

The Role of Nuclear Activities for Civil Purposes in the Context of the EU Sanctions Against Russia

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Abstract

As a response to the Russian war against Ukraine, the European Union has adopted a comprehensive sanctions framework which adds further restrictions on activities related to the nuclear sector to the already existing export control and sanctions measures.

The proposed work will focus on Regulation (EU) 833/2014, which imposes restrictions on the importation and/or the exportation of various goods, products and technology, alongside other financial and atypical restrictions related to Russia. Many restrictions therein are carved out by exceptions, allowing otherwise prohibited activities when these deal with, inter alia, the civil applications of nuclear technology.

Against this background, this paper explores the lack of a clear definition of the concept of "civil applications of the nuclear technology" in Regulation (EU) 833/2014 and the dangers that may derive from erroneous interpretations of the exceptions in the Regulation.

Having in mind the intrinsic cross-sector nature of the topic, such as the use of inherently scientific concepts within the regulatory framework of international economic sanctions and export control, this paper highlights two possible outcomes of the misinterpretation of the Regulation's restrictions on nuclear activities. On the one hand, an excessively restrictive interpretation of the exceptions could prevent the beneficial application of nuclear technology, such as the production of clean and renewable energy. On the other hand, an overly liberal interpretation of the restrictions could allow transactions and operations aiming at pursuing a malicious use of the same technology.

Section I: EU restrictive measures against the Russian Federation

The European Union, in a similar fashion to its partner countries (e.g., the US and the UK), has adopted a set of restrictive measures against the Russian Federation since 2014, as a response to the invasion of Crimea. These restrictions have been put into place mainly through Regulation (EU) 833/2014 (hereinafter, "Reg. 833/2014") and Regulation (EU) 269/2014 (hereinafter, "Reg. 269/2014"). After the invasion of Ukraine in February 2022, these restrictions have been comprehensively expanded through ten "sanction packages" which amended and expanded Reg. 833/2014 and Reg. 269/2014.

As of today, commercial relations between EU entities and Russian counterparties are at an all-time low, precisely because of these restrictive measures. As an example, according to an EU Parliament briefing published in March 2023¹, a comparison between October 2021 and October 2022 revealed that EU exports to Russia have decreased by 52% (4.6 billion of US dollars). The two main Regulations abovementioned impose different kinds of restrictions so as to achieve this unprecedented result, that being the entrance into force of the most comprehensive sanctions regime ever adopted by the European Union. Such sanctions regime is structured through two main Regulations. First, **Reg. 833/2014** establishes the EU legal framework under which specific activities are subject to prohibitions or prior authorisations by national authorities. Second, **Reg. 269/2014** sets restrictive measures resulting in the freezing of assets and economic resources directly and/or indirectly belonging to individuals and entities listed in Annex I of the same Regulation.

On one hand the sanctions set forth Reg. 833/2014 may be grouped into 3 macro-categories: restrictive measures related to listed goods (e.g. the prohibition on the export and import of certain of goods), financial measures (e.g. the prohibition to make loans or to deal with transferable securities and money-market instruments with a maturity

¹ *EU sanctions on Russia: overview, impact, challenges*, EU Parliament briefing, Anna Caprile and Aneglos Delivorias, PE 739.366 – March 2023

exceeding 30 days, issued by the major institutions listed in Annex III of Regulation 833 and the prohibition to accept deposits from Russian nationals above EUR 100.000) and "atypical" measures (, such as the prohibition on the provision of accounting, auditing, credit rating, architecture and engineering, legal advice, IT consultancy), and, finally, restrictive measures targeting listed parties².

Concerning measures related to listed goods, Reg. 833/2014 prohibits the exportation to Russia and/or for use in Russia and the importation from Russia of the goods listed in the Annexes of the Regulation itself. These prohibitions constitute the very core of Reg. 833/2014, as they were present since the very first version of the Regulation in 2014 (adopted in response to Russia's invasion of Crimea) and have been greatly expanded ever since. At the same time, they appear to be in line with other sanctions regimes adopted by the EU: Regulation (EU) 267/2012, which imposed sanctions against Iran, had already introduced similar prohibitions.

On the other hand, the impact of the freezing measures posed by Reg. 269/2014 has been undeniably relevant. After the implementation of the 10th "package" of sanctions against Russia through Regulation (EU) 2023/426 and Regulation (EU) 2023/429, a grand total of 1499 individuals and 209 entities have been directly listed under Annex I of Reg. 269/2014³. By way of example, Vladimir Putin, Sergey Lavrov, members of the State Duma and people who helped and maintained Russian military actions in Ukraine are designated. Additionally, the effects of EU designations extend to all those entities owned or controlled⁴ by designated entities/individuals. Consequently, the actual scope of the freezing measures set forth by Reg. 269/2014 is wider than what it may initially appear to be.

