Facilitation, circumvention and personal offences under EU sanctions, and a review of penalties for breach of sanctions

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Introduction

EU-based companies that have any involvement in a transaction that infringes EU sanctions need to be aware that, even in circumstances where they have not committed a 'primary' offence, they are still at risk of committing a 'secondary' offence if they have facilitated or enabled an infringement of a prohibition under EU sanctions by another party, or they are involved in activities to circumvent the prohibitions.

Given that exposure may arise even where the entity that has committed the 'primary' offence is not itself liable, for example because it is not an EU person and all relevant activities take place outside the EU, it demonstrates how important it is that all EU companies understand the risks to which they are exposed by the activities of their trading partners.

In this article, we look at the circumstances in which EU-based companies are exposed to these risks, the limited defences that are available and the potentially severe consequences for those companies that get it wrong.

We focus on the EU sanctions against Iran and Syria, but the points are generally applicable in the case of other sanctions regimes.

What are the risks?

Circumvention

An EU-based company that participates knowingly and intentionally in activities the object or effect of which is to circumvent the prohibitions will in most instances have breached EU sanctions (as well as UK implementing legislation, which tends to include similar language).

From our discussions with the regulators in the UK, it is clear that they will adopt a broad view of what constitutes "circumvention" such that companies that have any concerns should be vigilant to ensure that they are not involved in any such activities.

As a result, EU-based companies that have any suspicion that their counterparties are devising structures, or concealing information, in order to get around the various sanctions in place should take immediate advice from the club or lawyers.

Facilitation/enabling/assisting offences

A UK-based company or individual that *"intentionally participates in activities knowing that the object or effect of them is (whether directly or indirectly) to enable or facilitate the contravention of a prohibition or requirement"* will in most instances have breached the UK legislation that implements the EU sanctions (and thereby committed a criminal offence).

Again, from our discussions with the UK regulators, they take a wide view of these prohibitions. Given the wide scope of these offences, a UK-based company that has any direct (or indirect) involvement in a transaction that breaches sanctions is exposed if it has the requisite knowledge.

In addition, a company or individual that within the UK assists another person to commit a criminal offence may be guilty of an English common law offence, and anyone who encourages or assists crime may be guilty of an offence under the Serious Crime Act 2007.

We understand that US sanctions law contains a similarly wide offence of 'facilitation'.

Who is potentially exposed?

Parent company liability

Parent companies whose subsidiaries or associated companies (even outside the EU) infringe the sanctions could be caught by these anti-circumvention and facilitation offences, depending of course on the facts. Indeed, mere control may be sufficient to establish liability, and this is especially likely where the parent company approves or has directed the subsidiary's conduct.

Officers of a company

National implementing legislation may also provide for personal liability of officers of companies that infringe the EU sanctions.

For example, where an offence is committed with the consent or connivance of any director, manager, secretary or other similar officer of the company (or is attributable to any neglect on the part of any such person), that person, as well as the company, is guilty of an offence.

What defences are available?

EU sanctions (and national implementing legislation) may provide for a *'no knowledge'* defence. This is generally available where the relevant individual did not know, and had no reasonable cause to suspect, that their actions would infringe the prohibition in question.

This *'no knowledge'* defence does not mean that a blind eye can be turned. But it does mean that if appropriate due diligence has been undertaken, and no suspicion reasonably aroused, then no offence is committed even if it turns out that there has been an infringement. What constitutes appropriate due diligence will of course depend on the particular facts of the case.

What penalties may be imposed?

The EU sanctions provide for implementation of *'effective, proportionate and dissuasive'* penalties by Member States. In the case of the UK, the penalties for infringements include potentially unlimited fines, as well as up to two years' imprisonment.

What penalties have been imposed to date?

In 2009, Mabey & Johnson Ltd was found guilty by the English courts of breaching UN sanctions on Iraq in and around 2001 to 2002. The offence involved the manipulation of the UN's 'Oil for Food' programme, creating inflated invoices, which included a 'kickback' to the Iraqi Government at a time when making funds available to the Iraqi Government was prohibited.

For the sanctions offence, Mabey & Johnson was fined £2m and was required to pay a £1.1m confiscation order, reparation payments of over £600,000 and the prosecution costs. In addition, Mabey & Johnson was found guilty of a bribery offence, which is outside the scope of this article.

