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The Kim-Trump Summit: a new era?

On 12 June, US president Donald Trump met North Korea's Kim Jong-un. The two leaders came to Singapore, shook hands, and later issued a statement in which they pledged to restart relations between their two countries and build a lasting and stable peace on the Korean peninsula. The statement also noted that North Korea reaffirmed the 27 April 2018 Panmunjom Declaration – by which it commits to work toward complete denuclearisation of the Korean Peninsula. We also know – because President Trump said so at a subsequent press briefing – that the US and South Korea are to refrain from antagonising Pyongyang with military drills or 'war games', and that North Korea ('DPRK') is to destroy a major testing site.

As regards other aspects of the arrangements, Trump refused to be drawn on specifics. Asked whether and how the denuclearisation of the peninsula would be verified, he said, 'Well, it's going to be achieved by having a lot of people there,

China has issued a statement to say that sanctions were always 'a means to an end'.

and as we develop a certain trust. And we think we have done that. Secretary Pompeo has been really doing a fantastic job – his staff, everybody. As we do that, we're going to have a lot of people there, and we're going to be working with them on a lot of other things. But this is complete denuclearisation of North



On 12 June Donald Trump and Kim Jong-un met in Singapore in the first summit meeting between the leaders of their two countries.

Korea, and it will be verified,' adding that those 'people' would be 'combinations of both [Americans and 'international']'.

Asked what kind of time-frame had been agreed, he explained: 'Well, you know, scientifically, I've been watching and reading a lot about this, and it does take a long time to pull off complete denuclearisation. It takes a long time. Scientifically, you have to wait certain periods of time, and a lot of things happen. But despite that, once you start the process, it means it's pretty much over; you can't use them. That's the good news.'

Sanctions status

On the issue of sanctions, the President told reporters that they would 'come off' at the point that it became apparent 'that the nukes are no longer a factor'.

'Sanctions played a big role,' he said, 'but they'll come off at that point. I hope it's going to be soon, but they'll come off. As you know, and as I've said, the sanctions right now remain. But at a certain point, I actually look forward to taking them off. And they'll come off when we know we're down the road – where it's not going to happen,

nothing is going to happen.'

China, however, has issued a statement to say that sanctions were always 'a means to an end' – which has been interpreted as indicating a willingness to begin relaxing sanctions against North Korea.

South Korea has issued a statement which reads: 'Regarding President Trump's comment regarding ending of the combined military drills ... we need to find out the exact meaning or intention behind his comments at this point.'

As at time of writing (12 June) the think-tank community has yet to marshal, for the most part, its thoughts on the landmark agreement into publishable form. However, in an article for the Brookings Institution, Jung Pak, K-Korea Foundation Chair in Korea Studies, Senior Fellow in the Center for East Asia Policy Studies noted: 'For Kim to do this 180-degree turn to engagement suggests to me that he's good at maximum pressure and maximum engagement...So, he'll talk to China and say the right things to the Chinese; he'll talk to the South Koreans and he'll say the right things to them about blood ties, peace, and unification – all the things that really appeal

to the South Korean public and its ambitious politicians.

'With the United States, he's not looking at the US government overall as an entity to deal with, but rather is focusing on how to manage Trump. It appears to me that the North Koreans are looking to appeal directly to Trump's preferences and priorities... He sees a South Korean president who's willing to look away from the nuclear and conventional threats. He sees a US president who is really eager to meet with him for a summit and wants to prove his international standing as a peacemaker, and a US president who is also very openly interested in potentially withdrawing US troops in the Korean Peninsula. So, I think Kim

On the issue of sanctions, the President told reporters that they would 'come off' at the point that it became apparent 'that the nukes are no longer a factor'.

sees these strategic opportunities...'

North Korea remains of huge concern to the non-proliferation community, and it's apparent that North Korea's appalling human rights track record was at best skirted around and at worst ignored entirely during talks.

Win-win, Kim-win, or Trump-win – there is little to indicate any compliance takeaway for the moment. The devil may be in the detail, and that has yet to materialise.

US announces 'strictest BIS compliance requirements ever' on ZTE

The US Department of Commerce's Bureau of Industry and Security ('BIS') has announced an exacting new deal with Chinese telecoms manufacturer ZTE, overturning the seven-year denial of export privileges imposed in April. The ban blocked ZTE's access to vital US components which comprise around 30% of its smartphones and networking gear, causing its factories to close and huge financial losses. ZTE's revival was reportedly raised by President Xi Jinping of China with President Trump before critical US-China trade talks.

Under the terms of the new deal, which replaces the settlement agreement entered into in 2017, ZTE must pay \$1bn and place an extra \$400m in escrow before being removed from the Denied Persons List. The penalties are in addition to the \$892m paid under the 2017 agreement. For the first time ever, a US compliance team answerable to BIS will be embedded in a company for ten years 'to monitor on a real-time basis ZTE's compliance with US export laws.' ZTE must also replace the entire board of directors and senior leadership. BIS has also imposed a ten-year suspended denial order, which can be activated in the case of export violations.

'This agreement is remarkable — not only because of the unprecedented size of the monetary penalty imposed, but also because of the sweeping changes required with respect to the company's board and management team as well as the long-term and direct access that the US government will



A US compliance team answerable to BIS will be embedded in the company for ten years.

enjoy in the form of embedded compliance monitors,' said Jeremy Zucker, co-chair of the international trade and government regulation practice at Dechert LLP.

'Had this agreement been announced originally — instead of the denial order — few would have questioned the seriousness of the US government's commitment to enforcement of export control laws. It is regrettable, however, that this agreement was reached only after the US government first announced, and then walked back, the imposition of a denial order on the company. It gives the appearance, whether or not accurate, that enforcement results are transactional and subject to undue political influence.'

The ZTE deal is the most severe penalty ever imposed on a company by BIS, and brings the total penalties assessed on ZTE to \$2.29bn.

BIS's denial of export privileges on ZTE in April, citing a 'pattern of deception, false statements and repeated violations' in ZTE's dealings with the US government, surprised some, including ZTE itself. A settlement had been reached between BIS and ZTE for

illegal shipments of US-origin electronics to Iran and North Korea ('DPRK') in 2017, involving the payment of a \$1.2bn penalty and a suspended denial of export privileges. BIS changed its position following the discovery that ZTE had made 'false statements' to

The ZTE deal is the most severe penalty ever imposed on a company by BIS, and brings the total penalties assessed on ZTE to \$2.29bn.

BIS both during the settlement negotiations and during the post-settlement probationary period concerning disciplinary actions taken against employees. ZTE retained — and even awarded bonuses to — some of the employees involved in the illegal shipments.

President Trump's tweet on the eve of trade talks with President Xi Jinping in May, promising to get ZTE 'back into business fast', caused shockwaves in the world of export control.

Presidential interference in the work of a US law

enforcement agency is unprecedented; it 'blindsided' BIS, 'placing us in uncharted waters' according to one source. 'The tradition of the United States is that the president does not meddle in prosecutions,' said Barack Obama, when petitioned by François Hollande over the Department of Justice's investigation into breaches of US sanctions by BNP Paribas in 2014.

In April, after the announcement of the denial order, ZTE publicly stated: 'ZTE has been working diligently on Export Control Compliance program and has invested tremendous resources in export compliance and has made significant progress since 2016. It is unacceptable that BIS insists on unfairly imposing the most severe penalty on ZTE even before the completion of investigation of facts, ignoring the continuous diligent work of ZTE and the progress we have made on export compliance and disregarding the fact that (1) ZTE self-identified the issues in the correspondence and self-reported by ZTE immediately; (2) the Company has taken measures against the employees who might have been responsible for this incident; (3) corrective measures has been taken immediately; and (4) a prestigious U.S. law firm has been engaged to conduct independent investigation.'

But ZTE's argument that the denial should be revoked because US suppliers such as Qualcomm and Broadcom were negatively affected was dismissed by

continues over

continued

industry insiders: 'The US government in terms of sanctions issues doesn't talk about collateral negative impact on US entities – if that was the case, it wouldn't have embargoed Iran,' one said.

President Trump's sanctions rollback has faced fierce opposition in Congress – both Republican and Democrat. On the same day the deal was reached, an amendment was introduced into Congress seeking to reinstate sanctions on ZTE

unless the president certifies to Congress that it is complying with US law.

'I assure you with 100% confidence that #ZTE is a much greater national security threat than steel from Argentina or Europe,' Republican Marco Rubio, a supporter of the amendment, wrote on Twitter. '#VeryBadDeal'.

Commerce Secretary Wilbur Ross's assertion in a CBNC interview that the ZTE deal is a law enforcement matter separate from trade negotiations with China has

been undercut by President Trump himself, who has tweeted that the move is only part of 'a larger trade deal we are negotiating with China'.

Inconsistent policy

Market commentators point out that the Trump administration's stance on ZTE is inconsistent with his decision to pull the US out of the 2015 nuclear deal with Iran – the Joint Comprehensive Plan of Action ('JCPOA') – under which Iran is granted sanctions relief in return for

a scaling down of nuclear capacity. Secretary of State Mike Pompeo has set out a list of 12 requirements Iran must meet under any new deal, or face 'the strongest sanctions in history'.

ZTE was, after all, sanctioned by the US for exporting US-origin electronics to the DPRK and Iran, and the US expects its Iran sanctions to be complied with by the European powers.

The company has yet to comment publicly on the terms of the new settlement agreement.

Total withdrawal from Iran?

French oil giant Total and China's Petrochina have announced that, in the wake of the US withdrawal from the the Joint Comprehensive Plan of Action ('JCPOA') and reimposition of secondary sanctions on companies doing business with Iran, they will wind down their participation in the South Pars 11 gas project – unless they can secure a specific waiver to allow them to continue.

In a statement, Total said: 'On 4 July 2017, Total, together with the other partner Petrochina, executed the contract related to the South Pars 11 (SP11) project, in full compliance with UN resolutions and US, EU and French legislation applicable at the time. SP11 is a gas development project dedicated to the supply of domestic gas to the domestic Iranian market and for which Total has voluntarily implemented an IRGC-free policy for all



Total has said 'it cannot afford to be exposed to any secondary sanctions which might include the loss of financing in dollars by US banks'.

contractors participating in the project, thereby contributing to the international policy to restrain the field of influence of the IRGC. [The Islamic Revolutionary Guard Corps, IRGC, is sanctioned in the United States under Executive Order 13224 for its 'activities in support of the IRGC-Qods Force... for providing support to a number of terrorist groups, including Hezbollah and Hamas, as well as to the Taliban'.]

'On 8 May 2018,

President Donald Trump announced the United States' decision to withdraw from the JCPOA and to reinstate the US sanctions that were in force before the JCPOA's implementation, subject to certain wind down periods.

'As a consequence and as already explained before, Total will not be in a position to continue the SP11 project and will have to unwind all related operations before 4 November 2018 unless Total is granted a specific project waiver by the US authorities

with the support of the French and European authorities. This project waiver should include protection of the Company from any secondary sanction as per US legislation.'

Total said it had 'always been clear that it cannot afford to be exposed to any secondary sanctions which might include the loss of financing in dollars by US banks for its worldwide operations (US banks are involved in more than 90% of Total's financing operations), the loss of its US shareholders (US shareholders represent more than 30% of Total's shareholding) or the inability to continue its US operations (US assets represent more than 10 billion dollars of capital employed)', and thus, 'in accordance with its contractual commitments vis à vis the Iranian authorities, is engaging with the French and US authorities to examine the possibility of a project waiver.'

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Jamaica among countries dealing with fallout from US sanctions on RUSAL

The Caribbean island nation of Jamaica has set up a task force to deal with the impact on its bauxite operations of the US's targeted Russia sanctions. Jamaica is a supplier to RUSAL, the world's second-largest aluminium producer, which was designated by the US in April. Jamaica's Minister of Mining, Robert Montague told the country's House of Representatives on 30 May that the task force will include representatives from his ministry, the Ministry of Finance and the Public Service, the Ministry of Foreign Affairs and Foreign Trade, the Attorney General's Chambers and the Jamaica Bauxite Institute, according to the Jamaica Information Service.

'We are consulting with



RUSAL chief, Oleg Deripaska, whose designation along with his company sent shockwaves through world aluminium markets.

the US Government, the Russian Embassy and UC RUSAL. We will update the country in a more fulsome way very soon. Discussions are at a very delicate stage,' he said.

As has been previously reported in *WorldECR*, on 6 April the US Department of the Treasury's Office of

Foreign Assets Control ('OFAC') sanctioned seven Russian oligarchs, a dozen of their companies, and 17 senior Russian government officials. Those sanctioned include Oleg Deripaska, who controls EN+ Group, RUSAL and GAZ Group. The consequence of RUSAL being blocked from the dollar markets was a jump in the price of aluminium and repercussions for the raw material supply chain.

'The RUSAL sanctions have had a huge impact on the aluminium market. If you add the US "232" regulation changes on steel and aluminium also this year, the market has really been in shock,' said a source from a metal commodities trading house.

Although RUSAL is based in Russia, it has bauxite mines in Jamaica, Guinea and Guyana; refineries in Jamaica, Italy, Ukraine, Guinea and Ireland; and smelters in Sweden and Nigeria. The Aughinish refinery in Limerick, Ireland, employs 450 people and is the largest of its kind in Europe, accounting for approximately 30% of alumina produced in the EU. Irish politicians have been petitioning the US over the

sanctions through the EU, said the source. Rio Tinto, which supplies Aughinish with bauxite, is reportedly reviewing its sales to the Irish refinery in the wake of the sanctions, as well as RUSAL's supply of alumina to Rio Tinto's smelters in France and Iceland. A smelter in Dunkirk, France, is the largest in the EU, supplying BMW and Daimler, amongst other manufacturers.

The Trump administration has moved quickly to mitigate the volatility it unleashed on the markets through the threat of secondary sanctions on non-US entities. A series of licences has been issued by OFAC to allow the continuation of contracts for the 'winding down and maintenance' of business with sanctioned Russian entities, including General Licence 14 on 23 April, which allows such dealings with RUSAL until 23 October.

On 22 May, a similar licence – General License 15 – authorised the same with GAZ Group (see box). OFAC has made clear that the price for sanctions relief is the 'relinquishment of control' of the sanctioned companies by Deripaska. He resigned from RUSAL's board on 25 May and is reportedly planning to reduce his stake in EN+ Group.

'Now that Deripaska is clearly trying to reduce his stake in the company to a level that the US government is comfortable with and has resigned all executive roles, we expect to see the situation calm down to a degree where RUSAL will be able to operate, albeit under slightly different circumstances than before,' said the source.

OFAC issues wind-down licences

The US Department of the Treasury's Office of Foreign Assets Control ('OFAC') has issued several licences to aid the 'maintenance and winding down' of business with the Russian entities sanctioned by Washington in April.

