

NOTE

Between Scylla and Charybdis: Sanctions Compliance for International Companies Divesting from Russia

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This Note offers an overview of the U.S. and Russian economic sanctions following the outbreak of the War in Ukraine. It examines the regulatory conflicts companies face when complying with U.S. or Russian sanctions and the challenges international companies encounter when divesting from Russia. The Note emphasizes the complexities of navigating international sanctions, suggests potential divestiture strategies without violating both sets of sanctions, and proposes potential additional clarification from the Office of Foreign Assets Control to resolve regulatory conflicts.

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I. INTRODUCTION

Over a year ago, Russia initiated an invasion of Ukraine. In response, the United States, European Union, and their allies have sought to bring a swift end to the conflict by imposing an unprecedented array of sanctions and special measures. These restrictions target the Russian government, officials, state-owned entities, Kremlin-linked businesspeople, and entities under their control. The wave of sanctions was enough to make Russia the most sanctioned country in the world,¹ but not enough to put rapid immediate pressure on the economy.² While experts are extending forecasts for the effects of sanctions,³ Russia has imposed significant “countersanctions” against “unfriendly states” and companies that are trying to comply with the U.S., U.K., EU, and other sanctions regimes against Russia and Belarus. These restrictions hinder or even halt foreign companies’ efforts to cease operations in Russia while attempting to comply with all relevant regulations. Moreover, certain situations may arise where

1. Nick Wadhams, *Russia Is Now the World’s Most-Sanctioned Nation*, BLOOMBERG (Mar. 7, 2022), <https://www.bloomberg.com/news/articles/2022-03-07/russia-surges-past-iran-to-become-world-s-most-sanctioned-nation>.

2. *Are Sanctions on Russia Working?*, THE ECONOMIST (Aug. 25, 2022), <https://www.economist.com/leaders/2022/08/25/are-sanctions-working>.

3. *What Are the Sanctions on Russia and Are They Hurting its Economy?*, BBC NEWS (Sept. 30, 2022), <https://www.bbc.com/news/world-europe-60125659>.

companies face limitations in winding down their operations due to both Russian and U.S. sanctions. In this Note, the author will examine the general provisions of U.S. sanctions and Russian countersanctions and discuss potential courses of action for companies at risk of violating these measures while trying to end their operations in Russia.

This Note specifically focuses on the actions that should be taken by an international company operating in Russia in order to conclude its operations there and does not touch on compliance issues faced by acquirers of businesses or assets. Importantly, the principal legal risk for a business acquirer in Russia is the potential invalidation of a transaction obtained in violation of newly imposed restrictions. In the fall of 2022, the Russian Code of Arbitration Procedure and Code of Civil Procedure were amended, empowering prosecutors to seek the invalidation of transactions violating counter-sanction regulations.⁴ While none of the newly adopted counter-sanction regulations mention consequences for validity of a transaction due to its execution without government commission approval, an inference regarding such legal consequences can be drawn from general norms of Russian civil law. Transactions breaching counter-sanction regulations may be deemed either void under Article 168.2 of the Russian Civil Code, or a specific form of voidable transactions under Article 173.1 of the Russian Civil Code.⁵

II. OVERVIEW OF ECONOMIC SANCTIONS AFFECTING U.S. COMPANIES AND THEIR SUBSIDIARIES IN RUSSIA FOLLOWING THE OUTBREAK OF THE WAR IN UKRAINE

Following the Russian invasion of Ukraine on February 24, 2022, the international community condemned the military aggression of the Russian government on all levels of international policy and affairs, including at the level of the U.N. General Assembly, which resulted in the adoption of two major resolutions of the U.N. General Assembly: (1) Resolution adopted by the U.N. General Assembly on March 2, 2022, on Aggression against Ukraine;⁶ and (2) Resolution adopted by the General Assembly on October 12, 2022, on Territorial Integrity of Ukraine.⁷ Both resolutions condemning

4. Federal'nyi Zakon RF o Vnesenii Izmenenij v Stat'yu 52 Arbitrazhnogo Processual'nogo Kodeksa Rossijskoj Federacii i Stat'yu 45 Grazhdanskogo Processual'nogo Kodeksa Rossijskoj Federacii ot 7 octyabrya 2022 N 387-FZ [Federal Law of the Russian Federation on Amendments to Article 52 of the Arbitration Procedure Code of the Russian Federation and Article 45 of the Civil Procedure Code of the Russian Federation N 387-FZ of Oct. 7, 2022], ROSSIŠKAIA GAZETA [ROS. GAZ.], Oct. 11, 2022.

5. GRAZHDANSKIĀ KODEKS ROSSIŠKOĀ FEDERATSII [GK RF] [Civil Code] arts. 168.2, 173.1 (Russ.).

6. G.A. Res. ES-11/1 (Mar. 2, 2022).

7. G.A. Res. ES-11/4 (Oct. 12, 2022).

actions of the Russian government violating core norms of international law were adopted with overwhelming majority.⁸ The very fact of adopting resolutions shows the concerns of the international community regarding international stability and challenges for collective international security. As the U.N. resolutions have not influenced the actions of the Russian government or prevented the escalation of military aggression, individual states have taken their own measures to protect collective security.

The international community, the EU, Switzerland, other European countries, the United Kingdom, Canada, Australia, New Zealand, Japan, South Korea, Singapore, and Taiwan, among others, have imposed export controls and a series of increasingly unprecedented sanctions on Russia.⁹ For example, the U.S. Ukraine-/Russia-related sanctions program is implemented by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and started with Presidential Executive Order (E.O.) 13660, dated March 6, 2014.¹⁰ The initiation of the program was an answer to Moscow's 2014 invasion of Ukraine, and it was strengthened in response to the ongoing Russian aggression.¹¹

Sanctions imposed on Russia following February 2022 can be broken down into two broad groups:

1. Sanctions prohibiting interactions with certain sectors of the Russian economy; and
2. Sanctions prohibiting interactions with particular legal entities and individuals.

These groups can be outlined as follows:

Sectoral sanctions:

1. Prohibition on U.S. persons from engaging in transactions with the Central Bank of the Russian Federation (CBR), the National Wealth Fund of the Russian Federation (NWFR), and the Ministry of Finance of the Russian Federation (MFR), and immobilization of assets of the CBR held in the U.S. or by U.S. persons, wherever located, imposed by Directive 4 under E.O. 14024.¹²

8. Press Release, General Assembly, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, U.N. Press Release GA/12407 (Mar. 2, 2022).

9. Richard Martin, *Sanctions Against Russia—A Timeline*, S&P GLOB. MKT. INTEL. (Jan. 4, 2024), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/sanctions-against-russia-8211-a-timeline-69602559>.

10. Exec. Order No. 13,660, 3 C.F.R. § 589.201 (2014).

11. U.S. DEPT OF STATE, *Ukraine and Russia Sanctions*, <https://www.state.gov/ukraine-and-russia-sanctions/> (last visited Feb 16, 2024).

12. Exec. Order No. 14,024, 31 C.F.R. § 587 (2022).

2. Export control regulations, implemented by the U.S. Department of Commerce that target Russia's defense, aerospace, and maritime sectors; energy production; and other commercial and industrial operations.¹³ Export controls include restrictions on sensitive U.S. technologies produced in foreign countries using U.S.-originated software, technology, or equipment.¹⁴

3. Legislation suspending normal trade relations with Russia and Belarus (Suspending Normal Trade Relations with Russia and Belarus Act)¹⁵ and prohibiting the import to the U.S. of Russian oil and other energy products (Ending Importation of Russian Oil Act),¹⁶ which continues the ban on the U.S. import of Russian crude oil, petroleum products, liquefied natural gas, and coal, established via E.O. 14066.¹⁷

4. Prohibition of new U.S. investment in Russia, established via E.O. 14071 and 14068.¹⁸

5. Prohibition of the provision of accounting, trust and corporate formation, management consulting, and quantum computing services, as determined by the OFAC pursuant to sections 1(a)(ii), 1(b), and 5 of E.O. 14071.¹⁹

6. Prohibition of secondary-market transactions by U.S. financial institutions in Russian sovereign debt, established via Directive 1A under E.O. 14024.²⁰

7. Blocking Russian aircraft and airlines from entering and using all domestic U.S. airspace, established via Order DOT-OST-2018-0073-0012.²¹

13. For the extended list of export restrictions see U.S. DEP'T OF COM., BUREAU OF INDUS. & SEC., *Resources on Export Controls Implemented in Response to Russia's Invasion of Ukraine* (Nov. 6, 2023), <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/russia-belarus>.

14. Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR), 15 C.F.R. §§ 734, 738, 740, 742, 744, 746, 772 (2022).

15. 19 U.S.C. § 2101 note (Suspending Normal Trade Relations with Russia and Belarus Act).

16. 22 U.S.C. § 8923 note (Ending Importation of Russian Oil Act).

17. Exec. Order No. 14,066, 87 Fed. Reg. 13625 (Mar. 8, 2022).

18. Exec. Order No. 14,071, 31 C.F.R. § 587 (2022); Exec. Order No. 14,068, 87 Fed. Reg. 14381 (Mar. 11, 2022).

19. U.S. DEP'T OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, DETERMINATION PURSUANT TO SECTION 1(A)(II) OF EXECUTIVE ORDER 14071, PROHIBITIONS RELATED TO CERTAIN ACCOUNTING, TRUST AND CORPORATE FORMATION, AND MANAGEMENT CONSULTING SERVICES (2022); U.S. DEP'T OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, DETERMINATION PURSUANT TO SECTION 1(A)(II) OF EXECUTIVE ORDER 14071, PROHIBITIONS RELATED TO CERTAIN QUANTUM COMPUTING SERVICES (2022).

20. U.S. DEP'T OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, DIRECTIVE 1A UNDER EXECUTIVE ORDER 14024, PROHIBITIONS RELATED TO CERTAIN SOVEREIGN DEBT OF THE RUSSIAN FEDERATION (2022).

21. Notification, Order Disapproving Schedules, and Order Suspending the Authority of Russian Foreign Civil Aircraft Operators to Navigate in the United States, Docket No. DOT-OST-2018-0073 (Dep't of Transp. Mar. 2, 2022).

8. Secondary sanctions on foreign financial institutions determined to have supported Russia's military-industrial base and to ban imports into the United States of certain Russian-origin goods notwithstanding whether they have been incorporated or substantially transformed into other products outside of the Russian Federation, as determined by the OFAC pursuant to E.O. 14114.²²

Sanctions against particular individuals and entities:

1. Sanctions against individuals, governmental officials such as President Vladimir Putin, Prime Minister Mikhail Mishustin, and members of Russia's Security Council²³ and Presidential Administration of Russia, Russia's Kremlin-connected business elite (many of whom are referred to as oligarchs), their family members, and business executives pursuant to various authorities, including E.O. 14024, E.O. 13661, E.O. 13694, as amended, E.O. 13848, and § 224(a)(1)(B) of Countering America's Adversaries Through Sanctions Act (CAATSA).²⁴

2. Sanctions against particular entities, major banks (VTB and Sberbank), major steel producers (Severstal and MMK), major diamond producers (Alrosa), aerospace and defense-industry firms, and transport.²⁵

Explicit enumeration of legal entities and individuals in the list reduces the risk of improper information about prohibited acts, which can cause disputes related to due process.²⁶

The purpose of all these measures is to prevent the Russian regime from further escalation of the military conflict and deprive its economy of the ability to finance military actions.

OFAC has issued several general licenses authorizing certain activities within the prohibited scope. These licenses either give permission to certain

22. Exec. Order No. 14,114, 88 Fed. Reg. 89271 (Dec. 22, 2023).

23. Press Release, U.S. Dep't of the Treasury, U.S. Treasury Escalates Sanctions on Russia for Its Atrocities in Ukraine (Apr. 6, 2022), <https://home.treasury.gov/news/press-releases/jy0705>.

24. Press Statement, Antony J. Blinken, Sec'y of State, Targeting Russian Elites, Disinformation Outlets, and Defense Enterprises (Mar. 3, 2022), <https://www.state.gov/targeting-russian-elites-disinformation-outlets-and-defense-enterprises/>; 22 U.S.C. § 9401 note.

25. Press Release, U.S. Dep't of the Treasury, U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs (Feb. 24, 2022), <https://home.treasury.gov/news/press-releases/jy0608>.

26. *Exxon Mobil Corp. v. Mnuchin*, 430 F. Supp. 3d 220, 235–237 (N.D. Tex. 2019) (holding that the failure of a company to seek clarification from OFAC was a relevant factor in determining whether the company had fair notice of the interpretation of the regulation that a United States entity could receive service from a Specially Designated National (SDN) when that SDN performed a service enabling a United States person to contract with a non-blocked entity).

types of transactions with entities restricted by sanctions or allow certain transactions ordinarily incidental and necessary to the winding down of dealing with sanctioned entities or sectors. Several general licenses already expired due to limited time provided for winding down.²⁷

Directive 4 under E.O. 14024 is one of the major sanctions-related acts, establishing a general prohibition for U.S. persons to engage in any transaction involving the CBR, the NWFR, or the MFR (“Directive 4 entities”).²⁸ OFAC stated that this Directive is aimed at the prevention of attempts of the Russian government to influence the declining exchange rate of the ruble.²⁹ It is remarkable that despite the sanctions pressure, isolationism, and the stable depreciation of the Russian ruble/U.S. dollar exchange rate through many years, the Russian currency avoided collapse and returned to pre-invasion levels due to strict measures endorsed by the CBR.³⁰ These measures will be discussed in more detail below. Due to a wide range of transactions affected by Directive 4, OFAC issued several general licenses authorizing otherwise banned transactions, i.e. Russia-related general licenses: 14 authorized transactions involving the Directive 4 entities in which the relevant entity acts solely as an operator of a clearing and settlement system, provided (i) there is no transfer of assets to or from such entity (unless separately authorized), and (ii) no such entity is a counterparty or beneficiary to the transaction (unless separately authorized).³¹ This license shows how general licenses can be used to clarify existing restrictions. The list of current and archived general licenses is published on the official OFAC website.³²

Given that Russia has faced widespread sanctions for two years, numerous stakeholders in the Russian economy seek ways to bypass these restrictions. As utilizing companies in third countries as intermediaries or significant counterparties is a common method to circumvent sanctions, the OFAC is compelled to enforce secondary sanctions against such entities

27. See for the list of expired general licenses, U.S. Dept. of the Treasury, Off. of Foreign Assets Control, *Ukraine-/Russia-Related Sanctions*, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/ukraine-russia-related-sanctions> (last visited Mar. 28, 2023).

28. OFF. OF FOREIGN ASSETS CONTROL, DIRECTIVE 4 (AS AMENDED) UNDER EXECUTIVE ORDER 14024 (2022).

29. Press Release, U.S. Dep’t of the Treasury, Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia’s Wealth (Feb. 28, 2022), <https://home.treasury.gov/news/press-releases/jy0612>.

30. Natasha Turak, *Russia’s Ruble Hit its Strongest Level in 7 Years Despite Massive Sanctions. Here’s Why*, CNBC (June 23, 2022), <https://www.cnbc.com/2022/06/23/russias-ruble-is-at-strongest-level-in-7-years-despite-sanctions.html>.

31. See *Ukraine-/Russia-Related Sanctions*, *supra* note 27.

32. U.S. Dep’t of the Treasury, Off. of Foreign Assets Control, *Selected General Licenses Issued by OFAC*, <https://ofac.treasury.gov/selected-general-licenses-issued-ofac> (last visited Feb. 7, 2024).

located in third countries.³³ E.O. 14114 additionally strengthened the scope of provisions of E.O. 14024 through authorizing the OFAC to introduce secondary sanctions against foreign financial institutions that are involved in significant transactions with sanctioned entities in sectors supporting Russia's military-industrial base.³⁴ This includes technology, defense, construction, aerospace, and manufacturing sectors in Russia. Sanctions may also apply to those facilitating significant transactions or providing services related to Russia's military-industrial base, such as the sale, supply, or transfer of specified items identified by OFAC.³⁵

The ongoing growth of sanctions and the implementation of secondary sanctions underscore the importance of examining potential exit strategies from the Russian market for American companies.

III. OVERVIEW OF THE RUSSIAN LEGAL SYSTEM FOLLOWING THE OUTBREAK OF THE WAR IN UKRAINE

The international community's consolidated response to Russia's invasion of Ukraine, through sanctions and other restrictive measures, has placed unprecedented pressure on the Russian economy. This challenging situation is exacerbated by the ongoing decline in the economically-active population and the withdrawal of foreign companies.

