HERBERT SMITH FREEHILLS

Response to the Public Consultation on Australia's sanctions relating to Russia, Crimea and Sevastopol

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1. This is a submission made in response to the amendments to the *Autonomous Sanctions Regulations 2011* (Cth) that are proposed in the exposure drafts of the *Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2014* (Cth) (**the draft Regulation**) and the *Autonomous Sanctions (Russia, Crimea and Sevastopol) Specification 2014* (Cth) (**the draft Specification**).

2. This response has been prepared by Herbert Smith Freehills LLP (**HSF**) on behalf of a group of clients comprising nine leading global investment banks, each of whom have operations in Australia, the US, the EU and elsewhere around the world. Our clients have been at the forefront of implementation of the sanctions which the US and the EU have imposed in response to the situation in Ukraine, and accordingly welcome the opportunity to comment on the proposed Australian measures.

3. HSF is a leading international law firm with significant experience of advising on intentional sanctions, in particular in recent months the Russia/Ukraine regime. Our response draws on our Australian, London and US offices. We hope that our practical experience of advising on compliance with the EU and US sanctions (and in particular some of the issues and interpretational difficulties in doing so) will be useful in informing the development of the Australian measures.

4. As a general matter, our clients welcome the fact that the proposed Australian measures are closely aligned with the EU and US legislation. Our clients are global institutions with global policies, procedures, systems and controls. Our clients are committed to compliance with all relevant sanctions regimes. Operationally, however, it can be a very significant challenge to implement systems to address multiple overlapping but different prohibitions. A multiplicity of marginally different prohibitions, definitions or exceptions gives rise to potential confusion, additional costs, and a greater risk of error. It also increases the

possibility of 'regulatory arbitrage' on the part of any persons who wish to take advantage of the differences between regimes.

5. The difficulties created by inconsistencies between regimes are particularly pronounced in relation to the Russian sanctions, since aspects of the regimes (notably, the so-called 'capital markets' or sectoral restrictions relating to new debt and equity issued by certain entities) are completely novel, and are therefore not readily addressed by pre-existing compliance processes such as screening against sanctions lists. Instead, they can require significant manual intervention to ensure compliance.

6. Accordingly, our principal comments are directed at:

    a. seeking as much alignment between the regimes as possible; and

    b. seeking to address some of the practical difficulties in interpretation and implementation that have arisen, particularly in the EU context.

7. The points that we would highlight as being of particular importance are:

    a. the scope of the entities which are subject to the capital markets restrictions – and in particular the inclusion in the draft Regulation of entities "controlled" by the restricted entities (rather than merely owned by them, as in the EU and the US). This is likely to give rise to very significant variation as to the scope of the sanctions as between different regimes and require significant additional work to achieve compliance; and

    b. the need for clarity as to the position of derivative instruments which reference transferable securities issued by the restricted entities. We would strongly suggest the introduction of a provision equivalent to the US Office of Foreign Assets Control (**OFAC**) General Licence 1A, as explained in more detail below.

8. We have also highlighted areas where we consider that additional guidance or Frequently Asked Questions (**FAQs**) (as have been issued by OFAC) would be of considerable assistance to companies in seeking to comply with the sanctions. We and/or our clients would be very happy to assist with the development of such

questions, based on our experience of the areas which have, in practice, required clarification under the EU and US regimes.

9. This response focuses first on the capital markets restrictions, which are of particular relevance and importance to our clients. In the second section of our response we make a number of observations in relation to the restrictions on the supply of goods and related services. We have not sought to comment comprehensively on all aspects of the new sanctions, but rather have focused on a selection of points of potential relevance. We would be happy to provide further detail if required.

Section 1: Capital markets restrictions

Restricted entities

10. Pursuant to draft regulation 23 (new regulation 5A(6)), entities subject to the capital markets restrictions comprise:

    a. those specified by the Minister in an instrument under the Regulation;

    b. "a body corporate or other entity that is incorporated, or was established, outside Australia and is over 50% owned or controlled by an institution, body corporate or entity referred to in [(a)]" (subsection (6)(d)) (emphasis added); or

    c. "a body corporate or other entity acting on behalf of, or at the direction of, an institution, body corporate or entity referred to in [(a) or (b)]" (subsection (6)(e)) .

11. The equivalent test in the EU to that in paragraph 10.b above is (pursuant to Council Regulation (EU) No 833/2014, as amended (**the EU Regulation**) that the person is:

> "a legal person, entity or body established outside the Union whose proprietary rights are directly or indirectly owned for more than 50% by an entity listed in Annex [III, V or VI]" (see Articles 5(1)(b) and 5(2)(c)).

