

WARTIME DILEMMAS



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The day on which Russia unlawfully invaded Ukraine was the beginning of a test for European solidarity and the resilience of the European economy. On a macro level the question is whether the European economy function without eastern markets. At the micro-level, companies wonder how to deal with their business partners in Russia and Bielarus—particularly those with long-term contracts at an advanced stage of completion.

BUSINESS WITH RUSSIA

As a result of the Russia/Ukraine war, the Council of the European Union has tightened its current economic policy towards Russia through a series of amendments to the already existing sanctions. The most relevant regulation for the relations between businesses in the EU and Russia is the Council Regulation (EU) No 833/2014 of July 31, 2014, concerning restrictive measures because of Russia's actions destabilizing the situation in Ukraine.

The sanctions affect many sectors, including heavy industry and high technology. As of February 26, agreements governing dual-use goods and technologies may not be concluded. Banned are also contracts governing trade in goods and advanced technologies with potential military applications. As provided in Art. 2(1) and 2a(1) of Regulation 833/2014, illegal are contracts for the sale, supply, transfer, or export of such goods, directly or indirectly to a natural or legal person, entity, or body in Russia or for use in that country. This ban also applies to the provision of technical assistance or brokering services related to the provision, manufacture, maintenance, or use of dual-use goods and goods with potential military use.

BUSINESS WITH BELARUS

Since 3 March 2022, similar sanctions have been in place against Bielarus. They are contained in Council Regulation (EC) No 765/2006 of May 18, 2006, and amended on February

17, 2022, and again on March 2, 2022.

The EU regulation indicates that sanctions apply to dual-use goods, such as items listed in Annex I to Regulation 2021/821 of May 20, 2021, setting up a regime for the control of exports, brokering, technical assistance, transit, and transfer of dual-use items.

Products that could potentially be used for military purposes in Russia, such as goods and advanced technologies, are included in Annex VII to Regulation 833/2014. This is a new list that does not refer to the EU combined nomenclature codes, and the vague wording of some product names may lead to inconsistent practices. These are items that can contribute to strengthening Russia's military and technological capabilities.

In principle, companies should remember that in times of armed conflict, goods and technologies that normally serve civilian purposes may also be dedicated to warfare. In each case, this circumstance must be evaluated by businesses having relations with Russia and Belarus. From February 26, 2022 (and March 3, 2022, in the case of Belarus), EU-based companies must not conclude contracts for the sale, supply, transfer, or export, including the provision of a service in the nature of a guarantee, of goods of potential military use listed in Annex VII to Regulation 833/2014 and dual-use goods.

CONTRACT LEGALIZATION

In practice, questions arise if it is possible to complete the performance of contracts concluded before February 26, 2022, (and before March 3, 2022, in the case of Belarus) by sending a batch of goods or installing equipment; and if additional contracts necessary to perform contracts concluded before that date, such as providing maintenance services to a Russian contractor, are permissible. These issues are addressed in Regulation 833/2014 by way of

derogation from the general ban on transactions in dual-use goods and goods with potential military use. Articles 2(5) and Art. 2a(5) of Regulation 833/2014 provide for the possibility of obtaining an exemption from these bans with the consent of the competent authority. In Poland it is the Minister of Entrepreneurship and Technology. The ministry may grant an authorization under certain conditions. The starting point is that it needs to verify the status of the contractor and the end-user of the contracted goods. Neither of them may be on the list of entities with whom transactions in dual-use goods and goods with potential military use are banned. The ministry will also verify the contractor's and the end user's membership in capital groups, as the sanctions also apply to entities owned or controlled by entities listed in the annexes to Regulation 833/2014.

If the verification is successful, the next step is to examine the contract item in terms of its application. Regulation 833/2014

provides that state authority cannot issue an authorization if it has reasonable grounds to believe that the end-use of the goods could be military, or the goods are intended for the aviation or space industry; or for the energy sector, except for specific permissions under specific conditions.

The possibility of applying for authorization from the minister to complete a transaction applies exclusively to contracts concluded before February 26, 2022, (and March 3, 2022, in the case of contracts with entities from Belarus). The next cut-off date provided for in Regulation 833/2014 is May 1, 2022, as under Art. 2(5) and 2a(5) of Regulation 833/2014, an authorization from the ministry must be requested before that date.

MONITORING PERMISSIONS

Under Regulation 833/2014 (in the version in force since March 1, 2022), the competent authorities will exchange information with other member states and the European Commission on the authorizations granted or denied. Furthermore, where appropriate and on a reciprocal basis, in consultation with EU member states, the European Commission will exchange information with partner countries to promote the effectiveness of the implemented export control measures and the consistent application of export control measures applied by partner countries.

This means that all decisions made in individual member states allowing completion of contracts and thus allowing individual exceptions to sanctions will be monitored at the EU level. With this, the authorities have the power to cancel, suspend, amend or revoke an authorization if they deem it necessary for the effective implementation of Regulation 833/2014.

CONCLUSIONS

The mechanism of authorizing the completion of existing contracts is provided for at the level of EU regulations. However, it is difficult to foresee whether it will be applied in practice by individual member states, and if so, to what extent.

An in-depth assessment of individual contracts as to their legal, economic, and social conditions is necessary to act in a way that protects the interests of the company and its employees. It is also socially responsible.

In addition, it is also necessary to monitor the legal and factual environment of business operations, as changes in these areas are subject to unprecedented dynamics.