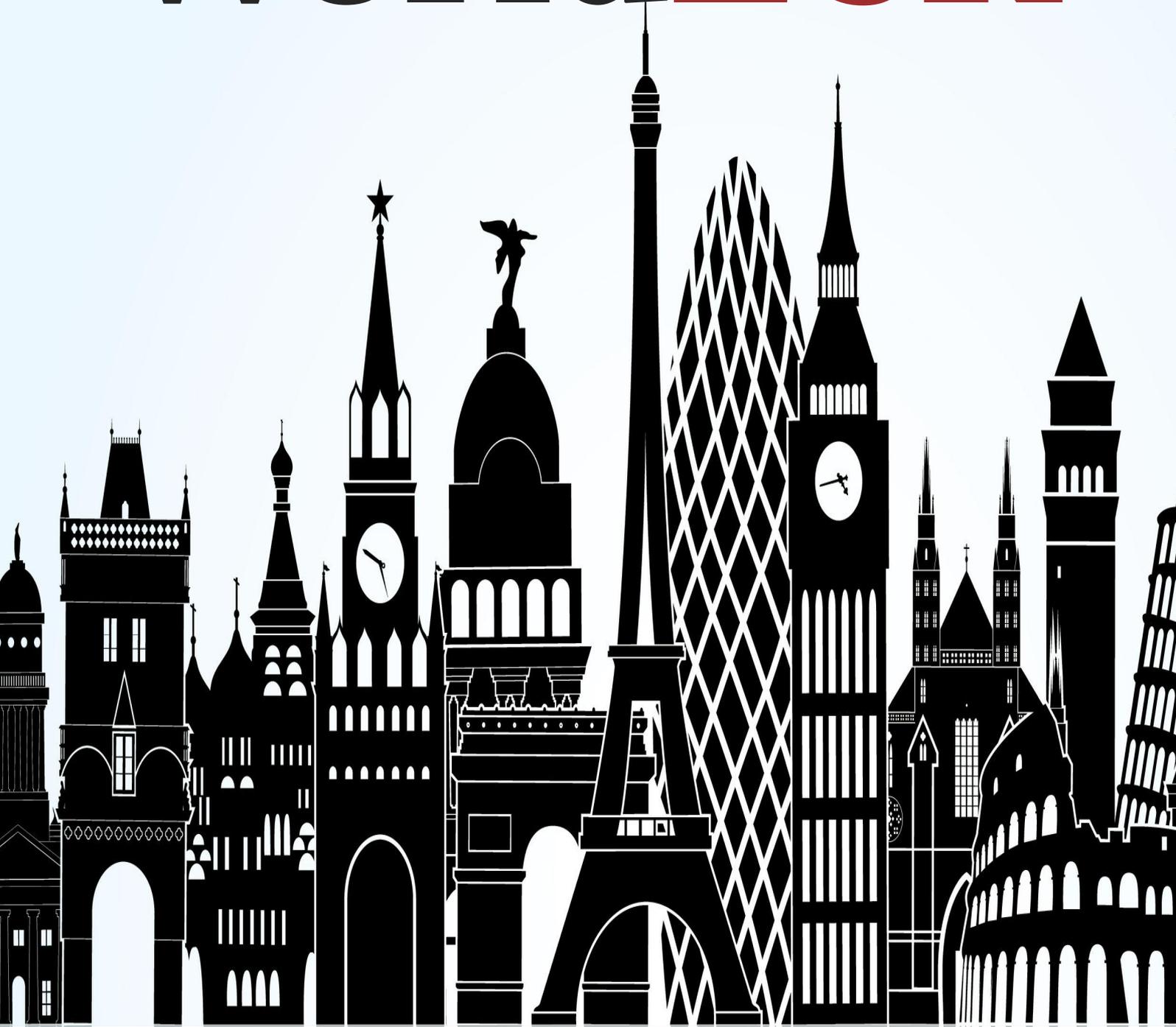


WorldECR



SPECIAL FOCUS EUROPE 2015

In 2014, conflict in Ukraine put EU sanctions and export controls firmly on the European corporate compliance agenda. In this Special Focus, *WorldECR* speaks to the lawyers advising on the impact of the regulations and the challenges facing business – and the regulators – in the year ahead.



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THE TOOLS OF TRADE

There are crucial differences between export control and sanctions practice – both in the way that the rules are made and in their technicalities. And yet in some respects, they continue to converge. One shared characteristic is that despite the illusion of ‘union’, when it comes to interpretation and enforcement, EU Member States have a tendency to set their own paths. But against a backdrop of rising geopolitical insecurity, it’s clear that business needs to take them on board – even if that means embracing uncertainty.

