



THE “NO-RUSSIA CLAUSE” – IMPACT ON EU EXPORTERS

Since the illegal invasion of Ukraine in early 2022 the EU, the UK and the USA have incrementally increased pressure on Russia by implementing successive packages of international sanctions.

On 18 December 2023 the EU announced a twelfth package of sanctions which, among other measures, creates a new contractual stipulation restricting the export of certain, specified goods to Russia. The so-called “No-Russia Clause”, required under Article 12g of Regulation 833/2014 (the “Regulation”), now places an obligation on EU-based corporates to contractually prohibit the re-export and supply of certain categories of sensitive items to Russia or for use within Russia.

There are a number of key issues with which European exporters must be familiar.

Who and what is covered?

The No-Russia Clause applies to EU persons which are entering into contracts as exporters, i.e. “selling, supplying, transferring or exporting” specified products. As the restriction does not refer to “sales contracts” or similar, on a reasonable interpretation, it will cover all types of contracts in which goods are or may be sold, supplied, transferred or exported to or for use in Russia. This would therefore include sales agreements, leases and sub-leases, and goods sold on hire-purchase terms.

The No-Russia Clause relates solely to goods or technology listed in the Regulation or included in Annex I to Regulation 258/2012. It applies to aircraft, jet fuel and fuel additives, firearms and common high priority items, which includes a wide variety of products such as electronic integrated circuits, ball bearings and navigation instruments and devices. Crucially, the scope of the No-Russia Clause is open to extension should the EU consider this to be necessary.

The contracts potentially affected are those in which EU exporters sell, supply, transfer, or export equipment and parts to third countries, with the exception of specified “partner countries”, namely the USA, UK, Japan, South Korea, Australia, Canada, New Zealand, Norway and Switzerland. At present neither the UK nor the USA have adopted equivalent measures. However, as both have demonstrated their own commitment to both increasing pressure on Russia and harmonising sanctions, as well as a desire to reduce circumvention opportunities, there is every possibility that similar restrictions may be enacted in the future. This notwithstanding, there are still a significant number of sanctions and export controls with which exporters must comply if they are or believe they may have some direct or indirect exposure to Russia.

Key Dates

All relevant contracts concluded on or after 19 December 2023 are required to have incorporated a No-Russia Clause by 20 March 2024. Any contracts concluded

prior to 19 December 2023 must have incorporated such a clause by 20 December 2024, unless those contracts have expired by that point. We address drafting considerations below. Contracts concluded from 20 March 2024 must include the clause from the outset.

Clause Requirements, Drafting Considerations and Practical Steps

There are three requirements with which exporters must comply if they are to ensure that they are not accused of breaching the No-Russia Clause restrictions:

1. The clause must prohibit the further re-export of the goods to Russia or for use in Russia by the third-country counterparty.
2. The contract must contain “adequate remedies” in the event that the counterparty breaches the clause. What constitutes an adequate remedy will vary depending on the contract itself, the governing law and the jurisdictions in which the parties are based. The guidance issued by the European Commission on 22 February 2024 clarifies that “adequate remedies” should be “reasonably strong” and aim to deter a third country importer/buyer from breaching the clause. Parties to contracts governed by English law should however be mindful of including any remedy which could be construed as a penalty as such provisions may not be enforceable.
3. Exporters must promptly report any breaches to the competent authority of the member state where they are resident or established.

Although guidance with template language has been suggested the EU has not indicated that it requires particular wording or mechanisms in order to comply with Article 12g. Therefore, exporters are free to consider both drafting, and an approach to amending their current contracts, that best suits their business. In assessing the best approach, the following should be considered:

- Contracts agreed on or after 19 December 2023 must include the No-Russia Clause. Accordingly, priority should be given to ensuring these contracts are compliant, or amendments are entered into to ensure that they are compliant.
- For contracts agreed prior to 19 December 2023, discussions will need to be opened shortly in order to ensure that appropriate wording is included prior to 20 December 2024.
- Audits of existing contracts and counterparties should be undertaken to ascertain actual or potential exposure. In particular, sanctions provisions and provisions limiting where and how products can be used should be reviewed to see if they have been drafted sufficiently widely to already encompass the new No-Russia Clause requirements. The area where existing drafting is most likely to be insufficient is in regard to ongoing monitoring after the export has been concluded. As part of the audit, consideration will need to be given as to what remedies are available if the sanction or prohibition provisions are breached. In many cases it may be that a combination of the indemnity and termination provisions are sufficient without further remedies being required.
- Contractual suites of documents should be amended to reflect best practice and be tailored to the contracts and exports in question.
- The method of including a No-Russia Clause should also be considered – all amendments must be executed in accordance with the governing law of the relevant agreement.
- As the No-Russia Clause could be extended in the future, all EU exporters may wish to include appropriate wording in their contracts now.

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EU exporters should also, as part of their standard operating procedures:

- Conduct thorough due diligence on the end-users and destinations of the goods and technologies and verify that they are not related to Russia.
- Maintain accurate records of transactions, including contractual provisions and any relevant authorisations.
- Train relevant personnel about the requirements of the clause.
- Keep abreast of any updates or changes to EU sanctions regulations.
- Seek legal advice should any actual or potential concerns be identified.

HFW's Sanctions experts are advising multiple clients in relation to their draft “No-Russia” clauses for leases and sale agreements.

Should you have any questions regarding the No-Russia clause and its application please do not hesitate to contact David Savage, Daniel Martin or a member of HFW's Sanctions team.

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