Starting in February of 2022, Russia is witnessing the biggest emigrational wave of the economically-active population and the withdrawal of capital since the collapse of the USSR.³⁶ Since the beginning of 2022, more than 650,000 people have left Russia and a migration outflow of at least 400,000 people was recorded in Russia in 2022.³⁷ In addition, there was a military draft of up to 500,000 people³⁸ that led to a reduction of the

33. Press Release, U.S. Dep't of the Treasury, Treasury Imposes Sanctions on More Than 150 Individuals and Entities Supplying Russia's Military-Industrial Base (Dec. 12, 2023), <https://home.treasury.gov/news/press-releases/jy1978>.

34. Exec. Order No. 14,114, 88 Fed. Reg. 89271 (Dec. 26, 2023).

35. *Id.*

36. Alexander Bolotov, *Chem nyneshnyaya volna emigracii otlichaetsya ot drugih? Predstaviteli kakih professij uekhali? Sobirayutsya li migranty vernut'sya? Sociolog Margarita Zavadsckaya—ob itogah oprosa emigrantov* [How Does the Current Wave of Emigration Differ from Others? Which Professions Have Left? Are the Migrants Going to Return? Sociologist Margarita Zavadsckaya—on the Results of the Survey of Emigrants], MEDUZA (July 31, 2022), <https://meduza.io/feature/2022/07/31/chem-nyneshnyaya-volna-emigratsii-otlichaetsya-ot-drugih-predstaviteli-kakih-professiy-uehali-sobirayutsya-li-migranty-vernutsya>.

37. *Iz Rossyi za polgodu uehali bolee 400 tysyach chelovek. Chto nuzhno znat' ob etom pokazatele* [More than 400 Thousand People Left Russia in Six Months. What You Need to Know About this Indicator], PAPER PAPER.RU (Sept. 6, 2022), <https://paperpaper.ru/papernews/2022/9/6/iz-rossii-za-polgodu-uehali-bolee-400-tys/>.

38. *Married and Drafted. Almost Half a Million Russian Men Were Mobilised in a Month Based on a Spike in Marriages*, MEDIZONA (Oct. 25, 2022), <https://en.zona.media/article/2022/10/24/marriedanddrafted>.

economically-active population (eighty-two million people)³⁹ by approximately 1.5% in 2022.

At the same time, a lot of international companies operating in Russia both directly or through their subsidiaries have dissolved or are undergoing the process of winding down, due to political or logistical reasons. Over one thousand companies have publicly announced cessation of operations in Russia to some degree beyond the legally required amount according to international sanctions.⁴⁰ In September of 2022, experts predicted the cumulative effect of the estimated decline of GDP to be 3.4% in 2022 and 8.5% in 2023 below the 2021 level.⁴¹ According to Russian official sources published in February of 2023, Russia's economy declined by 2.5% in 2022, which is lower than most forecasts.⁴² One possible explanation for the smaller-than-predicted decline is that numerous companies are still operating in Russia, despite the sanctions. This may be partly attributed to the fact that Russian authorities have implemented strict regulations in response to the international sanctions, which have made it difficult for companies to wind down their operations.

In response to international sanctions and economic challenges, including population outflow and divestment of international companies, the Russian government has enacted a broad set of regulations. A significant part of the countersanctions and anti-crisis measures introduced after the conflict in Ukraine began serves to prevent fund withdrawals and foreign entities' cessation of operations and is based on federal statutes on countersanctions:

1. Federal Law No. 281-FZ of December 30, 2006 "On Special Economic Measures and Compulsory Measures" ("Law on Special Economic Measures");⁴³
2. Federal Law No. 127-FZ of June 4, 2018 "On Counter-Measures for Unfriendly Actions of the United States and Other

39. Varvara Mitina, *Trudosposobnoye naseleniya Rossii vyroslo rekordnymi tempami* [*The Working-Age Population of Russia has Grown at a Record Pace*], SECRET MAG. (Apr. 13, 2022), <https://secretmag.ru/news/trudosposobnoe-naselenie-rossii-vyroslo-rekordnymi-tempami-13-04-2022.htm>.

40. Jeffrey Sonnenfeld et al., *Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain*, YALE SCH. OF MGMT. (Feb. 7, 2024), <https://som.yale.edu/research/insights/over-1000-companies-have-curtailed-operations-russia-some-remain>.

41. *Russia Privately Warns of Deep and Prolonged Economic Damage*, BLOOMBERG (Sept. 6, 2022), <https://www.bloomberg.com/news/articles/2022-09-05/russia-risks-bigger-longer-sanctions-hit-internal-report-warns?sref=cus85deZ>.

42. Kirill Rogov, *Russia's 2022 Economic Anomaly*, WILSON CTR. (Feb. 17, 2023), <https://www.wilsoncenter.org/blog-post/russias-2022-economic-anomaly>.

43. Federal'nyi Zakon RF o Special'nyh Ekonomicheskikh Merah i Prinuditel'nyh Merah No 281-FZ ot 30 dekabria 2006 [Federal Law of the Russian Federation on Special Economic Measures and Compulsory Measures No. 281-FZ of Dec. 30, 2006], ROSSIJSKAIA GAZETA [ROS. GAZ.] Jan. 1, 2007.

Foreign States” (“Countersanctions Law”),⁴⁴ including amendments to the Countersanctions Law of June 28, 2022;⁴⁵ and

3. Federal Law No. 390-FZ of December 28, 2010 “On Security.”⁴⁶

The Law on Special Economic Measures and Countersanctions Law are statutes with similar scope. The difference is that the Countersanctions Law appears to be a response to CAATSA, but unlike CAATSA, it does not require that the President and the government at his indication impose any measures.

Potential measures under the Countersanctions Law⁴⁷ may target:

1. The United States and other foreign states committing unfriendly actions (“Unfriendly States”);
2. Entities under Unfriendly States’ jurisdiction, direct or indirect control or affiliated with such entities, involved in unfriendly actions (“Unfriendly States’ Entities”); and
3. Officials and citizens of Unfriendly States involved in Unfriendly actions.

Countersanctions may include:⁴⁸

1. Termination and suspension of international cooperation in the areas determined by the President;
2. Prohibition of, or restrictions on, the import of products or raw materials originated from Unfriendly States or manufactured by Unfriendly States’ Entities;
3. Prohibition of, or restrictions on, the export of products or raw materials by Unfriendly States’ Entities and citizens of Unfriendly States;
4. Prohibition of, or restrictions on, the performance of works and provision of services for state and municipal needs and for legal entities listed in Art. 1(2) of Federal Law No. 223-FZ on

44. Federal’nyĭ Zakon RF o Merah Vozdejstviya (Protivodejstviya) na Nedruzhestvennye Dejstviya Soedinennyh SHtatov Ameriki i Inyh Inostrannyh Gosudarstv No 127-FZ ot 4 iyunya 2018 [Federal Law of the Russian Federation on Counter-Measures for Unfriendly Actions of the United States and Other Foreign States No. 127-FZ of June 4, 2018], ROSSIĖSKAIA GAZETA [ROS. GAZ.] June 6, 2018.

45. Federal’nyĭ Zakon RF o Vnesenii Izmenenij v Otdel’nye Zakonodatel’nye akty Rossijskoj Federacii No 212-FZ ot 28 iyunya 2022 [Federal Law of the Russian Federation on Amendments to Certain Legislative Acts of the Russian Federation No. 212-FZ of June 28, 2022], ROSSIĖSKAIA GAZETA [ROS. GAZ.] July 1, 2022.

46. Federal’nyĭ Zakon RF o Bezopasnosti No 390-FZ ot 28 dekabria 2010 [Federal Law of the Russian Federation on Security No. 390-FZ of Dec. 28, 2010] ROSSIĖSKAIA GAZETA [ROS. GAZ.] Dec. 29, 2010.

47. ROSSIĖSKAIA GAZETA [ROS. GAZ.] June 6, 2018, *supra* note 44, art. 1.

48. *Id.* art. 2.

