



Peace of mind

Negotiating the sanctions regulatory  
maze: Key jurisdictions to consider

Insights



With many multi-million  
dollar lawsuits plaguing  
even the biggest global companies,  
understanding the regulatory maze  
of sanctions compliance is now as  
important as ever.

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It truly is a legal and regulatory minefield out there. We summarise some of the key pieces of legislation and regulatory frameworks you will need to consider.

## UN Listings

The UN Charter confers on the Security Council powers to decide, in a manner binding for all UN members, restrictive measures required to maintain or restore international peace and security, if there is a threat to the peace, a breach of the peace, or an act of aggression.

Under Chapter VII of the UN Charter, the Security Council can take enforcement measures to maintain or restore international peace and security. Such measures range from economic sanctions to international military action. Article 41 of the UN Charter states that the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These measures might include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Council has resorted to mandatory sanctions as an enforcement tool when peace has been threatened and diplomatic efforts have failed. The range of sanctions has included comprehensive economic and trade sanctions and/or more targeted measures such as arms embargoes, travel bans, financial or diplomatic restrictions.

At the same time, a great number of nation states and humanitarian organizations have expressed concerns at the possible adverse impact of sanctions on the most vulnerable segments of the population. Concerns have also been expressed at the negative impact sanctions

can have on the economy of third countries.

In response to these, various Security Council decisions have reflected a more refined approach to the design, application and implementation of mandatory sanctions. These refinements have included measures targeted at specific areas, as well as humanitarian exceptions embodied in Security Council resolutions. Targeted sanctions, for instance, can involve the freezing of assets and the blocking the financial transactions of political elites or entities whose behaviour triggered sanctions in the first place. Recently, smart sanctions have been applied to conflict diamonds in African countries, where wars have been funded in part by the trade of illicit diamonds for arms and related materials.

The three most common sanctions are:

**ASSETS FREEZE:** Freezing funds or other assets. There is no requirement to seize or confiscate assets.

**TRAVEL BAN:** We preventing an individual from entering or transiting through territories. There is no requirement to arrest or prosecute these individuals.

**ARMS EMBARGO:** Reventing the direct or indirect supply, sale or transfer of arms and related materials.

The Special Notice was created in 2005, as a way to combine the UN sanctions regime with INTERPOL's well-established notice system into an effective law enforcement tool.

### **THE PURPOSE OF THE SPECIAL NOTICE:**

The Special Notice seeks to alert law enforcement agencies worldwide that a given individual or entity is subject to UN sanctions, and in doing so, to help give effect to those sanctions. Special Notices contain information that assists law enforcement officers to take appropriate action in accordance with their national laws.

Like other INTERPOL notices, Special Notices are circulated to all INTERPOL member countries through INTERPOL's secure global communications system. Extracts of Special

Notices also appear on the public website. More than 350 Special Notices have been issued since its creation.

## EU Listings

The European Union applies sanctions in pursuit of the specific objectives of the Common Foreign and Security Policy (CFSP) as set out in the Treaty on European Union, and particularly Article 11.

Sanctions in the CFSP framework include the interruption or reduction of economic relations with third countries and restrictions against specific individuals/entities. They also include the interruption or reduction of diplomatic relations, restrictions on admission and other measures not affecting economic relations with third countries. Restrictive measures are applied by the EU either in implementation of sanctions adopted by the UN Security Council in accordance with Chapter VII of the UN Charter or autonomously within the framework of the CFSP.

Restrictive measures imposed by the EU may target governments of third countries, or non-state entities and individuals (such as terrorist groups and terrorists). They may comprise arms embargoes, other specific or general trade restrictions (import and export bans), financial restrictions, restrictions on admission (visa or travel bans), or other measures, as appropriate

Using the CFSP framework, the 27 EU Member States implement sanctions imposed by the Security Council of the United Nations under Chapter VII of the UN Charter. When the EU implements UN Security Council Resolutions, it adheres to the terms of those resolutions but it may also decide to apply further restrictive measures. The EU will implement UN restrictive measures as quickly as possible.

### **WHICH LEGAL BASES ARE USED FOR EU SANCTIONS?**

The legal basis for sanctions depends upon on the exact nature of the restrictive measures and the areas or targets covered by them. Where community action is required, a Common Position must be adopted under Article 15

of the Treaty on European Union. As an instrument of the CFSP, the adoption of a new Common Position requires unanimity from EU Member States in Council.

Council Regulations imposing sanctions and related Council Decisions and Commission Regulations are part of Community law. It is standing case law that community law takes precedence over conflicting legislation of the Member States. Such Council and Commission Regulations are directly applicable and have direct effect in the Member States, creating obligations and rights for those subject to them (including EU citizens and economic operators). Their application and enforcement is a task attributed to the competent authorities of the Member States and the Commission.

