

Compliance With International Sanctions: “Facilitation” and “Circumvention” – Considerations for EU Citizens and US Nationals Wherever They Are Located

Restrictions on where your company can do business, prohibitions on those entities and individuals with whom you can engage, and wider measures relating to export and investment activity implemented under EU and US sanctions legislation trigger a wide range of offences. Companies on both sides of the Atlantic, and European and US, nationals employed or acting on behalf of companies outside of the EU and US need to consider and comply with these measures in order to manage both corporate and individual personal liabilities.

Given the heightened sensitivity following:

- the recent expansion of sanctions across a range of destinations and activities; and
- the headlines regarding prosecutions, fines and punitive settlements for failure to implement robust risk management procedures.

Companies will have been bombarded with information and general advice regarding sanctions issues such as economic sanctions aimed at freezing the funds of designated entities and individuals, arms embargoes and restrictions on the provision of associated technical assistance, training, insurance, logistics and financing.

However, many companies are less familiar with the finer nuances and risks of unwittingly committing offences under facilitation and circumvention measures and the associated risks for your organisation based on the actions of board members, employees and third parties.

Do you think facilitation offences only apply in the US and if you are an EU or wider non-US company you are safe?

This update considers the offences of facilitation and circumvention and the key issues that all companies need to ensure that the business and its employees are aware of.

FACILITATION

US sanctions apply to all “**US Persons**”, which includes:

- US citizens and permanent resident aliens of the US, wherever located **so including any US citizen working for a US or non US company;**
- Persons within the US regardless of nationality **so including non US citizens working for US based companies;** and
- Companies incorporated under the laws of the US or of any state, territory, possession of the United States, **including foreign branches.**

Many US sanctions programmes will contain so called “**facilitation**” provisions. These measures make it an offence for any US Person to approve, finance, facilitate or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited if performed by a US Person.

For example, a multinational company which has established a centralized system for management functions, such as order processing, marketing, logistics or IT, which are located or performed in the United States, would be prohibited from providing these services to a non-US subsidiary or affiliate in connection with a sanctioned country or person. The company would also be prohibited from outsourcing these functions to a non-US jurisdiction for the purpose of allowing the transaction to proceed.

“Approving”, “financing” and “guaranteeing” a transaction are straightforward concepts. However, “facilitating” is very often a more difficult activity to spot, manage and reconcile. What is meant by facilitation and what are the consequences for your business?

Facilitation can include:

- The involvement of, or approval by, any US parent company or US citizen working for that parent company of a transaction by a foreign subsidiary that would be prohibited under US sanctions. For example, US nationals who are directors or Board members of non-US entities would be prohibited from approving a transaction by that entity with a sanctioned country.
- The involvement of a US citizen working for a non-US company in a transaction which would be prohibited under US sanctions. These employees would be individually liable for participating in the negotiation, performance or wider decision-making in relation to a prohibited transaction — even where the transaction had been approved and licensed by the relevant domestic authorities.
- The involvement of US Persons in altering operating policies or procedures to permit a foreign subsidiary to do business that a US parent cannot undertake due to sanctions considerations. For example, a US manager may not modify existing business procedures to avoid or avert his involvement, or that of other US persons, in a particular transaction.

Recent litigation in the US reinforces the fact that US companies cannot avoid liability by simply turning a blind eye to the actions of their foreign subsidiaries. The US Treasury Department’s Office of Foreign Assets Control (OFAC) has made it clear that a U.S. company will be subject to civil or criminal penalties of up to \$250,000 or twice the value of the transaction (whichever is higher) if it facilitates the actions of a foreign subsidiary that run counter to OFAC prohibitions.

What should your company be doing?

It is critical that all companies, wherever they are located or incorporated know whether any of their employees are US citizens — due diligence on all employees is therefore necessary. Compliance policies, procedures, training and general awareness raising are also critical to ensuring compliance with US sanctions legislation.

Specifically, companies should consider:

- The implementation of robust recusal **policies and procedures** for any US Person employed by the company to recuse themselves from, for example:
 - Attending meetings where there are discussions related to business in sanctioned countries;
 - Participating in any telephone calls where business with sanctioned countries is discussed; and
 - Receiving, initiating or forwarding any correspondence, documents or other materials related to business with a sanctioned country.

All employees should receive **training** on how to properly respond to any inquiries about business opportunities related to a sanctioned destination.

