

Analyzing New EU Measure To Prevent Reexports To Russia

By **Niels Ersbøll, Alexander Italianer and Laura Beuls** (April 11, 2024)

Among its ongoing efforts to reinforce sanctions against Russia and prevent circumvention of export bans, the European Union introduced a new measure as part of its twelfth package of sanctions adopted on Dec. 18, 2023.

This measure, outlined in Article 12g of Council Regulation 833/2014, requires that EU exporters and suppliers dealing with certain restricted goods under the EU's Russia sanctions include a "no reexport to Russia" clause in their contracts with non-EU operators.

The requirement took effect on March 20 for contracts entered into as of Dec. 19, 2023.

Here we provide a comprehensive overview of this contractual obligation and the elements necessary for ensuring compliance to the regulatory requirements.

Scope of the Clause

Article 12g of the regulation obliges EU exporters to contractually prohibit the reexportation of certain goods to or for use in Russia when exporting, selling, supplying or transferring those goods from the EU to operators based in any non-EU country, with the exception of the "partner countries" listed in Annex VIII of the regulation.

Partner countries currently include Australia, Canada, Japan, New Zealand, Norway, South Korea, Switzerland, the U.K. and the U.S. These countries are considered to have adopted export bans similar to those of the EU, thus mitigating the risk of prohibited reexports to Russia.

This requirement extends beyond mere sales agreements, encompassing various types of contracts, including those for temporary supplies and transfers of restricted goods.

Article 12g only applies to the goods and technologies listed in annexes to the regulation, including aviation as listed in regulation Annex XI, jet fuels as listed in Annex XX and firearms as listed in Annex XXXV, and to common high priority goods as listed in Annex XL of the regulation. Article 12g also applies to firearms and ammunition as listed in Annex I of Regulation (EU) No. 258/2012.

Considering that the regulation does not define the term "reexport," we consider that it should be interpreted in alignment with the definition of "reexport" under the U.S. Export Administration Regulations, which refers to the shipment or transfer of a good initially exported from the EU customs territory to a third country and subsequently to Russia.



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Entry Into Force and Effect on Existing Agreements

The obligation to include the clause depends on the contract's effective date.

Contracts Entered Into Before Dec. 19, 2023

Contracts that were already in force when Council Regulation (EU) 2023/2878 went into effect benefit from a one-year transition period, to Dec. 19, 2024, or until the contract expires, whichever is earlier. Contracts executed on or after Dec. 20, 2024, need to include the "no re-export to Russia" clause.

Contracts Entered Into as of Dec. 19, 2023

Contracts Entered Into as of Dec. 19, 2023, must contain the "no reexport to Russia" clause as of March 20, 2024.

Clause Contents

On Feb. 22, the European Commission issued FAQ guidance to clarify the "no reexport to Russia" clause and ensure compliance.[1]

The guidance includes a proposed template for the clause that EU operators may use. While it does not preclude the use of other wordings by the parties, the template can be considered as meeting the obligation in Article 12g and is recommended in particular for contracts with non-EU operators doing business in jurisdictions seen as posing a high risk of circumvention.

A key element is that the clause must include adequate remedies in the event of breach of such clause by the importer. Per the guidance, the remedies "should be reasonably strong and aim to deter non-EU operators from any breaches. They can include, for instance, termination of the contract and the payment of a penalty."

In the absence of material guidance from the EU, an adequate remedy could be understood as one that effectively prevents exports or provides enough disincentives to dissuade a third-country counterpart from reexporting the restricted goods to Russia.

Recommendations

EU exporters are advised to have in place adequate due diligence procedures to prevent the diversion of sanctioned items to Russia, regardless of whether these are covered by the annexes referred to in Article 12g.

Prior to introduction of the reexport-prohibition clause requirement, the European Commission had already recommended that EU exporters include contractual provisions in contracts with third-country business partners, holding them liable if they reexport the items to Russia — Chapter D.2, question 46 of the FAQs on sanctions against Russia, for example.[2]

Hence, EU exporters may consider expanding the scope of the no-reexport clause to cover other sanctioned EU goods.

Additionally, it is recommended that EU exporters take adequate due diligence measures even when engaging with operators based in partner countries, to mitigate all risks.

For instance, although the U.S. EAR provides an effective mechanism to prevent circumvention by requiring licenses for the export, reexport or transfer of items subject to U.S. export controls, it is worth noting that certain exceptions to these licenses remain, including for items intended for Russia.

Consequently, certain goods falling outside the scope of Article 12g and banned for export by the EU may not face similar restrictions in partner countries, which could facilitate circumvention. Including the "no reexport to Russia" clause in contracts with all non-EU operators can aid in mitigating these risks.

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[1] https://finance.ec.europa.eu/document/download/7f54341b-2bf1-4142-b5d4-b1b09c93d03e_en?filename=faqs-sanctions-russia-no-re-export_en.pdf.

[2] https://finance.ec.europa.eu/publications/consolidated-version_en.