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NEWSLETTER SANCTIONS

SUCCESSFUL TOGETHER

Issue:
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The latest news on EU sanctions against Russia and Belarus

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→ News

Prohibition on EU companies providing ERP software and other services to their Russian subsidiaries: new Sanctions Regulation provides for much requested extension of transitional arrangement

The blanket exemption for the provision of certain services - including ERP software - to Russian subsidiaries of EU companies has been extended from 20 June 2024 to 30 September 2024. This should give affected companies more time to adjust their intra-group accounting, reporting and other service structures or to timely obtain the necessary authorizations from their competent national authorities to continue providing such services. For companies based in EU Member States that have issued a "General Authorization", such as Germany, the effect is that the required reference to such General Authorization will only need to be made for services to be provided after 30 September 2024.

The EU's 12th sanctions package changed the requirements for providing services to Russian legal entities. Until then, a blanket exemption applied to the provision of services to subsidiaries under the 100 percent control of one (or more) EU parent companies ("Subsidiaries").

From 20 June 2024, the ban on the provision of services to Russian legal and natural persons would have applied to Subsidiaries as well.

The affected services include:

- Provision of business management software (ERP software) and industrial design
- Audit, accounting and tax consulting, PR
- Legal and IT consulting
- Market and opinion research
- All types of technical assistance and intermediary services related to the above.

The issuance of authorizations to continue the provision of these services is handled very differently in different local EU countries, resulting in unequal treatment of companies and legal uncertainty within the EU.

In Germany - in order to anticipate the expected flood of applications - the competent authority BAFA has reacted with the General Authorization No. 42[1] of 20 February 2024. Thus, the services concerned are authorized in general form, so that a formal authorization in individual cases pursuant to Article 5n (10) (c) and (h) of Regulation (EU) No. 833/2014 (Russia) is not required, but a single notification to BAFA no later than 30 days after the start of the provision of services is sufficient (see the February 2024 issue of our "Sanctions Newsletter"[2]).

However, on 24 June 2024, Council Regulation (EU) 2024/1745 was published in the Official Journal of the European Union. This regulation extended the deadline for the provision of services to legal entities established in Russia and owned by legal entities registered in the EU, EEA, Switzerland or other partner countries, e.g. the UK, USA, until 30 September 2024.

CONTACT FOR FURTHER INFORMATION

Tobias Kohler
Partner

T +0 370 5 212 3590
tobias.kohler@roedl.com

Ignas Tamašauskas
Senior Legal Consultant

T +370 5 2123 590
ignas.tamasauskas@roedl.com

[1] BAFA - Außenwirtschaft - Allgemeine Genehmigung Nr. 42 – Bereitstellung von Unternehmenssoftware und Dienstleistungen an nicht sensitive Empfänger

[2] Final_Sanctions Newsletter_February_2024_EN.pdf (roedl.lt)

→ News

New EU sanctions against Belarus – significant tightening in response to its use as a "circumvention country" and liability for Belarusian subsidiaries

The sanctions against Belarus have so far been much less far-reaching than those against Russia in many areas. While the sanctions against Russia have been regularly tightened and supplemented (for example, the 14th package of sanctions against Russia was adopted on 24 June 2024), there have been only a few minor additions to the sanctions against Belarus in the past twelve months.

However, new EU sanctions against Belarus came into force on 30 June 2024, which in some areas represent a significant escalation and alignment with Russian sanctions and in some cases even go beyond previous Russian sanctions.

According to the EU presidency, the declared aim was to prevent Belarus from being used as a way of circumventing Russian sanctions in the future and thus to make the sanctions against both countries more effective.

In addition, however, it also contains important clarifications on controversial issues – such as the question of the standard for the responsibility of EU companies for the actions of subsidiaries in Belarus that violate sanctions, as well as the mitigating effect of self-reporting.

The following new regulations are particularly noteworthy:

1. Sanctions against specific services provided to certain Belarusian individuals (in particular the Belarusian state and its representatives)
2. Obligation of EU companies to introduce control measures and measures to prevent Belarusian subsidiaries from circumventing sanctions
3. Obligation to use a so-called "no Belarus clause" in contracts of EU exporters for certain goods
4. Extension of import bans and the export ban on dual-use goods and advanced goods and technologies, as well as further export restrictions on goods that could contribute in particular to strengthening Belarus' industrial capacities, and on luxury goods
5. Ban on transit deliveries of sensitive goods through Belarusian territory
6. A more comprehensive ban on road transport of goods within the EU territory for Belarusian transport companies
7. In order to facilitate the withdrawal of investments from the Belarusian market, there are new exemptions from the applicable import and export bans. These allow the delivery or transfer of certain goods or their import into the Union for this purpose until 2 January 2025
8. In the future, full and timely self-reporting of a violation of restrictive measures may be taken into account as a mitigating factor

Detailed description

PROHIBITION OF SERVICES

Specific services provided to certain Belarusian persons will be prohibited in the future for companies and other persons from EU member states.