General License 15, issued on 22 May, authorises specified transactions with Russian automotive manufacturer GAZ Group and its subsidiaries until 23 October 2018, extended from 5 June. GAZ Group is considered by OFAC to be owned (or controlled) by sanctioned individual Oleg Deripaska. The licence offers relief similar to that authorised by OFAC under General License 14 concerning aluminium giant, RUSAL, on 23 April.

General License 13B was issued on 31 May, superseding General Licence 13A. This licence adds EN+ Group to the list of entities – which comprise RUSAL and GAZ Group – for which the divestment, or transfer of debt or equity, is allowed. It extends the deadline for such activities to 5 August.

General License 16, issued on 4 June, authorises certain 'maintenance and wind down' activities with EN+ Group, EuroSibEnergo (or any entity owned by these companies or in which they have a direct or indirect 50% or more interest) until 23 October.

OFAC's General License 13B can be found here:
https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl13b.pdf

OFAC's General License 15 can be found here:
https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl15.pdf

OFAC's General License 16 can be found here:
https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl16.pdf

EU to use Blocking Regulation response to US withdrawal from the JCPOA

The European Union has responded to the threat posed to its businesses of the US re-imposing sanctions on Iran by starting the formal process for adding these sanctions to its Blocking Regulation (formerly Regulation 2271/96).

Following US withdrawal from the Joint Comprehensive Plan of Action ('JCPOA') on 8 May, it is not yet clear whether secondary sanctions will be imposed against EU businesses trading with Iran, although US national security adviser John Bolton has indicated that



Few commentators believe a Blocking Regulation will be relied upon.

this is 'possible'. If the re-imposed US sanctions on Iran are blocked by the Regulation, this means that no judgment or requirements from an authority outside the EU

concerning this measure will be recognised, and EU persons should not comply with any requirements or prohibitions unless that would seriously damage their interests or that of the

EU. Damages caused by the US sanctions, including legal costs, can be 'clawed back' by the affected party. But how likely is it to be relied on? 'The reinvigoration of the Blocking Regulation is an unwelcome development as it is intended to put EU businesses between a rock and hard place,' commented Ross Denton of Baker McKenzie. 'Unfortunately, the US rock is far more compelling than the EU hard place, and very few EU businesses will rely on the Blocking Regulation to guarantee their ability to keep doing business in the US and Iran.'

US considers easing of some arms export controls

The US administration is considering moving certain firearms and ammunition out of the remit of the International Traffic in Arms Regulations ('ITAR'). As part of the ongoing Export Control Reform ('ECR') programme, the Department of Commerce's Bureau of Industry and Security ('BIS') and the Department of State have simultaneously proposed new rules which will result

in the export licensing of some sporting and commercial firearms and ammunition being moved from the ITAR-controlled US Munitions List ('USML') to the Commerce Control List ('CCL'), under the Export Administration Regulations ('EAR'). The move will make it easier for US gunmakers to sell small arms (such as assault rifles and ammunition) abroad and relieve them of annual fees

required under the ITAR. The BIS proposed rule describes how the transitioned articles would be controlled under the CCL, while that of State discusses how Categories I, II, and III of the USML are to be

revised 'to describe more precisely the articles warranting continued control on that list.' The proposed rules were published on 25 May and the closing date for comments is 7 July.

For BIS's proposed rule, see: <https://www.bis.doc.gov/index.php/documents/pdfs/2207-05-4-18-signed-commerce-firearms-proposed-rule-delivered-to-ofr-for-publication/file>

For the Department of State's proposed rule, see: <http://accurateshooter.net/pix/itarstaterule2018.pdf>

UN considers further sanctions, including arms embargo, against South Sudan

The United Nations Security Council has voted to renew sanctions against officials in South Sudan, leaving the way open for further measures to be imposed, including a possible arms embargo.

Resolution 2418 (2018) renews sanctions imposed in Resolution 2206 of 3 March 2015 until 15 July. South Sudan has experienced a bloody civil war since 2013, characterised by ongoing violence by both government and armed opposition, despite a peace agreement brokered in December 2017. Millions of people have been displaced and an estimated 300,000 killed.

If by 30 June the Secretary General reports that no progress has been made by the parties signed up to the peace agreement towards a cessation of hostilities, or there is a lack of a 'viable political agreement', then the Council will consider targeted sanctions on six individuals, including travel bans and asset freezes and/or an arms embargo. Those named are officials considered to have exacerbated the conflict and blocked humanitarian access: Koang Rambang Chol, Kuol Manyang Juuk, Malek Reuben Riak Rengu, Martin Elia Lomuro, Michael Makuei

Lueth and Paul Malong Awan.

Washington introduced an export policy of denial – with limited exceptions – for the export of defence goods and services to South Sudan in April, at the same time pushing for other countries to follow its lead by imposing arms restrictions. The EU has also imposed unilateral sanctions on three individuals in response to the escalating crisis, the first time it has done so in addition to United Nations' sanctions.

<https://www.un.org/press/en/2018/sc13361.doc.htm>

Putin signs counter-sanctions into law

President Putin has signed a bill into law which allows the Kremlin to sever relations or restrict trade with foreign states viewed as hostile to Russia (4 June). Federal Law No 441399-7 'On Measures (Countermeasures) in Response to Unfriendly

Actions of the USA and (or) other Foreign States' enables a ban to be imposed on goods from the US and other 'unfriendly' states, as well as preventing citizens of those states from taking part in the privatisation of Russian property.

Two Russian bills were

proposed in response to Washington's sanctions on prominent Russian oligarchs and quasi-state businesses in April, labelled as a response to Russia's meddling in the US elections and damaging cyber activities.

Draft Bill No. 464757-7 'On Amendments to the

Criminal Code of the Russian Federation', criminalising those who refuse to provide business or services to a Russian individual on the grounds of US or other sanctions, has been postponed following pressure from business lobby groups.

US strengthens sanctions on Venezuela

The US has upped its sanctions on Venezuela by banning 'certain additional transactions', and also designating a number of current or former government officials. Venezuela has been subject to an escalation in both US and EU sanctions attributed to repeated violations of individual freedoms by the Maduro government and concerns that recent elections lack legitimacy.

On 22 May, President Trump signed an executive order which prohibits US citizens from transacting in:

- The purchase of any debt owed to the Venezuelan government, including accounts receivable;

- Any debt owed to the Venezuelan government that is pledged as collateral after 21 May 2018, including accounts receivable; and
- The sale, transfer, assignment, or pledging as collateral by the Venezuelan government of any equity interest in any entity in which the Venezuelan government has a 50% or greater ownership interest.

The US Department of the Treasury's Office of Foreign Assets Control ('OFAC') designated four Venezuelan individuals and three companies in Florida for corruption on 18 May. Three of the individuals designated

are current or former government officials, whilst Rafael Alfredo Sarria Diaz was designated for being the 'front man' for one of the officials, Diosdado Cabello Rondón.

The three Florida-based companies were designated for being owned or controlled by Sarria.

'The Venezuelan people suffer under corrupt

politicians who tighten their grip on power while lining their own pockets. We are imposing costs on figures like Diosdado Cabello who exploit their official positions to engage in narcotics trafficking, money laundering, embezzlement of state funds, and other corrupt activities,' said Treasury Secretary Steven Mnuchin.

For executive order dated 21 May see:

<https://www.whitehouse.gov/presidential-actions/executive-order-prohibiting-certain-additional-transactions-respect-venezuela/>

For EO 13692 see: <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/13692.pdf>

For the US Department of the Treasury's press release, see:

<https://home.treasury.gov/news/press-releases/sm0389>

For OFAC's list of those designated see: <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180518.aspx>

UK sanctions bill receives royal assent

The UK's Sanctions and Anti-Money Laundering Act has received royal assent. The Act creates a new domestic framework which will enable the UK to impose and enforce sanctions after Brexit. At present, the UK imposes non-UN sanctions through EU laws. The Act also contains additional powers to stop funding for terrorists, by making it easier to freeze assets and block access to bank accounts.

Under the Act, sanctions regulations may be made when appropriate for: the purposes of compliance with a UN obligation; the purposes of compliance with any other international obligation; or for a purpose stated within s1(2) of the Act, e.g. a 'discretionary purpose', such as in the interests of national security or the interests of international peace and security.

The list of 'discretionary purposes' set out in the Act also include providing 'accountability for or be a deterrent to gross violations of human rights,' and to 'contribute to multilateral efforts to prevent the spread and use of weapons and materials of mass destruction,' as well as other humanitarian concerns.

OFSI publishes new sanctions guidance

The UK's HM Treasury's Office of Financial Sanctions Implementation ('OFSI') has published a set of FAQs to assist exporters with financial and trade sanctions.

The FAQs are designed to complement OFSI's existing Financial Sanctions Guidance, published in March.

OFSI has previously published a set of FAQs aimed at the charity sector.

OFSI's FAQs can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706182/FAQ_guidance_for_trade_import_and_export_sector.pdf

OFSI's financial sanctions guidance can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685308/financial_sanctions_guidance_march_2018_final.pdf

UK failed to warn Bosnia of risk of arms exports being diverted to ISIS

The UK's Department for International Trade ('DIT') failed to pass on a warning to the Bosnian authorities that a consignment of arms exported to Saudi Arabia was likely to be destined for ISIS fighters in Syria, the House of Commons' Committees on Arms Export Controls has been told.

Lloyd Russell-Moyle MP questioned ministers from the DIT and the Joint Export Control Unit on why, having rejected an application for export licences from UK-based arms brokers in 2014 because it was possible that the end-user was Islamic militants in Syria, they did not inform Bosnian counterparts considering a parallel licence application. The 300m rounds of



UK rejected an export licence because end-user might be ISIS but failed to alert Bosnian authorities considering a parallel application.

ammunition included AK-47 assault rifles, which are not commonly used by the Saudi army. Both the US and EU had warned of the risks of diversion. The Bosnian arms exports were revealed in a recent report by the Balkan Investigative Reporting Network.

Graham Stuart MP, minister for investment at the DIT, confirmed that the Bosnians were not contacted, but stated that 'according to the report the goods were shipped before we turned down the licence applications.' The UK took 15 months to reject the licence

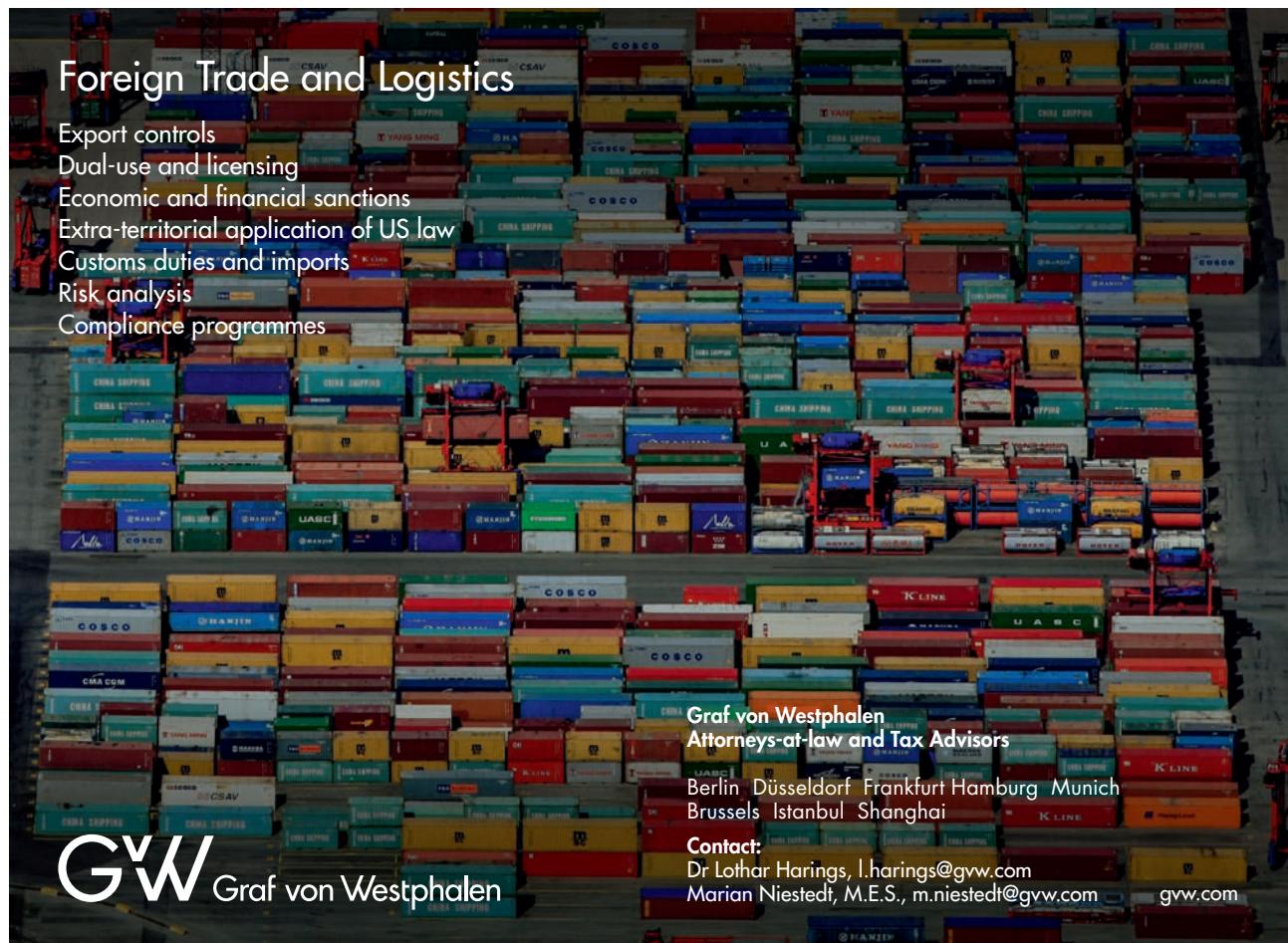
applications, instead of the usual 20 days.

Bosnia is not a Member State of the EU so has no right to be informed of denial notifications by Member States. Both the UK and Bosnia are signatories to the 2014 Arms Trade Treaty, under which members are obliged to monitor arms exports and ensure that weapons are not traded contrary to arms embargoes or end up in conflict zones where they can be used to perpetrate human rights abuses or terrorism.

In answer to other questions raised, the inquiry also heard that the UK conducts no audits overseas and there is no practice of end-use monitoring, as is the case in the US and Germany.