“Procurement of Goods, Works and Services by Certain Types of Legal Entities” (including state corporations, state companies, companies with more than 50% state participation, state and private companies that are included in the register of natural monopolies, etc.);

5. Prohibition of, or restrictions on, the participation in the privatization of state and municipal property, including the provision of investment banking services and agency and other services involved in arranging such privatization; and

6. Any other measures as determined by the President.

The implementation of these measures is mandatory for Russian public authorities and local governments, Russian citizens, and Russian legal entities.⁴⁹

Examining anti-crisis measures is particularly relevant for this Note, as a substantial portion of these measures target transactions involving legal entities and individuals from Unfriendly States. The current list of Unfriendly States is established by the Russian Governmental Order No. 430-r of March 5, 2022⁵⁰ and includes countries who adopted sanctions condemning Russian military aggression: the United States, all EU member states, Albania, Andorra, Australia, Canada, Iceland, Japan, Liechtenstein, Micronesia, Monaco, Montenegro, New Zealand, North Macedonia, Norway, San Marino, Singapore, South Korea, Switzerland, Taiwan, Ukraine, and the United Kingdom.⁵¹

Anti-crisis measures include, among other restrictions, the following regulations:

1. Russian entities may pay off their debts to Unfriendly States’ Entities, exceeding RUB 10,000,000,⁵² in Russian rubles instead of currencies designated in their agreement; additionally, the performance of monetary obligations to Unfriendly States’ Entities

49. *Id.* art. 1(4).

50. Rasporiazheniia Pravitelstva Rossiiskoĭ Federatsii No. 430-r Perechen’ Inostrannih Gosudarstv i Territoriy, Sovershaushchih v Otnoshenii Rossiyskoy Federatsii, Rossiyskih Yuridicheskikh i Fizicheskikh Lits Nedruzhestvenniye Deystviya ot 5 marta 2022 [Resolution of the Russian Federal Government No. 430-r List of Foreign States and Territories Committing Unfriendly Actions Against the Russian Federation, Russian Legal Entities, and Individuals of March 5, 2022], <http://actual.pravo.gov.ru/text.html#pnum=0001202203070001>.

51. *Id.*

52. RUB 10,000,000 = approx. USD 110,500 as of Feb. 1, 2024. *Russian Ruble SPOT (TOM)*, BLOOMBERG, <https://www.bloomberg.com/quote/USDRUB:CUR?embedded-checkout=true> (last visited Feb. 1, 2024).

should be made using currency conversion. Both rules are established via Presidential Decree No. 95 of March 5, 2022;⁵³

2. Prohibition on Russian residents, without prior approval by the CBR or the Governmental Commission for Control over Foreign Investments in the Russian Federation (“Commission”), from providing loans in rubles to Unfriendly States’ Entities; transferring ownership of securities to Unfriendly States’ Entities, or transferring ownership of real estate to Unfriendly States’ Entities, established via Presidential Decree No. 95 of March 5, 2022;⁵⁴

3. Prohibition on Russian residents from depositing non-ruble currency into their accounts in banks abroad; transferring money using non-Russian electronic payment services without opening an account; and transferring non-ruble currency to any nonresidents under loan agreements, established via Presidential Decree No. 79 of February 28, 2022, as later amended;⁵⁵

4. Prohibition on Russian residents from paying for shares in any nonresident companies or making payments to any nonresidents under joint venture agreements, without prior approval of the CBR until December 31, 2023, established via Presidential Decree No. 126 of March 18, 2022, as later amended;⁵⁶

53. Ukazy Prezidenta Rossiiskoi Federatsii No. 95 o Vremennom Poruadke Ispolneniya Obstoyatelstv Pered Nekotorymi Inostrannimi Kreditorami ot 5 marta 2022 [Decree of the President of the Russian Federation No. 95 on Temporary Procedure of Performance of Obligation to Certain Foreign Creditors of Mar. 5, 2022], <http://kremlin.ru/acts/bank/47628>.

54. *Id.*

55. Ukazy Prezidenta Rossiiskoi Federatsii No. 79 o Primenenii Spetsizlnih Ekonomicheskikh Mer v Svyazi s Nedruzhestvennimi Deystviyami Soyedinyennih Shtatov Ameriki i Primknvshih k Nim Inostrannih Gosudrstv i Mezhdunarodnih Organizatsiy ot 28 fevralya 2022 [Decree of the President of the Russian Federation No. 79 on Implementation of Special Economic Measures due to Unfriendly Actions of the United States of America Joined by Foreign States and International Organizations of Feb. 28, 2022], <http://kremlin.ru/acts/bank/47577>.

56. Ukazy Prezidenta Rossiiskoi Federatsii No. 126 o Dopolnitel'nykh Vremennykh Merakh Ekonomicheskogo Haraktera po Obespecheniyu Finansovoy Stabilnosti Rossiiskoi Federatsii v Sfere Valyutnogo Regulirovaniya ot 18 marta 2022 [Decree of the President of the Russian Federation No. 126 on Additional Temporary Measures of Economic Nature to Ensure Financial Stability of the Russian Federation in Currency Regulation of Mar. 18, 2022], <http://kremlin.ru/acts/bank/47655>. On June 23, 2022, the CBR allowed residents to carry out operations otherwise prohibited pursuant to Presidential Decree No. 126 if:

- The legal entity in respect of which the operation is carried out is not a resident of an Unfriendly State;
- The transaction is carried out in rubles or foreign currency of states that are not Unfriendly States; and/or
- The transaction is carried out in the foreign currency of states belonging to Unfriendly States, regardless of the location of the recipient of such funds in an amount not exceeding the equivalent of 15 million rubles (approx. USD 197,000) at the official exchange rate of the CBR on the date of payment.

5. Pursuant to Presidential Decree No. 520 of August 5, 2022,⁵⁷ a prohibition is established in relation to transactions entailing, directly or indirectly, the establishment, modification, termination or encumbrance of rights and obligations of parties to production sharing agreements, joint activity agreements or other agreements on the basis of which investment projects are implemented in the territory of the Russian Federation, and rights to securities and shares in the authorized capitals of the following categories of Russian legal entities owned by Unfriendly States' Entities, such as:⁵⁸

a. Strategic enterprises and strategic joint stock companies (according to Presidential Decree No. 1009 of April 8, 2004), as well as joint stock companies and LLCs in which such strategic enterprises/joint stock companies own shares;

b. Manufacturers of equipment for fuel and energy sector organizations, producers of heat and electricity, organizations engaged in the processing of oil and petroleum products (the list of companies is approved by the President);

c. Russian credit organizations (the list of companies is approved by the President); and

d. Users of certain types of subsurface resources (indigenous deposits of gold, lithium, platinum group metals, hydrocarbon raw materials, subsurface areas of internal sea

Reshenie Rabochej Gruppy Banka Rossii No PRG-12-4/1383 po Rassmotreniyu Voprosov Vydachi Razreshenij na Osushchestvlenie (Ispolnenie) Rezydentami, Nerezidentami Operacij (Sdelok), v Otnoshenii Kotoryh v Svyazi s Nedruzhestvennymi Dejstviyami Inostrannyh Gosudarstv Ustanovleny Zaprety (Ogranicheniya) na ih Sovershenie ot 23 iyunya 2022 [Decision of the Working Group of the CBR No PRG-12-4/1383 on Consideration of Issues of Issuing Permits for Residents and Non-Residents to Carry out Transactions in Respect of Which Prohibitions (Restrictions) on Their Commission Have Been Established in Connection with Unfriendly Actions of Foreign States of June 23, 2022], https://www.cbr.ru/Content/Document/File/138679/20220623_prg.pdf.

57. Ukazy Prezidenta Rossijskoj Federatsii No. 520 o Primnenenii Specialnih Economicheskikh Mer v Finansovoy i Toplivo-Energeticheskoy Sferah v Svyzi s Dedruzhestvennymi Deystviyami Nekotorih Inostrannyh Gosudrstv i Mezhdunarodnih Organizatsiy ot 5 avgusta 2022 [Decree of the President of the Russian Federation No. 520 on Implementation of Special Economic Measures in Finance and Energy Spheres due to Unfriendly Actions of Certain Foreign States and International Organizations of Aug. 5, 2022], <http://kremlin.ru/acts/bank/48232>.