Lest anyone think that sanctions and export controls are a peripheral part of the mandate of the European Union (and that its real mission is to standardise the size and colour of cauliflowers), it is worth reflecting on the EU’s origins. On 9 May 1950, French statesman Robert Schuman proposed the creation of a Coal and Steel Community whose members would pool production of those materials thus making war between European states ‘not merely

unthinkable, but materially impossible’. ‘World peace,’ said Schuman, ‘cannot be safeguarded without the making of creative efforts proportionate to the dangers that threaten it.’

The following year, West Germany, France, Italy, the Netherlands, Belgium and Luxembourg signed a treaty which put Schuman’s declaration into effect, and in 1957, the same six signed the Treaty of Rome, enshrining the notion of the free

movement of goods and services across borders.

The EU, both as a historical and a political entity, has changed significantly since that time, growing to include 28 states (many of which share a single currency) and it’s fair to say that the original impetus for its creation – the promotion of peace within Europe – is easily forgotten amidst the vast body of legislation pertaining to almost every aspect of personal and commercial life.

In recent years it has come under renewed pressures both economically, and politically. Indeed, in some respects the Union is ever more polarised between those who would see greater integration of Europe's constituent parts, and those that would reclaim the national sovereignty that they regard as being lost to Brussels.

Yet by paying increasing attention both to sanctions and export controls, Europe is revisiting that part of its mandate that aims to safeguard world peace through the expending of those 'creative efforts proportionate to the dangers that threaten it'.

'You could say that it's about Europe maturing,' says Dr. Salomé Cignal de Ugarte, a partner in the Brussels office of law firm Crowell & Moring. 'Sanctions were not used so actively until recently, and perhaps it took a bit of a push from the United States, but there are values that the U.S. and EU share, and the sanctions give them political expression.'

And they're here to stay, says John Grayston of Grayston & Company: 'Speaking as we are, days away from the terrible shootings at the offices of [satirical magazine] *Charlie Hebdo*, no-one should be in any doubt as to the need for sanctions as a complementary measure to the EU's Common Foreign Security Policy. When talking both to other practitioners and people in the commercial sphere, I'm always keen to reinforce the point that sanctions and export controls are here to stay – they're not temporary and so neither

especially where, as is increasingly the case, the UN Security Council fails to agree on the need for action. And, whether at the urging of the U.S. administration or as a genuine demonstration of its own initiative, the EU has begun to flex the muscles that it finds it now possesses.

Six years after the publication of the



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**Dr. Salomé Cignal de Ugarte,
Crowell & Moring**

EU's Dual-Use Regulation (289/2009), awareness of the need for export controls has come of age, as has what appears to be the mixing and matching of export controls and sanctions, not only toward the same policy ends, but within the same policy instruments, in so much as restrictive measures against Syria, Iran and Russia each stipulate that the export of certain products – either by reference to the EU control lists or, in the case of Russia, by reference to items on the Customs Code – is prohibited.

This coming together is reflected in the approach that businesses are taking. 'There's a growing awareness of export controls because of heightened attention being given to sanctions. There's a clear interplay between the

nevertheless consult the authorities. In the end, we obtained a "no licence required" decision which was only granted after several ministries and government offices had insisted on scrutinising the application in close detail.'

Ruessmann's experience is not an isolated one. 'Sometimes we see people

anticipating difficulties, and even if the sanctions don't yet prohibit the transaction that they want to make, they judge that it's prudent to not continue – that it might only be a matter of time before things get difficult,' says Sidley Austin's Yohan Benizri.

Jasper Helder, of the Amsterdam office of Baker & McKenzie, believes the development is part of a wider picture: 'What has happened is that there has been a shift from people being focused on inbound compliance – i.e. customs issues, toward outbound compliance – to export controls and sanctions. The allocation of resources has changed; there's greater professionalisation, and more of a European trade compliance community.'

Of course, there are practical differences between the two 'regimes', as Miriam Gonzalez of Dechert points out: 'The export control regulations are fairly static and compliance can be done in-house. But complying with sanctions is more complex; apart from anything, it requires navigating political uncertainty.'

Despite differences, many businesses regard sanctions as one half of a coin – the other half of which is the export control dimension.