Foreign Trade and Logistics

- Export controls
- Dual-use and licensing
- Economic and financial sanctions
- Extra-territorial application of US law
- Customs duties and imports
- Risk analysis
- Compliance programmes



Graf von Westphalen
Attorneys-at-law and Tax Advisors

Berlin Düsseldorf Frankfurt Hamburg Munich
Brussels Istanbul Shanghai

Contact:
Dr Lothar Harings, l.harings@gvw.com
Marian Niestedt, M.E.S., m.niestedt@gvw.com

gvw.com

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Tank Talk

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Responding to Caracas: a twin-track approach

In an editorial published on the website of the Brookings Institution, Brookings Fellow (and Israeli/Venezuelan economist) Dany Bahar writes that while the imposition of further sanctions might be the 'proper response' to the current situation in Venezuela, 'it is important to be extremely careful when designing them. The less targeted they are, the more likely they might hurt the Venezuelan people who are already living under one of the worst humanitarian crises the hemisphere has seen.'

Bahar describes two avenues which he suggests are 'worth exploring for the U.S. administration when designing a comprehensive response to the Venezuelan dictatorship, which has become a threat not only to its people, but to the entire region.'

Firstly, he says, there is greater scope for individualised sanctions to be imposed 'on middle- and high-ranking government officials and military officers who have effectively hijacked and abused the system in order to stay in power forever

while enriching themselves through corruption and illegal activities.' These, he says, should be expanded to include first-degree family members where there is evidence of 'foreign assets and bank accounts under their names,' – and should be coordinated with countries in Europe, Latin America and the Caribbean.

Second, he says, the United States must 'lead the international community and find solutions to what will continue to be an important challenge for the region: the Venezuelan refugee crisis,' noting that according to the UN Migration Agency, the number of Venezuelans in South America outside their home country 'rose from 90,000 to 900,000 between 2015 and 2017.'

He adds: 'The United States should also consider accepting more Venezuelans as refugees, or at the very least, provide them an option to apply for temporary protected status so that they can live and work in the United States.'

<https://www.brookings.edu/opinions/us-sanctions-must-be-precise-in-order-to-spare-innocent-venezuelans/>

Iran and North Korea: Links – but not the same

Writing for the European Council on Foreign Relations ('ECFR'), François Godement, director of the Council's Asia & China programme, says that there are 'deep and long-standing linkages' between the nuclear programmes of North Korea and Iran, which involve 'mutual help and the use of each other for cover at critical junctures,' – as evidenced in 2017, 'when Iran tested a ballistic missile at the height of the U.S. stand-off with North Korea.'

But, he argues, 'those linkages do not mean that the problems are identical. Iran received important sanctions relief in the 2015 nuclear deal, even though the U.S. is now re-imposing sanctions. North Korea, by contrast, is under increasingly biting sanctions. Iran is only a threshold nuclear power. North Korea is already a nuclear weapon state. Iran has not cheated on the 2015 nuclear deal, but it remains a major regional threat ... financing and arming, including with missiles, militias in Syria, Lebanon, Iraq and Yemen. By contrast, North Korea has a long history of breaking agreements. But it hasn't instigated armed factions in its neighbours' territories, not to mention arming them with missiles. Its danger to its neighbours lies in its ballistic threat which it would only exercise

in a fit of pre-emptive (and ultimately suicidal) self-defence.'

The linkage between the two problems, he suggests, emerges 'not from their similarities but from the potential to proliferate, including to each other,' and he points out that the proliferation record of North Korea towards Pakistan and the Middle East implies that North Korea might share the designs for its warheads. 'They might also sell the design and parts of its more recent solid fuel ballistic missiles.'

President Trump's initiatives, writes Godement, have built on the differences between Iran and North Korea. With Iran, the missile issue now seems to be paramount. Both the US-French-UK strikes on Syria, and the more devastating Israeli attack sent the message that missile sites in Iran could be hit easily. And nukes without missiles are less of an imminent threat.'

As regards North Korea, he says, US policy 'will rise or fall based on the degree of quick and intrusive verification that US can obtain from North Korea. And it is easier to verify the destruction of missiles than to search for nuclear warheads or even uranium enrichment sites.'

http://www.ecfr.eu/article/commentary_birds_of_different_feathers_why_the_north_korea_and_iran_problem

India's defence sector to suffer from US sanctions against Russia

'US sanctions on Russian defence companies may end up hurting an innocent bystander: India's defence sector.'

So write Amit Bhandari and Kunal Kulkarni, Fellows of Gateway House – the Indian Council on Foreign Relations: 'The impact of [sanctions] to continued procurement with Russia could be substantial. India, which is the world's largest importer of arms, is a leading buyer of Russian military hardware. Between 2012 and 2017, India imported \$22.4 billion worth of weapons, of which 67% was from

Russia. An as yet undetermined amount of this trade is now in question.'

Bhandari and Kulkarni say it will be hard to offset the interruption of arms procurement from Russia – given that the only comparable portfolio of weaponry is offered by the United States '...but at much higher prices and with many restrictions and strings attached.'

US sanctions also could cause problems, they say, for India's attempts to indigenise its defence production: In the short term, 'India can and must seek waivers to U.S.

sanctions for defence deals with Russia [though] waivers may not be forthcoming since the U.S. may see a business opportunity for its own vendors in disrupting Russian weapons-supply relationships. So India needs to find ways to work around the sanctions. One possibility might be to use state-owned firms, which don't have any business ties in the West and are therefore less vulnerable to the threat of sanctions, to partner with Russian firms in critical areas.'

<http://www.gatewayhouse.in/russia-sanctions-damage-indian-defence/>

EU

The EU blocking statute vs OFAC: No contest?

By Ross Denton, Baker McKenzie

www.bakermckenzie.com



The European Commission has started the process by which it would add US sanctions measures on Iran to the so-called Blocking Regulation (formerly Regulation 2271/96). This is in direct response to the US President's withdrawal of his waiver relating to the JCPOA. The effect of the withdrawal was to reintroduce US sanctions that were in force prior to the JCPOA. US sanctions on Iran not only impact US companies and persons, but can, in certain circumstances be applied to non-US persons. The most important extension of US jurisdiction relates to non-US subsidiaries of US companies.

However, the US also has powers to place so-called 'secondary sanctions' on non-US persons. These can be placed on any person (i.e., including non-US persons acting wholly outside US jurisdiction) engaging in certain 'sanctionable activities', as defined by the relevant US laws and regulations.

These 'sanctionable activities' are detailed in OFAC's recent FAQ document.¹

The US government has a considerable degree of discretion in determining whether to impose 'secondary sanctions' on non-US persons engaging in these 'sanctionable activities', and this will likely depend in part on the nature and scope of the activities, the parties involved, etc.

Most countries, and all the other signatories of the JCPOA (UK, Russia, China, France and Iran) plus Germany have reaffirmed their adherence to the JCPOA.

What does the Blocking Regulation do?

The Blocking Regulation has four main elements.

- First, it requires any EU person to notify the Commission of any effects

on the economic and/or financial interests of that person caused by a measure blocked in the Annex.

- Second, no judgment of a court or tribunal, and no decision of an administrative authority located outside the EU that gives effect, directly or indirectly, to the measure in the Annex, or to actions based thereon or resulting therefrom, shall be recognised or be enforceable in the EU in any manner. This is the main blocking measure.
- Third, no EU person shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate

The reinvigoration of the Blocking Regulation is an unwelcome development as it is intended to put EU businesses between a rock and hard place.

omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the measures specified in the Annex or from actions based thereon or resulting therefrom. EU persons may be authorised, in accordance with the procedures provided in Articles 7 and 8, to comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community.

- Finally, an EU person shall be entitled to recover any damages, including legal costs, caused to that person by the application of the

measures specified in the Annex or by actions based thereon or resulting therefrom. This is sometimes referred as the 'clawback measure'.

What is the process now being undertaken?

Based on a 2014 amendment to Regulation 2271/96, the Commission now has power, delegated to it from the Council, to add measures to the Annex of 2271/96. The process by which it is to do this is as follows: As soon as it adopts a delegated act, the Commission notifies it to the European Parliament and to the Council. That delegated act can enter into force only if:

- no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and to the Council; or
- before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object.

The two-month period shall be extended by four months at the initiative of the European Parliament or of the Council.

We assume that the Commission has notified the Parliament and Council of the measures to be added to the Annex, and unless either party objects, or both agree to the proposal sooner, the additions will take effect after two months

What is the practical implication of the Blocking Regulation?

The reinvigoration of the Blocking Regulation is an unwelcome

development as it is intended to put EU businesses between a rock and hard place. Unfortunately, the US rock is far more compelling than the EU hard place, and very few EU businesses will rely on the Blocking Regulation to

Links and notes

¹ https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_windown_faqs.pdf

guarantee their ability to keep doing business in the US and Iran.

The Blocking Regulation was of very little use in curtailing US policy on Cuba, and almost certainly will not curtail US policy on Iran. The US financial system is now so important to global and EU businesses that it cannot easily be avoided. Even during the US adherence to the JCPOA, all Western banks were reluctant to do

business with Iran, because of the risks posed under US law. This reluctance has now turned into positive dislike.

As noted above, the US is also stressing the possibility of secondary sanctions, which in principle force non-US businesses to choose between doing business in the US and doing business in Iran. The revivification of the Blocking Regulation will not affect that choice.

RUSSIA

Russia's proposed response to US sanctions: criminal liability for sanctions compliance and counter sanctions

By Hannes Lubitzsch, Noerr. www.noerr.com

Unlike other countries, Russia currently does not ban companies from complying with foreign economic sanctions. In particular, there is no administrative or criminal liability for sanctions compliance under Russian law. Further, to date only light economic counter sanctions have been imposed by Russia in response to the US and EU sanctions (primarily, an import ban for agricultural products since 2014¹).

The Russian State Duma now is working in parallel on two draft laws which are intended to be Russia's response to the latest round of US sanctions of 6 April 2018:

1. draft law No. 464757-7 'On Changes to the Criminal Code [...]’ imposing criminal liability on any individual complying with foreign sanctions in Russia (the 'Blocking Law'); and
2. draft law No. 441399-7 'On Measures (Counter Measures) in Response to Unfriendly Actions of the United States [...]’ authorising the Russian President to impose further economic counter sanctions on foreign states and their companies (the 'Sanctions Law').

In addition, high-ranking politicians had demanded the introduction of administrative liability for legal entities

complying with the latest US sanctions on the Russian territory, with a fine up to RUB 50 million (approximately USD 800,000).² To date, this legislative initiative seems to have been put on hold.

1. Blocking Law

Following the submission of the Blocking Law to the State Duma on 14 May, the Duma members unanimously adopted the draft law on the next day (15 May) in the first reading.³ The draft law introduces two new sanction-related offences to the Russian Criminal Code:

- Actions performed by any individual – i.e., a Russian or foreign citizen – to comply with foreign sanctions shall be punished by imprisonment of up to four years, if they result in the prevention or restriction of the ordinary business operations/ transactions of Russian persons.
- Deliberate actions performed by a Russian citizen which facilitate the introduction of foreign sanctions, including by providing recommendations and conveying information, shall be punished by imprisonment of up to three years.

The compliance with US and EU



sanctions in Russia is targeted by the first offence. The wording of this offence in the Blocking Law is rather vague:

Article 2842. Restriction or refusal to carry out ordinary business operations or transactions for purposes of assisting in the implementation of measures of restrictive character imposed by a foreign state, a union of foreign states or an international organization.

1. The performance of actions (inaction) for purposes of implementing the decision by a foreign state, a union of foreign states or an international organization on the introduction of measures of restrictive character, if these actions (inaction) resulted in the restriction or refusal of the performance of ordinary business operations and transactions by citizens of the Russian Federation, legal entities registered in the Russian Federation, the Russian Federation, subjects of the Russian Federation or municipal bodies, as well as persons controlled by them (Russian private and public subjects, as well as persons controlled by them) –

shall be punished by a fine in the amount of up to 600,000 rubles or the amount of the salary or other income of the convicted person for a period of up to four years, or by restraint of liberty for a term up to four years, or by forced

labor for a term up to four years, or by imprisonment for a term up to four years with or without a fine in the amount of up to 200,000 rubles or the amount of the salary or other income of the convicted person for a period of up to one year.

The scope of the protected 'ordinary business operations and transactions' of Russian persons is intended to be determined broadly. According to the explanatory remarks to this offence in the Blocking Law, they shall include any legal actions aimed at the performance of contractual or statutory obligations within the ordinary course of business. In particular, the protected business operations/transactions shall apparently extend to:

- the entering into agreements which would generally – without the sanctioning of the Russian counterparty – not be refused (e.g., the opening of bank accounts); and
- the performance of existing continuing obligations which would usually – without the sanctioning of the Russian counterparty – not be terminated.

Given the vague wording of the Blocking Law, the scope of restrictions actually applicable to companies operating in Russia – and the risk of a potential criminal liability for the management resulting from a violation of these restrictions – would depend to a large extent on the practical implementation of the law by the Russian law enforcement authorities.

Even without such a criminal liability, the winding down of business relationships with sanctioned persons

Links and notes

¹ <http://www.kremlin.ru/acts/bank/38809>

² <https://www.vedomosti.ru/business/news/2018/04/25/767812-edinaya-rossiya-predlozhila-shtrafovat-zasoblyudenie-sanktsii-ssha-na-50-mln-rublei>

³ <http://sozd.parliament.gov.ru/bill/464757-7>

⁴ <https://www.vedomosti.ru/economics/articles/2018/05/17/769805-duma-perenesla-rassmotrenie-zakonoproekta-o-nakazaniia-za-soblyudenie-sanktsii>

⁵ <http://sozd.parliament.gov.ru/bill/441399-7>

⁶ <https://www.kommersant.ru/doc/3629453>

⁷ <https://www.kommersant.ru/doc/3630415>

can turn out to be rather complex in the Russian legal environment, in particular due to civil law restrictions and antitrust requirements. The proposed criminal liability would further limit the room to manoeuvre for aligning Russian business operations with US and EU sanctions.

However, the Blocking Law has given rise to widespread criticism from large Russian businesses which are categorically rejecting the law: Russian

Measures of 2006, which formed the legal basis for the 2014 import ban for agricultural products from the US and the EU. The drawback of the 2006 law is that measures must be limited in time and, if needed, be extended. Under the Sanctions Law, counter-measures can be imposed without such a time limitation.

After a reading in the Duma on 22 May, the amended law now reads as follows

The Blocking Law has given rise to widespread criticism from large Russian businesses which are categorically rejecting the law.

companies and their management would be subject to liability either under US secondary sanctions or the Blocking Law. Further, the Blocking Law would create risks of unjustified criminal investigations against Russian and foreign citizens.⁴ To allow for consultations with the business community, the law's second reading in the State Duma (three readings are required) was postponed until further notice. It therefore seems that the Blocking Law will be subject to substantial changes before entering into force.

