

How Extension Of EU License Exemption Affects Subsidiaries

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In an unprecedented move, as part of the 14th sanctions package adopted on June 20, European Union member states agreed to extend partner countries subsidiaries' exemption for three months until Sept. 30, likely due to the workload faced by the regulators and a lack of guidance to businesses as well as the authorities.[1]

In addition, certain EU nationals providing services to such Russian subsidiaries will be exempt from the requirement to obtain a license.

In contrast, U.K. sanctions against Russia never contained the so-called partner countries subsidiaries' exemption, and U.K. companies or U.K. nationals providing business services to the Russian entities were always required to apply for a license.

To provide context, following the adoption of the EU's 12th sanctions package on Dec. 19, 2023, the "partner countries" subsidiaries' exemption was meant to be phased out within six months.[2]

This meant that from June 20, EU companies and EU nationals required a license from the member states' competent authorities to provide business services or software to their Russian subsidiaries.

In this article, we analyze how the German, French, Italian and the U.K. regimes are addressing this issue.

Restricted Services and Software

As of Sept. 30, EU entities will no longer be allowed to provide certain business services, including accounting, auditing, bookkeeping and tax consulting, business and management consulting services, legal advisory services, restricted services or certain software for the management of enterprises and for industrial management and infrastructure.

These are referred to as restricted services and restricted software respectively, and are intended for the exclusive use of their Russian subsidiaries.

Provision of restricted services and restricted software is currently authorized by the so-called partner countries exemption covering entities established in the EU, U.K., U.S., Australia, Canada, Japan, New Zealand, Norway, Switzerland and South Korea, and their Russian subsidiaries.

Instead, EU companies and EU nationals working in non-EU jurisdictions will need to obtain, or rely on, a license issued under Article 5n(10)(h) of Regulation 833/2014 to continue providing the restricted services or restricted software to the Russian subsidiaries that are owned by the companies established in partner countries.

On April 2, the European Commission updated its FAQ on professional services to reflect the 12th Sanctions Package, clarifying that:



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Competent authorities of EU Member States are responsible for issuing licenses under Article 5n(10)(h) of Regulation 833/2014, and they are free to establish their own procedures in this respect, including in relation to processing time, information and documents required to be submitted with the application, the period for which a license can be obtained, and any conditions attached to the license.

Although competent authorities may issue licenses covering a number of restricted services to be provided to the same Russian subsidiary, they must assess each license request on a case-by-case basis and are not authorized to issue general licenses covering entire sectors or activities.

Where restricted services to the Russian subsidiaries are provided by employees of EU companies from several EU member states, a license will need to be requested in each of these member states.

Differences exist in relation to the implementation of this amendment regarding restriction of services under the regulation. While the majority of EU member states will be assessing each license application individually, some competent authorities have taken a more extreme approach.

For example, Lithuanian officials have indicated that licenses for the provision of restricted services or restricted software to Russian subsidiaries will only be granted in exceptional circumstances. In contrast, Germany issued a license generally allowing all German entities and their employees to provide the restricted services or restricted software to their Russian subsidiaries.

In light of these developments, the 14th sanctions package also introduced a new exemption for the provision of services to the Russian subsidiaries of the partner countries by certain nationals of an EU member state.

Specifically, EU nationals who are residents of Russia, and were so before Feb. 24, 2022, do not need to apply for a license to be able to continue providing restricted services after Sept. 30. This aligns with Russia's countersanctions, which would in principle prohibit EU nationals working for the Russian subsidiaries of EU companies to comply with EU sanctions by applying for a license in a relevant EU member state.

Germany

German companies and their employees intending to provide restricted services or restricted software to their Russian subsidiaries after Sept. 30 will be able to rely on General License No. 42 issued by the German competent authority, Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA) on Feb. 20.

The German license authorizes the provision of restricted services and restricted software for the exclusive use of entities established in Russia owned, or solely or jointly controlled, by entities established in the EU, the European Economic Area or any of the partner countries from June 21, 2024, until May 31, 2025, subject to certain conditions.

Shortly after the publication of the German license, the commission amended its FAQ on professional services to expressly state that the regulation does not allow competent authorities of EU member states to issue general licenses covering entire sectors or activities.

In the commission's view, such a license would amount to a de facto exemption and would be in contradiction to the amendments introduced by the EU Council, which replaced the existing partner countries exemption with a requirement for a prior license from competent authorities of EU member states.

To date, the German authority has not changed its position, and the German license remains applicable. It is not the first time the German authorities' interpretation of EU sanctions has diverged from the commission's interpretation.

