

International Financial and White Collar Crime, Corporate Malfeasance and Compliance

Margot Sève, Ph.D.

Skadden, Arps, Slate,
Meagher and Flom LLP

Michel Perez, CAMS, MBA

Senior Fellow at New York
University Law School and
Associate Director of Labex
ReFi

This section edited by Margot Seve in Paris and Michel Perez in New York aims at presenting and analyzing legal developments related to cross-border enforcement actions in financial and white collar crime cases. It also focuses on the growth of compliance and corporate governance regulatory standards. Comments and suggestions are welcomed, including articles proposals.

Please email your inputs to margot.seve@skadden.com or michelaperez@gmail.com.

The EU and U.S. Russia and Ukraine Sanctions Programs: Comparisons and Perspectives

Sidne Koenigsberg, JD

Skadden, Arps, Slate, Meagher and Flom LLP

Gregory Vianesi, MSc in Management

Skadden, Arps, Slate, Meagher and Flom LLP¹

Both the EU and the U.S. have adopted a wide range of restrictive measures affecting Russia, the Crimea region, and Ukraine in the four years since the crisis in Ukraine began.² The EU and U.S. sanctions programs include list-based measures targeting certain individuals and entities, broad restrictions on investment in and trade with the Crimea region, and so-called “sectoral sanctions” – an innovation in the sanctions arena introduced in 2014 – targeting certain sectors of Russia’s economy. While these programs are in many ways aligned in their general approach as the product of joint diplomatic efforts, the EU and U.S. programs also present several key differences. This article summarizes the EU and U.S. Russia and Ukraine sanctions programs (Part I), with a focus on sec-

toral sanctions (Part II), and highlights key compliance challenges posed by these programs for those doing business in affected regions and sectors (Part III).

I. Overview of EU and U.S. Russia and Ukraine Sanctions Programs

1. List-Based Sanctions

On March 5, 2014, the Council of the European Union (the “Council”) adopted restrictive measures against 18 persons identified as responsible for the misappropriation of Ukrainian State funds and for human rights violations in Ukraine.³ On March 17 and March 21, 2014, the Council adopted restrictive measures against certain Russian and Ukrainian government and military officials, and related individuals and entities, including EU travel bans and asset freezes.⁴ The EU list regarding Russia and Ukraine has expanded since to 150 persons and 38 organizations.⁵

In parallel, in the U.S., beginning on March 6, 2014, President Obama signed a series of Executive Orders, authorizing sanctions targeting individuals and entities contributing to the situation in Ukraine.⁶ On May 8, 2014, the Office of Foreign Assets Control (“OFAC”) issued the Ukraine-Related Sanctions Regulations to implement these Executive Orders, adding certain individuals and entities to OFAC’s Specially Designated Nationals and Blocked Persons List (“SDN List”).⁷ Listed entities and individuals are subject to asset blocking measures and listed individuals

- 3 - Council Decision 2014/119, 2014 O.J. (L 66) 26 (EU); Council Regulation 208/2014, 2014 O.J. (L66) 1 (EU). Related statements were made by various configurations of the Council, including the Foreign Affairs Council and the EU Heads of State or Government. *See* Timeline – EU restrictive measures in response to the crisis in Ukraine, CONSILIUM.EUROPA.EU, <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/history-ukraine-crisis> (last visited Mar. 16, 2018), for a timeline of the measures imposed by the EU.
- 4 - Council Decision 2014/145, 2014 O.J. (L 78) 16 (EU); Council Regulation 269/2014, 2014 O.J. (L78) 6 (EU); Council Decision 2014/151, 2014 O.J. (L 86) 30 (EU).
- 5 - European Commission, Service for Foreign Policy Instruments, European Union Consolidated Financial Sanctions List (March 20, 2018), available at <http://data.europa.eu/euodp/data/dataset/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions>. The EU has also taken certain diplomatic measures and suspended certain bilateral and international economic cooperation agreements. For example, the EU suspended financing for new projects in Russia by the European Investment Bank and the European Bank for Reconstruction and Development and suspended certain EU bilateral and regional cooperation programs with Russia. *See* European External Action Service Press Release 170810_6, European Delegation to Russia, EU restrictive measures in response to the crisis in Ukraine (October 8, 2017).
- 6 - Exec. Order No. 13660, 31 C.F.R. § 589.802 (2014); Exec. Order No. 13661, 31 C.F.R. § 589 app. B (2014); Exec. Order No. 13662, 31 C.F.R. § 589.802 (2014).
- 7 - Office of Foreign Assets Control, Ukraine/Russia-related Sanctions Program (2016); Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List (2018).

1 - The views expressed in this article are those of the authors only. The authors would like to thank Wesley Laine, Annabelle Gauvain and Hugo Girard for the quality of their research.

2 - *See generally* EU restrictive measures in response to the crisis in Ukraine, CONSILIUM.EUROPA.EU, <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis> (last visited Mar. 15, 2018), for a summary of EU measures; Ukraine and Russia Sanctions, STATE.GOV, <http://www.state.gov/e/eb/tfs/spi/ukrainerrussia> (last visited Mar. 14, 2018), for a summary of U.S. measures.

subject to travel bans for U.S. territory. Since March 2014, the U.S. has added over 100 Russian and Ukrainian entities and individuals to OFAC's SDN List.⁸

2. Sanctions Affecting Trade with Crimea

In addition to list-based measures, the U.S. has enacted comprehensive sanctions prohibiting investment in and trade with the Crimea region. Unlike the U.S., the EU has not imposed a comprehensive ban on all trade with Crimea. Nevertheless, EU restrictive measures regarding investment in and trade with Crimea and Sevastopol have expanded over time so that these restrictions now comprise one of the broader EU sanctions programs.

On June 23, 2014, the EU Foreign Affairs Council adopted measures restricting trade with the Crimea region.⁹ These initial measures prohibited:

- importing into the EU goods originating from Crimea or Sevastopol, unless the EU importer has been granted a certificate of preferential origin issued by the Ukrainian authorities,¹⁰ and
- direct or indirect financing, or financial assistance for, importing goods from Crimea and Sevastopol, as well as insurance and reinsurance related to such imports.