2. Sanctions Law

The Sanctions Law was adopted by the State Duma in the second reading on 17 May.⁵ While the draft law adopted unanimously in the first reading on 15 May still provided for 16 harsh, mostly specific, economic counter-sanctions (including an import ban for foreign pharmaceuticals and a prohibition to employ foreign nationals in Russia), the current version is – following significant pushback from all sides⁶ – drafted as a framework law providing for only very general counter-measures.

The Russian President is already authorised to impose broad counter-sanctions – based on the Federal Law No. 281-FZ On Special Economic

Counter measures can be taken against (i) the United States and other foreign states performing 'unfriendly' actions against Russia, Russian legal entities or Russian citizens ('Unfriendly States'), (ii) organizations under the jurisdiction of Unfriendly States, (iii) organizations, which are directly or indirectly controlled by Unfriendly States or affiliated with them, and (iv) officials and citizens of Unfriendly States, provided that the organizations, officials or citizens under (ii) to (iv), participated in unfriendly actions against Russia.

The counter-measures listed in the Sanctions Law do not target the implementation of foreign sanctions in Russia. They are limited to economic counter-sanctions such as:

- import bans for products and raw materials originating from Unfriendly States, or manufactured by Unfriendly Organizations and Unfriendly Subsidiaries (except for products indispensable to life which cannot be replaced with products manufactured in Russia);
- exclusion of Unfriendly Organizations and Unfriendly Subsidiaries from the participation in state procurement on Russian territory;
- exclusion of Unfriendly Organizations and Unfriendly Subsidiaries from the privatization of Russian state property.

The Sanctions Law does not provide for an automatic sanctions escalation. Taking any specific counter-measures will require the prior decision of the Russian president and its implementation by the Russian government.⁷

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permit to export controlled goods when exported temporarily from Australia, but not transferred to another person.

- An exemption to the need for a permit to export controlled goods to the origin of import after it was temporarily imported into Australia.

The Regulations also contain changes to the basis on which controlled goods export permits will be issued or revoked. The changes largely enhance the transparency of the permit process.

The main changes are the following:

USA

OFAC issues General License 15 extending authorized activities with GAZ Group

By Wynn Segall, Jonathan Poling, Nnedinma Ifudu Nweke and Andrew Schlossberg, Akin Gump Strauss Hauer & Feld

www.akingump.com

On 22 May 2018, the US Department of the Treasury's Office of Foreign Assets Control ('OFAC') issued General License 15¹ authorising US persons to engage in specified transactions related to maintenance or wind-down of operations, contracts or other agreements involving Russian automotive manufacturer GAZ Group, a specially designated national ('SDN'), until 23 October 2018. Previously, General License 12B had imposed a 5 June 2018 deadline on such activities.

OFAC's issuance of General License 15 is intended to address the impact of its 6 April 2018 sanctions designation of GAZ Group, which OFAC reports as being owned or controlled by Oleg Deripaska, who was separately designated as an SDN on 6 April 2018.

Importantly, General License 15 applies to entities in which GAZ Group owns, directly or indirectly, 50% or greater interest, but does not extend to other persons sanctioned on 6 April 2018, including other entities owned by Mr. Deripaska. General License 14, which allows US persons to temporarily engage in similar maintenance or wind-down activities

- A new ministerial power to revoke a permit where it is determined that the export would prejudice Australia's national security, defence or international relations.
- New criteria that the Defence Minister may have regard to in determining whether or not to grant a permit.
- New requirements around attaching or varying conditions for a permit.
- A new requirement for the Minister to notify and give reasons if a permit is refused.
- A new review mechanism for permit decisions.

The changes bring the control rules for tangible exports better in line with those for intangible supplies providing the opportunity for businesses to streamline their controlled supplies compliance process.

The changes to the Regulations come into effect just as an independent review into the operation of the Defence Trade Controls Act 2012 commences. The Review aims to identify if there are any gaps in the Act's controls or any unintended consequences arising from the current operation of the Act.



with respect to UC RUSAL PLC, another company owned and controlled by Mr. Deripaska, was separately granted last month.

Key Points

- On 22 May, OFAC issued General License 15, authorising US persons to engage in specified transactions related to maintenance or wind-down of operations, contracts or other agreements involving GAZ Group or any entity in which GAZ Group owns, directly or indirectly, a 50% or greater interest, until 23 October 2018, extending the previous deadline of 5 June 2018.
- This is the same type of relief that OFAC authorised under General License 14 with regard to UC RUSAL PLC on 23 April 2018.
- OFAC also issued amended General License 12C, which contains minor changes intended to reflect and reference the new authorisation provided in General License 15, and issued Frequently Asked Questions related to General Licenses 15 and 12C.

As with General License 14, General License 15 does not authorise the divestiture or transfer of debt, equity or other holdings in, to or for the benefit of GAZ Group. Further, General License 15 does not unblock funds that were blocked prior to 22 May 2018, the date that General License 15 was issued. However, General License 15 authorises the use of blocked funds for the maintenance and wind-down activities described in the General License, and 'U.S. persons are not required to block transactions authorized by General License 15 that occur on or after May 22, 2018, except for transactions involving blocked persons other than GAZ Group or any other entity in which GAZ Group owns, directly or indirectly, a 50 percent or greater interest' (FAQ 586²).

On 22 May 2018, OFAC also issued amended General License 12C,³ which contains minor changes intended to reflect and reference the new authorisation provided in General License 15. General License 12C authorises until 5 June 2018 certain transactions and activities necessary to maintain or wind down operations,

contracts or other agreements involving 12 entities designated as SDNs on 6 April 2018, as well as entities owned 50% or more by them.

Related new FAQs

OFAC also issued updated Frequently Asked Questions ('FAQs') related to General Licenses 15 and 12C.

With respect to secondary sanctions, FAQ 589⁴ clarifies that non-US persons may engage in maintenance or wind-down activities that are within the scope of General License 15 without such activities being considered significant for the purposes of a sanctions designation under sections 226 and 228 of the Countering America's Adversaries Through Sanctions Act. OFAC also clarified that non-US persons engaging in maintenance or wind-down activities within the scope of General License 15 are not required to deposit payments into blocked accounts of US financial institutions in order to avail themselves of this stated policy (FAQ 590⁵).

FAQ 591⁶ explains that General License 15 does not restrict the exportation of goods from the United States to GAZ Group or any other entity in which GAZ Group owns, directly or indirectly, a 50% or greater interest, so long as the exportation is for maintenance or wind-down and consistent with the requirements of other federal agencies, which would include the Department of Commerce's Bureau of Industry and Security, as well as the Department of State's Directorate of Defense Trade Controls, among others.

Finally, FAQ 587⁷ specifically states that the path for the United States to provide sanctions relief is through divestment and relinquishment of control of GAZ Group by any specially designated nationals, including Oleg Deripaska. This is consistent with OFAC's guidance with respect to UC RUSAL, and Mr. Deripaska has reportedly already taken steps to relinquish his control of UC RUSAL⁸ and its controlling stakeholder (and

SDN) EN+ Group PLC.⁹ It is unknown at this time whether Mr. Deripaska will take similar steps with respect to his role at GAZ Group.

Links and notes

- ¹ https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl_15.pdf
- ² https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#586
- ³ https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl_12c.pdf
- ⁴ https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#589
- ⁵ https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#590
- ⁶ https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#591
- ⁷ https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#587
- ⁸ <https://rusal.ru/upload/iblock/8b1/ LTN201805240 53resig.pdf>
- ⁹ <http://www.enplus.ru/en/investors/regulatory-news-service-and-filings/2018/enplus-deripaska-bo d-resigns.html>

USA

President issues EO prohibiting transactions involving the government of Venezuela

By Ryan Fayhee, Alan G. Kashdan and Tyler Grove,
Hughes Hubbard & Reed LLP

www.hugheshubbard.com

On 21 May 2018, President Trump issued an executive order prohibiting certain transactions involving debt of the government of Venezuela or equity in entities majority-owned by the government of Venezuela. The executive order follows the recent re-election of Venezuela's incumbent president, Nicolás Maduro, which Secretary of State Mike Pompeo labeled a 'sham'.

The executive order specifically bars US persons from:

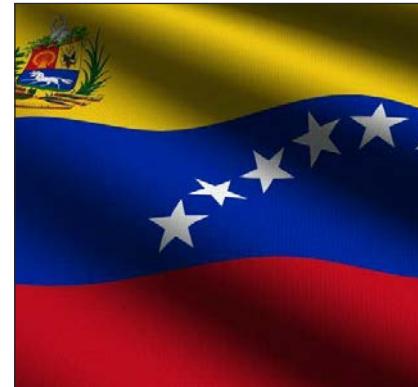
- Purchasing debt owed to the government of Venezuela;
- Pledging as collateral, debt owed to the government of Venezuela; or
- Engaging in transactions involving any equity interest involving an

entity owned 50% or more by the government of Venezuela.

The executive order targets the Maduro administration's attempts to

The 21 May executive order is the third such order in the past year responding to the economic, political, and humanitarian crisis unfolding in Venezuela.

liquidate state-owned assets for pennies on the dollar in what President



Trump called 'fire sales' in a statement accompanying the order.

The 21 May executive order is the third such order in the past year responding to the economic, political, and humanitarian crisis unfolding in Venezuela. On 24 August 2017, the President issued Executive Order 13808, which prohibits transactions involving long-term (90+ days) debt of the state-owned oil company (Petroleos de Venezuela, S.A.), mid-term (30+ days) debt of the government of Venezuela, bonds issued by the government of Venezuela, or dividend payments or distribution of profits to the government of Venezuela. On 19 March 2018, the President also issued Executive Order 13827, which prohibits US persons from engaging in

transactions involving digital currency 'issued by, for or on behalf of the government of Venezuela.'

All of the executive orders issued by the Trump administration thus far have avoided more comprehensive

sanctions on Venezuela's oil sector, which administration officials warned could harm the Venezuelan people or American businesses. However, additional sanctions, including against the oil and gas sector, are possible if the

situation in the country continues to deteriorate. In a conference call with the press after its 19 March order, the White House warned that it is 'considering all options, including oil sector sanction options'.

UKRAINE

Ukraine publishes presidential decree on sanctions

By Alina Plyushch, Sayenko Kharenko

www.sk.ua



The Decree of the President of Ukraine approving the Decision of the National Defence and Security Council of Ukraine 'On introduction and repealing of special economic and other restrictive measures (sanctions) of personal nature' was made public on 19 May 2018. It has extended lists of sanctioned persons and updated the previous decree of 15 May 2017. The updated lists were made public on 24 May 2018.

The sanctions are introduced for a period of one or three years or without time-limit against 1,748 individuals and 756 legal entities, among them being Oleg Deripaska, Alexei Miller and the company RUSAL, previously sanctioned by the US.

Visa restrictions and asset freezes remain the main types of sanctions applied against individuals.

Asset freezes and suspension of performance of economic and financial

obligations are the most common type of sanctions applied against legal entities.

This year's sanctions lists include persons sanctioned by the US government and the governments of the Member States of the European Union.

Ukraine continues to unify its national sanction programme with the US and EU sanction programmes by these means.



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www.worldecr.com/find-an-expert/

It's not impossible and it's special

In *Alice in Wonderland*, the Queen of Hearts informs Alice that as a child she could imagine as many as 'six impossible things before breakfast'.

Such regal powers of credulity may be ever more in demand, for these are extraordinary times when the president of the United States tears up a security arrangement concluded by his predecessors (the culmination of over a dozen years of back-channel and track one diplomacy), lambasts his nation's closest allies, lobbies for the re-inclusion into the G7 of a country that his own has heavily sanctioned – and goes on to shake hands with a man with whom he has spent the last year exchanging brickbats (and who lords it over a nation where torture, gulags, public executions and mass surveillance are routine).

There may be method in the unorthodox approach. The world appears to be divided between those commending a 'consummate deal-maker' for dispensing with the

diplomatic chaff, and the more sceptical 'believe it when they see it' brigade.

The agreement sees the DPRK 'commit to work toward complete

A rapport has been established – or as President Trump has described it, a 'special bond'.

denuclearization of the Korean Peninsula,' reaffirming its declaration to do so made on 27 April, but is vague on specifics (there is no mention of sanctions relaxation). Informed observers say this is not necessarily a bad thing, for at least a rapport has been established – or as President Trump has described it, a 'special bond'.

The Washington DC WorldECR Forum was a fine place to – continuing with the Carrollian – talk of many things, and we really covered the

gamut, from the impact of changing international nations on business strategy, to best practice in factory floor layout for manufacturers of controlled items.

Way-points included CFIUS, secondary sanctions compliance, data management and much more. What was evident was that we're in the throws of a revolution (televised, tweeted and live-streamed): the marginalisation of multilateral fora (our own excepted), abrupt shifts in foreign policy priorities and new tools and technologies emerging faster than it is possible to get to grips with them.

If you're able to join us in London between 28-29 June, we exhort you to do so! We can't promise you six unbelievable things before breakfast, but we know that you'll profit from the opportunity to pause, take stock and share ideas with other leaders in the world of trade controls – and, perhaps, new and special bonds.

Tom Blass, June 2018
TNB@worldecr.com

Raphaël Barazza
Avocat à la Cour

33 rue Galilée, 75116 Paris, France

Phone + 33 (0) 1 44 43 54 63

www.customs-lawyer.fr

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Focus: The US quits the JCPOA – the fall-out in perspective

No surprise that, in the current accelerated, generally Trump-driven news cycle, the US pull-out from the JCPOA has already been usurped from the top of the trade news agenda by fresher developments: President Trump's intervention in the ZTE issue, his imposition of tariffs against (and lambasting of) key allies, and the Singapore summit with North Korea.

Nonetheless, the pull-out (and any subsequent 'Plan B', which has as yet only been hinted at) is going to have profound effects at every level.

While the other signatories to the JCPOA have renewed their commitment to the agreement – the EU, on 6 June, publishing details of its

Blocking Regulation – the reality is that fear of US secondary sanctions enforcement will have a massively dissuasive effect on non-US companies in the absence of specific waivers permitting them to continue. For many, the announcement was no more than they had expected, and for that reason they had held off from investing.

Others may have made the call that the President had been bluffing in an attempt to extract from Iran more and greater concessions while allowing the JCPOA to survive – or that lobbying by the United States' 'key allies' might be successful. (Indeed, there is a rumour that in the run-up to the announcement on the United States'

withdrawal from the agreement, the respective press offices of the key agencies – OFAC, BIS and State Department – were asked to prepare different media statements covering different eventualities, suggesting that a final decision was only made at the last moment.)

Whether this momentous decision augurs war or peace isn't in our gift to know. However, for the benefit of our readers, we are pleased to be able to offer a series of articles exploring the ramifications of the post-JCPOA landscape as relating to different parties and from widely differing perspectives, written by experts in the field.

Tom Blass

What does the EU Blocking Regulation mean for finance agreements?