12. It follows from the above that the EU has, in relation to the capital markets restrictions (and in contrast to the normal position in relation to asset freezes), focused on a test of ownership rather than control.

13. This is also the case in the US. The OFAC "50% rule" applies to the US capital markets (SSI) sanctions as well as the asset freeze (SDN) sanctions, and OFAC has issued an FAQ in relation to the 50% rule as follows:

> **"398. Does OFAC consider entities over which one or more blocked persons exercise control, but do not own 50 percent or more of, to be blocked pursuant to OFAC's 50 Percent Rule?**
>
> No. OFAC's 50 Percent Rule speaks only to ownership and not to control. An entity that is controlled (but not owned 50 percent or more) by one or more blocked persons is *not* considered automatically blocked pursuant to OFAC's 50 Percent Rule. OFAC may, however, designate the entity and add it to the SDN List pursuant to a statute or Executive order that provides the authority for OFAC to designate entities over which a blocked person exercises control. OFAC urges caution when considering a transaction with an entity that is not a blocked person (a non-blocked entity) in which one or more blocked persons have a significant ownership interest that is less than 50 percent or which one or more blocked persons may control by means other than a majority ownership interest. Such non-blocked entities may become the subject of future designations or enforcement actions by OFAC. [08-13-2014]"

14. The Australian draft regulation would therefore cover a much broader range of entities than those covered by the EU or the US regimes and apply a different test to determine which entities are covered.

15. A separate point in relation to the coverage of entities which are "over 50% owned by" the listed entity is how this 50% test will be applied to complex ownership structures. Experience suggests that the entities which are affected by the capital markets restrictions rarely have straightforward ownership structures, and an "over 50%" test can be applied in a number of ways. To take an example, in a relatively straightforward scenario where a listed entity (X) owns 75% of entity Y, which in turn owns 51% of entity Z, does X own over 50% of Z? The possibilities would include:

    a. X owns 0% of Z (because the test only relates to direct ownership);

    b. X indirectly owns 38.25% of Z (because X owns 75% of 51% of Z); or

c. X indirectly owns 51% of Z (because X owns 75% of Y, Y is deemed to be a restricted person and Y's entire shareholding in Z is therefore taken into account).

16. Option (c) is the approach taken in the US. The position in the EU is less certain although it is likely to be (b). In any event, it would be of significant assistance for the position to be clear in respect of the Australian sanctions regime, so that firms can identify which companies are subject to the sanctions and are thereby able to comply with the sanctions. Related questions include whether the minority interests of two restricted entities should be aggregated if together those interests comprise a holding of over 50% of a company.

17. We would suggest that guidance or FAQs on the application of the test would be of significant assistance. We note that OFAC has issued a number of FAQs on its interpretation of the 50% rule, which we think provide a very helpful base set of scenarios for consideration of the equivalent Australian position (see FAQs 398 to 402 of the OFAC FAQs, available at: http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx#sectoral).

18. An additional issue in relation to the scope of the entities which are subject to the sectoral sanctions is the exemption of subsidiaries which are incorporated in Australia. This is, of course, a parallel to the EU's exemption of subsidiaries which are incorporated within the EU. Our concern in this area is the application of the exemptions on a global basis. Under the Australian sanctions, it would be prohibited to deal with the debt of an EU subsidiary of a listed entity; but under the EU sanctions it would be prohibited to deal with the debt of an Australian subsidiary of a listed entity. If a firm adopts the approach of complying with both the EU and Australian sanctions (irrespective of jurisdictional applicability), the net result is that no-one is regarded as exempt. We recognise that this issue arises under the pre-existing position (because the EU does not exempt Australian subsidiaries), but it is exacerbated if the Australian sanctions effectively render the EU exemption redundant. Our suggestion would therefore be that Australian sanctions exempt both Australian and EU subsidiaries.