Some sanctions provided for in Common Positions are implemented by Member States, for example, arms embargoes. Although trade in manufactured goods falls under exclusive Community competence, Article 296 of the Treaty on European Union allows for an embargo relating to military goods to be implemented by Member States using national measures. It is common practice that arms embargoes are imposed by a Common Position and enforced on the basis of export control legislation of Member States (although the prohibitions on providing related financial or technical assistance are implemented through a Regulation). Likewise, restrictions on admission (visa or travel bans) provided for in Common Positions are enforced on the basis of Member States' legislation on admission of non-nationals

While it is important that restrictive measures are adequately designed to address the specific situation of the targeted country or persons, they can only be effective if they are properly implemented, enforced and monitored. The EU's Sanctions Guidelines and Best Practices paper provide some relevant suggestions. Depending on the nature of the specific sanctions regime, both the Member States and the Commission are attributed particular tasks with regard to the implementation of restrictive measures.

Typically the competent authorities of Member States are responsible for:

- determination of penalties for violations of the restrictive measures;
- the granting of exemptions;
- receiving information from, and cooperating with, economic operators (including financial and credit institutions);
- reporting upon their implementation to the Commission;
- for UN sanctions, liaison with Security Council sanctions committees, if required, in respect of specific exemption and delisting requests.

## UK: HM Treasury

The Foreign and Commonwealth Office (FCO) is responsible for overall policy on international sanctions including the scope and content of international sanction regimes. HM Treasury (HMT) is responsible for the implementation and administration of international financial sanctions in the UK, for domestic designation and for licensing exemptions to financial sanctions. The Department for Business Innovation and Skills (BIS) is responsible for trade sanctions.

HMT is responsible for:

- domestic legislation on financial sanctions;
- the implementation and administration of domestic financial sanctions;
- domestic designations under the Terrorist Asset-Freezing etc. Act 2010;
- providing advice to Treasury Ministers, on the basis of operational advice, on domestic designation decisions;
- the implementation and administration of international financial sanctions in the UK, including those relating to terrorism,

sanctions in relation to states;

- working with the Foreign and Commonwealth Office on the design of individual financial sanctions regimes and listing decisions at the UN and EU;
- working with international partners to develop the international frameworks for financial sanctions;
- licensing exemptions to financial sanctions where permitted;
- directions given under Schedule 7 to the Counter-Terrorism Act 2008;
- issues Notices advising of the introduction, amendment, suspension or lifting of financial sanctions regimes with a view to making bodies and individuals likely to be affected by financial sanctions aware of their obligations;
- processes applications for licences to release frozen funds or to make funds available to designated persons;
- responds to reports and enquiries from financial institutions, companies and members of the public concerning financial sanctions;
- directions given under Schedule 7 to the Counter-Terrorism Act 2008

The UK Consolidated list of individuals and entities that are based in the UK or elsewhere, and are subject to financial sanctions, is maintained by the UK Treasury. As a member of the UN and the EU the list will include all entities that are on the UN and EU lists.

EC Regulations imposing and/or implementing sanctions are part of Community law, are directly applicable and have direct effect in the Member States. However, a Statutory Instrument is required to introduce any penalties resulting from a breach of the Regulation into UK law

United Nations Security Council Resolutions are not directly applicable in UK law. However, under the United Nations Charter, member

states are called upon to give effect to any measures decided upon by the Security Council. An EC Regulation or a Statutory Instrument is required to give effect to these measures in UK law. In most cases, a Statutory Instrument would be effected in the UK to introduce the measures ahead of the European Union adopting a Regulation introducing the measures into Community Law. If UN imposed measures are given effect by an EC Regulation, a Statutory Instrument would still be required to introduce any penalties resulting from a breach of the Regulation.

The UK in turn may also decide to apply further restrictive measures that or not on the UN or EU lists.

### **WHAT ARE THE PENALTIES FOR COMMITTING AN OFFENCE UNDER UK FINANCIAL SANCTIONS LEGISLATION?**

These are covered specifically in each relevant Statutory Instrument. However, in general terms, any person guilty of an offence under the relevant Statutory Instrument shall be liable on conviction to imprisonment and/or a fine. The maximum term of imprisonment is currently seven years.

Where any corporate body is guilty of an offence under the relevant Statutory Instrument, and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, that person as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly.

### **US: OFAC**

The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national

security, foreign policy or economy of the United States.

OFAC administers and enforces a number of different sanctions programs. The sanctions can be either comprehensive or selective, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals.

- Iran Sanctions
- Non-proliferation Sanctions
- Syria Sanctions
- Counter Terrorism Sanctions
- Counter Narcotics Sanctions
- Cuba Sanctions
- Other Sanctions Programs and Country Information

### **WHICH LEGAL BASES ARE USED FOR OFAC SANCTIONS?**

The above sanctions programs mentioned fall into one of two basic categories:

**COMPREHENSIVE** sanctions programs that broadly prohibit transactions with all individuals and companies in particular countries: Cuba, Iran, Myanmar (Burma), Sudan and Syria.

