

Global sanctions trends 2018

Eversheds Sutherland looks back on recent developments in global sanctions compliance and explores the trends that are expected in 2018 and beyond.

Sanctions compliance is becoming ever-more important for companies operating in the Middle East, as they seek to navigate their way through complex regimes and capitalise on emerging opportunities. The increased use of sanctions and divergence of approach is creating vast challenges for multinational and regional companies, while the evolving enforcement landscape has expanded the risk of enforcement action and reputational damage that may occur as a result.

NEW RISKS, NEW OPPORTUNITIES

Sanctions regulation remains a key priority for US and EU regulators as Western governments increasingly rely on diplomatic tools to further their foreign policy and national security interests. In the Middle East, sanctions have played an important role in recent responses to geopolitical events, as illustrated by the July 2017 imposition of restrictions against Qatar by Saudi Arabia, the United Arab Emirates, Bahrain, Mauritania and Egypt.

2017 saw the imposition of broad new US sanctions against Russia, Venezuela and Iran (and changes to US regime against Cuba); the ratcheting up of UN, EU and US sanctions against North Korea; and the revocation of most US restrictions against Sudan. The increased use of sanctions is set to continue giving rise to new risks and opportunities for businesses operating in the region.

INCREASING COMPLEXITY

Compounding the challenges is the increasing complexity of the new laws that are being imposed. For example, the US and EU have introduced sectoral sanctions against Russia in 2014, which seek to target specific dealings in money market instruments and transferrable securities, and the US has imposed sectoral sanctions against Venezuela in 2017.

In July 2017, the US signed into law the Countering America's Adversaries Through Sanctions Act ("CAATSA"), which sought to codify and strengthen existing sanctions against Russia, Iran and North Korea; expand existing restrictions on US persons; and increase so-called secondary sanctions (i.e. sanctions that seek to target business by non-US persons and entities).

The new waves of sanctions are transaction specific adding new layers of

complexity to the sanctions landscape and leaving companies with the difficult task of assessing risk under country-wide, list-based, sectoral and secondary sanctions regimes.

UNCERTAINTY AND DIVERGENCE OF APPROACH

2017 has also seen increasing uncertainty following a divergence of approach between the US and other jurisdictions. Previous actions by the US and EU sought to coordinate sanctions, for example, their response to the conflict in Ukraine and the sanctions relief provided to Iran by the P5 +1 under the 2015 Joint Comprehensive Plan of Action ("JCPOA").

The US has sought to impose unilateral sanctions on Russia, Iran and North Korea with the introduction of CAATSA. CAATSA allows for sanctions to be imposed on any state-owned entity in Russia's railway, metals or mining sector; tightens existing debt financing restrictions on Russian SSI-listed entities;² imposes a number of mandatory sanctions targeting non-US persons' dealings with Russia; and establishes new secondary sanctions in relation to Russia's energy-export pipelines, among other things. Previous sectoral sanctions applied to Russia's energy, financial and defence sectors only. They were broadly aligned to (and introduced concurrently with) EU sanctions. CAATSA represents a shift in US sanctions policy away from the coordinated approach seen in former years, prompting backlash from some European states and a revision to the bill's language.

There is also continued uncertainty and a divergence of approach regarding the potential re-imposition of US secondary sanctions against Iran. On January 12, 2018, President Trump threatened to revoke the sanctions relief provided under the JCPOA unless "*the Europeans... fix the deal's disastrous flaws*".³ As a result, most banks are unwilling to process transactions with Iran and financial transactions remain the biggest obstacle to trade with Iran. The position is unlikely to change until we have clarity and commitment from the US on its position, which seems unlikely to happen under the current administration.

In 2019, the UK will exit the EU, following which, we are likely to see greater divergence between the EU and UK sanctions regimes. EU sanctions,



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which make up the majority of the UK regime, will no longer have direct effect and new legislation will allow for the maintenance of existing EU sanctions and the implementation of unilateral regimes. We anticipate that there will be more restrictions at UK level and less at EU on the basis that most EU sanctions are proposed by the UK. For example, some member states may seek to relax sanctions against Russia following Brexit while the UK is likely to retain and even strengthen Russian sanctions given escalating political tensions.

This uncertainty and divergence of approach is expected to continue causing greater risk for companies trading with high risk jurisdictions, and exacerbating challenges for multinational corporations seeking to develop effective compliance and business strategies.

THE LONG ARM OF THE US

A number of new US secondary sanctions have also been imposed against Russia, Iran and North Korea in 2017. These sanctions purport to have extraterritorial effect, applying to virtually every company internationally, including those in the Middle East. The result is a complex, multi-faceted regulatory framework, which exacerbates compliance challenges for businesses in the region. The trend is set to continue leaving non-US persons with a choice; either comply with US secondary sanctions or risk being cut off from US commercial and financial markets.

