

“BEST EFFORTS” OBLIGATION
RELATED PROVISION: ARTICLE 8a of COUNCIL REGULATION 833/2014
FREQUENTLY ASKED QUESTIONS – AS OF 22 NOVEMBER 2024

1. What does the concept of “best efforts” mean, in the context of Article 8a?

Last update: 22 November 2024

Article 8a should be read in light of recitals 27, 28, 29 and 30 of Regulation 2024/1745. In particular, the concept of “best efforts” is detailed in recital 30:

‘Best efforts should be understood as comprising all actions that are suitable and necessary to achieve the result of preventing the undermining of the restrictive measures in Regulation (EU) No 833/2014. Those actions can include, for example, the implementation of appropriate policies, controls and procedures to mitigate and manage risk effectively, considering factors such as the third country of establishment, the business sector and the type of activity of the legal person, entity or body that is owned or controlled by the Union operator. At the same time, best efforts should be understood as comprising only actions that are feasible for the Union operator in view of its nature, its 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 situation where the Union operator, due to reasons that it did not cause itself, such as the legislation of a third country, is not able to exercise control over a legal person, entity or body that it owns.’

2. What does the concept of “undermining” mean, in the context of Article 8a? What is the difference between “circumventing” and “undermining”?

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The concept of “undermining” is exemplified in recital 29 of Regulation 2024/1745. While “circumventing” involves activities that, under cover of a formal appearance which enables them to avoid the constituent elements of an infringement of a restrictive measure, have the aim or result of enabling their author to avoid the application of that measure¹, “undermining” involves activities “*resulting in an effect that [the] restrictive measures seek to prevent, for example, that a recipient in Russia obtains goods, technology, financing or services of a type that is subject to prohibitions under Regulation (EU) No 833/2014*”.

¹ Case C–72/11 Criminal proceedings against Mohsen Afrasiabi and Others [2011] ECR I-14285, paragraphs 60 and 68.

3. Does Article 8a also cover Russia-based entities that are owned or controlled by an EU operator?

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Yes. The obligation in Article 8a, binding on EU operators, concerns entities that are owned or controlled by these EU operators and located anywhere outside the EU – including in Russia.

4. How is Article 8a to be applied when doing so is prevented by the laws of the third country where the owned or controlled entity is incorporated?

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Recital 30 of Regulation 2024/1745 indicates that the best efforts required from the part of EU operators should be understood as comprising only actions that are feasible for each EU operator in view of (i) its nature, (ii) its size and (iii) the relevant factual circumstances. The precise scope of best efforts that can be expected from each EU operator will differ on a case-by-case basis.

The factual circumstances to be taken into account include, in particular, the degree of effective control over the non-EU entity in question. Recital 30 explicitly mentions the situation where, due to reasons that the EU operator did not cause itself, such as the legislation of a third country, an EU operator is not able to exercise control over an entity that it owns. In principle, where control is entirely absent, the EU operator cannot be expected to have any power to prevent that the non-EU entity that it owns participates in activities that undermine the sanctions.

Conversely, this mitigation of liability does not apply if control over the non-EU entity is lost for reasons that the EU operator caused itself. In this respect, operators should be aware that Russia is a country where the rule of law is virtually not applied anymore², and that the Russian state has adopted several pieces of legislation unjustly targeting assets of companies from ‘unfriendly countries’, including EU Member States³. In such circumstances, inadequate risk assessment and management, coupled with risk-prone decisions of the EU operator, can be considered as a factor

² By way of example, on 6 March 2022 Russia amended Article 1360 of the Russian Civil Code to enable its authorities to license patents of EU operators to Russian businesses, without the obligation to compensate the former. This means that Russian companies can infringe patents and related IPRs of EU operators without consequences. Moreover, since 2020, when Article 248 of the Commercial Code of Russia was amended by Russian Federal Law No. 171-FZ, Russian companies can request Russian court to establish jurisdiction over disputes involving EU and Russian “sanctioned parties”, even if those parties agreed competence for their disputes to non-Russian courts or arbitral panels; or issue an injunction prohibiting the EU operator to commence or continue a foreign litigation or an arbitration seated abroad.

³ Presidential Decree No. 302 of the Russian Federation of 25 April 2023, that established a legal framework to authorize the Government to take control of Russian assets owned or managed by investors associated with “unfriendly” foreign States; Federal law No. 470-FZ, “On Specifics of Corporate Governance in Business Companies which are Economically Significant Organizations.

that contributed to the loss of control⁴.

The factual circumstances may also include, for instance, the risk incurred by executives and employees of the non-EU entity in question to be prosecuted under the laws of the third country of incorporation. This risk is to be assessed on a case-by-case basis.

5. How can EU operators sufficiently show they undertook their best efforts within the meaning of Article 8a?

Last update: 22 November 2024

As indicated above (see Questions 1 and 4), the depth and complexity of actions expected from each EU operator depend on the operator's (i) nature, (ii) size and (iii) the relevant factual circumstances.