In July and December 2014, EU restrictive measures on trade with Crimea and Sevastopol were expanded to prohibit:¹¹

- financing, investing in, or creating a joint venture relating to the creation, acquisition or development of transport, telecommunications, or energy infrastructure in Crimea or Sevastopol;
- financing, investing in, or creating a joint venture relating to the exploitation of oil, gas or mineral resources in Crimea or Sevastopol;¹²

- the export to Crimea or Sevastopol or for use in Crimea or Sevastopol, of listed key equipment and technology related to the creation, acquisition or development of infrastructure in the sectors of transport, telecommunications, energy, and oil, gas and mineral reserves exploitation in Crimea or Sevastopol; and
- providing, directly or indirectly, technical assistance, brokering services, or maintenance services or financing or financial assistance related to listed key equipment and technology.¹³
- investment in Crimea or Sevastopol, and
- tourism activities, including cruise services, in Crimea and Sevastopol.¹⁴

In the U.S., by an Executive Order dated December 19, 2014, President Obama imposed a broad-based prohibition on virtually all transactions to or from Crimea unless authorized by OFAC or exempted by statute.¹⁵ These sanctions, comparable to other comprehensive sanctions programs the U.S. maintains against Iran, Syria, North Korea and Cuba, prohibit (i) investment in Crimea by a U.S. person, (ii) import, export, or re-export to or from Crimea, directly or indirectly, of any goods, services or technology, and (iii) any approval, financing, facilitation, or guarantee by a U.S. person, wherever located, of a transaction by a non-U.S. person where the transaction by that non-U.S. person would be prohibited if performed by a U.S. person or within the United States.¹⁶

EU sanctions targeting Crimea contain broad grandfathering provisions allowing the execution of obligations arising from contracts concluded before December 20, 2014.¹⁷ By contrast, U.S. sanctions against Crimea do not contain grandfathering provisions, although certain general licenses have permitted a wind-down period to exit existing contracts.¹⁸

8 - See Supplement No. 4 to Part 744-Entity List, 15 C.F.R. § 744 (2018); Supplement No. 2 to Part 746-Russian Industry Sector Sanction List, 15 C.F.R. § 746 (2018). The lists of individuals or entities targeted by the EU sanctions in the Ukraine-/Russia-related sanctions context are available in the annexes to relevant EU Regulations and Council Decisions. With respect to U.S. sanctions, OFAC publishes on the Sectoral Sanctions Identifications List ("SSI List") the persons listed under the U.S. sectoral sanctions, and on the Specially Designated Nationals And Blocked Persons List ("SDN List") the individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries or region like Crimea. The U.S. Department of Commerce Bureau of Industry and Security also maintains a list of Russian entities subject to export controls. On April 6, 2018, OFAC announced additional sanctions against certain Russian individuals, companies owned or controlled by these individuals, and certain Russian state-owned companies. See Press Release, U.S. Department of Treasury, Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity (April 6, 2018), <http://home.treasury.gov/news/press-releases/sm0338>.

9 - European Commission Press Release, Foreign Affairs Council, Council supports Kiev efforts for a peace plan (June 23, 2014); Council Decision 2014/386, 2014 O.J. (L 183) 70 (EU); Council Decision 2014/386, 2014 O.J. (L 183) 70 (EU) (later amended by Council Decision 2014/507, 2014 O.J. (L 226) 20 (EU)); Council Regulation 692/2014, 2014 O.J. (L 183) 9 (EU).

10 - In accordance with the non-preferential EU rules of origin used, pursuant to Council Regulation 2913/92, 1992 O.J. (L 302) 1 (EC), establishing the Community Customs Codes and outlining commercial policy measures, including trade embargos.

11 - Council Decision 2014/507, 2014 O.J. (L 226) 20 (EU) (amending Council Decision 2014/386, 2014 O.J. (L183) 70 (EU)) and Council Regulation 825/2014, 2014 O.J. (L 226) 2 (EU) (amending Council Regulation 692/2014, 2014 O.J. (L 183) 9 (EU)).

12 - Mineral resources are defined in Annex II of Council Regulation 825/2014, 2014 O.J. (L 226) 5 (EU).

13 - The applicable key equipment and technology are listed in Annex III of Council Regulation 825/2014, 2014 O.J. (L 226) 13 (EU).

14 - Council Decision 2014/933, 2014 O.J., (L 365) 152 (EU); Council Regulation 1351/2014, 2014 O.J. (L 365) 46 (EU).

15 - Executive Order 13685, 31 C.F.R. § 589 (2014).

16 - *Id.* at 589; In addition, the U.S. Department of Commerce Bureau of Industry and Security maintains controls on export, re-export, and transfer of certain U.S.-origin goods, software, technology, and technical data to prohibited entities, end destinations, and end uses in Russia and the Crimea region. See U.S. Department of Commerce, Bureau of Industry and Security, Guidance on Due Diligence to Prevent Unauthorized Transshipment/Reexport of Controlled Items to Russia, available at <https://www.bis.doc.gov/index.php/policy-guidance/russia-due-diligence-guidance>.

17 - Council Regulation 1351/2014, 2014 O.J., (L 365) 46 (EU), the grandfathering provisions are outlined in the following articles: Article 2a (3); Article 2b (4); Article 2c (2); Article 2d (4).

18 - See, e.g., U.S. Department of the Treasury, Office of Foreign Assets Control, General License No. 5, *Authorizing Certain Activities Prohibited by Executive Order 13685 of December 19, 2014 Necessary to Wind Down Operations Involving the Crimea Region of Ukraine* (2014) https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl5.pdf; U.S. Department of the Treasury, Office of Foreign Assets Control, General License No. 12A, *Authorizing Certain Activities Necessary to Maintenance or Wind Down of Operations or Existing Contracts* (2018); U.S. Department of Treasury, Office of Foreign Assets Control, General License No. 13, *Authorizing Certain Actions Necessary to Divest or Transfer Debt, Equity, or Other Holdings in Certain Blocked Persons* (2018); U.S. Department of the Treasury, Office of Foreign Assets Control, General License No. 14, *Authorizing Certain Activities Necessary to Maintenance or Wind Down of Operations or Existing Con-*

3. Sectoral Sanctions

On July 16, 2014, the U.S. introduced sectoral sanctions against certain Russian entities.¹⁹ These U.S. “sectoral sanctions,” an innovation at the time by OFAC, aim to limit certain sectors of the Russian economy, including the financial services, energy, mining, and defense and related materiel sectors, from gaining access to U.S. capital and debt markets, and limit Russia’s access to U.S. technology and expertise in the energy sector.²⁰ Under four directives issued in July and September 2014 pursuant to Executive Order 13662, OFAC instituted narrowly tailored prohibitions on U.S. persons and transactions within the United States with respect to identified companies, so-called “SSI-listed entities,” in Russia’s financial (Directive 1), energy (Directives 2 and 4), and defense (Directive 3) sectors.²¹

On July 31, 2014, the Council of the European Union introduced restrictive measures, including sectoral sanctions, against Russia.²² EU restrictive measures include:

- restrictions on access to EU primary and secondary capital markets for sanctioned entities,
- arms embargo (import and export) of listed military equipment,²³
- restrictions on the export to Russia of dual-use goods to military end users,²⁴ and
- restrictions on the access to certain sensitive technologies and services (including financial assistance and services) that can be used for oil production and exploration in deep waters, in the offshore area of the Arctic Circle, and in shale formations.

tracts with United Company RUSAL PLC (2018). See also Jamie L. Boucher, Eytan J. Fisch, William J. Sweet, Jr., Greg Seidner, James E. Perry, Joydeep Sengupta, *US Imposes New Russia Sanctions Targeting Oligarchs, Senior Government Officials and Entities* (2018), <https://www.skadden.com/insights/publications/2018/04/us-imposes-new-russia-sanctions>; Boucher et al, *OFAC Issues New General Licenses, Guidance Related to Recent Russia Sanctions* (2018), <https://www.skadden.com/insights/publication/s/2018/04/ofac-issues-new-general-licenses>.

