Complying with Multiple and Conflicting Sanctions Regimes as a Multi-national Company

Extraterritoriality of US and EU Sanctions Laws

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Sanctions Outside US Territory / EU Community

1. US Economic Sanctions
   - Actions prohibited / penalized by sanctions
   - Actions that can lead to foreign persons being cut off from US market(s)

2. EU Economic Sanctions

3. Implications & Comparative Analysis

4. Navigating EU Blocking Statute Targeting Extraterritorial US sanctions
Prohibited actions penalizable under US sanctions laws
US Economic Sanctions Basics

- Primarily administered by US Treasury (OFAC) and US State (OTF)
- Comprehensive economic sanctions against governments of / persons in:
  - Cuba, Iran, Sudan, and Syria
- Targeted sanctions against:
  - Persons undermining democratic institutions, peace initiatives, human rights abuses, etc.
  - Terrorists / terrorist organizations
  - Weapons of mass destruction proliferators
  - International narcotics traffickers and transnational criminal organizations
- Specially Designated Nationals and Blocked Persons (SDN) List
  - List of hundreds of individuals, organizations, entities, and vessels
  - Can be located anywhere
  - US persons cannot deal with them
Basic Restrictions Applying to US Persons

- Curtailing any dealing, transaction, or brokering of any good, service (including financial services), or technology
- Financial transactions and transfers of money
- Investments
- Performance of contracts
- Freezing property owned by “blocked persons,” where property is located in US or held by US persons
- Any “dealing” in “property” or “interest” in such blocked property
- Any activity that provides a benefit to sanctioned country / blocked person, subject to certain exemptions and general licenses
Who is a “United States” Person?

- The following must comply with US economic sanctions:
  - US citizens and permanent resident aliens, wherever located or employed,
  - Any person or entity physically located within the US, and
  - Unincorporated foreign branch offices of US organizations (but not subsidiaries)
    - Cuba only currently: Includes foreign entities “owned or controlled” by a US person

- Additional restrictions/implications
  - US person executives abroad cannot be involved in restricted business
  - US persons cannot evade or avoid US sanctions regulations
Liability for Facilitation of Restricted business

- US person cannot “facilitate” or “approve” the activities of non-US persons that could not be undertaken directly by a US person or from the US
  - Foreign affiliates must act “independently” of their US parent or affiliate’s support
  - Failure to remain independent can lead to liability for US and foreign persons
  - Foreign affiliates of US companies directly restricted by US embargo against Cuba
  - Can trigger EU blocking statute concerns discussed below
NEW Definition of US Person for Iran Sanctions

- Required by the Iran Threat Reduction Act (ITRA) of 2012
- Any non-US entity owned or controlled by a US person cannot do business with:
  1. The GOI, its agencies, or officials/agents or
  2. any person subject to GOI’s jurisdiction (unclear meaning; could be broadly defined)
- Will apply where US persons currently are restricted from business dealings
- Would apply to all business with Iran, unless exempt/generally licensed
- Anticipated President will issue order making this change on/before 9 Oct. 2012
- Failure of a non-US entity to terminate such transactions would potentially subject the US parent company to civil penalties
How can foreign persons be affected?

- Under International Emergency Economic Powers Act (IEEPA) sanctions can be enforced against “any person or ... property, subject to the jurisdiction of the United States”
  - Prohibits acts by foreign persons, including conduct abroad, if such activity *causes* others, even unknowingly, to violate US sanctions, such as”
  - Banks processing a transaction relating to a US origin good or service (e.g., insurance), even if bank is not aware of the sanctioned nature of the transaction
  - Services related to clearing offshore transactions denominated in US$ if the transactions involve Cuba, Iran, Syria, or Sudan or SDNs
What kind of penalties can be enforced?

- **US Department of Justice (DoJ) Enforces Criminal Penalties:**
  - Maximum Criminal Penalty: $1mm or 20 years imprisonment, or both
  - Willful intent to violate, attempt to violate, or conspiracy to violate required

- **OFAC Enforces Civil Penalties**
  - Maximum Civil Penalty: Twice value of transaction or $250K, whichever greater
  - No intent required; strict liability can be imposed for violations

- **Increasingly, agencies of US state governments have become involved**
  - District of Attorney of New York (DANY)
  - New York State Department of Financial Services (NYDFS)
    - $340M Settlement with Standard Chartered plc last month
    - Theory of liability: failure to maintain accurate books and records required under state laws re certain dealings with Iran.
Major criminal settlements with foreign banks

Theory of liability: Manipulated payment messages involving US sanctioned countries or SDNs concealing the identities of customers & impeding ability of US banks to detect, causing them to process transactions illegally

- ING (2012): $619M (half DOJ/half DANY)
- Credit Suisse AG 2009: $536M (half DOJ/half DANY)
- ABN AMRO (RBS-2010): $500M (half DOJ/half DANY)
- Barclays plc (2010): $298M (half DOJ/half DANY)
- Lloyds TSB (2009): $350M (half DOJ/half DANY)

Note: USG may be turning its attention to insurers, reinsurers, and related brokers
Major Civil Enforcement Against Foreign Persons