The EU export control regime falls within the auspices of the European Commission Directorate-General of Trade (DG Trade), headed by the Trade Commissioner (currently Swedish politician Cecilia Malmström) but is formulated in conjunction with the European Parliament.

Restrictive measures (sanctions) are articulations of the EU's Common



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A coming of age?

The EU Dual-Use Regulation (428/2009) provides both a set of common rules for the export of controlled goods and for 'free movement of dual-use items within the EU Single Market'.

Like the United States, the EU both enshrines United Nations sanctions and makes unilateral sanctions policy,

two,' says Laurent Ruessmann a partner at the law firm Fieldfisher. 'Here's an example: 'Here's an example: A client of ours is regularly involved in tenders in Russia. We had a case where he was participating in a tender for the supply of a product not generally subject to export controls. The problem was that it was for a military end-user. There were no obvious sanctions issues, but given the political uncertainties and evolving state of the sanctions, we proposed to

Foreign Security Policy (‘CFSP’) and within the purview of the European External Action Service, headed by the High Representative of the Union for Foreign Affairs and Security Policy, currently Federica Mogherini.

‘This is the way sanctions policy works,’ says James Killick of the Brussels office of White & Case. ‘The

a few countries do the “heavy lifting” within the Commission – in this case, probably the UK, Germany, France and Italy, the others just following on. That just reflects the foreign policy trend.’

Altogether different

Where export controls and sanctions re-converge is in their implementation.



‘Ask yourself the question, why doesn’t someone know the EU export control rules as well as they should? The answer is because doing so means having to be up to speed with the (often unwritten laws) of 28 systems.’

Curtis Dombek, Sheppard Mullin

Lisbon Treaty provides that two processes need to happen – namely a CFSP decision taken [by EU Member State representatives] on a unanimous basis, and also, a Regulation taken on a qualified majority basis.’

In the case of Russia, he says, ‘While some countries were not comfortable imposing sanctions, if they had doubts, there were clearly not enough of them to say so. What tends to happen is that

The Commission has taken increased responsibility for formulating European foreign policy, supplanting (though not entirely) Member States’ unilateral policies in this regard – but has left the Member States a free hand in the extent to which they implement and enforce those policies. And, in practice, national regulators frequently adopt different approaches. Whether this reflects divergences in national

commercial and/or political interest, or differences in resources and capability available to and within the competent authorities, it gives rise to a multitude of confusions.

Sheppard Mullin’s Curtis Dombek divides his time between Los Angeles and Brussels. He observes that in Europe, ‘There’s this illusion of union. But ask yourself the question, why doesn’t someone know the EU export control rules as well as they should? The answer is because doing so means having to be up to speed with the (often unwritten laws) of 28 systems.’

By comparing his own experience with that of colleagues throughout Europe, Jasper Helder concludes that advice given by different authorities can vary remarkably: ‘Currently, the UK is interpreting the Russia regulations as meaning that goods now requiring an export licence only do so when leaving the European Union. But in the Netherlands they’re being interpreted as meaning that the exporter would need a licence to sell, supply or transfer the same goods to Germany if they’re aware that their ultimate destination is Russia.’

That there should be a national

GIDE
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A recognised export control and sanctions practice

With 600 lawyers, Gide offers some of the most respected specialists in all sectors of national and international finance and business law. On issues relating to export control and financial sanctions, which are a European competence and an integral part of the EU’s Common Foreign and Security Policy, Brussels acts in much the same way as Washington DC acts in the US. In consequence, Gide’s Brussels office focuses the firm’s expertise in that specific field. Our team has successfully assisted a broad spectrum of clients including maritime and air carriers, banks, tech companies and exporters of dual-use goods by analysing potential risks and proposing strategies to comply with sanctions.

Our lawyers are able to advise clients on all aspects of EU sanctions:

- Drafting legal opinions on the interpretation and application of EU sanctions
- Liaising with national authorities to obtain individual and global licences
- Assisting in the design and implementation of corporate compliance programmes
- Assisting in conducting due diligence of export control risks in the context of mergers and acquisitions in Europe
- Advising on criminal sanctions
- Advising on data transfers and cryptology
- Monitoring the adoption and evolution of trade and financial sanctions in Brussels and the case law of the relevant national courts and the European Court of Justice

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View Building, Rue de l’Industrie, 26-38 - 1040 Brussels - Belgium | tel. +32 (0)2 231 11 40 | brussels@gide.com - gide.com

flavour to interpretation is only inevitable, but so, it would seem, are the frustrations. Arnoud Willems of Sidley Austin's Brussels office, comments: 'Clients report to us about an inconsistent approach. What you don't want is, for example, a subsidiary in Poland to have a different

to 28 Member States. Indeed, Dr. Salomé Cissal de Ugarte, who works closely with colleagues in Washington, DC says that it is frequently 'transnational' issues upon which they are asked to advise: 'We are often called to provide legal guidance to companies wishing to structure their

Adamantopoulos. 'Yes, some regulators go by the book, and others are more "friendly", which could be interpreted as meaning more pro-business. But the quality of informal guidance that you receive really depends on the extent of their practical experience, and there are some officials who don't have any.'

