

# EU Updates Sanctions Best Practices, Clarifying Ownership Threshold for Asset Freeze Restrictions

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The Council of the European Union (Council) has updated its [EU Best Practices for the Effective Implementation of Restrictive Measures](#). Published on 3 July 2024, the new version clarifies the threshold for the ownership test in relation to EU asset freeze restrictions and provides valuable guidance on EU sanctions concepts such as “control” over and “acting on behalf or at the direction” of an entity, amongst other updates.<sup>1</sup>

Perhaps the **most significant change** in the EU Best Practices is that the Council has now specified that ownership means being in possession of **50% or more** of the proprietary rights of an entity or having a majority interest therein for the purpose of EU asset freeze restrictions.

Prior to this update, it had been a broadly accepted view under EU sanctions that the ownership threshold was **more than 50%** of the proprietary rights of an entity. Companies should reflect this important update in their sanctions compliance programs and when assessing their exposure to sanctions risks.

The EU Best Practices are nonbinding recommendations for effective implementation of EU sanctions.<sup>2</sup> In practice, however, EU national competent authorities will likely consider the Council’s recommendations to contribute to a uniform interpretation and application within the EU. The Court of Justice of the European Union (CJEU) has the sole competence to bindingly interpret EU law.<sup>3</sup>

Key updates in the EU Best Practices guidance include:

- **Clarity on the ownership threshold** for assessing whether an entity is owned by an EU-designated person or entity (*i.e.*, subject to an EU asset freeze). The ownership threshold has been amended to specify that ownership means the possession of 50% or more of the proprietary rights of an entity or having a majority interest therein.
- **Ownership interests of EU-designated persons** in an entity should be aggregated to determine whether such entity is owned 50% or more by EU-designated persons.
- Regarding the **control test under EU asset freeze restrictions**, the EU Best Practices include new examples of circumstances that may indicate that an EU-designated person or entity has control over a nondesignated entity. Such examples include large shareholding by EU-sanctioned persons; a buyback option for an EU-designated owner in a management buyout transaction; transfer of shares at a time close to an EU designation; use of front persons; and use of trusts, shell companies and limited liability companies.
- The EU Best Practices have **also amended the concept of “dominant influence”** under the control test criteria to specifically cover the *de facto* power to exercise a dominant influence over a legal entity.

<sup>1</sup> This client alert is for informational purposes only and does not constitute legal advice. Complex assessments often have to be made as to which sanctions regime applies in any given instance, given the multinational touch points of many entities and individuals. In that regard, given the complex and dynamic nature of these sanctions regimes, there may be developments not captured in this summary. Moreover, while the summary was accurate when written, it may become inaccurate over time given developments. For all of these reasons, you should consult with a qualified attorney before making any judgments relating to sanctions, as there are potentially severe consequences for failing to adhere fully to sanctions restrictions.

<sup>2</sup> Per the Council, the EU Best Practices are to be considered nonexhaustive recommendations of a general nature for effective implementation of restrictive measures in accordance with applicable EU laws and national legislation. They are not legally binding and should not be read as recommending any action that would be incompatible with applicable EU or national laws, including those concerning data protection.

<sup>3</sup> See [Article 267](#) of the Treaty on the Functioning of the European Union.

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- With respect to the notion of “**acting on behalf or at the direction**” of an entity, the EU Best Practices state that although ownership and control are distinct from this concept, the effects of acting on behalf or at the direction of an entity should be considered to be on equal footing as ownership and control.

## New EU Ownership Test for Asset Freeze Restrictions

### Ownership Threshold

In the previous version of the EU Best Practices, the language in the main body of the guidance stated that the ownership threshold for assessing whether an entity is owned by an EU-designated person or entity was more than 50% of the proprietary rights of an entity or having majority interest in it.<sup>4</sup>

However, the footnote on the ownership threshold in the old guidance cited the definition of ownership under Council Regulation (EC) 2580/2001 on combating terrorism (Regulation 2580), which states that “[o]wning a legal person, group or entity means being in possession of 50% or more of the proprietary rights of a legal person, group or entity, or having a majority interest therein.”<sup>5</sup>

Despite this inconsistency, it had been widely accepted for years that ownership under EU sanctions for asset freeze purposes meant owning more than 50% of the proprietary rights of an entity.

