

**Baker
McKenzie.**

Annual Corporate Compliance Conference 2020

7 September - 9 October 2020



Export Controls and Trade Sanctions

21 - 25 September 2020



Agenda

Tuesday 22 September
2.00 - 3.00 pm BST

Key EU, UK and US Sanctions Update

Chair: Sunny Mann, Partner, London | Paul Amberg, Partner, Amsterdam | Ben Smith, Partner, London | Meghan Hamilton, Associate, Chicago | Akash Sikka, Associate, London

Wednesday 23 September
2.00 - 3.00 pm BST

Key EU, UK and US Export Controls Update

Chair: Ben Smith, Partner, London | Kerry Contini, Partner, Washington D.C. | Mini vandePol, Partner, Hong Kong | Lise Test, Of Counsel, Washington D.C. | Ross Evans, Associate, London

Thursday 24 September
2.00 - 3.00 pm BST

Trends in Trade Investigations

Chair: Tristan Grimmer, Partner, London | Terry Gilroy, Partner, New York
Alison Stafford Powell, Partner, Palo Alto | Julian Godfray, Associate, London

Thursday 24 September
3.45 - 4.45 pm BST

Increased Focus on Foreign Investment Review

Chair: Sunny Mann, Partner, London | Rod Hunter, Partner, Washington D.C.
Sylwia Lis, Partner, Washington D.C. | Karoline Phillips, Senior Associate, London
Alexander Rickets, Associate, London