Finally, EU legislation on restrictive measures against Russia does not only prohibit conducts explicitly prohibited in Regulations 833/2014 and 269/2014, but also conducts consciously and intentionally aimed at circumventing the prohibitions laid down in those Regulations. Articles 12 of Reg.833/2014 and Article 9 of Reg. 269/2014, using a similar wording, prohibit the '*participation, knowingly and intentionally, in activities with the objective or effect of circumventing the prohibitions*' set out in the Regulations in question.

Section II: EU sanctions and nuclear energy: an overview

As explained in the previous Section, the restrictive measures imposed by the European Union against the Russian Federation have reached an unprecedented level, both by their scope of application and the staggering decrease of trade between the two "blocs".

Such a wide sanction program has certainly not limited itself to the purely military field, nor did it stop at dual-use goods, which is to say, those goods and technologies having both a military and civil use⁵. In fact, extremely wide categories of activities involving Russia and/or Russian actors have been *de jure* or *de facto* made impossible: from the prohibition to import Russian oil if its price is above a certain price cap, to the prohibition to export and sell horses in Russia; from the restrictions to financing activities in the energy sector to the prohibition to engage in transactions with the Russian Maritime Registry, it is difficult to find fields that have not been affected by these sanctions in connection with Russia.

However, as it is often the case with sanctions programs, exceptions to the prohibitions set out by Reg. 833/2014 and Reg. 269/2014 are envisaged. These exceptions are sometimes rather complex and very specific, since they are intended to limit the scope of a single prohibition⁶. At the same time, however, these Regulations also envisage broader exceptions pertaining to vital interests EU law wants to safeguard throughout the entire sanctions program, and that are not limited to a single or few provisions.

As an example, both Reg. 833/2014 and Reg. 269/2014 systematically exclude the application of various prohibitions in view of the so-called "humanitarian exception". This "humanitarian exception" is found in various

² Reg. 833/2014 provides for restrictive measures targeted at specific entities. These provisions, however, do not entail "freezing measures" such as those under Reg. 269/2014.

³ Annex I of Reg. 269/2014 shall likely be further amended by the 11th package of EU sanctions against, which should be adopted in the days following the submission of this paper.

⁴ The main criteria to establish ownership or control have been set out by the Council through the "EU Best Practices for the Effective Implementation of Restrictive Measures".

⁵ See for reference Regulation (EU) 2021/821, which sets up a regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items.

⁶ The prohibition to accept deposits of Russian citizens, for instance, as set out by article 5 b of Reg. 833/2014, does not apply specifically to Russian nationals that hold the EU citizenship as well.

articles of both Regulations⁷, and is further outlined by non-binding guidance instrument published by the European Commission, such as the "*Frequently Asked Questions on Humanitarian Aid*"⁸.

Among all these, EU law also envisages an exception based on the concept of "*civil nuclear capabilities*". This is a "thematic" exception (though less used than the so-called "humanitarian exception") applying throughout the entire sanction program and it is not specifically tied to one or more provisions. The concept of civil nuclear capabilities has been utilised as a thematic exception in numerous provisions of Reg. 833/2014, allowing for otherwise prohibited activities when they pertain to this vital field. In Reg. 269/2014, on the other hand, this exemption cannot be found in explicit terms. This does not mean, however, that Reg. 269/2014 strongly affects the nuclear sector. To the contrary, this Regulation does not provide explicitly for the "*civil nuclear capabilities*" exception because *a fortiori*, no person nor entity specifically involved with the Russian civil nuclear sector has been designated. As a matter of fact, the term "nuclear" is used just 4 times in all the Regulation when describing why three specific individuals have been listed after the adoption of the 10th sanctions "package". It is worth to notice that these descriptions all refer to persons/entities being involved in threats that nuclear weapons would be used, without even mentioning nuclear programs for civil purposes in Russia.

Given the relevance of the explicit exception in Reg. 833/2014 when dealing with civil nuclear capabilities and the notable absence of any impact from the freezing measures of Reg. 269/2014 on the Russian civil nuclear programmes, one may wonder both what "*civil nuclear capabilities*" mean in the context of Reg. 833/2014 and what is the significance of Reg. 269/2014's silence on the topic.

The aim of this paper is to give an in-deep answer to both issues.