The following services are affected:

- Accounting, auditing, including the audit of financial statements, bookkeeping or tax services, management consulting or public relations services
- architectural and engineering services
- Legal and IT consultancy
- market and opinion research services, technical testing and analysis services and advertising services
- software for business management and software for industrial development and manufacturing
- related services such as technical assistance, intermediation, financing, etc.

However, the ban only applies to services provided to the following recipients:

- the Republic of Belarus, its government, public bodies, corporations or agencies
- any natural or legal person, entity or body acting on behalf of or at the direction of the Republic of Belarus, its government, its public bodies, corporations or agencies

However, even for services provided to the above-mentioned recipients, the following exceptions and transitional arrangements apply:

- These restrictions do not apply to the provision of services that are strictly necessary for the termination of contracts concluded before 1 July 2024 that do not comply with the new restrictions, or for ancillary contracts necessary for the execution of such contracts, until 2 October 2024.
- Exemption for subsidiaries until 2 January 2025 – the prohibitions do not apply until 2 January 2025 to the provision of services intended for the exclusive use of legal persons, organisations or institutions established in Belarus, which are owned or controlled by a legal person, organisation or institution established under the law of a Member State, a Member State of the European Economic Area, Switzerland or a partner country.

- The prohibition on services does not apply to tax, audit, accounting and legal services

    - if the provision of the services is absolutely necessary for the exercise of the right of defence in legal proceedings and the right to an effective remedy,
    - if the provision of the services is absolutely necessary to ensure access to court, administrative or arbitration proceedings in a Member State or to ensure the recognition or enforcement of a judgment or arbitral award issued in a Member State, provided that the provision of the services is in accordance with the objectives of this Regulation.

- However, prohibited services may continue to be provided for certain purposes, provided that the competent authorities authorise the provision of such services under the conditions they deem appropriate.

FACILITATED DEDUCTION OF INVESTMENTS

In order to facilitate the withdrawal of investments from the Belarusian market by economic operators from the Union, temporary derogations from the prohibitions on the import and export of goods and the provision of certain services imposed by Regulation (EC) No 765/2006 are introduced by Decision (CFSP) 2024/1864.

The exemption allows the sale, supply or transfer of certain goods or their import into the Union until 2 January 2025 and applies only to goods that were already physically in Belarus at the time the relevant prohibitions entered into force. The services may be provided only to the legal persons, entities or bodies resulting from the withdrawal of investments and solely for their benefit.

INCREASED DUE DILIGENCE REQUIREMENTS FOR EU COMPANIES

Under the new regulation, EU parent companies must use their best endeavours to ensure that their subsidiaries in third countries are not involved in activities that would lead to a result that the sanctions are intended to prevent.

EU companies that sell battlefield goods to third countries must introduce due diligence mechanisms from 2 January 2025 to identify, assess and mitigate the risks of re-export to Belarus.

"NO-BELARUS CLAUSE"

EU exporters are obliged to include a so-called "No Belarus Clause" in their contracts from 1 July 2024. Such a clause must contractually prohibit the re-export of sensitive goods and technologies, battlefield goods, firearms and ammunition to Belarus or the re-export for use in Belarus.

EXPORT BAN

The export ban on dual-use goods and advanced goods and technologies has been extended, as have other export restrictions on goods that could contribute to strengthening Belarus' industrial capacity in particular.

Further restrictions will also be introduced on the export of goods and technologies for maritime shipping and luxury goods to Belarus.

IMPORT BAN

The direct or indirect import, purchase or transfer to the EU of gold and diamonds from Belarus, as well as helium, coal and mineral products, including crude oil, has been banned. The latter measure is complemented by a new export ban on goods and technologies suitable for oil refining and liquefaction of natural gas.

Contracts concluded before 1 July 2024 may be fulfilled until 2 October 2024. Exemptions may be requested in duly justified cases, for example where the health and safety of people is at stake. If certain supplies and services are necessary for the conduct of business in Belarus, exemptions may be requested until 31 December 2024.

TRANSPORT AND TRAFFIC

The ban on transporting goods by road in the EU with trailers and semi-trailers registered in Belarus is being extended. This now also applies if these are towed by lorries registered outside Belarus.

