

CLIENT ALERT

U.S., EU and UK Escalate Belarus Sanctions

December 15, 2021

On December 2, 2021, the United States, the European Union (“EU”), the United Kingdom (“UK”) and other allies took coordinated action to designate various individuals, entities, and aircraft connected to human rights abuses by Belarusian President Alexander Lukashenko and his regime. This builds on asset freezing actions by the U.S., UK, EU, and Canada earlier this year (which we discuss [here](#)).

Table 1 charts the entities designated by the U.S. on December 2, 2021, and related designations by the EU and UK. This summary chart is for convenience only, and readers should review the official government sanctions lists for the most up-to-date designation information.

Also, on December 2, 2021, the United States imposed restrictions on “new debt” issued by the Ministry of Finance of the Republic of Belarus (“Ministry of Finance”) and the Development Bank of the Republic of Belarus (“Development Bank”), similar to sovereign debt restrictions previously imposed by the EU, UK, and other allies in June 2021 (which we discuss [here](#)).

Actions by the United States

Asset Freezing Sanctions

On December 2, 2021, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) designated 12 entities and 20 individuals in Belarus as blocked persons pursuant to Executive Orders 14038 (Aug. 9, 2021) (“E.O. 14038”) and 13405 (June 19, 2006) (“E.O. 13405”).^[1] OFAC also identified three aircraft as blocked property of one of the designees.^[2]

These restrictions mean that U.S. persons are prohibited from all dealings with these persons. The prohibitions also extend to entities 50% or more owned, directly or indirectly, individually or in the aggregate, by the blocked persons.^[3]

OFAC also issued General License 5 to E.O. 14038 (“GL 5”), which authorizes all transactions and activities “incident and necessary to the wind down of transactions” involving Open Joint Stock Company Belarusian Potash Company (BPC) and BPC subsidiary Agrorozkvit LLC, and entities that BPC or Agrorozkvit own 50 percent or more of, directly or indirectly, individually or in the aggregate, through March 31, 2022.^[4] OFAC clarified in guidance that GL 5 also extends to “the wind down of such transactions in which Belaruskali OAO [previously designated as an SDN] has a property interest (*e.g.*, certain resale transactions by BPC or Agrorozkvit LLC of product sourced from Belaruskali OAO)” but does not authorize direct transactions with Belaruskali OAO.^[5]

New Debt Sanctions

On that same day, OFAC issued Directive 1 to E.O. 14038, which prohibits “all transactions in, provision of financing for, and other dealings in new debt with a maturity of greater than 90 days issued on or after December 2, 2021” (the “prohibited new debt”) by the Ministry of Finance and the Development Bank, respectively.^[6]

OFAC issued related guidance that clarifies, among other points, that these prohibitions do not prohibit (1) dealings with entities owned 50 percent or more, directly or indirectly, in the individual or aggregate, by the Ministry of Finance and the Development Bank,^[7] (2) dealings in debt with a maturity of greater than 90 days issued by the Ministry of Finance and the Development Bank before December 2, 2021, as long as material terms, such as repayment terms, are not modified on or after December 2, 2021,^[8] and (3) banks from maintaining correspondent accounts or processing U.S. dollar-clearing transactions for the Ministry of Finance or the Development Bank that are not otherwise prohibited by sanctions.^[9]

OFAC guidance does clarify, however, that the prohibitions do apply to (1) “all denominations of” prohibited new debt,^[10] (2) dealings in the prohibited new debt on “both primary and secondary markets,”^[11] and (3) derivative contracts tied to prohibited new debt.^[12]

Actions by the European Union

On December 2, 2021, building on trade restrictions already in place and [here](#), the EU imposed restrictive measures on an additional 17 individuals and 11 entities, targeting what it described as “prominent members of the Belarusian judicial branch and propaganda outlets that contribute to the continued repression of civil society, democratic opposition, independent media outlets and journalists, and high-ranking political officials and companies that have helped incite and organize illegal border crossing for political purposes.”^[13]

The persons and entities listed by the EU are now subject to an asset freeze pursuant to which all funds and economic resources belonging to, or owned, held or controlled by them must be frozen. In addition, no funds or economic resources may be made available, directly or indirectly, to or for the benefit of those listed persons.