Section III: Nuclear for civil purposes in Reg. 833/2014

In light of the above, understanding the role of the concept of "*civil nuclear capabilities*" is essential in order to allow operators to know whether the operations and transactions they are interested in are compliant with the EU restrictive measures against Russia. In this section, we shall analyse the impact of this concept in Reg. 833/2014 and outline the overall lack of a clear definition thereof.

As previously mentioned, the "*civil nuclear capabilities*" exception can be found throughout many prohibitions set out by Reg. 833/2014. More specifically, however, it is possible to distinguish between a proper *exception* and a slightly (albeit fundamentally) different *derogation*.

This distinction is quite typical in the context of the EU restrictive measures: rather often, the prohibitions in Reg. 833/2014 and in Reg. 269/2014 either (i) do not apply to a certain conduct because it meets all the pre-set criteria for a specific exception or (ii) the National Competent Authority of a Member State may authorise an otherwise prohibited transaction, so long as the necessary requisites are fulfilled. An *exception* applies to the former case, and a *derogation* applies to the latter. This dichotomy calls for a double-faced approach when dealing with the prohibitions set out by Reg. 833/2014 and in Reg. 269/2014.

When dealing with an authorisable operation because of a *derogation*, the EU operator should have a rather precise grasp of the criteria provided for by the Regulation and must make complete and coherent information available to the National Competent Authority, to obtain a favorable opinion. Shortly put, the EU operator should provide all the necessary elements to convince the Authority the proposed transaction deserves to be green-lighted. At the same time, however, the intervention of the Authority can be of some comfort to the operator. If the criteria set by the Regulation are not clear, one may take advantage of the Authority's previous rulings, determining the issuance or denial of the authorisation, to better understand said criteria. Moreover, the granting of authorisation by the Authority relieves the operator from (almost) all sanctions risks connected to the transaction: provided that the information the EU operator has notified is correct, the consequences of a subsequent misinterpretation of the

⁷ A total of 14 articles in Reg. 833/2014 provide for the "humanitarian exception", namely articles 2, 2a, 2e, 3c, 3d, 3ea, 3f, 3k, 3l, 3m, 5d, 5l, 5m and 5n. As per Reg. 269/2014, the "humanitarian exception" is provided for by article 2a and it applies to can apply to all designated individuals and/or entities.

⁸ More specifically, these Q&As can be found in Section G, Chapter 7 of the "Frequently Asked Questions on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014".

Regulation resulting in a wrongful authorisation would likely fall on the public administration rather than on the operator.

To the contrary, when dealing with an *exception* to a prohibition, the EU operator is in principle left on its own. Both the evaluation on whether the criteria for applying the exception and the sanctions risks deriving from a misinterpretation of the Regulation befall on the operator. In other words, if one might rely on guidance instruments other than previous authorisations provided for by the Authority, misinterpretation of the guidance and consequent misapplication thereof to the actual transaction still imply a sanctions risk for the operator itself.

As foreshadowed, the duality between the *exception* and the *derogation* is found also when dealing with the concept of "*civil nuclear capabilities*".

For the sake of reference, article 5l of Reg. 833/2014 prohibits to provide direct or indirect support to any legal person, entity or body established in Russia with at least 50% public ownership and/or under public control. Notably, this prohibition applies also to "*financing and financial assistance or any other benefit under a Union, Euratom or Member State national programme and contracts within the meaning of Regulation (EU, Euratom) 2018/1046*". However, paragraph 2, letter d) of article 5l of Reg. 833/2014 provides for a specific *exception*: the prohibition under article 5l does not apply when the transaction is necessary for, *inter alia*, the safety of civil nuclear capabilities.

A *derogation* can be found, instead, with respect to article 3k which prohibits to export, sell and/or transfer to Russia or for a use in Russia goods listed in Annex XXIII of the same Regulation. This prohibition is very relevant for the nuclear sector, as Annex XXIII encompasses products such as pumps, valves and engines sometimes used in nuclear plants. In this case, paragraph 5, letter c) of article 3k of Reg. 833/2014 states that the National Competent Authority of a Member State may authorise a transaction otherwise prohibited under article 3k provided that it is necessary for, *inter alia*, the safety of civil nuclear capabilities.

