

Sanctions update

Applicability of Article 5 of Regulation 833/2014 to EU incorporated entities and the meaning of “acting on behalf or at the direction of”

The EU’s key financing restrictions targeting certain Russian sectoral sanctions targets are contained in Article 5 of Council Regulation (EU) No 833/2014 (**Article 5**). Article 5 restricts certain activities involving transferable securities and money market instruments of, and the provision of certain forms of loans and credit to, the targeted entities.

Importantly, it is not just those entities explicitly listed in Regulation 833/2014 that are caught. Article 5 also imposes the same restrictions against any legal person (a) established outside of the EU whose proprietary rights are owned more than 50% by one of the listed targets; and (b) who acts on behalf or at the direction of any of the listed targets or persons falling within (a).

On 17 October 2019, the European Commission published an opinion on the interpretation of Article 5 (**Opinion**).¹

The Opinion touched on two main issues:

- (a) whether it is possible for *EU incorporated entities* to be targeted by the Article 5 sanctions where they are “acting on behalf or at the direction of” other targeted entities; and
- (b) how the term “acting on behalf or at the direction of” should otherwise be interpreted.

On the first issue, the Opinion confirmed that it is possible for an EU incorporated entity to be targeted by the Article 5 measures where it is “acting on behalf or at the direction of” another targeted entity. This is in contrast to the position as stated in earlier European Commission guidance on the scope of the Article 5 measures, where it is stated that the restrictions had been “carefully designed to ensure that EU subsidiaries of targeted entities do *not* become targeted entities themselves”.² EU subsidiaries that had previously relied on this earlier guidance, and persons doing business with them, should reassess their position at this point in light of the apparent change of position reflected in the Opinion.

¹ https://ec.europa.eu/fpi/sites/fpi/files/5_en_act_part1_v3.pdf

² FAQ33, Commission Notice of 25 August 2017; Commission Guidance Note on the Implementation of Certain Provisions of Regulation (EU) No 833/2014

On the second issue, the Opinion stated that the concept of “acting on behalf or at the direction of” was distinct from the “ownership and control” concept associated with the EU’s asset freezing sanctions, and that their effects could be placed on an equal footing. It went on to elaborate (among other matters) that:

- (i) where one entity “owns” or “controls” another, this *increases the likelihood* that conduct amounting to “acting on behalf or at the direction of” could have arisen, *but cannot suffice in determining whether or not such conduct has in fact occurred*; and
- (ii) all relevant circumstances should be taken into account to determine whether or not one entity is “acting on behalf or at the direction of” another, including the:
 - (A) extent to which natural persons link the two entities in question;
 - (B) nature and purposes of the transactions linking the two entities;
 - (C) stated business duties of the allegedly subordinate entity;
 - (D) extent to which previous instances of “acting on behalf or at the direction of” the targeted entity had arisen; and
 - (E) nature of the allegedly subordinate entity’s business (the Opinion indicates that, for example, an EU financial institution could be considered as presenting a lower risk of being an entity that is “acting on behalf or at the direction of” another).

Although no concrete parameters appear to have been established pursuant to which it is identified that one entity *will* be considered to be “acting on behalf or at the direction of” another, these tests nevertheless add useful colour.³ Businesses may therefore wish to re-consider their existing relationships with possible Article 5 targets in light of the apparent evolution in thinking from the European Commission as reflected in the Opinion.

If you wish to discuss any issue raised in this bulletin further please do not hesitate to contact a member of Allen & Overy’s International Trade and Regulatory Law Group or the authors below.

³ As the Opinion notes, the concept of “acting on behalf or at the direction of” has not been defined in relevant EU legal acts or guidance documents to date and, further, such notion has only been dealt with in passing through ECJ-level jurisprudence.

Contact information



Matthew Townsend | Partner, Global Co-Head International Trade and Regulatory Law Group

Tel +44 20 3088 3174

matthew.townsend@allenoverly.com



Tom d'Ardenne | Senior Associate, International Trade and Regulatory Law Group

Tel +44 203 088 3534

tom.dardenne@allenoverly.com

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