

RESTRICTIVE MEASURES TAKEN BY THE EU AGAINST RUSSIA

PART ONE - INTRODUCTION

March 1, 2022

The Russian Federation's decision to recognise the Donetsk and Luhansk "oblasts" as independent republics of Ukraine, and the subsequent invasion of Ukraine by Russian armed forces with the support of Belarus, has generated widespread rejection in Western countries. In addition to administrative measures and statements of condemnation from many different quarters, non-governmental bodies such as UEFA, FIFA, IIHF, IHF, Euroleague Basketball and many others have made agreements to exclude Russian and Belarusian entities from their respective activities.

For the time being, the measures adopted by various states and international organisations are limited to the imposition of sanctions and restrictions, mainly of an economic nature, aimed at individuals and entities close to Russian and Belarusian circles of power. In the case of the European Union, these measures have taken the form of a broad package of provisions published in the Official Journal of the European Union as of 23 February 2022, extending the existing restrictions agreed in 2014 on the occasion of the Russian annexation of Crimea. A number of additional new measures are also adopted.

The scope and, above all, the concrete effects of these measures are still difficult to gauge. Developments will determine whether the package of measures adopted so far will be maintained or whether the EU institutions decide to extend it, as has already been announced. In the following lines, we will try to summarise the main issues from the point of view of their actual impact on the functioning and operations of EU citizens. It will, however, be necessary to keep a constant watch on the updates and possible new measures that will be adopted.

Given the variety and extent of the sanctions imposed by the Community authorities, it is necessary to divide this summary into separate parts in order to facilitate the reading and understanding of the measures. In this first part we will deal with the general aspects of the restrictions imposed, such as their territorial and personal scope, the information and liability obligations imposed on addressees and the sanctioning regime in case of non-compliance.

Territorial scope

In this section, we must distinguish between the territories in which the measures have effect and the territories to which some of them refer. As we will see in the following sections, some restrictions are aimed at goods originating in or destined for certain territories (mainly the Donetsk and Luhansk areas), and we will analyse these situations on a case-by-case basis.

Community bodies cannot issue measures that have effects, at least directly, beyond the territories of their Member States, as they have no jurisdiction to do so. Nevertheless, as wide a scope as possible has been sought.

In general, the restrictive measures adopted by Community bodies apply:

- a. within the territory of the EU (including its airspace),
- b. on board any aircraft or any vessel under the jurisdiction of a Member State,
- c. to any person, whether inside or outside the territory of the EU, who is a national of a Member State,
- d. any legal person, entity or body, whether located inside or outside the territory of the EU, which is incorporated or constituted under the law of a Member State, and
- e. to any legal person, entity or body in respect of any business done in whole or in part within the EU.

As can be seen, all financial institutions, companies and individuals who are EU citizens, who are nationals of a Member State or who simply conduct business on EU territory are subject to the rules set out below. This means that, in the event of infringement of the restrictive measures imposed, they may be subject to the imposition of sanctions.

Personal scope of application

The various measures adopted are generally directed against persons and entities expressly mentioned in the annexes to the Community Decisions and Regulations ("blacklists" for the purposes of this note). These are essentially the following categories of persons:

- a. natural persons responsible for actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security in Ukraine, or who actively support or implement such actions or policies, or who obstruct the work of international organisations in Ukraine,
- b. legal persons, entities or bodies supporting, materially or financially, actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine,
- c. legal persons, entities or bodies in Crimea or Sevastopol whose ownership has been transferred in violation of Ukrainian law, or of legal persons, entities or bodies that have benefited from such transfer of ownership,
- d. natural or legal persons, entities or bodies actively supporting, materially or financially, or benefiting from, Russian politicians responsible for the annexation of Crimea or the destabilisation of Eastern Ukraine, and
- e. natural or legal persons, entities or bodies conducting transactions with separatist groups in the Donbass region.

By Council Decision (CFSP) 2022/265, Council Regulation (EU) 2022/259 and Council Implementing Regulation (EU) 2022/260, all of 23 February, 22 persons and 4 entities (Internet Research Agency, Rossiya Bank,

Promsvyazbank, VEB.RF) to the original blacklist of persons, entities and bodies subject to restrictive measures established in 2014.