The possibility to apply for an authorisation when dealing with civil nuclear capabilities in Reg. 833/2014 is also found in seven further provisions, namely:

- Article 2 and article 2a, prohibiting the exportation to Russia or for a use in Russia of goods listed in Annex VII.
- Article 3ea, prohibiting the entrance of Russian-flagged vessels in EU ports.
- Article 3g, prohibiting the importation from Russia of goods listed in Annex XVII.
- Article 3i, prohibiting the importation from Russia of goods listed in Annex XXI.
- Article 5k, imposing restrictions on public procurement contracts.
- Article 5n, imposing restrictions on the provision of professional services to Russian entities.

It follows that, in most cases, the EU operator confronted with a transaction potentially restricted under Reg. 833/2014, but dealing with the civil nuclear sector, may in theory benefit from the National Competent Authority's judgement. On the contrary, in the case of article 5l, the operator would be bound to determine on its own whether the relevant exception applies to the specific transaction⁹.

First and foremost, to understand when the commercial operators effectively can benefit from the "*civil nuclear capabilities*" exception and/or derogation, one is left to look to the letter of Reg. 833/2014.

To this end, it should be pointed out that the "*civil nuclear capabilities*" exception and potential authorisation are not provided for with the exact same language in all the relevant provisions of Reg. 833/2014. More specifically:

⁹ Certain authorities among EU Member States, however, may provide a "comfort letter" regarding the conformity of an operation with Reg. 833/2014 despite the fact that the Regulation does not provide for an exception. For the sake of reference, the German Competent Authority, the Federal Office for Economic Affairs and Export Control ("BAFA"), is invested of such power. Outside of the EU, the Swiss Competent Authority, the State Secretariat for Economic Affairs ("SECO"), provides for similar "comfort letters" when dealing with the Swiss sanctionatory regime which is similar to that adopted by the EU. Other authorities, however, are not invested of such power: for instance, the Italian Competent Authorities cannot issue any "comfort letter".

- Article 2 and 2a provide for an authorisation when the relevant transaction is "*intended for the operation, maintenance, fuel retreatment and safety of civil nuclear capabilities, as well as civil nuclear cooperation, in particular in the field of research and development*".
- Article 3ea allows for an authorisation in connection to transaction for the "*transport of nuclear fuel and other goods strictly necessary for the functioning of civil nuclear capabilities*".
- Article 3g, 3i, 3k and 5n provide for an authorisation when an operation is deemed "*necessary for the establishment, operation, maintenance, fuel supply and retreatment and safety of civil nuclear capabilities, and the continuation of design, construction and commissioning required for the completion of civil nuclear facilities, the supply of precursor material for the production of medical radioisotopes and similar medical applications, or critical technology for environmental radiation monitoring, as well as for civil nuclear cooperation, in particular in the field of research and development*".
- Article 5k and 5l, in a similar fashion, introduce the possibility to authorise otherwise prohibited transaction when they are necessary for the "*operation, maintenance, decommissioning and radioactive waste management, fuel supply and retreatment and safety of civil nuclear capabilities, and the continuation of design, construction and commissioning required for the completion of civil nuclear facilities, as well as the supply of precursor material for the production of medical radioisotopes and similar medical applications, critical technology for environmental radiation monitoring, as well as civil nuclear cooperation, in particular in the field of research and development*".

A careful reading of these provisions can certainly provide for some guidance to commercial operators on what circumstance may better persuade the National Competent Authorities to release the authorisation for civil nuclear applications. For instance, if one were to require an authorisation under article 3k, the term "continuation" makes it more reasonable to foresee a positive response from the Authority if the operator intends to export goods in the context of an already ongoing "civil nuclear capabilities" project. When dealing, instead, with the authorisation under article 3ea, a closer look at whether actual nuclear fuel is being transported by a Russian-flagged vessel may be a strong element to persuade the Authority.

In any case, it is rather clear that all exceptions and derogations listed above have one goal in common: they aim at protecting "*safety of nuclear civil capabilities*", "*civil nuclear facilities*", "*civil nuclear cooperation*". For the sake of brevity, in this paper we shall refer to this plethora of expressions as "*civil nuclear capabilities*".

The different languages of the above-mentioned articles, however, do not outline clearly enough the scope of the "*civil nuclear capabilities*" to allow EU operators to fully understand when they may, in practice, benefit from the exception or derogation.

No authorisation can be granted, and no exception can be applied if the overall transaction is not intended for the development and/or safeguard of "*civil nuclear capabilities*". However, except for the indications highlighted above, the cited articles of Reg. 833/2014 do not offer a definition of this concept.

The question on the meaning of "*civil nuclear capabilities*" under Reg. 833/2014, however, may *prima facie* seem rather simple. One could be tempted to say that all activities pertaining to a nuclear plant for the production of electricity should fall in this category, whereas all nuclear weapons related activities should be excluded. A closer look to the issue, however, quickly reveals how more complex and nuanced the issue is.

