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Russia Update: EU Strikes Back Against Russian Countersanctions

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On 24 June 2024, the European Union announced its 14th sanctions package in response to Russia's full-scale invasion of Ukraine. The new sanctions – which include measures targeting sanctions circumvention, LNG transshipment and political funding from the Russian State – take aim at Russia's "countersanctions" in response to previous sanctions by the EU and other countries.

In particular, the EU has introduced new provisions intended to protect EU operators that are facing claims or have suffered losses at the hands of Russian parties for having implemented EU sanctions. These protections will be of special interest to EU companies facing claims from Russian parties under contracts affected by sanctions, as well as EU investors in Russia that have been, or may be, placed under State control.

1 Background on Russian countersanctions

1.1 Anti-suit injunctions available under recent Russian legislation

In June 2020, the Russian *Arbitrazh* (Commercial) Procedure Code (the "**APC**") was amended to include new jurisdiction provisions: Articles 248.1 and 248.2:

a) Article 248.1 APC provides for exclusive jurisdiction of the Russian commercial courts over certain disputes involving sanctions. For example, the Russian commercial courts are to take exclusive jurisdiction where Russian companies affected by sanctions have agreed to litigate or arbitrate outside Russia, but that agreement is unenforceable because sanctions create an obstacle to the Russian company's access to justice.

b) Article 248.2 APC allows for Russian parties to apply to Russian courts for an anti-suit or anti-arbitration injunction to prevent their counterparties initiating or continuing litigation or arbitration outside Russia in respect of disputes that fall under the remit of Article 248.1 APC. The injunction is also enforceable by a monetary penalty up to a maximum of the damages sought by the non-Russian party.

These rules have been increasingly widely applied in the Russian courts. In December 2021, in *CJSC Uraltransmash v. PESA Bydgoszcz*, the Russian Supreme Court ruled that the mere fact that a jurisdiction has imposed sanctions against Russia in itself creates obstacles to access to justice under the meaning of Article 248.1 APC. The Supreme Court's ruling has been applied by the Russian courts so that any Russian legal person who has agreed to litigate or arbitrate in jurisdictions enacting sanctions can apply for an injunction from the Russian courts – even if they have not been individually targeted by sanctions.

The most recent case law indicates that Russian courts have been routinely issuing injunctions under Article 248.2 APC against parties who have agreed with Russian parties to litigate or arbitrate in European jurisdictions.

To take only one example, Gazprom Export LLC secured an anti-arbitration injunction against German energy companies Uniper Global Commodities SE and METHA-Methanhandel GmbH. On 15 March 2024, the Commercial Court of St Petersburg and the Leningrad Region ordered the German parties not to continue a Stockholm-seated arbitration administered by the Permanent Court of Arbitration (PCA), threatening a penalty of EUR 14.3 billion (equivalent to the total claimed in the arbitration) if the German parties did not comply with the injunction.

1.2 Compulsory administration of "unfriendly" investors

Following its full-scale invasion of Ukraine, the Russian Federation has imposed measures on investors from so-called "unfriendly" States. These include all EU Member States, as well as the USA, UK, Canada, Australia, Switzerland, Japan and others.

As reported in our previous legal update, these measures include Presidential Decree No 302, enacted in April 2023, which permits the Russian government to order the "temporary" administration of investments belonging to investors associated with "unfriendly" States. The decree was described as a response to asset freezes and other financial sanctions implemented by those countries that the Russian government sees as threatening the property rights of Russian nationals. Where an investment is placed into administration, the Federal Agency for State Property Management (*Rosimushchestvo*), or any other person appointed by the President, assumes control of the property, including the right to change the management and dispose of the property.

The Russian government promptly used this decree to appoint external administrators over the Russian subsidiaries of several EU-based investors, including Finland's Fortum, Germany's Uniper, Denmark's Carlsberg and France's Danone. In February 2024, President Putin lifted the administration of Danone after the food products corporation agreed to sell its Russian subsidiaries at a significant discount to one of the new directors that *Rosimushchestvo* had appointed. The Russian operations of Fortum, Uniper and Carlsberg remain under State management.

2 The EU response

The EU's 14th sanctions package includes effectively a "counter-countersanctions" response, with new measures implemented through Council Regulation (EU) 2024/1745. This amends Regulation (EU) No 833/2014 ("**Regulation 833/2014"** – trade sanctions) and Council Regulation (EU) 2024/1739 (which amends Regulation (EU) No 269/2014 ("**Regulation 269/2014**" – financial sanctions)).

These amendments:

- impose a transaction ban on companies that "meddle" with arbitration or exclusive jurisdiction clauses by bringing claims in Russia in reliance on Article 248 APC; and
- create compensation rights for EU operators for losses resulting from the countersanctions discussed above.