On the same date of 23 February 2022, Council Decision (CFSP) 2022/267 and Council Implementing Regulation (EU) 2022/261 add the 336 members of the Russian State Duma to the list of persons, entities and bodies subject to restrictive measures for having voted in favour of the recognition of the areas of Eastern Ukraine (Donetsk and Luhansk) as independent states.

Subsequently, on 28 February, 26 more persons and the SOGAZ Gas Insurance Company were added to the list by Council Decision (CFSP) 2022/337 and Council Implementing Regulation (EU) 2022/336.

Reporting obligation

The Community regulation imposes on its addressees an obligation to cooperate and provide information to the authorities to enable them to monitor the implementation of the measures. In particular, and without prejudice to the applicable rules on disclosure, confidentiality and professional secrecy, natural or legal persons, entities or bodies required to comply with the restrictions are obliged to provide information such as information on accounts and amounts frozen to the competent authorities of the Member State of residence or establishment. Such information should also be transmitted to the European Commission and co-operate with the competent authorities in any verification of this information.

Responsibility of Community operators

As a general rule, Community legislation on sanctions prohibits persons bound by it from knowingly and intentionally engaging in actions the object or effect of which is to circumvent restrictive measures.

Aware that this is a complex set of rules, the Community legislator has provided that operators are exempted from liability in the event of misapplication of the restrictions.

In particular, the freezing of funds and economic resources or the refusal to make funds or economic resources available, carried out in good faith on the basis that such action is in accordance with Community law, does not give rise to liability of any kind on the part of the natural or legal person, entity or body implementing it, or its directors or employees, unless it is proved that the funds and economic resources were frozen or withheld as a result of negligence.

On the other hand, actions taken by such persons and entities would not give rise to liability on their part if they did not know, and had no reasonable grounds to suspect, that their actions would infringe the measures laid down by the sanctioning legislation.

In this way, it is intended to protect operators against possible claims by affected persons. Of course, it will be necessary to determine liability on a case-by-case basis, as the level of diligence required of each operator will depend on the nature of each operator (for example, it could be argued that the diligence and knowledge required of a financial institution is higher than that required of an SME that deals with Russia on an occasional basis only).

Prohibition on meeting demands

As can be imagined, it is quite possible that those affected by the sanctions will strongly disagree with them. The situation may arise where economic operators, in seeking to comply with the restrictions provided for by the Community legislator, breach their contractual obligations towards the persons affected by the sanctions. This may give rise to litigation in which the persons concerned seek redress for the damage they have suffered, which may be brought before courts outside the Community.

In order to prevent the adverse consequences that this type of litigation may have for Community operators, the rules in force stipulate that they must not satisfy any claim relating to a contract or transaction the performance of which has been affected, directly or indirectly, wholly or in part, by sanctioning measures imposed by the Community legislator and which has been brought by blacklisted persons. This includes in particular claims for compensation or any other such claims, such as claims for compensation or by way of guarantee, in particular any claim for the extension or payment of a guarantee, financial security or indemnity, in particular financial, irrespective of the form it takes.

Sanctions regime

Finally, it should be noted that Community legislation stipulates that it is up to the Member States to regulate the system of penalties applicable to possible infringements of restrictive measures.

In Spain, this regime is dispersed among various regulations, such as Law 10/2010 on the prevention of money laundering, Organic Law 12/1995 on the repression of smuggling and Law 21/2003 on aviation security. It should be noted that the penalties provided for in these regulations can be substantial and, in the case of companies, even provide for the possible personal liability of their directors and managers. It is therefore highly advisable to analyse in detail the implications of transactions that may be considered suspicious of being included among the restrictions provided for by the Community legislator.

Forthcoming chapters

In future chapters we will deal with sanctions imposed in relation to the freezing of funds of blacklisted persons, limitations on financial instruments and transactions, bans on the sale of arms and dual-use goods, restrictions on the sale of oil exploration products and other goods, the ban on real estate purchases, the closure of Russian airspace, limitations on the provision of tourism services, etc.

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