The new version of the EU Best Practices has reconciled the language in the text of the document with the definition of ownership as set forth in Regulation 2580 (referenced in footnote 20 of the EU Best Practices). Specifically, the guidance provides that ownership means the possession of 50% or more of the proprietary rights of an entity or having a majority interest therein.

The term “interest” is not defined in the EU Best Practices or Regulation 2580. However, it is possible that the EU may look beyond traditional share ownership and review such interests that may be held through trusts, foundations and other business arrangements.

The EU’s “50% or more” ownership threshold is particularly relevant for EU joint venture (JV) partners in noncontrolled 50/50 joint ventures with a JV partner that is designated by the EU.

**The ownership test is relevant to determine whether funds of a nondesignated entity must be frozen.** According to the EU Best Practices, the asset freeze extends to these funds, if the

<sup>4</sup> See paragraph 62 of the Council’s Update of the EU Best Practices for the effective implementation of restrictive measures, issued on 27 June 2022.

<sup>5</sup> See Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

funds are (indirectly) held or controlled by designated persons.<sup>6</sup> According to nonbinding European Commission (Commission) guidance, this can be presumed if a designated person or entity is determined to own or control the nondesignated entity. Many EU operators are following this approach and treating nondesignated entities as sanctioned if they are owned or controlled by a designated entity.

The CJEU is reviewing **two requests for a preliminary ruling** that raise certain considerations regarding the ownership test under EU asset freeze restrictive measures.

- The first case raises the question of whether, under the EU asset freeze measures in Council Regulation (EC) 765/2006, it should be presumed that the funds of a nonlisted company that is owned exactly 50% by an EU-sanctioned entity should be considered to be owned, held or controlled by the EU-sanctioned entity.<sup>7</sup>
- In the second case, the Supreme Court of Latvia has asked the CJEU to interpret the notion of an “associated” entity under the EU asset freeze measures set forth in Council Regulation 269/2014<sup>8</sup> — in particular, whether an entity must be regarded as being “associated” with a sanctioned party if the entity is (indirectly) owned 50% by a sanctioned beneficial owner. The request also raises additional questions or considerations for the CJEU that implicate the 50% ownership threshold.

It remains to be seen whether the CJEU’s decision in these cases will impact the ownership threshold under EU sanctions.

### Ownership Threshold Considerations Under EU Sectoral Sanctions

As discussed above, the EU’s “50% or more” ownership threshold applies to asset freeze restrictions, such as the restrictions set forth in Council Regulation 269/2014 (Regulation 269) under the EU’s Russia sanctions program. However, the EU’s sectoral sanctions against Russia in Council Regulation (EU) 833/2014 (Regulation 833) apply both thresholds — *i.e.*, 50% or more, or more than 50% — depending on the restriction, as well as other thresholds.

<sup>6</sup> See paragraph 62 of the EU Best Practices, which refers to the conditions set forth in paragraph 35 of the EU Best Practices.

<sup>7</sup> See Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) lodged on 1 February 2024 – ‘EM SYSTEM’ UAB v SEB bankas AB, ‘Citadele banka’ Lietuvos filialas AS (Case C-84/24, EM System). The Supreme Court of Lithuania has also asked the CJEU to analyze whether the decision by an EU operator to freeze the funds of a nonlisted company due to its EU-sanctioned owner can be challenged on the basis that the nonlisted company’s funds are not used by, or for the benefit of, the EU-sanctioned owner. To the extent that the CJEU confirms that such decision can be challenged, the Supreme Court of Lithuania has asked the CJEU to clarify the criteria that must be applied to assess whether the funds of the nonlisted company are not used by or for the benefit of an EU-sanctioned party.





<sup>8</sup> See Request for a preliminary ruling from Augstākā tiesa (Senāts) (Latvia) lodged on 9 July 2024.