US sanctions also apply to all

transactions where there is a US nexus and it is a criminal offence for a non-US to cause a US person to breach US sanctions. As a result, all transactions denominated in US dollars or which involve US persons, including financial institutions, or goods must comply with US sanctions.

THE EVOLVING ENFORCEMENT LANDSCAPE

In the US, we have seen an increasing number of enforcement actions against non-financial institutions and coordination across federal agencies. For example, the Department of Justice, the Office of Foreign Assets Control of the Department of the Treasury ("OFAC") and Bureau of Industry reached their largest ever settlement (USD1.192 billion) with a non-financial firm, Zhongxing Telecommunications Equipment Corporation ("ZTE"), following an alleged scheme to use third-party companies to facilitate transactions with Iran.

OFAC also brought its first case against a non-US, non-financial entity (CSE TransTel Pte. Ltd) for allegedly causing a breach of the Iranian sanctions regimes, and fined ExxonMobil for dealing with a non-restricted Russian entity whose President was an SDN. The recent actions suggest a shift in the focus of US enforcement agencies to non-US non-financial institutions and an apparent willingness to penalise violations not previously enforced.⁴

The risks of breaching the UK and EU sanctions regimes have also increased. In the UK, the Office of Financial Sanctions

Implementation (“OFSI”) was provided with new enforcement powers under the Policing and Crime Act 2017 (the “Act”). The Act gives OFSI the ability to impose significant financial penalties (up to £1 million or 50 per cent of the estimated value of the breach, whichever is greater) on individuals and institutions where it is satisfied that “on the balance of probabilities” a breach has occurred. The Act:


- » increases the maximum term of imprisonment for breaches of EU financial sanctions to seven years (up from two years); and
- » adds breaches of financial sanctions to the list of offences for which Deferred Prosecution Agreements (“DPAs”) and Serious Crime Prevention Orders can be made.

How OFSI uses its powers remains to be seen. However, we expect to see an uptick in sanctions enforcement by the UK with the imposition of significant financial penalties (including referral to criminal prosecutors in the most egregious cases).

WHAT SHOULD YOU DO?

While sanctions have been imposed for a number years, they have never been more complex or volatile. Globalisation has increased the exposure of businesses in the region, while sectoral and secondary sanctions affect non-US persons and require complex compliance controls. Regulatory scrutiny and expectations are increasing as evidenced by escalating fines and penalties. As a result, there is a need for multinational firms and those involved in international trade to implement dynamic compliance programmes that mitigate current and future risk.

The mere screening of restricted parties and countries may no longer be sufficient following the expansion of sectoral and US secondary sanctions. Companies should consider the applicability of such sanctions in high risk jurisdictions such as Iran and North Korea, and conduct enhanced due diligence to ensure a detailed understanding of the underlying transaction.⁵ Firms should ensure that all transactions conducted in US dollars comply with the US sanctions regimes. Businesses should weigh up the risks and benefits of voluntary disclosure, transparency and cooperation with regulators and enforcement agencies if historic violations are identified given

the introduction and increased use of DPAs.⁶ Finally, companies should monitor regulatory developments, provide adequate training to employees, consider inserting protective contractual provisions in their commercial agreements, and audit their compliance programmes. 

1. China, France, Germany, Russia, the UK and the US

2. By shortening the maturity periods for new debt issued on or after 18 November 2017

3. If Trump fails to certify Iran's compliance with the JCPOA on 12 May, it will trigger a 60 day window during which

4. TransTel (a Singaporean entity) used its US dollar account to make significant payments to third parties, including Iranian companies, in connection with business in Iran. The payments were processed through the US financial system, causing several financial institutions to breach US sanctions against Iran. In ExxonMobil, the presidents of ExxonMobil's US subsidiaries entered into agreements with Rosneft (a non-sanctioned entity), which were allegedly signed by Igor Sechin, the Chief Executive Officer of Rosneft, who was a designated person. The actions are significant because they demonstrate OFAC's willingness to aggressively pursue non-US, non-financial institutions and highlight the risks of non-US persons conducting transactions in US dollars.

5. Appropriate due diligence should include restrictions relating to the goods and services being provided, all parties involved in the transaction and any underlying or related transactions (and owners and controllers and all parties' locations), the signatories to any of the contracts, and the end use and end users of the goods and services.

6. In the UK, penalties imposed by OFSI may be reduced if similar criteria are met.



Text by:

1. ZIA ULLAH, head of corporate crime and investigations, Eversheds Sutherland

2. LAURA SHINGLER, senior associate, Eversheds Sutherland

3. GILLIAN FLANNIGHAN, associate, Eversheds Sutherland