

ACTEC MEETING CHICAGO
September 21, 2024

What if the “Russia Playbook” is applied against other countries?
France

Maryse Naudin
Tirard Naudin

1. European Union sanctions against Russia in a nutshell

European Union (EU) started to impose sanctions on Russia since 2014, following the annexation of Crimea and the lack of implementation of the Minsk agreements.

Since February 24, 2022, the EU has imposed massive and unprecedented sanctions against Russia, following the start of Russia’s full-scale invasion of Ukraine.

The aim of the economic sanctions is to impose severe consequences on Russia for its actions and to effectively thwart Russia’s ability to continue its aggression.

The sanctions include targeted restrictive measures (individual sanctions), economic sanctions, diplomatic measures and visa measures.

Sanctions on individuals consist of travel bans and assets freezes. Sanctions on entities consist of assets freezes.

To hit Russia’s economy, which is highly dependent on the import of services from European companies, the EU has prohibited the provision of certain business-relevant services to the government of Russia or to any legal persons such as companies and other entities or bodies established in Russia.

The ban concerns among other services to Russia and Russian persons:

- accounting auditing, bookkeeping, tax consulting,
- IT consulting and legal advice,
- intellectual property rights and trade secrets (related to goods and technology covered by other sanctions).

In order to address the growing circumvention of EU sanctions, the EU has also decided to further strengthen bilateral and multilateral cooperation with non EU countries and the provision of technical assistance.

A consolidated list of individuals, companies and entities to which assets freezes apply is published and regularly updated by the European Union. The list includes all individuals and assets freezes decided by the EU Council and the United Nation.

Anyone may access this list.

2. French implementation of the European Union sanctions against Russia in a nutshell

The provisions of European directives sanctioning Russia have been fully transposed into French law. They are codified in articles L562-2 et seq. of the Monetary and Financial Code (« *Code Monétaire et Financier* »).

In addition to the list published by the European Union, the French tax authorities (« *Direction du Trésor* ») have published 2 different black lists in the « *Registre national des Gels* » (National register of freezes).

These lists include all assets freezes decided either by the EU Council, the United Nations and/or France, namely:

- The list of frozen companies (« *Liste des personnes morales propriétaires de biens immobiliers faisant l'objet d'un gel en application du règlement (UE)269/2014 Modifié* ») ;
- The list of French frozen real estate properties (« *Liste des biens immobiliers faisant l'objet d'un gel en application du règlement (UE)269/2014 Modifié* »).

Anyone may access these lists.

3. French trusts and « *fiducies* » register and beneficial owner register

3.1. French trusts and *fiducie* register (« *registre des trusts et fiducies* »)

As a reminder, it is impossible to set up trusts or family foundations governed by French law, as it does not know these institutions.

However, French tax residents may be either settlors or beneficiaries of trusts or family foundations governed by foreign laws.

Foreign trusts and family foundations may also be used to own directly or indirectly assets located in France.

The French courts recognize the legal effects of foreign trusts.

The definition of the concept of trust for French tax purposes was introduced in the French Tax Code in 2011. It is wide enough to include, among other legal relationships or entities, all types of trusts, as well as family foundations, regardless their characteristics.

Foreign trusts and family foundations are considered as connected to France, from a French stand point when either :

- One of the settlors, trustees or beneficiaries (receiving or not distributions) is a French tax resident ;
- One of the assets owned through the trust is located in France ;

Are considered as located in France for French tax purposes, movable and immovable assets physically situated in the French territory, as well as corporations (French or foreign) which directly or indirectly own French real estate properties located in France ;

- The trust indirectly owns a real estate property located in France or
- The trust enters into a business relationship in France (as defined by the French Monetary and Financial Code).

Since 2011, trustees of trusts connected to France are subject to reporting obligations which allow the French tax authorities to know :

- the actors of trusts (i.e. Settlers [grantors], trustees, protectors and beneficiaries ;
- The nature, location and market value of the trusts assets.

This information should be reported, by the trustee, annually and upon events which affect the trust's functioning.

Although the French « *fiducie* » seems similar to the concept of trust, it is in fact a very different instrument which may be used as security device but not as an estate planning tool.

A *fiducie* is a contract pursuant to which a company transfers ownership of specifically identified assets, rights or security interests (existing or future) to a « *fiduciaire* ». The latter holds these assets in a segregated estate created for the purpose of that « *fiducie* », until the discharge of obligations under the underlying financing agreement.