So, for example, is UK guidance applicable in Greece? 'Theoretically, no. But the reality is that the UK officials have dealt with very more cases, so what they say carries weight,' he says.

This view is shared by Georg Berrisch of Baker Botts: 'Member States are having difficulty actually understanding the regulations, because there is no case law, and few guidelines, so it is difficult to tell companies how an authority is going to interpret a particular piece of legislation.'

Berrisch points out also that the regulations can be more restrictive in practice than they are on paper: 'The new Russia sanctions, for example, stipulate that some transactions are not prohibited but they do now require a licence. Now, it could take six to eight weeks to get that licence from an over-stretched government body. And in effect that's up to two months during which an EU citizen can't be involved in the deal. If you're brokering deals across a wide range of projects on a daily basis, in practical terms, it means that that particular deal has to be taken off the table.'

But it's not all bad news. Carolina Dackö of Swedish law firm Vinge says that it's increasingly apparent that



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Charles Claypoole, Latham & Watkins

understanding of their obligations than their counterparts in Germany or Spain. But getting a consistent approach between regulators is difficult.'

The fact that sanctions legislation is politically driven frequently pushes lawyers into the role of quasi foreign affairs counsellors. Willems adds: 'Our role is of course very much legal, it's about navigating the complexity of the legislation. But we are called upon to try to guess what the next move might be, or how a situation is going to play out – of course, based on our legal expertise and experience. But we will be asked "How long before the Iran sanctions go away?", or about possible risks on entering new markets.'

And it's clear that the ramping up of sanctions by the EU in 2014 added further to the confusion – for all parties. 'In the U.S., export controls and sanctions have their own histories and are more discrete areas of practice. In EU Member States, it's more often the case – although not always – that the authorities dealing with export control applications are now suddenly dealing with sanctions issues, and many of them are woefully under-resourced,' says Latham & Watkins' Charles Claypoole. 'Historically, the broad nature of embargoes meant that businesses didn't need to worry about export controls, because all deals with a certain country were prohibited. But the combination of traditional sanctions with export controls leads to a whole new set of difficulties,' he adds.

Thus, the stock in trade for lawyers in the field is familiarity, gleaned by exposure not only to the law, but to its interpretation through the prism of up

transactions in a way that they comply with sanctions regulations in multiple jurisdictions like the EU, the U.S., Canada and Switzerland. While the substance might not vary that much, their interpretation is generally quite complex and the competent authorities might follow different enforcement practices.'

Business-friendly

Differences in approach might mean that one authority might refuse to approve (or take longer to consider) an export licence application than another, or that an export might fall within one country's 'catch-all' list and not that of another – perhaps because the intelligence agencies do not always share the same concerns about particular end-users.

But if some businesses are tempted



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**Konstantinos Adamantopoulos,
Holman Fenwick Willan**

to succumb to a kind of regulatory arbitrage, there are clear risks in doing so. The fact that a deal or an export might be cleared by one authority means neither that another will look upon it benignly, nor that it'll stay beneath the radar.

'The reality is that you have to be pragmatic,' says Holman Fenwick Willan partner Konstantinos

'When it comes to enforcement, there's evidently a great deal of cooperation between authorities in Member States. I recently had an opportunity to ask representatives of the Swedish security services (SÄPO) about how the situation might be if, for example, the authorities within one Member State were investigating activities of a subsidiary company: would the

authorities in the home jurisdiction of the parent company be informed? And the answer was, conclusively, that they would. Clearly there's good communication, at least a great deal of the time, between the authorities.'

It's interesting, Dackö says, to see

much a national issue, and not just about Brussels.'

Dackö says that while the relevant authorities, including ISP and Customs, are 'certainly-business friendly' (exports of industrial and machinery and hi-tech being key to the

some blue-chips, technology, aerospace and defence clients. But generally in France, awareness isn't universal and responses to changes in the law aren't so very well structured.'