For instance, if an EU operator wished to provide engineering documentation to Russian entities for the construction of a civil nuclear plant, should the authority grant a derogation to the prohibition to provide engineering services under article 5n of Reg. 833/2014, given that there is little to no way to ensure that, once in the hand of Russian counterparties, the documentation will not be used for non-civil purposes? Another example may concern end-users: one may think that the "Russian Federal Nuclear Center – All-Russian Research Institute of Experimental Physics" is a civil end-user by default, and yet Annex IV of Reg. 833/2014 lists it among the military end-users. Actual cases reveal the bitter truth: without proper definitions, even seemingly clear concepts in juridical instruments can create confusion among commercial operators.

One way to try to ease the interpretation issue is to look at National Competent Authorities' guidance provided when dealing with the "*civil nuclear capabilities*" derogations. Indeed, Authorities may provide some comfort, in

theory, when issuing authorisations or denials under derogation set out in Reg. 833/2014, since, in doing so, they reveal further criteria aimed at establishing whether certain operations can benefit from the mentioned derogations.

The "comfort" that the National Competent Authorities may provide in defining the concept of "*civil nuclear capabilities*" remains, to date, merely theoretical. As a matter of fact, EU authorities have scarcely dealt with the issue at hand. One should always bear in mind, as far as interpretation of EU sanctions is concerned, that many National Competent Authorities do not publish all their decisions on queries submitted to them.

In the case of Italy, for instance, the Italian authorities have not yet released¹⁰ any authorisation with reference to civil nuclear applications. Even more relevantly, it remains unclear which authority (whether the the "*Comitato di Sicurezza Finanziaria*" ("CSF") or the "*Unità per le Autorizzazioni di Materiale d'Armamento*" ("UAMA"), the two main regulatory bodies when dealing with EU restrictive measures in Italy), would have the authority to grant authorisations under article 5n of Reg. 833/2014. Article 5n imposes restrictions on the provision of certain professional services to Russian entities, including engineering services. Therefore, if Italian operators wanted to operate in the Russian nuclear field by providing engineering services would not know which authority to call upon to apply for the "*civil nuclear capabilities*" derogation.

It is particularly important to note, with reference to the scarcity of decisions on the "*civil nuclear capabilities*" issues, that the position taken by one or even more EU National Competent Authorities would not be binding on operators from a different EU Member State. This is a generally accepted conclusion drawn from article 215 of the Treaty on the Functioning of the European Union ("TFUE"): under such provision, the Council, acting by a qualified majority, is the main institution invested of the power to adopt restrictive measures against other countries under EU law. If National Competent Authorities had the power to adopt decisions binding on the operators of all EU Member States, they would be effectively amending, adopting or anyway modifying EU restrictive measures in plain violation of article 215 TFUE.

In light of above, even if, for instance, the German Competent Authority, the Federal Office for Economic Affairs and Export Control ("BAFA") were to give precise instructions on the criteria to be taken into consideration when dealing with "*civil nuclear capabilities*" authorisations, the same criteria would be in no way binding for other EU operators. Therefore, the decision of the authority from a different Member State is of little comfort to the commercial operators.

Given the above outlined lack of precise and comprehensive criteria from national authorities, the scenario is as follows: under Reg. 833/2014, various commercial activities related to Russia and Russian entities are prohibited and/or restricted. At the same time, however, the Regulation often allows the National Competent Authorities to authorise otherwise prohibited transactions when they deal with "*civil nuclear capabilities*", but the lack of decisions on the matter and the limited scope of these decisions does not offer a precise definition of the concept. When dealing with the explicit *exception* under article 5l, the operator is left even more on its own in determining what "*civil nuclear capabilities*" mean.

The consequences of breaching EU restrictive measures can be dire: several countries, such as Italy, provide for criminal punishment for the intentional violation of the measures outlined in Reg. 833/2014; others, such as Latvia, punish even violations by negligence with a criminal penalty. When faced with these kind of penalties, therefore, commercial operators understandably need precise instructions on how to act.

Since the above cited articles do not provide for a clear definition and the National Competent Authorities' decisions are unlikely to be the right instrument to solve the issue, one may investigate other articles of Reg. 833/2014. None of them, however, touch upon the concept: even article 1 of Reg. 833/2014, which defines several key concepts and expressions used in the Regulation, does not outline the concept of "*civil nuclear capabilities*". Absent a definition in Reg. 833/2014, it would be reasonable to look into its "sister" Regulation, Reg. 269/2014, the other major instrument imposing restrictive measures against Russia. Once again, the answer remains identical: the concept at hand is not defined in any way.

