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Counter-Countersanctions: The EU's Legal Mechanism for Compensating Losses from Asset Seizures of EU Operators in Russia

Hosna Sheikhattar (Leiden University) · Friday, December 20th, 2024

On June 24, 2024, the European Union ("EU") has introduced Council Regulation 2024/1745 which imposes the 14th package of sanctions against Russia, intensifying its response to Russia's continued aggression in Ukraine. Among the key legal innovations in this package are Articles 11a and 11b, which provide EU operators with two distinct legal bases to seek compensation in Member State courts from Russian parties. Article 11a establishes a framework for EU operators to recover damages arising from claims brought by Russian parties in non-EU courts regarding the non-performance of contracts impacted by EU sanctions. It is particularly relevant for EU litigants subjected to proceedings in Russian courts under Article 248 of the Commercial Procedural Code of the Russian Federation. Article 11b, on the other hand, enables EU operators to claim compensation from Russian parties that have benefited from the seizure of assets by Russia. This blog post focuses on the mechanisms introduced under Article 11b.

1. Article 11b

Article 11b(1) establishes a mechanism for claiming damages from Russian individuals or entities that benefit from measures authorized under Russia's Decree No. 302, signed on April 25, 2023. The decree permits the seizure of assets belonging to entities from so-called "unfriendly" countries, in retaliation for sanctions imposed on Russia by these states. The decree stipulates that assets may be seized if Russian-owned assets have been frozen, restricted, or are threatened with such actions in the foreign country, or if any threat exists to the Russian Federation. Once seized, the assets are placed under the management of the Russian Federal Agency for State Property Management (*Rosimushchestvo*) or other entities designated by the President. While the decree prohibits the sale or disposal of these assets and frames the arrangement as "temporary management," it lacks explicit mechanisms for ending the arrangement or returning the assets to their original owners. Companies such as Uniper, Fortum, Danone, and Carlsberg have already experienced their Russian subsidiaries being placed under this regime while attempting to exit the Russian market.

Article 11b(1) counters these measures by providing EU operators with a legal avenue to seek compensation for losses incurred as a result of Decree No. 302 or similar legislation. Anticipating potential retaliation from the Russian government and Russian entities, Article 11b(2) stipulates that EU Member States will not be held liable for rendering and enforcing judgments under Article

11b(1), nor will they be required to enforce decisions, including investment treaty arbitration awards, that impose liability on them.

2. Key Features of Article 11b(1)

A. Eligible Claimants

Under Article 11b(1), the individuals and entities specified in paragraphs (c) and (d) of Article 13 of Council Regulation No. 833/2014 are entitled to seek damages before the competent courts of Member States. These include nationals of EU Member States and legal persons that are incorporated or constituted under the laws of a Member State.

B. Eligible Defendants

Claims may be brought against any person identified in points (a), (b), or (c) of Article 11(1) of Regulation 833/2014 if they have benefited from decisions pursuant to Decree No. 302 or related or equivalent Russian legislation. This includes listed entities, entities outside the Union whose proprietary rights are directly or indirectly more than 50% owned by listed entities, as well as any Russian natural or legal person and any person acting through or on behalf of them.

Since sovereign immunity can protect the Russian Federation and its agencies from direct claims, Russian individuals and entities acting as external administrators or recipients of seized assets are expected to be the primary defendants of such claims.

C. Required Elements for Claiming Compensation

To succeed under Article 11b(1), claimants must satisfy several criteria:

- *Loss or Damage*

Claimants must demonstrate harm caused by Decree No. 302 or equivalent legislation. The broad wording of Article 11b(1) suggests that any loss, including legal costs, stemming from the Decree or similar asset administration or seizures falls within its scope.

- *Benefit to Respondent*

Claimants must demonstrate that the respondent directly benefited from the enforcement of the decree. The most obvious cases include private Russian parties acting as external administrators or those receiving transferred assets.