In future, operators in the EU who are 25 per cent or more owned by a Belarusian natural or legal person will be prohibited from transporting goods on EU roads. This also applies to transit traffic.

The transit of dual-use goods and technologies, goods and technologies that could contribute to the military and technological armament of Belarus or to the development of its defence and security sector, goods that could contribute to the strengthening of Belarusian industrial capacities, goods and technologies for use in the aerospace industry, and weapons exported from the EU via the territory of Belarus is prohibited.

“BEST EFFORTS” DEFENCE

Economic operators from the European Union shall make best endeavours to ensure that legal persons, entities or bodies established outside the Union and owned or controlled by them do not engage in activities that undermine the restrictive measures provided for in Regulation (EC) No 765/2006.

The term "best efforts" is to be understood as meaning all measures that are appropriate and necessary to achieve the objective of preventing the undermining of the restrictive measures contained in Regulation (EC) No 765/2006. These measures may include, for example, the implementation of appropriate policies, controls and procedures to mitigate and manage risks effectively, taking into account factors such as the third country of establishment, the sector of activity and the nature of the activity of the legal person, entity or body owned or controlled by the Union operator.

At the same time, 'best efforts' should be understood as including only measures that are feasible for the Union economic operator, given its nature, size and the relevant factual circumstances, in particular the degree of effective control over the legal person, entity or body established outside the Union.

Such circumstances include the case where the Union economic operator is unable to exercise control over a legal person, entity or body owned by it for reasons beyond its control, such as the legislation of a third country.

PROTECTION OF EU COMPANIES

In the future, EU economic operators should be able to claim compensation for damages caused to Belarusian individuals and companies as a result of the implementation of the sanctions and the expropriation, provided that the national of a Member State or the company concerned does not have effective access to legal remedies, e.g. under the relevant bilateral investment agreement.

VOLUNTARY DISCLOSURE

Where a natural or legal person voluntarily discloses a breach of restrictive measures in a complete and timely manner, the competent national authorities should be able to take due account of such disclosure when imposing sanctions.

LEGAL FRAMEWORK

The new sanctions regime is based on the following legal acts, which entered into force on 30 June 2024:

- Council Regulation (EU) 2024/1865 of 29 June 2024 amending Regulation (EC) No 765/2006
- Council Decision (CFSP) 2024/1864 of 29 June 2024 amending Decision 2012/642/CFSP

CONTACT FOR FURTHER INFORMATION

Tobias Kohler
Partner

T +0 370 5 212 3590
tobias.kohler@roedl.com

Ewald Plum
Partner
T +49 711 7819 144 97
ewald.plum@roedl.com

→ News

Sanction compliance: Is voluntary disclosure really worth it?

When companies discover that they have violated EU sanctions against Russia or Belarus, a crisis situation regularly arises. German criminal law sometimes provides for drastic penalties; the focus of the steadily increasing number of official investigations is typically on the members of the management personally. It should be clear that a violation that is still ongoing must be stopped immediately and further violations in the future must be prevented. But how should the violation that has been uncovered be dealt with? What risks and opportunities does a possible cooperation with the authorities in particular entail?

Background: EU sanctions against Belarus

In addition to the 14th package of new EU sanctions against Russia, new EU sanctions have recently been imposed against Belarus. These specify, among other things, the requirements for criminal sanctions that the member states have in place for violations. According to the new regulation[3], these no longer have to be 'only' effective, proportionate and dissuasive; rather, a voluntary disclosure of violations of the provisions of the Belarus Sanctions Regulation must be taken into account as a mitigating circumstance in accordance with the respective national legislation.

Under German law, a comprehensive 'punishment-free' self-disclosure was previously only provided for in the case of tax evasion (Section 371 of the German Fiscal Code). The idea that offences discovered by self-monitoring and voluntarily reported to the state should not be prosecuted is also found in foreign trade law (Section 22 (4) AWG); however, the scope of application there is limited to certain (less serious) administrative offences. For criminal offences, no voluntary disclosure requirements and effects have been regulated – at least explicitly.

Effects of voluntary disclosure

The new version of the Belarus Sanctions Regulation does not change this. As an EU regulation, it applies directly in all member states like a national law. However, the legal consequence of the voluntary disclosure is expressly (only) to be taken into account 'in accordance with the respective national legal provisions as a mitigating circumstance'.

