

US and EU Ukraine/Russian Sanctions

What you need to know for your business

Breakfast at Bryan Cave

Washington, D.C.

Tuesday, October 14, 2014
8:30 a.m. to 9:30 a.m



Presenters



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Why is this important?

- Sanctions can interrupt the ability to do business, to obtain financing and to make and receive payments
- Violations can result in serious criminal and civil penalties – as well as denial of export privileges – and can have serious reputational consequences
- Successor liability in M&A transactions, even asset acquisitions
- Disruptive effects of investigations

Economic Sanctions

- Foreign policy and national security objectives
- Scope of sanctions depends on each program
 - Some are comprehensive
 - Others targeted or limited in scope

Whose Rules are Relevant?

- Compliance systems often need to deal with multiple regimes
 - Particularly those of the United States
 - ◆ Extraterritorial effect
 - ◆ Aggressive enforcement, including against non-US companies

US Sanctions

- The US cooperates in multilateral sanctions, such as UN and some EU sanctions, but often goes beyond
- Very complex and differ for different sanctioned countries and persons
- OFAC maintains a list of Specially Designated Nationals and Blocked Persons (“SDN”) List – thousands of names designated under various sanctions regimes – asset freezing and dealing prohibitions

Application to US Persons

- US economic and financial sanctions affect US persons:
 - US citizens and green card holders, wherever located
 - US entities and their branches, wherever located
 - Any person in the US
- For Cuba and Iran sanctions, US restrictions also apply to foreign subsidiaries owned or controlled by US persons

Non-US Persons

- However, even where US economic sanctions do not extend the prohibitions on US persons to their non-US affiliates, US sanctions can affect both affiliated and non-affiliated non-US persons:
 - In respect of actions involving US-origin items when those items are subject to US export controls
 - US dollar transactions or US banks
 - Causing, aiding and abetting US violations – broad interpretation
 - US persons may not facilitate a transaction by a non-US person that the US person would be prohibited from engaging in

EU Sanctions

- For EU-wide sanctions, a Common Position must be adopted which requires the unanimous consent of all the member states
- Within the framework of the EU's Common Foreign & Security Policy, the Council of the EU may impose sanctions against countries, entities or individuals
- Some sanctions are implemented directly by the member states, such as arms embargoes and visa bans

EU Sanctions

- Council Decisions on freezing of funds and economic resources or other trade restrictions are implemented by means of Regulations, binding and directly applicable in all the member states, and administered and enforced by the competent authorities in the relevant member states
- They are subject to judicial review and must take into account fundamental human rights
- Council Decisions may have a review or an expiration date
- The EU generally favors targeted or “smart” sanctions rather than total embargoes

To Whom Do EU Sanctions Apply?

- Within the EU, including its airspace
- On board any aircraft or vessel under the jurisdiction of a member state
- To any person inside or outside the EU who is a national of a member state
- To any legal person, entity or body inside or outside the EU, which is incorporated or constituted under the laws of a member state
- To any legal person, entity or body in respect of any business done in whole or in part in the EU

Summary of US Sanctions

- Freezing of assets of persons on the SDN List
- Sectoral sanctions against financial, energy and defense companies on Sectoral Sanctions Identifications (“SSI”) List
- Export control driven sanctions in the Export Administration Regulations and for persons on the Entity List

US Freezing Sanctions – Russia/Ukraine

- US persons (not including non-US affiliates) are required to block assets of and prohibited from dealing with persons and entities on the SDN List
- The US has extended the reach of restrictions on persons on the SDN List by adding some Russian SDNs to the US Commerce Department's Entity List
 - Prohibits exports, reexports and transfers (in-country) by any person – **not just US persons** – of items subject to US export control jurisdiction – even items not on a control list, e.g. EAR99 items – to such designated persons

EU Freezing Sanctions – Russia/Ukraine

- The politics of imposing Ukraine-related sanctions on Russia are very different in the EU than in the US
- The EU is very dependent on gas supplies
- Some EU member states are more dependent on trade with Russia than others, and other member states are more concerned about possible future aggressive moves by Russia than others – difficulty in getting unanimity

EU Freezing Sanctions – Russia/Ukraine

- Funds and economic resources (broadly defined) belonging to, owned or controlled by a freezing sanctions target are required to be frozen
- Funds and economic resources (including goods) may not be made available, directly or indirectly, to or for the benefit of a designated sanctions target

US Freezing Sanctions – Russia/Ukraine

- OFAC Guidance treats entities owned 50% or more by one or more persons on the SDN List, on an aggregate basis, also to be blocked even though not listed
- This is a change in policy, which until recently did not aggregate the interests of SDNs
- The 50% rule applies to ownership, not control, but beware ...