An EU Blocking Regulation to counter those US extra-territorial laws perceived to be damaging to European interests raises difficult and conflicting concerns for lenders and borrowers, writes Matt Townsend.

In response to President Trump's announcement to withdraw the US from the JCPOA, the European Commission announced on 18 May that it was launching a process to activate the so-called Blocking Regulation in respect of certain US sanctions on Iran. The move is designed to provide protection against, and counteract the effect of, those pieces of extra-territorial US law that are perceived to be damaging to European interests.

If the EU goes ahead as planned, it will breathe fire into a largely moribund piece of European law (Regulation 2271/96). Whilst the Blocking Regulation has been in force since 1996, it has very rarely been enforced and, in the context of commercial contracts, has not been the focus of major attention (which contrasts with the German Trade Regulation). This may be about to change and, if so, will present particular issues in the context of existing and future finance agreements.

The issue for lenders and borrowers is whether the sanctions representations and covenants we commonly see in credit agreements (and which are generally set to require compliance with US sanctions) will offend the Blocking Regulation. In this regard, Article 5 is the most problematic. This prohibits any EU person, directly or indirectly, and either actively or by deliberate omission, from complying with any requirement or prohibition based on or arising from the US sanctions listed in the Annex to the Regulation (absent an authorisation). It is anticipated that a wide range of US secondary sanctions targeting Iran will be re-introduced and will, therefore, be referenced in the Annex.

Article 5 states that EU persons will not comply with any such requirement or prohibition. This can be contrasted with the German Trade Regulation

which prohibits, and may render void, any declaration to comply with the relevant US sanctions. This is one of the reasons why we often see express carve-out language or a side letter to a finance agreement which involves a German

The thorniest issue arises in the context of the use of proceeds covenant.

party – there is valid concern that the mere inclusion of a clause which offends the German Regulation may be problematic.

The Blocking Regulation may be narrower in effect but EU-based borrowers are still likely to be concerned that the inclusion of obligations which, in effect, require compliance with US sanctions in their credit agreements may trigger a breach of Article 5 or at least strongly suggest they are doing so in practice. Borrowers will argue that they cannot comply with any such provisions in any event. Excluding the application of any such obligation where it offends the Blocking Regulation may be acceptable to a lender with no presence in the US but clearly it will be more problematic for US banks or any lenders otherwise seeking compliance with US sanctions. A similar concern arises with a covenant which obliges the borrower from acting in a way that doesn't breach sanctions applicable to the lender.

The thorniest issue arises in the context of the use of proceeds covenant. There is a standard prohibition on the use of the proceeds for activities in connection with certain sanctioned countries (which would include Iran) and/or otherwise in a manner which would trigger a liability for the bank. An

EU borrower who wishes to trade with Iran may seek to argue that the provision is unenforceable on the basis that compliance would breach Article 5. Ironically, this may be more problematic for EU lenders than their US counterparts as they will be driven more by secondary sanctions concerns.

EU-based lenders seeking compliance with US standards will also likely have to make a difficult choice as to whether to continue actively requiring their borrowers to give covenants of the kind as contemplated above. The concern, obviously, is that by proactively compelling borrowers not to violate the US's new Iranian regime they could themselves be seen as actively complying with the US sanctions in a manner that is non-compliant with the EU's regime. It should be noted that, in certain cases, it may be technically impossible to comply with both regimes simultaneously.

The precise application of Article 5 cannot be seen in isolation. Penalties that may arise from a breach are determined at a Member State level. It is important, therefore, to understand how the applicable penalty regime has been set and whether it adds any nuance to these provisions. That said, it would be a surprise to many if we saw any real enforcement of Article 5 in the EU, particularly where that Article was used as a sword against, rather than a shield to protect, European companies.

There are practical solutions to these issues and much depends on what unfolds in the coming months as regards potential diplomatic solutions (if any) between the US and its EU allies on the application of secondary sanctions. However, lenders and borrowers should be considering these issues now in the context of both existing and new finance agreements.

Matt Townsend is a partner and co-head of Allen & Overy's International Trade Practice.

matthew.townsend@allenavery.com

US withdrawal likely to chill EU investment in Iran's energy sector



Despite the EU's announcement that it will be reactivating a Blocking Regulation to discourage EU companies from pulling out of Iran as a response to the US decision to withdraw from the JCPOA, it is unlikely that many in the energy sector will be committed to staying, writes Jason Wilcox.

The US withdrawal from the Joint Comprehensive Plan of Action ('JCPOA' or the 'Agreement') is fueling great uncertainty in global markets with respect to the future of Iran and its role in the international political and commercial spheres. In response to President Trump's 8 May announcement, the European Union quickly reaffirmed its commitment to the Agreement. EU High Representative and Vice-President Federica Mogherini issued a statement attesting that '[a]s long as Iran continues to implement its nuclear related commitments, as it is doing so far, the European Union will remain committed to the continued full and effective implementation of the nuclear deal.'¹

In light of its commitment to the Agreement and the protection of its economic interests, the EU is seeking to amend its Blocking Regulation, which prohibits EU entities from complying with US sanctions, to account for the re-implementation by the US of its Iran 'secondary' sanctions programme, following the 90- and 180-day wind down periods. However, it is not clear that this measure will

convince EU firms, particularly in the oil and gas industry, to invest or continue investing in Iran's energy output.

The lifting of US secondary

The re-imposition of US 'secondary' sanctions against Iran is likely to have a powerful chilling effect on future investment in Iran's energy sector.

sanctions on 16 January 2016 (JCPOA 'Implementation Day') provided vast opportunities for non-US companies to engage in activities related to Iran's energy sector. These included

1. investment, including participation in joint ventures, goods, services, information, technology, and technical expertise and support for Iran's oil, gas, and petrochemical sectors;
2. the purchase, acquisition, sale, transportation, or marketing of petroleum, petrochemical products, and natural gas from Iran; and
3. the export, sale, or provision of refined petroleum petrochemical products to Iran.

Despite the JCPOA's removal of the threat of secondary sanctions on non-US companies that take part in such activity, many oil and gas firms, particularly in the EU, remained hesitant to engage with Iran throughout the relief period even before the President Trump's 8 May announcement. In large measure, the limited investment in Iran's energy sector stemmed from fear that any misstep by these firms, or the financial institutions that fund such projects, would result in exclusion from the US financial system, which would effectively cripple any company in the dollarised global marketplace.

For this very same reason, the re-imposition of US 'secondary' sanctions against Iran is likely to have a powerful chilling effect on future investment in Iran's energy sector. Thus, despite the EU's best overtures at encouraging companies to invest in Iran's energy sector, given the international reach of the US financial system and the importance of the US market for many European companies, such efforts may ultimately prove unsuccessful.

Jason Wilcox is a senior associate in the Washington, DC office of Baker Botts.

jason.wilcox@bakerbotts.com



Germany's swooning reactions to the US withdrawal from the JCPOA



Is Europe's economic powerhouse experiencing a soft power blackout? How will Germany respond to US pressure when its companies have already invested so much in Iran, ask Baerbel Sachs and Carl-Wendelin Neubert.

German companies are greatly affected by the looming re-imposition of US secondary sanctions against Iran. German companies were at the forefront of re-entering the Iranian market after January 2016.

In 2017, they exported a net worth of Euro 3.4 billion of goods to Iran. However, the majority of German companies trading with Iran – be they large or small – will need to avoid falling under the reinstated sanctions regime – or risk jeopardising their business relations with Western companies and access to international capital markets. Many have already announced their intention to cease their Iran business altogether.

Discussed reactions

As elsewhere in the European Union, the German public, businesses and politics have reacted with disbelief and resignation to the US decision to withdraw from the JCPOA – and in particular to the US ambassador to Germany's undiplomatic pronouncement that the US would vigorously enforce secondary sanctions, calling upon German companies to wind down their Iran operations immediately.

There is a political consensus in Germany that the JCPOA should be kept in place, a consensus shared with the other countries party to the deal. However, when it comes to political, legal, and economic actions to mitigate the impact of US secondary sanctions, the picture remains blurry. Most high-level government officials, including the German minister for economy and energy, Peter Altmaier, admit that there appear to be very few effective measures that could shield internationally operating German companies with Iran business from the effects of US secondary sanctions.

Financial compensation

There have been calls for setting up a state fund to compensate German companies trading with Iran in adherence to the JCPOA for the

Existing debt guarantees, so-called 'Hermes guarantees', for export transactions with Iran will be kept in place.

negative effects incurred in consequence of reinstated US sanctions. These calls have not found support among political leaders and government officials in Germany. However, existing debt guarantees, so-called 'Hermes guarantees', for export transactions with Iran will be kept in place. The German economic ministry also issued a statement, on 6 June, that it is currently reviewing options to mitigate the economic impact of the looming sanctions for German companies by extending the 'Hermes guarantees'.

Blocking laws

Updating and extending existing blocking regulations appears to be the most widely shared means of response to the reinstated US secondary sanctions for Iran.

German Blocking Law, § 7 Foreign Trade Ordinance

It should be noted that Germany already has a blocking law in place, § 7 Foreign Trade Ordinance (*Außenwirtschaftsverordnung*), prohibiting compliance with sanctions that go beyond UN and EU sanctions. Although introduced in the 1970s to counter the Arab world's

boycott against Israel, it now prohibits so-called OFAC-clauses. Under German civil law, these clauses are null and void. It was already tricky striking a balance between, in particular, the financial institutions' need to prevent any facilitation of sanctioned business on the one hand and the need of both parties to a transaction to comply with applicable law in Germany on the other. Although this blocking law is not being vigorously enforced, the German Federal Reserve, the Deutsche Bundesbank, for example, checks compliance with the blocking law in routine audits with banks and insurance companies.

EU Blocking Regulation

The EU Commission, on 6 June, adopted a measure to amend EU Regulation 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country (the so-called 'Blocking Regulation'). The amendment would prohibit EU companies from complying with the re-imposed US secondary sanctions with regard to Iran. The Blocking Regulation also aims to enable companies to recover damages arising from such sanctions, and nullifies the effect that foreign court decisions based on the included sanctions provisions have in the EU. The EU Parliament and the Council of the European Union now have two months to object to the measure or signal their support.

EU Member States' representatives officially welcomed the Commission's plans to renew the Blocking Regulation in May. However, official German reactions to the now proposed amendment to the EU Blocking Regulation have been strikingly

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The Asian response to United States' JCPOA withdrawal



Dr Scott Jones considers the impact of the US decision to leave the JCPOA on Asian countries, many of which are among the biggest buyers of Iranian oil and gas.

Shortly after the US announced its plans to withdraw from the 2015 Joint Comprehensive Program of Action (JCPOA), European Union Commission President, Jean-Claude Juncker, announced that the EU plans to reactivate a 1996 regulation that would seek to prevent European companies from complying with any sanctions the US may reintroduce against Iran. Specifically, Juncker said: 'As the European Commission, we have the duty to protect European companies. We now need to act, and this is why we are launching the process to activate the "blocking statute" from 1996.'

The practical merits of the revised regulation (2271/96) notwithstanding, the reaction from European governments has been unequivocal and relatively uniform. The reaction from Asian governments has been less in evidence, certainly to the extent that they are planning counter-measures to the reimposition of sanctions.

Asian government responses

The reversion of US secondary sanctions potentially impacts non-US companies involved in primary Iranian markets; i.e., oil and gas and the financing thereof. The reality of

returning sanctions is particularly relevant to Asian economies. China, India, South Korea, and Japan are major Iranian oil importers, whereas European transactions with Iran are primarily investment and export-

Unlike most other Asian countries, China has more experience with US secondary sanctions, particularly those relating to Iran.

related. If past is prologue, then we could reasonably expect to see increased secondary sanctions enforcement by Washington in markets tightly wedded to Iranian oil.

For example, the *B Whale* and *TransTel* Office of Foreign Asset Control ('OFAC') cases, both involving Asia-origin companies, illustrate the risks of oil and/or dollar-denominated transactions.

After announcing the withdrawal, President Trump declared that 'Any nation that helps Iran in its quest for nuclear weapons could also be strongly sanctioned by the United States.'

Indeed, the withdrawal decision was ostensibly based on the perception that Tehran was not abiding by the terms of agreement in general and that the increased revenue from sanctions relief was being directed to the military for missile development and regional provocations.

Correspondingly, economic pressure would force Tehran back to the negotiation table and, more practically, minimise the Iranian adventurism abroad. This scenario depends of course on several variables, including stable world oil markets and

the cooperation of major economic actors, particularly those in Asia. Therefore, what can we expect?

China

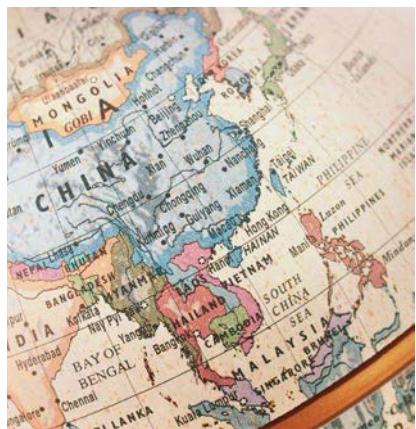
After the US announcement, foreign ministry spokesman Geng Shuang said China would 'maintain communication with all parties and continue to protect and execute the agreement fully.' Unlike most other Asian countries, China has more experience with US secondary sanctions, particularly those relating to Iran (e.g., ZTE). In this case, as the primary importer of Iranian oil, the possibility of secondary sanctions are unlikely to thwart China's buying attitude. Furthermore, China views Iran as an important player in its Belt and Road initiative. However, Beijing may exercise greater discretion as trade talks continue with the US.

India

Like China, India is heavily reliant on Iranian oil and energy imports. As a JCPOA hedge, India, for the first time beyond Bhutan and Nepal, started investing in Iran through its own national currency to bypass any trouble arising out of impending US sanctions. Delhi will most likely seek to accommodate the reality of secondary sanctions while devising work-arounds and waivers. For example, under previous Western sanctions against Iran, India imported Iranian oil via a barter-like system through a small state bank.

Japan and South Korea

As major US allies and economic partners, Japan and South Korea will have less incentive to ignore or rebut Washington's current Iran policy. In 2012, for example, Japan and South Korea banned energy-invested projects in Iran and restricted trade financing in response to mounting economic pressure on Iran. However, after the JCPOA, Japan and South Korea increased their investment profile in Iran. In February 2016, Japan and Iran signed an investment agreement, and in May 2016, South Korea and Iran signed memorandums of understanding for 30 joint projects in



energy and infrastructure. With contractual obligations in place, both governments are likely to pursue waivers, extensions, and renegotiations.