- *Breach of International Law*

Claimants must establish a violation of customary international law or a bilateral investment treaty ("BIT") protection between an EU Member State and Russia. Commentators suggest that the State-ordered administration of foreign investments—if sufficiently permanent in effect—could qualify

as unlawful expropriation under customary international law and relevant BITs. Additionally, such measures could breach other BIT protections, including fair and equitable treatment or non-impairment clauses.

Article 11b(1) notably omits any reference to multilateral treaties, raising questions about its scope. Additionally, the requirement to demonstrate a breach of international law poses challenges, as it remains unclear how EU domestic courts will evaluate violations of international law committed by a sovereign State. Although the Russian Federation itself may not be a direct respondent, establishing its breach of international law as a prerequisite for a successful claim against a Russian party introduces complex issues related to sovereign immunity. The interplay between the jurisdiction of EU Member State courts in addressing breaches of international law as a preliminary matter to the main claim and the international law of sovereign immunity requires further clarification to ensure that Article 11b(1) can be effectively employed by EU operators.

- *Lack of Effective Access to the Remedies Under the Relevant Jurisdiction*

A claimant must demonstrate that it does not have "effective access to the remedies" in another "relevant" forum. The relevant forum includes investment arbitration under a BIT. However, the concept of "effective" access to remedies requires further clarification. Currently, 18 EU Member States maintain BITs with Russia. Importantly, several BITs concluded by the former USSR and Russia impose limitations on the jurisdiction of arbitral tribunals in expropriation cases (*see* previous coverage on the Blog here). For instance, some BITs restrict disputes to those concerning "the amount of compensation or the method of its payment." In such cases, where the ability of an investment tribunal to assume jurisdiction is uncertain, it can be argued that there is no effective access to remedies, and therefore, Article 11b(1) provides an alternative avenue for seeking redress.

For investors from EU Member States without a BIT in force with Russia, the relevant jurisdiction would often be Russian national courts. Given the barriers to effective remedies in Russian courts, such as potential bias, establishing the absence of effective remedies may be more straightforward. In such scenarios, the Article 11b(1) mechanism ensures that claimants are not left without recourse in the absence of treaty-based protections.

D. Competent Courts in the Member States

The EU's accompanying Q&A on the 14th package of EU sanctions against Russia highlights that compensation claims based on Article 11 aim to enable EU companies to recover appropriate damages from the potential assets of Russian counterparties located within the EU. However, Article 11b does not establish the location of assets as a basis for jurisdiction. Instead, Recital 25 of Council Regulation 2024/1745 defers to the procedural rules and jurisdictional frameworks of individual Member States for "civil and commercial matters."

Recital 25's reference to "civil and commercial matters" suggests that the drafters classified these claims as private in nature, despite their basis in breaches of public international law. This approach may reflect an intention to avoid issues of immunity by targeting Russian individuals and entities rather than the Russian Federation itself. However, a prerequisite for these claims to succeed is a determination by national courts that a breach of international law has occurred. While these claims do not invoke state responsibility, it is debatable whether the private international law

framework for civil and commercial matters is suitable for addressing claims that involve complex questions of international law.

Further, the drafters' decision to defer to the private international law rules of individual Member States introduces uncertainties regarding how this new cause of action interacts with cross-border jurisdictional rules. The rules of cross-border jurisdiction of Brussels I-bis Regulation apply to such claims only if the Russian defendants targeted under Article 11b(1) are domiciled within the EU, which is likely to be a minority of cases. When the defendant is not domiciled in the EU, jurisdiction will be determined by the private international law rules of the relevant EU Member State.