EU Freezing Sanctions – Russia/Ukraine

- No 50% rule as in the US for freezing purposes
- However, Guidelines issued by the Council state that making funds or economic resources available to a non-listed person that is owned or controlled by a designated person will in principle be considered as making them indirectly available to the designated person unless it can reasonably be determined they will not be used by or for the benefit of the designated person
- Ownership is more than 50%, but control is also an issue and the guidelines provide examples of control

US Sectoral Sanctions – Russia/Ukraine

- A new phenomenon
- Persons designated as targets of US sectoral sanctions are not “blocked” or listed on the SDN List
- Instead a separate Sectoral Sanctions Identification List (“SSIL”) – yet another list to screen
- Not all transactions with persons on the SSIL are prohibited, just those specified in the implementing sectoral sanctions directives
- The OFAC 50% rule applies to entities owned by one or more persons on the SSIL

US Sectoral Sanctions -- Russia/Ukraine-Related

- Apply to SSIL-listed companies in the financial, energy and defense sectors and companies 50% or more owned by one or more of them
- Prohibition on transactions in the US or by a US person in provision of financing for or other dealings in:
 - “New” debt of more than 30 days maturity (formerly 90 days), or new equity in listed **banks**
 - “New” debt of more than 90 days maturity of listed **energy sector companies**
 - “New” debt of more than 30 days maturity of listed **defense sector companies**

US Sectoral Sanctions -- Russia/Ukraine: Energy Sector

- SSIL sanctions apply to listed oil and gas companies
 - Block provision of goods, services or technology when intended for certain deepwater, Arctic offshore and shale projects

US Sectoral Sanctions -- Russia/Ukraine: Energy Sector

- US Commerce Department sectoral sanctions apply to exports, re-exports and in-country transfers based on:
 - Entity List: all items destined for energy companies listed on the Entity List when intended for certain oil and gas projects
 - End-use of particular items: items listed under specific ECCNs and HTS numbers intended for certain types of Russian oil and gas projects or if end-use is unknown, regardless of end-user

US Sectoral Sanctions -- Russia/Ukraine: Defense Sector

- “China Rule” military end-use/end-user restrictions are extended to Russia
 - Applies to targeted ECCNs only

US Sectoral Sanctions –

Russia/Ukraine: Access to Capital

- Letters of credit where SSIL-listed entity is the applicant?
- Issues relating to revolving credit facilities and rollovers of debt
- All other activities with SSIL-listed companies are permitted:
FAQ 371: US financial institution may continue to maintain correspondent accounts and process dollar clearing transactions
- Nonetheless, these sanctions have a chilling effect on the willingness to deal with listed companies
- Intended to deny access to the US financial markets
- But broad enough to cover trade debt over 30 days – what about past due debt in excess of 30 days?

EU Sectoral Sanctions –

Russia/Ukraine: Access to Capital

- Direct or indirect purchase, sale, brokering or assistance in issuance of, or dealing in new transferable securities and money market instruments with a maturity in excess of 30 days (formerly 90 days) of listed Russian financial, energy and defense companies
- Applies to entities established outside the EU owned more than 50% by such an entity and persons acting on their behalf or at their direction

EU Sectoral Sanctions – Russia/Ukraine: Access to Capital

- Transferable securities are negotiable on the capital markets with the exception of instruments of payment and include shares and bonds
- Money market instruments are those normally dealt with on the money market, such as treasury bill, c/ds, commercial paper (and exclude instruments of payment)
- This restriction is narrower in scope than the US financial sectoral sanctions