19. Finally, and as noted above, the final limb of the definition captures entities which act "on behalf of or at the direction of" the listed entities. We note that in practice there has been significant difficulty for firms in seeking to establish the

circumstances in which a company may act "on behalf of or at the direction of" a listed entity. There are some obvious examples (such as a special purpose vehicle incorporated in order to raise finance) that would be covered, but a much broader range of scenarios where the position is less clear, including minority owned subsidiaries of the listed entities, connected parties, and even, potentially, fund vehicles managed by the listed entities. Since the wording of this limb reflects the wording of the EU Regulation, and because of the importance of ensuring that the sanctions are not circumvented, we would not suggest that the limb be deleted altogether. We do, however, consider that this would be another area where guidance on the criteria to be adopted in assessing whether an entity is covered, and/or guidance which provides examples of the sorts of scenarios which would and would not be covered, would be very beneficial. As noted above, our clients would be very happy to assist with developing such guidance, for instance by providing examples of the sorts of circumstances in which the test may need to be applied.

Restricted types of securities

20. We have two minor comments and one significant comment in relation to the types of securities which are covered by the restrictions, pursuant to draft regulation 23, amending regulation 5A(5).

21. As to the minor points:

a. Draft regulation 5A(5) would impose restrictions relating to:

> "bonds, equity, transferable securities, money market instruments or other similar financial instruments".

A definition is added (by draft regulation 1) to regulation 3, that:

> "***tradeable securities*** means transferable securities, other than instruments of payment, that are negotiable on the capital market …"

We therefore assume that the reference in 5A(5) should be to "tradeable securities" rather than "transferable securities".

b. The definition of "transferable securities" includes, in limb (b), "bonds or other forms of securitised debt ...". The reference to "bonds" in regulation 5A(5) therefore appears to be superfluous, and potentially confusing. If it is intended to mean something different than "bonds" as used in the context of the "money markets instruments" definition, there is an obvious question as to what it does mean.

22. Much more significantly, one area which has been of particular relevance to financial institutions who are seeking to comply with the sanctions has been the coverage of various types of derivative instruments. In particular, it has been important to clarify that a derivative instrument which references (i.e. whose value is linked to) "new" securities issued by a listed entity is permissible, if the parties to the derivative are not subject to sanctions and the derivative instrument would not be physically settled by delivery of the underlying securities. Trading in such derivatives provides no funding to the listed entity, and there is no policy reason why they should be restricted. Such derivatives are merely a mechanism for market counterparties to trade with each other and manage their exposure to certain Russia-related risks.

23. From a US perspective, we note that OFAC has issued General Licence 1A, which provides that:

> "(a) All transactions … involving derivative products whose value is linked to an underlying asset that constitutes (1) new debt with a maturity of longer than 30 days or new equity issued by a person subject to Directive 1 under Executive Order 13662, (2) new debt with a maturity of longer than 90 days issued by a person subject to Directive 2 under Executive Order 13662, or (3) new debt with a maturity of longer than 30 days issued by a person subject to Directive 3 under Executive Order 13662, are authorized.
>
> (b) This general license does not authorize the holding, purchasing, or selling of underlying assets otherwise prohibited by Directives 1, 2, or 3 under Executive Order 13662 by U.S. persons, wherever they are located, or within the United States."

24. From an EU perspective, the point is dealt with in a way which is less clear – but there is some recognition of the need for derivative instruments which reference

the securities of restricted issuers not to be covered by the restrictions. In particular:

a. Recital (6) to the EU Regulation expressly states in respect of the capital markets restrictions that: "Financial services other than those referred to in Article 5 … such as … derivatives used for hedging purposes in the energy market are not covered by these restrictions" (although this does not clarify the position of derivatives used in non-energy contexts); and

b. The inclusion in the definition of "tradeable securities" of "securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement"[1] was amended by Council Regulation (EU) No 960/2014 on 8 September 2014 to delete the words: "or giving rise to a cash settlement". Arguably, this was not necessary (since the types of cash-settled derivative instrument which are permitted by General Licence 1A, and which we suggest should fall outside the regime, are in any event not derivatives *issued by* the listed entities, and would therefore not have been restricted transferable securities in any event[2]). Nonetheless, the amendment was widely assumed to be an effort by the EU to make it more clear that cash-settled derivatives were not intended to be captured.

25. We consider it would be beneficial to clarify the position by the inclusion in the regulation of the equivalent of General Licence 1A. This could be effected by, for example, adding at the end of the first line of regulation 5A(5)(b) (after "also means") the words "(subject to sub-regulation [x])" and adding sub-regulation [x], as follows:

"A *sanctioned commercial activity* does not include any activity in relation to tradeable securities or other financial instruments which are derivative products whose value is linked to an underlying asset of a type specified in regulation

[1] We note that, as a result of the amendment, the definitions in the draft Regulation track the old EU definition, not the current EU definition.