Private international law rules on cross-border jurisdiction typically require characterization of claims. Claims brought under Article 11b(1) aim to secure compensation for benefits derived from the seizure of assets in Russia. Therefore, tort claims—liability arising outside contractual obligations—appear to be the most suitable characterization among existing civil and commercial matters. However, most Member States do not recognize asset location as a sufficient connecting factor for establishing jurisdiction in tort cases involving foreign defendants. Many Member States provide jurisdiction for tort claims based on general rules of cross-border jurisdiction, which typically place jurisdiction in the courts of the defendant's domicile (e.g., Article 3.1 of Italian Law n. 218 of 1995). Additionally, some Member States allow for special jurisdiction in tort cases, based on either the place of the harmful event (e.g., Article 6.e of the Dutch Code of Civil Procedure) or the place where the resulting damage occurred (e.g., Article 96.2(b) of the Belgian Code of Private International Law). In the context of Article 11b(1), however, none of these bases seem applicable. The defendant's domicile would typically be in Russia, and both the location of the harmful event and the place where the damage occurred would also be in Russia, where the asset seizure has taken place.

Notably, some Member States permit *in personam* jurisdiction over foreign defendants based on the nationality of the claimant. For example, French courts grant jurisdiction over claims brought by French nationals against foreign defendants under Article 14 of the Civil Code. Although this provision primarily addresses contractual obligations owed to a French person, French case law has broadened its scope to encompass all matters, including tort claims. (*See* Audit, & d'Avout, p. 356).

In addition, some Member States allow *in personam* jurisdiction over foreign defendants based on the location of assets within their territory. A notable example is Germany, where courts may exercise jurisdiction over foreign debtors under § 23 of the Zivilprozessordnung if the debtor's assets are in Germany and the claim has a sufficient territorial connection with Germany. This connection is evaluated on a case-by-case basis. Notably, jurisdiction under § 23 is not restricted to claims directly related to the property serving as the jurisdictional basis (*see* Kuner, p. 691).

For Member States lacking similar jurisdictional bases, the doctrine of *forum necessitatis* may offer a potential avenue for establishing jurisdiction. This doctrine allows courts to assume jurisdiction in exceptional cases where, despite the absence of a strong connection to the forum, ensuring access to justice justifies the assumption of jurisdiction. For instance, Article 9 of the Dutch Code of Civil Procedure identifies two scenarios where Dutch courts may assert jurisdiction: (1) when legal proceedings outside the Netherlands are impossible (sub b), or (2) when the case is sufficiently connected to the Dutch legal order, and requiring the claimant to pursue the matter in a foreign court would be unreasonable (sub c). Similarly, Article 11 of the Belgian Code of Private

International Law allows Belgian courts to assume exceptional jurisdiction when the case has close connections with Belgium, and proceedings abroad are either impossible or unreasonable.

While Article 11b(1)'s requirement for a lack of effective access to remedies in a relevant forum could align with the impossibility or unreasonableness criteria under *forum necessitatis*, it remains unclear whether courts will deem claims under Article 11b(1) to meet the high threshold of *forum necessitatis*.

3. Concluding Remarks

The evolving landscape of economic sanctions against Russia, along with Russia's countersanctions, underscores the need for ongoing legal adaptation. Article 11b introduces a novel framework for EU operators to seek compensation from Russian entities benefiting from asset seizures in Russia. However, the practical implementation of such mechanism is fraught with challenges.

Firstly, it raises critical questions regarding the relationship between EU Member States courts and international law, particularly in relation to Article 11b(1)'s reference to breaches of international law and the role of domestic courts in addressing such matters as a preliminary issue in the compensation claim. Furthermore, Article 11b(2) seeks to shield EU Member States from potential international liability for breaching BIT protections when issuing or enforcing judgments under Article 11b(1), raising questions about the interaction between EU law and the BITs entered into by Member States.

Additionally, classifying such claims as "civil and commercial matters" and deference to the rules of private international law on jurisdiction in each Member State leads to uncertainty regarding the jurisdictional basis for claims under Article 11b(1). The rationale behind such claims suggests that the location of assets of Russian defendants should be the connecting factor for the jurisdiction of the EU Member States' courts. However, the current rules of cross-border jurisdiction in many EU Member States do not provide for such a connecting factor.

It remains to be seen how EU Member States will navigate these complexities and whether clarity on issues of immunity and jurisdictional grounds for Article 11b claims will be provided by the EU.

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