

European Commission Publishes New Guidance on Scope of Sanctions Prohibitions

November 1, 2023

On October 23, 2023, the European Commission (the “**Commission**”) updated its non-binding Frequently-Asked-Questions guidance relating to the EU’s Russia-related sanctions regime (the “**FAQs**”).¹ Specifically, the Commission provided guidance on the meaning of ‘acting on behalf or at the direction of’ an entity in the context of sanctions targeting state-owned enterprises.

While not strictly binding, the Commissions’ broad interpretation of ‘acting on behalf or at the direction of’, and the stated aim of preventing circumvention of relevant prohibitions through shareholding restructurings, is reflective of a generally expansive approach to the scope of the EU’s sanctions regime. This is consistent with other international developments.

This alert memorandum explains the Commission’s guidance against its relevant context and discusses its implications.

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¹ The Commission’s new guidance is accessible [here](#).



I. Background

In March 2022, the Council amended Regulation 833/2014 so as to introduce a new Article 5aa which prohibits transactions with certain state-owned companies.² Specifically, the prohibition in Article 5aa(1) is as follows:

1. It shall be prohibited to directly or indirectly engage in any transaction with:
- (a) a legal person, entity or body established in Russia, which is publically controlled or with over 50 % public ownership or in which Russia, its Government or Central Bank has the right to participate in profits or with which Russia, its Government or Central Bank has other substantial economic relationship, as listed in Annex XIX;³
 - (b) a legal person, entity or body established outside the Union whose proprietary rights are directly or indirectly owned for more than 50 % by an entity listed in Annex XIX; or
 - (c) a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph.

The prohibitions in this article are subject to a number of exceptions and derogations.

While the scope of limbs (a) and (b) of Article 5aa(1) is reasonably clear, the precise meaning of limb (c), specifically the meaning of “acting on behalf or at the direction” of an entity, has given rise to some uncertainty.

On October 23, 2023, the Commission amended its FAQs, seeking to provide guidance on this point (which

effectively replicates the earlier guidance on Article 5(1) of Regulation 833/2014 set out in the Commission Opinion of 17.10.2019⁴).

II. Guidance

The Commission’s guidance provides that, in assessing whether an entity is acting on behalf or at the direction of a targeted entity, the national competent authority should “*take into account all the relevant circumstances*”. These may include, for example:

- the precise ownership/control structure, including links between natural persons;
- the nature and purpose of the transaction, coupled with the stated business duties of the entity that is owned or controlled;
- previous instances of acting on behalf or at the direction of the targeted entity;
- disclosure made by third parties and/or factual evidence indicating that directions were given by the targeted entity.

The guidance also highlights that limb (c) of the prohibition seeks to address situations where a targeted person or entity attempts to circumvent the application of EU sanctions,⁵ for instance by changing the formal ownership of a company to side-step the application of Article 5aa (1)(b). Specifically, the guidance notes that ownership or control of the targeted person/entity over the other entity is an element that can be considered to increase the likelihood of acting on behalf or at the direction of the targeted person/entity, but cannot suffice in determining whether the conduct did occur.

Accordingly, a company will likely be ‘acting on behalf or at the direction of’ a targeted entity if it previously

² See Council Regulation (EU) 2022/428 of 15 March 2022, amending Regulation (EU) 833/2014 (accessible [here](#)), Recital (6) and Article 1(9).

³ Annex XIX to Regulation 833/2014 lists a small number of entities, including: OPK Oboronprom; United Aircraft Corporation; Uralvagonzavod; Rosneft; Transneft; Gazprom neft; Almaz-antey; Kamaz; Rostec (russian technologies state corporation); JSC PO Sevmash; Sovcomflot; United Shipbuilding Corporation; Russian Maritime Register of Shipping (RMRS); Russian Regional Development Bank.

⁴ Commission Opinion of 17.10.2019 on Article 5(1) of Council Regulation (EU) No 833/2014 (C(2019) 7476), accessible [here](#).

⁵ It should be noted, however, that, in relation to Article 5(1) of Regulation 833/2014, Commission Opinion of 17.10.2019 confirms that circumvention is also prohibited separately, under Article 12 of Regulation 833/2014, and that evidence of activities the object or effect of which is to circumvent the prohibitions laid down in Article 5 is not necessary to establish conduct prohibited by Article 5.

fell within limb (b) of the prohibition, but, following a change in the shareholding structure, does no longer satisfy the relevant criteria. This is so, in particular, where the share transfer is operated within the same corporate group and/or occurs close to the date of inclusion into Annex XIX of the relevant entity (or of the issuance of relevant guidance) and/or if any material influence over the relevant entity is maintained (e.g., veto rights or any other influence over the management of the entity). In such a situation, the Commission considers there to be reasonable grounds to suspect that the share transfer has been put in place in bad faith to camouflage the effective ownership or control and to circumvent the applicability of Article 5aa.

III. Implications

The Commission's guidance suggests an expansive approach to the interpretation of 'acting on behalf or at the direction of' a targeted entity, and, as such, to the scope of the EU's sanctions regime. However, while the guidance is helpful in setting out some criteria relevant to, as well as some of the aim underpinning, the assessment in Article 5aa(1)(c), some questions remain. In particular, the guidance does not specify what level of knowledge/certainty must exist in respect of the relevant factors (e.g., whether reasonable grounds to suspect 'acting on behalf or at the direction of' a targeted entity suffices, or whether more specific evidence is required).

The Commission's expansive approach is consistent with other developments in the area of Russia-related sanctions. For example, the English Court of Appeal adopted a similar approach when, in respect of the 'control' concept employed in the UK's Russia sanctions regime, it seemed to opine, *obiter*, that every Russian company could be deemed to be controlled by President Putin by virtue of his political office, and, consequently, subject to sanctions⁶ (albeit that, soon after that judgment, the Foreign, Commonwealth and Development Office issued a public statement noting, amongst other things, that there is no presumption on

the part of the Government that the fact that a private entity is based or incorporated in Russia is in itself sufficient evidence to demonstrate that the relevant entity is controlled by a Russian public official, and that, in the interests of reducing any uncertainty, the Government is exploring its options for clarifying this position⁷).

At the same time, the Russian legislature has indicated that it may respond to further nationalisations of Russian assets in Europe with further countersanctions and with asset-seizures. These developments create an environment that is increasingly complex and difficult to navigate for economic actors.

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⁶ *Boris Mints & Ors v PJSC National Bank Trust & Anor* [2023] EWCA Civ 1132 ("*Mints*").

⁷ For a more detailed discussion of the Court of Appeal's decision in *Mints* and its implication, please refer to our dedicated memorandum, [here](#).