58. These transactions can be made on the basis of a special permission of the President. The procedure for obtaining it has not been established, but such decisions have already been made. For example, Novatek purchased 49% in CJSC Terneftegaz from Total Energies. See Vladimir Afanasiev, *Novatek Buys Out TotalEnergies from Controversial Joint Venture in Russia*, UPSTREAM (Aug. 30, 2022), <https://www.upstreamonline.com/politics/novatek-buys-out-totalenergies-from-controversial-joint-venture-in-russia/2-1-1286021>. Another example is the sale of PJSC Enel Russia by ENEL S.p.A. to two buyers—(1) JSC AAA Capital Management as a trustee of mutual fund Gazprombank-Freesia, and (2) PJSC NK Lukoil. See *Enel Completes Sale of Russian Assets to Domestic Investors*, REUTERS (Oct. 12, 2022), <https://www.reuters.com/markets/deals/enel-completes-sale-russian-assets-domestic-investors-2022-10-12/>.

waters, territorial sea, continental shelf of the Russian Federation, etc.);

6. Prohibition for Unfriendly States' Entities, without prior approval of the Commission, from transactions entailing, directly or indirectly, the establishment, modification, or termination of the rights of ownership or use of shares in the authorized capitals of LLCs, as well as other rights that allow control over the management of such LLCs, established via Presidential Decree No. 618 of September 8, 2022.⁵⁹ Prohibition is extended to the shares of joint stock companies via Presidential Decree No. 737 of October 15, 2022;⁶⁰

7. Prohibition for Russian residents, without prior approval of the Commission, from transferring ownership of shares if the shares were acquired from an Unfriendly States' entity following March 1, 2022, established via Presidential Decree No. 138 of March 3, 2023;⁶¹

8. Pursuant to Presidential Decree No. 16 of January 17, 2023,⁶² companies are allowed to ignore votes of shareholders from Unfriendly States when calculating the quorum for making corporate decisions in companies with an annual turnaround of more than RUB 100 billion (approximately USD 1,315 billion) and working in the fields of energy, mechanical engineering, and trade;

9. Pursuant to Presidential Decree No. 302 of April 25, 2023,⁶³ the Russian government on the basis of the presidential decision can assume administrative control over Russian assets held or managed by Unfriendly States' Entities in case of threats to the national security of Russia or when Russia or Russian individuals

59. Ukazy Prezidenta Rossiiskoi Federatsii No. 618 ob Osobom Poryadke Osushchestvleniya (Ispolneniya) Otdel'nykh Vidov Sdelok (Operatsiy) Mezhdru Nekotorimi Litsami ot 8 sentyabrya 2022 [Decree of the President of the Russian Federation No. 618 on Special Procedure of Execution (Fulfilment) of Certain Types of Deals (Transactions) Between Certain Individuals of Sept. 8, 2022], <http://kremlin.ru/acts/bank/48287>.

60. Ukazy Prezidenta Rossiiskoi Federatsii No. 737 o Nekotorikh Voprosakh Osushchestvleniya (Ispomemiya) Otdel'nykh Vidov Sdelok (Operatsiy) ot 15 oktyabrya 2022 [Decree of the President of the Russian Federation No. 737 on Some Issues of Execution (Fulfilment) of Certain Types of Deals (Transactions) of Oct. 15, 2022], <http://kremlin.ru/acts/bank/48424>.

61. Ukazy Prezidenta Rossiiskoi Federatsii No. 138 o Dopolnitel'nykh Vremennykh Merakh Ekonomicheskogo Haraktera, Svyazannykh s Obrashcheniyem Zennykh Bumag ot 3 marta 2022 [Decree of the President of the Russian Federation No. 138 on Additional Temporary Measures of Economic Nature Related to Securities Circulation of Mar. 3, 2023], <http://kremlin.ru/acts/bank/48990>.

62. Ukazy Prezidenta Rossiiskoi Federatsii No. 16 o Vremennom Poryadke Prinyatiya Resheniy Organami Nekotorikh Rossiyskikh Khozyastvennykh Obshchestv ot 17 yanvary 2023 [Decree of the President of the Russian Federation No. 16 on Temporary Procedure of Decision Making by Bodies of Certain Russian Entities of Jan. 17, 2023], <http://kremlin.ru/acts/bank/48842>.

63. Ukazy Prezidenta Rossiiskoi Federatsii No. 302 o Vremennom Upravlenii Nekotorykh Imushtvov ot 25 aprelya 2023 [Decree of the President of the Russian Federation No. 302 on Temporary Management of Certain Assets of Apr. 25, 2023], <http://kremlin.ru/acts/bank/49196>.

are deprived of their ownership rights to assets located abroad. The decree identifies that movable and immovable asset, securities, shares or stocks in Russian companies, and other property rights can be subject to administrative control by the Russian Government.

It seems that the Presidential Decree No. 16⁶⁴ appears to target specific companies, as only a few Russian firms meet the criteria. Remaining shareholders can decide not to count votes of a foreign shareholder. Foreign shareholders have several tools related to this decree:

1. Foreign shareholders may try to challenge the restriction based on reasonableness and the company's interests. If they can prove that the rights deprivation has no legal or economic justification, the challenge could succeed.

2. It is unclear how restricted shareholders will exercise other rights tied to voting shares, such as the right to information or convening a meeting. Foreign shareholders should retain these rights in the absence of a direct restriction.

3. Restricted shareholders may have claims against others if the company was poorly managed, leading to a decline in share value. If the restriction would be imposed by the government, claims against remaining shareholders may not be valid due to a "change of law," but in case of Presidential Decree No. 16,⁶⁵ domestic shareholders restrict the rights of a foreign shareholder.

Following the adoption of Presidential Decree No. 302, the Russian government gained control over multiple companies, e.g. two energy companies—Finland's Fortum and Germany's Uniper in April 2023,⁶⁶ or Russian subsidiaries of French yoghurt-maker Danone and Danish brewing company Carlsberg.⁶⁷

The MFR clarified that provisions of Presidential Decree No. 618⁶⁸ do not cover operations performed against the will of a person as a result of the enforcement of a court decision. However, the MFR also clarified that the decree covers reorganizations and mergers, thus further limiting potential ways to structure winding down. Similar explanations were given in relation to Presidential Decree No. 81 (the Official Explanation of the

64. Ukazy Prezidenta Rossijskoj Federatsii No. 16, *supra* note 62.

65. *Id.*

66. *Russia Seizes Subsidiaries of Finland's Fortum and Germany's Uniper*, FIN. TIMES (Apr. 25, 2023), <https://www.ft.com/content/aa7ffb41-bcb9-4983-a312-1473fa0513b8>.

67. *Russia Seizes Control of Shares in Danone and Carlsberg Subsidiaries*, GUARDIAN (July 16, 2023), <https://www.theguardian.com/world/2023/jul/17/russia-seizes-control-of-shares-in-danone-and-carlsberg-subsidiaries>.

68. Ukazy Prezidenta Rossijskoj Federatsii No. 618, *supra* note 59.

CBR of March 18, 2022, No. 2-OR). The MFR issued guidelines regarding conditions of a deal that could be taken into account by the Commission when reviewing the deal:

1. The requirement for an independent appraisal of the market value of assets or shares;
2. The sale of assets or shares should be made at a discount of at least 50% of the market value of the relevant assets or shares indicated in the appraisal report;
3. The establishment of key performance indicators for new shareholders (owners); and
4. The availability of installment payments for 1–2 years and (or) an obligation to voluntarily send funds to the federal budget in the amount of at least 10% of the amount of the transaction (operation) being carried out.⁶⁹

As can be seen from the list above, the Russian authorities have established obstacles for international companies trying to sell their shares in Russian companies or withdraw funds from the territory of Russia. Thereby, the freedom of contract of both residents and so-called Unfriendly States' Entities is significantly limited.

The initial two sections of this Note highlight the buildup of sanctions and countersanctions enacted by the U.S. and Russia. The plethora of regulations can notably hinder the operation of companies not directly impacted by the imposed restrictions but attempting to adhere to all applicable laws. Furthermore, legal risks for foreign companies are escalating as the Russian legislative body is reviewing the Draft Law “On External Administration for the management of an organization.”⁷⁰ This law will provide Russian courts with authority to introduce external management in a company or its Russian branch if: control over the company or at least 25% of the voting shares belongs (directly or indirectly) to an Unfriendly States' entity, and the company is “crucial for ensuring the sustainability of the economy, protecting the rights and legitimate interests of citizens of the Russian Federation.”⁷¹ Certain risks related to the draft law

69. MINISTRY OF FIN. OF RUSSIAN FED’N, EXTRACT FROM THE MINUTES OF THE MEETING OF THE SUBCOMMITTEE OF THE GOVERNMENT COMMISSION FOR THE CONTROL OF FOREIGN INVESTMENTS IN THE RUSSIAN FEDERATION DATED DECEMBER 22, 2022, NO. 118/1 (2022), https://minfin.gov.ru/common/upload/library/2022/12/main/30_12_2022__05-06-10_VN-67867.pdf.