- **Balli Group/Aviation Intl (2009): $15M**
  - Exporting aircraft to Iran

- **Australia and New Zealand Bank Group, Ltd. (2009): $5.75M**
  - Similar violations to Lloyds, involving Sudan

- **Innospec Inc. (2010): $2M (as part of a $40.2M US/UK criminal & civil actions)**
  - After its acquisition of a foreign corp that maintained a sales office in Cuba, Innospec conducted business in Cuba through its acquired sub

- **Genesis Asset Managers, a US investment fund, where it had a management agreement with its UK subsidiary that invested in an offshore investment fund holding Iranian securities (2012): $122K**
  - Theory of liability appears to be facilitating a financial service or investment primarily for Iran, but all investment activity took place offshore / outside of the United States
Actions that can lead foreign persons being excluded from US markets
Sanctionable Conduct re Iranian Energy Sector

- Comprehensive Iran Sanctions Accountability & Divestment Act of 2010 (CISADA)
- OTF of US State Department Administers this Program
- Target’s non-US persons, with no jurisdictional nexus to US, for:
  - investing to develop petroleum resources in Iran ($20M or series of $5M or more),
  - providing any good, service, technology, or assistance ($5M or series of $1M or more) to expand or maintain refined petroleum product capabilities in Iran,
  - export to Iran or import from Iran refined petroleum products ($5M or series of $1M or more)
  - conduct is not illegal but is sanctionable, including blocking of property, restrictions on US bank accounts, US export licenses revoked, inability to contract with USG, etc.
  - Exception for insurers and reinsurers who conduct reasonable due diligence
- To date, about 13 foreign entities sanctioned under CISADA
Sanctionable Conduct Re Certain Iranian Banking Transactions

- Required by CISADA; implemented by Iranian Financial Transaction Regulations (IFSR)
- IFSR target non-US financial institutions that conduct business with the Government of Iran (GOI) or Iranian Revolutionary Guard Corps (IRGC)
- OFAC must determine that foreign bank knowingly facilitated GOI’s effort to acquire WMDs, support terrorism, or related money laundering
- OFAC may restrict or prohibit a foreign bank’s accounts at a US bank
- On July 31, 2012, Bank Kunlun of China and Elaf Islamic Bank of Iraq sanctioned for providing financial services to designated Iranian banks under this regime
Expansion of CISADA Sanctions – Energy Sector

- Executive Order 13590 of 2011 expands / lowers US$ levels for CISADA’s energy-related sanctions directed at foreign persons

- Sanctions target any sale, lease, or provision of goods, services, technology or support directly and significantly
  - Contributing to maintenance or enhancement of Iran’s ability to develop domestic petroleum resources ($1m or series of $250K)
  - Facilitating the maintenance or expansion of Iran’s domestic production of petrochemical products ($1m or series of $250K)

- A person must have actual knowledge or reason to know of conduct

- Can be attributed to any person that:
  - owns or controls another person engaging in such transactions, or
  - is owned or controlled by, or under common ownership or control with, a person referred to above, and “knowingly” participated in the above activities

- Sanctions include prohibition on any transactions in exchanges subject to US jurisdiction, prohibition on loans of more than $10 million from US financial institutions, blocking of property, etc.
Further Isolation of Iran from US financial system

- Authorizes the blocking of property of GOI and all banks in Iran
- Foreign banks accounts in US can be restricted or prohibited if conducting / facilitating any “significant financial transaction” with the Central Bank of Iran (“CBI”) or Iranian banks that are SDNs
- Foreign banks to evaluate which is more important: access to US financial system or continued business with Iranian banks
- Exception if country with primary jurisdiction over foreign bank has significantly reduced its purchases of Iranian crude oil
  - Japan, South Korea, China, Singapore, Taiwan, and others have been reported to have significantly reduced their purchases
Foreign Sanctions Evaders

- Executive Order 13608 of 2012 prohibit transactions with foreign persons who have:
  - caused a violation of any existing U.S. sanctions against Iran and Syria, or
  - have “facilitated deceptive transactions” with respect to such sanctions

- OFAC has authority to identify such foreign sanctions evaders

- Although such foreign person evaders’ property is not technically blocked, US persons cannot conducting business with them

- “Deceptive transaction”: “any transaction where the identity of any person subject to US sanctions re Iran or Syria is withheld or obscured from
  1. other participants in the transaction or
  2. any relevant regulatory authorities

- Could allow designation of non-US financial institutions that do not inform US parties where Iranian or Syrian entities that are subject to US sanctions may benefit from financial transactions or services
Additional Sanctionable Activities

- ITRA authorizes sanctions against global financial communication providers, e.g., “SWIFT”, for providing services directly or indirectly to the CBI and other Iranian financial institution SDNs

- Executive Order 13622 of 2012 authorizes sanctions on foreign financial institutions that knowingly conducted or facilitated any significant financial transaction with the National Iranian Oil Company (“NIOC”) or the Naftiran Intertrade Company (“NICO”)

- Note: No jurisdictional nexus to the United States required
Prohibited Actions under EU Economic Sanctions
EU Sanctions: a Wide Range of Restrictive Measures