2.1 Mechanism allowing transaction ban on companies invoking Russian anti-suit legislation

The sanctions package includes measures to address recent anti-suit and anti-arbitration injunctions ordered by Russian courts, which the European Commission's FAQs describes as "*meddl*[ing] *with arbitration and court competence rules*".

The newly introduced Article 5ab in Regulation 833/2014 allows the EU Council to designate and impose a transaction ban on persons or entities that have lodged a claim for relief from Russian courts under Article 248 APC in connection with any contract or transaction whose performance has been affected by EU sanctions. Persons or entities sanctioned under Article 5ab are to be designated in a new Annex XLIII. No parties have yet been designated at the time of writing.

Unusually, Article 5ab does not refer directly to Article 248.1 and Article 248.2 APC. Instead, the legislation refers to Article 248 APC (which provides for exclusive jurisdiction of the Russian courts in certain circumstances, including disputes regarding Russian real estate) "*or equivalent Russian legislation*". Nevertheless, the fact it lists "*injunction*[s]" as the first type of Russian court relief, indicates that the transaction ban is indeed targeted at Russian companies making injunction applications under Article 248.1 and Article 248.2 APC.

The transaction ban mechanism is unusual because it specifically targets Russian companies applying for legal remedies before the Russian courts, even where these companies might not otherwise have been subject to sanctions.

The list of exceptions to such transaction bans is also notably more limited than in other sanctions imposed in the past. For example, the new Article 5ab includes a carve-out for the purchase, import or transport of pharmaceutical, medical, agricultural or food products, but not natural gas (as currently permitted under Article 5aa of Regulation 833/2014). The EU Council has therefore sent a strong message that it regards as illegitimate *all* attempts by Russian companies to avoid litigation and arbitration outside Russia by making applications for anti-arbitration injunctions under Articles 248.1 and 248.2 APC.

Whether the transaction ban will have any effect on the behaviour of Russian companies is debatable. The risk of being added to the sanctions list might be enough to deter some companies from seeking injunctions from Russian courts, although Russian companies that would choose to injunct their European counterparties may not be concerned about further sanctions in Europe.

2.2 Compensation rights for EU companies and individuals

2.2.1 Compensation for claims brought in third countries

The sanctions package also inserts a new Article 11a into both Regulation 833/2014 and Regulation 269/2014. This new article creates a legal basis for EU operators to claim compensation before the competent courts of their home EU State for losses incurred as a result of "*claims lodged with courts in third countries*" (*i.e.*, non-EU Member States) in connection with any contract or transaction affected by sanctions under those regulations. This is subject to the following conditions:

a) the claim is brought by an entity designated under Regulation 833/2014 or Regulation 269/2014 (and, in respect of contracts affected by Regulation 833/2014 only, any other Russian person, entity or body) or any person, entity or body acting through or on their behalf; and

b) the EU operator does not have "*effective access*" to remedies in the jurisdiction in which the other party is bringing its claim.

The “effective access” condition is not defined, but would appear to cover, for example, a situation where the third-country jurisdiction does not recognise the operator’s compliance with EU sanctions as a contractual defence. The European Commission’s FAQs explains that this new article is intended to prevent Russian parties from avoiding the effect of “no claims” clauses in EU sanctions regulations – which shield EU operators from liability where a contract is affected by sanctions – by bringing claims in Russia or other non-EU countries:

“*Currently, EU companies that, for instance, end a contract with a Russian firm to comply with sanctions are shielded by possible claims in the EU. However, they can be sued in Russia for that and have their assets there seized. The new instrument establishes a specific legal basis for EU companies to recover such damages from the Russian counterpart’s possible assets in the EU.*”

Thus, if a French company suspends or terminates a contract with a sanctioned Russian counterparty as a result of EU sanctions, and the counterparty responds by filing suit for damages in Russia under Article 248.1 APC, the French company can file a countersuit before the French courts.

Unlike Article 248.2 APC, the new Article 11a *does not* grant the EU courts the power to issue anti-suit injunctions, which are not an available remedy in many EU Member States. Rather, the sole remedy lies in compensation for any damages from the other proceedings, including legal costs. Since a judgment for compensation from an EU court is highly unlikely to be enforced in Russia, the effectiveness of this remedy may be doubtful. However, the prospect of enforcement in other EU Member States, and potentially third countries, may be a disincentive for any counterparties considering bringing a claim in Russia or other non-EU countries.