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For instance, **Regulation 833** applies the “50% or more” ownership threshold in relation to the so-called best effort oversight rule, which requires EU businesses to use their best efforts to ensure that any legal entities outside the EU that they own or control do not participate in activities that undermine EU sanctions. (See our 25 July 2024 client alert “[EU’s 14th Sanctions Package: Compliance Obligations Expand and Exits Are Facilitated.](#)”)

**Regulation 833** applies the “more than 50%” threshold for certain finance and banking restrictions, including capital market restrictions, transaction bans, deposit restrictions and the EU SWIFT ban. Moreover, entities that are owned more than 50% by an entity sanctioned under Regulation 833 are also barred from bringing claims in relation to a contract or transaction whose performance has been directly or indirectly affected by Regulation 833.

The chart below depicts the relevant ownership thresholds that apply for certain EU sanctions.

 <p><b>Asset Freeze</b></p> <p>Art. 2 Reg. 269/2014</p> <p>50% or more</p>	 <p><b>Non-EU Subsidiaries</b></p> <p>Art. 8a Reg. 833/2014*</p> <p>50% or more</p>
 <p><b>Finance, Banking Restrictions</b></p> <p>Art. 5 <i>et seq.</i> Reg. 833/2014</p> <p>More than 50% (or on behalf/at the direction of an entity subject to EU sanctions)</p>	 <p><b>No-Claims Provision</b></p> <p>Art. 11 Reg. 833/2014</p> <p>More than 50% (or on behalf/at the direction of an entity subject to EU sanctions)</p>

\* Recital 28 of Council Regulation (EU) 2024/1745 of 24 June 2024 amending Regulation (EU) 833/2014.

## Aggregating Ownership

In March 2022, the Commission issued [guidance on the asset freeze restrictions in Regulation 269](#) relating to the EU’s Russia-related sanctions program. The Commission’s guidance states that EU operators should take into account the aggregated ownership of an entity to determine whether such entity is owned by EU-designated persons.

The new guidance in the EU Best Practices now confirms that aggregated ownership should also be taken into account when assessing ownership under any EU sanctions regulation for asset freeze purposes.

In practice, it means that EU sanctions apply to any entity owned in the aggregate, directly or indirectly, 50% or more by one or more persons or entities subject to an EU asset freeze, such that the entity itself is considered to be subject to an asset freeze in the EU and all the same restrictions apply to them (even if the entity is not itself listed in an annex of an EU regulation).

## Comparative Analysis With US and UK Sanctions Regimes

**The US approach.** The EU’s “50% or more” ownership threshold is now aligned with that of the US Department of the Treasury’s Office of Foreign Assets Control (OFAC), which has long maintained a “50% rule” in applying sanctions to nonlisted entities held by sanctioned parties. The EU’s position on the aggregation of ownership for asset freeze sanctions also aligns with OFAC’s position under the US blocking sanctions described below.

OFAC imposes blocking sanctions on individuals and entities under various statutes or sanctions-related executive orders. These persons are added to OFAC’s List of Specially Designated Nationals and Blocked Persons (SDN List). US persons are generally prohibited from transacting with, and providing or receiving funds, goods, or services to, from or for the ultimate benefit of, persons on the SDN List.<sup>9</sup> All property and interests in property of designated persons that come within the US or within the possession of a US person must be “blocked” (*i.e.*, frozen).

Under OFAC’s 50% rule, the blocking sanctions also apply by operation of law to any entity owned in the aggregate, directly or indirectly, 50% or more by one or more persons on the SDN List, such that the entity itself is considered to be a blocked person and all the same restrictions apply to them (even if the entity is not itself listed on the SDN List).<sup>10</sup>

<sup>9</sup> The term “US person” is defined as a US citizen or permanent resident (regardless of location, and even if working for a non-US company), an entity organized under the laws of the US or any jurisdiction within the US (including foreign branches), or any person while physically present in the United States.

<sup>10</sup> OFAC, “[Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked](#)” (13 August 2014).