70. Draft Law No. 1045796-8 [“On External Administration for the management of an organization”], <https://sozd.duma.gov.ru/bill/104796-8>. As of March 28, 2022, the draft law has passed the first hearing and is being amended prior to the second one.

71. *Id.* (translation by author). According to the Draft Law No. 1045796-8, a company can be considered to be of “key importance” if:

have materialized following the adoption of Presidential Decree No. 302 authorizing the implementation of administrative management for assets owned by international companies in response to the confiscation of Russian assets. Therefore, the next part will cover ways to conduct winding down without violation of either U.S. or Russian sanctions.

IV. POTENTIAL WAYS OF CONDUCT FOR COMPANIES

As U.S. and Russian sanctions significantly limit international companies' capacity to do business in Russia, many firms find that the only solution to navigate the conflicting sanctions regimes is to halt operations in Russia. Nevertheless, exiting the Russian market can be challenging, as numerous potential transaction structures may breach Russian sanctions, U.S. sanctions, or both. Consequently, it is crucial to examine how companies can structure their transactions while adhering to legal requirements.

A. *Compliance with Russian Sanctions*

The possibility of implementing a wind down has recently been significantly limited as a result of the adoption of Presidential Decree No. 618⁷² and Presidential Decree No. 737.⁷³ At the moment, the only consequence of not obtaining approval of the Commission for the

-
- It organizes the production or sale of goods (services) that are defined as socially significant food and other essential goods or for which the legislation of the Russian Federation provides for the possibility of state regulation of prices;
 - It carries out the production or sale of goods (services) on the terms of a natural monopoly and/or its position may be recognized as dominant in the commodity market in accordance with the antimonopoly legislation of the Russian Federation;
 - It is the only manufacturer of certain types of products, including medicines or medical devices, or the only supplier of products that do not have Russian analogues, included in the register of sole suppliers in accordance with the legislation of the Russian Federation ;
 - The number of its employees is not less than twenty-five percent of the working population of the corresponding locality;
 - It conducts activity, termination of which may lead to man-made or environmental disasters;
 - It conducts activity, termination of which may lead to destabilization, unjustified increase in retail prices for essential goods;
 - It is part of a chain of significant productions, and the termination of its activities may lead to the closure of other companies that meet the criteria specified in this paragraph.

The Internal Commission under the Ministry of Economic Development of the Russian Federation has the right to qualify any other company as “exceptionally significant,” even if it does not meet the criteria specified above.

72. Ukazy Prezidenta Rossijskoj Federatsii No. 618, *supra* note 59.

73. Ukazy Prezidenta Rossijskoj Federatsii No. 737, *supra* note 60.

transaction is the voidness of the transaction.⁷⁴ Consequently, a lack of approval leads to the establishment of a mandatory lock-up in relation to shares owned by an international company. Despite the fact that consent of the Commission is required to make a wide range of transactions and this requirement has been expanded more than once, the procedure for obtaining such consent, the timeframe of review, and the criteria for making a decision are not clarified in regulations.

In practical terms, the Commission rarely explicitly refuses to grant an approval, but the Commission may keep the application without consideration, thereby effectively placing a divestment transaction on hold. The practice of obtaining consent within months of the existence of the requirement has shown that one of the criteria for obtaining consent is providing the Commission with a detailed explanation of the commercial ratio of a planned transaction and confirmation that divestment is not its sole purpose.⁷⁵ Considering the guidelines introduced by the MFR in December of 2022, the need to find alternative ways for divesting activities in Russia is further emphasized.

The sluggish process of obtaining approval of the Commission is an additional incentive to search for alternative options for structuring the transaction. About two thousand companies have submitted applications to the Commission and are awaiting approval for selling their Russian assets in order to leave the country, while the Commission considers only around twenty applications per month.⁷⁶

Taking into account the current legal regulations, international companies have several possible ways to terminate operations in Russia in addition to the direct sale of shares of a Russian operating company:

1. *Transaction on the Holding Company Level*

Many companies have traditionally utilized corporate structures involving international holding companies. If an international firm owns a Russian operating company through a special holding company, it may sell shares of that holding company. This approach is the most direct and relies on a formal interpretation of the restrictions imposed by Presidential Decree No. 618⁷⁷ and No. 737.⁷⁸ Even if Russian authorities broadly interpret these

74. MINISTRY OF FIN. OF RUSSIAN FED'N, OFFICIAL EXPLANATIONS NO. 1 ON THE APPLICATION OF PRESIDENTIAL DECREE NO. 618, NO. 05-06-14RM/99138 (2022).

75. *New Restrictions for Companies Controlled by "Unfriendly" Countries*, SCHNEIDER GRP. (Feb. 15, 2023), <https://schneider-group.com/en/news/countries/new-restrictions-for-companies-controlled-by-non-friendly-countries/>.

76. Polina Ivanova & Anastasia Stognei, *Western Groups Leaving Russia Face Obligatory Donation to Moscow*, FIN. TIMES (Mar. 27, 2023), <https://www.ft.com/content/77368014-1397-4a08-901d-1f996e66d627>.

77. Ukazy Prezidenta Rossijskoj Federatsii No. 618, *supra* note 59.

78. Ukazy Prezidenta Rossijskoj Federatsii No. 737, *supra* note 60.

restrictions to include transactions at the international holding company level, it is improbable that this would impact the transaction. Generally, a transaction at the international holding company level will be governed by the law of the place of the company's incorporation rendering Russian restrictive measures unable to effectively invalidate such a transaction.

However, not all companies have international holding companies in their structures. These companies would need to incorporate a holding company in a country not designated as an Unfriendly State and then apply for the Commission's approval to conduct intra-group corporate restructuring. This would make the newly incorporated holding company the owner of the Russian operating company's shares. Obtaining consent for internal restructuring should be more manageable than approval for share sales aimed at ceasing operations in Russia.

2. *Direct Sale of Operating Assets*

Another straightforward option for an effective exit from business in Russia is the direct sale of an operating asset on the territory of Russia without selling the shares of the company owning such an asset. This approach does not entail a change in the corporate structure of the Russian legal entity and therefore should not trigger restrictions in Presidential Decree No. 618⁷⁹ and Presidential Decree No. 737.⁸⁰ A potential risk of this approach is a possibility that the transaction will be recognized as a quasi-reorganization and that such a sale will be treated as void. However, transactions with operating assets are not currently covered by the imposed restrictions. This option is not devoid of the usual disadvantages of an asset deal in comparison with a share deal such as difficulties with transferring contracts with suppliers, customers and employees, retitling of assets, and the trivial issue with the number of required sales if the operating company has a large flow of operations. Thus, this option is more suitable for international companies whose operating companies own a small number of assets in Russia, for example, technology companies whose main assets are often certain technologies that they invest in joint ventures or promote for Russian customers.

3. *Foreclosure on Shares*

If the approaches indicated above do not suit international companies, another way to transfer shares of a Russian operating company may be to construct a situation wherein shares are transferred as part of the execution of a court decision. Pursuant to the Letter of the MFR of October 13, 2022

79. Ukazy Prezidenta Rossijskoj Federatsii No. 618, *supra* note 59.

80. Ukazy Prezidenta Rossijskoj Federatsii No. 737, *supra* note 60.

No. 05-06-14RM/99138,⁸¹ Presidential Decree No. 618⁸² does not require approval of the Commission if the transaction to change ownership of the company's shares is made against the will of the Unfriendly State entity and as an act of enforcement of a court decision.

Under this option, the buyer acts as a plaintiff suing for some kind of claim (preferably having a monetary valuation approximately equal to the value of the shares of the operating company) and the seller is a defendant in the buyer's claim. The seller-defendant can admit the claim or the court can approve a settlement agreement, as a result of which the buyer-seller will have a court decision confirming the amount of the claim. Once the court makes a decision in favor of the plaintiff-buyer, the plaintiff-buyer initiates the enforcement of the decision with the bailiff service.