19 - Press Release, U.S. Department of the Treasury, *Announcement of Treasury Sanctions on Entities Within the Financial Services and Energy Sectors of Russia, Against Arms or Related Materiel Entities, and those Undermining Ukraine’s Sovereignty* (July 16, 2014), <http://www.treasury.gov/press-center/press-releases/Pages/jl2572.aspx>.

20 - On July 16, 2014, the Secretary of the Treasury issued a determination that section 1(a)(i) of Executive Order 13662 shall apply to the financial services and energy sectors of the Russian Federation economy. On September 12, 2014, a similar determination was made with respect to the defense and related materiel sector of the Russian Federation economy.

21 - U.S. Department of Treasury, Office of Foreign Assets Control, *Sectoral Sanctions Identifications List*, (January 26, 2018) <https://www.treasury.gov/ofac/downloads/ssi/ssilist.pdf>. See Jamie L. Boucher, Khalil N. Maalouf, Lindsey F. Randall, *Sectoral Sanctions Add New Layer of Complexity to OFAC Sanctions*, Skadden’s 2015 Insights - Financial Regulation (2015) <http://www.skadden.com/insights/publications/2015/01/sectoral-sanctions-add-new-layer-of-complexity-to>; Jamie L. Boucher, Eytan J. Fisch, William J. Sweet, Jr., Ondrej Chvosta, James E. Perry, Greg Seidner, *Trump Administration Sets Approach to Implementation of New Russia Sanctions* (2017), http://www.skadden.com/insights/publications/2017/11/trump_administration_sets_approach_new_sanctions.

22 - Council Decision 2014/512, 2014 O.J. (L 229) 13 (EU); Council Regulation 833/2014, 2014 O.J. (L 229) 1 (EU) (*Note: The consolidated version of Council Regulation 833/2014, 2014 O.J. (L 229) 1 is cited throughout this text*).

23 - Common Military List of the European Union, 2017 O.J. (C 97) 1 (EU).

24 - Commission Delegated Regulation 1382/2014, 2014 O.J. (L 371) (EC).

These EU “sectoral sanctions” were expanded successively over time.²⁵

Again, EU sectoral sanctions contain broad grandfathering provisions allowing the execution of obligations arising from contracts concluded before August 1, 2014 with respect to the provision of certain goods, services and technologies,²⁶ while U.S. sectoral sanctions allowed only for a wind-down period to exit existing contracts.²⁷ The EU and U.S. Russia sectoral sanctions programs are discussed in greater detail in Part II.

4. U.S. Secondary Sanctions

To create incentives for non-U.S. persons to distance themselves from certain sanctioned parties and activities, the U.S. has adopted in the Russia context so-called “secondary sanctions,” previously used in other U.S. sanctions programs.²⁸ Secondary sanctions allow the U.S. government to impose sanctions against foreign parties who provide material support to sanctioned parties upon a determination by the President that the parties have engaged in certain enumerated activities. The violation of these secondary sanctions do not lead to civil or criminal penalties but to the imposition of sanctions against parties who provide material support to sanctioned parties, and possibly the application of blocking measures against such parties. The U.S. secondary sanctions in the Russia/Ukraine context include, for example, the possibility to impose sanctions on foreign financial institutions that: (1) engage in certain significant transactions involving defense-related activities by sanctioned persons; (2) engage in significant transactions involving investment in special Russian crude oil projects, or (3) facilitate a significant financial transaction on behalf of any Russian person on the SDN List under a Ukraine/Russia program.²⁹

The EU does not use secondary sanctions in any of its sanctions programs. Secondary sanctions are designed to force economic actors to choose between trade with a party

25 - On September 8, 2014 (Council Decision 2014/659, 2014 O.J. (L 271) 54 (EU) and Council Regulation 960/2014, 2014 O.J. (L 271) 3 (EU)); On December 4, 2014 (Council Decision 2014/872, 2014 O.J. (L 349) 58 (EU) and Council Regulation 1290/2014, 2014 O.J. (L 349) 20 (EU)); On June 22, 2015 (Council Decision 2015/971, 2015 O.J. (L 157) 50 (EU)); On October 1, 2015 (Council Decision 2015/1764, 2015 O.J. (L 257) 42 (EU) and Council Regulation 2015/1797, 2015 O.J. (L 263) 10 (EU)); On December 21, 2015 (Council Decision 2015/2431, 2015 O.J. (L 334) 22 (EU)); On July 1, 2016 (Council Decision 2016/1071, 2016 O.J. (L 178) 21 (EU)); On December 19, 2016 (Council Decision 2016/2315, 2016 O.J. (L 345) 65 (EU)); On June 28, 2017 (Council Decision 2017/1148, 2017 O.J. (L 166) 35 (EU); and on November 30, 2017 ((Council Decision 2017/2214, 2017 O.J. (L 316) 20 (EU) and Council Regulation 2017/2212, 2017 O.J. (L 316) 15 (EU).

26 - See Article 2 (2); Article 2a (3); Article 3 (5); Article 3a (2); Article 4 (2) of Council Regulation 833/2014, 2014 O.J. (L 229) 3,4,5,6,7 (EU).

27 - Two weeks were given to wind-down existing operations, contracts or other agreements involving entities listed by Directive 4 under Executive Order 13662 U.S. Department of the Treasury. See U.S. Department of the Treasury, Office of Foreign Assets Control, *Directive 4 (As Amended on October 31, 2017) Under Executive Order 13662* (2017) https://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive4_20171031.pdf; U.S. Department of the Treasury, Office of Foreign Assets Control, *General License No. 2 Authorizing Certain Activities Prohibited by Directive 4 under Executive Order 13662 Necessary to Wind Down Operations* (September 12, 2014) http://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl2.pdf.

28 - To date, secondary sanctions provisions have been included in the U.S. sanctions programs against Hezbollah, Iran, Russia and North Korea.

29 - Countering America’s Adversaries Through Sanctions Act of 2017, Pub. L. 115-44, § 226, 131 Stat. 886 (2017) (hereinafter “CAATSA”).

targeted by U.S. sanctions and trade with the U.S., even in the absence of a U.S. nexus in a relevant transaction.³⁰ Secondary sanctions have therefore been criticized for territorial overreach. EU authorities expressed concerns following the introduction of U.S. secondary sanctions legislation targeting Russia (under CAATSA), and have “reserved the right to take adequate measures” (*i.e.* adopt blocking statute) to deter the unilateral effects of such secondary sanctions that impact the EU’s energy security interests.³¹