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**The UK approach.** The EU and US' position on ownership and aggregation diverges from the UK's position, where a "more than 50%" ownership rule remains in place. The UK also does not aggregate the ownership interests of designated persons except in limited circumstances.

The table below illustrates these differences.

Issue	US	EU	UK
50% ownership	Yes	Yes	No (>50%)
Aggregate ownership	Yes	Yes	No (**)
Control	No	Yes	Yes (***)
Held	No	Yes*	Yes (^)
Belonging to	No	Yes*	No (^*)

\* Not fully clarified in case law/guidance

\*\* While ownership will not typically be aggregated, it will be in certain circumstances (e.g., where there is evidence of a joint arrangement between the designated shareholders, a designated party controls the shares/rights of another, etc.)

\*\*\* Note that the EU and UK control tests are similar but not identical

^ Some limited guidance is available

^\* This term is not expressly used in UK sanctions regulations, but it is referred to in Office of Financial Sanctions Implementation guidance and is therefore likely to be relevant to a UK asset freeze

## The Concept of 'Dominant Influence' and the Control Test

### De Facto Dominant Influence

EU asset freeze restrictions require that funds and economic resources belonging to, owned, held or controlled by a listed natural or legal person be frozen. For the purposes of assessing control, the EU Best Practices provide a list of criteria that includes a situation where an EU-designated person has the right to exercise dominant influence over an entity, among other factors.

The EU Best Practices have now expanded the scope of the control test to include a situation where an EU-designated person exercises *de facto* dominant influence over an entity (without being the holder of that right), including for example by means of a front company.<sup>11</sup>

The concept of exercising *de facto* dominant influence is not defined in the EU Best Practices. However, considering the diversity of situations that could lead to such type of dominant influence, it is likely that such *de facto* dominant influence will be assessed on a case-by-case basis, taking into account the factual considerations.

<sup>11</sup> See paragraph 64(e) and footnote 21 of the EU Best Practices.

### Red Flag Indicators of Potential Control

The EU Best Practices now provide a nonexhaustive list of examples of circumstances (*i.e.*, red flags) that may indicate that an EU-designated person or entity might exercise control over a nonlisted entity.

These red flags are similar to examples included in the Commission's [guidance note](#) on implementing enhanced due diligence to shield against Russian sanctions circumvention. (See our 28 September 2023 client alert "[EU Commission Issues Guidance for EU Companies on Enhanced Due Diligence To Prevent Sanctions Circumvention.](#)")

The red flags in the EU Best Practices include:

- **Majority shareholding.** The EU Best Practices state that a situation where an EU-designated person is the largest shareholder of a company compared to other shareholders (*e.g.*, a 40% shareholding) may warrant further analysis on whether any of the control criteria in the guidance might apply. For instance, does the EU-designated majority shareholder have the power to appoint the majority of directors in the management board?

The EU Best Practices do not provide a definition for majority shareholding. However, as mentioned above, the EU Best Practices use less than 50% shareholding (*i.e.*, 40% shareholding) as an example to describe a red flag situation that may raise control considerations. This potential red flag indicator raises a number of open questions from a compliance standpoint absent further clarification from the Council.

- **Buyback option.** The EU Best Practices provide that if a company owned by an EU-designated owner is sold to such company's management (*i.e.*, a management buyout) and includes a buyback clause in favor of the EU-designated owner, this type of business transaction may warrant further assessment on whether the EU-designated owner might have control of the company.

- **Transfer of shares at a time close to designation.** Where a relevant number of shares of an entity owned by an EU-designated owner are transferred to a new owner shortly before or after the EU-designated owner becomes sanctioned by the EU, the EU Best Practices state that this type of transaction may suggest that the EU-designated owner might retain influence over the new owner.

The guidance states that a "relevant" number of shares in such transaction is not only a large number of shares but also smaller numbers that enable the EU-designated seller to, for instance, fall below the EU's ownership threshold (*i.e.*, 50%).