Asian companies

Iran has been a known risk quantity for decades. Despite the JCPOA, the Iranian economy has improved marginally. The limited growth has as

much to do with internal factors (e.g., corruption and mismanaged capital accounts) as with de-risking trends. Many banks and other companies, including foreign subsidiaries of US businesses, are wary of doing business in Iran for fear of incurring fines or being barred from the US commercial and financial markets. With the possible exception of Chinese state-driven investment, Asian companies

will manage risk accordingly and limit their exposure in the Iranian market.

Dr. Scott Jones is a Non-Resident Fellow at the Stimson Center in Washington, DC and a principal at TradeSecure, LLC.

<http://tradesecure.net>

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restrained. This appears to be due to the fact that amending the EU Blocking Regulation does not offer an effective measure to mitigate the negative economic effects of the US withdrawal from the JCPOA as EU companies in consequence are caught between a rock and a hard place: Either they comply with the EU Blocking Regulation and violate US sanctions or they comply with US sanctions and violate the EU Blocking Regulation, thus risking being fined by EU Member States – there is no middle ground. The protection offered by the EU Blocking Regulation is thus merely theoretical.

Exemptions and alternatives

On 4 June, the EU High Representative for Foreign Affairs and the foreign, economic and finance ministers of Great Britain, France and Germany sent a letter to the US administration urging the US administration to put in place secondary sanctions exemptions for EU companies doing business with Iran in line with the JCPOA but in conflict with reinstated US sanctions. The exemptions should be granted for automotive, banking, civil aviation, energy, healthcare, infrastructure and pharmaceuticals. So far, there has been no response from the US side.

Against this background, the measures taken by the German

government and the European Union with the aim of mitigating the impact of reinstated US secondary sanctions with regard to Iran and of sustaining the JCPOA's economic lifeline as of yet appear feeble. Effective alternatives are hard to come by.

As in the past, the US secondary sanctions will hit the transfer of funds and financial services to and from Iran the hardest. This is why alternatives, particularly with regard to keeping open functioning financial channels to Iran, are being sought out at the moment.

One measure aimed to address this issue is the extension of the European Investment Bank ('EIB')'s External Lending Mandate, concluded on 6 June, making Iran eligible for investment activities by the EIB. EIB officials, however, dismissed expectations that the EIB could finance Iran business transactions on a large scale, underscoring that the EIB itself operates within the restraints of international capital markets.

In a similar fashion to the EIB proposal, representatives of the German machine-building industry association have suggested processing financial transactions with Iran for German companies through the Deutsche Bundesbank. As of yet, there have been no official reactions.



Baerbel Sachs is a partner and head of Noerr LLP's trade compliance practice. Carl-Wendelin Neubert is an associate and member of the firm's regulatory and governmental affairs group.

baerbel.sachs@noerr.com
carl-wendelin.neubert@noerr.com

Aviation and humanitarian exports in the post-JCPOA world



Two industry sectors that stand to be impacted by the US's withdrawal from the JCPOA and the reimposition of the sanctions that it had lifted are the humanitarian products (agricultural commodities (including food), medical devices, and medicines) and aviation sectors – albeit in very different ways, writes Doug Jacobson.

On the face of it, there should be few changes related to the humanitarian sector. The big picture is that under the Trade Sanctions Reform Act of 2000 ('TSRA'), exports of food and medicines – humanitarian goods – by US companies and their affiliates are exempt from sanctions, subject to reasonable one-year general or specific licensing requirements. This was neither altered by the coming into force of the JCPOA, or by the 8 May announcement of the withdrawal.

In the years leading up to the JCPOA, US companies faced difficulties getting the specific licences they required, and processing payment, which led OFAC to issue additional general licences. Ironically, when OFAC moved from a specific to a general licence requirement, to ease things for exporters, it became harder to arrange financing with risk-averse EU banks which wanted the assurance of a specific licence before processing payments for humanitarian goods.

Things eased up after Implementation Day because several large Iranian banks involved in international transactions, such as Bank Tejarat, were removed from the SDN list and onto the Executive Order 13599 list, which allowed non-US banks to work with these banks. Starting on 5 November, however, Bank Tejarat will be placed back on the SDN list and the pool of Iranian banks that will be possible to process payments for humanitarian products will be reduced. There will be some compliant workarounds – for example, using smaller non-SDN banks and UAE banks – whether companies resort to them or not will very much depend on the commercial imperative.

Another challenge of course, will lie in shipping – especially if EU shipping

companies continue to follow Maersk's lead and announce that they will cease shipping to Iran.

Grounded?

Aviation was the one sector where the JCPOA created significant opportunities for US companies. On 16 January

As for the enforcement of secondary sanctions, the focus is going to be on aviation service providers.

2016, OFAC issued a statement of licensing policy ('SLP') establishing a favourable licensing policy towards the sale of commercial passenger aircraft and related parts and services to Iran, provided such transactions did not involve any person on OFAC's Specially Designated Nationals List ('SDN List').

It meant that both US, and non-US persons could receive a licence to sell or lease US commercial aircraft and parts to non-designated Iranian entities.

Rivals Airbus and Boeing both sought to take advantage of the relaxed sanctions regime – and each signed deals worth upwards of \$15bn with Iranian entities, licences for which have now been revoked.

While the 2016 change was met with enthusiasm by the aviation sector, even during the first year of the JCPOA under the Obama administration, OFAC was very slow in granting licences to US and EU companies – since licence applications required a great deal of vetting that led to many licences not be issued.

Looking forward, there a number of things to watch for. The chances of companies now receiving a licence for

the export or reexport of aircraft subject to US jurisdiction will be nearly impossible. As regards licences for the export of commercial aviation-related parts and services, that will be problematic. Before the withdrawal there was a presumption that they would be granted. But now it will be on a case-by-case basis, and only likely to succeed on 'safety of flight' grounds – for example, for the servicing of old Boeing 747s which Iran has had in its fleets since before the 1979 Revolution – but there would have to be a compelling case and a need to overcome the presumption of denial.

As for the enforcement of secondary sanctions, the focus is going to be on aviation service providers. It's worth noting that Iran Air will be back on the SDN list on 5 November. Whether or not OFAC will enforce secondary sanctions on non-US companies providing services to purely commercial flights, it's too early to tell, although there is already pressure from the US government for the European aviation sector not to provide services to Iran's Mahan Air, which has been on the OFAC SDN List and BIS Entity Lists for many years.

As regards European airlines which have resumed flights to Iran, that traffic is not likely to be affected. General License J permits non-US airlines to use US aircraft – and has done since before the JCPOA. Is it likely to be revoked? I don't think so.

Douglas N. Jacobson is a founder of Jacobson Burton Kelley PLLC in Washington, DC.

djacobsen@jacobsonburton.com

The Sanctions & Anti-Money Laundering Act 2018



Maya Lester QC discusses the sanctions parts of the Sanctions and Anti-Money Laundering Act 2018, which received Royal Assent (i.e. became law in the United Kingdom) on 23 May 2018.

This is the first substantive piece of Brexit-related legislation to have been enacted. It sets up a whole new framework for United Kingdom sanctions.

First, some context...

At present, the UK does most of its sanctioning via the European Union and United Nations. Most sanctions implemented in the United Kingdom are derived from United Nations Security Council resolutions and European Union 'restrictive measures'. The EU implements UN sanctions resolutions collectively (although the obligation falls on each of the 28 Member States) and in addition imposes its own 'autonomous' EU measures as part of the EU's Common Foreign and Security Policy.

The United Kingdom's only significant power to impose 'unilateral' sanctions (as opposed to UN/EU regimes) is for terrorist asset freezing, which the UK currently undertakes pursuant to the Terrorist Asset Freezing Act 2010. For almost all other sanctions, the UK implements UN and EU sanctions regimes. This amounts to around 30 regimes in the UK, roughly half of which are UN and half EU, which the UK now implements in order to comply with its international and EU law obligations. And like other EU Member States, the UK is also responsible for imposing penalties for sanctions breaches, and for granting licences (exceptions) to sanctions prohibitions on the grounds permitted by the relevant UN or EU legal instrument.

Why the need for a new Act?

Because the UK needs new sanctions powers of its own post-Brexit. If and when the UK withdraws from the European Union, it will no longer be

part of the EU institutions that make sanctions. It will no longer be obliged to implement EU law, and will (via the EU Withdrawal Bill currently making its way through Parliament) repeal the European Communities Act 1972. This is significant for UK sanctions because that act (which gives EU law legal effect in the UK) is the current legal basis for UK implementation of UN and EU sanctions (UN as well as EU, because the UK Supreme Court in *HM Treasury v Ahmed* [2010] UKSC 2

If and when the UK withdraws from the European Union, it will no longer be part of the EU institutions that make sanctions.

decided that the United Nations Act 1946 could not be used to implement asset freezing measures).

This means that the UK needs new legal powers in order to continue to implement UN sanctions (an international legal obligation) and EU sanctions (which will presumably no longer be a legal obligation but may be seen as desirable in some cases), and in order to impose new UK sanctions after Brexit. That is why the Queen's Speech (the government's legislative agenda for the year) in June last year announced that the government would introduce an international sanctions bill among the new Brexit-related draft legislation, in order to 'return decision-making powers on non-UN sanctions to the UK, and enable the UK's continued compliance with international law after the UK's exit from the EU'.

Why isn't the EU (Withdrawal) Bill enough?

Because the Withdrawal Bill transposes into UK law existing EU law ('retained EU law') as it exists at a particular point in time. As the excellent House of Commons briefing paper on the Sanctions Bill puts it, the Withdrawal Bill will 'copy existing EU-derived sanctions measures into law but they will be "frozen".' Sanctions measures cannot be frozen because they change so regularly, in particular amendments to the lists of sanctions targets.

Hence the need for a separate Sanctions Bill. Parts of the Bill were publicly consulted on, then scrutinised in detail and significantly amended in both Houses of Parliament. Various parliamentary committees expressed concerns about aspects of the Bill (the Joint Committee on Human Rights, the Constitution Committee and the Delegated Powers Committee, in particular).

Concerns included the fact that so much is left to government ministers to decide in future regulations rather than being set out in the Act, including a power to create new criminal offences. Lord Judge, former Lord Chief Justice, described the Bill as 'a vast, great superstructure of secondary legislation being erected on virtually non-existent primary legislation. It is, in truth, a bonanza of regulations.' Lord Pannick QC noted the 'disturbing irony when a Brexit that is said to be justified by a desire to restore to Parliament powers currently enjoyed in Brussels results in Ministers seeking to confer extensive powers on themselves.'

Does the Act change anything as from today?

No. Although the Act has received Royal Assent and is already law in the UK, it isn't yet in force (other than

some requirements, e.g., for the government to report to Parliament), and we don't know when it will be ('on such day as the Secretary of State may by regulations appoint'). Curiously, the 'interpretation' section, which is already in force, refers to the EU (Withdrawal) Act 2018 which does not yet exist (that's the Withdrawal Bill still being debated in Parliament).

What will the Act do?

Key aspects to be aware of (in oversimplified form) are as follows:

1. New broad powers for the UK to make/suspend/revoke sanctions regimes, either to implement UN sanctions or for other purposes including the prevention of terrorism, international peace and security: The regimes may consist of a broad range of measures (targeted and sectoral) including shipping, trade and aircraft restrictions as well as financial sanctions and travel restrictions.
2. New powers for the UK to add and remove people/entities/organisations from targeted sanctions lists ('designations') where there are 'reasonable grounds to suspect' involvement (of defined kinds) in certain specified activities: The 'reasonable grounds to suspect' threshold reflects the UK government's current standard when proposing designations to the EU or UN. The EU has no published standard for its listings, although the European Court has required there to be a 'sufficiently solid factual basis'. The new powers include the potential to list by 'description' where it isn't possible to name someone.
3. New 'Magnitsky' sanctions powers, to freeze and seize assets on grounds of gross human rights violations (an amendment made to the Bill in the aftermath of the Skripal poisoning).
4. Due process requirements for designations including notifying designated people and entities, and

automatic reviews of designations every three years (currently every year), and the need for proportionality. The Act requires designations to be 'appropriate', having regard to the purpose of the regulations, and 'the likely significant effects of the designation on that person'.

5. New wider UK licensing powers: At the moment, the grounds on which the Office of Financial Sanctions

***The Act requires
designations to be
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that person'.***

Implementation ('OFSI') may grant exceptions and licences to sanctions prohibitions in the UK are for the most part limited to the specific grounds set out in the relevant EU or UN regime. The Sanctions Act allows regulations that create exceptions to any prohibition, including general and specific licences, on far wider grounds (i.e., powers potentially more akin to US OFAC licences).

6. New framework for UK court review: Certain sanctions decisions (including UK designations) will be subject to judicial review in the UK courts, with new rules of court to follow. Judicial review in the UK was previously limited because sanctions were imposed by the UN and EU rather than the UK. New court reviews will include closed material procedures in some cases, and damages for cases of negligent decision making; and different remedies available for those listed on UN rather than EU lists (for legal reasons connected with the *Kadi* and *Al Jedda* cases).
7. New UK terrorist asset freezing

regime: The Act repeals the Terrorist Asset Freezing Act 2010, the current regime for terrorist asset freezing in the UK. This means the Act brings together terrorist asset freezing and other forms of sanctions into one piece of legislation. The Sanctions Act makes it easier to freeze terrorist assets (on a 'reasonable grounds to suspect' threshold as opposed to 'reasonable belief' plus 'necessity'). There will still be an independent reviewer of terrorism designations (but not other sanctions designations).

8. Powers to make UK regulations for enforcement and breach of sanctions, both civil and criminal, in relation to conduct in the UK or by UK nationals/incorporated bodies.
9. Increased powers to require the provision and sharing of information and for search, entry and seizure. And obligations on the government to issue guidance about prohibitions and requirements and the report on use of sanctions powers.
10. New registers of beneficial ownership in overseas territories to be published by 2020.

What will happen during the 'transitional period'?

The Act is silent on this issue, so we don't know. However, it does contain powers for the UK to amend EU sanctions (which, as mentioned above, will initially be transposed into UK law 'frozen' in time if the Withdrawal Bill is enacted) for up to two years after the Act comes into force, to allow the UK a smooth transition from EU sanctions...

Maya Lester QC is a barrister at Brick Court Chambers and co-author of europeansanctions.com
maya.lester@brickcourt.co.uk

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The UK's 'arms brokering' controls: not always understood

Be aware that under UK law, there are a host of ways in which someone can become an arms broker, writes Martin Drew.

In May 2003, the UK government changed the rules on the supply of military equipment, and many operators and companies then became 'arms brokers'. These new laws were officially known as 'trade controls' or more commonly 'trafficking and brokering' regulations.

Up until that time, exporting (including in-passenger baggage) military equipment from the UK required an export licence from the (as was) Department of Trade and Industry ('DTI'). But this created a supposed 'loophole' whereby UK persons could move military equipment overseas without any oversight from the British government; the exception to this being arranging the supply of military equipment to nations subject to an arms embargo (UN, EU, OSCE) which was already restricted.

