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The EU's Eighth Package of Sanctions Against Russia and the Potential Ramifications of a Blanket Ban on Legal Advisory Services

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Over the past few weeks, Russia has announced a “**partial mobilisation**,” has illegally annexed the Donetsk, Luhansk, Zaporizhzhia and Kherson regions of Ukraine, and has repeatedly threatened to use weapons of mass destruction, thereby ruthlessly escalating its war of aggression against Ukraine. In response, the EU has imposed its **eighth package of sanctions against Russia** by adopting *inter alia* **Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine** and **Council Regulation (EU) 2022/1905 of 6 October 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine**.

Among other sanctions, **described by the EU Council** as “*biting measures intended to reinforce pressure on the Russian government and economy, weaken Russia's capabilities, and make the Kremlin pay for the recent escalation*,” the eighth package **includes a prohibition** “*to provide, directly or indirectly, [inter alia] legal advisory services [...] to: (a) the Government of Russia; or (b) legal persons, entities or bodies established in Russia*.” This ban on legal advisory services follows UK's announcement, on 30 September 2022, of its own **decision** to ban the provision of such services in order to “*hamper Russia's businesses' ability to operate internationally*.”

Even though the prohibition to provide legal advisory services has been carefully delineated so as not to encroach on the fundamental right of access to justice and to an effective legal remedy, this new prohibition might nonetheless ultimately affect dispute-resolution proceedings, including arbitration proceedings. As explained hereafter, the prohibition indeed risks deterring attorneys and legal counsel that are nationals of EU Member States or are operating within the EU from providing pre-trial/pre-arbitral advice to Russian entities concerning the viability of potential claims and defenses.

A Clear Attempt to Fetter Russia's Economy

The ban on the provision of legal advisory services indiscriminately targets all Russian legal entities, in addition to the Government of Russia. It thus clearly differs from, and comes on top of,

other – more targeted – measures which were already in place before the adoption of the eighth package of sanctions and which have the potential of impacting services provided by lawyers.

Indeed, the newly-imposed ban on legal advisory services comes in addition to sectoral sanctions in place against Russia, which prohibit not only the conclusion and performance of contracts involving exports and imports of certain goods or technology or involving certain activities, but also the provision of services related to such goods or technology or such activities, potentially including legal services. It also comes on top of anti-circumvention provisions, which prohibit the participation in activities whose object or effect is to circumvent, directly or indirectly, sanctions (see **Council Regulation (EU) No 269/2014**, Article 9 and **Council Regulation (EU) No 833/2014**, Article 12) and which compel attorneys to consider the types of activities prohibited so as to “*avoid unwittingly committing or becoming an accessory to the commission of a [sanctions] offence.*” Anti-circumvention provisions have themselves been reinforced in the eighth package of EU sanctions against Russia, which introduces a new listing criterion allowing the EU to sanction persons who facilitate infringements of the prohibition against circumvention of the provisions of Council Regulation (EU) No 269/2014 (see **Council Regulation (EU) 2022/1905**, Article 1(1) (amending Article 3(1) of Council Regulation (EU) No 269/2014)).

Clearly, the purpose of the newly-imposed ban on legal advisory services is not just to ensure that attorneys refrain from providing services that might counter the effects of sanctions. Its primary purpose is to forcefully respond to Russia’s annexation of parts of the Ukrainian territory, through measures that have the potential to broadly affect Russia’s economy, knowing that “*Russia is highly dependent on Western countries for legal services with 85% of all legal services being imported from G7 countries.*”

The Potential Tension Between the Ban on Legal Advisory Services and the Right to an Effective Legal Remedy

While the EU has imposed, in the context of its sanctions program against Russia, restrictions that might affect the provision of legal services, it has been careful to define these restrictions in such a manner as not to encroach on the fundamental right of access to justice and to an effective legal remedy, enshrined in Article 47 of the EU Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights.

By way of example, as noted in a **former blog entry by the same authors** regarding the EU’s seventh package of sanctions against Russia, on 21 July 2022, the European Council adopted **Council Decision (CFSP) 2022/1271 amending Decision 2014/512/CFSP** and **Council Regulation (EU) 2022/1269 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine**, in which the Council explained that “[i]n order to ensure access to justice, Decision (CFSP) 2022/1271 [...] allows an exemption from the prohibition to enter into any transactions with Russian public entities necessary to ensure access to judicial, administrative or arbitral proceedings.” Further to these Council Decision and Council Regulation, Article 5aa of **Regulation (EU) No 833/2014**, which prohibits transactions with publicly-owned or -controlled Russian listed entities, was amended to specify that such prohibition shall not apply to “*transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a*

Member State and if such transactions are consistent with the objectives of this Regulation and Regulation (EU) No 269/2014” (Article 5aa(3)(g)).

Before the adoption of **Council Decision (CFSP) 2022/1271** and **Council Regulation (EU) 2022/1269**, the European Commission had already clarified, in June 2022, that “[w]ith regards to the provision of [...] legal services, Article 5aa should be interpreted in light of the fundamental rights protected under the Charter, in particular the right of defence. This provision does not affect the provision of services that are strictly necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy as referred in Article 47 of the EU Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights.”¹⁾

In the same vein, the EU Council has made it clear that the ban on legal advisory services that is part of the eighth package of sanctions only proscribes the provision of legal advice regarding non-contentious matters, and that there are certain exceptions to the ban.

Council Regulation (EU) 2022/1904 indeed defines “legal advisory services” as covering “*the provision of legal advice to customers in non-contentious matters, including commercial transactions, involving the application or interpretation of law; participation with or on behalf of clients in commercial transactions, negotiations and other dealings with third parties; and preparation, execution and verification of legal documents. ‘Legal advisory services’ does not include any representation, advice, preparation of documents or verification of documents in the context of legal representation services, namely in matters or proceedings before administrative agencies, courts or other duly constituted official tribunals, or in arbitral or mediation proceedings.*”²⁾ Furthermore, **Council Regulation (EU) 2022/1904** specifies in Article 1(12) (amending Article 5n of Council Regulation (EU) 833/2014) that the prohibition “*shall not apply to the provision of services that are strictly necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy[,]* [nor shall it apply] *to the provision of services which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, or for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State, provided that such provision of services is consistent with the objectives of [Council Regulation (EU) No 833/2014] and of Council Regulation (EU) No 269/2014.*”

The above definition of “legal advisory services” and exceptions to the ban, read in conjunction with **Article 47 of the EU Charter of Fundamental Rights** – whereby the right to an effective remedy and to a fair trial includes the right to “*have the possibility of being advised, defended and represented*” – suggest that EU operators are not prohibited from providing legal advice to Russian legal entities ahead of dispute-resolution proceedings, including arbitral proceedings, if such advice concerns the viability of potential claims and defenses in contentious matters.

Knowing, however, that such advice might ultimately lead to a decision *not* to engage in legal, administrative or arbitral proceedings, the broad prohibition to provide legal advisory services might nonetheless deter EU operators from conducting any pre-trial or pre-arbitral claim assessment. Attorneys and legal counsel that are nationals of EU Member States or are operating within the EU might fear that pre-trial or pre-arbitral advice in fact be regarded as proscribed “*legal advice [...] involving the application or interpretation of law,*” should there ultimately be no dispute. They might therefore choose not to provide any advice to Russian legal entities, so as to err on the side of caution. The coming months will be instructive in this respect.


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References

?1 **Consolidated FAQs on the implementation of Council Regulation (EU) No 833/2014 and Council Regulation (EU) No 269/2014, p. 211, question no. 5.**

?2 **Council Regulation (EU) 2022/1904**, recital 19.

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