From a criminal law perspective, this means that a voluntary disclosure in the aforementioned sense is no guarantee of exemption from punishment. Rather, the investigating authorities (customs/public prosecutor's office) will initiate their investigations if there are actual indications of criminal behaviour. In doing so, the investigating authorities are not only required to investigate the circumstances that serve to incriminate, but also those that serve to exonerate. However, as such, the voluntary disclosure does not constitute an obstacle to prosecution according to the aforementioned concept.

In principle, the self-disclosure only has an effect when a decision has actually been made regarding the accusation of guilt. In the context of the guilty verdict, a court would have to take into account, in favour of the accused person, that they voluntarily and fully disclosed the offence themselves. In particular, the fact that they cooperated with the investigating authorities in the interest of maximum transparency and contributed to the clarification of the offence could be rewarded.

However, a conviction will by no means be the rule. Due to the typical complexity of business transactions in foreign trade, the question of whether proceedings for sanctions violations can be discontinued before charges are brought regularly arises in preliminary proceedings. In particular, it is

[3] Art. 9 Abs. 1 Satz 2 der Verordnung (EU) 2024/1865 des Rates vom 29. Juni 2024 zur Änderung der Verordnung (EU) 765/2006 („Belarus-Sanktionsverordnung")

difficult for investigating authorities to attribute the violation to a specific person within the context of more complex work processes. In the case of minor offences, a 'suspension in return for a fine' (Section 153a of the Code of Criminal Procedure) is a possibility. In this respect, a voluntary disclosure would have to be taken into account in the amount of the fine.

Risks and opportunities of voluntary disclosure

The realisation that compliance in the sense of corporate self-regulation can have a mitigating effect on criminal or administrative fines is of course nothing new. The Federal Court of Justice (BGH) has long recognised an efficient compliance management system and its (subsequent) optimisation as a mitigating circumstance for fines.[4]

Nevertheless, in the event of an emergency, companies and their management members are faced with the question of whether they should, as it were, 'deliver themselves up to the sword' by making a voluntary disclosure. In addition to the evaluation of a comprehensive analysis of all economic and legal risks, the decisive factor for such a step will certainly be the assessment of the actual probability of detection with regard to the infringement. However, the latter is likely to increase continuously in view of the increasing density of controls in the enforcement of sanctions.

In addition to the aforementioned reduction in the penalty, another argument in favour of a voluntary disclosure is that it regularly offers the opportunity to retain the power of interpretation over the facts of the case. Nobody knows the processes and procedures within which the specific offence occurred as well as the companies or their managers themselves. A well-prepared description of the facts can provide a comprehensible explanation of how the offence could have occurred in the sense of an accidental error or 'outlier' within a fundamentally flawless process.

If the investigating authority accepts this explanation, there is usually no longer any question of intentional – and therefore criminal – behaviour, but at most of negligence. This can – at least according to the current version of the law – only be punished as an administrative offence with a fine. In the case of the amount of the fine, voluntary disclosure would then again be taken into account as a mitigating circumstance.

Conclusion and outlook

In view of the steadily growing number of official investigations into criminal violations of the EU sanctions against Russia and Belarus, a voluntary self-disclosure should not be categorically ruled out in the event of an infringement. Although a voluntary self-disclosure does not usually lead to exemption from any sanctions, it can have a mitigating effect. In addition, there is the opportunity to clarify the facts of the matter independently in advance of uncontrollable official investigations and to bring them to the attention of the investigating authority 'at your own pace'. Experience shows that this approach allows companies to retain a large degree of control over the interpretation of the facts – an advantage that should not be underestimated and that will become even more significant in the future, given that German lawmakers[5] are likely to include gross negligence in the list of criminal offences.

[4] More details: BGH NZWiSt 2018, S. 379 ff.

[5] More details: die seitens Deutschland noch nicht umgesetzte Richtlinie (EU) 2024/1226 sowie den diesbezüglichen Überblick

CONTACT FOR FURTHER INFORMATION

Dr. Stefan Lehner
Attorney
T +49 911 9193 1492
stefan.lehner@roedl.com

Imprint

Publisher:
Rödl & Partner
Tilto str. 1
01101 Vilnius, Lithuania
T +370 52 1235 90
vilnius@roedl.com
www.roedl.lt
www.roedl.com
www.roedl.de

Responsible for content:
Tobias Kohler
tobias.kohler@roedl.com

Ignas Tamašauskas
ignas.tamasauskas@roedl.com

Ewald Plum
ewald.plum@roedl.com

Dr. Stefan Lehner
stefan.lehner@roedl.com

Layout/Type:
Lina Pradkelienė
lina.pradkeliene@roedl.com