[2] To put this another way: (a) a 'new' derivative issued by a listed entity would be restricted whether it is cash settled or not, and (b) a 'new' derivative referencing the securities of a listed entity (but not issued by it) would not itself by caught by the regime. The security that is restricted is the reference security. A physically settled derivative is problematic not because the derivative itself is a restricted transferrable security, but because the derivative may cause the delivery of a restricted transferable security.

5A(5)(b), providing that the activity does not involve the purchase, sale or any other dealing with the underlying asset."

26. There are also a number of respects in which the definition of the securities covered by the EU and US regimes, and the application of the sanctions to derivative instruments (even with the benefit of the clarity provided by General Licence 1A), has been challenging. Examples include:

    a. the treatment of derivatives which reference a basket of securities (defined by class rather than by issuer) which may include or which may come to include the securities of a listed entity;

    b. the treatment of derivatives which reference “old” securities which are fungible with “new” securities, where a firm cannot determine which securities will be delivered on physical settlement; and

    c. the effect of amending the terms of an “old” security and whether this creates a “new” security.

27. We recognise that these issues, which are questions of detail – albeit important practical detail – would not be practicable to address within the draft Regulation itself. As such, we consider that it would be helpful for DFAT to publish additional guidance on the types of products covered by the regime. By including such material in non-statutory guidance, there would also be flexibility for it to be developed as further products and scenarios fall to be considered.

28. Another area where additional guidance would be of assistance is in relation to the definition of "instruments of payment", which is carved out from the definition of "tradeable security". As you may be aware, this term is not defined in the EU Regulation, nor in the EU instruments from which the definition of "tradeable securities" is taken. The scope of the carve-out has been the source of considerable debate and uncertainty.

29. Finally, we note that the regulation does not appear to impose measures equivalent to the EU prohibition on the making of "loans and credit" to the restricted entities (i.e. the provision of loan capital only appears to be prohibited where a restricted entity borrows by way of issuing "bonds", "transferable securities" or other "money market instruments"). We assume that this is

deliberate, and our clients have no position on whether or not such restrictions should be imposed. We would observe, however, that the restrictions on lending have been particularly difficult to apply in practice (for example, the EU has had to issue amending legislation to clarify the position of drawdowns under existing loan facilities), and if the Australian regime is at some stage extended to cover lending, it will be important for there to be a further opportunity to comment on the scope of the proposed restrictions.

Restricted types of services

30. Our final comments on the capital markets restrictions relate to the restrictions on the provision of ancillary services. By regulation 5A(5), a prohibition is imposed on "the direct or indirect purchase or sale of, or any other dealing with" the restricted types of securities. We agree that this is a sensible way to impose the relevant restrictions.

31. Additionally, however, the amendments to regulation 5(4) (draft regulation 21) would prohibit: "(a) technical advice, assistance or training; or (b) financial assistance; or (c) a financial service; or (d) another service" in relation to "engagement in a sanctioned commercial activity for Russia". As a result, providing any service whatsoever in relation to any dealing with the restricted securities would be prohibited. This goes considerably beyond the EU regime, which restricts a defined list of prohibited "investment services".

32. Given the novel nature of these capital market restrictions, and the lack of clarity in relation to their scope, we would suggest that the very broad "another service" prohibition is not appropriate, particularly in the context of a regime where there is strict liability for breach. There could be a huge range of activities by banks, professional advisers and others which might inadvertently assist someone in some way to deal with restricted securities. The language of "technical advice, assistance or training" also seems somewhat inapt. We would suggest that the more appropriate focus of the sanctions would be on matters such as underwriting, financing, advice on issuance, execution of orders and so on – the types of services which are restricted by the EU sanctions. We would therefore suggest that the "sanctioned services" in relation to "sanctioned commercial activity" with respect to Russia should either (i) be confined to the matters set out in limbs (a) to

(c); or (ii) should comprise a separate list of targeted activities (such as the EU list of "investment services") which are relevant and appropriate in the context.

Section 2: Other restrictions

33. As we explain at the outset, in this section of our response we highlight a number of provisions of the draft regulation, but do not comment comprehensively on the proposed restrictions.

Prohibited Projects: Paragraph 7: insertion at the end of regulation 4(2) (after table item 3)

34. The draft regulation imposes restrictions on the supply to Russia of equipment and technology of a listed type if that equipment is to be used in deepwater oil exploration or production in Russia, Arctic oil exploration or production in Russia, or a shale oil project in Russia ("Prohibited Projects").