Key EU, UK and US Sanctions Update

Tuesday 22 September, 2.00 - 3.00 pm BST



Speakers



Sunny Mann

Partner (Chair), London



Paul Amberg

Partner, Amsterdam



Ben Smith

Partner, London



Meghan Hamilton

Associate, Chicago



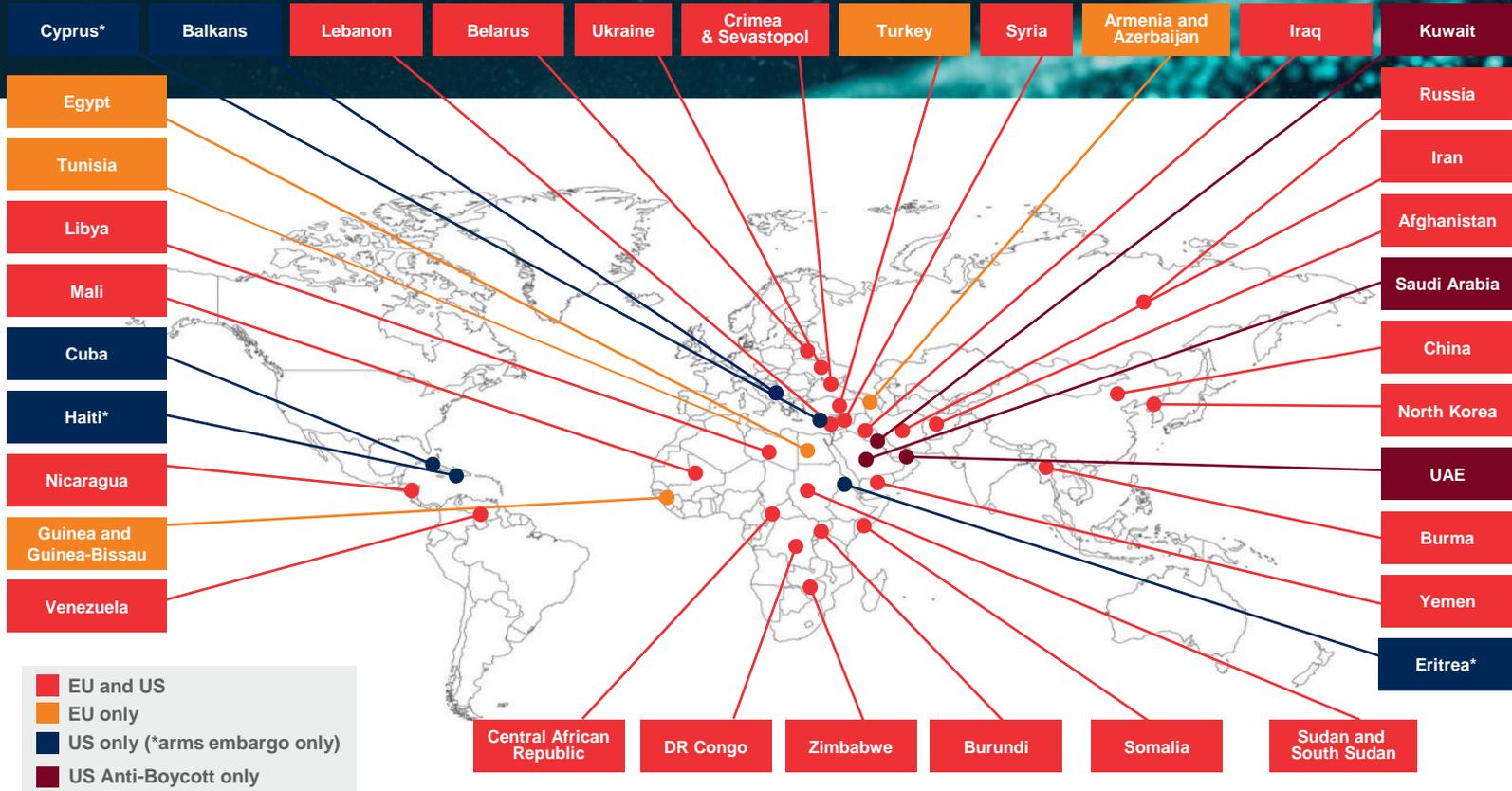
Akash Sikka

Associate, London

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General Overview of US and EU Sanctions

Current EU and US sanctions targets



US Sanctions apply to US Persons



Entities organized under the laws of the United States and their non-US branches;



Employees (regardless of nationality) of the above entities;



Individuals and entities physically located in the United States;



US citizens and permanent residents ("Green Card" holders), wherever located or employed; and



For purposes of sanctions targeting Cuba and Iran, entities that are owned or controlled by any of the foregoing.

US Person Facilitation

With some very limited exceptions, any form of support/assistance that facilitates someone else's ability to do business with a sanctions target, including



Approving business/transactions



Issuing, advising, confirming, negotiating, etc. letters of credit



Referral of business to non-US Persons



Strategizing business



Negotiating/drafting/reviewing commercial terms, contracts



Processing/clearing/settling transactions



Certain forms of IT support/access



Changing policies or procedures to enable transactions

Jurisdictional scope of EU sanctions

**EU Entities
(and foreign branches)**



**EU Nationals
(wherever located)**

**EU Territory
(irrespective of nationality
or place of incorporation)**

Business conducted in EU

* Note: EU circumvention controls

* Note: EU export controls apply to exports of dual-use items from inside to outside the EU

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Iran

Iran: US Overview



Comprehensive embargo prohibiting virtually all transactions by US Persons (which includes entities owned or controlled by US Persons for purposes of US sanctions targeting Iran) related to Iran



Certain transactions authorized under general licenses. Where licensed, activities "ordinarily incident" also authorized.



The P5+1 and Iran entered into the Joint Comprehensive Plan of Action ("JCPOA") regarding Iran's nuclear program in July 2015, which was implemented in 2016. As a result of the JCPOA, the EU relaxed almost all of its sanctions on Iran. The United States still maintained most of its sanctions on US Person dealings with Iran, but it relaxed "secondary sanctions" measures that affected non-US parties, and authorized non-US subsidiaries of US companies under GL H

Iran: US Updates



On May 8, 2018, the Trump administration announced the withdrawal of the US Government from the JCPOA .