This option is complicated since, as a general rule under Russian law, the bailiff organizes the sale of the debtor's property at auction and the plaintiff can take the property only if it was not sold at auction within two rounds.⁸³ Thus, there is a risk that some third party may try to outbid the shares after they are placed at auction. In order to mitigate this risk, the parties may execute a share pledge agreement in order to apply special rules for foreclosure. However, the transfer of shares as collateral will also require the consent of the Commission.⁸⁴ Similarly with obtaining approval for internal reorganization, obtaining approval for a share pledge agreement may be more probable than approval for the sale of shares for the purpose of ceasing operations in Russia. Another disadvantage of this approach is that it is time-consuming. Even if the court decides on the case within the regulatory time frame, which is six months under Russian law,⁸⁵ and the bailiff forecloses within three months, the entire process of the transfer of shares will take at least nine months. Due to its disadvantages, this strategy is the least recommended and is applicable only if other options are not available.

An important aspect of this strategy is whether a judicial decree exception applies to all judicial decrees no matter the county of origin or only those made by Russian courts. This exception should be applicable to Russian court decisions and foreign decrees enforced through a procedure for acknowledgment and enforcement (domestication) of foreign judgments through Russian courts. Domestication of foreign court judgments can be

81. MINISTRY OF FIN. OF RUSSIAN FED'N, *supra* note 74.

82. Ukazy Presidenta Rossiĭskoĭ Federatsii No. 618, *supra* note 59.

83. Federal'nyĭ Zakon RF ob Iсполnitel'nom Proizvodstve No 229-FZ ot 2 oktyabrya 2007 [Federal Law of the Russian Federation on Enforcement Proceedings No. 229-FZ of Oct. 2, 2007] ROSSIĬSKAIA GAZETA [ROS. GAZ.] Oct. 6, 2007.

84. Ukazy Presidenta Rossiĭskoĭ Federatsii No. 618, *supra* note 59; Ukazy Presidenta Rossiĭskoĭ Federatsii No. 737, *supra* note 60.

85. Morgan, Lewis & Bockius LLP, *Dispute Resolution in Russia*, LEXOLOGY (July 25, 2019), <https://www.lexology.com/library/detail.aspx?g=b98815c5-e550-4656-9cab-ab4fa7cfbae5>.

done in Russia on the basis of either an international treaty on the recognition of foreign judicial decrees or the principle of reciprocity.⁸⁶ Currently there are treaties with countries of the Commonwealth of Independent States, Argentina, China, Cyprus, India, and some other countries.⁸⁷ As an alternative to the domestication of foreign judicial decrees, parties may use the procedure for acknowledgment and enforcement of awards of international arbitration if the parties are choosing between litigation or arbitration abroad. Enforcement of an arbitration award may be faster if parties try to use manufactured decrees rather than foreign court decrees. In state courts, a civil case usually takes between three and five months, with the duration depending on the caseload. For larger and more complex cases, the time of procedure could extend beyond a year. Appeals for civil claims might take around six months, resulting in a total timeframe of nine to twelve months for both the initial decision and the appeal, under the best circumstances.⁸⁸ On the other hand parties can obtain an arbitration award much faster.

However, in any case, the parties might have difficulties if the subject matter of a foreign domestic dispute or international arbitration is the ownership of shares and not a simple monetary claim. Over the past few years, the approach of Russian courts to the recognition of the arbitrability of corporate disputes and recognition of foreign decisions regarding ownership rights to shares of Russian companies has not been constant and unified. Some courts may recognize the decision of a foreign arbitration institution on a dispute over the ownership of shares, while other courts may refuse to do so with reference to the exclusive competence of Russian courts.⁸⁹

The arbitrability of corporate disputes in relation to Russian companies is governed by Article 225(1) the Code of Arbitration Procedure of Russia⁹⁰ and Article 45 of the Law on Arbitration⁹¹ and, starting from September 2016, can be categorized as follows:

86. ARBITRAZHNO-PROTSESSUAL'NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 241 (Russ.).

87. *Information of Federal Bailiffs Service of Russia on Enforcement of Russian Judicial Decisions*, FSSP (Nov. 27, 2018), <http://fssprus.ru/>.

88. *See Dispute Resolution in Russia*, *supra* note 85.

89. Anastasia Cheredova & Daria Ovchinnikova, *Foreign Arbitral Awards in Russia—Public Policy Issue*, VEGAS LEX (Aug. 23, 2021), <https://www.mondaq.com/russianfederation/arbitration-dispute-resolution/1104076/foreign-arbitral-awards-in-russia-public-policy-issue>.

90. ARBITRAZHNO-PROTSESSUAL'NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 225(1) (Russ.).

91. Federal'nyi Zakon RF ob Arbitrazhe (Tretejskom Razbiratel'stve) v Rossiiskoĭ Federatsii No. 382-FZ ot 29 dekabria 2015 [Federal Law of the Russian Federation on Arbitration (Arbitration Proceedings) in the Russian Federation No. 382-FZ of Dec. 29, 2015], ROSSIĬSKAIA GAZETA [ROS. GAZ.] Dec. 31, 2015. (Russ.).

a. Disputes in relation to the following issues are non-arbitrable (the following disputes can be resolved only by Russian domestic commercial courts):

- i. Convening of a general meeting of members/shareholders;
- ii. Notarial actions for the certification of transactions regarding shares in LLCs;
- iii. Corporate disputes in relation to companies of “strategic importance,” except for disputes in relation to transactions in relation to ownership of shares if such transactions do not require governmental approval;
- iv. Tender offers, buyouts, or acquisition of more than 95% of shares; and
- v. Exclusion of members of legal entities.

b. Disputes in relation to the following issues are arbitrable, if: (1) the arbitration institution is approved as a permanent arbitration institution by the Russian government; and (2) the arbitration institution has special rules for the arbitration of corporate disputes:

- i. Incorporation, reorganization, and liquidation of a company;
- ii. Derivative claims of shareholders;
- iii. Appointments, election, or resignation of managers;
- iv. Contractual disputes with managers;
- v. Shareholders’ agreements;
- vi. Invalidation of corporate resolutions;
- vii. Issue of securities, except for disputes in relation to non-normative actions of state and municipal agencies; and
- viii. Other corporate issues, if such disputes arise within a company’s members or a company itself.

c. Disputes in relation to the following issues are arbitrable, if the arbitration institution is approved as a permanent arbitration institution by the Russian government:

- i. Ownership of shares; enforcement of encumbrances, including disputes in relation to the execution of sale purchase agreements regarding shares;
- ii. Ownership of shares in companies of “strategic importance,” provided that the transaction does not require governmental approval; and
- iii. Activities of register holders.

As of February 2023, the following international arbitration institutions have certification as permanent arbitration institutions in Russia:

- a. International Court of Arbitration (ICC);
- b. Singapore International Arbitration Centre (SIAC);
- c. Hong Kong International Arbitration Centre (HKIAC); and
- d. Vienna International Arbitral Centre (VIAC).

There is also an exception from the general rule of arbitrability which may be used for manufactured decisions to a limited degree. If an international arbitration institution reviews a dispute in Russia (with Russia being the seat of arbitration), then an arbitration award can be treated as an award of an *ad hoc* arbitration, meaning that obtaining a permanent arbitration institution certification is not needed.⁹² However, this award may be treated as violating public policy, if an arbitral tribunal is formally formed to resolve a particular dispute (*ad hoc*), but it actually has features typical of institutional arbitration institutions (for example, the association of arbitrators in panels or lists, the formulation of their own rules of arbitration, and the performance by the same person of functions to facilitate arbitrations involving different arbitrators).

Thus, foreign court decisions and decisions of international arbitration may be used to implement an exception to the provisions of Presidential Decree No. 618⁹³ if they are recognized by a Russian court, but there might be risks or refusal in recognition if the subject matter is ownership of shares. At the same time, introduction of the guidelines by the MFR in December of 2022 makes the usage of structures involving foreclosure on shares more alluring.⁹⁴

B. *Compliance with U.S. Sanctions*

There are concerns that potential transactions can be interpreted as making “new investments” in connection with the possible generation of investment profits in the case of the transfer of shares of a Russian operating company. Moreover, market players had concerns about the ambiguity of the concept of new investments. As a result, on June 6, 2022, OFAC issued clarifications regarding the definition of the term “new investments” applicable for the purposes of Russia-related E.O. 14066, E.O. 14068, or E.O. 14071.⁹⁵ Pursuant to OFAC’s clarification, investments are “new” if

92. *Id.* art. 44.

