

2019 developments in sanctions targeting Russia

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Ethan Heinz, Counsel

Sanctions developments since 14 September 2018

- Latest developments on 6 April 2018 designations – delistings and license extensions
- CBW Act second round sanctions – the least severe outcome
- Haverly Systems settlement re Rosneft invoices
- OFAC sanctions compliance guidance
- DETER, DASKAA & other pending US sanctions legislation
- Other developments

Update on 6 April 2018 SDN designations

- Delisting of En+, Rusal and EuroSibEnergou
 - On 27 January 2019, EN+, Rusal and EuroSibEnergou were removed from the SDN list. This also frees their respective subsidiaries from being blocked.
 - Congress did not block the delisting during the 30-day review period required by CAATA section 216
 - As a condition of delisting, Deripaska had to reduce his stake to in En+ to below 45% (without getting cash consideration), and En+ and Rusal had to restructure their boards to provide for a majority of independent directors and undertake auditing, certification & reporting obligations
 - N.b., Deripaska himself remains an SDN, as do all other companies 50%+ owned by him
- No delisting yet of Deripaska's GAZ Group, but repeated extensions of general licenses allowing winding down of pre-existing and certain other transactions with most corporate targets:
 - General License 15F— latest extensions, currently until 8 November, of authorization for transactions to wind-down or maintain of pre-existing operations with GAZ Group & its subs, or to engage in transactions (including new transactions) to install certain automotive safety technology
 - General License 13L issued – authorizes until 8 November 2019 transactions by US persons to divest GAZ Group debt or equity or facilitate transfers of the same between non-US persons
 - N.b., US persons must file with OFAC a detailed report on transactions pursuant to these licenses within 10 business days of their expiration.

CBW Act second-stage sanctions

- Required pursuant to CBW Act US gov't determination that Russia used Novichok
- Two stages of implementation:
 - first was immediate (mostly duplicative export restrictions)
 - second, after Congressional consultation, unless Russia took corrective measures within 90 days
- After delay, second stage sanctions took effective as from 27 August 2019:
 - Prohibition on US “banks” making any non-RUB loans to the RF sovereign, or participating in the primary market for non-RUB funds.
 - US banks includes (i) financial market participants such as securities brokers & dealers; and (ii) foreign banks in US
 - “sovereign” includes ministries, agencies and sovereign funds, but not SOEs
 - Loans for food & agricultural exports or under pre-existing agreements exempted
 - US policy to oppose loans & technical assistance to Russia by multilateral financial institutions
 - “Presumption of denial” for US exports of dual-use chemical & biological items
- Administration avoided harsher measures contemplated by CBW Act, e.g.:
 - Prohibition on all US exports to Russia (except food & agricultural products)
 - Severe restrictions on imports into US from Russia Downgrading of diplomatic relations
 - Suspension of flights by Russian state-owned carriers (Aeroflot) to the US

Haverly Systems settlement

- On 25 April 2019, OFAC announced a settlement with Haverly Systems (a New Jersey company) for violations of Directive 2 arising from late payments by Rosneft
- Relevant facts:
 - Haverly provided lawful software licenses to Rosneft with lawful payment terms
 - Rosneft could not pay on time due to Haverly's initial failure to provide certain tax documentation
 - One invoice successfully paid 9 months after issuance; banks refused to process the others due to payment delay being a potential loan. So Haverly re-issued "fresh" invoices which were duly paid.
- OFAC treated invoice re-issuance and lack of compliance program as aggravating factors, but noted as a mitigating point that it likely would have granted a license to receive the payments if Haverly had sought one
- Haverly agreed to a ~ \$75k settlement (vs. potential \$715k liability) and to implement a compliance program
- Cf. the EU position:
 - Delayed payment is not considered a loan for the purpose of Article 5 of Regulation 833/2014, but delayed payment may not be used as a means of circumventing the restriction on loans over 30 days. Payment terms not in line with normal business practice or which have been substantially extended may suggest circumvention.

OFAC compliance guidance

- On 2 May 2019, OFAC published a “A Framework for OFAC Compliance Commitments”, its most extensive sanctions guidance in years
- Sets out OFAC’s perspective on the essential components of a sanctions compliance program, which OFAC will take into account in assessing violations. Five essential components identified as:
 - management commitment – promotion of “culture of compliance”
 - risk assessment – review of sanctions risks based on counterparties, industry and geography
 - internal controls – clear policies, consistently and dynamically implemented
 - testing and auditing – sophisticated, independent & accountable to senior management
 - training – potentially covering not only employees, but partners and customers
- Identifies 10 root causes of most sanctions violations, including:
 - facilitating transactions by non-US persons such as by referring business opportunities; approving transactions; facilitating dealings. Companies with integrated operations are especially warned
 - re-exports of US origin goods to sanctioned territories/persons
 - utilizing the US financial system/processing payments through it
 - use of non-standard payment or commercial practices (a red flag for OFAC)
- Express warning by OFAC that it may take enforcement action against employees of US subsidiaries that conceal activities from compliance personnel & regulators

DETER, DASKAA et al.

- Reintroduction of DETER and DASKAA (with some amendments) in 2019
- Defending Elections from Threats by Establishing Redlines Act (DETER)
 - Provides for new blocking and secondary sanctions in case of interference with any US federal election
 - Targets “new investments” in Russia’s energy sector; requires blocking sanctions on two Russian state banks, all CAATSA s. 231 defense/intelligence entities, and those “Kremlin List” oligarchs involved in electoral interference; total ban on US transactions involving new RF sovereign debt
 - Pending before Senate Banking Committee
- Defending American Security From Kremlin Aggression Act of 2019
 - Imposes exclusionary sanctions (under CAATSA s. 235) against persons (US or non-US) that (i) invest in energy (not just oil) projects outside Russia involving a Russian state company and a value over \$250m; or (ii) provides support over \$1m per transaction/\$5m per year for crude oil projects (not just “special” oil projects) in Russia.
 - Threatens to target Russian ship-building sector.
 - Some refinements to 2018 version
- Protecting Europe’s Energy Security Act of 2019
 - Imposes blocking sanctions on those involved in the sale, leasing, facilitation, or provision of the vessels used in the undersea construction of Russian export pipelines at 100 feet below sea level, including Nord Stream 2
- On 29 April 2019 OFAC issued regulations to implement the 12 September 2018 Executive Order, which was intended to forestall DETER/DAKSAA
- US domestic political considerations may impact these, although the end of the Mueller investigation has mostly removed one impetus for new sanctions

Other developments

- 17 September 2019 settlement with British Arab Commercial Bank PLC (“BACB”) a commercial bank in London “with no offices, business or presence under US jurisdiction” resulted in a \$4 million penalty (reduced from OFAC’s proposed penalty of \$229 million) “in view of BACB’s operating capacity”
 - FCPA-like expansion in OFAC’s jurisdictional application of US sanctions?
- Cobham Holdings settlement of 27 November 2018 – violations of Russian sanctions program arising from improper screening software
- Other US sanctions programs & export restrictions do impact Russian companies
 - E.g., 11 March 2019 designation of Evrofinance Mosnarbank under Venezuela program
 - Huawei addition to Entity List (subject to temporary general license)
 - Shipping companies sanctioned under other programs also operate in Russia
- No real developments in Russia program secondary sanctions since October 2018 CAATSA s. 231 designation of Chinese army unit & its director – the real impact seems to be private sector “enforcement”
- In EU, status quo continues largely to prevail
- UK has post-Brexit sanctions framework in place

Questions?



Ethan Heinz

Counsel

Dentons, Moscow

T +7 495 644 0500

E ethan.heinz@dentons.com

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