Under EU law, there is a presumption that making available funds or economic resources to non-listed legal persons or entities which are owned or controlled by a listed person or entity will in general be considered as making them indirectly available to the latter, unless it can be reasonably determined, on a case-by-case basis using a risk-based approach, taking into account all of the relevant circumstances, including certain enumerated criteria, that the funds or economic resources concerned will not be used by or be for the benefit of that listed person or entity.^[14]

EU Guidance sets out various criteria to be taken into account when assessing whether an entity is controlled by another person, as follows:

“63. The criteria to be taken into account when assessing whether a legal person or entity is controlled by another person or entity, alone or pursuant to an agreement with another shareholder or other third party, could include, inter alia:

a) having the right or exercising the power to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person or entity;

b) having appointed solely as a result of the exercise of one's voting rights a majority of the members of the administrative, management or supervisory bodies of a legal person or entity who have held office during the present and previous financial year;

c) controlling alone, pursuant to an agreement with other shareholders in or members of a legal person or entity, a majority of shareholders' or members' voting rights in that legal person or entity;

d) having the right to exercise a dominant influence over a legal person or entity, pursuant to an agreement entered into with that legal person or entity, or to a provision in its Memorandum or Articles of Association, where the law governing that legal person or entity permits its being subject to such agreement or provision;

e) having the power to exercise the right to exercise a dominant influence referred to in point (d), without being the holder of that right;

f) having the right to use all or part of the assets of a legal person or entity;

g) managing the business of a legal person or entity on a unified basis, while publishing consolidated accounts;

h) sharing jointly and severally the financial liabilities of a legal person or entity, or guaranteeing them." [15]

The EU Guidance further provides that if any of the above criteria are satisfied, EU law considers the legal person or entity is controlled by another person or entity, unless the contrary can be established on a case-by-case basis, and that the fulfilment of the above criteria of ownership or control may be refuted on a case-by-case basis.[16]

The criteria to be taken into account when assessing whether the funds will be used by or be for the benefit of that listed person include:

"a) the date and nature of the contractual links between the entities concerned (for instance sales, purchase, or distribution contracts);

b) the relevance of the sector of activity of the non-listed entity for the listed entity;

c) the characteristics of the funds or economic resources made available, including their potential practical use by, and ease of transfer to, the listed entity." [17]

Actions by the United Kingdom

Prior to its December action, the UK introduced a package of sanctions against Belarus in October 2021[18] (which we discuss [here](#)).

On December 2, 2021, the UK designated additional persons and one entity under asset freezing restrictions.[19]

UK law defines ownership and control slightly differently from the EU, stating that an entity is "owned or controlled directly or indirectly" by another person if either (or both) of two conditions is met:

- a person holds 50% of the shares; 50% of the voting rights; or holds the rights to remove a majority of the board of directors;[20] or
- it is reasonable, having regard to all the circumstances, to expect that the listed person would (if he chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that the affairs of the entity “are conducted in accordance” with his wishes.[21]

UK legislation also specifies that funds and economic resources are made available for the benefit of a designated person only if that person thereby obtains, or is able to obtain, a significant financial benefit.[22]

Practical Considerations

- Companies should risk assess their exposure to Belarus and ensure that, for any given transaction involving Belarus, they are considering the various Belarussian sanctions regimes that may apply.
- Ownership information for Belarussian entities is notoriously opaque and, with the number of sanctioned Belarussian entities and persons growing, companies doing business involving Belarus should consider the risk that non-listed entities may have undisclosed ownership or control by sanctioned persons. If a company subject to U.S. or foreign sanctions programs wishes to continue Belarussian business, it would be prudent to work with external counsel and sanctions intelligence providers to assess potential ownership or control, to the extent possible, by sanctioned parties, and consider this information against applicable ownership or control criteria for the U.S., UK, EU, and other relevant sanctions regimes.
- Companies with exposure to Belarus should also plan now for potential additional sanctions on Belarus. The U.S., UK, EU, and other jurisdictions have placed sanctions on different groups of persons or entities, and may, seek to harmonize their lists by adding persons targeted under other regimes. There is also the risk of targets new to all of these regimes. Companies may wish to consider their risk exposures to all entities and persons designated by the U.S. and its allies in order to plan for the impact of potential additional designations.