Since the US's withdrawal from the Iran nuclear deal, US sanctions targeting Iran have primarily focused on secondary sanctions, i.e., increased pressure on non-US parties not to engage in "sanctionable activity" with Iran. These have primarily consisted of

- Targeting Iran's metal sector (copper, aluminum, steel);
- Targeting Iran's construction, mining, manufacturing, and textiles sectors of the Iranian economy;
- Targeting transactions involving the IRGC; and
- Targeting transactions involving the Iranian oil sector, including those parties shipping to and from Iran



Possible changes under Biden Administration, but will depend on regional developments during the next few weeks given peace deals between Israel and UAE and Bahrain

Iran: EU position



JCPOA

- The EU has repeatedly stressed its continued support for the JCPOA since the US's withdrawal
- While the E3 (UK, France, Germany) triggered the JCPOA dispute resolution in January, this was described as being "in good faith with the overarching objective of preserving the JCPOA", and this was reaffirmed in June
- A UN arms embargo on Iran is due to be lifted 18 October 2020 (contrast with the corresponding EU measures which will remain in place until 2023)
- Risk of UN and EU snapback?
 - US announced on 20 September 2020 that UN sanctions had been re-imposed following 30 day procedure
 - EU and UN rejected US' statement – stating that US' actions had no "legal effect"



INSTEX

- INSTEX facilitated its first transaction earlier this year – providing for the sale of medical equipment to Iran
- The instrument has also expanded – and with 9 EEA countries presently participating
- In parallel, the Swiss Humanitarian Trade Arrangement (SHTA), a payment mechanism designed to enable humanitarian goods to be delivered to Iran, came into effect in February

Iran: Impact of snapback

 UN snapback requires EU to impose UN sanctions, but not re-imposition of EU sanctions

 Snapback of EU sanctions would require unanimity across all EU Member States

 If EU snapback occurs, will see a number of measures reintroduced, including:

- Controlled transactions
 - certain controlled exports/imports relating to Iran
 - increase in the numbers of designated parties – most Iranian banks re-designated
- Product controls and restrictions impacting certain sectors
 - heightened customs controls
 - heightened WMD controls
- Financial controls
 - controls on transfer of funds between Iranian and EU persons / banks

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Blocking Regulation

EU Blocking Regulation: Overview

-  EU Blocking Regulation first introduced in 1996 to counter extraterritorial effects of US sanctions targeting Cuba
-  Primary purpose to act as a political signal and protective shield for EU companies, rather than enforcement tool
-  Following US decision to re-impose sanctions against Iran and withdraw from JCPOA, the scope of Blocking Regulation expanded in relation to Iran
-  Revised Annex restricts compliance with certain US sanctions targeting Cuba and Iran
-  Prohibition on compliance (Article 5); Entitlement to claim damages (Article 6); Requirement to notify (Article 2)
-  Updates entered into force on 7 August 2018 and remain in force

EU Blocking Regulation: Compliance Challenges



Conflict between EU and US laws

- Risks: regulatory and litigation risk (recent cases in the UK, NL, Germany, Italy)



Navigating a path

- EU parties complying with US sanctions? **Prohibited**
- EU parties making commercial/financial decisions? **Permitted**
- EU parties complying with EU sanctions/other laws (ABC, AML etc.)? **Permitted**
- EU parties deferring decisions to US parent, complying with global policies? **Mitigates risk**
- Case by case arguments as to why the EU Blocking Regulation does not bite

EU Blocking Regulation: Increase in cases



Increase in EU Blocking Regulation Judgments across EU:

- Italian judgments:
 1. Italian bank was ordered to release funds from a US-designated entity
 2. Injunction granted to prevent a bank from terminating its services to an Iranian controlled Italian company
- German judgments:
 1. The Regional Court of Hamburg granted an interim injunction requiring a telecoms company to authorise access to a target of US Iran sanctions
 2. The Regional Court of Hamburg rejected an injunction request from a logistics company to order a bank to maintain their savings account. The court held that US secondary sanctions risk was a "valid reason" for the purposes of the bank's terms and agreements
- Dutch judgments:
 1. Supreme Court held that EU Blocking Regulation would not prevent the extradition of an Iranian national to the US for their alleged involvement in US export controls and sanctions violations
 2. District Court of The Hague granted specific performance and prevented termination of Cuba-related distribution agreement following acquisition of supplier by US parent

Lamesa Case: sanctions contractual wording



High Court (2019) and now Court of Appeal (2020) ruled that US secondary sanctions were a "mandatory provision of law" for the purposes of a loan agreement

