

# FIVE MINUTES ON... EUROPEAN EXPORT CONTROLS AND SANCTIONS

In recent years, due to geopolitical crises occurring at their doorsteps, the European Union and its 28 Member states have significantly increased the use of their export controls and sanctions tools, adopting them much more frequently than before and extending their scope of material and geographical application.

As a consequence, all companies operating internationally are increasingly exposed to the application of various overlapping and far-reaching sanctions regimes. The legal challenge faced by European companies can become a true corporate puzzle accentuated by the following factors:

## Far-reaching Scope of the Sanctions Measures

Economic sanctions – also known as “restrictive measures” – take a variety of forms, and no longer focus only on financial transactions with specific individuals or entities. Export and import activities, and wider sectoral activity, such as insurance, reinsurance, shipping, telecommunications and tourism, have increasingly fallen under the spotlight, impacting broad economic sectors rather than just companies or individuals.

In addition it is worth noting that the jurisdictional reach of EU sanctions extends to:

- All activities done within the EU;
- Any person inside and outside the EU who is a national of a member state;
- Any company which is incorporated in an EU member state; and
- Any person or business in respect of any business done in whole or in part within the EU.

## A Complex Maze of European and National Legal Layers

Despite the fact that sanctions originate from the United Nations or the EU, or both, ultimately an EU Member State must adopt national measures for enforcement purposes. Differences exist in the interpretation, administration and enforcement of some sanctions regimes inevitably resulting in some conflicting interpretations or decisions obtained from the EU.



## The Compliance Challenge

Whilst the use of sanctions exclusion clauses and warranties may be a useful tool to mitigate sanctions risk in the acquisition of a target company, these should not be considered to be a substitute for the due diligence measures. Recent political developments have made national authorities increasingly stringent in their enforcement of national and international legislation regarding dealing with embargoes destination, or trade of military and dual-use goods subject to export control orders.

### a. What to look for

The following factors are key in assessing the extent to which sanctions and export controls are applicable to a company's trading activities:

- The identity of the goods, equipment or services concerned (e.g., can they have a military application?);
- The identity of the parties involved in such trade/supplies (e.g., are any parties or entities subject to sanctions?);
- The location or origin of the goods or equipment (e.g., are the goods going to Syria, Iran, Russia, Cuba, Sudan or other sensitive destinations?);
- The destinations (including any intermediate destinations) of supplies of such goods or equipment (e.g., is the intermediary trading with sensitive countries?);
- The intended use of the goods/equipment and any specification or modification of the goods/equipment (e.g., can the goods be incorporated into a dual-use or military technology?); and
- The identity of any intermediaries involved in the handling of the goods/equipment concerned (e.g., are any intermediaries subject to EU or US sanctions?).

## The Compliance Challenge (cont'd)

### b. What to do

To add more complexity, EU sanctions laws do not generally impose specific compliance policies and procedures. It remains the obligation of an individual or a company to comply with the rules, and satisfy itself that its corporate activities do not circumvent any of the always-evolving sanctions prohibitions. The hurdles increase as the compliance expectations set out by regulators will differ, depending on the industry sector or size of a business.

Whilst the EU does not impose a set of compliance standards, there are good rules to follow for any companies operating in an international world, especially where restrictive measures (i.e. sanctions) apply. These include:

- Assessing the need for licenses, authorisation or notification PRIOR to the sending any goods, software or technology outside of the EU;
- Getting to know your business counterparts to get satisfaction that they are not associated with any sanctioned entity or individual, and record the checks performed;
- Including sanctions wording to the contracts and/or terms and conditions, in order to mitigate any sanctions liabilities arising out of the performance of the contract;
- Implementing due diligence checks and policies as part of a global trade compliance programmes responding to the industry's best practices; and
- Monitoring the geopolitical situation and the development of the sanctions lists and adapting the new requirements as and when the rules enter into force.

### OUTLOOK FOR 2015

In 2014, the development of EU sanctions policies was marked by the escalation of the conflict in eastern Ukraine, leading to the adoption by the EU of a wide range of restrictive measures targeting sectorial cooperation and exchanges with the Russian Federation.

For the first time, EU sanctions measures include not only traditional sanctions measures – including an embargo on trade in arms, an export ban for dual use goods for military end use and end users, and restrictions on access to certain sensitive technologies, particularly in the oil sector – but also a package aimed at limiting access to EU capital markets for Russian State-owned financial institutions.

The impact of such restrictions on the EU market has been unprecedented. And many European companies have been left with the challenge of navigating a sophisticated set of rules, initially without real guidance from the EU or the national regulators. As tension in Eastern Ukraine reaches new heights, the EU has already announced that further preparatory work be undertaken on “any appropriate action, aiming at ensuring a swift and comprehensive implementation of the Minsk agreements.” In other words, the EU could be considering new sectorial restrictions if the situation on the ground deteriorates further.

Watch this space as we have embarked upon a new sanctions journey that will be every bit as unpredictable as it was before.

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