**NON-COMPREHENSIVE** programs that prohibit transactions with specifically named individuals and entities who are in certain countries (such as North Korea or the Ivory Coast) or who are engaged in terrorism, proliferation of weapons of mass destruction or international narcotics trafficking. These individuals and entities are included in a list maintained by OFAC that is formally known as the “Specially Designated Nationals and Blocked Persons” —usually referred to simply as the “SDN List.” The various sanctions programs are authorized by two principal federal statutes—typically either the Trading with the Enemy Act (TWEA) or the International Emergency Economic Powers Act (IEEPA).

All US persons—meaning US citizens and permanent residents—must comply with OFAC regulations. This is true regardless of where the US person currently resides. OFAC sanctions programs also apply to all persons and businesses within the US, and the foreign branches of US companies. The Cuba sanctions program also applies to foreign subsidiaries that are owned or controlled by US companies (which can create a conflict of laws in some countries, including Canada, that prohibit adherence to the Cuba sanctions programs).

New trends are developing in the OFAC area, and one of the most interesting aspects of OFAC today is the US sanctions laws' expanding reach into other countries.

Not only is OFAC applicable to all US companies, but now its reach really extends worldwide. Except for the Cuba sanctions, which apply to foreign subsidiaries of US companies, the law by its terms does not apply to foreign companies, even if those foreign companies are wholly owned by US companies, but little by little, OFAC has engaged in this extraterritoriality creeping.

One example of that can be seen in the headline-grabbing bank cases. US sanctions against Cuba, for instance, allow for violations against US companies and their foreign subsidiaries, but the US was able to penalise HSBC, a foreign entity.

Companies that are accused by OFAC of violating sanctions laws generally pay fines to settle the allegations rather than challenge them, even in cases that involve only tenuous connections to the US. The nearly complete discretion that OFAC holds is one of the ways the nature of OFAC sanctions has developed worldwide.

The threat of being listed by the US as a specially designated national (SDN) is another factor in the control of OFAC outside if the US. When an individual or entity is listed, it is named as a prohibited party, no US person or company can have anything to do with it, and it is cut off from accessing its US located assets

A May 2012 executive order, titled "Prohibiting Certain Transactions With and Suspending Entry into the United States of Foreign Sanctions

Evaders With Respect to Iran and Syria," is an example of how this authority continues to develop. President Obama issued the latest in a number of recent executive orders tightening Iranian and Syrian sanctions laws in an effort to increase the pressure on the two nations regarding issues such as weapons of mass destruction, terrorism support and human rights violations. It came on the heels of an April 2012 executive order issuing sanctions on companies that provide information technologies that facilitate human rights abuses in the two countries.

The May 2012 executive order gives OFAC the authority to publicly identify foreign individuals and entities that have violated, conspired to violate or caused a violation (even unknowingly) of US sanctions against Iran and Syria, and to list them and block them from accessing the US financial and commercial systems.

A press release from the Treasury Department said the executive order would give it  
"additional means to impose serious consequences on foreign persons who seek to evade our sanctions."

#### **WHAT TYPES OF TRANSACTIONS CAN GIVE RISE TO A VIOLATION OF THE SANCTIONS PROGRAM?**

OFAC sanctions programs have a broad reach. Most obviously (and with certain exceptions), a US company cannot engage in financial transactions with, sell goods to, or provide services to anyone on the SDN List or to nationals of the countries that are the subjects of the comprehensive sanctions programs. But not all violations of the OFAC programs are quite so obvious.

The following examples, under certain circumstances and in the absence of a license or other permission, could give rise to a violation of OFAC sanctions programs:

- A US company acquires a European bank that has customers who are Cuban nationals and now is faced with providing banking

services in violation of the Cuba sanctions

- A US parent company provides back-office services for its overseas subsidiaries, which may do business with entities or individuals on the SDN list
- A financial institution makes a loan in support of an underlying sale of goods that are shipped on a vessel affiliated with an Iranian shipping company
- Employees of a financial institution “strip” out accurate information in order to disguise transactions involving a Sudanese business
- A food manufacturer sells its products to wholesalers knowing that the products will be sold to Iranian supermarkets

Also, to the extent that a US company restructures its business or reporting lines in order to use a foreign subsidiary or non-US personnel to engage in a transaction that otherwise would be prohibited by sanctions, the company may be liable for facilitation of a prohibited transaction. The sanctions programs are complicated and can be easily overlooked, even by well-intentioned businesses.

Some types of international trade with countries that are subject to OFAC sanctions still can be conducted in a manner that is permitted by law. For example, there often are licenses available for selling US agricultural products or providing humanitarian services in countries that are subject to comprehensive sanctions programs.





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