The « *fiduciaire* » acts on behalf of one or more « *bénéficiaires* », which usually are, until a default, the company and, after a default, the security agent on behalf of the lenders/bondholders.

French « *fiducies* » as well as foreign trusts should be reported by their trustees (« *fiduciaires* ») to the French tax authorities.

Further to the implementation of these reporting obligations on the trustees and « *fiduciaires* », the French tax authorities have created a French register of trusts and « *fiducies* ».

However, the public access of this register has been limited by the French Constitutional Court (decision dated October 21, 2016) as being contrary to the fundamental principle of the respect of privacy.

From 2016 to 2021, only French authorities were able to access the trusts and « *fiducies* » register.

Since August 27, 2021, this access has been extended to professionals subject to due diligence obligations (including French « *avocats* » [see §4]) and persons having a legitimate interest. They can obtain certain information mentioned in the trusts and « *fiducies* » register.

A special request should be completed by the relevant professionals, providing their identity, address and quality. They should also mention the name of the trust, its address as well as the name of either the settlor, or trustee or protector. They should mention the reasons of their request.

The professionals must undertake not to disclose to third parties any documents or information obtained in response to their requests.

3.2. Beneficial owners register (« *registre des bénéficiaires effectifs* »)

Beneficial owner (« *bénéficiaires effectifs* ») (BO) means an associated natural person who fulfills one of the following conditions:

- The BO holds, directly or indirectly, more than **25%** of the voting rights or capital of the business ;
- The BO has the power to control the company by any other means (e.g. the BO can appoint or remove a majority of the members of the management bodies).

If none of these criteria is met, the BO is the person or persons who legally represent the business (« *gérant* », « *président du conseil d'administration* », etc.).

When the legal representative is a business, the beneficial owner shall be the natural person or persons legally representing that business.

Are subject to the BO reporting:

- Companies and economic interest groups (GIE [*groupements d'intérêt économique* »]) having their registered office in France. Companies include among others, SA (« *société anonyme* »), SAS (« *société anonyme simplifiée* »), SARL (« *société à responsabilité limitée* »), SC (« *Société civile* »), SCI (« *société civile immobilière* »), SNC (« *société en nom collectif* »), SCA (« *société en commandite par actions* »).
- Companies whose registered office is abroad and which has an branch in France ;
- Any other entities such as collective investment undertakings, associations, endowment funds, etc.).

The public access to the French register of beneficial owners finally came to an end in July 31, 2024, as a consequence of a decision of the Court of Justice of the European Union on November 22, 2022.

From July 31, 2024, professionals subject to due diligence obligations (including French « *avocats* » [see §4]) and persons having a legitimate interest, may access information mentioned in the French register of beneficial owners.

A special request should be completed by relevant professionals, providing their identity, address and quality.

The professional must undertake not to disclose to third parties any documents or information obtained in response to the request.

4. Due diligence obligations of French *avocats* entailed by the EU sanctions against Russia

In France, the « *avocats* » are lawyers advising clients on all legal matters and representing them before courts or other dispute resolution body.

It is a regulated profession with specific ethical rules and controlled by a professional body (« *Ordre des avocats* »).

The issue faced by French *avocats* stems from the fact that the prohibition on rendering legal and tax services to Russian clients who are blacklisted is in contradiction with their traditional obligations such as the client attorney privilege (professional secrecy). In fact, this is not a new issue as it has already arisen in respect of their obligation to report suspicious operations in the area of fighting against anti-money laundering and terrorism.

In order to be able to meet their reporting obligations, the French *avocats* have access to the 3 Russian registers mentioned above (§1 and §2) as well as to certain information contained in the French trusts and « *fiducies* » register (3.1) and in the beneficial owner register (3.2).

They have then the possibility (and obligation) to check whether their potential customers, whether individuals or legal entities, are covered by the sanctions against Russia.

The prohibition on advising, acting or representing « blacklisted » Russian clients is very broad. It includes assistance with the preparation and filing of tax returns. The only exception is representation in court.

It is obvious that existing conflicting obligations are not easy to meet.

In practice it is up to each *avocat* to strike a balance between his/her research and reporting obligations and the respect of his/her ethical obligations.