- Lamesa ("L"), a Cypriot company ultimately owned by a Russian individual, lent £30m to Cynergy Bank ("CB"), a UK bank, pursuant to an English law facility agreement. The facility agreement contained the following clause: *"[CB] shall not be in default if during the 14 days after [L's] notice it satisfies [L] that such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction."*
- L's Russian owner became designated as a US SDN. US secondary sanctions provide that the US Government shall (unless determined otherwise) impose restrictions on foreign financial institutions that **"knowingly facilitated a significant financial transaction on behalf of"** the Russian owner
- As a result, CB refused to make interest payments to L, relying on the clause set out above and the secondary sanctions risk as a result of the designation
- Both the High Court and now Court of Appeal agreed that the clause applied to protect CB's refusal
- The Court of Appeal also took into account the fact that US secondary sanctions were recognized under the EU blocking regulation



Demonstrates importance of being as clear as possible in sanctions clauses

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Russia

Russia/Crimea Sanctions: US Overview

1 Restricted party controls ("SDNs")

- SDNs: blocked and prohibited as to US Persons
- On OFAC List or 50% or more owned by one or more SDNs in aggregate (ownership test)

2 Sectoral Sanctions ("SSILs")

- Not blocked; more targeted restrictions on US Persons under four OFAC Directives
- Finance: new debt/new equity e.g. VEB, Gazprombank, VTB, Sberbank
- Energy: new debt or Russian Oil Industry End-Uses e.g. Rosneft, Lukoil, Gazprom Neft, Gazprom
- Defense: new debt e.g. Rostec

3 Export/product Controls

- Russian Entity List parties (inc. Yuzhno-Kirinskoye Field, GGE, FSB)
- Russian Oil Industry End-uses – any items
- Military end-user/end-use controls – specific items (e.g. telecoms)
- Denial policy; "high technology" items

Crimea

- Virtually complete embargo
- Applies to "US Person" dealings
- Export ban (minor exceptions) for exports/re-exports by anyone of US origin/content items

Russia Sanctions: US Updates



The Countering America's Adversaries Through Sanctions Act ("CAATSA") was signed into law in August 2017 and introduced new Russia-related sanctions



Secondary sanctions on parties (US and/or non-US, depending on the provision) who engage in activities that include:

- Investments in "special Russian crude oil projects"
- Sanctions on parties engaging in "significant transactions" with the Russian intelligence or defense sectors
- Sanctions related to Russian energy export pipelines under CAATSA Section 232
 - **Most recently, clarification from State Department that this includes Nord Stream and Turk Stream Projects**
- Sanctions related to investments in the privatization of Russia's state-owned assets



Issuance of 241 List of Russian oligarchs and senior officials – NOT sanctioned

Russia: Overview of EU sanctions

1 Restricted party controls

- EU DP List
- EU ownership or **control** test (broader than US 50% Rule)
- EU Defence if no "knowledge" or "reasonable cause to suspect"

2 Sectoral Sanctions

- EU maintains certain sanctions targeting specific sectors of the Russian economy (i.e., financial, energy, and defence)
- Similar scope but some differences to US (fewer entities targeted; no secondary sanctions; broader equity restrictions; narrower controls on payment terms)

3 Export/product Controls

- EU Annex II oil and gas items – license required regardless of end-use; licenses denied for deep water, arctic, shale oil projects
- Heightened controls on dual-use items/ML end-use
- Broad controls on related services

Controls regarding Crimea

- EU has not introduced complete embargo, but restrictions are significant
- Import ban on any items "originating" in Crimea & Sevastopol
- Broad restrictions on investments, products and services related to targeted sectors

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Other Sanctions Updates

Venezuela Sanctions: US Overview



US Sanctions targeting Venezuela **do not consist of a territory-wide ban**



Rather, they are targeted towards:

- The Government of Venezuela (which is broadly to include entities owned/controlled by the Government of Venezuela); and
- Specially Designated Nationals and Entities owned/controlled by one or more SDNs.