The new trade controls created a requirement for British persons/companies and/or people based in the United Kingdom to obtain a DTI trade licence if they wanted to arrange the transfer of military equipment from one third country to another (never touching the UK).

Military equipment

What does the UK government classify as military equipment? Well, it's anything 'specially designed for or adapted for military use'.

The UK publishes its Military List ('ML') which provides a definitive schedule of those items which require both export and trade licences. It includes small arms and light weapons, ammunition, sights, armoured vehicles (4x4s), riot-control equipment (including CS gas), explosives, ships/vessels, aircraft, jamming equipment, comms, demolition, body armour/plates/helmets, training simulators, night vision, stun guns, shackles, and a plethora of other equipment and technologies.

Current position

In time, the controls evolved, and the concept of extra-territoriality was

introduced, meaning that the situation as it stands is that the law can apply to British persons wherever they are located.

Occasionally companies work under the assumption that what is out of sight is out of mind. But the government of the United Kingdom – and its friends

What does the UK government classify as military equipment?
Well, it's anything 'specially designed for or adapted for military use'.

– possess considerable reach, and it is not unknown for individuals who have breached trade controls to have landed at UK airports to find themselves facing arrest by officers of Her Majesty's Revenue & Customs ('HMRC'). Given that the penalty for breaching the trade controls is up to 10 years' imprisonment (and that the Proceeds of Crime Act may also apply), the resulting scenario thus faced can be scary.

It is thus worth understanding that if you are a UK person, and you are involved in activity (including matching up contacts for a fee) which may result in ML goods moving

between two third countries, you come within the trade controls.

There are different requirements placed on you depending on:

1. the nature of the goods being supplied (they must be on the UK military list for the law to apply)
2. the end-user of the goods – e.g., are they subject to any restriction/embargo?
3. the part you played (some subsections of the trade controls exclude financial and transportation services)

In the following scenarios, the rules would apply:

- whilst providing training overseas, you supplied military list equipment to your trainers/trainees
- where you have supplied your overseas security or private military company ('PMC') personnel with military list equipment, or
- where you have provided bomb disposal suits and CIED equipment to trainers/practitioners.

They would also apply where you have been:

- arranging or negotiating contracts
- arranging intra-company transfers
- introducing third parties to an 'arms' deal for a fee.



Or if you are:

- a banker providing financial services for a transfer
- supplying onboard maritime security personnel (see below).
- a UK airline/shipping line which has shipped military goods to a location subject to a UK embargo or transhipped small arms/light weapons through the UK.

These controls were drafted prior to the explosion in maritime security considerations precipitated by the increase in modern security – and were designed for shipments between countries, not for transfer of goods on and off vessels.

To alleviate the problem, the UK government, in concert with others, formulated an open licence designed for the maritime security sector called the ‘Open General Trade Control Licence Maritime Anti-Piracy’.

Links and notes

¹ Floating armories also create licensing requirements – but that’s beyond the scope of this article.

This, while helpful, has its own problems in attendance: as with all UK open licences, it comes with a large amount of small print, which if not fully complied with, invalidates the licence and threatens to render the user an illegal arms broker.¹

You can also apply to the Department of International Trade for a single licence, and there are a range of other open licences available, including one for small arms, which again, have a long list of exemptions which can invalidate their use.

Be well advised

In my experience as a (former) employee of Her Majesty’s Government, the following pattern was not uncommon – and illustrative of some of the examples shown above:

Former members of the armed forces – typically ex-special forces – would go on to work in the risk and security industry. It would not be unusual for their work to include the acquisition of military equipment, and thereafter the supply of kit to others, and it is here that they fell foul.

Unlike, for example, South Africa, the UK does not legislate for the

regulation of private military companies, but it does vigorously control the supply of equipment.

The key messages here are:

- The trade controls cover arranging a sale – no transfer needs to have taken place for a breach to have occurred
- It is imperative to have the required licence from the Department of International Trade in place before you agree a relevant transaction
- The prospect of a prison sentence for breaching the trade controls is more than theoretical – it has happened on numerous occasions.

Martin Drew is a member of the EU’s and UN’s panels of experts providing guidance on implementing the United Nations Arms Trade Treaty and is a special advisor to the UK Parliament on export controls.

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Crypto currencies, tokens, smart contracts and sanctions



OFAC and Switzerland's SECO have confirmed the relevance of crypto currencies/tokens for sanctions compliance, write Prof. Dr. Andreas Furrer, Peter Henschel and Chris Gschwend.

Both the US Office of Foreign Asset Control ('OFAC') and the Swiss State Secretariat for Economic Affairs ('SECO') have confirmed that transactions involving digital currencies (also known as crypto or virtual currencies, or tokens) are subject to US and Swiss sanctions and embargo law. It is important to note that crypto currencies are not only used for payment purposes but also for executing so-called smart contracts (executable code) on the blockchain.

At the request of these authors, SECO has confirmed the relevance of digital currencies for sanction compliance purposes¹ and clarified that digital information units with potential value are considered to be funds or economic assets in the context of sanctions in Switzerland. The prohibitions laid down in the different regulations and ordinances (in particular, bans on the provision of financing) must therefore be complied with accordingly.

Similarly, in a recent update of its Sanction Compliance FAQs, OFAC announced its intent to alert the public to specific digital currency identifiers (also known as 'wallets' or 'public keys') associated with blocked persons by adding the individual's wallet address and associated digital currency (e.g., Bitcoin ('BTC'), Ether ('ETH'), Litecoin

('LTC'), etc.) to the profile of specially designated nationals ('SDNs').

Persons and entities subject to SECO and/or OFAC jurisdiction, including users of virtual currency or smart contracts, as well as crypto exchanges, will be responsible for ensuring that they do not engage in trade or other transactions with blocked persons or assets, including by means of virtual currencies or tokens.

Background

OFAC has been taking a closer look at the overall development of blockchain or distributed ledger technology ('DLT'), in particular the ability of virtual currencies to store and transfer value or property, and the relevance for sanctions compliance.

In March 2018, OFAC published a guidance on crypto currencies in a section of its Sanction Compliance FAQs entitled 'Questions on Virtual Currency'.² In it, OFAC confirms that existing sanctions are applicable to all forms of virtual currencies, which are defined broadly as 'a digital representation of value that functions as

1. a medium of exchange,
2. a unit of account, and/or
3. a store of value,
4. is neither issued nor guaranteed by any jurisdiction,

5. and does not have legal tender status in any jurisdiction'.

Additionally, the FAQ clarifies that OFAC sanctions are also applicable to a sovereign cryptocurrency, virtual currency and a digital representation of fiat currency which are described as 'digital currencies'. OFAC may therefore not only exercise jurisdiction over any form of decentralised crypto currency, such as Bitcoin or Ether, but also over digital currencies issued by third countries' sovereign central bodies.

This was demonstrated on 19 March 2018, when President Trump expanded the scope of the Venezuelan sanction regime with an executive order ('EO') prohibiting US persons from dealing in any digital currency issued by, for, or on behalf of the government of Venezuela on or after 9 January 2018. This action targeted the 'petro' and 'petro gold', two digital currencies issued by the government of Venezuela which, according to the US, could be used to circumvent US sanctions against Venezuela.

Impact for companies

Any company dealing with or involved in crypto currency transactions by receiving, storing, exchanging or transferring tokens must ensure



compliance with local sanctions regime, however, companies must also consider compliance with US sanctions if their activities fall under US jurisdiction due to the involvement of US persons, US parts, US dollars or US infrastructure, even though the transaction may take place abroad. Under the Countering America's Adversaries Through Sanctions Act ('CAATSA'), US sanctions go even further; US authorities may penalise non-US companies if they conduct significant transactions with US sanctioned persons, even if these transactions have no US nexus or connection.

Companies must therefore review their exposure to digital currencies and should develop necessary wallet screening capabilities as part of an internal risk-based compliance management programme ('ICP'). Such screening may prevent the indirect involvement of sanctioned individuals who operate under the guise of a non-sanctioned individual or stolen identity that would otherwise pass compliance screening.

Likewise, the OFAC listing of wallets will provide a much-needed

authoritative resource for the identification of blacklisted wallets associated with sanctioned individuals. In particular, wallet-screening service providers who automate compliance checks should include the OFAC wallet

The OFAC listing of wallets will provide a much-needed authoritative resource for the identification of blacklisted wallets associated with sanctioned individuals.

listing in their services, thereby further reducing the likelihood that the crypto community indirectly engage with sanctioned individuals and weakening the ability of sanctioned individuals to transact anonymously using virtual currencies. This preventative action will not stop malicious activity from taking place via private digital currencies or blockchains, but it's a step in the right direction.

It should also be noted that the growing use of smart contracts in business transactions will in most cases not be possible without the use of crypto currencies or tokens. Companies developing business

solutions involving blockchain and smart contracts will therefore need to ensure that sanction and embargo compliance are built into their business processes to prevent restricted parties from transacting with their business platform or application.

While public keys have not yet been added to the SDN List, it can be assumed that the listing of public keys will become a standard instrument of OFAC and other regulatory bodies around the world. We also assume that the rules regarding KYC (know your customer/client) and money laundering will soon be adapted to require a more explicit screening of source of crypto funds as part of a thorough KYC process. Both will probably converge, requiring companies to perform an end-to-end DLT screening prior to accepting virtual currencies or dealing with tokens.

Prof. Dr. Andreas Furrer is a legal partner at MME in Switzerland, where Peter Henschel is managing director of compliance and Chris Gschwend is a senior compliance advisor.

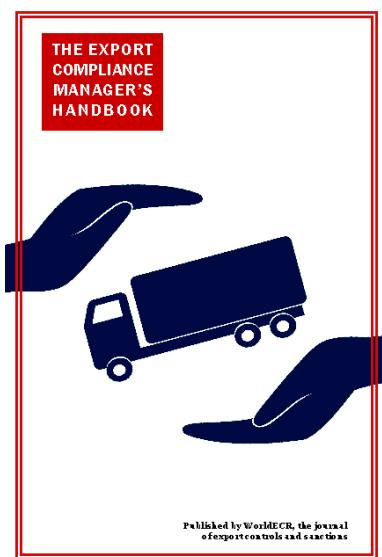
*andreas.furrer@mme.ch
peter.henschel@mme.ch
christine.gschwend@mme.ch*

Links and notes

¹ Email correspondence with the author

² http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_compliance.aspx

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The Export Compliance Manager's Handbook (published

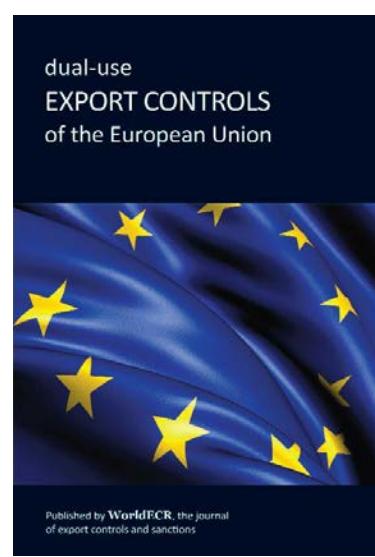
May 2017).

For full information go to
<https://www.worldcr.com/wp-content/themes/worldcr-child/ECMH-information.pdf>

Dual-use Export Controls of the European Union (published

December 2015)

For full information go to
<https://www.worldcr.com/wp-content/uploads/eu-dual-use-export-controls.pdf>



Recent changes in Japanese export controls: a review



Japan's export control regime is especially unique. While it seeks to draw on the different multilateral regimes, variations in classification nomenclature and in the definitions of export, among other things, make the export of controlled items from the country more challenging than recent reform efforts have aimed for, writes George Tan.

The world's third-largest economy after the United States and China, Japan has implemented security trade controls for decades, beginning in the Cold War era in the 20th Century. Japan's Ministry of Economy, Trade and Industry ('METI') has imposed strict controls on the export of certain items from Japan and implements such controls rigorously, alongside Japan's customs authority. While Japan's export controls adhere to international regimes, such as the Wassenaar Arrangement, its policy, regulation and practice have somewhat unique aspects compared with other countries.

This article looks at those unique aspects, as they relate to the controlled items list, arms export policy, and technology transfer.

Control list and a move towards EU-type nomenclature

As Japan is a member of the four international trade regimes – the Nuclear Suppliers Group ('NSG'),

Australia Group ('AG'), Missile Technology Control Regime ('MTCR'), and the Wassenaar Arrangement ('WA') – its dual-use control list follows and reflects the items controlled in those regimes.

The list is diligently revised and updated by METI each year, with the previous updated list implemented on 7 January 2017. On 30 October 2017, METI announced its draft update of the list for public comment – to be received by 11 November 2017. The update is to reflect revisions of the lists of international regimes in recent years – e.g., the dual-use list of WA as of December 2016. Therefore, this update draft is an annual opportunity to diligently track the revision of controlled items listed under the international regimes.

The new control list was promulgated on 22 November 2017, and implemented on 22 January 2018 as scheduled. The information is available in the New Arrival (新着情報) corner of the METI Export Control

Web site (only in Japanese). This can be found at the following address: <http://www.meti.go.jp/policy/anpo/index.html>

More substantial changes to the controlled items list nomenclature have been discussed with METI and the industry association, the Center for Information on Security Trade Controls ('CISTEC'), for more than 10 years. When these are finally implemented, it is expected that Japan's export control list will move towards an 'EU dual-use type' nomenclature. To date, however, there has been no announcement as to when such a development can be expected.

The current Japanese export control list reflects government orders, ministerial ordinance, and METI notifications. It has a unique numbering structure, written only in Japanese characters, using no alphabetic words in the code, and adopting a numbering scheme which is different both from the US ECCN and the EU dual-use code. Although



basically compatible with the EU dual-use code (because it likewise reflects international regimes), the identification of controlled goods and technology means global companies should ascertain for themselves the relevant category into which items fall, in order that they can oversee the same items in different jurisdictions.

In an effort to reduce the challenges therein, the following recommendations to the government have been made publicly by CISTEC, after collecting industry opinion, consulting with METI, and providing substantial working resources to achieve this list nomenclature change:

- Laws, orders, and ministerial ordinances are NOT changed for this purpose, and will continue to reflect the current list of controlled items.
- In addition to the current list, it would be beneficial to create and maintain a 'conversion list' of items, so that current Japanese listed items can be matched, one-to-one, to the EU dual-use code.
- In export licence applications, an

exporter should be allowed to use EU-type dual-use code for documentation filing.

