising the situation in Ukraine* (the "[Notice](#)"), drawing attention to Regulation 1290 and confirming the need to comply with the financial restrictions set out in Article 5 of Regulation 833 as amended by Regulation 1290. As of 7 December 2014, the Department of Business, Innovation and Skills' Export Control Organisation guidance on Regulation 833 had not been updated to reflect the changes made by Regulation 1290.

In paragraph 4, the Notice states that there is no provision for licensing the restricted conduct in Article 5 (which includes involvement in issuances of transferable securities and money-market instruments by defined entities, as well as a prohibition on new loans or credit). The Notice also indicates that the UK legislation that provides for the enforcement of Regulation 833 will be amended very shortly.²

The Notice highlights also the fact that the entities targeted by the measures in Regulation 833 are not subject to an asset freeze and so are not listed in the Consolidated List of asset freeze targets maintained by HM Treasury. Those subject to restrictions in Article 5 of Regulation 833 are included on a separate list, as referenced in paragraph 7 of the Notice.

According to paragraph 14 of the Notice, the European Union is separately publishing advice on the application of sanctions under Regulation 833, which "will be published in due course". While Regulation 1290 goes some way to clarifying the activity prohibited or restricted under the EU's sectoral sanctions, many interpretational questions do remain and further guidance is likely to be welcomed.

² The current UK legislation that relates to the restrictions on access to the capital market – that is, Article 5 of Regulation 833 as amended – is The Ukraine (European Union Financial Sanctions) (No. 3) Regulations 2014, SI 2014 No. 2054, as amended by The Ukraine (European Union Financial Sanctions) (No. 3) (Amendment) Regulations 2014, SI 2014 No. 2445. A separate statutory instrument creates offences for infringements of Regulation 833 in relation to the energy sector restrictions in Articles 3 and 4 of Regulation 833, including the financing and financial assistance restrictions: The Export Control (Russia, Crimea and Sevastopol Sanctions) Order 2014, SI 2014 No. 2357, as amended by The Export Control (Russia, Crimea and Sevastopol Sanctions) (Amendment) Order 2014, SI 2014 No. 2932.

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