In both the case of export controls and sanctions, says Massot, Brussels and London remain, for the moment 'bubbles, where the quality of export control and sanctions advice, and the extent to which it is sought' is significantly greater than elsewhere. 'For example,' he says, 'even very large EU dual-use manufacturers are not that well organised when it comes to export controls. They're starting to request advice from lawyers but it's a process in development. Many of them are much more in tune with the need to have in place anti-corruption/bribery mechanisms. And they see these issues – especially sanctions – as being about politics, unlike, say, competition, which they see as legal. It really is very much the U.S. companies that have the awareness.'

In so saying, Massot points to an irony that others hint at implicitly or overtly in their observations on export controls and sanctions in the European Union: U.S. companies tend to pay greater attention to the EU rules than do their European competitors because export controls and sanctions generally have been driven further up their compliance agendas by fear of aggressive enforcement action by BIS,



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Alexis Massot, Gide

how these competing imperatives play out in the case of the Russia restrictions. According to the Swedish embassy in Moscow, in 2013 Russia was Sweden's 13th biggest export market and 7th biggest import market. 'Actually, those exports haven't been very seriously hit,' she says, 'but the [restrictive measures] have certainly caused a stir – companies really need to know who they're dealing with. Also, sanctions have been getting a lot of attention because the previous foreign minister, Carl Bild was very outspoken against Russia's activities in Ukraine, exhorting his European colleagues to take strong action. This gave Swedish local media as well as Swedish-based companies the sense that this was very

Swedish economy), there's also a grown-up and responsible attitude amongst companies that starts with strong recognition of the needs for export controls – not least because public awareness of issues such as global human rights, international politics and business integrity are so high, and companies are keenly conscious of possible consumer backlash if they transact or export with or to the wrong markets.

In France, by contrast, says Alexis Massot of the Brussels office of French law firm Gide, 'It is really a very focused circle of businesses that understand what's happening in these areas; of course banks, especially in the wake of the BNP Paribas settlement,



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EU sanctions country list

The EU has designated for sanctions entities in

- Afghanistan
Belarus
Bosnia and Herzegovina
Burma
Central African Republic
China
Cote d'Ivoire
Croatia
Cuba
DR Congo
Egypt
Eritrea
Guinea
Guinea-Bissau (Republic of)
Haiti
Iran
Iraq
Korea (Democratic People's Republic of)
Lebanon
Liberia
Libya
Moldova
Russian Federation
Somalia
South Sudan
Sudan
Syria
Tunisia
Ukraine
United States of America (blocking regs)
Yemen
Zimbabwe

OFAC and other U.S. agencies while many EU companies are slanting their compliance efforts toward meeting the requirements of U.S. laws.

Matthew Getz, international counsel in the London office of Debevoise, says that such is the fear of the U.S. regulators that as an EU-based lawyer, while he advises his EU clients on EU law first 'they also want to know the U.S. position even where there is no issue of extra-territorial jurisdiction.'

According to Massot, 'The BNP Paribas case [in which the bank agreed to pay a total of \$9billion to U.S. regulators in July 2014] is a game changer for the law of sanctions: not only for banks operating in the U.S. but, more importantly, for all businesses who still had doubts about the importance of EU and U.S. sanctions for the global business environment. The next challenge is to help European companies incorporate this new constraint in their risk-management strategy: this is a task we are taking very seriously.'

And as one Brussels lawyer observes, 'The board of directors of an EU company is going to look at the cost of compliance, and the relative cost and risk of breaching the EU sanctions or export control laws against that of breaking the U.S. laws. Where do you think they're going to make the greatest spend for now?'

Whilst this may be understandable,

Getz points out that it is harder to discern any enforcement trend in the EU because high-profile actions are less frequent or visible. But, he says, it would inadvisable to take too lackadaisical an approach on that account. 'Look, I've never seen the U.S. authorities stopped by the passage of time - and remember that in the UK for example, there's no statute of limitations.'

Tools for the times

Europe has become accustomed to being described as being on the edge. The banking crisis, the currency crisis, and a surge in the popularity of political parties that would undo the very fabric of the institutions that make up the European Union have all contributed to the erosion of post-war certainties. At the same time, the increasingly numerous and unpredictable nature of external (or externally sponsored) dangers, such as that posed by those behind the Charlie Hebdo attacks in Paris in January, demand that the European Union continue the project initiated by Robert Schuman five or so decades past and work to safeguard the Union and the wider world.