US Persons should know that they should not refer any matters or business opportunities related to a sanctioned country to non-US persons.

Non-US Persons should know that they should not:

- Provide or forward any correspondence, documents or other materials related to business with a sanctioned country to a US Person;
- Refer any matters or opportunities related to a sanctioned country to a US Person;

- Discuss any matters or opportunities with a US Person, in meetings, telephone calls or private conversations; or
- Request any assistance from a US Person.

CIRCUMVENTION

Given the aggressive stance taken by US enforcement agencies to investigate and prosecute violations, many US and non-US companies often lose sight of extra-territorial obligations under European trade law. The perception is that US trade law is broader and more complex than that in the EU and therefore compliance with US regulation is enough to protect your business worldwide. However, confining compliance to a single jurisdiction can carry significant risks for your business.

Whilst EU sanctions do not currently extend to “facilitation” offences, offences under EU legislation implementing restrictive measures include the equally wide ranging offence of **circumvention** of sanctions measures.

EU sanctions apply to:

- Any EU national wherever located. Therefore, they extend to **any EU national working for an EU or non EU company**;
- Any legal person, group or entity doing business within the Community **so including non-EU nationals working for EU companies or the activities of non-EU companies which take place in whole or in part in the EU**; and
- Entities incorporated or constituted under the law of an EU Member State, for example **the branches or wider representative offices of EU incorporated entities**.

EU sanctions provisions contain anti-circumvention provisions aimed at prohibiting those to whom the legislation applies from knowingly and intentionally participating in activities which circumvent the wider sanctions measures. These anti-circumvention provisions could therefore catch, in the same way as facilitation provisions operate, EU companies transferring business that would be prohibited under the EU Regulation to non-EU affiliates, or structuring a particular transaction to avoid or evade EU sanctions.

In today’s economic climate, the temptation to circumvent sanctions can be great, for example structuring a transaction through a company subsidiary incorporated outside of the EU and, therefore not subject to EU sanctions. However, any company or individual employee that knowingly diverts business via a subsidiary risks committing an offence.

What should your company be doing?

Again, it is important that all companies, wherever they are located or incorporated know whether any of their employees are EU nationals. Avoiding circumvention offences then comes down to ensuring that robust systems and procedures are in place to manage risk and guide the actions of your employees — awareness raising, training and ongoing monitoring, testing and refreshing of sanctions knowledge is key.

Do your employees understand the scope of sanctions measures and how they apply on both a corporate and individual basis?

Does your sales team fully understand what they should and should not be doing in the context of sanctions compliance when pitching for business overseas?

Does your Board and senior management know what considerations they have to give to sanctions restrictions when approving transactions?

PENALTIES

There are both substantial civil and criminal penalties for breaching sanctions. In the UK, the maximum penalty is seven years imprisonment, an unlimited fine or both. However, the wider reputational damage is often very difficult, if not impossible to repair.

Compliance is therefore crucial.

How Dechert Can Help You

Dechert’s Trade and EU Government Affairs Practice regularly works with corporate and financial institutions on the application of international sanctions measures. We provide an experienced partner able to offer sound commercially focused

advice in relation to specific transactions, or wider compliance programming, including:

- Knowledge of the development, implementation, interpretation and legal and practical implications of economic sanctions and trade embargoes applied by the United Nations European Union, United States and Individual EU Member States.
- Designing compliance programmes tailored to individual needs, to minimise compliance risks, as well as reviewing existing company procedures, conducting internal audits and establishing improved compliance plans.
- Advising on jurisdictional issues associated with the administration of economic sanctions, including potential extraterritorial aspects of export, re-export, investment and transactional controls.
- Preparing and negotiating sanctions compliance provisions in contracts, purchase orders, distributor agreements, subcontracts, and supply arrangements and related representations and warranties in connection with mergers, acquisitions and joint ventures.
- Assisting with licence applications and obtaining authorisations in relation to regulatory exemptions and the interpretation of limitations in sanctions provisions.
- Investigating potential violations, responding to enforcement inquiries and representing clients before European and U.S. regulatory and enforcement agencies in connection with voluntary disclosures, enforcement and

criminal and civil (administrative) investigations.