35. The definition of the Prohibited Projects has been subject to continued discussion at EU level following the EU's introduction of equivalent measures at the end of July, and was amended on 4 December 2014. The clarified terminology is largely consistent with the current US definitions. The US has defined deepwater in OFAC FAQ 413 as follows: "A project is considered to be a deepwater project if the project involves underwater activities at depths of more than 500 feet"). The clarified EU restrictions apply to "oil exploration and production in waters deeper than 150 metres", which corresponds roughly to the metric conversion of the US definition. The US has published an FAQ on "shale projects", which indicates that the term applies to projects that have the potential to produce oil from resources located in shale formations. The EU restrictions no longer refer to "shale oil projects" but to "projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing" (with the exception of "exploration and production through shale formations to locate or extract oil from non-shale reservoirs"). The EU has also clarified the meaning of Arctic, which is now referred to as "the offshore area north of the Arctic Circle".

36. Our clients have no position on the depth that should be adopted for "deepwater" or the definition of "shale oil project" or "Arctic". However, it would clearly be helpful for all relevant sanctions regimes to be aligned, and we would therefore

suggest the incorporation of either the EU's recently adopted amendments, or the definitions provided in the relevant OFAC FAQs, in the regulation (or any accompanying guidance).

'Grandfathering' and exemptions

37. It is a feature of the EU regime that there are a number of so-called 'grandfathering' provisions which permit the performance of contractual obligations which pre-date the imposition of the sanctions. The recent amendments to the EU restrictions further extend these carve-outs to the execution "ancillary contracts" necessary for the execution of contracts pre-dating the imposition of the sanctions. There are also a number of exemptions for types of projects which are not considered objectionable (eg. the supply of dual use goods to maintain the safety of civil nuclear capabilities within the EU).

38. We note the comment on the consultation webpage that: "[a]ny person with a pre-existing legal obligation to export goods or to import goods, to provide a service or engage in a commercial activity subject to the new restrictions may apply for an authorisation to meet that legal obligation. Such an application must be made within 30 days of the commencement of the new sanctions". However, there is no specific provision relating to the granting of authorisations generally to permit conduct pursuant to pre-existing contracts.

39. Entities which are, as a result, unable to comply with existing contractual obligations may be exposed to litigation risk and, since the resolution of any disputes may fall to be determined under the law of jurisdictions other than Australia, the fact that performance of the contract would be unlawful under the Australian sanctions regime may provide no defence. Thus, it seems to us that there is a compelling policy argument to exempt, or provide for general authorisation of, conduct under pre-existing contracts. Furthermore, the absence of any grandfathering provisions (other than the 30 day grace period contained in draft regulation 4(a)(i)) means that there is an inconsistency between the EU and Australian regimes, which for the reasons outlined above we consider to be inherently undesirable.

40. The provisions which are inconsistent, and in respect of which we would suggest some provision to address the position of pre-existing contracts and/or the other exemptions covered by the EU regime could be considered, are:

a. Acquiring or extending a participation in an enterprise in a restricted sector in Crimea or Sevastopol; the granting of any loan or credit relating to, or creation of any joint venture relating to, restricted sectors in Crimea or Sevastopol (Council Regulation (EU) No 692/2014, as amended, article 2d);

b. Supply etc of military goods: spare parts and services necessary to the maintenance and safety of existing EU capabilities (article 2(4) of Council Decision 2014/512/CFSP of 31 July 2014);

c. Supply etc of dual use goods[3] which may be used for a military end use or end-user: licensable in relation to agreements concluded before 1 August 2014 (article 2(2) of the EU Regulation);

d. Supply etc of dual use goods[4] to certain restricted entities: execution of contracts concluded before 12 September 2014; or necessary to the maintenance and safety of existing capabilities within the EU; or intended for the aeronautics and space industry, for non military use and a non military end user; or for maintenance and safety of existing civil nuclear capabilities within the EU (articles 2a(3) and 2a(4) of the EU Regulation);

e. Financing and other restricted ancillary services relating to military and dual use goods: licensable in relation to agreements pursuant to an agreement concluded before 1 August 2014, or necessary to the maintenance and safety of existing capabilities within the EU (article 4(2) of the EU Regulation).

41. Of these, we consider the first item (in relation to Crimea and Sevastopol) to be the most significant. This is because the investment restrictions relating to Crimea and Sevastopol, whilst limited geographically, are otherwise very broad in scope.