Below is a sample of the draft screen shot of the 'conversion list'. This conversion list on the CISTEC web site

The ideal status in the future will be an entire restructuring of the export control law to keep a single EU-type list.

currently shows only goods, and the technology conversion list (e.g., code such as 1D001, or 1E001) has not yet been developed. Therefore, further structural review of the conversion list, particularly for technology, will be required to realise a change in nomenclature. Once the conversion list scheme has been realised, there will be considerable benefits for traders, as regards the compatibility of controlled items globally. Classification and

licensing work should certainly become easier than before.

On the other hand, from a regulatory authority point of view, having controlled items 'doubly' listed in different places could increase regulatory administration work. The ideal status in the future will be an entire restructuring of the export control law to keep a single EU-type list. In the meantime, a conversion list approach could represent a meaningful compromise both for industry and government.

Defence equipment export controls – issues and challenges

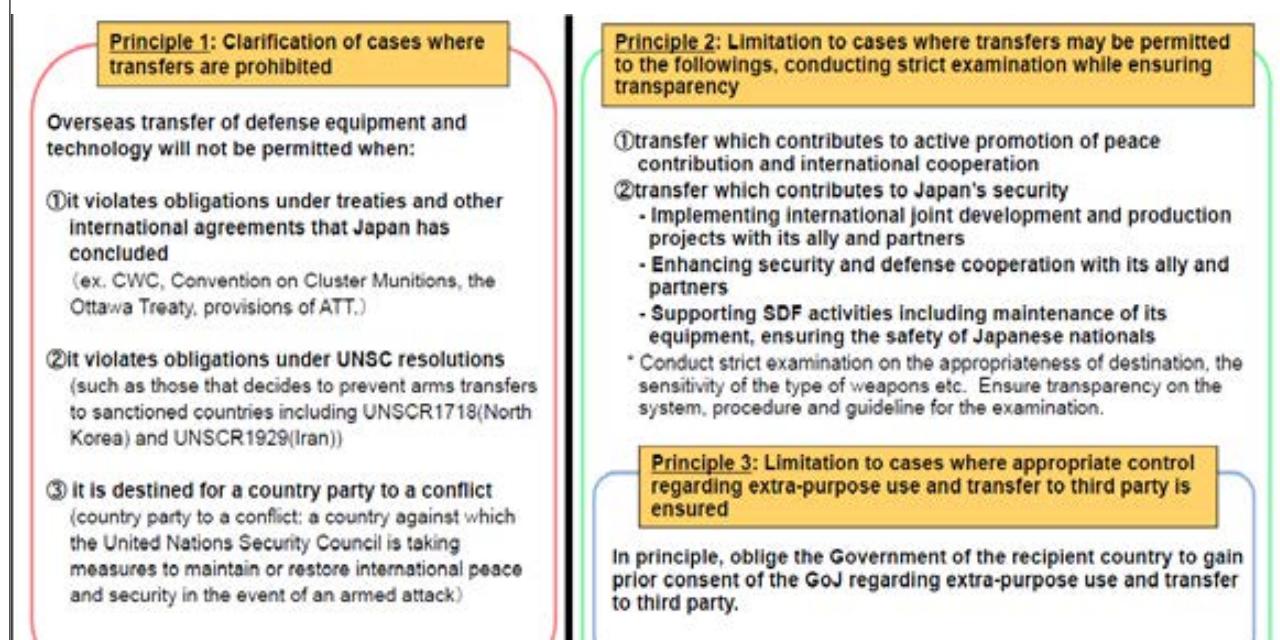
The Japanese government announced changes to its long-standing policy for arms exports in April 2014. What followed was basically a relaxation which aims to help potential collaboration in military technical development with the United States and other allies. Until April 2014, the export of arms was in effect prohibited with the exception of certain cases made with ministerial authority. This policy was amended to allow arms export based on three principles as

輸出令	貨物等省令				EU規制番号		貨物等省令文言(原文)	
	条	項	号	イロハ	細番	5桁	細番	
5(13)	4	1	十二	口		1C007	b	口 チタンの)もう化物からなるセラミックの半製品又は一次製品であって、理論密度比が98パーセント以上のもの(研磨材を除く。)
5(14)	4	1	十二	ハ	(一)	1C007	c	ハ セラミック複合材料であって、ガラス又は酸化物をマトリックスとするもののうち、次のいづれかに該当するもの (一) 次の1及び2に該当する繊維により強化されたもの 1 比強度が12,700メートルを超えるもの 2 次の系のいづれかの元素の組合せからなるもの 一 けい素及び窒素 二 けい素及び炭素 三 けい素、アルミニウム、酸素及び窒素 四 けい素、酸素及び窒素
5(14)	4	1	十二	ハ	(二)	1C007	f	(二) 次の1又は2からなる連続した繊維(1,000度の温度における引張強さが700メガパスカル未満のもの、又は1,000度の温度において100メガパスカルの応力が発生する荷重を100時間にわたって加えたときに、クリープ歪みが1パーセントを超えるものを除く。)により強化されたもの 1 酸化アルミニウム
5(14)	4	1	十二	ハ	(二)	1C007	f	2 けい素、炭素及び窒素
5(14)	4	1	十二	二		1C007	d	二 セラミック複合材料であって、粒子、ウイスカーや繊維により強化されたもののうち、けい素、ジルコニウム又はもう素の炭化物又は窒化物をマトリックスとするもの
5(15)	4	1	十二	ホ		1C007	e	ホ セラミックの材料となる前駆物質であって、次のいづれかに該当するもの
5(15)	4	1	十二	ホ	(一)	1C007	e	(一) ポリジオルガノシラン
5(15)	4	1	十二	ホ	(二)	1C007	e	(二) ポリシラザン
5(15)	4	1	十二	ホ	(三)	1C007	e	(三) ポリカルボシラザン

A sample of the draft screen shot of the 'conversion list'. The draft list is available in CISTEC web site for reference.

http://www.cistec.or.jp/service/eu_taihi.html

Three principles governing the transfer of defence equipment and technology 2014



shown in the graphic 'Three principles governing the transfer of defence equipment and technology 2014', above.

However, since the relaxation, the change has not resulted in the increase in exports that was expected and hoped for. Indeed, there has not been a single successful arms export since: the high-profile failure of an estimated \$40bn deal to sell submarines to Australia, when French company DCNS secured the agreement at the last minute, being an illustrative case in point.

If METI were to incorporate the WA munitions list into the Japanese control list, the definition of arms could be made much clearer and transparent.

As background, it is important to emphasise that export control law and regulation governing arms exports were not amended with the change of policy in April 2014. That means all practical aspects (excluding policy) of regulatory interpretation and licensing practice remain, with the assumption of prohibition.

Although METI's Manufacturing

Industries Bureau, together with the Ministry of Defense ('MoD'), try to promote and encourage the defence industries, Japanese exporters must still have their licence applications thoroughly reviewed by METI's Security Export Control Policy Division as before. Naturally, the METI export control team's stance is not to promote arms exports, but to review transactions very cautiously under current regulations. In the end, Japanese exporters are advised by METI that their applications are unlikely to be granted, and they tend to withdraw from the deal against a background of unclear regulatory circumstances and potential risk.

Although export control is just one of the reasons there have been so few arms exports, there are other issues and operational challenges, as outlined below.

Classification of the goods as arms: Should our product be classified as 'military' or 'dual-use'?

As stated above, export control regulation for arms has yet to be amended to reflect the government policy change. The structure of the arms control list has not changed substantially for several decades and does not reflect the international regime of the Wassenaar Arrangement munitions list. The Japanese control list (Category 1 – arms) is very simple

and its definitions are vague. The technical specifications provided are very limited. This is a big difference compared with the WA munitions list and dual-use items list. The only key guidance on interpretation is, 'if this is designed or used for civil use, it can be regarded as non-arms'. Although some FAQs are provided by METI, they are general in nature and the illustrative cases are very limited. While METI has a consulting process on arms classification for exporters, the exporter has to provide a number of documents for determination by METI and the whole process and timeframe tends to be unpredictable. Unfortunately, METI's reply is not made in writing, but only through a verbal call to the exporter. Consequently, the time and cost intrinsic to the process discourages exporters who often tend to abandon their attempts.

If METI were to incorporate the WA munitions list into the Japanese control list, the definition of arms could be made much clearer and transparent, to the benefit of exporters.

'Arms technology' sharing with non-Japanese nationals at exhibitions and shows: Not allowed to say anything? As per the definition of goods as stated above, the definition of 'arms technology' is similarly broad and vague.

Technology transfer – Japanese interpretation

In line with the international regimes, Japan is obliged to implement robust controls for technology transfer. Below are a few points for global traders to consider:

Residential status is a key factor in technology transfer, NOT nationality

An export of technology from Japan to a foreign country is prescribed in Article 25 (1) of Foreign Exchange and Foreign Trade Law ('FEFTL') which describes a technology export as 'the transaction from (Japanese) resident to non-(Japanese) resident.' Unlike US export control regulation, nationality is not mentioned at all, and not included in the criteria in technology transfer. As a concrete example, if a foreign national is hired by a Japanese company, or has stayed in Japan more than six months, he/she is treated as a Japanese resident. On the other hand, if a Japanese national works in a foreign country as an expat, he/she is treated as a non-resident. The technology transfer from resident to non-resident is then in the scope of exports, and if the technology is a list-controlled one, then it requires a licence.

Thus (asks a smart reader) what would happen if a deemed Japanese resident who is a foreign national leaves Japan, after acquiring controlled technology in Japan via a domestic transaction without a licence, and then makes use of such controlled technology in a foreign country?

Such a situation did, indeed fall through a loophole in technology transfer rules under FEFTL until November 2009. Article 25 of FEFTL has since been amended to fix this kind of problem, so that virtual cross-border transactions can be captured as technology exports, regardless of the residency. METI may impose licence requirements upon the sending of controlled technology by email, through the internet, by hand carry, or by whatever method of cross-border transaction, under Article 25 (3), in order to prevent the possible misuse of this loophole.

A technology licence is a different kind of export licence from a licence for goods export

Because Japanese export of technology is prescribed in a different order (Foreign Exchange Order) from the export of goods (Export Trade Control Order), a different export licence is required for technology exports from the one for the goods. If the technology and/or software is embedded in the goods, and both goods and technology/software are controlled items, a separate technology export licence is required in addition to the goods licence. In other words, an exporter must file two different export licences, one each for goods and technology. This is a common pitfall in licence preparation, and will increase administrative effort and time for supporting documentation for the exporter. The licence application forms are totally different for goods and technology, and separate kinds of supporting documents are requested, e.g., end-user profiles, and end-user certificates.

Cloud computing guidance

METI published guidance as a notification in June 2013 on cloud computing, and it has been implemented since September 2013. It is an advisory. If the purpose of the cloud is 'data storage only' and no technology transfer happens to a non-resident, it is out of the scope of export of technology. On the other hand, if a trader uses software applications in the cloud, e.g., for SaaS (software as a service) and if the software provides substantial support or service through a cloud computer, so that non-residents can make use of it, it may be regarded as a technology export transaction. However, if such support or service is done through publicly available software (so-called 'mass market') software, it is exempted in the same manner as mass market software itself. The thinking in the new notification is generally consistent with existing export control regulation and no significant contradiction is seen in this notification.

It reads: 'Technology pertaining to the design, manufacture, or use of the goods listed in the middle column of row 1 of appended table 1 of the Export Trade Control Order'.

'Pertaining to' implies something different from 'necessary to' which is the wording commonly used in the dual-use technology list. Also the definition of 'use' reads: 'Use is all the stages other than design and manufacture'.

The consequence of a lack of precision in these definitions is that information about arms is practically limitless in scope and includes any kind of technical information. Based on this, unless the discussion about the arms product is 'publicly available', exporters must obtain export licences to enable discussion at exhibitions or trade shows with potential foreign customers.

Of course, it is nigh on impossible to apply for export licences as the names

of potential buyers are unavailable in advance, and export licences require certification of all end-users and their profile as part of supporting documents.

For example, one company was advised by a METI officer to restrict discussions with customers at an exhibition to information that was 'publicly available'. But sales discussions naturally tend to include the sharing of information that is more detailed than that is publicly available. In the event, the information given by the Japanese seller to potential customers was restricted to generalities such as, 'it flies very far' and 'it is very strong'. The situation was especially ironic as a top Japanese government official spoke at the event, referencing the new 'three principals', and encouraging greater engagement with Japanese industry – which stood to lose credibility, on account of the restrictions placed upon it.

Conclusion

Japanese export control rules have some unique aspects, and in-depth rules and implications are provided only in Japanese materials. English language information provided by METI and CISTEC is really in high-level summary format only, and only rarely are control list updates or defence item license interpretation provided in English. Global traders who seek solutions for issues are encouraged to contact local experts with a solid understanding of local regulation.

George Tan is an experienced export controls practitioner and principal at Global Trade Security Consulting, based in Singapore.

georgetansc@gmail.com

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Contributors in this issue

Matt Townsend, Allen & Overy
www.allenover.com

Jason Wilcox, Baker Botts
www.bakerbotts.com

Baerbel Sachs and Carl-Wendelin Neubert, Noerr LLP
www.noerr.com

Dr. Scott Jones, TradeSecure, LLC.
<http://tradesecure.net>

Douglas N. Jacobson, Jacobson Burton Kelley PLLC
www.jbktradelaw.com

Maya Lester QC, Brick Court Chambers
www.europeansanctions.com

Martin Drew
www.britishexportcontrol.co.uk

Prof. Dr. Andreas Furrer, Peter Henschel and Chris Gschwend, MME
www.mme.ch

George Tan, Global Trade Security Consulting
[georetansc@gmail.com](mailto:georgetansc@gmail.com)

WorldECR Editorial Board

Michael Burton, Jacobson Burton Kelley PLLC
mburton@jacobsonburton.com

Larry E. Christensen,
The Law Offices of Larry E. Christensen.
www.larrychristensenpllc.com

Jay Nash, Nash Global Trade Services
jaypnash@gmail.com

Dr. Bärbel Sachs, Noerr, Berlin
bärbel.sachs@noerr.com

George Tan, Global Trade Security Consulting, Singapore
georetansc@sg-gtsc.com

Richard Tauwhare, Dechert
richard.tauwhare@dechert.com

Stacey Winters, Deloitte, London
swinters@deloitte.com

General enquiries, advertising enquiries, press releases, subscriptions: info@worldecr.com

Contact the editor, Tom Blass: tnb@worldecr.com tel +44 (0)7930405003

Contact the publisher, Mark Cusick: mark.cusick@worldecr.com tel: +44 (0)7702289830

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ISSN 2046-4797. Refer to this issue as: WorldECR [0070]

Correspondence address: D.C. Houghton Ltd, Suite 17271, 20-22 Wenlock Road,
London N1 7GU, England

D.C. Houghton Ltd is registered in England and Wales (registered number 7490482)
with its registered office at 20-22 Wenlock Road, London, UK

ISSUE 70. JUNE 2018
www.WorldECR.com