In a separate prosecution, three former employees of Mabey & Johnson were found personally liable for their role in making the illegal payments in breach of UN sanctions. A former managing director was sentenced to 21 months imprisonment, disqualified from acting as a company director for five years and was ordered to pay the prosecution costs of £75,000. A former sales director was sentenced to eight months imprisonment, disqualified from acting as a company director for two years and was ordered to pay prosecution costs of £125,000. Another former sales manager was also imprisoned for eight months but this was suspended for two years. The penalties imposed on these individuals are, however, small in comparison to those imposed in the US.

In 2010, the Weir Group PLC was found guilty by a Scottish court of offering similar 'kick-backs' to the Iraqi Government in breach of UN sanctions against Iraq. The Court had some regard to the penalties imposed in the Mabey & Johnson case and levied a fine of £3m against Weir. When sentencing, the Court highlighted the need to deter future offences that would damage the interests of the UN by breaching resolutions agreed by the UK. The Court, however, after arriving at its initial fine of £4.5m, allowed a significant discount to Weir for entering into an early plea of guilty.

In 2010, the UK Financial Services Authority (FSA) fined the Royal Bank of Scotland Group £5.6m under the Money Laundering Regulations 2007. Although not accused of committing a direct breach of sanctions imposed against a state, members of the Group had failed to have in place adequate screening against the sanctions list of customers, and particular payments, resulting in an unacceptable risk that the Group could have facilitated transactions involving sanctions targets. The original fine was £8m, but this was later reduced when the Group agreed to settle early in the FSA's investigation. The level of fine set shows that, under the matrix of UK legislation, high penalties can be imposed for entities that merely expose themselves to the possibility of facilitating the financing of sanction targets.

Conclusion

All of those involved in the international movement of goods could potentially be involved in enabling or facilitating prohibited transactions (or in circumvention practices), where their counterparties engage in prohibited transactions. Organisations with a possible exposure include shipowners, charterers, ship suppliers, shipbrokers, insurers, insurance brokers, operators, technical managers, providers of bunkering or ship supply services (or any other services to ships), parent companies, banks and other providers of financial assistance.

Organisations should therefore ensure that appropriate due diligence is carried out and, if necessary, legal advice is taken, to reduce the risk of falling foul of the sanctions regimes. In considering the potential for sanctions legislation to be triggered, organisations must carefully consider the parties, the cargo and the ports involved as well as the extent to which existing contracts include sufficient protection (including appropriate warranties, indemnities and liberties).

EU Regulation 267/2012 in regard to crude oil, petroleum products and petrochemicals

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The restrictive measures against Iran outlined in EU Regulation 267/2012 include, amongst others, the prohibition on the import into the EU of all crude oil and petroleum products under Article 11 and Annex IV, as well as the prohibition on the purchase or transport of such products, if they originate or are being exported from Iran.

The range of products obtained from the refining and secondary/tertiary processing of crude oil is included in Annex IV to the Regulation and specific mention is given to waxes, petcoke and bitumen products. Products not specifically mentioned, but which undoubtedly fall into the general description of 'petroleum oils', include well-known clean petroleum products (CPPs) such as naphtha, gasoline/mogas, kerosene/jet fuel, diesel/gasoil and base lube oils.

The cargo prohibition in Annex IV does not generically refer to LNG and LPG (liquefied petroleum gas) cargoes. Annex V to the Regulation, of which further reference is made below, does however refer to ethylene, propylene and butadiene, elements of which may be found in LPG cargoes. So if such cargoes are being contemplated for loading, it would be prudent to request product analysis details and to ascertain whether the cargo does contain any of the prohibited products identified in Annex V. Having said that, the UK Competent Authority for Customs Classification has advised that cargoes with a six-digit customs tariff bearing the number 271111 (LNG) or 271112 (LPG) are not caught by the Regulation.

Other CPP products derived from refinery processes and sometimes shipped aboard tankers include condensates, raffinates, reformates, alkylates, pygas, vacuum gasoil (VGO), cycle oil and others.

Insofar as dirty petroleum products (DPPs) are concerned, product descriptions include well-known terms such as intermediate fuel oil (IFO), heavy fuel oil (HFO) and high/low sulphur versions of same (HSFO and LSFO). Other descriptions for DPPs can include: low sulphur waxy residual (LSWR), rubber process oil (RPO), carbon black feedstock (CBFS), hydrocracker bottoms (HCB) and others.

It is recommended that expert advice be sought if any doubt exists regarding product description and whether the description falls within Annex IV.

Article 13 and Annex V also provide for the complete prohibition of the import into the EU of petrochemical products, as well as the prohibition on the purchase or transport of such products, if they originate or are being exported from Iran.