- Restrictions on admission (visa ban)
- Trade restrictions: embargo on arms, embargo/controls on certain goods and technology (e.g. dual-use items, luxury goods, forestry/mining equipment, crude oil and petrochemical products, diamonds), prohibition of procurement of certain goods and technology
- Trade-related measures: ban/control on provision of certain services, e.g. technical assistance, brokering, financial assistance, investment
- Trade-related measures: inspection of cargo and prior information requirement (Iran)
- Financial measures: freezing of funds and economic resources
- Financial measures: vigilance over the activities of EU financial institutions with certain banks (Iran)
- Financial measures: Restrictions on grants, financial assistance and concessional loans (Iran), public provided financial support for trade ((re)insurance, export credits and guarantees)
- Measures to prevent specialized teaching or training (e.g. WMD proliferation)
EU Sanctions – Territoriality (1)

- EU sanctions are applicable to:
  - Persons or entities of any nationality resident or incorporated within the EU
  - Persons or entities of any nationality in respect of any business done in whole or in part within the EU
  - Activities on board any aircraft or vessel under the jurisdiction of an EU Member State
  (see e.g. Article 49 Council Regulation N° 267/2012)
EU Sanctions – Territoriality (2)

- EU sanctions are applicable to foreign branches of EU legal entities and employees of such legal entities.
- EU sanctions are not applicable to foreign/non-EU subsidiaries of EU headquartered companies, but only to the extent that:
  - The products are not of EU origin
  - The products are not restricted
  - Their final destination is not a sanctioned country
EU Sanctions – Territoriality (3)

- Technical, sales and financial assistance provided by EU employees/entities to non-EU companies in relation to restricted products may be prohibited under
  - Technical assistance
  - Financial assistance
  - Brokering

⇒ Whether or not the goods subject to assistance are of EU or non-EU origin
EU Sanctions – Territoriality (4)

- Failure to comply with sanctions = no liability of any kind for natural or legal person if:
  - No knowledge that actions would infringe prohibition, AND
  - No reasonable cause to suspect that actions would infringe prohibition

⇒ Due Diligence
Implications & Comparative Analysis
Comparative Analysis

- US regime is more comprehensive re certain countries and blocked persons => generally all business is restricted
- EU regime is more targeted against persons and not on a country wide basis => certain sectors in Iran and Syria have been restricted
- US federal/state governments can enforce high penalties against actions undertaken willfully (criminal) or with no intent (civil)
- Civil standard does not exist in EU
- Non-US persons have received significant penalties for allegedly violating US sanctions for conduct primarily undertaken outside US
- EU enforcement is left to Member States – not as vigorous enforcement as seen in US
- No real EU corollary to US approach seeking to deny US markets to foreign persons undertaking certain actions re Iran and Syria
Navigating EU Blocking Statute
Targeting Extraterritorial US sanctions
Countering US Extraterritoriality: EU Response

- US adopted sanctions with extraterritorial scope of application

- EU response:
  - Blocking Regulation (EC) 2271/96: prohibits compliance with specific US extraterritorial legislation
  - Joint Action 96/668/CFSP: requires Member States to take the measures it deems necessary to protect the interests of persons affected by the extraterritorial application of laws insofar as these interests are not protected under the Blocking Regulation
  - WTO consultations and request for panel: DS38US – Helms Burton
Countering US Extraterritoriality: The EU Blocking Regulation

- In response to US laws and regulations
  - Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ("The Helms Burton Act") and Cuban Assets Control Regulations
  - Iran and Libya Sanctions Act of 1996, which preceded CISADA and ITRA

- No EU sanctions against Cuba

- Binding Regulation directly applicable in all the Member States
EU Blocking Regulation – Scope of Application

- Covered persons and Entities
  - Residents in the EU and EU nationals
  - Legal entities incorporated in the EU
  - EU nationals resident abroad
  - Non-EU person acting in the EU in “a professional capacity”
  - Shipping companies domiciled outside the EU and controlled by EU nationals
EU Blocking Regulation – The Prohibition

- Ban on compliance with Blocked US Sanctions “whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission” (Art. 5)

- Ban on compliance with US Court orders and no enforcement within the EU (Art. 11)

- Reporting obligations when a Covered Person’s economic/financial interests are affected (Art. 2)

⇒ But possibility of Member State License to the extent non-compliance will damage “Covered Persons”’ interests
EU Blocking Statute – Penalties

- Possibility to recover any damages caused by actions resulting from Blocked US Sanctions
- Sanctions determined by Member States must be “effective, proportional and dissuasive”
EU Blocking Statute – Limited Enforcement

- Implementation at national level incomplete
  - Lack of sanctions regime in some Member States
  - Sanctions regime in place but no enforcement (UK, Netherlands, Germany)

- Limited actions (UK banks) but no real enforcement at national level

- Lack of political will at European Commission to press enforcement

- No update of US blocking laws in the Annex
EU Blocking Statute – The Future

- New legislative process to update trade policy decisions
- Series of US enforcement actions against EU companies
  ⇒ More US laws to be included in the Annex?
- US and EU aligned on rationale of sanctions, particularly with regard to Iran and Syria
Questions?

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