[3] We appreciate that the EU dual use list is in any event broader that the "arms and related materiél" and "Australian Obligated Nuclear Material" covered by the proposed Australian regime.
[4] We appreciate that the EU dual use list is in any event broader that the "arms and related materiél" and "Australian Obligated Nuclear Material" covered by the proposed Australian regime.

Sanctioned imports from Crimea and Sevastopol: Paragraphs 13 and 14: Insertion of sub-regulation 4A(2) (after table 1)

42. The EU Regulation provides a carve out from the restriction on importing goods which originated in Crimea and Sevastopol where the goods "have been made available to the Ukrainian authorities for examination, for which compliance with the conditions conferring entitlement to preferential origin has been verified" (article 3(b) of EU Regulation 692/2014). We are not certain why this was not included and, as a result, we would suggest that a similar carve out be considered in relation to the restriction on import sanctioned goods imposed by regulation 4A(1).

Sanctioned imports from Russia: Paragraph 14: Insertion of sub-regulation 4A(2) (after table 1)

43. We note for completeness that there is no EU equivalent to the restriction on the import, purchase and transport of sanctioned goods from Russia, and the ancillary restrictions imposed by regulation 5(2) on financial assistance or a financial service.

Sanctioned services (other than in relation to Prohibited Projects): Paragraph 21: insertion of sub-regulation 5(4) (after table item 3)

44. We noted above in the context of the capital markets restrictions the disparity between, on the one hand, the EU's restriction of "investment services" and, on the other, the proposed approach set out in the draft regulation of restricting "technical advice, assistance or training; financial assistance a financial service; or another service". In the context of services ancillary to the supply of goods, the disparity is not as stark. Nonetheless, the restriction on the provision of "another service" means that the Australian restrictions on services are wider than those imposed by the EU. One area where we envisage that this may have an impact is in relation to the insurance of dual use/nuclear goods which would not be prohibited by the EU regime but would, we assume, be "another service" from the Australian perspective. This is not a point of particular practical significance to our clients, however we note the inconsistency.

Sanctioned services in relation to Prohibited Projects: Paragraphs 16 and 22: insertion after sub-regulation 5(1) of paragraph 1A, and insertion at the end of regulation 5

45. We have no comments on the restriction intended to be imposed on the provision of specified services such as drilling and well-testing to prohibited projects.

46. We agree with the approach of not restricting the provision of services which are ancillary to the supply of restricted oilfield equipment (as set out in paragraph 16).

Manufacture, maintenance or use of an export sanctioned good for Crimea or Sevastopol, and restricted ancillary services: Paragraphs 20 and 21: insertion after sub-regulation 5(4) (after table item 3)

47. Whilst we appreciate that the approach of restricting the "manufacture, maintenance or use" of items, and imposing ancillary restrictions, is not peculiar to the Russia/Ukraine regime, we query the extent to which it will be possible for someone providing ancillary services to determine whether or not they are in compliance with the these restrictions. A supplier of goods to Crimea will, presumably, know or be able to ascertain with reasonable diligence (if they are a middleman), the end destination of their goods. A person financing the supply of goods to Crimea may, with reasonable diligence, be able to determine the nature of the goods they are supplying and their destination. It seems more challenging for a person manufacturing (for example) pipes which may be exported to Crimea to determine that s/he is undertaking a restricted activity. It seems even more challenging for a bank financing the manufacture of the pipes to determine that they may be supplied to Crimea in due course. We therefore query the application of the restriction on ancillary services to these activities.

"No claims"

48. The EU Regulations routinely provide a "no claims" provision. By article 11 of the EU Regulation, for example:

> "1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under Regulation, including claims for an indemnity or any other claim of this type, such as a claim for compensation

or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatsoever form, shall be satisfied, if they are made by:

(a) entities [subject to the capital markets restrictions];

(b) any other Russian person, entity or body;

(c) any person, entity or body acting through or on behalf of one of the persons, entities or bodes referred to in points (a) or (b) of this paragraph.

2. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim.

3. This Article is without prejudice to the right of the persons, entities and bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation."

49. This provision seeks to provide assistance to companies who are exposed to litigation as a result of their efforts to comply with the sanctions. It does not provide a complete answer to litigation risk in such circumstances, not least because companies may be sued in jurisdictions which do not recognise this provision (hence the importance of the sanctions being carefully scoped and suitable grandfathering provisions being considered, as outlined above). Nonetheless, it can be of assistance in supporting companies to comply with sanctions regulations. As there is no equivalent provision in the Australian legislation, we believe its inclusion would be helpful.

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