ARTICLE 8A "BEST EFFORTS" EXPLAINED

Date: 8 January 2025

UK Policy and Regulatory Alert

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On 24 June 2024, the European Union (EU) implemented its 14th package of sanctions against Russia to combat its continued aggression against Ukraine. The package introduced new anti-circumvention measures to strengthen existing sanctions. A notable addition was made to Article 8a of Council Regulation (EU) No 833/2014, which introduced the requirement that EU operators "undertake their *best efforts* to ensure that any legal person, entity or body established outside the [EU] that they own or control does not participate in activities that undermine the restrictive measures provided for in [the] Regulation." A similar clause has also been included in the Belarus sanctions framework.

When first established, only limited guidance (contained in particular in Recitals 27, 28, 29 and 30 of Regulation 2024/1745) was provided for a measure that could have potentially far-reaching implications. However, on 22 November 2024, the European Commission (the Commission) published an FAQ to clarify the "best efforts" obligation (the FAQs).

This alert provides a brief summary of the Commission's much anticipated answers to the most frequently asked questions regarding the parameters of "best efforts."

SUMMARY OF FAQS AND ANSWERS

What Does the Concept of "Best Efforts" Mean?

- It means "all actions that are suitable and necessary" to prevent the undermining of Regulation (EU) No 833/2014.
- However, efforts should only be those that are considered "feasible", depending on the "nature… size and the relevant factual circumstances" of the EU operator, particularly the extent of "effective control over the legal person, entity or body established outside the [EU]."

What Does the Concept of "Undermining" Mean?

- "Undermining" includes efforts that result in an outcome that the restrictive measures specifically seek to prevent.
- This is different to "circumvention", which has as its aim the bypassing of certain measures to avoid the constituent elements of an infringement.

How Can EU Operators Show They Undertook Their "Best Efforts"?

- This will be decided on a case-by-case basis.

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- Various factors will be taken into account when assessing what amounts to best efforts, including the relevant market sector, company turnover, risk profile and available compliance resources.
- Operators should ensure that they are aware of the activities of non-EU entities that they own or control. They should also aim to improve the entities' own knowledge of activities that might risk undermining EU sanctions.
- This might include operating internal compliance programs, regular sharing of compliance standards and establishing mandatory training and reporting requirements.

How Is Article 8a to Be Applied if Prevented by the Laws of the Third Country Where the Owned or Controlled Entity Is Incorporated?

- The scope of “best efforts” will depend on each individual case.
- As such, different factors will be taken into account, including situations whereby the legislation of a third country means the EU operator cannot exercise control over a legal person, entity or body that it owns.
- This means that an EU operator will not be expected to exercise control when such power to do so is impossible.
- However, this mitigating factor will not apply if the loss of control was caused by the EU operator itself, such as inadequate risk assessments or unnecessary risk-prone decisions.

Will EU Operators Be Liable if They Are Aware Of, and Accept, Any Non-EU Entities That They Own or Control Undermining EU Sanctions?

- Yes – the operator will be in breach of Article 8a as they will not be considered as having performed all necessary, suitable and feasible actions to prevent such undermining.

Does Article 8a Cover Russia-Based Entities Owned or Controlled by an EU Operator?

- Yes.

If an EU Operator Owns or Controls an Entity in Russia, Which Produces And/or Exports Goods Covered by an EU Import Ban, Would the EU Operator Breach Article 8a if the Entity Supplied Such Goods to Non-EU Entities? Do Intra-Group Transfers Count?

- Yes – if non-EU entities owned or controlled by EU entities continue to trade EU restricted goods produced in Russia, a stream of revenue for the Russian economy is continued, thereby defeating the aim of the relevant EU sanctions ban.
- This means that should the EU operator not discontinue the supply (or block the use), it will not be regarded as having performed all necessary and feasible actions to prevent the undermining of EU sanctions by related non-EU entities.

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If an EU Operator Owns or Controls an Entity Which Produces And/or Exports Goods Covered by an EU Export Ban, Would the EU Operator Breach the "Best Efforts Clause" if Such Goods Were to End up in Russia/Belarus?

- Yes – if the EU operator does not try to prevent the supply of such goods by the entity it owns or controls, then the EU operator will not be considered as having taken all necessary and feasible steps to prevent the entity from undermining EU sanctions.
- Even if the transfer to Russia/Belarus occurred before the prohibition came into force, the undermining of EU sanctions by a non-EU entity as a result of the prior transfer would render the owning or controlling EU operator in violation of the best efforts clause should the EU operator not discontinue the supply or block the use of the goods.

CONCLUDING REMARKS

The FAQs reaffirm the EU's determination to broaden and strengthen the application of sanctions in order to hinder Russia's military action in Ukraine. The onus is on operators to ensure that any entities they control or own do not engage in activities that undermine EU sanctions. This will pose particular challenges to those that function in high-risk regions.

Whilst the FAQs do not represent binding obligations, they are reflective of the Commission's intentions and could be relied upon by EU Member States enforcement authorities. The Commission has also committed to engaging with EU Member States to prepare a clear set of expectations, to ensure legal certainty and a level playing field across the EU. In the meantime, operators are encouraged to take a proactive approach to ensure adherence to compliance measures, such as continuous risk assessments, compulsory and tailored training, and transparent policies and procedures for the reporting of violations.

If you have any questions regarding the various elements of the "best efforts" obligation as outlined in this alert, please do not hesitate to contact our Policy and Regulatory group. The firm continuously analyses and reports on developments across various sanctions regimes, including the EU, United Kingdom and United States.

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KEY CONTACTS



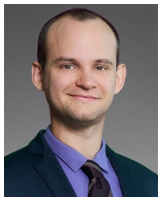
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