93. Ukazy Presidenta Rossijskoj Federatsii No. 618, *supra* note 59.

94. MINISTRY OF FIN. OF RUSSIAN FED’N, *supra* note 69.

95. U.S. Dep’t of the Treasury, Off. of Foreign Assets Control, *Russian Harmful Foreign Activities Sanctions, FAQ 1049* (June 6, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1049>; U.S. Dep’t of the Treasury, Off. of Foreign Assets Control, *Russian Harmful Foreign Activities Sanctions, FAQ 1050* (June 6, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1050>.

they are made on or after the effective date of the respective prohibitions under applicable E.O.s, or investments resulting from the exercise of rights under an agreement made before the effective date and occurring on or after the effective date of the respective prohibitions.⁹⁶

OFAC provides the following examples of transactions that are qualified as new investments:

1. “The purchase or acquisition of real estate in the Russian Federation, other than for noncommercial, personal use;
2. Entry into an agreement requiring the commitment of capital or other assets for the establishment or expansion of projects or operations in the Russian Federation, including the formation of joint ventures or other corporate entities in the Russian Federation;
3. Entry into an agreement providing for the participation in royalties or ongoing profits in the Russian Federation;
4. The lending of funds to persons located in the Russian Federation for commercial purposes, including when such funds are intended to be used to fund a new or expanded project or operation in the Russian Federation;
5. The purchase of an equity interest in an entity located in the Russian Federation; and
6. The purchase or acquisition of rights to natural resources or exploitation thereof in the Russian Federation.”⁹⁷

OFAC also provides the following examples of transactions that OFAC does not consider to be “new investment” for the purposes of the respective E.O. prohibitions:

1. “Entry into, performance of, or financing of a contract, pursuant to ordinary commercial sales terms, to sell or purchase goods, services, or technology to or from an entity in the Russian Federation (e.g., a payment of an invoice for goods, where payment is made within the contracted time period and such payment does not involve participation in royalties or ongoing profits);
2. Maintenance of an investment in the Russian Federation, where the investment was made prior to the effective date of the respective E.O. prohibitions, including maintenance of pre-existing entities, projects, or operations, including associated

96. *Russian Harmful Foreign Activities Sanctions, FAQ 1049*, *supra* note 95.

97. *Id.*

tangible property, in the Russian Federation,”⁹⁸ e.g., the following activities:

- a. “Transactions to ensure the continuity of pre-existing projects or operations located in the Russian Federation, including payments to employees, suppliers, landlords, lenders, and partners;
 - b. The preservation and upkeep of pre-existing tangible property in the Russian Federation; and
 - c. Activities associated with maintaining pre-existing capital investments and equity investments.”⁹⁹
3. “Wind down or divestment of a pre-existing investment, such as a pre-existing investment in an entity, project, or operation, including any associated tangible property, located in the Russian Federation.”¹⁰⁰
 4. Lending funds to, or purchasing an equity interest in, entities located outside of the Russian Federation “provided that (i) such funds are not specifically intended for new projects or operations in the Russian Federation,” and (ii) the revenues of the entity located outside the Russian Federation are not predominantly derived from its investments in the Russian Federation.¹⁰¹

Thus, OFAC explicitly indicates that divestment of a pre-existing investment is not a prohibited act and even published a separate clarification regarding the permissibility of divestment transactions.¹⁰² Nevertheless, OFAC highlights that such transactions while permissible may not involve a blocked person or otherwise prohibited transactions unless authorized by OFAC.¹⁰³ Such an explanation is ambiguous and additional clarification would not be superfluous. One of OFAC’s recent clarifications adds even more fuel to the fire. On May 19, 2023, OFAC issued an updated clarification No. 1118 stipulating that companies owned by U.S. persons and compelled to pay a fee of 10% of the transaction amount for exiting the Russian market will need to obtain an OFAC license for such payment.¹⁰⁴ This license will be necessary for carrying out a direct or indirect transaction

98. *Id.*

99. *Russian Harmful Foreign Activities Sanctions, FAQ 1050, supra* note 95.

100. *Russian Harmful Foreign Activities Sanctions, FAQ 1049, supra* note 95.

101. U.S. Dep’t of the Treasury, Off. of Foreign Assets Control, *Russian Harmful Foreign Activities Sanctions, FAQ 1055* (Jan. 17, 2023), <https://ofac.treasury.gov/faqs/1055>.

102. U.S. Dep’t of the Treasury, Off. of Foreign Assets Control, *Russian Harmful Foreign Activities Sanctions, FAQ 1053* (July 22, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1053>.

103. *Id.*

104. U.S. Dep’t of the Treasury, Off. of Foreign Assets Control, *Russian Harmful Foreign Activities Sanctions, FAQ 1118* (May 19, 2023), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1118>.

or transfer of assets in favor of the CBR, the MFR, and other Russian agencies. It should be noted that this special fee “recommended” by the Commission cannot be construed as a payment of taxes and mandatory payments allowed under General License GL 13E.¹⁰⁵ A more flexible approach of OFAC on this issue could help many companies that are still waiting for the Commission’s approval.

As it was demonstrated above, in order to comply with Russian law, some intermediate steps of deal structuring require an international company to make transactions otherwise prohibited by applicable E.O.s. One example of a prohibited transaction may be the establishment of an international holding company in a country not subject to sanctions for the purpose of transferring shares of a Russian operating company as a preliminary step in the sale of the Russian company, which could result in an indirect violation of sanctions. Another example may be the conclusion of a financing agreement with a Russian operating company in order to create an obligation that will subsequently be used for forming a claim in order to transfer shares of a company pursuant to a court decision, which could be viewed as an attempt to circumvent the sanctions. It is important to note that such actions could result in severe penalties and legal consequences, and careful consideration of all potential risks and compliance with relevant laws and regulations is crucial. Additional clarification from OFAC could provide a potential solution to the regulatory conflict of regulations. Clarification could address the permissibility of transactions that would otherwise be prohibited by the applicable E.O.s but that are necessary as part of a divestment plan aimed at winding down operations in Russia. Such a clarification would increase the effectiveness of the E.O.s by reducing the burden on international companies that wish to curtail their operations in Russia but are currently unable to do so due to Russian and U.S. restrictions. This would also provide a clearer and streamlined process for companies to comply with the regulations and avoid any potential legal or financial repercussions.

V. CONCLUSION

From the very beginning of the war in Ukraine, Russia has been introducing a large number of restrictions in order to slow down the damage to its economy caused by sanctions. Due to the fact that many such measures have been prepared in a hurry, people and companies that are forced to comply with them are often deprived of transparent and understandable procedural rules. At the same time, when the Commission clarifies these rules, it does it in a way that does not facilitate the

105. *Id.*

implementation of the rules, but on the contrary, establishes additional repressive restrictions that are not based on the law. This turns the activities of foreign companies that still remain in Russia into a gamble when foreign investors are forced to guess how many new restrictions on their rights will be proposed by the Russian government. Therefore, investors may face the necessity of ceasing operations in Russia, even if there are no formal international sanctions in place. If these investors, for any reason, prefer not to follow the standard procedure of obtaining a Commission decision, they can evaluate the advantages and disadvantages of alternative scenarios, such as carrying out a transaction at the level of a holding company, selling their assets directly, or initiating a foreclosure on shares through a court or arbitration decision.

At the same time, neither U.S. sanctions nor Russian counter-sanctions are exhaustively transparent. The lack of clarity of regulations creates challenges for companies that aim to comply with sanctions and voluntarily cease operations in Russia, even if it is not mandatory in accordance with existing regulations. Competent U.S. agencies should take into account the interests of companies that try to comply with sanctions but may still face challenges due to the lack of clarity in the regulatory framework. In order to facilitate compliance and promote preferred business practices, these agencies should provide more guidance and transparency on the scope and limitations of sanctions, as well as on the requirements for continuing operations in Russia. This would help companies avoid unintentional violations while reducing the risk of potential negative impacts on U.S. and international companies. One of the challenges facing U.S. agencies is to find the right balance between imposing targeted sanctions that effectively achieve their intended goals and broad measures, while not unnecessarily harming U.S. and international companies. The issue is further complicated by the fact that some strategies for winding down operations in Russia involve intermediate steps that may inadvertently run afoul of OFAC sanctions regulations. As a result, international companies may find themselves in a difficult position where they are unable to comply with both U.S. and Russian regulations, leading to a stalemate that only benefits the Russian government. This underscores the need for clear guidance and additional clarification from U.S. agencies, such as OFAC, to help international companies navigate the complex regulatory landscape and ensure compliance with relevant laws.

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