5. Application to Subsidiaries

EU list-based sanctions apply to entities directly or indirectly controlled by or owned more than 50% by a listed person.³² By contrast, the EU sectoral sanctions regime is designed to ensure that EU subsidiaries of targeted entities do not become targeted entities themselves. The EU sectoral sanctions only apply to sanctioned entities and (i) to any legal person, entity or body established outside the European Union, whose proprietary rights are directly or indirectly owned more than 50% by an entity sanctioned under the EU sectoral sanctions, and (ii) to any legal person, entity or body acting on behalf or at the direction of: a) any legal person, entity or body directly or indirectly owned more than 50% by an entity sanctioned under the EU sectoral sanctions or, b) an entity sanctioned under the EU sectoral sanctions.³³ Ownership interests under EU sanctions are generally not aggregated, but situations where multiple entities targeted by EU sectoral sanctions together own more than 50% of another entity should be reviewed in light of the prohibition on anti-circumvention.³⁴ Both the EU and U.S. Russia and Ukraine sanctions programs contain broad anti-circumvention provisions.³⁵

Under U.S. sanctions, any person listed on the SDN list is considered to have an interest in an entity in which such

person owns, whether individually or in the aggregate, directly or indirectly, a 50% or greater interest.³⁶ Consequently, any entity owned in the aggregate, directly or indirectly, 50% or more by one or more blocked persons is itself considered to be a blocked person by operation of law, even if it is not on the SDN list.³⁷ OFAC has advised to act with caution when considering a transaction with a non-listed entity in which one or more listed persons has a significant ownership interest that is less than 50% or which one or more blocked persons may control by means other than a majority ownership interest.³⁸ Such entities may be the subject of future designation or enforcement action by OFAC.³⁹ OFAC’s “50% rule” also applies to entities on the Sectoral Sanctions Identifications List (“SSI List”), even though the property and interests in property of SSI-listed entities are not required to be blocked, which means that the restrictions that apply to an SSI-listed entity are extended to subsidiaries in which it owns a 50% or more interest, even if such subsidiaries do not act in the same sector as the SSI-listed parent entity.⁴⁰

II. Focus on EU and U.S. Sectoral Sanctions

A common principle governs the EU and U.S. sectoral sanctions regimes against Russia: they are designed to restrict the ability of sanctioned Russian companies, acting in sectors known for their need for medium- to long-term financing, to issue medium- and long-term equity or debt on EU and U.S. markets, and to restrict Russia’s access to EU and U.S. technology and expertise in the energy sector.⁴¹ However, differences remain between the two regimes which can pose challenges to companies subject to both EU and U.S. jurisdiction.

1. Restricted Equity And Debt Instruments

Both EU and U.S. sanctions restrict listed entities’ access to new equity, meaning equity-related instruments issued after the date the entity became subject to the prohibitions.



30 - Eric Lorber & Elizabeth Rosenberg, *Don't Mistake Russia for Iran*, Foreign Affairs (Oct. 20, 2014), <http://www.foreignaffairs.com/articles/russia-fsu/2014-10-20/dont-mistake-russia-iran>. (“Such powerful prohibitions would apply to a vast universe of global companies and make them choose between maintaining access to U.S. markets or dealing with Russian partners. They would not be able to do both.”)

31 - European Commission Press Release 17/2302, The Commission, European Commission President Juncker: New US sanctions on Russia only after consultation of allies (August 2, 2017). For an example of a blocking statute, see Council Regulation 2271/96, 1996 O.J. (L 309) (EC). Similar statements by EU officials were recently made in connection with the potential reinstatement of U.S. secondary sanctions with respect to nuclear-related sanctions on Iran. See Council of the EU Press Release 590/17, General Secretariat of the Council, Iran nuclear deal: EU statement on the Joint Comprehensive Plan of Action (October 16, 2017).

32 - Council Regulation 2580/2001, 2001 O.J., (L 344) 70 (EU). See also Guidelines on implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy.

33 - Council Regulation 833/2014, 2014 O.J., (L 229) 1 (EU).

34 - Article 12 of Council Regulation 833/2014, 2014 O.J., (L 229) 6 (EU).

35 - An example of such anti-circumvention provisions can be found in the Article 12 of the Council Regulation 833/2014, 2014 O.J. (L 229) 6 (EU), stating that “It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the prohibitions [of the Regulation], including by acting as a substitute for the entities referred to in [the Regulation].” Whereas non-EU entities are not subject to European Union restrictive measures with respect to their activities conducted wholly outside the European Union, EU parent companies must not use their non-EU subsidiaries as a proxy to circumvent EU sanctions. OFAC’s regulations include general prohibitions targeting transactions that “evade or avoid, have the purpose of evading or avoiding, or attempt to violate” any other prohibition. E.g., in the Russia/Ukraine context, Sec. 5. (a) of Executive Order 13660 dated March 6, 2014.

36 - U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 401 available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#ukraine

37 - U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 399 available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#ukraine.

38 - OFAC’s Revised Guidance On Entities Owned By Persons Whose Property And Interests In Property Are Blocked dated August 13, 2014.

39 - U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 398 available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#ukraine.

40 - U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 373, available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#ukraine.

41 - See Elizabeth Rosenberg, Zachary K. Goldman, Dr. Daniel Drezner & Julia Solomon-Strauss, Center for a New American Security, *The New Tools Of Economic Warfare*, at 18 (2016). (“The [sectoral] sanctions were chosen to maximize the effect on Russian entities while limiting effects on other countries or companies with which Russia trades and banks. [...] both the effectiveness and legitimacy of the [sanctions] instrument depends on increasing the proximity of the link between interests that the sanctioned country values and the means chosen to target those interests.”)

While the U.S. new equity restrictions⁴² target Russia's financial institutions subject to Directive 1, the EU restrictions⁴³ are broader and apply to sanctioned Russian financial institutions, as well as sanctioned entities in the Russian energy and defense sectors.⁴⁴ Both U.S. and EU rules authorize certain transactions involving derivatives.⁴⁵

While both EU and U.S. sectoral sanctions regimes limit the availability of new debt for sanctioned Russian entities (*i.e.* financing issued after the entity was sanctioned), the scope of the debt restrictions varies between the two regimes.⁴⁶ First, the maturity limits are not the same. U.S. sectoral sanctions prohibit transacting in, providing financ-

ing for, or other dealings in new debt of longer than 14 days⁴⁷ regarding sanctioned Russian financial institutions, 60 days⁴⁸ regarding sanctioned Russian energy companies, and 30 days regarding sanctioned Russian companies acting in the defense and related materiel sector. EU sectoral sanctions apply the same 30 days maturity restriction to any deal related to the issuance of new debt as of September 12, 2014 by sanctioned Russian entities in the financial services, energy and defense sectors.⁴⁹ Second, and quite significantly for EU financial institutions, the loan restriction under EU regulations does not apply to payment and settlement services, including in the context of correspondent banking.⁵⁰ Deposit services are not covered by the EU debt restrictions as long as the term deposits are not used to circumvent the prohibition on new loans.⁵¹

42 - The term "equity" under U.S. sectoral sanctions regime includes stocks, share issuances, depositary receipts, or any other evidence of title or ownership.