The operator's nature and size reflect various elements such as its market sector, risk profile and turnover, and, for entities, the number of staff. Apart from the degree of effective control over the non-EU operator, the relevant factual circumstances include the compliance resources available to the operator. Such elements should be taken into consideration together. For example, even if an operator is relatively small in size, the fact that it operates in a highly regulated sector with abundant compliance resources means that substantial actions are to be expected.

In practice, EU operators should seek to ensure their awareness of the activities conducted by the non-EU entity that they own or control, and the entity's understanding of the types of activities that risk undermining EU sanctions and thus exposing the EU operator to a breach of Article 8a. Depending on the specific characteristics of the EU operator, this could be achieved, for instance, through internal compliance programs, systematic sharing of corporate compliance standards, sending newsletters and sanctions advisories, setting up mandatory reporting or organising mandatory sanctions trainings for staff, as well as setting up procedures to rapidly react to sanctions violations, including by reporting them to the EU operator that has ownership or control. In addition, the non-EU entity may consider publicly stating its intent not to engage in any activities that risk undermining EU sanctions or the compliance and governance policies of the EU operator that has ownership or control.

The Commission will engage with Member States towards preparing a clear set of expectations

⁴ This is without prejudice to the measures that the Council has adopted to protect Member State operators from damages caused by illegitimate actions of the Russian persons; the fact that a Member States company may have miscalculated the risk of their presence of the Russian market does not exclude their right to receive compensation from the Russian persons or entities responsible for the damage suffered or protection from illegal actions of the Russian persons.

for EU operators, thus enabling the latter to comply with their obligations and ensuring a level playing field across the EU.

6. Coupled with other provisions in Regulation 833/2014, such as Article 10 or Article 12, should Article 8a be understood as creating liability for an EU operator that is merely aware of the activities of the non-EU entity that it owns or controls, and accepts them?

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If an EU operator is aware that the activities of a non-EU entity that it owns or controls undermine EU sanctions and accepts these activities, that amounts to a breach of Article 8a, as the EU operator cannot be considered to have performed all actions necessary and feasible to prevent the undermining of EU sanctions by the non-EU entity. Moreover, it may also amount to a breach of Article 12 of Regulation 833/2014, as amended by Regulation 2024/1745. In this context, it should be noted that recital 36 of Regulation 2024/1745 clarifies that the protection against liability set out in Article 10 of Regulation 833/2014 cannot be invoked where EU operators have failed to carry out appropriate due diligence. In the context of Article 8a, such due diligence includes ensuring their awareness about the activities of non-EU entities that they own or control.

7. If an EU operator owns or controls an entity in Russia or in another third country, which produces and/or exports goods covered by an EU export ban, would the EU operator run afoul of Article 8a if these goods ended up in Russia?

Last update: 22 November 2024

EU sanctions do not impose obligations on such an entity in Russia or another third country. Obligations are imposed only on EU operators owning or controlling such entity. Thus, if the goods in question are produced on the basis of, for example, intellectual property rights or trade secrets that the EU operator transferred to the non-EU entity, and the EU operator owns or controls that entity at the time of the supply to Russian clients and does not act to prevent such supply, including by blocking the use of intellectual property rights or trade secrets, then the EU operator cannot be considered to have performed all actions necessary and feasible to prevent the undermining of EU sanctions by the entity, as required by Article 8a.

The timing of the transfer of such intellectual property rights or trade secrets is not relevant towards the application of Article 8a, as long as the EU operator retains the power to block further use thereof. Concretely, even if the transfer of the intellectual property rights or trade secrets related to sanctioned goods and technology was made before those sanctions came into effect (e.g. before the relevant item became subject to an export prohibition), the undermining of sanctions by a non-EU entity on the basis of that prior transfer would render the EU operator

owning or controlling the entity in violation of Article 8a.

For the situation where the EU operator is no longer able to exercise control over a non-EU entity that it owns, see Question 4.

8. If an EU operator owns or controls an entity in Russia, which produces, and/or exports goods covered by an EU export ban, would the EU operator run afoul of Article 8a if these goods ended up in Belarus?

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If the final destination of the goods is truly Belarus, this activity could constitute a breach of the “best efforts” obligation on the EU operator as set out in Article 8i of Council Regulation (EC) No 765/2006.

9. If an EU operator owns or controls an entity in Russia, which produces and/or exports goods covered by an EU import ban, would the EU operator run afoul of Article 8a if this entity supplied such goods to non-EU entities? Does it make a difference if these non-EU entities are owned or controlled by the same EU operator (i.e. intra-group transfers)?

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The aim of import bans is to weaken Russia’s economic base and curtail its ability to wage war, by depriving it of critical markets for its products. If non-EU entities owned or controlled by an EU operator continue trading in restricted goods produced in Russia, thus creating additional revenue for the Russian economy, then, in principle, the EU operator cannot be considered to have performed all actions necessary and feasible to prevent the undermining of EU sanctions by these entities, as required by Article 8a.