Legally uncertain, hastily drafted and inexpertly enshrined as they may be, the EU's sanctions and export control regimes appear to be increasingly vital tools.

FROM THE ARCHIVE

Sanctions

The life cycle of a sanctions programme



Recent years have seen a significant increase in the use of trade sanctions as a tool of international policy. Daniel Martin examines the aims of such sanctions and their chances of ultimate success with reference to those imposed upon targets in Ivory Coast, Libya, Iran and Syria.

The continued increase of multilateral sanctions against Iran offers useful context to the thinking of sanctions against Burma, which now has an appropriate time to look at some of the trends and common features in EU sanctions programmes, with a particular focus on how these programmes have developed over time.

The political basis for international trade sanctions is that they are imposed in response to particular circumstances and operate to achieve particular foreign policy objectives. As a result, the sanctions should be flexible, rather than static, pieces of legislation and they should be focused on specific, clearly identified policy objectives. They should be targeted to address the needs of the specific political situation, and more serious sanctions should only be imposed if those needs are not met by other means.

EU sanctions common features I will focus on 'trade' sanctions in those which prohibit or otherwise restrict some or all trade between the sanctioned region and commercial organisations elsewhere. The EU trade sanctions programme imposes an asset freeze, by which the funds and economic resources of named individuals and entities are frozen and, in addition, the provision of funds and economic resources directly or

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Germany

Russia and EU sanctions: a German perspective



Dr. Philipp Heelmgigs provides an overview of the current trade restrictions with practical advice on the necessary internal compliance measures.

As a result of the current political events in the Ukraine, and the Russian actions in the situation, the U.S. and the EU have both now imposed sanctions on Russia. Arguably the current restrictions are tightly linked to their content as well as their scope, since the EU - in particular, Germany - continues to focus on a dialogue (instead of confrontation) with Russia.

The regulatory content and efficiency of the individual penalties are, however, far greater than one might at first glance assume. The current sanctions already force (reporting) companies to take internal compliance measures when conducting their business with Russia, and those that had to be implemented rapidly. Given Russia's stance, which so far remains unchanged, it cannot be ruled out that the EU may impose further sanctions on Russia which will extend the content and scope of the current restrictions.

As a second step, individual export bans on Russian and Ukrainian persons entering EU countries, or with the freezing of their EU foreign accounts, were imposed.

Member States as well as the definition of the specific trade restrictions, in particular with respect to the internal bodies during the implementation of the sanctions on the market of the Member States, as well as the safeguarding of energy supplies - show the complexity of the EU's key economic connection to Russia. While the Federal Republic of Germany consists of about 15% of its gas supply through Russia, 85% flows through to 160th in some Eastern European countries. Therefore, the

U.S./China exports

What U.S. and Chinese companies need to know about U.S. export control laws applicable to China



The People's Republic of China is the United States' second-largest trading partner and third-largest export market, yet U.S. exports to the country are among the most strictly controlled. Joseph D. Gustavus details the regime that governs trade between the two countries.

According to a recently published report of the U.S. Congressional Research Service, the United States and the People's Republic of China (China) equaled each other in exports to the United States for the first time in 2013. Total U.S.-China trade rose from \$3.6 billion in 1981 to \$393 billion in 2013. China is currently the United States' second-largest trading partner and third-largest export market. The mutually beneficial trade relationship between China and the United States is growing increasingly complex due to the rapid growth of economic integration.

At the same time, U.S. national security concerns are of a high-order nature. U.S. technology transfers to China under U.S. export control laws receive increasing scrutiny from enforcement authorities. Significant civil and criminal penalties result from violating the conditions set forth in the U.S. export control laws, which control the production, trade, and export of controlled items and technology. U.S. export control laws are particularly important for companies involved in the design and software development, information technology, defense, information technology, and aerospace industries.

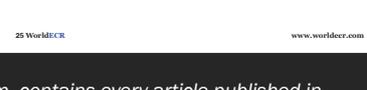
U.S. export control laws have an extraterritorial reach, leading to the proliferation of foreign persons located abroad. The remaining 20 associated technologies, military equipment, chemical and biological agents, and nuclear materials are also controlled. The Department of Defense Trade Controls (DDTC) approves the export from the U.S. of defense articles and technical data subject to EAR export controls. The U.S. export control laws are particularly important for companies involved in the design and software development, information technology, defense, information technology, and aerospace industries.



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