43 - The EU sectoral sanctions refer to "transferable securities," which includes both debt and equity. With respect to equity, the EU rules apply to the following classes of securities which are negotiable on the capital market: (i) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares, (ii) any other securities giving the right to acquire or sell any such transferable securities. Also, securities giving the right to sell securities are covered regardless of whether or not that right is actually exercised. *See* European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014 (EU) (Aug. 25, 2017). Finally, EU persons are prohibited from entering into repurchase agreements or securities lending agreements where transferable securities or money market instruments subject to the capital market restriction are used as collateral. *See* Question 45 of European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, (EU) (Aug. 25, 2017). However, the EU rules do not restrict equity used as instruments of payment.

44 - Council Regulation 833/2014, 2014 O.J. (L 229) 1 (EU) Targeted entities are listed in Annex III (financial institutions), Annex VI (energy sector) and Annex V (defense sector).

45 - U.S. Department of the Treasury, Office of Foreign Assets Control, General License No. 1B, *Authorizing Certain Transactions Related to Derivatives Prohibited by Directives 1, 2, and 3 under Executive Order 13662*. This general license authorizes transactions by U.S. persons, wherever located, and transactions within the U.S. involving derivative products whose value is linked to an underlying asset that constitutes prohibited debt issued by a person subject to Directive 1, 2, or 3 or prohibited equity issued by a person subject to Directive 1, but not the holding, purchasing, or selling of underlying assets otherwise prohibited by Directives 1, 2, or 3 by U.S. persons, wherever they are located, or within the U.S. (November 28, 2017). EU regulations also authorize certain transactions involving derivative products such as interest rate swaps, cross currency swaps, credit default swaps (except where these give the right to acquire or sell a transferable security), and derivatives used for hedging purposes in the energy market. However, derivatives which give the right to acquire or sell a transferable security or money market instrument covered by the debt/equity prohibitions of Article 5 of Council Regulation 833/2014, 2014 O.J. (L 229) 9 (EU), such as options, futures, forwards or warrants, remain prohibited irrespective of how they are traded (on-exchange or over-the-counter).

46 - U.S. sanctions define "debt" broadly including bonds, loans, extensions of credit, loan guarantees, letters of credit, drafts, bankers acceptances, discount notes or bills, or commercial paper. U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 371, available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#ukraine. EU sanctions define "debt" by catch-all terms "transferable securities" and "money-market instruments." A distinction is usually made between medium-term to long-term financings (sourced from capital markets through equity or debt securities) and short-term financings (sourced from money markets liquid instruments). Under EU sectoral sanctions regulations, the term "transferable securities" mixes two classes of financial instruments (debt and equity), but with respect to debt includes the following classes of securities which are negotiable on the capital market, with the exception of instruments of payment: (i) bonds or other forms of securitized debt, including depositary receipts in respect of such securities, and (ii) any other securities giving the right to acquire or sell any such transferable securities. "Money-market instruments" means those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment.

2. Prohibited Transactions Related To Capital Market Instruments

The EU sectoral sanctions prohibit the direct or indirect purchase, sale, or provision of investment services (or any other assistance⁵²) relating to the issuance or otherwise dealing in transferable securities and money-market instruments issued by sanctioned entities, that constitute new debt with a maturity of longer than 30 days and new equity instruments. The EU Commission has stated that delayed payment for goods or services will generally not be considered a provision of new loans or credit under EU sectoral sanctions regulations. However, delayed payments must not be used to circumvent the prohibition on providing new loans or credit.⁵³ Given the possible circumvention risk raised by delayed payment, some companies have decided not to agree to delayed payment terms exceeding 30 days.

The U.S. sectoral sanctions rules are drafted broadly, as U.S. sanctions rules often are, and prohibit "all transactions

47 - Such maturity has been reduced from 30 to 14 days as of September 12, 2014.

48 - Such maturity has been reduced from 90 to 60 days as of September 12, 2014.

49 - Council Regulation 833/2014, 2014 O.J. (L 229) 18 (EU) for sanctioned Russian financial institutions (listed under Annex III). The debt restriction is set at 90 days, for debt instruments issued after August 1, 2014 and before September 12, 2014.

50 - Article 5 (3) of Council Regulation 833/2014, 2014 O.J. (L 229) 10 (EU). *See* European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 28, (EU) (Aug. 25, 2017).

51 - *See* European Commission, Commission Notice of 25 August 2015, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 27 at 8, (EU) (Aug. 25, 2017).

52 - Such "investment services" for, or "assistance in the issuance" of, prohibited financial instruments are different from the services related to certain goods and technology listed in the Common Military List, for which EU restrictions regarding "financial assistance" do not generally include the processing of a payment by a financial institution. "Financial assistance" is defined as measures that require the financial institution concerned to commit its own resources. However, the Court of Justice in Case C- 72/15, PJSC Rosneft Oil Company v Her Majesty's Treasury and Others, 2017, ECLI:EU:C:2017:236 *also* clarified that the processing of payments linked to the sale, supply, transfer or export of prohibited items is prohibited. *See* European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 1, (EU) (Aug. 25, 2017).

53 - Evidence of circumvention would include payment terms that are not in line with standard business practice. *See* European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 30, (EU) (Aug. 25, 2017).

in, provisions of financing for, and other dealings” in new debt with a maturity longer than the applicable limit⁵⁴ or new equity⁵⁵ of those parties sanctioned under the sectoral sanctions, “their property, or their interests in property.”⁵⁶ Although the U.S. sectoral sanctions do not generally prohibit U.S. persons from engaging in commercial transactions with SSI-listed entities⁵⁷, OFAC, unlike the EU Commission, has interpreted the debt restrictions in the sectoral sanctions to apply to deferred payment for goods or services beyond the applicable maturity limit, even if no interest is due.⁵⁸ The starting date to be taken into account when assessing payment terms for sales of goods to an SSI-listed entity is the moment when the title or ownership of the goods has been transferred to the SSI-listed entity; for services, the starting date is the moment when a final invoice is issued.⁵⁹

Both U.S. and EU prohibitions include dealings in the secondary markets regarding debt⁶⁰ or equity instruments issued on or after the date on which the person was sanctioned under the applicable OFAC Directive or EU Regulation. If the debt or equity instrument was issued prior to the date on which an entity was sanctioned, and not amended thereafter, dealing in the secondary markets relating to such securities is generally permitted. From a practical standpoint, it may be difficult to differentiate the equity issued prior to the date an entity was sanctioned from the equity issued after the date on which such entity was sanctioned.⁶¹

3. Exceptions to Prohibited Transactions Related To Capital Market Instruments

In order to ensure that legitimate EU trade is not harmed, the EU Regulation contains exceptions applicable to trade financing.⁶² Most significantly, the EU Regulation generally excludes from the new debt prohibition new loans or cred-

it⁶³ to a sanctioned entity that have a specific and documented objective to provide financing for non-prohibited import or export of goods and non-financial services between EU member states and non-EU countries (including Russia)⁶⁴, even if such goods transit through another non-EU country as long as the export or import contract clearly stipulates that the imports or exports originate in or are destined for the EU.⁶⁵ The EU Regulation also generally does not prohibit an EU from providing new loans or credit⁶⁶ after September 12, 2014 for the export or import of goods or services between non-EU countries to a sanctioned entity. In that case, such loan or credit must have a maturity of 30 days or less, otherwise it would constitute extending credit to a targeted entity that is not covered by the trade finance exemption and would therefore be prohibited.⁶⁷