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- **Use of front persons.** According to the EU Best Practices, if a new owner of a company is closely connected to such company's previous EU-designated owner (e.g., a family member, former employee or business partner), and, for instance, the sale price of the company appears too low or otherwise abnormal, this type of transaction may involve a front person, and the EU-designated person might still exercise control over the company.

Another example includes a situation where there is a written agreement pursuant to which it appears clear that a nonshareholder or a shareholder with minor shareholdings has the authority to solely decide on the business of the entity.

- **Use of trusts, shell companies and limited liability companies.** The EU Best Practices caution dealing with an entity that is part of a needlessly complex corporate structure that potentially involves entities such as shell companies, limited liability companies or trusts that are linked to an EU-designated person. According to the EU Best Practices, some of these entities may have been established or changed identity shortly before or after EU sanctions were imposed, or before or after the EU designated the relevant person.

The issue of control in the context of a trust structure is under review by the CJEU in a 2023 [case brought before it by the Regional Administrative Court of Lazio](#) (the Lazio Administrative Court). In particular, the Lazio Administrative Court has sent a request for a preliminary ruling to the CJEU, seeking clarification on the interpretation of the asset freeze restrictions in Regulation 269.

The case involves a company vested within a trust whose trustee does not appear to be designated by the EU. The settlor of the trust, however, is subject to an EU asset freeze under Regulation 269. The Lazio Administrative Court has asked the CJEU to clarify whether the assets transferred to a trust could be deemed to "belong" to the settlor or to a person "associated" with it or, alternatively, whether they could be deemed to be "controlled" by the settlor himself, among other considerations.

## The Concept of 'Acting on Behalf'

Certain EU restrictions prohibit dealing directly or indirectly with entities acting on behalf or at the direction of an entity subject to EU sanctions. For instance, the EU transaction ban in the Russian [sectoral sanctions regulation](#) includes such a restriction. The EU Best Practices state that while the notion of acting on behalf or at the direction of an entity is distinct from ownership and control, its effects can be placed on equal footing.<sup>12</sup>

<sup>12</sup> See Judgment of 10 September 2019, [HTTS Hanseatic Trade Trust & Shipping GmbH v Council](#), C-129/18P, EU:C:2019:694, paragraph 79.

The EU Best Practices include **certain criteria that business operators may consider when assessing** whether an entity may be acting on behalf or at the direction of an EU-designated entity. The criteria appears to be consistent with the criteria included in the [Commission Opinion](#) on the notion of acting on behalf or at the direction of an entity in the context of sectoral sanctions set forth in Regulation 833.

The list of criteria in the EU Best Practices includes:

- the precise ownership/control structure, including links between natural or legal persons, entities or bodies;
- the nature and purpose of the transaction, coupled with the stated business duties of the legal person, entity or body;
- previous instances of acting on behalf or at the direction of the listed natural or legal person, entity or body; or
- disclosure made by third parties obtained from credible, reliable and independent sources and/or factual evidence indicating that directions were given by the natural or legal person, entity or body.

## Practical Considerations

According to the Council, the EU Best Practices are nonexhaustive and nonbinding recommendations for effective implementation of EU sanctions in accordance with applicable EU law and national legislation. However, considering that the EU Best Practices are issued by the Council (*i.e.*, the legislator of the sanctions regulations), they express legislative intent, which is a main criterion for the interpretation of sanctions regulations, absent a ruling by the CJEU.

Inconsistencies across various jurisdictions' sanctions programs have made compliance particularly complex. **Understanding to whom sanctions apply is critical.** It does not suffice to check names on a country's designated persons list.

Different liability standards across jurisdictions also increase sanctions-related risk exposure for companies. It is therefore **essential that companies have strong sanctions compliance programs and undertake appropriate levels of due diligence** on their counterparties and transactions.

Companies involved in corporate transactions requiring sanctions compliance representations and warranties should in particular take into consideration the guidance in the EU Best Practices to mitigate potential risk.

Given the increasing levels of sanctions enforcement across many EU member states and the continuing political focus on Russia, ensuring compliance with the EU's sanctions has never been more important.

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