Table 1: Entities the U.S. Designated on December 2, 2021 that the UK and EU also Designated

Entity Name	Designated by United States	Also Designated by United Kingdom	Also Designated by European Union
140 Repair Plant JSC	X	X Listed on Dec. 18, 2020	X Listed on Dec. 17, 2020
Agrorozkvit LLC	X Wind down License through Mar. 31, 2022		
CJSC Beltechexport	X	X Listed on Dec. 18, 2020	X Listed on Dec. 17, 2020

Foreign Limited Liability Company Slavkali	X		
OOO Gardservis	X		
JSC Agat-Electromechanical Plant	X	X Listed on July 21, 2020	X Listed on Dec. 17, 2020
JSC Transaviaexport Airlines	X		
Kidma Tech OJSC	X		
OJSC Belarusian Potash Company	X Wind down License through Mar. 31, 2022		
Peleng JSC	X		
Republican State Public Association Presidential Sports Club	X		
Republican Unitary Enterprise Tsentrkurort	X		X Listed on Dec. 2, 2021

The information contained in this publication should not be construed as legal advice.

[1] See U.S. Dep't of the Treasury, [Press Release, Treasury Expands Sanctions Against Belarusian Regime with Partners and Allies](#) (Dec. 2, 2021).

[2] *Id.*

[3] See U.S. Dep't of the Treasury, OFAC, [Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked](#) (Aug. 13, 2014) (explaining OFAC's "50% Rule").

[4] See U.S. Dep't of the Treasury, OFAC, [GL 5, § \(a\)](#) (Dec. 2., 2021).

[5] See U.S. Dep't of Treasury, OFAC, [Frequently Asked Question \("FAQ"\) 939](#) (Dec. 2, 2021).

[6] See U.S. Dep't of Treasury, OFAC, [Directive 1 Under Executive Order 14038](#) (Dec. 2, 2021).

[7] See U.S. Dep't of Treasury, OFAC, [FAQ 943](#) (Dec. 2, 2021).

[8] See U.S. Dep't of Treasury, OFAC, [FAQ 942](#) (Dec. 2, 2021); U.S. Dep't of Treasury, OFAC, [FAQ 947](#) (Dec. 2, 2021).

[9] See U.S. Dep't of Treasury, OFAC, [FAQ 946](#) (Dec. 2, 2021).

[10] See U.S. Dep't of Treasury, OFAC, [FAQ 940](#) (Dec. 2, 2021).

[11] See U.S. Dep't of Treasury, OFAC, [FAQ 941](#) (Dec. 2, 2021).

[12] See U.S. Dep't of Treasury, OFAC, [FAQ 948](#) (Dec. 2, 2021).

[13] See European Union, [Official Journal of the European Union](#), Vol. 64 L430I (Dec. 2, 2021).

[14] See Council of the European Union, [Foreign Relations Counsellors Working Party, Restrictive Measures \(Sanctions\) - Update of the EU Best Practices for the Effective Implementation of Restrictive Measures](#), at para. 66 (May 4, 2018) ("EU Guidance").

[15] *Id.* at para. 63.

[16] *Id.* at para. 64.

[17] *Id.* at para. 66.

[18] See United Kingdom, [The Republic of Belarus \(Sanctions\) \(EU Exit\) \(Amendment\) \(No. 2\) Regulations 2021](#) (Oct. 11, 2021).

[19] See HM Treasury, Office of Financial Sanctions Implementation, [Financial Sanctions Notice: Belarus](#) (Dec. 2, 2021).

[20] Schedule 1 to 2019 UK regulations sets out the criteria to be used to interpret these conditions, and includes similar criteria to those set out by the EU although there is considerably more detail and guidance. See United Kingdom, [The Republic of Belarus \(Sanctions\) \(EU Exit\) Regulations 2019, Schedule 1, Rules for Interpretation of Regulations 7\(2\) and 15D\(3\) and \(4\)](#) (Mar. 18, 2019).

[21] See United Kingdom, [The Republic of Belarus \(Sanctions\) \(EU Exit\) Regulations 2019, Regulation 7](#)(Mar. 18, 2019).

[22] See *id.*

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