U.S. sectoral sanctions do not prohibit certain trade-related transactions, but subject dealing in or processing transactions under a letter of credit issued on or after the sanctions effective date to certain conditions, similar to the EU restrictions regarding trade between non-EU countries. Indeed, U.S. persons may not deal in (including act as the advising or confirming bank or as the beneficiary) or process transactions under a letter of credit, if all of the following three conditions are met: (1) the letter of credit was issued on or after the sanctions effective date, (2) the letter of credit carries a term of longer than the applicable maturity date specified in the relevant Directive, and (3) an SSI-listed entity is the applicant of the letter of credit.⁶⁸ Conversely, U.S. persons may generally deal in (including act as the advising or confirming bank or as the applicant (*i.e.*, the purchaser of the underlying goods or services) or process transactions under a letter of credit in which an entity subject to Directive 1, 2, or 3 is the beneficiary (*i.e.*, the exporter or seller of the underlying goods or services) because the subject letter of credit does not represent an extension of credit to the SSI entity. Also, OFAC confirmed that U.S. persons may deal in (including act as the

54 - New debt of longer than 14, 30 or 60 days maturity (depending on the Directive).

55 - For Russian financial institutions subject to Directive 1 under Executive Order 13662.

56 - Directives 1 to 4 under Exec. Order No. 13662.

57 - Directive 4 under Exec. Order No. 13662 prohibit certain categories of commercial transactions.

58 - U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 410, available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_othe r.aspx#ukraine.

59 - U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 419 available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_othe r.aspx#ukraine.

60 - Provided that the maturity of the debt instrument is greater than the maturity limit set forth in the applicable OFAC Directive or in the EU Regulation.

61 - OFAC acknowledged such issue in FAQs 392, See U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 392, available at http://www.treasur y.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#ukraine.

62 - Article 5 (3) of Council Regulation 833/2014, 2014 O.J. (L 229) 10 (EU). Another exception excludes from the new debt prohibition new loans to a sanctioned entity that have a specific and documented objective to provide emergency funding to meet solvency and liquidity criteria of EU entities owned more than 50% by a sanctioned Russian financial institutions. See Article 5 (3) (b) of Council Regulation 833/2014, 2014 O.J. (L 229) 10 (EU).

63 - Including processing payments, providing insurance, issuing letters of credit, extending loans. See European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 12 at 5, (EU) (Aug. 25, 2017). Loans and credits do not include purchases of bonds which remain restricted under Article 5 (1) and (2) of Council Regulation 833/2014, 2014 O.J. (L 229) 9 (EU) (see European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 20 at 6, (EU) (Aug. 25, 2017)).

64 - Article 5 (3) (a) of Council Regulation 833/2014, 2014 O.J. (L 229) 10 (EU).

65 - The mere transit of goods through the EU would be insufficient. There must be a meaningful nexus with the EU, in order for this exemption to apply. As such, loans for trade taking place purely between two non-EU countries remain prohibited. European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 11 at 5, (EU) (Aug. 25, 2017).

66 - Including confirming or advising a letter of credit that was issued after September 12, 2014 by a sanctioned entity for the export or import of goods or services between non-European Union States, and provide discounting or post-financing for them, as long as the applicant of the letter of credit (the buyer or importer) is not a sanctioned entity. In such case, the maturity shall not be longer than 30 days.

67 - European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 18-19 at 6, (EU) (Aug. 25, 2017).

68 - U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 395, available at http://www.treasury.gov/resourcecenter/faqs/Sanctions/Pages/faq_othe r.aspx#ukraine.

advising or confirming bank or as the applicant or beneficiary) or process transactions under a letter of credit where the issuing bank is an SSI-listed entity provided that the terms of all payment obligations under the letter of credit conform with the debt prohibitions under the applicable Directives.⁶⁹

Both the EU and U.S. sectoral sanctions regulations generally do not prohibit loans granted to a sanctioned entity before the date it was sanctioned under a loan agreement or a credit facility agreement. Loan disbursements whose repayment terms exceed the applicable authorized maturity date can generally be extended after the date an entity was sanctioned under certain conditions, including if all the terms and conditions (length of the repayment, interest rate calculation method and maximum amount) were contractually agreed prior to that date.⁷⁰

There is also an exception to the equity-related prohibition applicable under the EU regime to depositary receipts issued after September 12, 2014.⁷¹ If a sanctioned entity is acting as a custodian for equity issued by a non-sanctioned entity, EU persons may deal in such depositary receipts, as it does not constitute dealing in new equity from the sanctioned entity.⁷² If the sanctioned entity is itself the issuer of the equity, any transaction consisting in dealing in such transferable securities falls under the equity-related prohibition.⁷³ Furthermore, if a European custodian holds shares in a non-sanctioned entity, on behalf of a client which is a targeted entity, the legitimate safekeeping, custody and settlement of the underlying shares representing equity of a non-targeted entity are generally not prohibited.⁷⁴

4. Specific Restrictions on Transactions Related to Energy Sector

Both EU and U.S. sanctions provide restrictions regarding equipment, services and technology for the Russian energy sector. However, while U.S. sectoral sanctions on the Russian energy sector target oil and gas companies, due to the European Union's dependence on Russian gas, EU sectoral sanctions only target oil companies.⁷⁵

69 - Id. Question 395.

70 - See with respect to EU sectoral sanctions regulations, Council Regulation 833/2014, 2014 O.J. (L 229) 10 (EU); with respect to U.S. sanctions regulation, See U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, Question 394, available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#ukraine.

71 - Or after August 1, 2014 for the Russian financial institutions sanctioned under Article 5 (1) of Regulation 833/2014. Under certain circumstances U.S. persons may issue and deal in depositary receipts that are based on equity issued by a person subject to Directive 1 prior to the date the person became subject to Directive 1. U.S. persons may not, however, deal in or issue depositary receipts that are based on equity issued by a person subject to Directive 1 on or after the sanctions effective date (OFAC's FAQ 391).

72 - European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 39 at 11, (EU) (Aug. 25, 2017).

73 - Case C-72/15, PJSC Rosneft Oil Company v Her Majesty's Treasury and Others, 2017, ECLI:EU:C:2017:236.

74 - European Commission, Commission Notice of 25 August 2017, Commission Guidance note on the implementation of certain provisions of Regulation 833/2014, Question 39 at 11, (EU) (Aug. 25, 2017).