¹⁰ At the date of finalising this Paper.

Often enough, relevant clarifications on the interpretation of Reg. 833/2014 can be found in EU authoritative guidance instruments. The Council has published the "*EU Best Practices for the effective implementation of restrictive measures*" ("Best Practices"). This instrument is particularly important as it provides guidance by the Council, the same EU institution adopting the Regulation at hand. Moreover, the European Commission has adopted the "*Frequently Asked Questions on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014*" ("FAQs"), a useful (albeit non-binding) Q&A instrument for the interpretation of both Reg. 833/2014 and Reg. 269/2014. Regrettably, neither of these guidance instrument provides any definition or relevant criteria to make the "*civil nuclear capabilities*" clearer to the commercial operator.

In light of the above, we note that Reg. 833/2014 often provides for *exceptions* or *derogations* to the prohibitions therein based on the concept of "*civil nuclear capabilities*". Such concept, however, is not clearly defined by the Regulation itself, by relevant guidance instruments or by the "sister" Reg. 269/2014. At the same time, the opinions of National Competent Authorities on the matter have been scarce and, in any case, their value is limited by the boundaries of each individual EU Member State, therefore they cannot be the one and only saviour in this search for the correct scope of application. Given the outlined absence of clarity, EU commercial operators are left with the (almost) forced option to look outside the core of the sanction regime against Russia, so as to find other relevant guidance and analogies which may shed light on a rather obscure concept.

Section IV: The concept outside of Reg. 833/2014: possible solutions?

The purpose of this section is that of looking into relevant instruments other than Reg. 833/2014 and its specifically connected guidance in order to better understand the scope of the "*civil nuclear capabilities*" concept. By adopting specific legal terminology, in this section we shall use the argument by analogy.

The argument by analogy is a long-established method of decision making which can be found both in civil law judicial systems, generally intended as a way to fill a gap in a code, and in common law judicial systems, therein intended to justify the application of the *ratio decidendi* of a precedent to a new case¹¹. Provisions allowing for the argument by analogy to be used in EU Member States' laws are widespread¹². Moreover, the European Court of Justice has often used it to interpret EU law. It is therefore well within the EU commercial operators' possibilities to have their doubts on EU law clarified by an argument by analogy, when suitable.

Other relevant EU legal instruments which may touch upon the "*civil nuclear capabilities*" or even specifically define it may thus offer some guidance to the interpretation of the term. The *rationale* behind invoking this kind of instruments is rather simple: if EU legislation intended for a provision to have a certain meaning in a Regulation, the same meaning may likely be applied to the same concept in another legal instrument, provided nothing explicitly bars it.

When dealing with both the matter of nuclear energy-related activities and international economic sanctions adopted by the European Union, the relevance of Regulation (EU) 267/2012 ("Reg. 267/2012"), imposing restrictive measures against Iran, is almost self-evident.

Reg. 267/2012, as it is well known, provides for a set of restrictive measures against Iran which still remain focused, for the most part, on the nuclear sector. It is no news that these measures have been drastically reduced after January 2016, with the arising hope that the Joint Comprehensive Plan Of Action ("JCPOA") would gradually solve Iran-related issues for all parties involved.

Even after many provisions of Reg. 267/2012 have either been changed or fully amended, it is still relevant to note, to this day, that article 28b of said Regulation allows National Competent Authorities to authorise the release of frozen funds if they are necessary for the "*civil nuclear cooperation projects described in Annex III of the JCPOA*". This provision is noteworthy, for a series of reasons: first of all, it provides for a specific reference to

¹¹ *Argument by analogy in European Law*, Katja Langenbucher, The Cambridge Law Journal, 57, 3, p. 481 (1998)

¹² For the sake of reference: Italian Civil Code, Art. 12 *Preleggi; a contrario*, the "strict interpretation" of criminal law under the French "*Code Pénal*" prohibiting the argument by analogy specifically when dealing with criminal and administrative penalties; Spanish Civil Code, Art. 4; *et similia*.

which activities can be considered part of the "civil nuclear cooperation". Moreover, the provision shares similarities to the "*civil nuclear capabilities*" derogations under Reg. 833/2014, since it allows the authorisation of otherwise prohibited transactions because they ultimately pertain to the civil nuclear sector.