Venezuela Sanctions: US Updates



The Trump Administration has taken a hardened stance against Venezuela and imposed increased restrictions both under US sanctions and export controls, as follows:

- Increased risk of US secondary sanctions on parties transacting with GOV/SDNs
- Increased licensing requirements for US items exported/re-exported to military end-users/for military end-uses



In addition, non-US parties face increased risk of US secondary sanctions where SDNs/GOV entities are involved, especially transactions contributing to the Venezuelan oil sector (among others)

China: Increased US SDN Designations

-  Most restrictions regarding China are targeted towards exports/re-exports of US items (e.g., Entity List, military, etc.), which will be covered in a separate presentation as part of the conference
-  However, there have been increased US sanctions on those parties engaged in what the US Government views as humanitarian violations in Xinjiang, China
-  Also sanctions-related designations due to situation in Hong Kong

Other EU Sanctions Updates



Turkey

- Feb 2020 - Sanctions levelled at two oil executives for their role in illegal drilling in Cypriot (EU) waters. Further sanctions (and retaliatory measures) threatened



Nicaragua

- May 2020 – Added six additional persons to sanctions list for human rights abuses



Venezuela

- June 2020 – Added 11 additional persons to sanctions list for human rights abuses



Cyber

- July 2020 – 6 individuals and 3 entities designated for attempted cyber-attack



Belarus

- August 2020 – EU announce sanctions will be imposed against individuals in Belarus following disputed presidential election.

UK Sanctions: Impact of Brexit



No deal Brexit?

- No deal Brexit looking increasingly likely as of 11pm on 31 December 2020



Post-Brexit Regime

- UK has adopted legal framework for independent sanctions regime - EU (Withdrawal) Act, the Sanctions and Anti-Money Laundering Act 2018 Sanctions, related Regulations and guidance
- Provides the UK with freedom to swiftly adopt independent sanctions
- UK post-Brexit Regulations and guidance already demonstrate differences to current EU approach
- **On 6 July 2020, the UK used this new, independent regime for the first time – introduction of sanctions against 47 Saudi, Russian and Burmese individuals, as well as two North Korean entities, for alleged human rights abuses**
- Example of how UK will be prepared to act independently of EU and may increasingly align with US
- Will need to ensure compliance with both EU and UK regimes (including screening)

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Screening and Enforcement

UK Sanctions Enforcement



February 2020 - Standard Chartered Bank
(GBP 20.4 million)

- SCB made 102 loans to Denizbank A.Ş., a Turkish subsidiary of Sberbank, between 2015 and 2018 – 70 found in breach of EU Russia sectoral sanctions (falling outside EU trade exemption)
- Decision upheld but penalty discounted from £30.5m on Ministerial review, including since this was not a willful breach; Standard Chartered acted in good faith and intended to comply; had taken remedial steps
- Inclusive of 30% reduction for voluntary disclosure and co-operation



September 2019 – Telia Carrier UK Limited
(GBP 146,341)

- Indirect facilitation of international calls to SyriaTel, a designated party under EU Syria sanctions
- OFSI re-iterated the breadth of EU sanctions controls on direct/indirect provision of economic resources



March 2019 – Travelex (UK) Ltd
(GBP 10,000)



January 2019 – Raphaels Bank
(GBP 5,000)

US Enforcement Trends



Know your Suppliers;



Know Your Screening Tools;



Require your Freight Forwarders/Shipping Service Providers to Comply;



Watch Out for Actions by Non-US Companies Recently Acquired by US Companies



Non-US Companies Need to Be Aware of US Sanctions when Sourcing from US Suppliers/Using US Dollars

Best Practices for Screening

- 1 A risk-based approach
- 2 Screen at least directors, shareholders and managers of direct counterparty, and check for management agreement
- 3 Check all available resources, but do ask counterparty
- 4 If this raises any "red flags", need to discharge those "red flags"
- 5 If no "red flags", no obligation to push to next level, but apply risk analysis (e.g. most important JV or business deal?)
- 6 Record and keep screening DD to prove that you did it
- 7 Screen: Direct counterparties; whoever is behind direct counterparties such as shareholders, directors, managers; check for any other indicia of control (e.g., management contract); banks; any other third parties

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Questions

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