Here, however, the commission's position is less clear. Not only does Article 5n(10) give competent authorities the power to issue licenses "under such conditions as they deem appropriate," but a number of prohibitions in Regulation 833/2014 also instruct the authorities to grant trade licenses in accordance with the rules and procedures laid down in Regulation 2021/821 on dual-use items. These procedures deliberately allow them to issue national general licenses.

France

French companies and French nationals located outside of France intending to provide restricted services or restricted software to the Russian subsidiaries after Sept. 30 should apply for a license to the French competent authority, Direction générale du Trésor, which has clarified that license applications should be made by way of the electronic platform Téléservice.

In the case of several Russian subsidiaries, a separate license will need to be submitted for each of them. It appears that currently it may take over two months for DG Trésor to issue a license.

Italy

Italian companies intending to provide restricted services or restricted software to their Russian subsidiaries after Sept. 30 should apply for a license to the Italian competent authority, the division for dual-use items of the Unità per le autorizzazioni dei materiali di armamento.

The authority will only issue specific individual licenses and will not grant any general licenses. Licenses are generally granted within 30-45 days.

U.K.

The Russia (Sanctions) (EU Exit) Regulations 2019 that govern U.K. sanctions against Russia never provided for the partner countries subsidiaries' exemption in the context of the professional and business services and legal advisory services prohibitions set out in regulations 54C and 54D — broadly encompassing the scope of restricted services.

Instead, the regulations introduced a number of exemptions covering, among other things, the provision of services in discharge of various U.K. statutory duties.

U.K. companies intending to provide services not falling within any of the exemptions to their Russian subsidiaries were, and are, required to apply for a license with the U.K. competent authority, the Export Control Joint Unit. The regulations do not provide for the equivalent to the EU's prohibition on restricted software.

All applications for licenses should be made through the SPIRE online platform. As part of the application, U.K. companies should include a cover letter explaining the services to be provided to Russian subsidiaries and referring to the applicable prohibitions, and a list of recipients of the services and any other interested parties. An end-user undertaking is not required, however.

The processing time for the license is likely to take significantly longer than the standard 20-working-day target.

Practical Tips

EU companies with a presence in Russia should assess whether they provide any restricted services or restricted software to their Russian subsidiaries and, if necessary, apply for a license in the relevant EU member state. Any new services intended to be provided to these subsidiaries should be carefully evaluated in light of applicable prohibitions or required licenses.

In-house lawyers providing legal advice to the Russian subsidiaries of their group companies will need to consider whether such support is still allowed under an existing exemption or license, or whether a new license is required after Sept. 30, 2024.

Lawyers advising companies on sanctions compliance matters should remember that although the possibility for granting licenses exists under Article 5n(10) of Regulation 833/2014, it cannot be excluded that competent authorities of a particular EU member state will not issue such licenses.

As the outcome of a license application process could be crucial in the context of intragroup restructurings, EU companies should prepare in advance for such an eventuality, including revising their intragroup contractual arrangements accordingly.

Groups and professional partnerships providing restricted services or restricted software from a number of EU member states should consolidate and centralize the license application process in a single legal team to avoid any differences in the information provided to the authorities, and to

ensure that the scopes of requested licenses are aligned.

Also, given the different licensing approaches, EU groups may consider simplifying, consolidating or otherwise rationalizing intragroup arrangements to limit the number of required licenses. Legal and business professionals should also carefully assess compliance of their companies' supply chains with EU sanctions.

EU companies should ensure that restricted services and restricted software are provided "for the exclusive use" of their Russian subsidiaries, noting that the interpretation of this term and the applicable burden of proof have not been yet clarified by the commission.

In addition, they must ensure, including by contractual warranties, that restricted services or restricted software are not provided to the Russian subsidiaries through EU companies' subsidiaries in third countries.

This is because any such structure would likely be considered by the commission as indirect provision of restricted services or restricted software and therefore prohibited. It is worth noting that additional sanction circumvention considerations may also come into play in this respect.

Global companies should also consider whether any employees who are EU nationals located outside the EU may be providing restricted services or restricted software to Russian subsidiaries of partner countries. EU sanctions apply to EU nationals wherever they are located, thus a license may be in order after Sep. 30, 2024.

Finally, even where no restricted software is provided by EU companies from relevant EU member states, EU companies should assess if any software is provided by U.S. companies from U.S. territory, or whether it contains U.S. technology. Additional assessment under U.S. sanctions should be conducted in case the U.S. nexus exists.

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401745.

[2] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32023R2878>.