75 - Securing alternative sources of oil and gas is complex given the EU's lack of necessary infrastructure to receive greater imports from abroad. Most of Russia's energy exports (in 2016, 65 % of crude oil exports and 81 % of natural gas exports) go to European markets. British Petroleum,

Under Executive Order 13662, the U.S. restricts the provision of goods, services (except for financial services) and technology in support of nonconventional – i.e., Arctic offshore, deepwater and shale – oil exploration and production projects in Russia or Russian maritime waters involving SSI-listed entities identified under Directive 4. On October 31, 2017, an additional layer of sanctions was taken against Russia under section 223 of CAATSA, which notably amended Directive 4 to prohibit certain activities in support of new nonconventional projects (i) that are initiated⁷⁶ on or after January 29, 2018, (ii) that have the potential to produce oil anywhere in the world, and (iii) in which an SSI-listed entity identified under Directive 4 has either a 33 % or greater ownership interest or owns a majority of the voting rights. CAATSA also introduced secondary sanctions relating to investment in special crude oil projects and energy export pipelines.⁷⁷

EU regulations do not include a blanket export prohibition but instead require prior authorization from competent authorities of EU member states for the supply, transfer or export of specifically listed equipment and technology necessary for certain categories of oil exploration and production projects in Russia.⁷⁸ The EU regulations also prohibit the provision of certain services associated with certain categories of oil exploration and production projects in Russia.⁷⁹

III. Compliance Challenges

The EU and U.S. sanctions regimes in the Russia/Ukraine context, and particularly sectoral sanctions, pose certain unique compliance challenges, particularly for international financial institutions and major companies operating in the energy or defense sector.⁸⁰ The entities identified under these sectoral sanctions are highly integrated into the global economy. Companies must ensure that they are not engaging in prohibited transactions with sanctioned entities by

um, BP's Statistical Review of World Energy, Ser. No. 66, (2017), <http://www.bp.com/content/dam/bp/en/corporate/pdf/energy-economics/statistical-review-2017/bp-statistical-review-of-world-energy-2017-full-report.pdf#page=3>. In parallel, Russia continues to depend on the European market for its gas exports. The Economist Intelligence Unit, More than oil, gas is Russia's main strategic asset, The Economist, (Dec. 11, 2017, <http://www.eiu.com/industry/article/816211465/more-than-oil-gas-is-russias-main-strategic-asset/2017-12-11>).

76 - OFAC has clarified that it considers a new project to be "initiated" when "a government or any of its political subdivisions, agencies, or instrumentalities (including any entity owned or controlled directly or indirectly by any of the foregoing) formally grants exploration, development, or production rights to any party."

77 - CAATSA, Pub. L. 115-44, §§ 225 and 232, 131 Stat. 886 (2017).

78 - Article 3 of Council Regulation 833/2014, 2014 O.J. (L 229) 3 (EU). Restricted projects are: (i) Oil exploration and production in waters deeper than 150 meters; (ii) oil exploration and production in the offshore area north of the Arctic Circle and, (iii) projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing; it does not apply to exploration and production through shale formations to locate or extract oil from non-shale reservoirs. Restricted equipment and technology are listed in Annex II of Council Regulation 833/2014, 2014 O.J. (L 229) 9 (EU). Regarding prior authorization see Article 11 of Council Regulation 428/2009, 2009 O.J. (L 134) 6 (EU).

79 - Article 3 (a) Council Regulation 833/2014, 2014 O.J. (L 229) 6 (EU). Restricted services are: drilling; well testing; logging and completion services; and supply of specialized floating vessels.

80 - Samuel Rubinfeld, Non-Financial Companies Getting Heightened Sanctions Scrutiny, Wall Street Journal., (Jan. 11, 2018), <http://blogs.wsj.com/riskandcompliance/2018/01/11/non-financial-companies-getting-heightened-sanctions-scrutiny/>.

performing appropriate due diligence on their counterparties, the sectors and projects with which they are involved, and the transactions they perform or underwrite. The initial approach to sanctions compliance is otherwise the traditional one: one must analyze whether the transaction has a jurisdictional connection (or so-called “nexus”) to EU⁸¹ or U.S.⁸² territory, and whether a sanctioned party is involved. Sanctioned parties are not only the persons identified on sanctions lists but also persons owned or controlled by those listed persons, under different criteria depending on whether the party is targeted by traditional list-based sanctions or by sectoral sanctions.

In the contrast with traditional list-based sanctions, a simple screening and review against the sectoral sanctions lists, which are not blocking lists, is not sufficient to determine whether a transaction may be processed. Additional controls must be performed to determine whether a transaction is permissible. Due diligence can be challenging due to the complex nature of commercial transactions in the affected sectors, the complex nature of the applicable restrictions, and the lack of transparency in certain corporate structures making it difficult to determine whether a sanctioned party has an interests in the transaction.⁸³

The vast and sometimes nontransparent holdings throughout the world belonging to entities identified under sectoral sanctions make the implementation of the 50% rule even more difficult. Additionally, the recently amended OFAC Directive 4 discussed above prohibits, among other things, certain activities in support of new nonconventional projects in any location around the world in which an SSI-listed entity identified under Directive 4 has either a 33% or greater ownership interest or owns a majority of the voting rights. OFAC has clarified that nothing in the Directive 4 amendment is intended to displace the “50% rule,” whereby the restrictions applicable to dealings with sanctioned persons automatically apply by operation of law to entities owned 50% or more by sanctioned persons. OFAC has advised that the new “33% rule” serves as an additional prerequisite for triggering the restrictions on new nonconventional projects, and this adds a new layer of complexity for businesses performing due diligence and analysis as to whether these sanctions are triggered.⁸⁴

81 - EU sanctions apply: (i) within the territory of the EU, including its airspace; (ii) on board any aircraft or any vessel under the jurisdiction of an EU Member State; (iii) to any person inside or outside the territory of the EU who is a national of an EU Member State; (iv) to any legal person, entity or body inside or outside the territory of the EU which is incorporated or constituted under the law of an EU Member State. This also includes branches of EU companies in third countries; and to any legal person, entity or body in respect of any business done in whole or in part within the EU. EU sanctions generally do not apply to non-EU subsidiaries (as opposed to non-EU branches) of EU companies.

82 - A transaction can have a nexus to the territory of the United States if it involves a U.S. person, including a U.S. financial institution, or U.S. origin goods. U.S. person means any U.S. citizen (including dual citizens) and lawful permanent resident alien of the United States, wherever either are located; any entity organized under the laws of a United States jurisdiction; or any person physically located in the United States, including U.S. branches of non-U.S. banks. The U.S. sanctions against Russia and Ukraine do not apply to non-U.S. subsidiaries of U.S. companies. Under certain circumstances, doing business with a third country entity that in turn does a “predominant” share of its business with a sanctioned person can risk an OFAC violation for a U.S. person.

83 - Bret Wolf, Wall Street struggles to comply with new U.S. sanctions on Russia, REUTERS, Jul. 28, 2014, <http://www.reuters.com/article/us-ukraine-crisis-sanctions/wall-street-struggles-to-comply-with-new-u-s-sanctions-on-russia-idUSKBN0FX1P120140728>.