EU Sectoral Sanctions – Russia/Ukraine: Access to Capital

- However, a prohibition on making or being part of an arrangement to make new loans or credit with a maturity in excess of 30 days to any of the listed financial, energy or defense companies was recently added to the EU sectoral sanctions
- Exceptions: Loans or credits having a specific and documented objective to provide financing for non-prohibited exports and imports of goods and non-financial services between the EU and Russia, or to protect solvency of an EU company owned more than 50% by a listed company

EU Sectoral Sanctions – Ukraine/Russia: Energy Sector

- Sale, supply, transfer or export of listed items with specific tariff or CN Codes thought to be useful in the oil industry (not identical to US Schedule B numbers) if for use in Russia, and for related technical assistance, financing and financial assistance
- Absolute license requirement regardless of end-use, but a license may be granted if not for deep water exploration, arctic oil exploration or shale oil projects in Russia – note, unlike US, does not include gas
- License may also be granted if there was a pre-existing contract obligation

EU Sectoral Sanctions – Ukraine/Russia: Energy Sector

- Prohibited to provide drilling, well testing, logging and completion services, or supply of specialized floating vessels necessary for deep water oil exploration and production, arctic oil exploration and production or shale oil projects in Russia
- Grandfather provision for execution of obligations arising from a contract or framework agreement concluded before 12 September or ancillary contracts necessary for execution of such contracts
- Exception where services necessary in connection with human health and safety or environmental harm

EU Sectoral Sanctions – Ukraine/Russia: Defense Sector

- Prohibited to supply dual-use goods and technology (items described on the Dual-Use List under the EU dual-use export control Regulation 428/2009 as amended), and to provide related technical assistance, brokering, financing or financial assistance to listed defense-related companies
- Prohibited to supply dual-use goods and technology intended for military end-uses or end-users

EU Sectoral Sanctions – Ukraine/Russia: Defense Sector

- Grandfather provision for execution of contracts concluded before 12 September
- Exclusion from prohibition for such items intended for the aeronautics and space industry for non-military use or end-users and for maintenance and safety of existing civil nuclear capabilities within the EU for non-military use or end-users

EU Sectoral Sanctions – Crimea and Sevastopol

- No imports of items originating in Crimea or Sevastopol or related financing
- License requirement for sale, supply, transfer or export of listed items thought to be useful in connection with certain infrastructure projects
- Prohibitions on investments and financing of certain infrastructure in the areas of transport, telecommunications or energy, or relating to oil, gas and certain listed mineral resources, in Crimea or Sevastopol, as well as related technical assistance and brokering services

Comparison Between US and EU Sanctions

- US applies export restrictions on items intended for military end-use only to specific, listed items, whereas EU applies this restriction to all items
- OFAC 50% rule for asset freezes has no EU parallel
 - but, >50% ownership or control can result in indirect benefit to persons on the EU freezing list

Comparison Between US and EU Sanctions

- US: no sunset provisions
- EU provisions will expire unless renewed:
 - Freezing sanctions – March 2015
 - Sectoral sanctions – 31 July 2015
 - Crimean and Sevastopol – 23 June 2015

Comparison Between US and EU Sanctions

- US facilitation rule
- Provisions prohibiting circumvention of the prohibitions in the EU sanctions
- EU defense if a person did not know and did not have reasonable cause to suspect their actions would infringe the sanctions – differs from normal US strict liability

Compliance – Good Practice

- Screening
 - At customer intake
 - Ongoing screening of customer base
 - ◆ Updates to target lists
 - Transactions screening
 - ◆ All parties to a transaction:
 - Customers, end-users
 - Freight forwarders
 - Banks

Due Diligence

- Ownership and control concepts make due diligence a challenge
- Screening is not enough
- Difficulties of ascertaining ownership
- How much due diligence is enough?

Compliance – Good Practice

- Screening is not enough – Is the transaction prohibited?
 - The target list may not identify a prohibited transaction – important to understand the rules
 - End-use and end-user restrictions apply!

Conclusion

- Economic sanctions are extremely complex
- Many unanswered questions
- Screening and due diligence to identify transactions potentially caught are important
- Due diligence in M&A and investment transactions is of growing importance

Questions and Answers

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