It is therefore possible to conclude that EU commercial operators may look at Annex III to the JCPOA, analyse the operations therein and get a rather solid idea on what the EU legislation, in a very similar context to that of Reg. 833/2014, intended for the civil nuclear sector and activities pertaining to it. It would be safe to assume that transactions meeting all the explicit criteria under the "*civil nuclear capabilities*" derogations (e.g., being part of an ongoing nuclear cooperation project) and sharing the same nature of those in Annex III to the JCPOA would have a good chance to be authorised by the National Competent Authorities.

On a second note, Annex III to the JCPOA can be particularly useful for commercial operators who are not very well versed in the technicalities of the nuclear sector, but may nonetheless be involved in a nuclear-related transaction. In this case, practical examples of the EU legislation's idea of the civil nuclear sector may be of use in understanding one's compliance with Reg. 833/2014.

Other EU legal instruments have the potential to provide for some clarification by analogy to the commercial operators, such as the EURATOM Directives¹³ and the overall EURATOM legal framework, though they do not necessarily share the same similarities with Reg. 833/2014 that Reg. 267/2012 has and, generally speaking, they may not provide for specific practical examples of civil nuclear operations.

A second set of instruments which may be taken into consideration, when dealing with the argument by analogy, is guidance and legislation not strictly adopted under EU law, but sharing connections and/or similarities with it.

One could take into consideration, for instance, the International Atomic Energy Agency ("IAEA") and its 1957 Statute. As a matter of fact, under article III, par. A of the Statute, the IAEA's function is that of "*encourag[ing] and assist[ing] research on, and development and practical application of, atomic energy for peaceful uses throughout the world*". Furthermore, under article III, par. B of the Statute, the IAEA shall "*establish control over the use of special fissionable materials received by the Agency, in order to ensure that these materials are used only for peaceful purposes*". In light of the above, a commercial operator may very well assume that working within the boundaries of an IAEA sponsored project would entail dealing with exclusively with nuclear energy for civil purposes and, therefore, the criteria for the "*civil nuclear capabilities*" derogations and exceptions under Reg. 833/2014 would be met. However, as much as with any analogy with extra-EU law instruments, the matter is not as simple as it looks.

First of all, the concept of "peaceful" and that of "civil" do not necessarily have the exact same scope. For instance, when dealing with outer space activities (which often involve nuclear-fuelled spacecrafts), the "peaceful uses of outer space" have sometimes been interpreted as including military uses aiming at State's self-defence as allowed for by the Charter of the United Nations. It is therefore possible that, in certain instances, operations potentially deemed as "peaceful" may not be "civil", but rather embedded within the military complex. More in general, one should always remember that, when applying the argument by analogy with instruments falling outside of EU law, the likelihood that definitions and terminology therein may differ in their meaning from that of EU law instruments is always present.

Though the application of the argument by analogy, both within and outside of EU law, may help clarify whether actual operations can be considered to be for civil nuclear purposes, there remains a certain degree of uncertainty as per the meaning of the "*civil nuclear capabilities*" derogations and exceptions in Reg. 833/2014.

Section V: Nuclear for civil purposes in Reg. 269/2014: the Rosatom case

¹³ As an example, COUNCIL DIRECTIVE 2009/71/EURATOM, applies to "*any civilian nuclear installation subject to a licence*". Though the Directive *per se* does not define this civilian application, one may look at the licenses granted by a Member State's Authority under this Directive so as to identify an example of a civil nuclear installation.

As explained in Section I, Reg. 269/2014 does not provide for any "*civil nuclear capabilities*" exceptions or derogations, rather it does not directly affect Russia's civil nuclear sector as no person or entity involved in it is listed under Annex I to the Regulation itself.

Under Reg. 269/2014, therefore, EU operators are left with little to no doubt: there are no exceptions to be interpreted and no criteria for derogations to be anticipated when dealing with the nuclear sector; rather, one should simply make sure its counterparties are not directly or indirectly listed under Annex I, bearing in mind that the main actors of the field in Russia are not listed. This situation, however, may not remain so for a long time: already in the weeks leading the adoption of the "10th package" of EU sanctions against the Russian Federation, rumours spread about several parties asking for Rosatom State Atomic Energy Corporation ("Rosatom" or "the Company") to be listed under Annex I of Reg. 269/2014. Though this listing did not take place, in the last hours leading to the adoption of the "11th package" of EU sanctions against Russia, the listing of Rosatom, albeit once reasonably to be excluded, was sought upon by many. For instance, Poland and the Baltic states proposed to target the Company by limiting imports of nuclear fuel, stopping new investments into power plants and restricting exports to Russia that will benefit this industry. In this view, the first step to reach the goal would be to target Rosatom's top executives by listing them in Annex I of Reg. 269/2014. At the same time, it is no secret that Ukraine has long supported a further extension of sanctions toward the Russian nuclear sector¹⁴. These continuous pressing and requests beg for the question: what would happen if the EU were to list Rosatom under Annex I of Reg. 269/2014?