2.2.2 Compensation for companies placed under external administration

The latest sanctions package also adds a new Article 11b to Regulation 833/2014. This creates a new basis for compensation claims by EU operators affected by Decree No 302 or similar legislation:

- **Who can claim?** EU nationals, or any legal person, entity or body incorporated or constituted under the law of an EU Member State, can bring a claim before the competent courts of their Member State.
- **Who is liable for compensation?** The article does not allow claims directly against the Russian Federation or its agencies, thus avoiding potential issues of sovereign immunity. Instead, it allows claims for losses caused by any persons, entities or bodies designated under Regulation 833/2014, or any other Russian person, entity or body (or any person, entity or body acting through or on their behalf) that have “benefited from a decision” under Decree No 302 or related or equivalent Russian legislation. This would likely cover the situation where a private Russian party is appointed as external administrator, or where Russian authorities use their power to sell or transfer the investor’s property to a private Russian party.
- **What damages can be claimed?** The EU operator may claim for any “damages” incurred, though only legal costs are expressly mentioned as a head of damage. The recitals to the amending regulation indicate that damages incurred by an entity owned or controlled by the EU operator (such as a Russian subsidiary) will also be recoverable.

Article 11b(1) sets out two further requirements for a compensation claim:

- the decision under Decree No 302 must be “*illegal under international customary law or under a bilateral investment treaty entered between a Member State and* Russia”; and

- *"the person concerned does not have effective access to the remedies under the relevant jurisdiction*. According to the recitals to the amending regulation, this latter requirement includes effective access to remedies under a bilateral investment treaty ("**BIT**").

Currently, 18 EU Member States have BITs in force with the Russian Federation (Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Romania, Slovakia, Spain and Sweden). The State-ordered administration of foreign investments, if sufficiently permanent in effect, may constitute an unlawful expropriation under customary international law and any applicable BIT. It may also violate other treaty protections, such as the fair and equitable treatment and non-impairment clauses often found in BITs.

However, many first-generation Russian BITs contain narrow dispute settlement clauses, which only provide for investor-State arbitration in disputes regarding compensation for expropriation and the free transfer of capital. Several arbitral tribunals have interpreted such narrow dispute settlement clauses to exclude disputes over whether an expropriation occurred; such that investors could only bring such disputes before the Russian courts.

Investors from States with such restrictively worded BITs (or without any BIT in force with Russia), may therefore argue that they lack effective access to remedies under a BIT. Presumably, it would fall to the competent courts of their home State to decide whether the BIT provides for access to investor-State arbitration and whether the "administration" of their investments under Decree No 302 breaches the BIT or customary international law – questions that would normally be decided by arbitral tribunals under those treaties.

Notably, new Article 11b(2) of Regulation 833/2014 asserts that EU Member States will not be liable for judicial decisions under Article 11b(1) or their enforcement and that they shall not comply with any judgments or arbitral awards holding them so liable. This paragraph appears to recognise that Russian parties subject to compensation claims may file their own BIT claims against EU Member States. Several Russian or Russian-owned investors have already threatened, or commenced, claims against Germany, Cyprus and Luxembourg arising out of measures taken since the February 2022 invasion of Ukraine.

3 Key considerations for EU businesses

The latest EU sanctions package shows that the EU Council is alive to Russian countersanctions and is actively implementing measures to protect EU companies from their effect. While the EU's measures give new options for redress to EU businesses, their efficacy remains to be seen.

EU companies facing potential sanctions-related disputes with Russian companies should consider monitoring the Russian commercial court website to assess whether their counterparties have lodged claims invoking the exclusive jurisdiction of the Russian courts and/or seeking injunctions. If their Russian counterparties have filed for this type of relief, they may soon be designated by the EU under the corresponding sanctions list. Companies concerned that their counterparties may seek injunctive relief from the Russian courts may warn their counterparties that doing so could lead to designation under the EU's new sanctions powers. For companies already subject to Russian anti-suit or anti-arbitration injunctions, the new basis for compensation claims provides an avenue to reclaim any legal costs and penalties imposed by the Russian courts – although recovering them from Russian parties is likely to prove more problematic in practice.

For EU investors that have faced, or may face, State-imposed administration under Decree No 302, BIT claims are likely to remain the preferred option, given that investors may seek enforcement of any arbitral awards rendered under those BITs via the New York Convention. However, the new compensation mechanism under Article 11b of Regulation 833/2014 offers an alternative for those investors who lack access to investor-State dispute settlement under a relevant BIT. Again, whether a party can enforce an EU court judgment awarding compensation is likely to depend on where the defendant has assets available. Enforcing such judgments against private Russian defendants may, however, be easier in some ways than enforcing BIT claims against the Russian Federation, since private defendants'

It is open to question whether the UK and Switzerland (which has mirrored the EU's previous 13 sanctions packages) will follow suit by implementing similar counter-countersanctions in their own sanctions regimes. Meanwhile, the Russian government has vowed an "appropriate response" to the EU's new sanctions. The cycle of sanctions and countersanctions looks set to continue.