- Advising persons and entities which have been targeted under EU and US lists of “designated” entities with regards to their legal rights and obligations and wider public relations considerations.
- Conducting trade embargo and economic sanctions due diligence in connection with exports and re-exports, distributor/supply agreements, mergers, acquisitions and joint ventures.
- Counselling clients with respect to their exposure for sanctions violations committed by third parties and potential courses of action to protect their business interests.



Dechert’s Trade and EU Government Affairs Practice

Dechert’s Trade and EU Government Relations team advises on all aspects of trade law and policy, including sanctions, export control, WTO matters, anti-dumping, customs law and trade agreements. We bring together international trade lawyers and practitioners with political advisors to offer a unique blend of legal and strategic trade advice. We have wide ranging experience in advising European, US and other companies and financial institutions on transactions involving countries, entities and individuals subject to sanctions regimes. We draw on the first hand experience of ex regulators to provide legal advice and minimise corporate and personal exposure to enforcement proceedings.

Practice group contacts

For more information, please contact the attorney listed, or any Dechert attorney with whom you regularly work. Visit us at www.dechert.com/trade.

Miriam Gonzalez

London
+44 20 7184 7892
miriam.gonzalez@dechert.com

Sign up to receive our other [DechertOnPoints](#).

Dechert internationally is a combination of limited liability partnerships and other entities registered in different jurisdictions. Dechert has more than 800 qualified lawyers and 700 staff members in its offices in Belgium, China, France, Germany, Georgia, Hong Kong, Ireland, Kazakhstan, Luxembourg, Russia, the United Arab Emirates, the UK and the US.

Dechert LLP in the US ("Dechert LLP US") is a Pennsylvania limited liability partnership which has branch and representative offices in Beijing, Brussels, Dubai, Frankfurt and Munich.

Dechert LLP in the UK is a limited liability partnership registered in England & Wales (Registered No. OC306029) and is authorised and regulated by the Solicitors Regulation Authority of England and Wales. The registered address is 160 Queen Victoria Street, London EC4V 4QQ, UK.

A list of names of the members of Dechert LLP (who are referred to as "partners") is available for inspection at the above address. The partners are solicitors or registered foreign lawyers. The use of the term "partners" should not be construed as indicating that the members of Dechert LLP are carrying on business in partnership for the purpose of the Partnership Act 1890.

Dechert (Paris) LLP is a limited liability partnership registered in England and Wales (Registered No. OC332363), authorised and regulated by the Solicitors Regulation Authority of England and Wales, and registered with the French Bar pursuant to Directive 98/5/CE. A list of the names of the members of Dechert (Paris) LLP (who are solicitors or registered foreign lawyers) is available for inspection at our Paris office at 32 rue de Monceau, 75008 Paris, France, and at our registered office at 160 Queen Victoria Street, London, EC4V 4QQ, UK.

Dechert Georgia LLC, a limited liability company registered in Georgia (Identification number 404423147), is a wholly owned subsidiary of Dechert LLP US.

Dechert in Hong Kong is a Hong Kong partnership regulated by the Law Society of Hong Kong.

Dechert Kazakhstan Limited, a private limited company registered in England & Wales (Registered No. 07978170), is a wholly owned subsidiary of Dechert LLP US, and is authorised and regulated by the Solicitors Regulation Authority of England and Wales. Legal services in Kazakhstan are provided by the Almaty branch of Dechert Kazakhstan Limited. A list of the names of the directors of Dechert Kazakhstan Limited is available for inspection at its registered office: 160 Queen Victoria Street, London EC4V 4QQ, England.

Dechert in Ireland is an Irish partnership regulated by the Law Society of Ireland.

Dechert Luxembourg is a multi-national partnership regulated in Luxembourg by the Luxembourg Bar and authorised and regulated in the UK by the Solicitors Regulation Authority of England and Wales.

Dechert Russia LLC, a wholly owned subsidiary of Dechert LLP US, is a Delaware Limited Liability Company with a registered branch in Moscow.

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking action. This publication, provided by Dechert LLP as a general informational service, may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

© 2012 Dechert LLP. Reproduction of items from this document is permitted provided you clearly acknowledge Dechert LLP as the source.

Almaty • Austin • Beijing • Boston • Brussels • Charlotte • Chicago • Dubai • Dublin • Frankfurt • Hartford
Hong Kong • London • Los Angeles • Luxembourg • Moscow • Munich • New York • Orange County • Paris
Philadelphia • Princeton • San Francisco • Silicon Valley • Tbilisi • Washington, D.C.