The listing of Rosatom under Annex I of Reg. 269/2014 would imply (i) the prohibition to make funds and economic resources available, directly or indirectly, to the Company and (ii) the freezing of all funds and economic resources held by the Company. In a nutshell, operating with Rosatom and with the Company's subsidiaries all over the world would become impossible for EU operators.

This listing would thus have the potential to severely affect certain Russian military programs deeply connected to the nuclear field, such as the nuclear-powered fleet being built by Atomflot, one of Rosatom's subsidiaries, a business some EU entities appear to be involved in¹⁵. At the same time, however, Rosatom is involved in numerous civil nuclear projects around the world, such as the construction of two units of the Paks nuclear power plant in Hungary¹⁶ or the construction of Egypt's first nuclear power plant in El-Dabaa. Therefore, the sanction of Rosatom could cause a severe break to the development and the functioning of these facilities, causing equally severe economic damages to the beneficiary countries and entities of such projects.

The impact of Reg. 269/2014 on "*civil nuclear capabilities*" can therefore be summed up as follows: to date, the Regulation does not prevent EU entities from engaging in relevant operations in the Russian nuclear sector or in nuclear project elsewhere in the world where Rosatom is involved. Since all relevant Russian actors in the field are not listed in Annex I, Reg. 269/2014 does not provide for derogations or exceptions to be interpreted in the same fashion as Reg. 833/2014. The situation may however change, should stricter measure affect Rosatom – thus potentially causing for far more complex issues than the interpretation of the concept of "*civil nuclear capabilities*".

VI. Conclusions

Regulation (EU) 833/2014 and Regulation (EU) 269/2014, constituting the very bulk of the EU restrictive measures against Russia, are intimately connected with the civil nuclear sector.

More specifically, Reg. 833/2014, restricting, *inter alia*, exportation and importation to/from Russia, provides for *exceptions* and *derogations* to the provisions therein when the otherwise prohibited operations deal with the "*civil nuclear capabilities*". Regrettably, the concept at hand is not sufficiently clarified: the language of the Regulation can only suggest so little to its scope of application, while relevant guidance thought specifically for EU sanctions against Russia is silent on the topic. At the same time, other instruments have both been reluctant to address the

¹⁴ As per Politico, Ukrainian Deputy Prime Minister Yulia Svyrydenko, in the late stages of the drafting of the "10th package" of EU sanctions against Russia, asked for EU sanctions to focus on Russia's nuclear industry, especially after Moscow's withdrawal from nuclear arms control treaties.

¹⁵ EU Parliament Question to the Commission, E-000068/2023, 11.1.2023

¹⁶ Idibem note 17

issue and, even if or when they did, they proved to be intrinsically insufficient for fully clarifying the meaning of the concept.

The National Competent Authorities, for one, have scarcely provided opinions on "*civil nuclear capabilities*" derogations. At the same time, the decision of one Authority offers little to no comfort to the commercial operators of different EU Member States. Similarly, attempting to solve the issue by analogy offers only few clarifying options – after all, looking at other legal instruments to interpret Reg. 833/2104, especially if those legal instruments were not adopted in the EU law framework, may naturally provide clarification only to a limited degree.

It follows therefore that, while Reg. 833/2014 offers several exceptions and derogations to its prohibitions when dealing with "*civil nuclear capabilities*", the scope of this concept is clear, leaving EU operators in a state of potentially detrimental uncertainty.

Reg. 269/2014, conversely, does not provide for any exception or derogation when dealing with "*civil nuclear capabilities*", but rather avoids any (*rectius*, most) negative effects on the civil nuclear field because it does not feature any relevant Russian civil nuclear operator in Annex I to the same Regulation. One should be aware, however, of the ever-growing pressure from various actors for the listing of Rosatom in said Annex I – a game-changing event which, albeit still far from coming true in the short period, would have heavy consequences on the world-wide functioning of the nuclear sector.

The sole "comfort" of such a historic decision would be that of eliminating all interpretation issues on the "*civil nuclear capabilities*" under Reg. 833/2014 – there would be very little room left for speculation on those should Rosatom be fully prohibited from working with EU operators.