84 - Regarding the articulation between the “50% rule” and the “33% rule,” see Jamie L. Boucher, Eytan J. Fisch, William J. Sweet, Jr., Ondrej Chvosta, James E. Perry, Greg Seidner, Trump Administration Sets

Regarding restrictive measures against Crimea, due diligence is also complicated by the fact that Crimea is not a country but rather a geographic region. Compliance best practices that may have been designed to identify problematic parties in comprehensive sanctions programs targeting countries must be adapted. For example, information on cities in the Crimean region is needed to track potential violations, as analyzing the country name alone is not enough. OFAC has identified evasive practices that have developed in the Crimea context, including the omission of references to Crimea (and locations within Crimea) in information regarding trade and financial transactions.⁸⁵ In the EU, while sanctions have been imposed affecting Ukraine and the neighboring areas of Crimea and Russia, the EU has also continued to promote EU-Ukraine trade relations under the Deep and Comprehensive Free Trade Agreement in force since January 1, 2016.⁸⁶ While this trade agreement creates new business opportunities for EU companies, it also presents challenges for EU-based companies and financial institutions who may finance transactions involving Crimea without proper enhanced due diligence.

Finally, the general enforcement context for EU and U.S. sanctions differs significantly. EU Sanctions implementation and enforcement are conducted by relevant authorities in each EU member state. Each EU country is also responsible for establishing penalties for sanctions violations, as well as the statute of limitations for breach of the EU regulations. A limited history of enforcement and limited guidance creates a lack of certainty in the EU on certain rules, for example regarding aggregation of ownership interests under the “50 % rule” in the EU. This differs from the U.S., where a single agency, OFAC, is responsible for sanctions administration, civil enforcement and issuing relevant guidance. U.S. sanctions are broadly interpreted and based on a strict liability regime, and therefore companies can face liability even if they did not willfully violate sanctions regimes.⁸⁷ By contrast, the EU sanctions require knowledge or “mens rea,” for a violation, meaning there will be no liability, unless the person knew or had reasonable cause to suspect that their actions would violate EU sanctions. The regulatory fines and reputational harm that companies, especially financial institutions, may incur as a result of violating U.S. sanctions, have deterred certain companies from pursuing business abroad that they perceive as too risky.⁸⁸

These challenges underscore the importance for affected companies operating across various legal regimes and cultures to have a risk-based and effective sanctions com-

Approach to Implementation of New Russia Sanctions (2017), http://www.skadden.com/insights/publications/2017/11/trump_administration_sets_approach_new_sanctions.

85 - In July 30, 2015, OFAC issued a guidance regarding obfuscation of critical information in financial and trade transactions involving the Crimea region of Ukraine. See U.S. Department of the Treasury, Office of Foreign Assets Control, Crimea Sanctions Advisory (2015).

86 - This agreement means that both the EU and Ukraine have mutually opened their markets for goods and services. See Association Agreement, EU-Ukraine, 2014 O.J. (L 161) 3 (EU).

87 - Although good faith, self-reporting and cooperation are mitigating factors in OFAC’s penalty calculation. See 31 C.F.R. § 501 (2009), Economic Sanctions Enforcement Guidelines.

88 - Regarding the hazards of “de-risking,” see Press Release, U.S. Department of the Treasury, Remarks of Under Secretary Cohen at the ABA/ABA Money Laundering Enforcement Conference (November 10, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl2692.aspx>.

pliance program. Such a program would include tailored sanctions compliance policies and procedures kept up to date in line with evolving risks (based on an appropriate risk assessment) and with management's risk appetite, training for relevant employees, and clearly defined roles and responsibilities from the top to the bottom of the business organization chain. Just as companies conduct regulatory, legal, financial, and other due diligence, they must also scan the horizon for geopolitical risks and their potential regulatory fallout.⁸⁹

Unanimous agreement of all 28 EU member states is required to enact new EU sanctions or extend the term of current EU sanctions. In March 2015, EU leaders decided to tie any easing of the existing Ukraine-Russia sanctions regime to the complete implementation of the Minsk agreements.⁹⁰ The Council has successively extended the term of EU Ukraine-Russia sanctions, which are currently in place until July 31, 2018.⁹¹ With respect to U.S. sanctions, a distinction is made between sanctions that specifically target Crimea, which will remain in place, according to the U.S. Department of State, until the peninsula returns to Ukraine, and sanctions targeting Russia which will remain in place until complete implementation of the Minsk agreements.⁹²

Recent developments in international cooperation in criminal justice: a brief overview

Francois Falletti

Former General Prosecutor of Paris and Honorary President of the International Association of Prosecutors ("IAP")
Former Head of the Criminal Division of the French Ministry of Justice and National Member (i.e. Country Representative) at Eurojust
Partner at CARLARA Law Practice

Edited by Michel Perez

Senior Fellow at New York University Law School and Associate Director of Labex ReFi

On a chilly evening of November 1989, I had just landed at the Washington Dulles airport, when I felt the loneliness of an officer of the judicial body in the French administration. I was then a member of the delegation arriving from Paris to negotiate the draft of the future 40 recommendations of the Financial Action Task Force (FATF). Upon arrival my colleagues and I went in different directions, the officer from the Tax office met his liaison officer at the French Embassy in Washington. My colleagues in charge of narcotics, customs, treasury, etc., also met their counterparts. I was the lonely exception as I was the representative of the Ministry of Justice which at the time did not have a resident officer in Washington. Luckily I was offered a ride in the car of one of my travel companions to reach my hotel downtown. Four hours later, the FATF Meeting hosted by the US Treasury convened with experts from 14 countries around the world. Our endeavor was successful as our discussions led to the adoption in February 1990 of the first FATF Agreement, a landmark in the international efforts against money laundering.

A quarter century later, much has changed. Relationships among prosecutors and judges from different countries are much more frequent and enjoy the support of legislators and many facilitators. In addition to routine informal exchanges, new entities, more or less specialized, have been created and are convened on a regular basis. Today, in our globalized world, the international dialogue among legal experts is quite alive, although, clearly, further efforts are needed. These changes appear in various fields, including the establishment of international courts. In this article we will focus on the judicial achievements in the area of economic violations and offences. We will first comment on the rise in informal cooperation (I.) and then consider the development of new international bodies (II).

I. The rise in informal cooperation

Since the 90s, a changing environment (1.) has made possible new ways of cooperating, while some facilitators (2.) have provided support for informal cooperation.

1. New modes of cooperation

89 - See John Chipman, Why Your Company Needs a Foreign Policy, Harvard Business Review, (September 2016), <http://hbr.org/2016/09/why-your-company-needs-a-foreign-policy%20on%2020.05.2017> ("the most successful multinational companies will be those that make expertise in international affairs central to their operations, adopting what can best be described as a corporate foreign policy [to] improve a [their] ability to operate in foreign environments through effective corporate diplomacy, and to ensure its success wherever it is engaged through careful geopolitical due diligence.")

90 - Full text of the Minsk agreement, Financial Times (February 12, 2015), <http://www.ft.com/content/21b8f98e-b2a5-11e4-b234-00144feab7de>.

91 - The Council extended economic sanctions on July 31, 2016, July 1, 2016, December 19, 2016, June 28, 2017, and 21 December 2017.

92 - Press Statement, U.S. Department of State, Third Anniversary of the Signing of the Minsk Package of Measures, (February 13, 2018), <http://www.state.gov/r/pa/prs/ps/2018/02/278270.htm>.